



Torture in the Americas: The Law and Practice

Regional Conference Report

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Global Sharing of Expertise:
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Series

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REDRESS would like to thank the participants of the Americas Regional Experts Meeting for their valuable contributions, which served as the basis for the present report. Participants came from countries across the region, including Argentina, Belize, Brazil, Canada, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Peru, United States of America (USA), and Venezuela. We also thank the representatives from CNDDHH, in particular Victor Alvarez, Legal Adviser, and Hayley Reyna, member of the legal team, as well the key note speaker Mario Coriolano, former vice president of the UN Subcommittee on Prevention of Torture.

Methodology

Participants were invited to the Americas Regional Experts Meeting on the *Law and Practice on Torture* on the basis of their expertise and experience in litigation and advocacy on torture related issues. The participants completed a questionnaire regarding the law and practice of torture in their jurisdiction and made presentations at the meeting covering national practice as well as thematic issues. The meeting provided an opportunity to exchange information and experiences on litigating torture cases and advocating legal and institutional reforms.

This report builds on the presentations and discussions of the meeting, as well as information shared by experts in their responses to the questionnaire that informed the content and structure of the meeting. Where there is no footnote, reference is to the conference proceedings. The report provides a review of laws, practices and patterns of torture, examining the availability and effectiveness of safeguards, accountability mechanisms and avenues to obtain reparation for torture in the countries considered. The report reflects both systemic challenges and best practices identified by the participants in respect of key areas of concern. It includes information on the law and practice in the following countries of the Americas region: Argentina, Belize, Brazil, Canada, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Peru, United States of America and Venezuela.

Executive Summary

Torture and ill-treatment continue to be committed throughout the Americas, including in all 18 countries considered, notwithstanding transitions to democracy in a number of countries. Nonetheless its prevalence, forms, perpetrators and victims have changed over time. The main perpetrators are members of the police and security forces as well as prison staff, with the majority of violations taking place at prison facilities and police stations. Some of the most common patterns seen in the region include torture by law-enforcement personnel during criminal investigations to extract confessions and information, and by prison officials as a means of punishing, maintaining control over detainees and discriminating against some groups of detainees. Police and other law enforcement personnel have also on several occasions used excessive force amounting to ill-treatment if not torture, against demonstrators to quell social protests. In addition, the implementation of specific policies, such as on counter-terrorism and anti-drug trafficking, has given rise to credible allegations of torture and ill-treatment. The United States in particular has been implicated in such violations in the context of the global “war on terror”, especially its programme of extraordinary rendition, as well as the military engagements in Iraq and Afghanistan. Canada is also alleged to have been complicit in cases of torture in this regard.

In some parts of the region, conditions of detention are reportedly so poor that they amount to cruel, inhuman or degrading treatment, as evidenced in a number of decisions of the Inter-American Court and Commission on Human Rights, including precautionary and provisional measures in the case of Argentina and Brazil.

Across the region, members of marginalised groups face disproportionate and heightened vulnerability to torture and ill-treatment, including indigenous peoples, women, migrants, lesbian, gay, bisexual and transsexual (LGBT) persons, persons of African descent, and people living in poverty. Women and members of the LGBT community are at heightened risk of being subjected to sexual violence, which is particularly severe in countries affected by armed conflicts.

All of the States considered have ratified international and/or regional treaties prohibiting torture and protecting human rights. Most also prohibit torture within their national legal systems. However, the definition of “torture” as a crime is frequently not in line with article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 2 of the Inter-American Convention to Prevent and Punish Torture, as is the case in Brazil, Dominican Republic, Guatemala, Mexico, Nicaragua and Peru. Furthermore, practices in various countries suggest that perpetrators are often prosecuted for less serious offenses if at all.

Though many countries have laws in place to regulate the length of pre-trial or preventive detention, these are not always enforced resulting in widespread use of prolonged pre-charge and pre-trial across the region. Furthermore, while several countries have constitutional provisions allowing detainees to challenge the legality of their detention, including through *habeas corpus* petitions, these are often of little use to detainees who have no access to legal representation. Many countries in the region have legal provisions in place to guarantee detainees’ access to a lawyer. However, there are serious obstacles that prevent this from being realised, even in countries where legal aid is available. These include an insufficient number of public defenders; lack of knowledge of international norms on torture amongst public defenders; or public

defenders' inability to speak the same language as their clients, which particularly affects members of indigenous groups. Where access to a lawyer is contingent on the ability of a victim to pay for legal services, economically marginalised persons often face particularly serious challenges putting them at greater risk of torture.

Participants reported major deficiencies regarding the oversight of places of detention in many countries. While nine of the 17 States represented at the meeting have ratified the Optional Protocol to the Convention Against Torture, several have yet to establish the required National Preventive Mechanism. Where monitoring bodies have been established, lack of requisite independence and impartiality is reported. All of the countries considered have constitutional or criminal law provisions that prohibit the use of evidence obtained through torture, however these are not always implemented, and there have reportedly a range of instances in which use of such evidence has been permitted.

Impunity for torture remains a major shortcoming, and challenge, across the region. Though the majority of States have become parties to treaties that incorporate the right to an effective remedy and the obligation to investigate, prosecute and punish perpetrators of torture and ill-treatment, and have adopted criminal provisions at the domestic level, a range of obstacles make it difficult for perpetrators to be held accountable. Investigations are carried out mainly by the National Police, in many cases under the direction of the Public Prosecutor's Office, even in cases where the alleged perpetrator is a member of the police. The lack of independence of investigating authorities is seen as one of the main barriers to accountability for perpetrators. The absence of effective investigations has contributed to a profound lack of public confidence in the institutions responsible for holding perpetrators of torture accountable. Coupled with the inadequate protection provided in national law and practice, this has resulted in many victims refraining from making complaints about torture or ill-treatment. Furthermore, in some countries amnesty laws and statutes of limitation bar or effectively frustrate the prosecution of perpetrators of torture, for example in Chile where Decree Law No. 2191 of 1978 grants blanket amnesty to those responsible for crimes committed under the dictatorship of General Pinochet, including torture and ill-treatment.

Legal recognition of the right to reparation varies among the countries considered. While some have adopted constitutional norms specifically aimed at providing victims of torture with the right to reparation, others have established more general rights to reparation for victims of any crime resulting in harm or damage. In most countries, criminal legislation includes provisions allowing victims of crimes that lead to damage or injury the possibility of obtaining reparation at the final stage of criminal proceedings. In addition, it is also possible to file civil claims for reparation separately from the criminal process in many countries. This is usually regulated by tort law and is generally applicable to any cases where individuals' rights have been violated. In some countries, civil suits are dependent on the determination of criminal responsibility through a criminal proceeding, which can make it difficult for victims to obtain reparation through civil claims in practice. The Inter-American Court of Human Rights has well-developed jurisprudence with regard to reparation. Given the serious difficulties victims face in obtaining reparation in domestic jurisdictions, participants emphasised the importance of litigation before the Inter-American System. Several countries in the region have established administrative reparation programmes for victims of past violations. While these have had some positive results, they have raised concerns, including for their failure to take into account the specific facts of each individual case in determining the amount and form of reparation to award.

Across the region, monetary compensation is still the most common form of reparation awarded to victims of torture and ill-treatment. The focus on this type of reparation, which is often inadequate in terms of the amount awarded, is highly problematic as it fails to take a holistic approach towards reparation. This is also a major shortcoming of administrative reparation programmes set up in the region to deal with redress for mass violations. The right to rehabilitation is not established in the national legal systems in the region and there is limited awareness, including among human rights lawyers and NGOs, concerning this right. While there are facilities in many countries established to provide victims of torture and ill-treatment with rehabilitation services, these are NGOs rather than government-led initiatives. The failure of Courts to award reparation in the form of medical and psycho-social rehabilitation services is a major shortcoming in both law and practice.

The challenges identified in preventing and punishing torture in the Americas point to broader structural problems, including insufficient political commitment to hold perpetrators accountable, weak domestic institutions and a lack of respect for the rule of the law. As such, the effective tackling of impunity for torture and ensuring victims' rights requires multiple interventions by human rights lawyers and civil society, focused on individual cases and strategic litigation at the domestic, regional and international levels, as well as advocacy for wider legislative and institutional changes.

1. Practice and Patterns of Torture in 18 Countries

Notwithstanding transitions to democracy in a number of countries, torture and ill-treatment continue to be committed throughout the region. Its prevalence, forms, perpetrators and victims have changed over time. Some of the most common patterns seen in the region include torture by law-enforcement personnel during criminal investigations to extract confessions and information, and by prison officials as a means of punishing, maintaining control over detainees and discriminating against some groups of detainees. Police and other law enforcement personnel have on several occasions used excessive force amounting to ill-treatment if not torture against demonstrators to quell social protests. In addition, the implementation of specific policies, such as the counter-terrorism policies of the United States of America (US or USA), has given rise to credible allegations of torture and ill-treatment by US officials. Similarly, in Mexico, the government's fight against organised crime and drugs has reportedly been characterised by law enforcement officials systematically using torture and ill-treatment against suspects.¹

Another major pattern identified is the disproportionate and heightened vulnerability to torture and ill-treatment faced by marginalised groups such as indigenous peoples, women, migrants, lesbian, gay, bisexual and transsexual (LGBT) communities, persons of African descent, and people living in poverty. Members of some of these groups often face abuse by law enforcement officials while taking part in peaceful protests linked to the very extreme poverty, exclusion and discrimination that they are subjected to. Women and members of the LGBT community are at particular risk of being subjected to sexual violence.

The forms that torture and ill-treatment take vary across the region, and have become increasingly sophisticated in some countries. Participants described 'white torture' (*tortura blanca*), such as sleep deprivation and exposure to heat with denial of water, which is designed to inflict pain and suffering without leaving any marks on the body. Beatings and physical assault, simulated drowning, and psychological forms of torture such as isolation, sensory deprivation and threats, as well as other forms of torture were reported to be widespread. Different forms of sexual violence, including rape, are also documented throughout the region, against both men and women. In many countries, prison conditions are reportedly extremely poor, giving rise to concerns of ill-treatment of detainees.

1.1. Torture and ill-treatment by police in the course of criminal investigations

In a number of countries, torture and ill-treatment is reportedly a routine component of police interrogations of criminal suspects. In this context, violations are most prevalent immediately following arrest before reaching a police station, which in many cases does not conform to formal procedures. Following its visit to Brazil in 2011, the UN Subcommittee Against Torture (UN Subcommittee), the body established by the Optional Protocol to the Convention Against Torture (OPCAT) to monitor places of detention in States parties, described the use of torture and ill-treatment by law enforcement personnel as "gratuitous violence, as a form of punishment, to extract confessions, and as a means of extortion."² In Ecuador, torture and ill-treatment are used to "intimidate, coerce and punish victims under police investigation in order to achieve self-

¹ Throughout this report, 'reportedly' refers to information provided by participants, unless otherwise indicated.

² UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Visit to Brazil*, UN Doc. CAT/OP/BRA/1, 5 July 2012, p. 79.

incriminating confessions.”³ In Haiti, members of the National Police reportedly inflict torture to extract information from suspects regarding criminal activities and/or particular individuals.⁴ The same is true in Honduras.⁵ The prevalence of torture during the course of criminal investigations is an issue of serious concern in many of the countries considered, with some members of marginalised or indigenous groups facing heightened risk, as discussed further below.

Law enforcement officials in Mexico are reported to employ torture systematically in the fight against organised crime and drug trafficking. The case of Miriam Lopez is illustrative: she was arrested and detained in February 2011 in Baja California, Mexico, and subsequently transferred to the military base in Morelos, Tijuana, where she was suffocated with plastic bags, raped three times and subjected to electric shocks by officials trying to force her to confess her involvement in drug trafficking and to incriminate others.⁶ The Committee Against Torture (CAT) has commented on the increasing use of torture by the Mexican armed forces and security bodies during interrogations of persons arbitrarily detained in the course of operations against organised crime.⁷

1.2. Torture and ill-treatment of persons belonging to marginalised groups

Across the region, people from poor socio-economic backgrounds and members of marginalised and/or vulnerable groups are at heightened risk of torture and ill-treatment. This results from a number of factors, and reflects historical discrimination that these disadvantaged groups face.

The increased vulnerability to torture and ill-treatment experienced by persons from poor socio-economic backgrounds is compounded by their inability to afford legal representation and lack of access to legal aid. In Argentina, young disadvantaged men are easy targets for unlawful arrest by police and law enforcement officials looking to solve crime, putting them at serious risk of torture and ill-treatment. The same pattern is reported from Belize, Haiti, Jamaica and Peru. In these countries, young people in conflict with the law face severe difficulties in obtaining *pro bono* legal assistance. In a context where criminal investigations are heavily reliant on confessions, this puts them at serious risk of torture by the police.

Following the 2010 attacks on police stations in Jamaica, which included shootings and firebombs by suspected supporters of an alleged drug lord, a state of emergency was declared and approximately 4,000 people detained without charge and forced to give fingerprints and photographs in order for police to build a database of persons “known to the police.” However, this was discriminatory as security forces targeted inner-city neighbourhoods which have historically faced socio-economic deprivation, and almost all of the young black males living in these areas were added to the database.⁸

³ Foundation for Integral Rehabilitation of Victims of Violence (PRIVA), *Alternative Report on Torture and Ill-treatment of Prisoners in Social Rehabilitation Centres*, October 2010, p.11.

⁴ IACHR, *Haiti: Failed Justice of the Rule of Law? Challenges Ahead for Haiti and the International Community*, OEA/Ser/L/V/II.123, 26 October 2005, p. 109.

⁵ UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the Visit to Honduras*, UN Doc. CAT/OP/HND/1, 10 February 2010, p. 26.

⁶ Information provided by participant. See also Amnesty International, “End Torture in Mexico,” 5 March 2013, available at: <http://www.amnesty.org/en/appeals-for-action/Torture-in-Mexico>, accessed 10 March 2013.

⁷ CAT, *Concluding Observations: Mexico*, 11 December 2012, UN Doc. CAT/C/MEX/CO/5-6, p. 10.

⁸ Jamaicans for Justice, “The State of Human Rights in Jamaica Since the State of Emergency 2010 (Report prepared by Jamaicans for Justice and the International Human Rights Clinic of the George Washington University Law School for

Indigenous communities have similarly faced discrimination. Where such communities have mobilised to demand their rights in the face of evictions due to mining or logging contracts, they have been targeted to suppress dissent.⁹ For example, in Colombia, indigenous communities who have protested against the operation of mining companies have been particularly vulnerable to torture and ill-treatment by police officials. Reportedly, from 1998-2008, there were over 1000 murders of indigenous persons, 321 faced threats and intimidation, 254 were forcibly disappeared, 492 were physically injured, and 216 were subjected to sexual violence and torture.¹⁰

Irregular or undocumented migrants have also been targeted, particularly in Central America as they make their way north. The situation in Mexico is particularly alarming, with many migrants facing torture and ill-treatment by criminal gangs, often with the collusion of police and other public officials, and certainly without their protection.¹¹ According to the Mexican National Human Rights Commission, in one six-month period in 2010, 11,000 migrants were kidnapped and many faced ill-treatment, including at the hands of or with the acquiescence of public officials.¹² Migrant women travelling through Mexico are at particular risk of serious sexual abuse and violence from other migrants, criminal gangs, transport officials and public officials.¹³ An estimated six in 10 migrant women and girls are raped in Mexico, including by State officials.¹⁴

In a number of countries, LGBT persons have been targeted for torture and ill-treatment, reflecting widespread discrimination. In Peru, for example, members of the LGBT community face daily discrimination, including torture and ill-treatment committed predominantly by members of the National Police and the security forces as the case of Luis Alberto Rojas Marín illustrates. He was arrested in February 2008, and raped with a rubber baton by three members of the National Police while in police custody. He alleges that he was targeted due to his sexual orientation. REDRESS, CNDDHH and PROMSEX filed a petition in his case before the Inter-American Commission on Human rights (IACHR) which is pending a decision on admissibility.¹⁵ In its Concluding Observations on Peru's state party report, the CAT expressed serious concern regarding the "harassment and violent attacks, some of which have resulted in death, against

submission to the IACHR)" 25 March 2011, available at: <http://www.jamaicansforjustice.org/docs/110406J2GF.pdf>, accessed 10 March 2013, p. 3.

⁹ See IACtHR, *Saramaka People v. Suriname*, Judgment of 12 August 2008; Resolution of the IACtHR, *Case of the Yanomami People of Brazil*, Case No. 7615, 5 March 1985; IACHR, *Precautionary Measures for Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala*, PM 260-07, 20 May 2010.

¹⁰ UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The situation of indigenous people in Colombia: Follow up to the recommendations made by the previous special rapporteur*, 25 May 2010, UN Doc. A/HRC/15/37/Add.3, p. 18.

¹¹ Amnesty International, *Mexico: Authorities urged to end torture epidemic*, 11 October 2012, available at: <http://www.amnesty.org/en/news/mexico-authorities-urged-end-torture-epidemic-2012-10-11>, accessed 10 March 2013.

¹² Ibid.

¹³ Amnesty International, *Invisible Victims: Migrants on the Move in Mexico*, 28 April 2010, p. 15, available at: <http://www.unhcr.org/refworld/topic,4565c22541,4565c25f527,4bd7e8de2,0,AMNESTY,,.html>, accessed 10 March 2013.

¹⁴ Ibid.

¹⁵ The organisations also submitted a shadow report on torture and ill-treatment of members of the LGBT community in Peru to the CAT for its November 2012 review of the country. See: REDRESS, CNDDHH, PROMSEX, *Torture and the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Peru*, available at: <http://www.redress.org/downloads/publications/Shadow%20Report%20Peru%20-%20PROMSEX%20CNDDHH%20REDRESS.pdf>, accessed 10 March 2013.

members of the LGBT community by members of the National Police, armed forces, municipal patrols and prison officials....”¹⁶

1.3. Gender based violence and failure to protect women

The prevalence of violence against women across the region, committed by both public officials and private actors, compounded by the lack of adequate protection, is a major concern. In Guatemala, many women arrested on suspicion of crime are reportedly subjected to sexual violence amounting to torture or ill-treatment, while in police custody.¹⁷ Similarly, in Honduras, following the coup d'état in June 2009 which ousted President Manuel Zelaya, thousands of protesters were arrested and detained, including women, many of whom alleged to have been subjected to sexual abuse, including rape, by police.¹⁸ In the Colombian armed conflict, sexual violence is used as a weapon of war, and women are reportedly targeted by both military forces and members of illegal armed groups.¹⁹

Indigenous women are often at particular risk of sexual violence. Several landmark rulings by the Inter-American Court of Human Rights (IACtHR) illustrate this reality. In the cases of *Fernandez Ortega v. Mexico* and *Rosendo Cantu v. Mexico*, the Court stated that the acts of sexual violence which the claimants were subjected to amounted to torture. In the first case, Fernandez Ortega, a member of the Me'phaa indigenous community, was raped by three soldiers who entered her house in search of her husband. Similarly, Rosendo Cantu, also a member of the Me'phaa indigenous community, was raped by two soldiers while she was washing clothes in a stream. In both cases, the Court found a violation of article 5(2) of the American Convention and article 2 of the Inter-American Convention to Prevent and Punish Torture (IACPPT).²⁰ Rape of indigenous women in Colombia and Mexico, particularly in areas under military control, has also been widely reported.²¹

Domestic violence and violence against women by private actors is a widespread problem in the region. In respect of Canada, for example, CAT expressed concern regarding the disproportionately high levels of life-threatening forms of violence, spousal homicides and enforced disappearances of marginalised, and in particular Aboriginal women.²² In Mexico, the well-documented cases of murdered women in Ciudad Juarez, also known as 'femicides,' provides another example of exclusion and discrimination against women resulting in ill-treatment, torture and murder. In the landmark *Cotton Field* case (*Gonzales and Others v. Mexico*), the IACtHR found the State to have failed in its positive obligations to protect the victims and prevent the crimes. Furthermore, though the violations were not proven to have been committed by State actors, in light of the

¹⁶ CAT, *Concluding Observations: Peru*, 21 January 2013, UN Doc. CAT/C/PER/CO/5-6, p. 22.

¹⁷ According to one organisation, some 90 per cent of women arrested reported police abuse at the time of detention, of which 75 per cent constituted sexual violence. See MADRE, *Demanding Women's Human Rights in Guatemala*, March 2012, available at:

http://www.madre.org/images/uploads/misc/1332520499_Guatemala%20Shadow%20Report%20Shortened%20032312_FINAL.pdf, accessed 5 June 2013.

¹⁸ UN Subcommittee, *Report on Visit to Honduras*, supra n. 5, p. 41.

¹⁹ Amnesty International, *Colombia: Hidden from Justice – Impunity for Conflict Related Sexual Violence, a Follow-Up Report*, 2012, p. 5, available at: <https://www.amnesty.org/en/library/asset/AMR23/031/2012/en/8779cba6-f18f-4f06-9007-4cb337fcd1bd/amr230312012en.pdf>, accessed 5 June 2013.

²⁰ IACtHR, *Fernández-Ortega et al. v. Mexico*, Judgment of 30 August 2010, Series C No. 215, p. 128.

²¹ Ibid.

²² CAT, *Concluding Observations: Canada*, 25 June 2012, UN Doc. CAT/C/CAN/CO/6, p. 20.

context of the generalised violence against women in Ciudad Juarez which created a real and imminent risk that missing women would be sexually abused, tortured and killed, the Court found the State in violation of the right to life, personal integrity and personal liberty recognised in articles 4(1), 5(1), 5(2) and 7(1) of the American Convention, in relation to the general obligations under articles 1(1) and 2 for failing to prevent and adequately investigate the disappearances and subsequent murders of the young women.²³

1.4. Torture and ill-treatment against popular protest movements

In a number of countries, law enforcement officials have resorted to measures amounting to torture and/or ill-treatment in response to popular protests. The most commonly-used methods are excessive use of tear gas at close range; excessive and indiscriminate beatings with wooden bats; mass arrests and even firing live ammunition into crowds. In Honduras, following the 2009 coup d'état, the police and army used excessive force to break up the marches and demonstrations that took place around the country. Citing information from a local NGO, the UN Subcommittee reported that during the days following the demonstrations, 133 cases of cruel, inhuman or degrading treatment, 21 cases of serious injury, 453 of injury from beatings and 211 of injury caused by unconventional weapons were reported.²⁴

In some countries, the use of violence to break up demonstrations has a disproportionate impact on members of disadvantaged or marginalised groups, as in many cases, these are the groups carrying out demonstrations and protests to demand their rights. For example, the Aysen community in the Chilean Patagonia region have in recent years protested to demand better health services, education and working conditions, and police have frequently used excessive force to intimidate the population and quell mobilisation.²⁵ In Colombia, there have been many reports of excessive force against demonstrators protesting to demand their rights. In Peru in 2009, a group of Peruvian farmers accused British-based mining corporation Monterrico Metals of colluding with police in their detention and torture, after they were subjected to beatings and arbitrary detention by police in response to their protests of the mine's construction. While these were not the actions of Monterrico Metals officials, according to eye-witnesses, the police were acting on their instructions. In 2011, the case was settled in the UK with Monterrico Metals paying compensation to the complainants, without admitting liability.²⁶

1.5. Torture, counter-terrorism policies and anti-drug trafficking policies

Following the 11 September 2001 terrorist attacks in New York and Washington, the US government pursued counter-terrorism policies and practices which in some cases included systematic use of torture and ill-treatment on terrorism suspects. The so-called "extraordinary renditions" programme is a well-documented example of such a practice.²⁷ Such illegal transfers

²³ IACtHR, *González et al. ("Cotton Field") v. Mexico*, Judgment of 16 November 2009, Series C No. 205, para. 283-286.

²⁴ UN Subcommittee, *Report on Visit to Honduras*, supra n. 5, p. 40.

²⁵ Information provided by participant.

²⁶ Leigh Day & Co., "Monterrico Metals PLC settles Peruvian cases without admission of liability," 20 July 2011, available at: <http://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-minin>, accessed 10 March 2013.

²⁷ See, for example: Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, February 2013; Human Rights Council, "Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and

were carried out by the US Central Intelligence Agency and involved transferring foreign nationals suspected of involvement in terrorism to countries such as Egypt, Jordan and Syria for interrogation, where use of torture during interrogations is well-documented. These transfers were in clear violation of the principle of *non-refoulement*, which prohibits transferring any person to a country where he or she may be at risk of torture. Despite the extensive documentation of these violations, the US has failed to investigate and prosecute the perpetrators. It has also blocked litigation seeking civil redress for victims through invocation of the so-called “States secrets” privilege or by claiming immunity from suit, as discussed in chapter 4.

Canadian authorities have also been found to be complicit in the US illegal transfers. In the case of Omar Khadr, a Canadian citizen detained and tortured by US military forces in Afghanistan in July 2002 and subsequently transferred to Guantanamo Bay, the Supreme Court of Canada ruled that the participation of Canadian officials in his interrogation was in violation of his rights to life, liberty and security of the person.²⁸ Canadian citizen Maher Arar was found to have been detained in the USA and unlawfully rendered to Jordan and from there to Syria, where he was tortured. A Canadian commission of inquiry found that in sharing detailed information about Arar with US authorities, Canadian officials contributed to the circumstances that led to his detention and torture.²⁹

Some States have adopted regulations that permit the use of information that may have been obtained from terrorism suspects under torture, which condones if not encourages torture and fails to conform to States’ international obligations and UNCAT’s object and purpose of eradicating torture worldwide.³⁰ For example, in Canada, a Ministerial Directive was issued in 2010 permitting the Canadian Security Intelligence Service, police and border services to use and share information that may have been obtained through torture by foreign agencies.³¹ The Canadian Government has stated that in exceptional circumstances, “ignoring such information solely because of its

fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances,” UN Doc. A/HRC/13/42, 26 January 2010; Council of Europe, “Alleged secret detentions in Council of Europe Member States,” 22 January 2006, available at:

http://assembly.coe.int/main.asp?link=/committeedocs/2006/20060124_jdoc032006_e.htm, accessed 10 March 2013;

Council of Europe, “Secret detentions and illegal transfers of detainees involving Council of Europe Member States: second report,” 7 June 2007, available at: http://www.assembly.coe.int/CommitteeDocs/2007/EMarty_20070608.htm, accessed 10 March 2013; UN Human Rights Committee, *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006; CAT, *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 20 May 2005; European Court of Human Rights, *El-Masri v. the Former Yugoslav Republic of Macedonia*, Application No. 36930/09, Judgment of 13 December 2012.

²⁸ Supreme Court of Canada, *Canada (Prime Minister) v. Omar Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44. See also the interveners’ factum in Omar Khadr case at the Supreme Court of Canada, available at:

http://www.asfcanada.ca/uploads/publications/uploaded_memoire-des-intervenants-final-pdf-9.pdf, accessed 10 March 2013.

²⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, 2006, available at: http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf#53, accessed 10 March 2013.

³⁰ HRC, *Concluding Observations: USA*, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev. 1, para. 14; CAT, *Concluding Observations: Canada*, supra n. 25, p. 12(d).

³¹ CBC News Canada, *CSIS may use intelligence derived from torture, Toews says*, 7 February 2012, available at: <http://www.cbc.ca/news/politics/story/2012/02/07/pol-cp-torture-csis.html>, accessed 10 March 2013.

source would represent an unacceptable risk to public safety.”³² The CAT has expressed its concern about this Ministerial Directive and called on the State to modify it.³³ Furthermore, in the context of US counter-terrorism activities, detainees have in many cases reportedly been tortured in order to obtain intelligence information as opposed to a confession to be used as evidence against them. This is complicated by the fact that such intelligence is not obtained for the purpose of being introduced as evidence and, therefore, not subject to the absolute inadmissibility of evidence obtained through torture and the ‘fruit of the poisonous tree’ doctrine adhered to by US courts.³⁴

In a number of countries, including Guatemala, Mexico, and Honduras, the “war against drugs” has intensified the use of torture against suspected members of drug cartels. In Mexico, this has in part been catalysed by the role of the armed forces in maintaining public security in areas suspected of drug-trafficking activity. This practice begins with the arbitrary detention of suspected cartel members without any judicial order, and in many cases persons are detained by military or police officials using excessive force. There are also reports that such arrests have been carried out by officials wearing civilian clothing or balaclavas to protect their identity. Once they have been picked up, detainees are forced to get into vehicles and are transported to military barracks or isolated places without being informed about the reasons for their arrest and detention, and are tortured for the purpose of obtaining a confession and information about other suspects.

1.6. Torture in armed conflict

Many of the armed conflicts in the Americas have been characterised by the use of torture and ill-treatment by military and paramilitary forces against both civilians and armed groups. In the conflict in Colombia, torture has been used systematically by military and paramilitary forces against the civilian population as a means of cracking down on insurgent groups. In recent years, the military has engaged in mass arbitrary detention of individuals in areas suspected of providing support to insurgents. Members of armed forces have tortured such detainees to gather intelligence, as well as to punish those who are suspected collaborators and to obtain confessions about participation in such groups, which enables the military to show “operational results.”³⁵

The US military engagements in Iraq and Afghanistan have also led to well-documented allegations of torture and ill-treatment of detainees in those countries, however investigations into these allegations have been inadequate and have resulted in impunity. Although torture and mistreatment is criminalised under numerous US laws, Section 1004 of the Detainee Treatment Act 2005 (DTA) provides a statutory defence to any official who “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know that the practices were unlawful,” a defence which comes into play at an early stage of investigations as a matter of prosecutorial discretion and has resulted in practice in very few prosecutions of

³² CBC News Canada, *RCMP, border agents can use torture-tainted information*, 24 August 2012, available at: <http://www.cbc.ca/news/canada/story/2012/08/24/rcmp-border-agency-information-torture.html>, accessed 10 March 2013.

³³ CAT, *Concluding Observations: Canada*, supra n. 25, p. 17.

³⁴ Information provided to REDRESS by participant.

³⁵ Coalición Colombiana contra la Tortura, *Informe Alternativo al 4º Informe Periódico del Estado Colombiano al Comité Contra la Tortura*, October 2009, p. 15, available at: <http://www2.ohchr.org/english/bodies/cat/cats43.htm>, accessed 10 March 2013.

perpetrators of torture and ill-treatment against detainees in US custody.³⁶ Furthermore, at the time the DTA was adopted, a series of then-classified memoranda had been drafted by the US Justice Department Office of Legal Counsel (OLC) which effectively provided a legal justification for the use of torture to extract information from terrorism suspects. Though the Obama administration rescinded the memos by executive order and declared that no government agency can rely on any opinions from the OLC between 2001 and 2009, Attorney General Eric Holder also made clear in 2009 that there would be no prosecutions of those who “acted in good faith and within the scope of the legal guidance of the OLC regarding the interrogation of detainees.”³⁷ This has created a framework for impunity for US officials involved in the well-documented torture and ill-treatment of detainees. The CAT has also expressed concern about a breach of the prohibition of refoulement in relation to the reported transfer of prisoners by Canadian armed forces into the custody of Afghanistan where the prisoners experienced torture and ill-treatment.³⁸

1.7. Torture and ill-treatment in detention centres

The use of torture and ill-treatment in detention centres is a systemic practice in many countries considered, used as a means of punishing and disciplining inmates individually, as well as to maintain control of the prison population collectively. As highlighted above, the findings of the UN Subcommittee during its visit to Brazil included ill-treatment and excessive use of force by prison guards.³⁹ The CAT expressed concern over the extremely harsh regime imposed on detainees in maximum security detention centres in the USA, known as ‘super-max prisons,’ and the use of prolonged periods of isolation for detainees which has a negative impact on their mental health.⁴⁰ It also expressed concern regarding the abuse and ill-treatment by prison personnel of marginalised groups such as racial minorities, migrants and LGBT persons.⁴¹ In Argentina, detention centre personnel are reported to use torture to quell inmate protests; to intimidate and silence victims and witnesses of torture and ill-treatment by prison personnel; as an initiation ritual; and to punish detainees who are perceived to be morally inferior, such as sexual offenders or homosexuals.⁴² The use of torture and ill-treatment as a form of punishment and discrimination against detainees is reportedly also common in Dominican Republic, Ecuador, Guatemala, Haiti and Mexico.

In addition, conditions of detention in many countries are extremely poor, giving rise to concerns of cruel, inhuman or degrading treatment. In Brazil, the UN Subcommittee found that the physical conditions of some centres did not comply with national or international standards in terms of space, personal hygiene, bedding, clothing and medical services, among others, and that detention in such conditions amounts to inhuman and degrading treatment.⁴³ In 2005, the IACHR ordered provisional measures in favour of children and adolescents deprived of liberty in the *Complex do*

³⁶ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1004 (a).

³⁷ US Department of Justice, “Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees,” 20 August 2012, available at: <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>, accessed 10 March 2013.

³⁸ CAT, *Concluding Observations: Canada*, supra n. 25, p. 11.

³⁹ UN Subcommittee, *Report on Visit to Brazil*, supra n. 2, p. 128.

⁴⁰ CAT, *Concluding Observations: USA*, 25 July 2005, UN Doc. CAT/C/USA/CO/2.

⁴¹ *Ibid*, p. 37.

⁴² Information provided to REDRESS by participant.

⁴³ UN Subcommittee, *Report on Visit to Brazil*, supra n. 2, p. 107.

Tatuape de FEBEM prison in Sao Paulo, Brazil.⁴⁴ Similarly, in April 2012, the IACtHR issued precautionary measures regarding conditions of detention centres in several regions of Argentina, and particularly Buenos Aires, ordering the State to take specific measures to protect the lives and integrity of all persons deprived of liberty in several units of the Buenos Aires Penitentiary Services.⁴⁵ This led to the establishment of a follow-up panel composed of representatives of local NGOs and the government, which is responsible for designing programs and public policies aimed at improving the situation of all persons deprived of liberty in the State of Buenos Aires. The IACtHR has granted similar measures regarding prisons in Mendoza, Argentina.⁴⁶

Poor conditions of detention are often the result of overcrowding, which is so severe in some countries that categories of inmates who should be held separately are detained together. For example, in Nicaragua, women and minors are not detained separately from adult men, putting them at increased risk of abuse by other inmates.⁴⁷ In Colombia, there are persistent reports about overcrowding in prisons, and the CAT has expressed concern regarding complaints of torture and ill-treatment in prisons in the Valledupar high and medium security prisons and in the Bellavista prison in Medellin.⁴⁸

The conditions of detention for persons with mental illness are of particular concern in several countries. For example, both the IACHR and the UN Special Rapporteur on Torture have drawn attention to the inhuman conditions in which detainees with mental illness in Jamaica are held, in particular in Spanish Town and Hunts Bay police stations where overcrowding, unsanitary conditions (including detainees living in rubbish and human waste) are common.⁴⁹ Furthermore, persons with mental illness are not detained separately from the overall prison population. The Special Rapporteur has called on the Jamaican authorities to ensure that persons with mental illness who are suspected or convicted of a crime are held in separate psychiatric institutions rather than in police stations.⁵⁰

Persons confined to care institutions, such as psychiatric hospitals, children's homes and drug rehabilitation centres, among others, are also vulnerable to torture and ill-treatment. In Jamaica, the IACHR has reported that "the Jamaican government's child-care system suffers from disturbing levels of sexual, physical and mental abuse of children at the hands of caregivers, and urgently requires reform and additional resources."⁵¹ In Mexico, Disability Rights has reported that many people living in psychiatric institutions, orphanages or shelters face inhuman and degrading treatment, arising from the poor conditions of these facilities. According to Disability Rights, some patients in these institutions and hospitals are left in permanent physical restraints, amounting to ill-treatment and possibly even torture.⁵² Similar practices of torture and ill-treatment of psychiatric patients are reportedly common in Argentina and Haiti.

⁴⁴ Resolution of the IACtHR, *Caso de los Niños y Adolescentes Privados de Libertad en el "Complejo do Tatuape" de Febem*, 17 November 2005.

⁴⁵ IACHR, Precautionary Measures 104/12: Penitentiary Services, Buenos Aires Province, Argentina. For more information, see: <http://www.oas.org/en/iachr/decisions/precautionary.asp>

⁴⁶ Resolution of the IACHR, *Caso de las Penitenciarias de Mendoza*, 22 November 2004.

⁴⁷ CAT, *Concluding Observations: Nicaragua*, 10 June 2009, UN Doc. CAT/C/NIC/CO/1, p. 22.

⁴⁸ CAT, *Concluding Observations: Colombia*, 4 May 2010, UN Doc. CAT/C/COL/CO/4, p. 21.

⁴⁹ *Ibid*, p. 190.

⁵⁰ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum Mission to Jamaica*, 11 October 2010, UN Doc. A/HRC/16/52/Add.3, p. 64.

⁵¹ IACHR, *Report on the Situation of Human Rights in Jamaica 2012*, 10 August 2012, OEA/Ser. I/V/II.144, Doc.12, p. 243.

⁵² UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim Report of the Special Rapporteur to the General Assembly*, 28 July 2008, UN Doc. A/63/175, paras. 37-41. Cases have been

reported in particular in psychiatric hospitals (Hospital Psiquiátrico José Sayago, Hospital Psiquiátrico Samuel Ramirez Moreno and Centro de Atención Integral de Salud Mental de Estancia Prolongada). See Disability Rights International, *Abandoned & Disappeared: Mexico's Segregation and Abuse of Children and Adults with Disabilities*, 30 November 2010, p. x, available at: <http://www.disabilityrightsintl.org/work/country-projects/mexico/>, accessed 10 May 2013.

2. Legal Framework

2.1. Regional and international law on the prohibition of torture

The main regional and international treaties relating to torture are:

- American Declaration on the Rights and Duties of Man (1948)
- American Convention on Human Rights (1969)
- Inter-American Convention to Prevent and Punish Torture (1985)
- International Covenant on Civil and Political Rights (1966)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002)
- Rome Statute of the International Criminal Court (1998).

Of the countries represented at the meeting, Argentina, Brazil, Chile, Ecuador, Guatemala, Mexico, and Peru are parties to all of the above-mentioned instruments. Colombia and the Dominican Republic are party to the same, excluding the OPCAT. Apart from Haiti and Jamaica, all the States considered are party to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Belize, the USA and Canada have not ratified the American Convention on Human Rights, and recently, Venezuela denounced it, a move widely seen as undermining human rights protection in the region.⁵³ Honduras and Haiti have signed but not yet ratified the IACPPT. With the exception of Canada, Jamaica, the USA and Belize, all the other countries considered have ratified the IACPPT.

Despite the extensive ratification of international and regional human rights treaties, there are persistent problems with their effective implementation. The weakness of key public institutions such as the judiciary, public prosecution and ombudsmen, is a major problem contributing to the lack of compliance with international norms. This is in part due to, as well as exacerbated by, the limited financial and human resources available, which negatively impacts on the ability of institutions to cope with the high number of allegations of torture and to monitor States' compliance with international obligations. This appears to be a common problem throughout the region, but is particularly pronounced in some countries, including Brazil, Chile, Nicaragua, Haiti, Honduras and Peru. For example, in Haiti, while governmental institutions were already weak and somewhat ineffective prior to the devastating earthquake of 2010, due to corruption and lack of independence, the situation became significantly worse after the natural disaster as funding for public ministries dramatically reduced.

2.2. Status of international treaties in domestic law

While States must comply with their treaty obligations in good faith,⁵⁴ in general, they retain discretion as to how best to implement their obligations, unless there are explicit obligations to adopt legislation, such as in articles 4 and 5 of UNCAT or articles 6 and 9 of the IACPPT. Systems of

⁵³ Amnesty International, "Venezuela's break with regional human rights court 'an affront to victims,'" 13 September 2012, available at: <http://www.amnesty.org/en/news/venezuela-s-break-regional-human-rights-court-affront-victims-2012-09-12>, accessed 5 June 2013.

⁵⁴ Article 26 VCLT.

incorporation of international treaties vary across the region, with some States having monist systems, some dualist, and others a mixed model.

For instance, following the constitutional reform of 1994 in Argentina, article 75(22) of the Constitution establishes that the ICCPR, ACHR, UNCAT and other human rights treaties supersede domestic law and have constitutional status.⁵⁵ In Colombia, the 1991 Constitution establishes that “international treaties and agreements ratified by the Congress that recognise human rights and that prohibit their limitation in states of emergency have priority domestically,”⁵⁶ which has been understood to mean that they have also constitutional status. Similar provisions giving prevalence to some human rights treaties over domestic legislation are also part of the constitutions of Dominican Republic, Guatemala, Peru and Venezuela, and this is the dominant system in most of Latin America.⁵⁷

In the USA, article VI, cl.2 of the Constitution establishes that duly ratified treaties become part of the Supreme Law of the Land, equivalent in legal status to enacted federal statutes. However, if the provision is designated as ‘non-self-executing,’ it may not be invoked by parties in litigation unless there is implementing legislation.⁵⁸ In practice, all of the human rights treaties ratified by the USA have been declared non-self-executing, and in most cases, no implementing legislation has been adopted.⁵⁹ In Canada, courts have reiterated that international law, although not implemented directly into domestic law, should be taken into account in the interpretation of the Canadian Charter of Rights and Freedoms, the Constitution and the common law.⁶⁰

2.3. Consideration of international law by domestic courts

In several countries, domestic courts have failed to consider international law and apply relevant international standards in their jurisprudence, their adherence to the monist system notwithstanding. Amongst the few examples of courts that have referred to international norms and instruments in their decisions, the Supreme Court of Argentina and the Constitutional Court in Colombia both stand out. These courts have relied on human rights standards to intervene in favour of persons deprived of liberty by granting structural measures aimed at improving prison conditions. For example, in 2005, the Supreme Court of Argentina ruled on the collective *habeas corpus* petition filed on behalf of detainees in prisons and police stations in Buenos Aires province, and ordered that all prisons in Argentina must conform to the United Nations Standard Minimum

⁵⁵ Constitution of Argentina, article 75, p. 22.

⁵⁶ Constitution of Colombia, article 93.

⁵⁷ Article 46, Constitution of Dominican Republic 2010, article 74, p. 3; Constitution of Guatemala; Constitution of Peru, article 55; Constitution of Venezuela 1999, article 23. See also Christian Curtis, “Notes on the implementation by Latin American countries of the ILO Convention 169 in indigenous peoples,” *SUR: International Journal of Human Rights*, Vol. 10, available at: http://www.surjournal.org/eng/conteudos/getArtigo10.php?artigo=10,artigo_courtis.htm, accessed 10 March 2013.

⁵⁸ US Supreme Court of Justice, *Foster v. Neilson*, 27 US 253, 314 (1829).

⁵⁹ Kenneth Roth, “The Charade of US Ratification of International Human Rights Treaties,” *Chicago Journal of International Law*, Vol. 1, No. 2 (Fall 2000); Penny M. Venetis, “Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation,” *University of Alabama Law Review*, Vol. 63, No. 1 (2011).

⁶⁰ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 70; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, p. 137; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] CSC 1, 1 R.C.S. 3, p. 60.

Rules for the Treatment of Prisoners.⁶¹ In Colombia, both the Colombian Constitutional Court and the Council of State have referred to international standards and the jurisprudence of the IACtHR when giving content to the rights established in its Constitution.⁶² For example, after declaring a systematic violation of the fundamental rights of prisoners, the Constitutional Court issued a structural injunction ordering other branches of government to improve the facilities in detention centres.⁶³ However, this ruling has yet to be fully complied with.

In Mexico, following the ruling in case of *Rosendo Radilla Pacheco v. Mexico* in 2009,⁶⁴ the Supreme Court of Justice issued a historic statement on the mandatory character of IACtHR decisions. This resulted in the Constitutional reform through the Decree of 10 June 2011 which requires all judges—federal and State—in all cases, to uphold and protect, *ex officio*, the human rights under the Constitution, as well as international treaties and decisions of international bodies with jurisdiction.⁶⁵

In other countries, consideration of international law by the judiciary is still rare, though not completely absent. For example, in the USA, though the judiciary is limited to applying provisions of international treaties only where there is incorporating legislation,⁶⁶ UNCAT and other international standards on torture and inhuman treatment have been cited and referenced in federal judicial proceedings brought under the Alien Tort Claims Act 1789 and the Torture Victims Protection Act 1991, and more generally, to give content to domestic constitutional, statutory and common law provisions.

In most of the countries represented at the meeting, including Belize, Dominican Republic, Haiti and Nicaragua, the judiciary has largely failed to apply and/or be guided by international instruments and standards. In Jamaica, the dualist nature of the jurisprudence has not encouraged judges towards this practice, and participants noted that the 2010 Charter of Rights did not include a clause requiring judges to take international instruments into account in their decision-making. Lack of awareness of, and training in international law among judges and lawyers, as well

⁶¹ Argentina Federal Supreme Court of Justice, *Verbitsky, Horacio (representative of Centro de Estudios Legales y Sociales) Habeas Corpus petition (case V856/02)*.

⁶² Colombian Constitutional Court, C-010/2000, Speaker Judge: Alejandro Martínez Caballero, 19 January 2000. Council of State, Chamber for Contentious Administrative Proceedings, Third Section, Ruling 18 February 2010, Speaker Judge: Mauricio Fajardo; Case 20001-23-31-000-1998-03713-01(18436).

⁶³ Colombia Constitutional Court, Rulings T-153/98, T-256/00, T-257/00, T-1077/01 and T-1096/04.

⁶⁴ IACtHR, *Rosendo Radilla Pacheco v. Mexico*, Judgment of 23 November 2009, Series C No. 209. The case concerns the enforced disappearance of Mr. Rosendo Radilla Pacheco by Mexican authorities in 1974, during the country's "Dirty War" in which enforced disappearances were a frequent occurrence. The Court condemned Mexico for the disappearance of Radilla Pacheco and recognised the widespread and systematic abuses that took place during the "Dirty War." It also found Mexico to have failed in its obligations to effectively investigate allegations of human rights violations, to have denied the victim and his family's right to due process and access to justice, and to have created a climate of impunity. Mexico was ordered to pay the family pecuniary compensation, and to investigate, prosecute and punish those responsible. The Court also ordered Mexico to amend its military and criminal code to military jurisdiction over civilians and to bring them more in line with international human rights norms.

⁶⁵ Mexico Supreme Court of the Nation, Miscellaneous Case 912/2010, Reporting Judge: Margarita Beatriz Luna Ramos, 14 July 2011, available at: http://www.utexas.edu/law/colloquium/papers-public/2011-2012/03-19-12_The%20Rosendo%20Radilla%20Case%20%282010%29.pdf, accessed 10 March 2013; Decree of 10 June 2011, Mexico, article 1, available at: http://dof.gob.mx/nota_detalle.php?codigo=5194486&fecha=10/06/2011, accessed 10 March 2013. See also Victor Manuel Colli Ek, "Improving Human Rights in Mexico: Constitutional Reforms, International Standards and New Requirements for Judges," *American University Washington College of Law Human Rights Brief*, Vol. 10, No. 1 (Fall 2012), available at: <http://www.wcl.american.edu/hrbrief/20/1ek.pdf>, accessed 10 March 2013.

⁶⁶ *Medillen v. Texas*, 552 US 491 (2008).

as other public servants, has been identified as a major factor contributing to the failure of courts to apply international norms and standards in many countries, including Dominican Republic, Ecuador, El Salvador, Mexico, Nicaragua, Peru, Haiti and Venezuela.

2.4. Influence of international bodies at the domestic level

While there are significant obstacles and challenges with regard to the domestic implementation of international human rights norms, participants agreed on the importance of decisions of the Inter-American Human Rights System, despite problems relating to enforcement. In Argentina, the precautionary measures granted by the IACHR regarding conditions of detention at Buenos Aires prisons initiated a dialogue between the government and civil society about the programmes and policies needed to improve prison conditions. Precautionary measures also had a positive impact in respect of adolescents confined in the provisional detention centre of Guaruja in the State of Sao Paulo, Brazil, who were detained with adults in overcrowded and inhuman conditions.⁶⁷ As a result of this intervention, the centre was closed and detainees were transferred to a new facility. The case is still monitored by the Commission, which also declared it admissible before the IACtHR.⁶⁸

Other decisions of the Inter-American System have not produced the same positive results. In Belize, the visits and decisions of the IACHR regarding indigenous peoples have not impacted on the government's policies, and all recommendations have reportedly been met with non-compliance. In Chile, the Amnesty Law has not been revoked despite repeated decisions of the IACtHR calling for Chile to do so.⁶⁹ In Colombia, there is yet to be full compliance with the precautionary measures granted by the IACHR, particularly regarding the protection of human rights defenders.⁷⁰ In Venezuela, the IACtHR has issued rulings finding the State responsible for the inhuman conditions of detention centres and has also granted provisional measures in eight detention centres, but none of the measures or rulings has been complied with.

In the case of USA, the lack of ratification of the American Convention and acceptance of the IACtHR's jurisdiction has meant that only the Commission can deal with alleged violations of human rights in that State, and can only make non-binding recommendations. The USA has furthermore failed to engage with the Commission in certain cases. For example, in the case of Khaled El-Masri, who submitted a petition to the IACHR in 2008 alleging human rights violations arising from his unlawful arrest, detention and torture in Afghanistan while in CIA custody, the US government has simply failed to respond.⁷¹ The same is true of two other petitions before the Commission with broadly similar fact patterns and claims of torture.⁷²

⁶⁷ IACHR, Precautionary Measures 63-07, Adolescents in the Public Prison of Guaruja, Brazil, 26 October 2007. For more information, see: <http://www.oas.org/en/iachr/pdl/protection/precautionary.asp>, accessed 10 March 2013.

⁶⁸ IACHR, Report No. 41/08, *Admissibility: Persons deprived of Liberty at the Provisional Detention Centre of Guaruja, Sao Paulo, Brazil*, 23 July 2008, available at: <http://cidh.org/annualrep/2008eng/Brazil478.07eng.htm>, accessed 10 March 2013.

⁶⁹ IACtHR, *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006.

⁷⁰ IACHR, *Annual Report 2011*, Chapter IV, pp. 30-33.

⁷¹ American Civil Liberties Union on behalf of Khaled El-Masri, *Petition to the Inter-American Commission on Human Rights alleging violations of the human rights of Khaled El-Masri by the United States of America with a request for an investigation and a hearing on the merits*, 9 April 2008, available at: http://www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf, accessed 10 March 2013. REDRESS submitted an amicus curiae brief in this case in April 2008, available at:

The absence of domestic bodies mandated to monitor State party compliance with treaty and other bodies is also problematic. In some countries, monitoring mechanisms have been established but lack effectiveness in practice. For example, in Nicaragua, after the recommendations of the CEDAW Committee,⁷³ CAT⁷⁴ and the Committee on the Elimination of Racial Discrimination,⁷⁵ the Government created an Inter-Institutional Commission to monitor compliance with the various recommendations. However, the Commission suffers from understaffing with just six employees, and is as a result largely ineffective.

2.5. Jurisdiction over torture committed abroad

Of the States considered, 13 have legislation in place allowing their courts to exercise universal jurisdiction over torture. In some cases, specific legislation has been adopted, for example in Argentina where the 2006 International Criminal Court Statute Implementation Law gave courts jurisdiction over war crimes, genocide and crimes against humanity committed abroad.⁷⁶ In most cases, such legislation requires “presence” to initiate proceedings. The Canadian Criminal Code provides for universal jurisdiction over torture provided that “the person who commits the act or omission is, after the commission thereof, present in Canada.”⁷⁷ In the Dominican Republic article 56 of the Code of Criminal Procedure provides for universal jurisdiction over “cases involving genocide, war crimes or crimes against humanity, wherever committed, provided that the accused person is resident, even temporarily, in the country or that the acts caused harm to Dominicans.”⁷⁸ In the USA, the Torture Act 1994 permits US federal courts to exercise universal jurisdiction over persons suspected of torture committed anywhere in the world against victims of any nationality, if the perpetrator is present in the US.⁷⁹ Charles ‘Chuckie’ Taylor was the first person to be tried under the Torture Act 1994. In 2008, Taylor, the son of the former Liberian President of the same name, was charged and convicted of torture while residing in Florida for acts committed in Liberia while he was head of the Anti-Terrorist Unit.⁸⁰

In other countries, legislation refers more generally to the obligation to prosecute suspected torturers as set out in international treaties to which they are party. For example, in Honduras, article 5(5) of the Penal Code 1997 states that “Honduran courts shall have jurisdiction over crimes committed abroad when so provided in a treaty to which Honduras is a party or the crime

http://www.redress.org/downloads/casework/REDRESS%20Amicus%20Brief_Khaled%20El%20Masri%20v%20United%20States_30%20March%202009.pdf, accessed 10 March 2013.

⁷² See: American Civil Liberties Union, *Petition to the Inter-American Commission on Human Rights Alleging Violations of the Human Rights of Thahe Mohamed Sabar, Sherzad Khamal Khalid, Ali Hussein, Mehboob Ahmad, Said Nabi Siddiqi, and Haji Abdul Rahman*, 19 March 2012, available at: <http://www.aclu.org/human-rights/sabar-et-al-petition-inter-american-commission-human-rights-torture-us-military-0>, accessed 10 March 2013.

⁷³ Committee on the Elimination of Discrimination Against Women, *Concluding Observations for Nicaragua*, 5 July 2005, UN Doc. CEDAW/C/NIC/CO/6.

⁷⁴ CAT, *Concluding Observations: Nicaragua*, supra n. 42.

⁷⁵ Committee on the Elimination of Racial Discrimination, *Concluding Observations for Nicaragua*, 19 June 2008, UN Doc. CERD/C/NIC/CO/14.

⁷⁶ Ley de Implementacion del Estatuto de Roma del 17 de julio de 1998, No. 26, adopted on 15 December 2006.

⁷⁷ Criminal Code of Canada, article 7(3.7)(e).

⁷⁸ Code of Criminal Procedure, article 56.

⁷⁹ 18 U.S.C. §§ 2340-2340A and 2340B available at <http://www.law.cornell.edu/uscode/text/18/2340A>

⁸⁰ Amnesty International, “Chuckie Taylor convicted of torture,” 31 October 2008.

seriously violates human rights universally recognized. However, the state where the crime has been committed shall have preference with regard to Honduras, as long as the criminal complaint has been initiated before the one in Honduras.”⁸¹ Similar legislation exists in Nicaragua⁸², Chile,⁸³ Guatemala,⁸⁴ Peru,⁸⁵ Ecuador⁸⁶ and Colombia.⁸⁷ In some countries, legislation appears to allow for universal jurisdiction, but is somewhat vague. For example, in El Salvador the Criminal Code provides that “criminal legislation shall also apply to offences committed by anyone whosoever in a place not subject to Salvadoran jurisdiction, provided that they [...] seriously undermine universally recognized human rights.”⁸⁸ As of 2011, this law had never been applied.⁸⁹ Similarly, in Mexico, article 6 of the Federal Criminal Code, states that “[w]hen a crime not defined in this code is committed and that crime is defined in a treaty to which Mexico is a party, that treaty shall apply.”⁹⁰

⁸¹ Criminal Code of Honduras, article 5(5); Code of Criminal Procedure, article 66.

⁸² Code of Criminal Procedure of Nicaragua, article 19. See also Articles 16(d) and (n) of the Penal Code 2008 (principle of universality).

⁸³ Criminal Procedure Code of Argentina, article 1.

⁸⁴ Penal Code, Guatemala, article 5(5).

⁸⁵ Penal Code of Peru, article 2(5).

⁸⁶ Code of Criminal Procedure of Ecuador, article 18(6).

⁸⁷ Law No. 907 of 31 August 2004, article 29.

⁸⁸ Criminal Code of El Salvador, article 10.

⁸⁹ UN Doc A/66/93 para 54 http://www.fd.uc.pt/igc/pdf/mne/varios/uj_3.pdf

⁹⁰ Federal Criminal Code of Mexico, article 4.

3. Prevention of Torture

3.1 Safeguards, complaint and investigation mechanisms

Pre-trial detention and judicial control

Legal limits to the length of pre-charge and pre-trial detention are important safeguards as detainees are highly vulnerable to torture and ill-treatment during this period. The CAT has routinely emphasised the importance of limiting pre-trial detention as an obligation under article 2 of the UNCAT.⁹¹ While most of the countries in the Americas have adopted legislation limiting pre-trial detention, in some countries this can be extended well beyond the exceptional circumstances permitted under domestic and international law.⁹² Myriad legal and practical loopholes exist, enabling extensive pre-trial detention and increasing the risk of torture and ill-treatment.

A major safeguard during pre-trial detention is the right to be brought promptly before a judge. In many countries in the Americas, legislation requires a detained person to be brought before a judge within 48 hours or less, in accordance with international standards. For example, in Guatemala, detainees must be brought before a court during the first six hours of detention.⁹³ In many provinces of Argentina, persons can be detained for a maximum of 24 hours before they must be brought before a judge and charged. The same is true in Peru and Honduras.⁹⁴ In Colombia, a suspect must be brought before a Court within 32 hours of arrest so that a judge can assess the legality of the detention. In Haiti, article 26 of the Constitution stipulates that no one may be kept under arrest for more than 48 hours unless they have appeared before a judge. This is also the case in Nicaragua and the USA.⁹⁵

In some countries the maximum period of pre-charge detention before being brought before a judge can be extended under certain circumstances—usually in cases involving suspicions of organised crime or terrorism. For example, in Peru, the 24 hour maximum allowable period of detention before being brought before a court does not apply in cases of suspected terrorism, espionage and drug trafficking. In such cases, suspects can be held in police custody for up to 15 days. The police are required to inform a judge and the *Ministerio Público* (Office of the Prosecutor), who assumes jurisdiction from the moment of detention, which can last up to 15 days, after which the case must go before a judge.⁹⁶ These regulations exceed the internationally

⁹¹ UNCAT, article 2: 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

⁹² For instance, emergency laws allow for extensions of pre-trial detention where there is ‘an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population, or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the state is composed.’ See International Law Association, Paris Minimum Standards of Human Rights Norms in a State of Emergency (1984), section A.1(b), available at <http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/ParisMinimumStandards.pdf>, accessed 10 March 2013.

⁹³ Constitution of Guatemala, 2002, article 6

⁹⁴ Constitution of Honduras, 1982, article 71

⁹⁵ Constitution of Nicaragua, 1987, article 33.

⁹⁶ Constitution of Peru, 1993, article 2.24(f)

accepted maximum 48-hour limit and significantly exacerbate the risk of torture and ill-treatment.⁹⁷

In Mexico, persons suspected of involvement in organised crime can be detained without charge for up to 80 days under the practice of *arraigo*, which was constitutionalised through the Constitutional reform process of 2008. The purpose of this kind of detention is to keep alleged suspects of organised crime in custody while investigations are on-going and until enough information is gathered to charge them. In practice, however, it is effectively a form of preventive or administrative detention as the definition of the offence of organised crime in the Constitution is vague and extremely broad, making it possible for virtually anyone to be detained without charge. The constitutionalising of the system of *arraigo* has coincided with a drastic increase in the number of complaints of both cruel, inhuman or degrading treatment and arbitrary detentions received by the National Commission of Human Rights. The number of complaints increased more than threefold from 45 in 2008 to 148 in 2011.⁹⁸ In its 2012 review, the CAT called on Mexico to eliminate *arraigo* from the law and practice at the federal and state level. It also highlighted that this regime has facilitated the use of confessions allegedly obtained under torture.⁹⁹

The laws in most countries provide strict limits for the extension of pre-trial detention. However, in many cases, such legislation is simply disregarded by judicial authorities, which results in accused persons facing long delays before their trial. In Argentina, for example, the law provides for investigative detention of up to two years for indicted persons awaiting or undergoing trial; the period may be extended for one year in limited situations. The slow pace of the justice system, however, has meant that in practice, pre-trial detention often extends beyond the period stipulated by law. According to the NGO *Centro de Estudios Legales y Sociales* (CELS), detainees have to wait an average of three years to be tried, with some cases taking up to six years. Furthermore, 74 per cent of detainees in Buenos Aires Province are reportedly in pre-trial detention.¹⁰⁰ In Brazil, pre-trial detention is allowed for an initial period of 15 days, which may be renewed under specific circumstances. In several cases, detainees, particularly those who are uneducated and from deprived backgrounds, were held longer than the provisional period.¹⁰¹ According to one organization, 44 per cent of the Brazilian prison population consists of pre-trial detainees due to the abuse and overuse of this type of detention.¹⁰² In response, Law No. 12,403 was adopted in 2011 creating alternative measures to pre-trial detention such as electronic monitoring, restricted movement and restricted contact with others. This law could help alleviate the problem of overcrowding, but it is still too early to assess its impact.¹⁰³

⁹⁷ Open Society Foundation, "Why pre-trial detainees face the greatest risk of torture," 20 February 2013, available at: <http://www.opensocietyfoundations.org/sites/default/files/pretrial-detention-and-torture-20130220.pdf>, accessed 5 June 2013. See also IACtHR, *Castillo Petruzzi et al v. Peru*, Judgment of 30 May 1999, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf, accessed 5 June 2013.

⁹⁸ Information provided to REDRESS.

⁹⁹ CAT, *Concluding Observations: Mexico*, supra n. 7, paras. 11 and 15.

¹⁰⁰ US Department of State, *2010 Human Rights Report: Argentina*, 8 April 2011, available at: <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154491.htm>, accessed 10 March 2013.

¹⁰¹ US Department of State, *2010 Human Rights Report: Brazil*, 8 April 2011, available at: <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154496.htm>, accessed 10 March 2013.

¹⁰² Conectas Direitos Humanos et. al., *Joint Submission by relevant stakeholders on Human Rights Violations in Places of Deprivation of Liberty in Brazil to Universal Periodic Review of Brazil*, para. 68, available at http://www.conectas.org/arquivos/JointSubmission_Brazil_MayJune2012_PlacesDeprivationLiberty_FINAL.pdf, accessed 10 May 2013.

¹⁰³ Ibid.

Extended pre-trial detention is also a serious problem in Jamaica. According to the IACHR, in many cases, pre-trial detention exceeds the prison sentences that detainees would have received if convicted.¹⁰⁴ In 2010, reportedly only 1,722 of 5,331 persons in custody were tried and sentenced.¹⁰⁵ Nearly one-third of those awaiting trial had been in prison for a year or longer. In addition, the prison population statistics reportedly do not usually include the number of people detained in police stations in prolonged pre-trial detention.¹⁰⁶ Time limits have also been established for the length of pre-trial detention in the Dominican Republic,¹⁰⁷ Ecuador,¹⁰⁸ Salvador,¹⁰⁹ Guatemala¹¹⁰ and Honduras,¹¹¹ but in many cases these are not adhered to by authorities.

Limited access to lawyer and medical examination in practice

Detainees' rights to promptly access a lawyer of their choice and to have a medical examination are fundamental safeguards against torture and ill-treatment for those in pre-charge and pre-trial detention. While the laws of most countries recognise these safeguards, practical problems abound in ensuring their effective application.

With the exception of Haiti, the laws in all the countries reviewed provide some form of legal aid for detainees. However, the implementation of such legislation is limited, mainly due to a lack of financial resources, which frequently results in lack of legal representation and protection. The most serious difficulties in accessing legal aid are found in those countries with the highest rates of poverty. For example in Belize, where 40 per cent of the population are deemed to live in poverty,¹¹² only those accused of murder can receive legal aid and, in practice, this usually only happens very near to the trial date due to the insufficient numbers of public defenders. In Haiti, while some defendants have access to counsel during trials through government support and/or through *pro bono* assistance offered by members of the legal community, the right to access legal representation is not established in law, and publicly funded defence is not routinely provided. Some NGOs have provided funds to indigent defendants for legal representation who otherwise would be unable to access to any type of counsel.¹¹³

In other countries, the right to legal aid exists in law, but structural factors make it difficult for this right to be realised in practice. In Argentina, for example, detainees who are unable to afford a

¹⁰⁴ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II, Doc.64, p. 125.

¹⁰⁵ US Department of State, *2010 Human Rights Report: Jamaica*, 8 April 2011, available at: <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154511.htm>, accessed 10 March 2013.

¹⁰⁶ US Department of State, *2010 Human Rights Report: Haiti*, 8 April 2011, available at: <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154509.htm>, accessed 10 March 2013.

¹⁰⁷ Article 150 of the Constitution of Dominican Republic establishes a maximum time frame of three months for the investigation to be conducted when the suspect is under preventive detention.

¹⁰⁸ Ecuador Code of Criminal Procedure 2000, article 169.

¹⁰⁹ El Salvador Code of Criminal Procedure, article 6.

¹¹⁰ Guatemala Code of Criminal Procedure 1992, article 6.

¹¹¹ Honduras Code of Criminal Procedure 1984, article 181.

¹¹² According to the United Nations Development Programme (UNDP), the poverty rate in Belize is 41.3 per cent. See UNDP in Belize, 'About Belize', available at: <http://www.bz.undp.org/content/belize/en/home/countryinfo/>, accessed 10 May 2013.

¹¹³ US Department of State, *Haiti*, supra n. 86.

lawyer are provided with a public defender; however, the high demand and lack of resources available to the Public Defender's Office have resulted in excessive caseloads for public defence attorneys and consequently, significant delays.¹¹⁴ In Brazil, every person has a right to an attorney or public defender by law if he or she cannot afford one, though in practice there are not enough public defenders to assist all detainees, and attorneys are prohibited from providing *pro bono* legal assistance.¹¹⁵ In Nicaragua, the law provides suspects with the right to legal aid-funded counsel, however there is no legislation providing recourse where these rights are violated, making their implementation difficult in practice.

In Mexico, though accused persons have the right to a lawyer even if they cannot afford one, in most cases public defenders play a very limited role. This is in part due to the fact that until the constitutional reforms of 1993, public defenders were only able to meet with their clients during the pre-trial phase.¹¹⁶ Israel Arzate Melendez, a 26-year old male, was detained in February 2010 and subjected to torture and ill-treatment, including electric shocks, for 36 hours by soldiers to force him to confess to his participation in the massacre of 15 people in Villas de Salvacar, Ciudad Juarez. Despite his body bearing clear physical signs of abuse, the medical report failed to document this. The public defender failed to challenge this omission, and furthermore was present during Melendez's 'confession.' She failed to object either to taping the confession while in a military base or to the soldiers beating Melendez when he made mistakes in his prepared statement.¹¹⁷

Most countries provide an explicit or implicit right to medical examination for those deprived of their liberty. The IACtHR has held that this right stems from articles 1(1) and 5 of the American Convention on Human Rights that establish the "duty to provide prisoners with regular health screening and adequate care and treatment when necessary."¹¹⁸ However, in practice this important safeguard is reportedly denied to most detainees. In Honduras, while article 29 of the Offender Rehabilitation Act states that all persons admitted to a penitentiary or prison must be examined upon arrival by a physician, the UN Subcommittee has noted that medical examinations of detainees in police stations is not a routine practice. Furthermore, in many cases, access to a doctor is at the discretion of the police, even when a detainee's need for a doctor arises from ill-treatment or torture by police officers. When carried out, medical examinations are often superficial and medical forms are not completed adequately.¹¹⁹ Similarly, in Brazil, though article 41 of the Law on Execution of Sentences provides detainees with the right to medical treatment, detainees have reported they were not given a medical examination on entry to prison and that their access to medical care was often at the discretion of prison guards or of '*faxinas*' (other detainees working informally for the institution).¹²⁰ In Mexico, anti-torture legislation provides for the right of detainees to request medical assistance at any time. However, the CAT expressed its concern over reports that detainees are often denied prompt access to an independent medical

¹¹⁴ US Department of State, *Argentina*, supra n. 80.

¹¹⁵ Conectas Derechos Humanos, *UPR Submission*, supra n. 82, p. 68.

¹¹⁶ Niels Uildriks, *Mexico's Unrule of Law: Implementing Human Rights in Police and Judicial Reform under Democratization* (Lexington Books: Plymouth, England, 2010), p. 84.

¹¹⁷ Human Rights Watch, *Torture Report*, CAT 49, November 2011, p. 58-59, available at http://www2.ohchr.org/english/bodies/cat/docs/ngos/HRW_Report_Mexico_CAT49.pdf, accessed 10 March 2013.

¹¹⁸ IACtHR, *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006. Series C No. 150, p. 102, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_150_ing.pdf, accessed 10 March 2013.

¹¹⁹ UN Subcommittee, *Report on Visit to Honduras*, supra n. 5, p. 152.

¹²⁰ UN Subcommittee, *Report on Visit to Brazil*, supra n. 2, p. 42.

examination and that where they have taken place, members of security forces have been present, potentially undermining their independence.¹²¹ Similarly, in its review of Ecuador, the CAT expressed concern regarding the failure to ensure detainees' access to a medical examination, stating that "before being taken to a prison facility or a police cell, arrested persons are seen by doctors or whoever is standing in for the duty doctor at a health clinic operated by the National Police of the Office of the Public Prosecutor."¹²² In Argentina, the CAT has criticised the lack of independence of medical staff in prisons, given that they are themselves members of the prison service.¹²³

Monitoring bodies for places of detention

Following the entry into force of the OPCAT in 2006, States parties are required to establish a National Preventive Mechanisms (NPM) for the prevention of torture at the domestic level, which increasingly complement regional oversight.¹²⁴ Of the countries represented at the meeting that have ratified the OPCAT, most have established the required NPM. In some countries, the Ombudsman's Office has been designated as NPM, as is the case in Ecuador and Nicaragua. In other countries, this role has been bestowed on the national human rights institution.¹²⁵ Other countries such as Brazil and Peru have not established a NPM, despite having ratified the OPCAT. In Peru, the Ombudsman and the *Ministerio Público* (National Prosecutor) have some supervisory functions over places of detention though not as the required NPM, however the many prisons and detention facilities requiring monitoring combined with the paucity of human and financial resources available means that in practice, the monitoring function is inadequate.

Although the establishment of these institutions plays an important role in the prevention of torture, participants remarked that they are in many cases ineffective. For example, the National Commission of Human Rights of Mexico reportedly does not maintain a registry of cases of torture, or the penalties imposed on convicted perpetrators. In addition, it limits its monitoring function to federal detention centres, is not allowed to carry out unannounced visits, and has been criticised for failing to carry out comprehensive assessments of the situation of detainees. Furthermore, while the Commission issues recommendations, these are often not complied with. The work of the Commission is seen as increasingly politicised as its actions are often taken with a view to avoiding any conflict or disagreement with the government, raising concerns of lack of impartiality, independence and transparency. In other countries, such as Guatemala, legislation has been adopted to establish the *Oficina Nacional de Prevención de la Tortura* (National Preventive Office) as the OPCAT-required NPM. However, this body is not yet functioning as the selection process for members of the institution has been delayed by over eight months, despite ratification of the OPCAT in 2008 and the requirement to establish an NPM within one year of ratification.

¹²¹ CAT, *Concluding Observations: Mexico*, supra n. 7, pp. 9 and 17.

¹²² CAT, *Concluding Observations: Ecuador*, 7 December 2010, UN Doc. CAT/C/ECU/CO/4-6, p. 11.

¹²³ CAT, *Concluding Observations: Argentina*, 10 November 2004, UN Doc. CAT/C/CR/33/1, p. 6(m).

¹²⁴ Argentina, Brazil, Chile, Ecuador, Guatemala, Honduras, Mexico, Nicaragua and Peru have ratified the OPCAT.

¹²⁵ Mexico: *Comisión Nacional de los Derechos Humanos* (National Commission of Human Rights); Chile: *Instituto Nacional de los Derechos Humanos* (National Institute of Human Rights); Argentina: *Sistema Nacional para la Prevención de la Tortura y Otros Tratos Crueles, Inhumanos o Degradantes* (National System for the Prevention of Torture and Other Cruel, Degrading and Inhuman Treatment); Honduras: *Comite Nacional para la Prevención de la Tortura* (National Committee for the Prevention of Torture).

In those countries where the OPCAT has not been ratified,¹²⁶ other national institutions have played a role in monitoring places of detention. In most cases, the Office of the Prosecutor and/or the Ombudsman's Office have some monitoring functions over prisons and other places of detention. However, for a number of reasons, these institutions have limited effectiveness in preventing torture. In Colombia, the *Procuraduría General de la Nación* (General Procurator of the Nation) has disciplinary powers over police officials and prison staff and can impose sanctions, including the dismissal of public servants involved in human rights violations. Any person can present complaints to this institution, including detainees. In addition, the *Defensoría* (Ombudsman) can present recommendations to the Congress on criminal justice policies and compliance with human rights obligations in prisons. In addition, resolution No. 5927/2007 of the National Penitentiary and Prison Agency (INPEC) allows for the creation of human rights committees inside prisons, which include the representatives of the detainees and the personnel in charge of the prisons. These committees can bring legal assistance to prisoners for the protection of their rights. The Colombian government has argued that the establishment of these committees is the reason for not ratifying the OPCAT,¹²⁷ however in practice they have been hijacked by detention facility directors, in opposition to their original promotion by the Defensoría, which limits their autonomy and independence considerably.¹²⁸ This is reflected in the low participation of prisoners in these committees – reportedly only 48 per cent of prisoners participate in the committees.¹²⁹ In El Salvador, the *Procuraduría para la Defensa de los Derechos Humanos* (Ombudsman for the Protection of the Human Rights) monitors the situation of detainees, and has the power to review specific cases. However, its effectiveness is limited as it is unable to visit places of detention without prior notification and its decisions are not legally binding.

There is a striking correlation between lack of institutional capacity and effective monitoring of places of detention. In Belize, an Ombudsman's Office was established in 1999, however this position has been vacant since December 2011. Also, while there are Visiting Judges mandated to pay regular visits to places of detention, they have ceased operating in recent years and there is no on-going discussion regarding their resumption of duties. In Jamaica, institutions that currently have some monitoring functions lack the resources and capacity to effectively prevent torture and ill-treatment. Firstly, the Office of the Public Defender, mandated to receive human rights complaints, has limited power and capacity due to its small staff. The Independent Commission of Investigations (INDECOM), discussed in detail in chapter 4, has faced challenges to its authority by law enforcement, which has hampered its effectiveness in ensuring accountability for police officers accused of torture or ill-treatment. Furthermore, the Office of the Children's Advocate (OCA), created under the Child Care and Protection Act 2004, has not been effective in ensuring accountability for those responsible for abuse of children in the care of the State. In Haiti, the *Protecteur du Citoyen* (Ombudsman) is in charge of visiting prisons, and since 1995, domestic laws have authorised visits to detention centres by human rights organisations, although there have been difficulties in implementation. In 2011, draft legislation was presented to parliament to

¹²⁶ Belize, Canada, Colombia, Dominican Republic, El Salvador, Haiti, Jamaica and USA have not ratified the OPCAT. Venezuela has signed but not yet ratified.

¹²⁷ CAT, *Concluding Observations: Colombia*, supra n. 43.

¹²⁸ Colombian Coalition Against Torture, *Alternate Report to the 4th Periodic Report of the Colombian State to CAT*, October 2009, p. 4, available at http://www.coljuristas.org/documentos/libros_e_informes/informe_alterno_4_tortura_re_en.pdf, accessed 10 March 2013.

¹²⁹ Ibid.

create a national mechanism to monitor detention centres and investigate allegations of torture or ill-treatment. However as of January 2013, this had yet to be voted upon.

Admissibility of evidence obtained through torture

The inadmissibility of statements obtained through torture in legal proceedings is a key safeguard and deterrent in respect of torture, as recognised in article 15 of UNCAT. All countries reviewed have legislative or constitutional provisions in place excluding the use of evidence obtained through torture.¹³⁰ Despite this, confessions obtained through torture are reportedly used in judicial proceedings in a number of countries in the region.

The CAT has clarified that in cases where suspects or accused persons allege torture, the burden of proof should in principle lie with the prosecution, however this is not always enforced.¹³¹ In Mexico, for example, the Supreme Court has established that a declaration obtained under torture can only be excluded from a legal proceeding once the allegation of torture from the suspect has been proved in a criminal case resulting in a criminal conviction.¹³² This practice is reinforced by the commonly held notion amongst judges in Mexico that the first confession or declaration made by a suspect holds more probative value according to a restrictive interpretation of the “principle of immediacy.” The IACtHR has established clear jurisprudence on this question, for example in the case of *Cabrera Garcia and Montiel Flores v. Mexico* in which it held that “whenever a person alleges, within a proceeding, that his statement or confession was obtained as a result of torture, the State party has the obligation to ascertain the veracity of such a complaint by means of a diligent investigation. Likewise, the burden of the proof cannot rest on the complainant, but it is on the State to prove that the confession was voluntary.”¹³³

In the USA, the Military Commissions Act 2009 and the Guantanamo Military Commissions rules allow the admission of involuntary statements, including evidence gained from coercion, unlawful influence and inducement. This rule applies so long as a) the statement is made by someone other than the defendant; b) the judge finds the statements are reliable and probative and that it is in the “interest of justice” to allow them; and c) the treatment did not cross the line into torture or cruel, inhuman or degrading treatment. However, the lack of clarity as to the threshold for torture and ill-treatment under US law and policy combined with the overwhelming secrecy of the military commission trials means that in practice, these rules have effectively allowed the use of

¹³⁰ Argentina (article 18 of the Constitution); Belize (Evidence Act, Chapter 95 of the Laws of Belize, R.E. 2003); Brazil (article 32 of the Constitution and, Brazilian Code of Criminal Procedure, article 157); Canada (Section 269.1 of the Canadian Criminal Court); Chile (article 10 of the Criminal Procedural Code); Colombia (article 36 of the Criminal Procedure Code, Law 906 of 2004); Dominican Republic (articles 26,110, 166, and 167 of the Criminal Procedure Code); Ecuador (articles 76.4 and 76.7 (e) of the Constitution); El Salvador (article 15 of the Criminal Procedure Code); Guatemala (article 183 of the Criminal Procedure Code); Honduras (article 94 of the Criminal Procedure Code); Jamaica (under common law, statements obtained as a results of torture are not admissible in legal proceedings); Mexico (article 20 of the Constitution); Nicaragua (article 27 of the Criminal Procedure Code); Peru (Article 2.24(h) of the Constitution); United States (Protection against Self-incrimination is guaranteed under the Fifth Amendment and state law generally provides for exclusion of illegally obtained evidence); Venezuela (article 197 of the Criminal Procedure Code).

¹³¹ CAT, *Concluding Observations: Sri Lanka*, 8 December 2011, UN Doc. CAT/C/LKA/CO/3-4, p. 11; CAT, *Concluding Observations: the Philippines*, 29 May 2009, UN Doc. CAT/C/PHL/CO/2, p. 23.

¹³² Supreme Court of Mexico, *Juicio de Amparo Directo Penal 9/2008, Caso Acteal*, Judgment of 12 August 2009, pp. 483-485.

¹³³ IACtHR, *Cabrera-García and Montiel-Flores v. Mexico*, Judgment of November 26, 2010. Series C No. 220, p. 136.

information obtained through torture as evidence in legal proceedings against suspected terrorists.¹³⁴

Prohibition of refoulement

The principle of non-refoulement is recognised in article 3 of UNCAT, as well as articles 5 and 22(8) of the American Convention on Human Rights¹³⁵ and article 13(4) of the IACPPT. According to this principle, individuals must not be returned to a country where they are at a genuine risk of torture. While the principle has been incorporated into the legal systems of most of the relevant jurisdictions, it is not always strictly adhered to. The US Foreign Affairs Reform and Restructuring Act of 1998, (“FARRA”), prohibits the practice of *refoulement*. However, the USA has reserved the right to return individuals to countries when “diplomatic assurances” have been obtained from the receiving country prior to the transfer. However, these so-called assurances have been shown to be inherently unreliable, especially in those countries where torture is well-documented and carried out with systematic impunity.¹³⁶ The UNCAT has expressed concern regarding the US use of diplomatic assurances¹³⁷ and the Special Rapporteur has also found that these “do not provide any additional protection to deportees.”¹³⁸

¹³⁴ According to one expert, while the Military Commissions Act 2009 made some improvements over the 2006 version of the law, there are still enormous loopholes, including the secrecy of the terrorism cases at Guantanamo which makes it extremely difficult to ascertain whether information provided by a defendant was obtained through torture or not. See Public Radio International, “As Khalid Sheikh Mohammed terror trial continues, commission faces 'impossible' task,” 15 October 2012, available at: <http://www.pri.org/stories/politics-society/government/as-sept-11-terrorism-trial-continues-commission-faces-impossible-task-11778.html>, accessed 10 March 2013. See also, The Guardian, “Khalid Sheikh Mohammed: a former military prosecutor denounces trial,” 4 May 2012, available at: <http://www.guardian.co.uk/world/2012/may/04/khalid-sheikh-mohammed-military-prosecutor>, accessed 10 March 2013; Human Rights Watch, “The Guantanamo Trials,” available at: www.hrw.org/features/guantanamo, accessed 10 March 2013.

¹³⁵ This protection provided under this provision is weaker than that of CAT article 3 as it is subject to balancing the risks of return against the risks caused by non-removal.

¹³⁶ Columbia Law School Human Rights Institute, *Promises to Keep - Diplomatic Assurance Against Torture in US Terrorism Transfers*, December 2010, available at: http://www.law.columbia.edu/ipimages/Human_Rights_Institute/Promises%20to%20Keep.pdf, accessed 10 March 2013.

¹³⁷ UNCAT, *Concluding Observations: USA*, supra n. 35, para. 21.

¹³⁸ Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, “‘Diplomatic Assurances’ not an adequate safeguard for deportees, UN Special Rapporteur against torture warns,” 23 August 2005, available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/0/9a54333d23e8cb81c1257065007323c7?OpenDocument>, accessed 5 June 2013.

4. Accountability for Torture

4.1. Criminalisation of torture

Constitutional prohibitions of torture and ill-treatment are well-established in the region and, in most of the countries considered, torture is also a criminal offence. The criminal laws in Canada¹³⁹ and Colombia,¹⁴⁰ for example, prohibit torture, and include a definition in line with article 1 of UNCAT. In El Salvador, following recommendations made by the Committee Against Torture in 2009, the Penal Code was reformed, repealing previous provisions and bringing the definition in line with UNCAT in 2011.¹⁴¹

However, in many countries, legislation criminalising torture does not include a definition that conforms with article 1 of UNCAT. For example, in Argentina, “torture” is criminalised under article 144 of the 1984 Penal Code, which limits its scope to harm inflicted on individuals deprived of their freedom.¹⁴² In Brazil, the definition of torture under Law No. 9.455 broadens the UNCAT definition by including torture by private or non-State actors,¹⁴³ which, by failing to take sufficient account of State responsibility, weakens the overall impact of the definition. Moreover, it restricts acts of torture to “violence or serious threats” and does not cover those acts which are not violent per se yet which could cause “intense pain or suffering, whether physical or mental” (article 1 of UNCAT). Similarly, in Nicaragua the prohibition of torture under article 486 of the Penal Code includes private and non-State actors but the definition is limited to torture of persons in the custody and control of the perpetrators.¹⁴⁴

Torture is prohibited in Peru under article 321 of the Penal Code but does not include discrimination of any kind as one of the elements of the crime.¹⁴⁵ The same is true of legislation in Guatemala¹⁴⁶ and Mexico.¹⁴⁷ In the Dominican Republic, criminal legislation includes a very general definition of torture which fails to take into account all the elements of the crime under article 1 of UNCAT.¹⁴⁸ In particular, it does not include a clause on intent, and fails to criminalise torture for the purpose of discrimination, or at the instigation or acquiescence of public officials. In some countries, torture is criminalised, but no definition is provided which fails to provide clear guidance. For example, in Venezuela, article 46 of the Constitution prohibits torture and article 182 of the Penal Code criminalises torture, establishing a sentence of 3 to 6 years. Articles 125(10) and 125(11) of the Penal Code further prohibit torture and ill-treatment of detainees. However, none of these provisions provide a definition of torture. In Honduras, torture is prohibited under article 209-A¹⁴⁹ of the Penal Code, however the definition does not include discrimination as a purpose for inflicting torture. Furthermore, members of the armed forces are subject to the

¹³⁹ Criminal Code of Canada, article 269.1.

¹⁴⁰ Penal Code of Colombia 2000, articles 137 and 178.

¹⁴¹ Penal Code of El Salvador 1980, article 366-A.

¹⁴² Penal Code of Argentina, article 144(3) and (4).

¹⁴³ REDRESS, *Country Report: Brazil*, May 2003, available at: <http://www.redress.org/americas/brazil>, accessed 10 March 2013.

¹⁴⁴ Penal Code of Nicaragua 2007, article 486.

¹⁴⁵ Penal Code of Peru 1991, article 321.

¹⁴⁶ Penal Code of Guatemala, article 201Bis.

¹⁴⁷ *Ley Federal para Prevenir y Sancionar la Tortura 1991*, article 3.

¹⁴⁸ Article 1 of Law 24-27, which amends article 303 of the Criminal Code.

¹⁴⁹ Penal Code of Honduras 1983, article 209-A

Military Code, which includes a prohibition of torture, though with inappropriately low penalties.¹⁵⁰ In the USA, the CAT has expressed concern that while there are state laws prohibiting the acts of torture found in UNCAT, there is no federal law criminalising torture in line with article 1 of the Convention.¹⁵¹

In some countries, such as Belize,¹⁵² Jamaica,¹⁵³ and Ecuador,¹⁵⁴ constitutional prohibitions are in place but are not translated into criminal legislation. In Chile, neither the constitution nor criminal legislation includes a prohibition of torture.

4.2. Investigation and prosecution for torture

International human rights law has developed well-established principles for investigating allegations of torture. States' responsibilities are clearly outlined in articles 12 and 13 of UNCAT, and in article 8 of the IACPPT and the specific obligations have been further developed in the jurisprudence of regional and international bodies. The IACtHR, through its jurisprudence, has developed rigorous standards for effective investigations of alleged torture stemming from article 5(2) of the American Convention on Human Rights. The Court has specified that investigations must be prompt, take place within a reasonable timeframe and be undertaken in a serious and impartial manner, not as a mere formality preordained to be ineffective.¹⁵⁵ In the *Cotton Fields case*, the Court found an article 5 violation, among others, resulting from Mexico's failure to carry out an effective investigation into the disappearance of the victims in this case.¹⁵⁶ Regarding the collection of evidence, and specifically in cases of torture, the IACtHR has referred to the *United Nations Principles on the Effective Investigation and Documentation of Torture* as the relevant standard applicable to investigating authorities, doctors and other professionals involved in investigating allegations of torture or ill-treatment.¹⁵⁷ Despite this jurisprudence and the systems in place for investigating torture in the States in the region, obstacles abound in practice and often result in impunity.

Lack of independence of investigating bodies

Investigations in the relevant countries are the responsibility of a variety of bodies, including the National Police, Ombudsman's office, Public Prosecutor's office, or a combination thereof, though in most cases are carried out by law enforcement. The lack of independence of and adequate oversight over investigating authorities is one of the main barriers to effective investigations and prosecutions, arising from the fact that in many cases, an alleged perpetrator is part of the same body responsible for investigating the allegation, namely the police. As a result, investigation reports often appear partial to the views of the alleged perpetrators. The close relationship between investigators and many perpetrators has also led to malpractices by police, including

¹⁵⁰ Military Code of Honduras, article 218.

¹⁵¹ CAT, *Concluding Observations: USA*, supra n. 35, p. 13.

¹⁵² Chapter 101 of the Criminal Code of Belize includes the offences of attempted murder, aggravated assault, injury and harm, which can be invoked in cases of torture, the penalties for these lesser crimes fail to reflect the gravity of the crime of torture.

¹⁵³ The Offences Against the Persons Act criminalises the infliction of serious bodily harm, but fails to prohibit torture specifically.

¹⁵⁴ Penal Code of Ecuador 1971, article 187.

¹⁵⁵ IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, Series C No. 4, p. 177.

¹⁵⁶ *González et al. v. Mexico ('Cotton Fields case')*, supra n. 23, p. 389.

¹⁵⁷ *Ibid*, p. 502. See also IACtHR, *Rosendo-Cantú et al. v. Mexico*, Judgment of 31 August 2010, Series C No. 216, p. 242.

eliminating evidence so as to protect their colleagues from prosecution. The overall result is impunity for perpetrators.

In some countries, the Prosecutor's Office is charged with coordinating investigations into alleged torture or ill-treatment, but relies on the police to carry out this function, raising serious concerns about impartiality. The *Ministerio Público* (Office of the Prosecutor) of Mexico was described as one of the most corrupt institutions in the country, and investigations into alleged torture are notoriously lacking in independence. In Colombia, investigation of torture is coordinated by the *Fiscalía General de la Nación* (General Prosecutor's Office), which is designed to be an independent institution. Although investigations into cases of torture are supposed to be carried out by a specialised unit within the Prosecutor's Office (Prosecutor General's Corps of Technical Investigators), in some cases the "internal control offices" of the Police or the National Penitentiary Institute (INPEC) assume control.¹⁵⁸ Both institutions have been criticised for lacking independence, in particular in cases where the perpetrators are members of the police or the prison service.¹⁵⁹

In the Dominican Republic, criminal investigations into allegations of torture are carried out by the *Ministerio Público* (Office of the Prosecutor) which is, according to the Constitution, an independent institution.¹⁶⁰ However, the President is responsible for appointing half of the prosecutors¹⁶¹ which casts doubt on the independence of investigations which are in many cases largely ineffective. In El Salvador, the *Fiscalía General de la Nación* (Prosecutor's Office), criticised as highly politicised, coordinates investigations and charging of suspects. A number of complaints alleging abuse by prosecutors have been reported to the UN Working Group on Arbitrary Detention.¹⁶² The Working Group has also reported that "the judiciary is hampered by partisan politics, corruption and institutional weakness at various levels."¹⁶³ In Venezuela, the *Ministerio Público* (Prosecutor's Office) is in charge of investigating and prosecuting allegations of torture. However, the IACHR has expressed concern regarding the lack of constitutional and legal procedures for the appointment and revocation of prosecutors which can contribute to their lacking independence.¹⁶⁴

In Argentina, personnel in charge of detention facilities are responsible for carrying out initial investigations into allegations of abuse. According to CELS, there have been incidents of officials tampering with evidence and threatening and intimidating victims and witnesses before the arrival of judiciary personnel. In addition to criminal investigations, detention centre personnel carry out internal investigations of alleged violations for disciplinary purposes. This information is shared

¹⁵⁸ Colombian Coalition Against Torture, *Alternate Report to the 4th Periodic Report of the Colombian State to CAT*, October 2009, p. 7, available at http://www.coljuristas.org/documentos/libros_e_informes/informe_alterno_4_tortura_re_en.pdf, accessed 10 May 2013.

¹⁵⁹ Ibid, p. 3; Fundacion Comite de Solidaridad con los Presos Politicos, *Advocacy Paper for Colombia UPR 2013*, available at <http://www.oidhaco.org/uploaded/content/article/1550127380.pdf>, accessed 10 May 2013.

¹⁶⁰ Article 170 of the Constitution of Dominican Republic establishes that the Public Ministry has functional, administrative and budgetary autonomy.

¹⁶¹ Constitution of Dominican Republic, article 171.

¹⁶² UN Working Group on Arbitrary Detention, *Report on Mission to El Salvador*, 11 January 2013, UN Doc. A/HRC/22/44/Add.2, p. 114.

¹⁶³ Ibid, p. 116.

¹⁶⁴ IACHR, *Annual Report 2012*, Chapter IV Venezuela, p. 370, available at <http://www.oas.org/en/iachr/docs/annual/2012/TOC.asp>, accessed 10 March 2013.

with judicial authorities to contribute to the criminal investigation. In practice, many witnesses (mostly detainees in the same centre where the alleged violation took place) have reportedly been apprehensive to speak out, fearing reprisals from detention personnel. In Colombia, when there are allegations of torture or ill-treatment inside detention facilities, investigations are carried out by the National Institute of Penitentiaries (INPEC), which reportedly lacks independence as detention personnel are seen as colleagues by its staff.

In Jamaica, the Independent Commission of Investigation (INDECOM), mentioned in section 3.1 above, is responsible for investigating and, if appropriate, prosecuting cases of alleged abuses by agents of the State. The INDECOM was established to replace the Bureau of Special Investigations and the Police Public Complaints Authority, following long-standing public complaints that these bodies lacked the independence required to effectively investigate allegations of wrongdoing by police and security forces. According to article 5 of the INDECOM Act 2010, INDECOM is an independent body that is not subject to the direction or control of any other person or authority. The current director has lamented the poor practices of the Jamaican police force, including the unwillingness of police officers involved in allegations of abuse or killings to give statements to INDECOM investigators, and collusion amongst police officers when providing statements, which impede investigations and prosecutions.¹⁶⁵ INDECOM has faced considerable institutional resistance. It does not have power to prosecute, however there have been significant delays in the cases that INDECOM has forwarded to the Director of Public Prosecutions (DPP), resulting in considerable tension between these institutions.¹⁶⁶ In addition, in February 2012, the Jamaican Police Federation brought a case challenging INDECOM's decision to arrest eight police officers suspected of fatally shooting two men, after the officers refused to cooperate with INDECOM's investigation into the case. The Federation argued that the INDECOM Act violated the suspects' right not to self-incriminate and the presumption of innocence until proven guilty.¹⁶⁷ In June 2012, the Constitutional Court found in favour of INDECOM, arguing that the reason for adopting the INDECOM Act was to improve Jamaica's compliance with international human rights standards, which includes ensuring prompt and effective investigations into alleged abuses.¹⁶⁸

4.3. Procedural obstacles to accountability

Amnesties for the crime of torture

The obligation to prevent, investigate and punish human rights violations requires the State to ensure that there are no barriers to accountability. Immunities and amnesties, although less prevalent than in previous decades, still exist—as a trace of States' dictatorial past in Chile, or as a way to secure the peace after an armed conflict in Colombia, El Salvador, Honduras and Nicaragua. The IACHR and IACtHR have repeatedly stated that amnesty laws stand in the way of

¹⁶⁵ Jamaica Gleaner, *Groups call for greater accountability for police shootings*, 17 January 2013, available at: <http://jamaica-gleaner.com/gleaner/20130117/lead/lead3.html>, accessed 10 March 2013.

¹⁶⁶ Jamaica Gleaner, *Let us prosecute them – INDECOM boss*, 16 May 2013, available at: <http://jamaica-gleaner.com/gleaner/20130516/lead/lead2.html>, accessed 5 June 2013; Jamaican Observer, *Parliament moves to quell ODPP, INDECOM conflict*, 3 June 2011.

¹⁶⁷ In June 2012, the Constitutional Court found in favour of INDECOM, arguing that the reason for adopting the INDECOM Act was to improve Jamaica's compliance with international human rights standards, which includes ensuring prompt and effective investigations into alleged abuses.

¹⁶⁸ Jamaica Gleaner, *Court rules in favour of INDECOM*, 3 May 2012, available at: <http://jamaica-gleaner.com/gleaner/20120503/lead/lead2.html>, 5 May 2013.

accountability and justice for serious human rights violations and contravene the obligations of States under the American Convention on Human Rights.¹⁶⁹

In Chile, Decree Law No. 2191 of 1978 grants blanket amnesty to those responsible for crimes committed under the dictatorship of General Pinochet, including torture and ill-treatment. In the case of *Almonacid Arellano v. Chile*, the IACtHR found that the establishment of an amnesty law for crimes against humanity is against international law. However the law has yet to be repealed.¹⁷⁰ The Supreme Court of Chile has also declared the amnesty law inapplicable in cases of enforced disappearances, however not in cases of extrajudicial executions or torture, making it impossible to prosecute perpetrators of these crimes under the Pinochet regime.¹⁷¹ Furthermore, while the Valech Commission was established to document the widespread and systematic violations that took place during this period, article 15 of Law No. 19,992 of 2004 prohibits the Commission from publishing the information received until 2054. This secrecy clause maintains impunity in Chile by allowing the anonymity of perpetrators to persist and consequently negating any possibility of initiating criminal investigations.¹⁷²

In Colombia, the Justice and Peace Law (Law No. 975 of 2005) is considered a *de facto* amnesty law, providing demobilised paramilitaries significantly reduced sentences for confessing their crimes, even if they amount to war crimes or crimes against humanity. As such, perpetrators of mass violations have received token sentences, in some cases inferior to robbery sentences.¹⁷³ Another serious shortcoming of this process is that while the conflict in Colombia has been characterised by sexual violence, there has been a marked dearth of confessions for sexual violence, resulting in impunity for perpetrators.

In El Salvador, the Amnesty Law for the Consolidation of Peace, adopted by Decree 486 in 1993, has prevented prosecution of torture cases committed during the country's 12-year internal armed conflict, resulting in high levels of impunity. Although the Constitutional Chamber of the Supreme Court determined in 2000 that the amnesty law would not apply to gross violations of human rights, in practice, there is resistance within the judiciary to qualify crimes as crimes against humanity. As a result, crimes such as torture and ill-treatment have been covered by the amnesty law. In December 2012, the IACtHR issued a decision against El Salvador in *Massacres at El Mozote and Nearby Places*, for the largest massacre committed in Latin America in which 1000 persons were executed by government forces.¹⁷⁴ In its judgment, the Court clarified that El Salvador's amnesty law cannot be applied in cases involving human rights abuses committed during the armed conflict.

¹⁶⁹ IACHR, *IACHR Expresses concern about amnesty decree in Honduras*, Press Release, 3 February 2010, available at: <http://www.cidh.oas.org/Comunicados/English/2010/14-10eng.htm>, accessed 5 June 2013. See also IACtHR, *Case of Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment of 25 October 2012, Series C No. 252, para. 296; IACtHR, *Case of Barrios Altos v. Peru*, Judgment of 14 March 2001, Series C No. 75, para. 41; IACtHR, *Case of Moiwana Community v. Suriname*, Judgment of 15 June 2005, Series C No. 124, p. 167.

¹⁷⁰ *Almonacid-Arellano et al. v. Chile*, supra n. 64, paras. 113 and 114.

¹⁷¹ Supreme Court of Chile, *Urrutia Villa v. Ruiz Bungler*, 2009, Rol 4691-2007.

¹⁷² CAT, *Concluding Observations: Chile*, 23 June 2009, CAT/C/CHL/CO/5, p. 19.

¹⁷³ International Center for Transitional Justice, *Background: Demobilization, Justice and Peace Law, and Other Initiatives*, available at: <http://ictj.org/our-work/regions-and-countries/colombia>.

¹⁷⁴ *Case of Massacres of El Mozote and Nearby Places v. El Salvador*, supra n. 153.

In Honduras, an amnesty decree was adopted in January 2010, which allows pardon for crimes such as terrorism and abuse of authority, among others.¹⁷⁵ Although the Decree states that amnesty will not be granted for acts relating to corruption, human rights violations and crimes against humanity, the IACHR has expressed its concern that “the language is ambiguous, and the decree does not establish precise criteria or concrete mechanisms for its application.”¹⁷⁶ In Brazil, article 1 of Law No. 6683 of 1979 grants amnesty to “all those who, during the period from 2 September 1961 to 15 August 1979, committed political crimes or related to these,” which included widespread use of torture by the military dictatorship.¹⁷⁷ In Nicaragua, article 138(3) of the Constitution of 1986 establishes that the National Assembly may grant amnesties, with no exceptions for its application to perpetrators of torture.

Statutes of limitation as a barrier to prosecution

Despite the clear and emphatic position of the CAT that statutes of limitation should not be applicable to torture, this legal barrier is in force in many of the legal systems considered.¹⁷⁸ While prosecuting perpetrators of torture may become more difficult as time passes, it is equally clear that victims of torture may be unable or unwilling to pursue complaints in the immediate aftermath of torture for a number of reasons. It is for these reasons that prosecutions for torture should not be time-barred, which has been reaffirmed by the CAT in its General Comment No. 3.¹⁷⁹ Furthermore, the slow pace of the investigations and the constant interruptions in many cases involving allegations of torture in countries where the crime is subject to a statute of limitation often leads to prescription. Statutes of limitation have prevented the prosecution of identified perpetrators of torture in a number of cases. A notable example is the case against former Haitian President Jean-Claude Duvalier, who was accused of crimes against humanity, including torture, disappearances and extrajudicial executions. The case was dropped when the investigating judge (*juge d’instruction*) declared that the statute of limitation had expired as the alleged acts occurred more than 20 years ago.¹⁸⁰

Although the applicable laws differ considerably across the region, the crime of torture is subject to prescription in several countries, including Brazil, Canada, Chile, Colombia, Ecuador, Haiti, Honduras and Mexico. In Canada, there is no specific limitation period for the criminal prosecution of torture, as it is an indictable offense under the Criminal Code.¹⁸¹ Limitations for a civil suit are determined by each province—in many it is 2 or 3 years—but can be suspended in certain

¹⁷⁵ Decree No. 2 of the National Congress of Honduras, 26 January 2010.

¹⁷⁶ IACHR, *Preliminary Observations of the Inter-American Commission on Human Rights on its Visit to Honduras*, 15-18 May 2010, p. 108, available at: http://www.cidh.org/countryrep/Honduras10eng/Honduras10.Situation.htm#_ftnref105, accessed 10 March 2013.

¹⁷⁷ REDRESS, *Country Report: Brazil*, supra n. 127, p. 3.

¹⁷⁸ CAT, *Concluding Observations: Japan*, 3 August 2007, UN Doc. CAT/C/JPN/CO/1, 3 August 2007, p. 12.

¹⁷⁹ CAT, *General Comment No. 3: Implementation of article 14 by States parties*, 2012, UN Doc. CAT/C/GC/3: “Specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include, but are not limited to: [...] statutes of limitations, amnesties and immunities [...]. See also CAT, *General Comment No. 2*, UN Doc. CAT/C/GC/2, 24 January 2008.

¹⁸⁰ Amnesty International, *Haiti: Dropping Jean-Claude Duvalier case ‘a disgrace’*, 31 January 2012, available at: <http://www.amnesty.org/en/news/haiti-dropping-jean-claude-duvalier-case-disgrace-2012-01-31>, accessed 10 May 2013.

¹⁸¹ Canada, Criminal Code, article 269.1: “Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.” Indictable offenses usually do not have limitation periods (except treason). Canadian Procedure Casebook 2012 1-3, p. 19.

circumstances. However, the applicability of these statutes of limitation in torture cases is an unresolved issue.¹⁸² In Colombia, torture is subject to a 30 year statute of limitation under article 83 of the Criminal Code unless it is considered a crime against humanity or a war crime. In Mexico, all states apply the general norms of prescription to the crime of torture,¹⁸³ except for the states of Chihuahua and Veracruz, which have established that the crime of torture does not prescribe.¹⁸⁴ In some countries, while the torture is not subject to a statute of limitations, the trend of classifying torture as a lesser crime means that in practice, prosecution can be time-barred.

Lack of victim and witness protection

The protection of victims and witnesses is integral to the effectiveness of investigations into torture and ill-treatment, and forms part of victims' rights to security and to an effective remedy. While it is increasingly recognised, both at the national and international level, that such protection is often critical to enable witnesses, including the victim, to come forward many of the countries reviewed do not have witness protection programmes in place, and even where legislation exists, implementation is frequently deficient.

In Canada, witnesses who have faced threats can receive protection provided for under the Witness Protection Program Act 1996.¹⁸⁵ In the USA, witnesses in federal cases can receive both temporary and more permanent protection under the Victim and Witness Protection Act 1982.¹⁸⁶ All 50 states have legislation providing similar court ordered protection to witnesses as well, and federal officials must enforce state-issued protection orders. The types of orders are commonly granted.

In Argentina, a national witness protection programme was established in 2003,¹⁸⁷ though it does not apply to persons in detention. In some cases, detainees alleging torture are transferred to another detention facility as a measure of protection, though this is not always an effective strategy as there are personal and professional connections between personnel working in different detention centres. In Brazil, there is currently a witness protection programme established by Provita Law No. 9807 of 2007, but this is only implemented in six provinces, making it inaccessible to many victims. Furthermore, the programme has been criticised for being overly bureaucratic, and for failing to protect human rights defenders who face constant threats and harassment. In Colombia, a number of victim and witness protection programmes are in place,¹⁸⁸

¹⁸² Information provided to REDRESS by participant. See also: Canadian Limitation Act (June 2013).

¹⁸³ Mexico, Federal Criminal Code, article 105: The criminal action prescribes in a term equal to the arithmetic average of the sentence that the law indicates for that crime. In any case this term cannot be less than three years.

¹⁸⁴ Article 112 of Veracruz criminal code establishes that all serious crimes (murder, kidnapping) do not prescribe. Torture is included as a serious crime.

¹⁸⁵ Witness Protection Program Act of 1996, S.C. 1996, c. 15.

¹⁸⁶ Victim and Witness Protection Act of 1982, Pub. L. 97-291, Oct. 12, 1982, 96 Stat. 1248.

¹⁸⁷ Implemented under Law No. 25,764 of 12 August 2003, available at:

<http://escritorioalumnos.educ.ar/datos/recursos/pdf/etica/Ley-25764.pdf>, accessed 10 March 2013.

¹⁸⁸ There are currently four witness/victim protection mechanisms in Colombia: i) Victims and Witnesses Protection Programme: led by the Prosecutor General's Office; aimed at victims, witnesses and intervening parties in the criminal process, as well as prosecutors and other official at extraordinary risk (Law 418/1997, Decree 2699/1991 and Law 938/2004); ii) Human Rights Protection Programme: under the Ministry of the Interior and Justice; aimed, inter alia, at political leaders or activists, social and human rights organization, witnesses in cases of human rights violations, journalist, mayors, representatives, leaders of displaced population groups, etc. (Law 418/1997 and Decree 1740/2010); iii) Victims and Witnesses Protection Programme of the Justice and Peace Law: aimed at victims and witnesses who are

including programmes to protect witness and victims who have taken part in criminal proceedings against demobilised paramilitaries in the context of the Justice and Peace Law.¹⁸⁹ However, there are several problems that make adequate protection difficult to ensure for victims, including lack of access to victims, delays, restrictive criteria in assessing risks and necessary security measures, and a failure to take the specific circumstances of certain victims, such as women, into consideration.¹⁹⁰ The CAT has expressed concern about the lack of protection for victims in Colombia, and has called on the State to comply with the interim measures issued by the Inter-American Human Rights System in this regard.¹⁹¹

In Ecuador, article 78 of the Constitution ensures protection for victims of crime, and there is a victim protection unit within the Prosecutor's Office. However, the system has been criticised for its lack of independence as those providing security to victims are members of the police who are, in most cases, the main suspects in cases of torture.¹⁹² In Honduras, though a witness protection programme was established in 2007, it still lacks sufficient resources to be adequately implemented, and in some cases persons have had to leave the country due to the lack of protection.¹⁹³ In Mexico, while the State has provided protection for victims in some cases, this has been limited to high-profile ones with significant media attention, and NGOs have had to step in to assist victims. In 2012, a federal law on the protection of persons participating in criminal proceedings was passed to combat the targeting of witnesses, judicial officials, prosecutors and court staff, but it is still too soon to assess its effectiveness.¹⁹⁴

In Jamaica, a programme was established for the protection of witnesses of major crimes and their relatives, including relocation, medical care, financial allowance, schooling for children, and psychological counselling. However, persons who have made complaints against the police are reportedly not offered protection through this programme.

Encouragingly, in Brazil, where a woman has filed a claim of domestic violence against their partner or spouse, the abuser is removed from the home so that the victim can return safely. Where it is not possible for women to return to their homes, they are taken to a temporary shelter so as to avoid contact with their abuser. This is the result of the implementation of the Maria Da Penha Law, which was an important outcome of the case of *Maria Da Penha v. Brazil* before the IACHR.¹⁹⁵

threatened or at risk, as a consequence of their participation in the criminal proceedings described in the context of the Law 975/2005 (Decree 1737/2003); iv) protection for victims of forced displacement.

¹⁸⁹ This programme offers initial assistance to victims and witnesses participating in the criminal proceedings of the Law 975/2005, and includes teaching measures of self-protection, protection provided by the National Police, provision of bulletproof vests, and in extreme circumstances, relocation.

¹⁹⁰ Comisión Colombiana de Juristas, *Observaciones y recomendaciones a los programas de protección existentes en Colombia en el contexto de implementación de la Ley 1448 de 2011, conocida como "Ley de Víctimas"* [Observations and recommendations to the protection programs established in Colombian in the context of the implementation of the Law 1448 of 2011 or "Victims Law"], 7 May 2012, available at:

http://www.coljuristas.org/documentos/pronunciamentos/pro_2012-05-07.pdf, accessed 10 May 2013.

¹⁹¹ CAT, *Concluding Observations: Colombia*, supra n. 43, p. 24.

¹⁹² Foundation for Integral Rehabilitation of Victims of Violence, *Alternative Report on Torture and Ill-Treatment of Prisoners in Social Rehabilitation Centres*, CAT Submission, p. 7-8, October 2010.

¹⁹³ Human Rights Watch, *Después del Golpe de Estado (After the Coup d'Etat)*, December 2010, p. 47.

¹⁹⁴ *Ley Federal para la Protección a Personas que Intervienen en el Procedimiento Penal*, Published in Official Gazette of the Federation of Mexico, 8 June 2012, available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFPPIPP.pdf>, accessed 10 March 2013.

¹⁹⁵ IACHR, *Maria da Penha Maia Fernandes v. Brazil*, Judgment of 16 April 2001, Report No. 54/01.

A number of countries, including Belize, Dominican Republic, Haiti and Nicaragua, have no witness protection programmes in place, which discourages many victims from coming forward and witnesses from testifying at trials, due to fear of reprisals.¹⁹⁶ Considering the numerous problems identified with witness protection programmes in the region, the precautionary measures regime of the IACHR is all the more important, serving as an effective mechanism for ensuring protection of victims and witnesses. Notwithstanding, there are also challenges ensuring the effective implementation of such precautionary measures, as discussed in section 2.4 above.

Challenges in obtaining forensic evidence

The lack of timely documentation of forensic evidence by qualified doctors, in line with the Istanbul Protocol, is another major obstacle to accountability for torture in the region. This is due to a number of factors, including limited resources, paucity of qualified doctors or psychiatrists familiar with the relevant standards, lack of independence of forensic doctors carrying out examinations, and the inability to carry out timely and confidential examinations.

Across the region, investigations into torture routinely fail to apply the standards for documenting torture set out in the Istanbul Protocol. Various UN Committees have expressed concern over this, including regarding Ecuador, El Salvador, Peru, Mexico, Chile and Honduras.¹⁹⁷ In these countries, and others in the region, the Protocol is not recognised by investigating authorities as a standard for gathering, recording and evaluating forensic evidence of torture. In the majority of cases of alleged torture under investigation in Mexico, the Office of the Prosecutor does not request a medical examination in line with the Istanbul Protocol.¹⁹⁸ In some cases in Peru, physicians who conducted medical examinations of victims of torture expressly stated in their findings that the injuries suffered did not amount to torture despite having registered physical signs of injury produced by beatings. Such conclusions are based on the argument that since there were no signs of hanging, use of electrical charges on the genitals, drowning or other similar techniques, torture had not been committed.¹⁹⁹ Such findings and reasoning reveal a fundamental misconception of torture and lack of familiarity with international standards. In Chile, a Forensic Medical Unit is responsible for ensuring and facilitating the implementation of the Istanbul Protocol, including publicising it amongst medical professionals. While this is a positive development, the CAT has expressed concern that the work of the Unit has not reached all doctors involved in documenting cases of torture, “and that due importance has not been placed on medical examinations carried out in accordance with the Istanbul Protocol.”²⁰⁰

In some countries, forensic medical services fall under governmental agencies and institutions, which can give rise to problems regarding the independence and impartiality of the doctors and

¹⁹⁶ US Department of State, *Haiti*, supra n. 86.

¹⁹⁷ CAT, *Concluding Observations: Ecuador*, supra n. 102, p. 21; CAT, *Concluding Observations: El Salvador*, 9 December 2009, UN Doc. CAT/C/SLV/Co/2, p. 16; CAT, *Concluding Observations: Peru*, supra n. 16, para. 8; CAT, *Concluding Observations: Chile*, supra n. 156, p. 20; CAT, *Concluding Observations: Honduras*, 23 June 2009, UN Doc. CAT/C/HND/CO/5.

¹⁹⁸ International Rehabilitation Council for Torture Victims and Colectivo Contra la Tortura y la Impunidad, *CAT Alternative Report: Mexico-Implementation of a nation-wide system of torture documentation according to the Istanbul Protocol*, September 2012.

¹⁹⁹ REDRESS, CNDDHH, PROMSEX, *Torture and the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Peru*, supra n. 15.

²⁰⁰ CAT, *Concluding Observations: Chile*, supra n. 181, 20.

other medical staff responsible for preparing forensic medical reports in cases of torture. For example, in Brazil, the Subcommittee on the Prevention of Torture found that “most institutes for forensic medicine [...] are subordinated to the States’ Secretariat for Public Security, which control the police,” expressing concern regarding the independence of forensic doctors and their ability to perform medical examinations without interference by the State.²⁰¹ Similarly, in Ecuador, the coordination of the activities of scientific experts, including forensic medical officers, is the responsibility of the State Prosecutor’s Office and the Judicature Council.²⁰²

4.4. Findings

Impunity for torture remains a major shortcoming, and challenge, across the region. Though international standards for investigation, prosecution and accountability for torture and ill-treatment have been accepted and provisions adopted at the domestic level by the majority of States considered, the number of prosecutions for torture in the Americas does not reflect the extent of actual cases of torture, owing to a range of factors. Investigations are frequently seen as inadequate and ultimately ineffective, hardly ever resulting in prosecution or conviction. In Argentina, reportedly 97 per cent of complaints of torture and ill-treatment made at the federal level from 2000 to 2011 are still in the investigative stage. In Mexico, the Secretariat of National Defense (*Secretaría de Defensa Nacional*) reportedly initiated 142 preliminary investigations for alleged acts of torture committed from 2002 to 2012, none of which have resulted in a conviction. In Nicaragua, only four per cent of complaints of torture or ill-treatment made to the police reach the Office of the Prosecutor for investigation.²⁰³ In Peru, from 2003 to 2011, the Ombudsman’s Office received 764 complaints of alleged torture and ill-treatment. However, from September 2004 until February 2011, only 37 cases were prosecuted resulting in 17 convictions.²⁰⁴ In other countries, accurate data about the number of cases of prosecutions and convictions for torture is unavailable. In the USA, the use of torture in the context of the ‘war on terror’ is well-documented.²⁰⁵ While several low-level military officials have been held accountable for detainee abuse amounting to torture,²⁰⁶ there have been no investigations or prosecution of CIA or senior military and government officials responsible for authorising and ordering the use of torture and ill-treatment against persons in US custody in the context of the military operations in Iraq and Afghanistan, or the ‘war on terror’.²⁰⁷

The lack of effective investigations has contributed to a profound lack of public confidence in the institutions responsible for holding perpetrators of torture accountable. Coupled with the lack of protection available, this has resulted in many victims refraining from making complaints about torture or ill-treatment. Where victims do complain, authorities often fail to register these as

²⁰¹ UN Subcommittee, *Report on Visit to Brazil*, supra n. 2, p. 34.

²⁰² *TORTURE: Journal on Rehabilitation of Torture Victims and Prevention of Torture*, “Desk study: Combating torture with medical evidence,” Vol. 20, No. 3 (2010), p. 158.

²⁰³ CAT, *Concluding Observations: Nicaragua*, supra n. 42, p. 11.

²⁰⁴ REDRESS, CNDDH, *Informe alternativo de la sociedad civil peruana sobre la aplicación del Pacto de Derechos Civiles y Políticos [Alternative Report of Peruvian Civil Society on the Application of the ICCPR]*, p. 102, available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/CCPR%20_CNDDHH_Peru107.pdf, accessed 10 June 2013.

²⁰⁵ See, for example: The Constitution Project, *Report of the Task Force on Detainee Treatment*, 16 April 2013, available at: <http://detainee-taskforce.org/pdf/Full-Report.pdf>, accessed 10 May 2013.

²⁰⁶ See for example, National Public Radio, “CIA Exempt from torture, but not Lynndie England,” 20 April 2009, available at: <http://www.npr.org/templates/story/story.php?storyId=103281803>, accessed 10 May 2013.

²⁰⁷ Center for Constitutional Rights, “Factsheet: Accountability and Prosecutions for Torture,” available at: <http://ccrjustice.org/learn-more/faqs/accountability-and-prosecutions-torture>, accessed 10 May 2013.

torture, instead charging perpetrators with lesser crimes. For example, in Argentina, between 2000 and 2011 of the 14,366 complaints of torture submitted to federal authorities, reportedly only four per cent were qualified as acts of torture.²⁰⁸

In practice, victims of torture still face numerous obstacles in accessing justice, particularly:

- Lack of access to a lawyer and medical examination for detainees during key stages of detention, putting victims at greater risk of torture and creating obstacles to submitting complaints where it does occur;
- Lack of independence and impartiality of investigations, and the failure of judges to adequately respond to allegations of torture;
- Delays in investigations and issuing charges against perpetrators, which in many cases results in prescription due to statutes of limitation;
- Threats, harassment and intimidation of individuals who complain of torture or ill-treatment, compounded by the lack of adequate protection mechanisms;
- Victims' lack of trust and confidence in the police and other authorities to handle complaints of torture, which is particularly pronounced in cases of gender-based violence. For example, in Mexico, CEDAW has expressed concern regarding the failure of police and prosecutors to register complaints regarding violations faced by women as they are not considered credible.²⁰⁹ In such cases, the burden of proof effectively shifts to the victim who has to convince the Prosecutor that her complaint is credible, in some cases by carrying out their own investigation;
- Laws providing actual or *de facto* amnesties resulting in impunity and preventing victims of certain crimes from accessing justice and reparation.

Across the region, the paucity of prosecutions compared with well-documented and widespread incidents of torture shows the ineffectiveness of investigations and prosecutions. While investigators and Prosecutors have undertaken coherent, coordinated and well-funded efforts to combat drug-trafficking and terrorism, showing that with political will, it is possible to establish the necessary framework and strengthen capacity of institutions to combat torture. However, this is not currently the case. A range of structural barriers exist, leaving victims without recourse to effective remedies or reparation. The prosecution of perpetrators of torture, resulting in conviction and punishment, remains the exception in most of the countries considered.

²⁰⁸ Information provided to REDRESS by participant.

²⁰⁹ CEDAW, "Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico," UN Doc. CEDAW/C/2005/OP.8/MEXICO.

5. Reparation

5.1. Recognition of the right to reparation for torture

The right to reparation for victims of torture and ill-treatment is well established in international law. It is enshrined in a number of international and regional human rights instruments, including UNCAT, the IACPPT and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles). According to the UN Basic Principles, forms of reparation can include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The right to reparation comprises the procedural right to an effective remedy and the substantive rights to obtain adequate forms of reparation, which should be underpinned by a victim oriented approach aimed at restoring victims' dignity. This has been reaffirmed by the CAT in its General Comment No. 3 which clearly sets out the obligations of States parties with regard to reparation for victims of torture and ill-treatment.²¹⁰

Legal recognition of the right to reparation varies among the countries considered. While some have adopted constitutional norms specifically aimed at providing victims of human rights violations the right to reparation, others have established more general forms of reparation available for victims of any crime resulting in harm or damage. In Venezuela, article 30 of the Constitution establishes that the State has the obligation to integrally compensate victims of human rights violations. Article 46 further establishes that "every victim of torture or cruel, inhuman and degrading treatment carried out or tolerated by State agents, has a right to rehabilitation." The constitution of some countries, such as Colombia and Mexico, include more general provisions regarding reparation. Article 250 of the Colombian Constitution requires the *Fiscalía General* (General Prosecutor) to "take the necessary measures in order to make effective the protection of rights and the payment of compensation." In Mexico, article 20 of the Constitution clarifies that the purpose of criminal proceedings is to make sure "the culprit is punished and the harm is repaired." In other countries, such as Argentina and Guatemala, the right to reparation stems from international treaties, which are directly applicable in domestic law. In addition, civil legislation in most countries considered establishes the possibility of obtaining some form of reparation for victims of crimes resulting in harm.

In most of the countries considered, legislation allows victims of crimes that lead to damage or injury the possibility of obtaining reparation at the final stage of criminal proceedings. In the USA, for example, a convicted person's sentence could include the requirement to pay restitution (money or services) to the victim for losses suffered as a result of the crime. At the state level, victims of violent crime can apply to Crime Victim Compensation Boards for monetary compensation to cover costs of treatment or loss of wages.²¹¹ In Peru, article 92 of the Penal Code provides for orders of reparation to be included in penalties meted out to convicted perpetrators.

In many countries, it is also possible to file civil claims for reparation separately from the criminal process. This is usually regulated by tort law and is generally applicable to any cases where an individual's rights have been violated. In most countries in the region, as in much of the rest of the

²¹⁰ CAT, *General Comment No. 3*, supra n. 163.

²¹¹ For more information on these, see:

<http://www.nacvcb.org/NACVCB/files/ccLibraryFiles/Filename/00000000120/BrochureCVC1.pdf>.

world, the burden of proof in civil cases rests on the complainant, and in some countries civil suits are dependent on the determination of criminal responsibility through a criminal proceeding. Both these practices make it difficult for victims to obtain reparation through civil claims. Conditioning reparation on the successful outcome of a criminal case undermines the role of civil legal action as an effective remedy, particularly in the absence of effective investigations and prosecutions in torture cases. In this regard, the CAT has clarified that "...a civil proceeding and the victim's claim for reparation should not be dependent on the conclusion of a criminal proceeding [...]. Civil liability should be available independently of criminal proceedings and the necessary legislation and institutions for such purpose should be in place."²¹² Nevertheless, in some countries it is only possible to file a civil claim when criminal liability has been established. For example, the jurisprudence of the Supreme Court of Justice in Mexico requires that torture must be proven through a criminal proceeding in order for civil reparation to be awarded.²¹³ Similarly, in Honduras, civil suits for reparation are dependent on the outcome of a criminal process.

In Brazil, victims may file a civil suit for moral and material damages.²¹⁴ A victim is not required to wait until the end of a criminal trial to file a civil claim, and the award of civil reparation is not reliant on the outcome of a criminal procedure.²¹⁵ In the Dominican Republic, the law provides for compensation to anyone who has suffered damage, and a civil claim can be presented together with the criminal case or independently. The same is true in Jamaica and Peru; however in the latter case, if a judgment in the criminal case includes a requirement that the offender pay compensation to the victim, this precludes the victim from bringing a civil claim for the same facts.²¹⁶ In practice however, participants from across the region reported that victims hardly ever obtain reparation through civil claims, in large part owing to the challenges faced by victims in obtaining evidence.

The IACtHR's jurisprudence on reparation is well-developed and credited for its progressiveness.²¹⁷ Given the serious difficulties victims face in obtaining reparation in domestic jurisdictions, recourse to the Inter-American System adds an important avenue of access to justice. In the case of *Gutiérrez Soler v. Colombia*,²¹⁸ for example, the IACtHR found Colombia in violation of articles 5 and 7 of the American Convention on Human Rights, resulting from the arrest and torture of the plaintiff for the purpose of extracting a confession for a crime for which he was eventually found innocent. The Court's ruling awarded him compensation for personal injury, as well as pecuniary damages and non-pecuniary measures of satisfaction, and also ordered the State to provide him and his family with psychological treatment and to ensure their security. The Court also ordered structural measures aimed at guaranteeing non-repetition, including the implementation of training courses for court officials and police, and the adoption of a training programme regarding the Istanbul Protocol for prison physicians, forensic medical officers, prosecutors and judges.

²¹² CAT, *General Comment 3*, supra n. 163, p. 26.

²¹³ Supreme Court of Mexico, *Juicio de Amparo Directo Penal 9/2008, Caso Acteal*, supra n. 112.

²¹⁴ Article 159, Civil Code of Brazil.

²¹⁵ STJ – RESP 293771 – PR – 2ª T. – Relª Minª Eliana Calmon – DJU 25.02.2002; See article 66 CPP. See Tribunal de Justiça do Paraná, TJPR – Ag Instr 0109431-3 – (20647) – Goioerê – 3ª Cív. – Rel. Juiz Conv. Ronald Schulman – DJPR 12.11.2001.

²¹⁶ Supreme Court of Jamaica, *Rules of Civil Procedure*, 2002, Part 56.10(1) and (2).

²¹⁷ Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, July 2007, p. 1, available at <http://www.dplf.org/uploads/1190403828.pdf>, accessed 10 March 2013.

²¹⁸ IACtHR, *Gutiérrez-Soler v. Colombia*, Judgment of 12 September 2005, Series C No. 132.

These measures were subsequently implemented.²¹⁹ These measures are highly significant in terms of prompting change in individual countries as well as establishing standards across the region.

In the USA, the Alien Tort Statute 1789 (ATS) and the Torture Victim Protection Act 1991 provide for civil redress for torture, even in cases where the unlawful acts took place outside of the USA by non-US citizens, effectively providing for universal civil jurisdiction for victims of torture. A number of successful cases have been brought under these statutes, some resulting in reparation for torture victims.²²⁰ However, the ATS has been quite controversial the jurisprudence has not been consistent. The April 2013 decision of the US Supreme Court in the case of *Kiobel v. Royal Dutch Shell Petroleum* emphasised the presumption against extraterritoriality in the specific case. In this case, Nigerian refugees living in the US brought a claim against Royal Dutch Shell Petroleum for its involvement in the killing and torture of environmentalists by the Nigerian military in the 1990s. In the *Kiobel* decision, the Court held that the ATS only applies to human rights violations committed abroad if there is a strong connection to the US, and the mere presence of a multinational corporation such as Royal Dutch Shell Petroleum is not a clear enough connection.²²¹ It is as yet unclear what bearing this decision will have on torture cases brought under the ATS.

There are serious challenges that make bringing successful cases under these statutes very difficult. First there are the practical difficulties that arise with regard to obtaining evidence in a civil case where the acts in question took place in another country. There are also major difficulties in enforcing judgments. For example, in the case of *Filartiga v. Pena-Irala*, the first human rights case to be litigated under the ATS, two family members of a Paraguayan man who had been tortured and killed brought a case against the police officer allegedly responsible. Both plaintiffs and the defendant were living in the USA at the time. The plaintiffs were successful in their claim and were awarded US\$10.4 million in reparation, however no payments have been made as yet.

Furthermore, in those cases brought against US officials, the government has alleged that pursuing such claims would not be in the interest of national security, resulting in many such cases being dismissed on procedural grounds at the pleadings stage, based on the assertion of the so-called “State secrets” privilege. An example is the case of *Mohamed v. Jeppesen Dataplan, Inc.*, which involved five victims of the CIA’s “extraordinary renditions” programme who sued the transport corporation Jeppesen Dataplan, Inc. under the ATS for its alleged involvement in transporting them when they were unlawfully transferred. The US Government intervened in the case, invoking the “State secrets” privilege which led to the case being dismissed before discovery or assessment of the merits. In many cases, the government has also claimed absolute immunity under the Alien Tort Statute, which has resulted in all torture cases brought under this law being dismissed prior to consideration of merits.²²²

²¹⁹ Order of the Inter-American Court of Human Rights of 31 January 2008, Case of *Gutiérrez Soler v. Colombia* (Monitoring Compliance with Judgement), pp. 24 and 28.

²²⁰ For ATCA, see for example: *Kadic v. Karadzic*, Court of Appeals, 2nd Circuit, 64 U.S.L.W. 3832 (18 June 1996) and *Forti v. Suarez-Mason*, US District Court, 694 F.Supp. 707 (1988). For TVPA, see for example: *Xuncax v. Gramajo and Ortiz v. Gramajo*, US District Court, 886 F.Supp. 162 (1992).

²²¹ *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, Supreme Court of the United States of America, No. 10-1491, 17 April 2013.

²²² See: *El Masri v. Tenet et al.*; *Arar v. Ashcroft et al.*; *Mohamed v. Jeppesen*; and *Ali v. Rumsfeld*.

Administrative reparation programmes

Several countries in the region have established administrative reparation programmes for victims of human rights violations committed under past dictatorships and/or in armed conflicts. While these have had some positive results, they have also been criticised, including for their failure to take into account the specific facts of each individual case in determining the amount and form of reparation to award. It is important to note that CAT General Comment No. 3 clarifies that “in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them.”²²³

In Argentina, Law No. 24,043 of 1991 established a reparation programme for victims of arbitrary detention under the most recent military dictatorship (1974 to 1983) and their relatives. This programme provides victims with only monetary compensation, which is higher for beneficiaries who have suffered serious and permanent injuries, or where relatives died in custody, recognising the many victims of torture under the military dictatorship. By 2010, 22,234 persons had applied for reparation under the programme, of which 44 per cent (9,776 persons) were awarded compensation.²²⁴ The program has been criticised for its focus on civilians and the resulting failure to allow for reparation for members of the military detained during the dictatorship for insubordination or for conscientious objection to the regime.²²⁵ In addition, some victims have been unable to register for reparation due to difficulties in obtaining evidence, and there have also been significant delays in providing reparation.²²⁶ In 1994, Law No. 24,411 was adopted, granting benefits to the heirs of individuals who were disappeared when that Act was promulgated and to the heirs of those who died as a result of action by the armed forces, the security forces or any paramilitary group prior to 10 December 1983.²²⁷

In Colombia, Decree No. 1290 of 2008 established an administrative reparation procedure for victims of abuses committed by paramilitaries and members of illegal armed forces prior to April 2008, including murder, enforced disappearances, kidnapping, personal injuries, torture and sexual violence, and forced displacement. Reparation provided is exclusively in the form of monetary compensation, with specific amounts awarded based on the type of violation, up to US \$12,500 per victim. To date, more than 280,000 persons have applied for compensation.²²⁸

²²³ Ibid.

²²⁴ OIM, Estudio Comparado de Programas de Reparación Administrativa a Gran Escala los casos de Colombia, Argentina, Chile, Irak, Turquía y Alemania, [Comparative Study of the Administrative Reparation Programs: The cases of Colombia, Chile, Iraq, Turkey and Germany], October 2010, at p.28.

²²⁵ See, for example, the Pereyra Case, a military detained for almost four years for refusing to wearing the military uniform based on his religious belief (he was a Jehovah witness). Pereyra was not accepted as a beneficiary under the Law 24,043 considering he was a military not a civilian. For an analysis of the case see http://www.gordillo.com/pdf_tomo6/01/cap07.pdf

²²⁶ IACHR, *Enrique Hermann Pfister Frias and Lucrecia Pfister Frias v. Argentina*, Admissibility Report 12/2010, Case 12.106.

²²⁷ <http://www.redress.org/downloads/country-reports/Argentina.pdf> p. 16 and 17.

²²⁸ International Organisation for Migration, “Facilitating access to reparation for victims of illegal armed groups in Colombia,” available at: <http://www.iom.int/cms/en/sites/iom/home/what-we-do/reparation-programmes/facilitating-access-to-reparation-for-vi.html>, accessed 10 May 2013. By June 2010, 40,779 victims had received payment. See International Organisation for Migration, Comparative Study of the Administrative Reparation Programs: The cases of Colombia, Chile, Iraq, Turkey and Germany, October 2010, p. 27.

However, the programme fails to provide reparation for victims of violations committed by State agents, and excludes victims of violations committed after April 2008. Furthermore, the programme provides only monetary compensation, and establishes a fixed amount for victims depending on the violation experienced, rather than assessing the specific circumstances of each victim's case, however there are some questions regarding to what degree this is possible when dealing with mass violations.

In Chile, an administrative reparation programme was created under Law No. 19,992 of 2004 for victims of violations listed in the Report of the National Commission on Political Imprisonment and Torture (Valech Commission report), which recognised 38,254 victims of torture and arbitrary detention. The reparation measures provided to victims recognised by the Valech Commission include a monthly pension or a one-time bonus payment if the person is already the beneficiary of other reparations (as is the case of those benefiting under the *programa de exonerados políticos*), access to health services for the victim and his or her next of kin and, access to education or for one of their grandchildren to apply for a special scholarship.²²⁹ The health services available as a form of rehabilitation include measures to repair mental and physical harm resulting from torture and arbitrary detention. However, these services are provided by the public health system and therefore unavailable to the many survivors of the dictatorship living in exile. For example, Leopoldo Garcia Lucero, a torture survivor from Pinochet's coup whose case was recently heard before the IACtHR, and his family have been waiting for justice and reparation while in exile for almost 40 years, since 1975.²³⁰

In Peru, the Integral Reparation Plan established by Law No. 28,592 in 2005 provides for both individual and collective reparation. In practice, the main emphasis has been on collective reparation delivered in the form of infrastructure projects such as restoration of basic community services and development initiatives, which many victims do not view as reparation. The inadequacy of such measures has been specifically noted by the CAT: "a State party may not implement development measures or provide humanitarian assistance as a substitute for redress for victims of torture or ill-treatment..."²³¹ In 2011, the Peruvian government announced that the individual component of the reparation programme was to start,²³² setting the date of 31 December 2011 as the deadline for victims to register with the programme for the purposes of obtaining individual economic reparation. This has been criticised for being discriminatory against indigenous and rural populations, as many victims were unable to register due to geographic inaccessibility, lack of funds, or lack of knowledge of the Integral Reparation Plan. The deadline has had a disproportionate impact on those victims living in remote parts of the country, who in large part bore the brunt of the violations committed during the period in question.

Reparation programmes for victims of armed conflict or State violence are also under consideration in other countries or awaiting implementation. In El Salvador, the negotiations ending the 12-year internal armed conflict in 1991 resulted in the establishment of a Truth Commission mandated to investigate grave cases of violence from 1980 to 1991. The Commission's final report included recommendations for material and moral reparations, in

²²⁹ Law 19.992, 17 December 2004, Establece Pensión de Reparación y Otorga Otros Beneficios a Favor de las Personas que Indica (through which a reparation's pension and other benefits are established to the persons it indicates), articles 1-14, available at: <http://www.leychile.cl/Navegar?idNorma=233930>, accessed 10 March 2013.

²³⁰ IACtHR, *Leopoldo Garcia Lucero v. Chile*.

²³¹ CAT, *General Comment 3*, supra n. 163, p. 37.

²³² Supreme Decree No. 051-2011-PCM.

particular a special fund for victims.²³³ However, none of these recommendations have been implemented to date. In January 2012, at a memorial event for the massacre at El Mozote, President Mauricio Funes announced that a reparation programme for victims of gross human rights violations would be established;²³⁴ however there has been no progress at the time of writing. While some positive steps have been taken, in many cases victims of torture are unable to obtain adequate reparation and therefore there is still much to be done to ensure the realisation of victims' rights under article 14 of UNCAT or article 9 of IACPPT, including establishing a clear avenue for victims to obtain reparation through judicial or administrative processes.

5.2. Compensation as a form of reparation

Across the region, monetary compensation is still the most common form of reparation awarded to victims of torture and ill-treatment. The focus on this type of reparation, which is often inadequate, is highly problematic as it fails to take a holistic approach towards reparation. This is further compounded by the fact that many courts fail to explain how they arrived at the amount of compensation awarded and in many cases this is inadequate. For example in Peru, in the case Manuel Cruz Cavalcanti, a judge sentenced two police officers to five years' imprisonment and payment of 10,000 nuevos soles (US \$3,800 approx.) for torturing the plaintiff, a Peruvian peasant who was severely beaten in police custody. The Court awarded only monetary compensation and failed to specify the criteria taken into account to determine the amount, which was criticised by the plaintiff and human rights organisations as being paltry to the point of being offensive. The plaintiff contested the amount of reparation awarded, and the Supreme Court raised the amount to 15,000 nuevos soles (US \$5690 approx.).²³⁵ This ruling recognised that the initial amount was inadequate, though it equally failed to specify how the amount awarded was decided, particularly whether it reflected the seriousness of the harm inflicted.

The focus on and low awards of monetary compensation is also a major shortcoming of administrative reparation programmes in the region.²³⁶ For example, in Colombia, victims of torture and sexual violence processed under the administrative reparation programme may receive a lump sum amount of approximately US\$9,400. The maximum amount awarded is US\$12,500, for next of kin of victims of murder. However, when torture is followed by death, or if there is more than one violation to be repaired, the maximum sum for reparation is still US\$12,500. The amount of compensation that can be awarded fails to take into account the multitude and variety of violations experienced by victims. In Chile, Law No. 19,992 establishes that the monthly pension victims may receive is between US\$2,800 and US\$3,200 per year, depending on the age of the victim. The amount, which is fixed, has been criticised for being insultingly low. Furthermore, it does not take into consideration the specific circumstances of each case such as permanent disability caused by the torture.

²³³ Alexander Segovia, "The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A history of non-compliance," in Pablo de Greiff (ed.), *The Handbook of Reparations*, (Oxford: Oxford University Press, 2006), p. 156.

²³⁴ North American Congress on Latin America (NACLA), *Removing the Veil: El Salvador apologises for State violence on 20th anniversary of Peace Accords*, 17 January 2012, available at: <http://nacla.org/news/2012/1/17/%E2%80%98removing-veil%E2%80%99-el-salvador-apologizes-state-violence-20th-anniversary-peace-accords>, accessed 10 March 2013.

²³⁵ Manuel Cruz Cavalcanti, 2004-00140-0-1903-JR-PE-2 (00198-2005-0-1SP).

²³⁶ Administrative reparation programmes are schemes set up in some countries in the context of the transition from repressive rule or armed conflict to democracy.

5.3. Rehabilitation as a form of reparation

Victims of torture have a right to rehabilitation, as explicitly recognised in article 14 of UNCAT. According to the CAT, rehabilitation “refers to the restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment [...]. Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society.”²³⁷ However, in practice, rehabilitation measures are awarded only in very specific circumstances, and reparation, if awarded generally consists of monetary compensation.²³⁸ While there are facilities to provide victims of torture and ill-treatment with rehabilitation services in many countries, these are NGO rather than government-led initiatives, even though such provision this is ultimately the responsibility of States.²³⁹ The lack of awards that include medical and psycho-social rehabilitation, particularly in the form of psychological and psychiatric services, is a major shortcoming in both law and practice in the region. This includes administrative programmes, as seen in Argentina and Colombia, that do not include rehabilitation services in any form.

²³⁷ CAT, *General Comment 3*, supra n. 163, p. 11.

²³⁸ According to the participants, the Peruvian courts have ordered physical and psychological assistance for victims as part of the reparation in only two cases (File No 09-05 and File No. 22-08).

²³⁹ CAT, *General Comment 3*, supra n. 163, p. 15.

6. Overarching Themes

6.1. Marginalisation, gender-based violence and torture

States have an obligation to take special measures to protect marginalised individuals or groups especially at risk of torture. The targeting of marginalised groups, in particular members of indigenous groups, persons living in poverty, the LGBT community and women, is a major concern in many countries across the Americas, and reflects the history of systemic discrimination against these groups. The significant difficulties in accessing justice faced by marginalised groups entrenches powerlessness and enhances vulnerability to torture and ill-treatment, as perpetrators face no significant risk of sanctions.

In some countries, young males from impoverished and/or indigenous backgrounds are frequently assumed to be involved in crime, resulting in their arrest and detention and subsequent torture. Their marginalised status makes them highly vulnerable to police abuse, and is further compounded by the lack of measures in place to protect them, and to ensure their access to a lawyer. These young males and people from poor socio-economic backgrounds generally often cannot afford a lawyer and legal aid is not available in most countries, thereby increasing their risk of ill-treatment and torture in detention. Gender-based and sexual violence is also a means of reinforcing historical discrimination and marginalisation of women. In many countries, including Nicaragua, Peru and Venezuela, women who have been victims of sexual violence are reluctant to bring complaints, out of fear of reprisals or discrimination from both authorities and their communities.

6.2. Tackling impunity

Impunity continues to be a serious problem in the fight against torture and ill-treatment in the Americas. Institutional failings are a major factor perpetuating impunity. This applies in particular to the lack of independence of investigations as investigators and alleged perpetrators often form part of the same police or military structure. In many cases, this is compounded by corruption and lack of professionalism of investigators. In addition, in some countries, judicial and investigatory bodies are easily influenced by political interests and high-level authorities who generally are disinclined to prosecute alleged perpetrators and hold them accountable, especially when torture has been encouraged, committed or tolerated by government officials. The lack of expertise and knowledge of relevant international law standards amongst prosecutors, judges, and lawyers is frequently seen as a factor that makes them ill-equipped to play a stronger role in securing accountability. Procedural obstacles such as amnesty laws that are common across the region, as well as statutes of limitation, also contribute to impunity for torture. These factors are often attributed to an apparent lack of political will to hold perpetrators accountable through effective investigations and prosecutions.

6.3. Challenges of proving torture, the role of forensic evidence and witness protection

Proving torture is a common challenge across the region, in particular with regard to obtaining medical evidence given the lack of independent forensic services. The effective implementation of the Istanbul Protocol is hindered by limited awareness among those involved in documenting torture. In addition, in many countries victims' lack access to a doctor capable and willing to

document injuries as being consistent with torture or ill-treatment, which is a particularly severe problem for victims in detention. Participants from across the region also highlighted the lack of adequate systems of victim and witness protection in their countries, and the resulting reluctance of victims to come forward, which was identified as one of the main reasons for the wide underreporting of torture and ill-treatment.

6.4. Regional and international litigation and advocacy strategies

The Inter-American System has been progressive in its jurisprudence on reparation for human rights violations, including torture. However, inconsistent compliance has undermined the system's effectiveness. Other shortcomings include significant delays in the progress of cases before the Commission and Court, and the lack of resources to cope with the volume of work. Lack of enforcement of the precautionary and provisional measures of the IACHR and IACtHR is also a serious problem in all the countries considered.

Nonetheless, the Inter-American Human Rights System plays a positive role and participants agreed that strategic efforts aimed at remedying its limitations need to be pursued. One suggestion was to use judgments of the Court to advocate legal reforms at the domestic level. An example cited of successful legal reforms resulting from IACHR decisions was the establishment of INDECOM, the independent body responsible for carrying out investigations in Jamaica, which was the result of advocacy by civil society based on the Commission's report on the merits in the case of *Michael Gayle* to improve investigations into allegations of abuses.²⁴⁰

Rulings and recommendations of the Inter-American System are often the first step rather than an end in itself when seeking social change in respect of torture related practices. Therefore, participants suggested that the work in the Inter-American System must be accompanied with advocacy activities before the UN system, as well as at the domestic level, including engaging with the media to reinforce efforts.

6.5. Enabling contexts

Armed conflict, counter-terrorism policies and anti-drug trafficking legislation have facilitated the use of torture in countries across the region, in the name of "State interests" and "national security." While torture is present even in situations of relative peace, where security legislation is adopted, the use of torture has typically become more prevalent.

In countries with previous or on-going armed conflicts, both State and non-State actors have been responsible for torture and ill-treatment. In Colombia, torture has reportedly been used by military and paramilitary forces against the civilian population in a systematic way, in an effort to combat guerrilla forces. Similarly, US military officials have been implicated in numerous and serious allegations of torture and ill-treatment of detainees in the context of the military operations in Afghanistan and Iraq and of counter-terrorism measures, particularly in the course of implementing the extraordinary rendition programme. US counter-terrorism policies since 11 September 2001 have also included attempts to justify the use of torture and ill-treatment, to block access to remedies and to limit accountability. Canada has also been found to be complicit in

²⁴⁰ IACHR, *Michael Gayle v. Jamaica*, Judgment of 20 February 2003, Case No. 191/02, Report No. 8/03.

these practices in cases concerning Canadian citizens.²⁴¹ In other countries, anti-drug trafficking legislation has increased the use of torture and ill-treatment by officials and armed forces, as has been seen in Mexico where torture of suspected members of drug cartels is now reportedly a systematic practice in the country.

²⁴¹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, supra n. 29.

7. Recommendations

The experts from across the Americas highlighted the need to take action to address the challenges identified. While the following list of recommendations was not formally agreed upon, it reflects some of the strategic priorities for the work of lawyers and NGOs identified in the course of the meeting:

To governments:

- Take all necessary measures, including amending or adopting national legislation, to ensure torture is a criminal offence with a definition in line with article 1 of UNCAT, and carrying appropriate penalties that reflect the gravity of the crime, as well as amending or adopting legislation to provide torture victims the right to reparation in domestic law;
- Take measures as may be needed to establish an independent institution responsible for providing oversight of places of detention with a view to ensuring the rights of detainees are respected in practice;
- Adopt legislation to introduce protective measures for victims, witnesses and human rights defenders, both procedural and non-procedural;
- Ensure training for prison officials on international standards for places of detention and treatment of prisoners;
- Provide training and education for members of the judiciary to ensure they have a good understanding of the international standards relating to torture; ensure training for public defenders with regard to international law and practice regarding torture, as well as with regard to domestic protocols that promote accountability for torture; provide training, particularly on the Istanbul Protocol, for all persons involved in investigating allegations of torture;
- Take all necessary measures to ensure compliance with the recommendations and decisions of the IACHR and IACtHR, in particular with regard to reparation;
- Ensure State officials develop a gender sensitive approach to torture and ill-treatment that includes respect for women rights and persons who belong to the LGTBI community;
- Improve access to justice for survivors of torture by ensuring greater access to legal aid and simplifying and streamlining procedures for invoking legal remedies;
- Eliminate any immunities, amnesties and defences in relation to torture; particularly those provided for members of armed forces in general or in specific areas of conflict or for security forces by means of emergency laws, prevention of terrorism acts or other security legislation.

To judicial authorities:

- Consider the wide array of domestic and comparative jurisprudence, and, as appropriate, take into account international human rights law in judicial practice and judgments;
- Refuse to admit statements and confessions elicited through torture;
- Order prompt investigations into allegations of torture when they arise in the course of judicial proceedings;
- Ensure improved judicial education and training to enable judges and magistrates to carry out appropriate investigations into allegations of torture;

- Take into account the gravity of torture as a serious violations of human rights and international crime, and the severe impact it has on individual victims, their families and society at large when making determinations as to the appropriate punishment and forms of reparation in criminal proceedings where appropriate;
- Broaden the scope of reparation to include other forms in addition to compensation by awarding measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition when ruling on reparation for torture victims, taking into account the seriousness of the violation and the particular needs and circumstances of torture survivors, where the law allows for such a broad interpretation;
- Be mindful of the needs of victim and witness protection and order adequate measures where required or requested, taking into account defence rights and fair trial standards.

To civil society and lawyers working on behalf of victims of torture:

- Collaborate on advocacy, including lobbying governments and strategic litigation, and other efforts to promote institutional reforms to ensure victims can access mechanisms capable of responding to allegations of torture, including an effective complaints mechanism and independent investigation bodies;
- Build a regional network with a view to:
 - a) Sharing experiences of cases, and collaborating on cases relating to the prohibition of torture, including strategising and coordinating on joint amicus curiae submissions;
 - b) Sharing experiences and supporting each other's work, particularly where human rights defenders face risk on account of their work;
- Bring cases before domestic courts and the IACHR and IACtHR that have potential to expand/advance judicial interpretation, including by invoking comparative and international precedents, and pursue parallel advocacy efforts to raise awareness and generate the momentum needed to bring about broader changes;
- Make use of the UN mechanisms, where possible, including sharing information about situations and specific cases with relevant special procedures of the Human Rights Council, human rights treaty bodies and the Universal Periodic Review process;
- Advocate for adequate pay and benefits for prison officials with a view to ensuring they are not motivated to engage in corrupt activities with inmates, such as gang involvement;
- Raise public awareness about government practices regarding torture and ill-treatment so as to galvanise public opinion to induce governments to take action, particularly in terms of implementing judgments of the IACHR and IACtHR;
- Ensure training for civil society members working with victims of torture, including documentation in line with the Istanbul Protocol;
- Work closely with marginalised communities, in particular women, LGBT persons, economically deprived persons and indigenous groups, to raise awareness about their rights in respect of the prohibition of torture, and to facilitate access to justice and reparation for victims from these groups.



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