JUSTICE FOR TORTURE WORLDWIDE

Law, Practice and Agendas for Change

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1. INTRODUCTION

Torture has many faces. It is both secretive and ubiquitous, an intensely personal ordeal and a practice that affects society as a whole. While its particular features frequently have a local imprint, its prevalence is truly worldwide. This double nature is also reflected in global efforts to combat torture. Prevention of, and accountability and reparation for, torture are first sought at the domestic level. Indeed, international human rights law requires victims[1] and those acting on their behalf to exhaust domestic remedies first before bringing claims to international bodies. Advocacy efforts are also often directed at local actors, with a view to changing domestic mindsets and practices. At the same time, these efforts do not take place in isolation. Regional and international fora provide platforms for litigation and advocacy, and cooperation often transcends national and regional boundaries. Yet in practice, it is still rare for those working on torture cases to come together and share their expertise and experience. As a result, national laws and practices, and particularly jurisprudence, often remain little known externally beyond national borders and lawyers and others concerned may be ignorant of precedents, strategies and best practices developed elsewhere that may provide important tools for their daily work. Relevant actors may also not fully benefit from having links to their counterparts in other countries and regions as networks remain underdeveloped.

Having these links and networks enhances cooperation and capacity and is therefore bound to increase the efficacy of work undertaken. It is certainly much needed, given the many systemic and specific challenges that lawyers and others face when seeking accountability and reparation for torture. These include legal obstacles (such as amnesties, immunities and short statutes of limitation), deficient victim protection, lack of access to justice, particularly for the most marginalised, and inordinate delays. They also comprise the often limited understanding of the definition of torture and weak judicial systems and responses, such as the award of inadequate amounts of compensation and other forms of reparation, if any, as well as poor enforcement mechanisms.

This Report forms an integral part of the REDRESS initiative *Reparation for Torture: Global Sharing of Expertise*, supported by the European Union through the European Instrument for Democracy and Human Rights.[2] It builds on comparative research, litigation and

[1] The report will primarily use the term “victim” in line with international legal practice and without prejudice to the fact that individuals who have been tortured may prefer the term “survivor”.

[2] The report was written by Lutz Oette, drawing on the reports published as part of the project (see below, note 6). REDRESS gratefully acknowledges the contribution of a great many people to this project, particularly the project partners and regional partners, that is the Asian Human Rights Commission; Coordinadora Nacional de Derechos Humanos, Peru; Mizan-Law Group, Jordan; Independent Medico-Legal Unit, Kenya, and the

advocacy undertaken, aimed at developing best practices and effective strategies to realise victims' right to a remedy and reparation.[3] The initiative *Reparation for Torture: Global Sharing of Expertise* is a collaborative effort, involving a number of partners and counterparts around the world.[4] It combines litigation in torture cases before national, regional and international mechanisms, thematic research and advocacy on security legislation and sexual violence amounting to torture,[5] as well as country-specific and regional meetings and interventions. Significantly, it brought together lawyers and human rights defenders working on torture in five regional meetings, which resulted in regional reports on Asia, Africa, Europe, the Americas and the Middle East and North Africa (MENA) region.[6]

This Report brings together the wealth of expertise generated and the experience shared in the course of this work, focusing on comparative law and practice relating to accountability and reparation. It draws on, rather than simply replicates, the findings of the regional reports, to identify key issues. To this end, the Report discusses key developments from a cross-regional perspective, mapping out the context in which torture takes place and its legal, institutional and political dimensions. Following this introduction, chapter 2 provides the broader context facing victims of torture seeking accountability and reparation. The challenges experienced by victims of torture and those working on their behalf when pursuing cases, and national responses in that regard are the focus of chapters 3 (accountability) and 4 (reparation). Combining legal analysis with practitioners' perspectives of effectiveness, these chapters examine the extent to which national law and practice are aligned with regional and international standards, considering in particular differences across regions/sub-regions. Such analysis allows for the identification of both common challenges and features, and regional approaches that promise to develop into, or serve as good practices. Chapter 5 considers how institutional, societal and political factors impact the realisation of the right to justice and reparation for torture. Based on the earlier analysis, chapter 6 sets out the way forward, focusing on steps to be taken to bring the law and practice in line with the Convention against Torture and other related standards. This includes critically assessing what strategies are needed and can be utilised to strengthen victims' rights to a remedy and reparation in practice.

European Centre for Constitutional and Human Rights, Germany; as well as participants of the regional expert meetings and the seminar, Global Perspectives on Justice for Torture: Experiences, Challenges and Strategies, organised by REDRESS in collaboration with the SOAS Centre for Human Rights Law on 2 August 2013. REDRESS also wishes to thank Kirsten Selvig for her valuable research assistance.

[3] See REDRESS publications at www.redress.org, particularly an earlier comparative study, REDRESS, *Reparation for Torture: A Survey of Law and Practices in Thirty Selected Countries*, April 2003.

[4] See above note 2.

[5] See REDRESS, *Extraordinary Measures, Predictable Consequences: Security Legislation and the Prohibition of Torture*, September 2012, http://www.redress.org/downloads/publications/1209security_report.pdf (hereinafter *Security Report*) and REDRESS report on Rape as torture and ill-treatment (forthcoming).

[6] All regional reports (Europe, Africa, Americas, Middle East and North Africa, Asia), published between September 2012 and August 2013, can be found at http://www.redress.org/reports/reports.

The Report is meant to be a source of information and tool for those seeking justice and reparation for torture, particularly lawyers and human rights organisations. It also addresses officials tasked with implementing international standards on torture, and mandate holders, experts, judges and others monitoring compliance or adjudicating torture cases. Beyond those working on primarily legal aspects of torture prohibition, the Report speaks to a broader range of political and societal actors whose conduct and attitudes have a bearing on the respect of the rights of victims. It therefore concludes with a set of recommendations aimed at states, the judiciary, human rights bodies, as well as civil society, particularly lawyers and organisations working on behalf of torture victims.

2. LAW AND PRACTICE ON TORTURE FROM A CROSS-REGIONAL PERSPECTIVE

2.1. The context of torture

2.1.1. Introduction

Torture, while often having distinctive local, national or regional features, is a global practice. Its prevalence varies but it is clear that torture and ill-treatment are widespread in all regions of the world. No region is completely immune to torture, including Western European states, particularly where their forces act abroad.

With notable exceptions, such as in Latin America in the 1970s and 80s and more recently in the context of renditions as part of counter-terrorism operations, there is limited evidence that torture is the outcome of regional or international networks or a recognisable "masterplan" (though certain methods of torture are facilitated by the trade in torture weapons).[7] Instead, torture is a mode of exercising power over bodies and minds that in its practice frequently draws on local patterns and forms of violence.[8] At the same time, there are commonalities across regions and "cultures" in terms of its victims, perpetrators, purposes, causes and methods.

When torture becomes a common occurrence, the "normality" of the practice may serve to legitimise it. Law enforcement agencies, security forces and others come to see torture as an acceptable way of exercising power. This function and effect of worldwide torture has become most apparent in the course of counter-insurgency or counter-terrorism measures. The last decade, which was particularly influenced by the policy and practice of the United States (US) during the Bush administration, illustrated the risk of the legitimising function of torture practices. Several states have sought to justify torture, or measures facilitating torture, by invoking the national security rationale.[9] States have publicly stressed that they recognise the absolute prohibition of torture. Yet at the same time, these same States have used rhetoric that contemplates exceptions (such as the "ticking-bomb example")[10] or seeks

[7] See for example the 'Study on the Situation of Trade in and Production of Equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destination and forms', *Report of the Special Rapporteur on the question of torture, Theo van Boven*, UN Doc. E/CN.4/2005/62, 15 December 2004; Abi Dymond and Joe Farah, 'The trade in torture technologies', in ACAT, *A World of Torture*, 2013, pp.243-257; and www.mispo.org.

[8] See in this context also Darius Rejali, *Torture and Democracy* (Princeton University Press, Princeton and Oxford, 2007).

[9] *Security Report*, above note 5 with further references.

[10] See Yuvar Ginbal, *Moral, Practical and Legal Aspects of the Ticking Bomb Justification for Torture* (Oxford University Press, 2008).

to narrow the definition of torture. They have also taken steps that undermined safeguards, accountability and access to justice for victims of torture.[11]

Courts and human rights treaty bodies largely succeeded in keeping the legal arguments and justifications for such "exceptional" measures in check.[12] This response was important in upholding the normative force of the prohibition of torture. Equally important, there has been a growing public movement that has used multiple media and other interventions to expose the practice of torture and its impact on victims and society at large. This movement has taken various forms, ranging from the wide circulation of photos in individual cases, such as Khaled Said, who was beaten to death by the Egyptian police and whose treatment became a rallying cry for demonstrators in Tahrir Square,[13] to an organised campaign to change unjust laws, as in Morocco when the suicide of Amina Filali, who had killed herself after being forced to marry her rapist, resulted in widespread protests which succeeded in repealing Morocco's law that had allowed rapists to avoid liability by engaging in such marriages.[14] These movements signal a willingness to speak out against the abuse of power and injustice inherent in torture. Crucially, this exposure, where it gains sufficient momentum, has become the yardstick of the legitimacy of institutions and regimes, particularly their modes of exercising power and denying justice. It has therefore contributed to the development of an important counter-culture that lays bare the reality of torture and inadequate responses thereto, and locates it at the heart of debates about the state of society and politics.

2.1.2. Victims of torture and ill-treatment

The widespread practice of torture has resulted in a large number of victims from diverse backgrounds. While it is difficult to generalise, and therefore correct to say that anyone may become a victim of torture, it is equally clear that certain categories of persons are at a comparatively greater risk. This applies in particular to those who are considered as an "enemy" of a regime or a particular way of life. This broad category comprises political opponents, particularly of authoritarian regimes, such as in Bahrain, Cameroon, Cote d'Ivoire, Ethiopia, the Maldives, Sri Lanka, Sudan, Ukraine, and Zimbabwe, and frequently includes peaceful protesters, as demonstrated by responses to certain recent uprisings in

[11] See Human Rights Committee, *Concluding observations: United States of America*, UN Doc. CCPR/C/USA/CO/3, 15 September 2006, paras.10-16 and Committee against Torture*, Conclusions and Recommendations: United States of America*, UN Doc. CCPR/C/USA/CO/3, 15 September 2006, passim.
[12] See Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States parties,* UN Doc. CAT/C/GC/2, 24 January 2008, para.5 and, on jurisprudence, further below at 5.2.
[13] Khaled Said, 'The face that launched a revolution', *Ahram Online*, 6 June 2012, available at: http://english.ahram.org.eg/NewsContent/1/64/43995/Egypt/Politics-/Khaled-Said-The-face-that-launched-a-revolution.aspx.
[14] Associated Press, 'Morocco to axe law allowing rapists to go free if they marry their victim', *Guardian*, 23 January 2013, available at: http://www.guardian.co.uk/world/2013/jan/23/morocco-law-rapists-marry?INTCMP=SRCH.

the MENA (Middle East and North Africa) region. Peaceful protestors are also at risk in diverse anti-globalisation and anti-austerity demonstrations, as in Greece, protests for self-rule, such as the 2007 unfurling of the Moluccan flag in Indonesia, to which the National Police anti-terrorism unit responded with beatings and the arrest of protesters,[15] as well as protests against forced evictions (e.g. in Cambodia),[16] destruction caused by mining (e.g. in Peru)[17] and displacement, particularly caused by major development projects. In Sudan, for example, protests by local communities against the building of the Kajbar dam were met with the use of live ammunition, resulting in several deaths, and a number of arrests and detention allegedly accompanied by ill-treatment.[18] It is also clear that human rights defenders themselves are at risk, as has been reported from countries such as Algeria, Bahrain, Bangladesh, Brazil, Colombia, Democratic Republic of the Congo, India, Mexico, Pakistan, the Philippines, Russia, Sudan, Turkey and Zimbabwe.[19]

Another prominent category of torture victims is suspects of "terrorism", which has often resulted in ethnic profiling and targeting of minorities and "others" (i.e. those seen as outsiders), such as Muslim men.[20] Anti-terrorism and security legislation has also been used to target local populations, as in Jammu and Kashmir, as well as the "seven sisters" in North-East India, and the Quechua-speaking "indigenous peasants" in Peru.[21] The existence of a defined "rebel" group often taints all civilians who are of the same community as the group, such as Palestinians in Israel and the occupied territories, Tamils in Sri Lanka, groups such as the Fur and others in Darfur in Sudan and Malay Muslims in Thailand. These communities are frequently at risk, with torture being one of the means used to suppress opposition and rebellion.[22] This may even include erstwhile perpetrators, as has been the case in times of transition. For example, Sunni Muslims in Iraq, or those seen as loyal to Ghaddafi – who

[15] REDRESS, *Torture in Asia: Law and Practice*, July 2013, p. 61 (hereinafter *Asia Report*).
[16] Kate Hodal, 'Cambodia police arrest women protesting against forced evictions', *Guardian*, 2 February 2012, available at: http://www.guardian.co.uk/world/2012/feb/02/cambodia-forced-evictions-land-grabs.
[17] Leigh Day, 'Peruvian torture claimants compensated by UK mining company: 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. See also REDRESS, *Torture in the Americas: Law and Practice*, June 2013, p. 12 (hereinafter REDRESS *Americas Report)*.
[18] *Situation of human rights in Sudan*, Note by the Secretary General, UN Doc. S/2007/624, 24 September 2007, para.17, and complaint submitted by the Egyptian Initiative for Personal Rights to the African Commission on Human and Peoples' Rights in July 2013 (on file).
[19] See in particular annual reports by the UN Special Rapporteur on the situation of Human Rights Defenders, available at: http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/SRHRDefendersIndex.aspx.
[20] See for example, Center for Human Rights and Global Justice and Asian American Legal Defense and Education Fund, *Under the Radar: Muslims Deported, Detained, and Denied on Unsubstantiated Terrorism Allegations* (New York: NYU School of Law, 2011), available at: http://www.chrgj.org/projects/docs/undertheradar.pdf.
[21] *Security Report*, above note 5, pp.74, 75.
[22] Ibid., passim.

mainly belong to certain tribes – in Libya, have been targeted and reportedly tortured by militias, with the de facto acquiescence of the new government.[23]

The torture of individuals belonging to any of these groups often generates considerable publicity, particularly where the group concerned is vocal. There tends to be a heightened awareness and focus on certain groups, such as human rights defenders, which frequently results in greater public interest when they are targeted. The raised profile of these victims and the often systematic nature of their torture mean that this context is widely known and recognised and given considerable attention by various actors. Many victims of torture, however, particularly those from an "ordinary" or marginalised background, receive less attention. This is often due to the very fact that their torture has become so "common" that it is expected, and, in turn, "accepted". This attitude may even include victims of torture themselves, some of whom, when asked whether the police had tortured them, are reported to have replied "no, we were only beaten up".

Two broad, and at times overlapping, groups are at particular risk of this type of torture: members of marginalised groups and suspects of crimes or misdemeanours. Suspects are frequently subjected to torture and other forms of ill-treatment as part of "institutionalised" practices. These practices are particularly common in malfunctioning criminal justice systems where law enforcement agencies resort to torture to "solve" crimes, targeting particularly marginalised and poor members of the community who can be presented as perpetrators, with confessions extracted under torture frequently constituting the main evidence against them. Such patterns have been reported from countries worldwide, including Mexico, Nigeria, Russia and India.[24] In practice, this means that those without influence or otherwise on the margins of society (in other words, those who are unlikely to protest or take legal action or whose story is less likely to be believed) are at an enhanced risk of torture to extract a confession. They are also vulnerable to arbitrary exercise of power, such as extortion and random beatings.

In Bangladesh, for example, Shahidul Islam, a rickshaw puller, and Monirul Islam Monir, his neighbour, were summoned to the Paikgachha police station in November 2008 in connection with an alleged theft. While in detention, they were beaten with bamboo sticks on various parts of their bodies. The police were seeking to extort money from the two men, who could not afford to pay the bribes, yet the police were reportedly determined to torture the men until the money was forthcoming. After Monir's mother borrowed 2,000 Taka (around $29) and paid it to the police, the two men were produced before the Magistrate's Court where they were confronted with fabricated charges of shouting in the

[23] Amnesty International, *Detention abuses staining the new Libya,* 2011, available at: http://www.amnesty.org/sites/impact.amnesty.org/files/PUBLIC/mde190362011en.pdf.

[24] *Americas Report*, above note 17, p. 9; *Asia Report*, above note 15, p.40; REDRESS, *Torture in Africa: The Law and Practice*, September 2012, p.8 (hereinafter *Africa Report*); REDRESS, *Torture in Europe: The Law and Practice,* September 2012, p.8 (hereinafter *Europe Report*).

street the previous night. Islam and Monir pled guilty to the charges and paid the additional fine, having been warned by the police before entering court that they would not be released without a confession.[25] In another case, in Sri Lanka, T. Sunil Hemachandra (Sunil), was a labourer who worked mostly in tapping rubber and climbing trees to pluck coconuts and fruits. After he had won more than three million rupees (around $25,000) in the lottery in 2003, a lottery sales agent, together with the local police, approached his family, suggesting that he apply for "protection". When Sunil resisted continuing police approaches to pay them some of the lottery money, he was reportedly arrested by several police officers and badly beaten up. The next day, Sunil's condition deteriorated but he was denied medical care for several hours. He was finally transferred to a hospital, where, despite undergoing brain surgery, he died three days later. Following the lack of an effective investigation, the case has now been brought before the United Nations (UN) Human Rights Committee.[26] In a further case reported from Nepal, a then police officer who refused to collect some gold on behalf of his superior - which was not within the scope of his duty – was accused of having stolen the gold, held incommunicado and tortured in 2002. Thereafter, he filed a case under the Torture Compensation Act and a separate complaint. This prompted a sustained campaign by the police, reportedly consisting of threats to dismiss him, harassment, the filing of other charges against him and further torture.[27]

Torture frequently functions as a disciplining device to impose or reinforce societal morals and power structures. Consequently, there is a visible nexus between torture and discrimination and marginalisation. Members of groups particularly vulnerable to this form of torture are street children, such as in Brazil;[28] young disadvantaged men in Argentina;[29] alcoholics and drunk persons suffering ill-treatment in sobering up stations, such as in Poland or Russia;[30] persons with mental disabilities, such as in Bulgaria,[31] Croatia,[32] Guatemala,[33] and Moldova;[34] members of minority groups, such as Roma in Croatia, Greece,

[25] *Asia Report*, above note 15, p.30.
[26] See *Complainant's Communication to the Human Rights Committee*, 27 September 2012, available at: http://www.redress.org/downloads/Amarasinghe.pdf.
[27] See Asian Human Rights Commission, 'Nepal: Torture victim denied justice for nine years must be granted protection', 28 October 2011, available at: http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-048-2011.
[28] Committee on the Rights of the Child, *Concluding Observations: Brazil*, UN Doc. CRC/C/15/Add.241, 3 November 2004, paras.64-65.
[29] *Americas Report*, above note 17 p.9.
[30] Information provided to REDRESS (Expert Meeting Transcript). See also Human Rights House Foundation, 'Why do we need sobering-up facilities?', 29 May 2008, available at: http://humanrightshouse.org/Articles/8721.html.
[31] Thomas Hammarberg, 'Inhuman Treatment of Persons with Disabilities in Institutions', *The Council of Europe Commissioner's human rights comment*, 21 October 2010, available at: http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=93.
[32] Information provided to REDRESS (Expert Meeting Transcript).
[33] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez,* UN Doc. A.HRC/22/53, 1 February 2013, para.59, n.75.

Hungary and Romania;[35] indigenous peoples, particularly where they protest against development projects, such as in Colombia;[36] and lower class/caste groups, especially those who transgress perceived boundaries, such as the Dalits in India.[37]

Women are often targeted on account of their gender, such as in the form of rape or sexual violence, including indigenous women in Colombia and Mexico, migrant women in Mexico or women from Eastern Europe trafficked throughout Europe and beyond.[38] Women are also targeted where they do not conform to stereotypical gender roles. In Sudan, for example, women wearing trousers or other "indecent dress", or behaving in an "indecent" manner, such as dancing with men, are liable under public order laws to arrest by the public order police and to flogging following summary trials.[39] Women from South Sudan who live in Sudan and survive by brewing and selling Merissa beer have also been targeted and subjected to whipping under these same laws.[40] In Nigeria, police reportedly raid commercial sex workers and subject them to rape, which is reportedly known as the "fringe benefit attached to night patrol".[41]

Lesbian, gay, bisexual, transsexual and intersex (LGBTI) persons are at considerable risk of torture at the hands of law enforcement agencies, or private actors with the acquiescence of officials. This risk is evident worldwide, with cases reported from a variety of countries, including Cameroon, Croatia, Greece, Peru, Russia, Uganda and Tanzania.[42]

Non-nationals, that is refugees, migrants and others, are frequently vulnerable to torture and ill-treatment, particularly where their legal recognition and status is weak and/or where they face adverse public sentiment, as has been the case in several countries in Africa, the Americas, Asia and Europe. In Cyprus, Turkey and Greece, for example, which are often the first ports of call for refugees coming to Europe, ill-treatment and torture is perceived to be a major problem.[43] The Greek authorities, in addition to leaving migrants destitute and

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[34] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak – Mission to the Republic of Moldova*, UN Doc. A/HRC/10/44/Add.3, 12 February 2009, paras. 42-44.
[35] *Europe Report*, above note 24, p.10.
[36] *Americas Report*, above note 17, p.10.
[37] *Asia Report*, above note 15, p.41.
[38] *Americas Report*, above note 17, pp.11-12.
[39] REDRESS and Sudanese Human Rights Monitor, *No more cracking of the whip: Time to end corporal punishment in Sudan*, pp.12-15, available at: http://www.redress.org/downloads/publications/Corporal%20Punishment%20-%20English.pdf; Strategic Initiative on Women in the Horn of Africa (SIHA), *Beyond Trousers: The Public Order Regime and the Human Rights of Women and Girls in Sudan: A Discussion Paper*, Submission to the 46th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 12 November 2009.
[40] Ibid.
[41] *Africa Report,* above note 24, p.10.
[42] Ibid., p.10*; Americas Report*, above note 17, pp.10-11*; Europe Report,* above note 24, p.10; REDRESS, *Torture in the Middle East and North Africa*, August 2013, pp.12,13 (hereinafter *MENA Report*).
[43] *Europe report,* above note 24, pp.9, 10.

failing to provide protection,[44] have also been found responsible for torturing and ill-treating them, such as Necati Zontul who was raped by Greek coastguards.[45] Women are often at particular risk, particularly of trafficking, where domestic authorities fail to provide adequate protection, such as in Cyprus.[46] Across the MENA region, and particularly in the Gulf states, migrant workers have been targeted for abuse, which is particularly serious for female domestic workers, who in many cases have faced violence and sexual abuse at the hands of their employers. Such abuse is facilitated by the limited status of female domestic workers, who often face significant difficulties in making complaints due to restrictions of their movements and communications imposed by their employers. Furthermore, many do not speak the local language, are unaware of available avenues for protection and recourse, and afraid to risk jeopardising their precarious migrant status.[47]

Excessive use of force during expulsion procedures amounting to ill-treatment if not torture have been reported from several countries, including Belgium and the United Kingdom.[48] There has been increasing concern over reliance on private security firms that are reported to have ill-treated persons subject to deportation, as in the case resulting in the death of the Angolan Jimmy Mubenga in the UK in 2010. After a jury delivered a verdict of unlawful killing in an inquest in July 2013, the Crown Prosecution Service stated that it would reconsider its earlier decision not to press criminal charges.[49]

2.1.3. Perpetrators of torture and ill-treatment

The identity of perpetrators differs depending on the contexts of torture. The police and law enforcement agencies figure prominently, particularly where "routine" torture is widespread. This is common in many parts of the world and has been reported from countries such as Afghanistan, Armenia, India, Nigeria, Peru, Russia and Ukraine. Security and intelligence forces, both "civil" and "military", are frequently notorious for systematic torture of political opponents. In the MENA region, for example, there is a legacy of torture by such forces, including in Algeria, Egypt, Iraq, Jordan, Libya, Morocco and Tunisia.[50] While

[44] M.*S.S. v. Belgium and Greece* (application no. 30696/09), ECtHR Grand Chamber judgment of 21 January 2011.
[45] See *Zontul v. Greece*, ECtHR judgment of 17 January 2012.
[46] *Rantsev v. Cyprus and Russia* (2010), 51 EHRR 1.
[47] *REDRESS and IRCT submission to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on its draft general comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, January 2013, available at: http://www.redress.org/downloads/publications/REDRESS%20%20IRCT%20submission%20-%20CMW%20GC2%20-%20Final.pdf.
[48] Human Rights Committee, *Concluding observations: Belgium*, UN Doc. C/BEL/CO/5, 16 November 2010, paras.20; Matthew Taylor, Paul Lewis and Guy Grandjean, 'Jimmy Mubenga was unlawfully killed, inquest jury finds', *Guardian*, 9 July 2013, available at: http://www.guardian.co.uk/uk-news/2013/jul/09/jimmy-mubenga-unlawfully-killed-inquest-jury
[49] Taylor, Lewis and Grandjean, ibid.
[50] *MENA Report*, above note 42, pp.6-10.

some of these forces are undergoing reforms, particularly following the uprisings across the region, the practice is deeply entrenched as demonstrated by persistent reports about torture, for example in Egypt.[51] Security services have also played an integral role in renditions where they are reported to have tortured suspects, such as in Pakistan, Egypt and Syria. The United Kingdom, Canada, Australia and Germany have reportedly sent information leading to the detention of some of their nationals or sent interrogators from their own security agencies to question detainees held by the Central Intelligence Agency (CIA) in the context of its rendition programme, raising concerns about collusion in violations.[52]

The armed forces of a country are often responsible for torture in times of conflict and counter-insurgency operations, as has been the case in respect of Colombia, the DRC, the Philippines, the United Kingdom, Syria and several others. In Southern Thailand, for example, over 10,000 ethnic Malay Muslims have been detained under Martial Law and Emergency Decrees.[53] Imam Yapa Kaseng, a local religious leader, was arrested by a Special Taskforce in 2008 and died in custody, allegedly as a result of torture. The Army offered conflicting reasons for his death, asserting alternatively that he had fallen to the ground and cracked his ribs or that a soldier had cracked his ribs while trying to resuscitate him.[54] Special forces, such as anti-drug trafficking units in Mexico and the Rapid Action Battalion in Bangladesh have also reportedly been responsible for torture.[55]

A noticeable trend is that of torture reportedly being committed by militias, thugs and other private actors with close links to officials but no official status. Their role has been particularly pronounced in suppressing protests, such as in Egypt in 2011, where they were hired to beat and terrorise demonstrators, and in periods of uncertain transitions, such as in Libya, where the militias failed to disarm following the end of the conflict.[56] These practices result in a blurring of responsibility and heighten a climate of impunity where these actors are allowed to act without constraint and/or where the government has insufficient power to restrain them. In a highly questionable decision, the African Commission on Human and Peoples' Rights held in *Zimbabwe Human Rights NGO Forum v Zimbabwe* that Zimbabwe was not responsible for the conduct of war veterans and members of the ruling party Zanu PF notwithstanding the close links between the veterans and the politicians and an apparent

[51] Association for Freedom of Thought and Expression, Egyptian Center for Economic and Social Rights, Egyptian Initiative for Personal Rights, El Nadim Center for Rehabilitation of Victims of Violence and Torture, 'Failed promises.. and torture continues', 26 June 2013, available at: http://eipr.org/en/pressrelease/2013/06/26/1749.
[52] Open Society Institute, *Globalizing Torture: CIA Secret and Extraordinary Rendition*, February 2013, available at: http://www.refworld.org/publisher,OSI,,,5118ce462,0.html.
[53] *Security Report*, above note 5, p.15.
[54] Ibid., p.16.
[55] *Americas Report*, above note 17, p. 14; *Asia Report*, above note 15, p.28.
[56] *MENA Report*, above note 42, pp.7-9.

state policy of condoning if not supporting their conduct.[57] Such decisions risk facilitating state denial for wrongdoing and undermining protection against, as well as justice for, torture. Concerns over private actors have also grown in the process of privatisation and outsourcing of public functions, particularly in war zones and deportation proceedings, with private firms increasingly exercising considerable powers over individuals, despite concerns over inadequate training, transparency and accountability mechanisms.[58]

Abuse taking the form of intense physical or mental pain or suffering inflicted for a particular purpose is frequently committed by non-state actors. In several countries, the prevalence and consequences of such abuse, which covers a broad spectrum from domestic violence to trafficking, criminal gangs and/or rebel forces, constitutes a major concern for human rights defenders.

As a matter of international law, states are duty bound to repress and respond to any form of ill-treatment, irrespective of the identity of the perpetrator.[59] In practice, states often fail to do so for a variety of reasons. These include inadequate legal protection, for example against sexual violence; institutional shortcomings, such as lack of gender-sensitive units; as well as power structures and discrimination that undermine accountability and access to justice. In Sudan, for example, legislation fails to provide adequate legal protection; it conflates rape with adultery putting women who complain about rape at risk of being prosecuted, creates nominally high evidentiary standards (four male eye-witnesses), and does not adequately criminalise other offences of sexual violence. Combined with the absence of gender-sensitive complaints procedures, and pervasive discrimination, *de jure* and *de facto*, as well as immunities enjoyed by officials, the system is geared towards impunity for gender-based violence.[60]

States are also frequently unable to prevent and/or adequately repress acts amounting to torture and ill-treatment of rebel forces. Examples abound, particularly where there has been violent conflict.[61] In an unusual example of a survivor driven initiative, in the

[57] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 245/02 (2006).
[58] Ibid. at paras.143-154. The lawsuits brought by Iraqi torture victims against several US security firms are of particular note as well, see Laura Raymond, 'Seeking Corporate Accountability for Crimes at Abu Ghraib, Truth-Out/News Analysis', 29 April 2013, available at: http://truth-out.org/news/item/16053-seeking-corporate-accountability-for-crimes-at-abu-ghraib
[59] *Velásquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Merits, Judgment of 29 July 1988, Ser. C No. 4; *Cyprus v. Turkey* (2002), 35 EHRR 30; Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras.15-18.
[60] REDRESS and KCHRED, *Time for Change: Reforming Sudan's* legislation *on rape and sexual violence*, November 2008, available at: http://www.redress.org/downloads/publications/Position%20Paper%20Rape.pdf.
[61] See for example the cases before the International Criminal Court (ICC): *The Prosecutor v. Thomas Lubanga Dyilo*, (ICC-01/04-01/06)(DRC); *ICC Prosecutor v. Bosco Ntaganda,* (ICC-01/04-02/06 (DRC); *ICC Prosecutor v. Jean-Pierre Bemba Gombo,* (ICC-01/05-01/08) (Central African Republic); *ICC Prosecutor v. Laurent Gbagbo,*

Philippines, the group Peace Advocates for Truth, Healing and Justice (PATH) documented torture and ill-treatment by cadres of the Communist Party of the Philippines-New People's Army (CPP-NPA) as part of an "anti-infiltration" campaign in the 1990s.[62] In so-called failed states, it may not even be clear who is exercising state power, with various forces exercising control over territory and persons, as has happened at various times in Afghanistan, Pakistan and Somalia.

These realities have resulted in calls for a broadening of the understanding, if not the definition, of torture.[63] Torture as defined in article 1 UNCAT requires some official involvement, which may range from directly committing the torture to acquiescence in the torture, including by failing to act in the face of allegations of acts of severe mental or physical pain or suffering inflicted by non-state actors. The similar nature of the pain and suffering experienced by victims, the often fluid nature of the exercise of power, going beyond the state and including local power brokers, businesses, rebels and individuals, and the need for greater protection have been put forward as arguments for a broader understanding of torture.[64] International humanitarian law and developments in international criminal law seem to support this viewpoint, as they do not require the involvement of an official for an act to be understood as torture, relying instead on the nature of the act and the power relationship between the victim and the perpetrator.[65] While many see the current definition of torture as too state-centric and narrow, excluding multiple forms of violence in non-state power relationships, others are concerned that broadening the definition would make the prohibition of torture too diffuse, making a catch-all norm that dilutes the focus on the state and undermines the prohibition and its implementation. Such a broadening may remove the notion of abuse of authority as a crucial and distinctive component of torture, and result in a weakening of the term if used to designate a large variety of abuse in different contexts by different actors. The Belgian experience is instructive in this regard. Belgium's anti torture provision defines torture to include both state and non-state actors. The only two prosecutions under the provision have been against non-state actors. In the first case, a man threw sulphuric acid on his former partner's face, and in the second case a woman who was seen as being unable to bear children was subjected to various forms of ill-treatment – in an exorcism ritual –

(ICC-02/11-01/11) (Côte d'Ivoire); *ICC Prosecutor v. Simone Gbagbo,* (ICC-02/11- 01/12) (Côte d'Ivoire) and *ICC Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, (ICC-02/04-01/05) (Uganda).

[62] See by Robert Francis B. Garcia, Secretary General, PATH (Peace Advocates for Truth, Healing and Justice), 'Introduction', in REDRESS, *Not only the State: Torture by non-state actors*, May 2006, pp.4-7, available at: http://www.redress.org/downloads/publications/Non%20State%20Actors%209%20June%20Final.pdf.

[63] This issue was discussed in some detail at some of the regional meetings, particularly in the African context.

[64] Ibid.

[65] On international criminal law, see in particular article 7(1)(f) on cries against humanity and article 8(2)(a)(ii)-1 of the ICC Elements of Crime, reproduction of the official records is available at: http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

resulting in her death.[66] Debates surrounding the understanding of torture are therefore not merely of a theoretical nature. They are often of considerable practical importance, particularly when defining torture in national legislation. In the Philippines, for example, several NGOs argued that the definition of torture should be in line with article 1 UNCAT whereas victims of torture by the Communist party and others argued for a broadening of the definition to include non-state actors.[67] These debates illustrate differences in approaches of both a fundamental and strategic nature, driven by the need to fashion adequate responses to serious abuse, including by actors other than the state.

2.1.4. Methods of torture and ill-treatment

Torture is frequently committed in a context where its secrecy and denial forms an integral part of the exercise of power over the victims. Combined with the stigma, fear and trauma it engenders, this reality leads to an under-reporting of torture. While it is therefore difficult to provide a full account of torture practices, documentation by rehabilitation centres and medical experts, commissions of inquiry, truth and reconciliation commissions and other bodies, as well as an increasing body of jurisprudence - together with detailed reports, studies, autobiographies and audio-visual evidence- mean that there is a wealth of knowledge about the methods of torture.[68] This was evident in the discussions of the regional expert seminars organised by REDRESS, which confirmed that many of these methods, such as beatings, applying electroshocks, hanging by the limbs, sexual violence and various forms of threats, are to varying degrees common around the world.[69] Nevertheless, there are distinctive national and regional (and even institutional) cultures of torture characterised by particular methods. In Nigeria, for example, mosquitos, flies, spiders, rats or snakes are reportedly used as part of the torture as most individuals have a phobia of at least one of these animals.[70]

Certain methods of torture are particularly pronounced in times of conflict, such as sexual violence, or as counter-insurgency measures, such as the “five techniques” (wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink). As became evident in the course of public inquiries prompted by litigation brought by the United Kingdom (UK) group Public Interest Lawyers and others, the UK army used these techniques in Iraq, notwithstanding the fact that the European Court of Human Rights

[66] *Europe Report*, above note 24, p.30.
[67] Robert Francis B. Garcia and Soliman M. Santos, Jr., ‘The Anti-Torture Law: a good advance but misses out on non-state torture’, 2009, available at: http://www.southsouthnetwork.com/calasag_antitorturelawgoodadvance.html.
[68] See in particular Dignity Documentation Centre and Library website, http://www.reindex.org/RCT/rss/Portal.php.
[69] See references to Practice and Patterns of Torture in *Africa Report, Europe Report, Americas Report*, available at: http://www.redress.org/reports/reports.
[70] *Africa Report*, above note 24, p.9.

(ECtHR) had found that their use in Northern Ireland had violated article 3 of the European Convention on Human Rights (ECHR) and the UK government had banned use of the techniques in 1972.[71]

Training of national security forces, exchange of experiences and techniques, and the export of specific equipment has resulted in distinctive torture methods in several contexts.[72] However, even without such "support", many methods of torture are widely known, or local actors develop and apply such methods as they proceed. There are, nevertheless, some notable differences between systematic torture and "routine" torture, with the latter tending to be more random in nature. There is also evidence to suggest that security services and law enforcement agents resort to torture methods that leave no traces, like the five techniques,[73] when there is a likelihood that the detection of torture will lead to accountability or otherwise have detrimental consequences for the perpetrators.[74]

"Physical torture", that is, acts primarily targeting the body, is still widespread. It frequently ranges from initial beatings to extreme violence, such as "Palestinian" hanging, where the victim's bound wrists are suspended from a wall and which can cause lasting damage or death. "Psychological torture", i.e. methods primarily targeting the mind, is reportedly used widely, particularly in the counter-insurgency context, and often in combination with physical torture. In the MENA region, for example, methods of torture reported include severe beatings, in particular to sensitive parts of the body such as falanga (beating the soles of the feet); electric shocks; sleep deprivation; denial of use of hygiene facilities; being forced to stand for long periods; suspension from the wrists; sexual abuse and humiliation; threats and insults to a victim's family, in particular female family members; insults against religion; and other forms of verbal abuse and humiliation. Methods such as the five techniques and mock executions, for example in Bangladesh[75] and Sudan,[76] are also reported to be common.

In many countries, the notion of torture is still largely seen as synonymous with physical violence only, going hand in hand with a reluctance to recognise psychological evidence of torture. As a result, there are very few reparation awards for treatment that does not

[71] See REDRESS, *UK Army in Iraq: Time to come clean on civilian torture*, October 2007; *The Report of the Baha Mousa Inquiry*, The Rt Hon Sir William Gage (Chairman), 3 Volumes (2011). For latest updates, see www.publicinterestlawyers.co.uk.
[72] See Marjorie Cohn, 'Training torturers: The School of the Americas', in ACAT, *A World of Torture*, 2013, pp. 233-241, and Dymond and Farha, above note 7.
[73] See above p.13.
[74] See also Rejali, above note 8, particularly pp.405-444.
[75] See Human Rights Watch, 'The Torture of Tasneem Khalil', 14 February 2008, available at: http://www.hrw.org/node/62431/section/6.
[76] Saeed Kamali Dehghan, and James Copnall, 'Arrested, beaten and tortured: young Briton describes year of terror in Sudan', *Guardian*, 6 August 2012, available at: http://www.guardian.co.uk/world/2012/aug/06/arrested-beaten-tortured-briton-sudan (Magdy al Baghdady's full statement is on file with REDRESS).

clearly fall within the preconceived category of torture. Challenges at the national level to detention in Polish "sobering houses", for example, have failed as there is no consensus on whether the practice in these facilities constitutes ill treatment. These facilities are operated in cooperation with the police to bring individuals who are drunk in public into the house, where there is a doctor and a few strong men. The person is then stripped, tied naked to a metal table with leather straps and left there until they are sober, which can be up to 20 hours, without water or the possibility of going to the bathroom. They are then charged for the cost of their stay.[77] While the pain and suffering inflicted can be extreme, and can therefore be most effective to achieving whatever purpose it is aimed at, victims of such ill-treatment often face a considerable struggle to combat official denial and prove the credibility of their accounts.

Sexual acts of torture and ill-treatment cover a broad spectrum, ranging from humiliation of a sexual nature (often combined with racist or other derogatory remarks), both verbal and physical, to rape. Examples include Abu Ghraib in Iraq (simulated sex), vaginal examinations (Egypt, Greece), threats of rape (including of family members) and various forms of rape, including with objects. Torture frequently targets the genitalia, such as applying electroshocks to testicles, both to increase the pain and, like acts of sexual humiliation and penetration, to damage if not destroy the identity of the victim as a sexual being.[78] Sexual acts of torture are often directed both at the victim him/herself and at family and community members, to elicit information, coerce others and mete out punishment, besides reinforcing power relationships.

There have been a series of landmark judgments on rape and other forms of sexual violence against women as a form of torture in countries such as Peru, Russia and Turkey.[79] Nevertheless, sexual acts of torture are believed to be widely under-reported because the stigma attached to them may militate against bringing complaints and/or pursuing remedies. This includes sexual torture committed against men, which has received comparatively little attention in terms of concerted responses. Its prevalence, if not systematic use, is becoming increasingly well documented in commissions of inquiry, such as Bahrain's Independent Commission of Inquiry, and individual cases. This applies to a

[77] Information provided to REDRESS (Expert Meeting Transcript). See also Human Rights House Foundation, 'Why do we need sobering-up facilities?', 29 May 2008, available at: http://humanrightshouse.org/Articles/8721.html.

[78] See *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, UN Doc. A/HRC/7/3, 15 January 2008, paras.25-76.

[79] This includes *Castro-Castro Prison v. Peru* before the Inter-American Court, *Aydin v. Turkey* and *Maslova v. Russia* before the European Court of Human Rights, and a series of cases before both the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda. See REDRESS and KCHRED, *Time for Change*, above note 60, pp.10-15; REDRESS and Amnesty International, *Gender and Torture: Conference Report*, 2011, available at: http://www.redress.org/downloads/publications/GenderandTortureConferenceReport-191011.pdf and REDRESS' Report on rape as torture and ill-treatment (forthcoming).

range of countries such as Bahrain, Greece, Peru, Saudi Arabia, Sri Lanka, Sudan and Uganda where male detainees have been raped or threatened with rape by officials.[80] Persons from the LGBTI community are often particularly at risk. For example, in the Aceh province of Indonesia, a homosexual couple was arrested, sexually abused and stripped naked by police in 2007, before being released on condition that one of them signed a statement that they would no longer engage in homosexual acts.[81] In addition, male detainees are often at risk of sexual abuse by both officials and/or other inmates.[82] In Peru, Luis Alberto Rojas Marin was raped with a rubber baton and robbed of his belongings by police in 2008.[83]

Ill-treatment takes myriad forms, as demonstrated by the jurisprudence of courts and human rights treaty bodies, reports and the experience of human rights defenders.[84] In addition to custodial issues of long-standing concern, such as poor prison conditions, solitary confinement, and denial of adequate medical care, which were found to be prevalent to varying degrees in all regions,[85] there has been an increasing practice of ill-treatment outside the custodial context. This applies in particular to the use of excessive force, and other methods, during demonstrations. In the course of the uprisings in the Arab world, police, security and army forces repeatedly used teargas, birdshot and other weapons. In Bahrain, for example, protesters were targeted and in several instances deliberately attacked – even though they ostensibly did not pose a security threat – a pattern suggesting that the policing of demonstrations was used as a cover for torture.[86]

Most states do not resort to corporal punishment, such as stoning, amputations and flogging. However, several states do apply such punishments. These include Iran, Saudi Arabia and Yemen, which apply the Shari'a (Islamic law) punishments of hudud (stoning,

[80] *Africa Report*, above note 24, pp.8, 10; *Americas Report*, above note 17, pp.10-11; *Europe Report*, above note 24, p 10; REDRESS and IRCT, *Bahrain: Fundamental Reform or Torture Without End?*, April 2013, p. 20 (*Bahrain Report*), available at: http://www.redress.org/downloads/publications/Fundamentalreform.pdf. See also OCHA Policy Development and Studies Branch, *The Nature, Scope and Motivation for Sexual Violence Against Men and Boys in Armed Conflict*, UN OCHA Research Meeting (June 26, 2008), p.5, available at: http://gender.care2share.wikispaces.net/file/view/Discussion+paper+and+Lit+Rev+SV+against+Men+and+Boys+Final.pdf.

[81] *Asia report,* above note 15, p.63.

[82] See in this context also Michael Peel, 'Men as Perpetrators and Victims', in Michael Peel (ed.), *Rape as a Method of Torture* (Medical Foundation for the Care of Victims of Torture, 2004), pp.61-69.

[83] REDRESS and CNDDHH, *Torture in Peru: Alternative Report Submitted to the Human Rights Committee*, March 2013, p. 2, available at: http://www.redress.org/downloads/publications/Peru%20HRC%20shadow%20report%20FINAL%20for%20website.pdf.

[84] See the regular reports by the UN Special Rapporteur on Torture at http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx. See also Nigel Rodley and Matt Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford University Press, 2011), pp. 125-144.

[85] See references to Practice and Patterns of Torture in *Africa Report, Europe Report, Americas Report*, MENA, ASIA, available at: http://www.redress.org/reports/reports.

[86] See REDRESS and IRCT, *Bahrain,* above note 80, pp.23-29. See on concerns over practices in Turkey in this regard, *Case of Izci v. Turkey*, Application No.42606/05, ECtHR Judgment of 23 July 2013.

amputations, including cross-amputations, and flogging) and quisas (retribution) and other states, such as Malaysia, whose laws prescribe caning as a judicial punishment and disciplining device.[87] The practice of some countries, such as Sudan, which apply both shari'a punishments and flogging for public order offences, has raised concerns, both in relation to the degrading nature of the punishments and their arbitrary use, targeting particularly women and members of marginalised groups.[88]

Around 58 states retain the death penalty, which raises further concerns.[89] These include the imposition of capital punishments following unfair trials, such as in Sudan and Uzbekistan, convicts being kept for years on death row, such as in Japan[90] and in nine of the Caribbean countries,[91] as well as cruel, inhuman and degrading execution methods such as hanging.[92] Many observers consider the death penalty to be inherently inhuman, a position that has found support at the regional level in the jurisprudence of the European Court of Human Rights.[93]

2.1.5. Causes of torture and ill-treatment

Combating torture requires an understanding of the factors contributing to its perpetuation. While it is difficult to identify the causes of torture, which are only rarely set out in explicit terms, the context and purposes can provide a good indication. This is arguably clearest where torture forms part of a broader security paradigm and is used to combat insurgencies, "terrorism" or any perceived threats to power. Resort to torture and ill-treatment continues to be common in these circumstances.[94] This is especially true when torture constitutes an integral means of exercising power and repressing any opposition and/or in the course of conflict. Resort to torture and other ill-treatment in such circumstances is often a recurring pattern of a country's history, and often stretches back to

[87] See for an overview of developments, with a particular focus on worldwide moves towards the abolition of corporal punishment, REDRESS and Sudanese Human Rights Monitor, *No more cracking of the whip,* above note 39, pp.38-43, and on international standards, ibid., pp.17-35.
[88] Ibid.
[89] Amnesty International, *The Death Penalty in 2012*, available at: https://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2012.
[90] *Concluding observations on the second periodic report of Japan*, UN Doc. CAT/C/JPN/CO/2, 28 June 2013, para.15.
[91] The Bahamas, Barbados, Belize, Grenada, Jamaica, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, and Trinidad and Tobago maintain the death penalty. See The Death Penalty Project website, http://www.deathpenaltyproject.org/where-we-operate/caribbean/.
[92] See *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, 9 August 2012, paras.33-36.
[93] Ibid., with particular reference to *Öcalan v. Turkey* and *Al-Saadoon and Mufdhi v. United Kingdom*.
[94] See in *particular Joint study on global practices in relation to secret detention in the context of countering terrorism (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the working group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the working group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin)*, UN Doc. A/HRC/13/42, 19 February 2010.

colonial times. In the case of the UK, for example, the use of torture formed part of responses to anti-colonial uprisings, such as with the Mau-Mau in Kenya, to conflict within the UK, particularly in Northern Ireland, and to armed conflict abroad, as in Iraq.[95]

Identifying the purpose of torture beyond apparent political and security rationales can be difficult. However, anecdotal evidence and country reports suggest that certain factors contribute to the prevalence of torture, particularly by law enforcement agencies. Weak rule of law, a lack of legal protection and malfunctioning institutions coupled with discrimination and marginalisation are at the heart of systems in which torture is routinely used. In several countries across different regions, resort to torture is widely believed to be integral to police investigations, with torture used as a shortcut in lieu of other investigation methods. In Sri Lanka, for example the police reportedly routinely resort to torture to "solve" cases. In addition, torture is used to extort money, leading to its "commercialisation". It is also employed as a means to further the interests of powerful actors, such as local business persons or politicians, with policing reflecting local power structures rather than public interest. Violence against women, both by law enforcement agencies and by private actors, with the police and other institutions failing to provide protection, is to varying degrees prevalent in all regions. In the MENA region, for example, practitioners working on such cases attributed the prevalence of violence against women to widespread discrimination, which is reflected in law, policy and many areas of society.[96]

Inadequate legal frameworks, such as a lack of anti-torture legislation, limited custodial safeguards, ineffective complaints procedures and obstacles to access to justice facilitate torture and entrench impunity. While legislation reflecting international standards is an important element, it is generally acknowledged that this is insufficient on its own where not complemented by institutional responses and protections.

Routine torture and ill-treatment is facilitated by an environment marked by a lack of internal control and adequate external oversight, particularly where institutions such as the judiciary or national human rights commissions are not sufficiently strong and/or independent. The resulting impunity means that law enforcement frequently turns from a service into a force that exercises its power arbitrarily. This is primarily at the expense of those who do not have the wherewithal to resist, and therefore entrenches class divisions, marginalisation and exclusion, both in terms of denying protection and subsequent lack of access to justice.

In the absence of a functioning justice system, it is often civil society and the media who try to raise awareness of, and concern about torture, demanding protection and accountability.

[95] *Europe Report*, above note 24, pp. 13-14. See also *Concluding observations on the fifth periodic report of the United Kingdom*, adopted by the Committee at its fiftieth session (6-31 May 2013), Advanced Unedited Version, paras.16-17.
[96] *MENA Report*, above note 42, pp.10, 11.

This has resulted in some responses. In Yemen, for example, a hunger strike by aa group of 22 Revolutionary Youth detainees who had been detained for two years without charge attracted the attention of the Minister of Human Rights, who threatened to join the detainees in their strike if they were not released. In response, President Abdu Rabbu Mansour Hadi ordered the Attorney General to release all 22 of the youths, and 17 were indeed released. However five of them still remain in prison.[97] Such advocacy, however, is often of limited immediate effect where journalists and civil society activists themselves face adverse repercussions, particularly in highly repressive systems.

Regional and international mechanisms and fora can play an important role in the absence of effective legislative and institutional protection at the domestic level. Human rights lawyers, NGOs and others have used these avenues – by means of litigation, submission of shadow reports or other interventions - to expose violations, raise awareness, demand protection, justice and reparation, and call for broader reforms. The purpose of these interventions has been to secure protection and justice in individual cases and to bring about wider change, using regional and international bodies as pressure points.[98] Bringing specific cases and/or pursuing a sustained strategic engagement with bodies, as with Turkey and Russia before the ECtHR, or in relation to Sudan and Zimbabwe before UN organs, special procedures, treaty bodies and African bodies, have resulted in a series of mostly favourable decisions.[99]

The effectiveness of these bodies to prevent torture and provide justice varies considerably, and depends on the broader political context. For example, Turkey's compliance with ECtHR judgments is encouraged by the fact that such compliance forms part of the criteria for Turkey's accession to the European Union (EU). However, while states such as Russia and Turkey have paid compensation and instituted some legislative and institutional changes, they have largely failed to ensure accountability of perpetrators of torture, particularly in relation to the conflict in Chechnya and the Kurdish areas of Turkey respectively. The recent practice of the ECtHR of using pilot judgments in article 3 ECHR cases carries some promise that it may compel states to address deep-seated structural problems, such as conditions of detention.[100] In other countries that lack a political context to encourage compliance, such as Sudan or Sri Lanka, there is limited evidence that sustained engagement of multiple regional or international bodies has brought about fundamental structural changes, though engagement has provided at least some level of protection in individual cases. This

[97] Nadia Al-Sakkaf and Samar Al-Ariqi, '17 Revolutionary Youth Go Home Thursday, 5 Still Behind Bars', *Yemen Times*, 6 June 2013, available at: http://yementimes.com/en/1683/news/2451/17-Revolutionary-Youth-go-home-Thursday-5-still-behind-bars.htm.

[98] See in particular Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights, From Commitment to Compliance* (Cambridge University Press, 2013).

[99] See on the jurisprudence on torture the OMCT Handbook Series on the bringing cases before the various treaty bodies and courts, and their jurisprudence at www.omct.org.

[100] *Ananyev and Others v. Russia*, [2012] ECHR 21.

illustrates the limits of regional and international bodies' capacity to act as a counterweight against continued resort to torture, at least in the short term, where civil society and other actors are facing sustained repression and where regional and international actors exercise limited political leverage to encourage implementation. Nevertheless, regional and international bodies are important fora of both contestation and constructive engagement, which have contributed to a series of discrete changes in national laws and practices pertaining to torture. This has been particularly evident in the Americas and in the broader Council of Europe context, and to some degree in the African system. In contrast, the absence of effective regional mechanisms in the Middle East or Asia is seen as one of the factors contributing to a comparatively weak coordination of anti-torture work across these regions.

2.1.6. Social and cultural dimensions

Torture often forms part of a broader spectrum of violence, which can cut across different levels of society, ranging from corporal punishment in education, domestic violence, crime to ill-treatment, custodial torture and conflict-related violations. There is no intrinsic causal relationship forcing one of these practices to lead to another. However, human rights defenders working on torture frequently express concerns about the general acceptance of violence in their societies as conducive to torture. Such an acceptance tends to reduce opposition to the idea that resort to violence is an acceptable way of solving disputes and treating other human beings. Such attitudes are often seen to be particularly strong where societies are highly stratified, divided among community lines, are highly "patriarchal", or in countries experiencing political transitions or political crisis, or high rates of crime. Countries hostile to those viewed as outsiders, including minorities, often also display a greater acceptance of violence vis-à-vis members of these groups. While such a "culture of violence" does not necessarily translate into greater prevalence of torture, it often sets a pattern that is reflected in how authorities interpret and exercise their powers. There is substantial evidence, shared across regions, that torture replicates broader societal power relations and that its practice disproportionately targets members of certain groups vulnerable on account of their marginalisation and outsider or enemy status.[101]

Societal power structures and marginalisation are equally reflected in the level of access to justice. Those working on behalf of torture victims are well aware of the nexus between societal status and accessibility to justice, which has been the focus of a series of recent reports by various UN special procedures.[102] Marginalised victims of torture frequently have

[101] See above at 2.1.2 and 2.1.5.

[102] See for example *Report of the Special Rapporteur on extreme poverty and human rights* [on access to justice by people living in poverty*]*, UN Doc. A/67/278, 9 August 2012; *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/HRC/11/41, 24 March 2009, paras.14-84 and 95-104; Human Rights Committee, *General Comment No. 32*: *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, paras.9-14; Committee on Migrant Workers, *General*

limited trust in authorities and the formal justice system, which they may view as intrinsically hostile. Foreign nationals or stateless persons with an uncertain status, minorities and indigenous peoples who struggle to have their rights recognised and respected, or persons with mental disabilities often have limited reason to believe that officials or judges will handle complaints or lawsuits without prejudice. This sentiment is often accentuated where victims have been criminalised, particularly on account of their status, such as LGBTI persons. The limited trust is often vindicated where authorities and judges dismiss accounts as unreliable or untrustworthy because of status of the victims.[103] Even if this lack of trust were overcome, other hurdles frequently constitute considerable barriers, including affordability of proceedings, access to a trustworthy lawyer, and the ability to effectively participate in proceedings where appropriate.[104]

The lack of effective access to justice can create a vicious circle of entrenched vulnerability because perpetrators know that violations are unlikely to be punished, further tipping the balance of power in their favour. Such a cycle highlights the importance of giving victims a stronger voice in public, which generates momentum to strengthen protection and effective access to justice. Redressing these imbalances clearly requires often wholesale reforms of the law and the administration of justice.

2.2. Torture and ill-treatment in situations of heightened tension

Torture is often particularly pronounced where levels of fear and tensions are high and/or where law and order has broken down. These situations merit special consideration in terms of the prevalence and nature of torture, securing evidence, and providing protection.

2.2.1. Armed conflict

The jurisprudence of international criminal tribunals, reports by several commissions of inquiry, as well as by NGOs and others demonstrate that torture and other forms of ill-treatment are widespread during armed conflict.[105] The accounts of experts from countries that have experienced or are experiencing conflict, such as Afghanistan, DRC, Colombia,

Comment No. 2: *Rights of migrant workers in an irregular situation and members of their families*, UN Doc. CMW/C/GC/2, 28 August 2013.

[103] See for example the ruling of the Spanish Supreme Court in the case of Igor Portu and Mattin Sarasola, where four police officers were acquitted of torturing the ETA militants because the judges believed the torture allegations were part of the "political-military strategy" of ETA. 'Four Spanish police cleared of torturing Eta militants', *BBC*, 15 November 2011, available at: http://www.bbc.co.uk/news/world-europe-15743175.

[104] See in this regard also report by the UN Special Rapporteur on Extreme Poverty and Human Rights, above note 102.

[105] See in particular the reports by UN Commissions of Inquiry on Darfur, Gaza conflict, Libya, Syria and Cote d'Ivoire as well as the UN Expert Panel on Sri Lanka, available at www.ohchr.org.

Libya and Russia (e.g., Chechnya), corroborate this reality.[106] While truth and reconciliation commissions in countries such as Sierra Leone have sought to draw lessons from past experiences, violations frequently continue unabated in other countries until conflicts exhaust themselves.

The practice of torture in armed conflict is characterised by a series of interrelated features: (i) it takes place in a situation often defined as either a state of emergency or lawlessness and insecurity, or both; (ii) the identity of the perpetrators may not be clear (not identifiable by uniform, having faces covered); (iii) perpetrators are often non-state actors or their status may be unclear; (iv) perpetrators may also become victims or may be simultaneously victims and perpetrators, such as child soldiers; (v) methods of torture used are often extremely brutal and cruel, such as mass rapes or mutilations, because perpetrators act with little constraint and often intend to spread fear or inflict revenge while victims are being dehumanised; (vi) individuals or groups of victims are frequently targeted based on their identity, such as belonging to a particular group, which heightens their vulnerability and goes hand in hand with a lack of protection as legal and institutional systems of protection and justice are weak or have broken down; and (vii) subsequent legal attempts to secure accountability and justice frequently face severe political, security and evidentiary obstacles.

Sexual violence in particular continues to be widespread in armed conflict, committed by both state and non-state actors. Such violence has received increasing attention, as reflected in UN reports, human rights jurisprudence, cases before international criminal tribunals and media coverage.[107] Yet lack of protection and impunity often persist as normative and institutional developments, particularly at the international level, have yet to translate into effective practice. In a notable step, the DRC instituted a programme of mobile courts in 2010. This programme has a strong emphasis on prosecuting cases of sexual violence, but its remit also covers other offences and it includes both civilian and military courts. Trials conducted by these courts have succeeded in holding some of the perpetrators accountable and have reportedly been well received by the local population

[106] See *Africa Report,* above note 24, p. 5; *Americas Report,* above note 17, pp.14-15; *Europe Report*, above note 24, p.12; *MENA Report*, above note 42, pp.8, 9.

[107] See for example OCHA Policy Development and Studies Branch, *The Nature, Scope and Motivation for Sexual Violence Against Men and Boys in Armed Conflict*, UN OCHA Research Meeting (26 June 2008), available at: http://gender.care2share.wikispaces.net/file/view/Discussion+paper+and+Lit+Rev+SV+against+Men+and+Boys+Final.pdf.

and international observers,[108] although problems with corruption, lack of resources and equal access to the courts remain.[109]

Increased engagement of military forces acting outside their home state, either acting on their own, in coalitions or as part of multinational forces, has resulted in a growing number of abuses. For example, there are numerous examples of peacekeeping troops being implicated in sustained acts of sexual exploitation and abuse;[110] foreign troops have engaged in torturing civilians, such as in the case of Baha Mousa, an Iraqi civilian who was beaten and kicked to death by UK soldiers.[111] The large number of allegations that have been raised against UK forces by Iraqi nationals, as well as concerning the conduct of other forces, including US troops, illustrate that cases are not as isolated as their public portrayal frequently suggests.[112] The practice of handing over suspects to local authorities or forces, such as by the UK and US forces in Iraq and Afghanistan even though these local actors have a poor record of respecting the prohibition of torture, also raises concerns.[113]

These developments have triggered litigation at the national and international level.[114] Efforts to obtain justice for violations committed by troops abroad face considerable challenges and complex legal questions in respect of jurisdiction, establishing responsibility and adequate implementation. Ultimately, litigation has been largely successful in establishing that human rights obligations apply extraterritorially, and therefore fall within the jurisdiction of a state, particularly where a person is under the effective control of forces and/or during times of occupation.[115] As a result, some states, particularly the UK, established commissions of inquiry and paid compensation to claimants. These belated

[108] Passy Mubalama and Simmon Jennings, 'Roving Courts in Eastern Congo', *Institute for War & Peace Reporting*, 13 February 2013, available at: http://iwpr.net/report-news/roving-courts-eastern-congo; Open Society Initiative for Southern Africa, 'DRC mobile gender courts nominated for award', 26 September 2012, available at: http://www.osisa.org/law/drc/drc-mobile-gender-courts-nominated-award.

[109] REDRESS, *Submission to the Committee on the Elimination of Discrimination Against Women for Consideration of the Combined 6th and 7th Report of the Democratic Republic of the Congo*, 24 June 2013, available at: http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/REDRESSsubmission_ForTheSession_DRC_CEDAW55_E.pdf.

[110] See, e.g., Chiyuki Aoi, Cedric de Coning, and Ramesh Thakur (eds.), *Unintended Consequences of Peacekeeping Operations* (New York: United Nations University Press, 2007); Prince Zeid Ra'ad Zeid Al-Hussein, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations', UN Doc. A/59/710, 24 March 2005.

[111] See *Al-Skeini and Others v. United Kingdom*, (2011) 53 EHRR 18.

[112] See on the UK, for example, Ian Cobain, 'MoD pays out millions to Iraqi torture victims', *Guardian*, 20 December 2012, available at: http://www.guardian.co.uk/law/2012/dec/20/mod-iraqi-torture-victims?INTCMP=SRCH.

[113] See in this regard, United Nations Assistance Mission in Afghanistan, *Treatment of Conflict-Related Detainees in Afghan Custody One Year On*, 2012, available at: http://unama.unmissions.org/LinkClick.aspx?fileticket=VsBL0S5b37o%3d&tabid=12254&language=en-US.

[114] See in particular *ER (on the application of Evans) v. Secretary of State for Defence*, [2011] ACD 11, [2010] EWHC 1445 (Admin); *Al Saadon and Mufdhi v. United Kingdom*, {2009} 49 EHRR SE 11.

[115] *Al-Skeini and Others v. United Kingdom*, above note 111.

responses brought to light a series of shortcomings in the rules of engagement, training, conduct and accountability mechanisms in operation, and led to a series of institutional changes.[116] However, some responses, such as the establishment of the so-called Iraq Historical Allegations Team (IHAT) have been mired in legal proceedings as doubts persist over its independence and effectiveness.[117]

The legal situation is less certain in respect of the conduct of multinational forces. It has been accepted that international humanitarian law applies to their conduct.[118] International human rights law, including during times of armed conflict, is seen to apply primarily to states, particularly states party to a treaty. These states may be absolved from responsibility if the conduct of their troops is attributed to the international organisation through which they are acting, which risks resulting in an accountability gap.[119]

2.2.2. Counter-terrorism and security

Concerns about counter-terrorism measures and torture predate the attacks of 9/11. What made responses to these attacks unique, however, was the concerted effort made to establish an international legal regime for combating terrorism. As a result, all states were mandated to adopt counter-terrorism legislation and measures by virtue of UN Security Council resolution 1373 (2001). This resolution, and parallel national developments, reinforced security paradigms and led to the adoption or revision of security/anti-terrorism legislation in many countries.[120] These developments eroded safeguards and protection, and resulted in heightened vulnerability of those suspected of being involved in terrorist activities.

The response of the then US administration to 9/11 in particular has raised a series of concerns and set a negative example by undermining the absolute prohibition of torture and engaging in conduct violating the same. This was done by (i) questioning whether the absolute prohibition of torture should apply to terrorism suspects; (ii) narrowing the definition of torture, infamously excluding waterboarding from its scope, and claiming that certain obligations, such as the prohibition of refoulement, do not apply to other acts of ill-treatment; (iii) seeking to place detainees outside the protection of the law (particularly in the detention facilities at Guantanamo Bay); (iv) restricting public scrutiny and access to justice, especially by classifying information and relying on the defence of national security; (v) putting in place a sophisticated programme, in collusion with other countries, in which

[116] See in particular the Report of the Baha Mousa Inquiry, above note 71.
[117] See REDRESS, 'Ali Zaki Mousa and others v Secretary of State for the Defence', available at: http://www.redress.org/case-docket/single-iraq-inquiry.
[118] See ICRC, 'Multinational forces', 29 October 2010, available at: http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/multinational-forces/overview-multinational-forces.htm;
[119] See Scott Sheeran, *Briefing Paper: Contemporary Issues in UN Peacekeeping and International Law*, (IDCR, 2 September 2010), available at: http://www.idcr.org.uk/wp-content/uploads/2010/09/02_11.pdf.
[120] *Security Report*, above note 5, p.5.

terrorism suspects would be rendered to be interrogated and ill-treated if not tortured in the process; (vi) effectively providing impunity for those responsible for committing torture, or colluding in the practice.[121]

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism described the main elements of the US rendition programme as follows:

> On 17 September 2001 President Bush authorised the CIA to operate a secret detention programme which involved the establishment of clandestine detention facilities known as "black sites" on the territory of other States, with the collaboration of public officials in those States. At about the same time he allegedly authorised the CIA to carry out "extraordinary renditions" (the secret transfers of prisoners outside any lawful process of extradition or expulsion) enabling them to be interrogated whilst in the formal custody of the public officials of other States, including States with a record of using torture. At the beginning of August 2002 the Justice Department's Office of Legal Counsel purported to authorise a range of physical and mental abuse of terrorist suspects known as "enhanced interrogation techniques". The Bush administration has since publicly acknowledged the use of "waterboarding" on "high value detainees" on the personal authority of the President.[122]

The authorised treatments were divided into three basic categories by a 10 May 2005 memorandum from the US Department of Justice Office of Legal Counsel: "conditioning techniques", "corrective techniques", and "coercive techniques".[123] Conditioning techniques were designed to demonstrate to the detainee that he had no control over basic human needs. They include nudity, dietary manipulation and sleep deprivation. Corrective techniques were used "principally to correct, startle, or … achieve another enabling objective with the detainee." The specific techniques include facial slaps, abdominal slaps, facial hold and attention grasp. Coercive techniques "place the detainee in more physical and psychological stress." These measures consist of walling (up to thirty times in a row),

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[121] See Human Rights Committee, *Concluding Observations: United States of America*, above note 11, paras.11-21; Committee against Torture, *Concluding Observations: United States of America*, above note 11, paras.25-26; Philippe Sands, *Torture Team: Rumfeld's Memo and the Betrayal of American Values*, (Palgrave McMillan, New York, 2008); Larry Siems, *The Torture Report: What the Documents Say About America's Post-9/11 Torture Program*, (OR Books, New York, London, 2011).

[122] *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, 'Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives', UN Doc. A/HRC/22/52, 1 March 2013, para.15.

[123] CIA, 'Background Paper on CIA's Combined Use of Interrogation Techniques (undated) (redacted)', Fax from [redacted], Central Intelligence Agency, to Dan Levin, Office of Legal Counsel, Department of Justice, 30 December 2004 (released 24 August 2009), p.4, available at: http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf.

water dousing, and the use of stress positions, which could also be used in combination with conditioning or corrective techniques. These techniques have been recognised by the European Committee for the Prevention of Torture as having "certainly led to violations of the prohibition against torture and inhuman or degrading treatment."[124]

Interviews with fourteen so-called High Value Detainees conducted by the International Committee of the Red Cross (ICRC) after they had been transferred to Guantanamo Bay in late 2006 described the rendition process as follows:

> The transfer procedure was fairly standardised in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and the effect of such suppositories was unknown by the detainees), was also administered at that moment. The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. …The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times obviously varied considerably and ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper. On some occasions the detainees were transported lying flat on the floor of the plane and/of with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort. In addition to causing severe physical pain, these transfers to unknown locations and unpredictable conditions of detention and treatment placed mental strain on the fourteen, increasing their sense of disorientation and isolation. The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees' feeling of futility

[124] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 18 June 2010*, CPT/Inf (2011) 17, 19 May 2011, para.66.

and helplessness, making them more vulnerable to the methods of ill-treatment described below.[125]

The programme resulted in distinctive practices of torture and ill-treatment. The main purpose of the rendition programme was to extract information from suspects. In its course, suspects were humiliated, ill-treated and beaten when being rendered, and subjected to sustained torture in the states to which interrogations had been outsourced. Maher Arar, for example, a Canadian telecommunications engineer who was – wrongly - believed to be a terrorist, was rendered from the US, with the involvement of Canadian secret services, to Jordan and then to Syria where he was detained for almost a year and subjected to sustained torture.[126]

Renditions were also used by other countries, which suggests that the US practice has served as a model. Kenya, for example, handed over five Kenyans to the Ugandan authorities. A Kenyan lawyer, Mbugua Murithi, together with another Kenyan, Al Amin Kimathi, were arrested by the Ugandan authorities when seeking to secure the release of the five Kenyans, and subsequently faced deportation and one year imprisonment respectively. [127]

There have also been allegations of complicity in torture, as with UK conduct in Pakistan.[128] However, it has proved extremely difficult to corroborate accounts because of the surrounding secrecy. Binyam Mohamed, an Ethiopian national who had lawfully resided in the UK since 1994, was arrested in Pakistan in 2002, and alleges to have subsequently been extraordinarily rendered to Morocco and Afghanistan, before being held at Guantanamo Bay. Facing charges of terrorism before a US military commission, Binyam Mohamed's lawyers commenced litigation in the UK in 2008, seeking disclosure of exculpatory documents in the UK's possession.[129] As a result of some of the evidence that became available during this long and complex litigation, the UK Home Secretary asked the Attorney General to investigate possible "criminal wrongdoing" by MI5 (UK intelligence service) and

[125] International Committee of the Red Cross (ICRC), *Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody*, February 2007, available at: http://www.therenditionproject.org.uk/pdf/PDF%20101%20[ICRC,%20Feb%202007.%20Report%20on%20Treatment%20of%2014%20HVD%20in%20CIA%20Custody].pdf.

[126] See website of the Center for Constitutional justice, which contains a video in which Maher Arar speaks about his ordeal, at: http://ccrjustice.org/arar.

[127] See REDRESS, *Kenya and Counter-Terrorism: A time for change*, February 2009, available at: http://www.redress.org/downloads/publications/Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf.

[128] Joint Committee on Human Rights (JCHR), *Allegations of UK Complicity in Torture*, 4 August 2009, available at: http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152.pdf.

[129] For an overview of *Binyam Mohamed v. Foreign and Commonwealth Office* see Reprieve, 'Guantanamo Bay: Binyam Mohamed v. Foreign and Commonwealth Office case briefing', 10 February 2010, available at: http://www.reprieve.org.uk/publiceducation/casebriefingbinyammohamedvsforeignoffice/.

the CIA over its treatment (alleged torture) of Binyam Mohamed.[130] The UK government was eventually compelled to share details of what it knew about Binyam Mohamed's treatment but efforts to trace responsibility up the chain of command failed to uncover enough evidence to sustain criminal charges.[131]

While the secret rendition programme effectively forcibly disappeared detainees, states have also sought to deport or extradite persons suspected of being involved in terrorism to third countries. This practice is problematic because the individuals concerned are invariably at risk of being tortured in the receiving states. As a result, states, such as the UK and Morocco,[132] have increasingly resorted to so-called diplomatic assurances, or memoranda of understanding, to circumvent the prohibition of refoulement. In these instruments, the receiving states guarantee not to torture returned persons and agree to monitoring mechanisms. These assurances have been widely criticised by UN human rights charter and treaty bodies, as well as NGOs. National bodies, such as the UK Special Immigration Appeals Commissions (SIAC), and regional courts, particularly the ECtHR, have taken a case-by-case approach to the question, and have at times sanctioned deportations where such assurances have been in place.[133] This practice has raised significant concerns, both in relation to the reliability and effectiveness of assurances in the individual case and to the appropriateness of using such arrangements when dealing with states whose torture record is highly questionable.[134]

The detrimental impact of counter-terrorism measures reaches beyond the high-profile cases, particularly in respect of the proliferation of security/anti-terrorism legislation. While such legislation normally does not explicitly authorise torture or ill-treatment, it frequently creates exceptions that erode safeguards against the use of torture. This applies in particular to custodial safeguards, especially ensuring prompt access to a lawyer of one's choice and the ability to challenge the legality of detention before a judge.[135] Some laws,

[130] Richard Norton-Taylor and Duncan Campbell, 'Smith orders inquiry into MI5 and CIA torture claims', *Guardian*, 30 0ctober 2008, available at: http://www.theguardian.com/uk/2008/oct/30/uksecurity-terrorism.

[131] The British government admitted that Binyam Mohamed was tortured during the two years he was held in Morocco, but there was insufficient evidence to proceed with charges against any British officer: Crown Prosecution Service, 'CPS decision on Witness B', 17 November 2010, available at: http://www.cps.gov.uk/news/latest_news/141_10/index.html; Crown Prosecution Service, 'Joint statement by the Director of Public Prosecutions and the Metropolitan Police Service', 12 January 2012, available at: http://www.cps.gov.uk/news/latest_news/joint_statement_by_the_director_of_public_prosecutions_and_the_metropolitan_police_service/index.html.

[132] Morocco has sought diplomatic assurances in two cases that went before the CAT. In *Djamel Ktiti v. Morocco*, the pending extradition of Ktiti to Algeria was found to violate Article 3, and in *Alexey Kalinichenko v. Morocco*, the assurances sought by Morocco in order to deport Kalinichenko to Russia, after he had fled fearing for his life after disclosing details of an organised crime group to the Russian authorities, were insufficient. *MENA Report*, above note 42, p.29.

[133] See *Othman (Abu Qatada) v. United Kingdom*, [2012] ECHR 56.

[134] See e.g. *Report of the Special Rapporteur on the Question of Torture*, *Manfred Nowak*, UN Doc. E/CN.4/2006/6, 23 December 2005, paras.28-33.

[135] *Security Report*, above note 5, pp.46-48.

such as Sri Lanka's Prevention of Terrorism Act, also facilitate forced confessions, by imposing the burden of proof on the defendant and by accepting confessions made to the police, and curtail other rights of the defence. In several countries, such as Bangladesh, India, Pakistan, Sudan and Syria, officials operating under security/anti-terrorism laws are granted immunity from prosecution.[136]

Considering their broader, systemic impact, counter-terrorism and security measures prioritise security concerns over individual rights, and foster international networks colluding in torture, either expressly or implicitly. In the US rendition programme, countries such as Lithuania, Poland and Romania reportedly maintained so-called black sites for "high value detainees", the UK and others granted overflight rights, and several states, such as Libya and Syria received suspects for interrogation.[137] Legislative measures have served as negative templates that created exceptions, and strengthened executive control at the expense of legal safeguards and accountability. The result has been ethnic and religious profiling of persons who have been rendered "rightless" by a combination of measures. These included vague offences, prolonged if not indefinite detention and lack of remedies. In this context, detainees have been vulnerable to various forms of torture, which included in particular positional torture, psychological torture and degrading treatment, notably comprising religious, racial and sexual insults.

Civil society, human rights lawyers and others have sought to expose these practices, with mixed results. Several attempts to pursue cases have been blocked, particularly in the US where the Government has repeatedly invoked the state secrets privilege. In the case of *Mohamed v. Jeppesen Dataplan Inc.*, for example, which involved five victims of the CIA's extraordinary renditions programme suing the transport corporation for its alleged involvement, the application of the privilege resulted in dismissal before discovery or assessment of the merits.[138] However, other cases, such as that of Binyam Mohamed in the UK, succeeded to varying degrees notwithstanding the secrecy and legal obstacles faced.[139]

2.2.3. Political transitions

The question of torture frequently plays a pivotal role in times of transition following conflict or dictatorship. Torture is often seen as the most egregious manifestation of state repression and of atrocities during conflict. Indeed, protest against torture, such as that of Khaled Said in Egypt, is often at the heart of political movements calling for change.[140]

[136] Ibid., pp.60-62.
[137] Open Society Institute, *Globalizing Torture: CIA Secret and Extraordinary Rendition*, February 2013, pp.61-119, available at: http://www.refworld.org/publisher,OSI,,,5118ce462,0.html.
[138] *Mohamed v. Jeppesen Dataplan Inc*., Court of Appeals, 9th Circuit, 614 F.3d 1070, 8 September 2010.
[139] See Binyam Mohamed case above note 129.
[140] See Khaled Said case above at note 13.

Yet, the expectation that political transitions will result in fundamental changes leading to less recourse to torture and justice for victims has often been disappointed. At least some of the transitional processes, such as in Egypt, have been marred by violations, including further torture. In some countries, such as in Iraq and Libya, erstwhile opposition, some of whom are victims themselves, may turn on members associated with the former regime and/or defeated forces.[141] Institutions are too weak to provide protection against torture by militias exerting revenge and acting as local forces, a problem which has been particularly pronounced in Iraq and Libya. In Libya, thousands of suspected or real Ghaddafi supporters reportedly continue to be arbitrarily detained by non-state militia groups across the country, which have refused to disarm.[142] Such detainees are held in a variety of irregular places of detention, including homes and schools, for extended periods of time, and many are reported to have been tortured. In one case, a women's rights activist critical of government policies and public statements made, was repeatedly arrested and detained by militias in various compounds, at times in the presence of officials, in Benghazi in August 2012, and subjected to severe beatings and verbal use.[143]

Transitions can also dramatically increase vulnerability. This feature has characterised many recent transitions in the MENA region where growing intolerance resulted in the targeting of women, religious minorities, LGBTI persons and foreign nationals, either by state forces or by others, with the state failing to protect.[144]

Even where transitions are largely peaceful and take place within stable structures, they often fail to uproot deep-seated torture practices. This is particularly the case where a successor regime co-opts the transition and uses the existing repressive state apparatus and its methods. It also applies where personnel and systems stay in place without vetting processes, which foster resort to torture. In Nepal, for example, the end of conflict in 2006 and subsequent change of regime**,** while triggering debate about how best to address the legacy of violations, including torture, has not resulted in any effective measures taken to ensure accountability and non-repetition. Members of the government are implicated in violations and the army, although subject to some reforms, remained an unaccountable institutional actor. No effective mechanisms for truth and accountability have been put in place. On the contrary, the prosecution of Colonel Kumar Lama on charges of torture in the

[141] See on Iraq, Human Rights Watch, *Iraq: Mass Arrests, Incommunicado Detentions*, 15 May 2012, available at: http://www.hrw.org/news/2012/05/15/iraq-mass-arrests-incommunicado-detentions.
[142] UN Security Council, 'Security Council Press Statement on Libya', 20 June 2013, available at: http://www.un.org/News/Press/docs/2013/sc11042.doc.htm. See also Human Rights Watch, *2013 World Report: Libya*, 31 January 2013, available at: http://www.hrw.org/world-report/2013; International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya*, 17 April 2013, available at http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/libya/140-trial-by-error-justice-in-post-qadhafi-libya.aspx.
[143] See 'Libyan rebel flees to UK as revolution sours for women', *BBC*, 4 December 2012, available at: http://www.bbc.co.uk/news/world-africa-20595841
[144] *MENA Report*, above note 42, pp.12-13.

UK in 2013, which was met with strong disapproval by the Government of Nepal, was followed by an ordinance that envisaged amnesties, including for perpetrators of serious crimes being passed in Nepal.[145] Unsurprisingly, the practice of torture remains a major concern in Nepal even beyond the conflict.

Transitional justice mechanisms, such as in Latin America, have often focused on politically motivated or conflict-related torture, while neglecting other forms of institutional torture. In addition, while mechanisms have been aimed at providing truth and justice for these violations, they have in several instances failed to tackle the causes of torture and to change legislative frameworks and institutional cultures by undertaking broader security sector reforms.

[145] Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission 2069 (2013).

3. CRIMINAL ACCOUNTABILITY FOR TORTURE AND ILL-TREATMENT: CHALLENGES AND RESPONSES

Discussions with practitioners working on torture cases around the world show a number of common – often interlinked – challenges that victims, and those working on their behalf, face when seeking justice for torture. While these challenges frequently have a local imprint, there are striking structural similarities across countries. Barriers encountered can be legal, institutional, social and political. Limited capacity and means to advocate and litigate cases, as well as external constraints, constitute additional obstacles for human rights lawyers and NGOs. At the same time, at least some states have taken measures to respond to these challenges. These responses have resulted in a body of practice that merits close attention, particularly with a view to assessing its effectiveness in implementing international standards relating to justice and reparation.

3.1. The Legislative Framework: Making Torture and Ill-Treatment a Criminal Offence

Many legal systems are characterised by shortcomings that undermine protection against, and accountability and justice for torture. These shortcomings are often due to the fact that unreformed ordinary legislation, such as criminal laws, does not adequately reflect international standards and best practices. As a result, such laws are ill-suited to address torture-specific concerns. The very absence of a definition in national laws of what constitutes torture, which is often only prohibited generically in the constitution, frequently means that officials, legal practitioners and others lack a clear understanding of what constitutes torture, and what rights and obligations flow from the prohibition of torture. This is particularly the case where there is no national jurisprudence on the issue of torture.

Inadequate legislative frameworks contribute to impunity. Some laws legalise treatment such as corporal punishment, which contravenes international standards.[146] Beyond this, a number of national legal systems do not effectively sanction torture. Many laws fail to adequately criminalise torture by:

[146] REDRESS and Sudanese Human Rights Monitor, *No more cracking of the whip,* above note 39, pp.17-35.

(i) Not having a criminal offence of torture

This includes countries such as Bangladesh, Belize, Chile, Ecuador, Germany, Hungary, India, Lebanon, Nigeria, Pakistan, Poland, Syria, Thailand and Zimbabwe.[147] In other countries, such as the United States, torture committed within the borders of the US is not recognised as a federal crime.[148] In Mexico, the Federal Law against Torture of 1991 implements article 1 UNCAT while the laws at the state level were found to be deficient.[149]

(ii) The definition of torture does not conform with international standards, particularly article 1 UNCAT

Several laws make "torture" a criminal offence, without, however, providing any definition. Article 126 of Egypt's Criminal Code of 1937 provides that: "[a]ny public official/civil servant or public employee who orders torturing a culprit or a suspect or the torturing personally, compelling him/her to confess, shall be punished by hard labor or imprisonment for a period of three to ten years...." Article 115 of Sudan's 1991 Criminal Act similarly fails to clarify the meaning of torture: "[e]very person who, having public authority entices, or threatens, or tortures any witness, or accused, or opponent to give, or refrain from giving any information in any action, shall be punished, with imprisonment, for a term, not exceeding three months, or with fine, or with both." Article 333 of Iraq's Criminal Code of 1969 stipulates that: "[a]ny public official or agent who tortures or orders the torture of an accused, witness or informant in order to compel him to confess to the commission of an offence or to make a statement or provide information about such offence or to withhold information or to give a particular opinion in respect of it is punishable by imprisonment or by detention." It then adds that "[t]orture shall include the use of force or menaces." Unsurprisingly, given the date of the law, this addition does not reflect the understanding of torture developed in international law. Article 208 of the Bahrain Criminal Code of 1976 provides: "[a] prison sentence shall be the penalty for every civil servant who uses torture, force or threat either personally or through a third party against an accused person, witness or expert to force him to admit having committed a crime or give statements or information in respect thereof"; it seemingly distinguishes between "torture", "force" and "threat" as distinct offenses, without providing any guidance as to how these terms are to be understood.

[147] Reform efforts to make torture a criminal offence were under way in several of these countries, see below at pp.38-39.
[148] Committee against Torture, *Concluding Observations: United States of America*, above note 11, para.13.
[149] Committee against Torture, *Concluding Observations: Mexico*, UN Doc. CAT/C/MEX/CO/5-6, 11 December 2012, para.8.

Where torture is defined in legislation, it often places heavy emphasis on the use of physical violence, such as the revised Criminal Code of Ethiopia.[150] Even where states adopt a criminal offence of torture with the declared intention to comply with article 1 UNCAT, the actual definition used often falls short of requirements. In Libya's law criminalising torture, enforced disappearances and discrimination of 2013, torture is confined to acts committed by a person "on a detainee under his [sic] control", which considerably narrows the scope of torture.[151] In Senegal's law, the element of the "infliction of severe physical or mental pain or suffering" is replaced by "assault, battery, physical or mental abuse or other assaults''.[152] This combination of recognised national offences with the elements of torture risks undermining the development of a jurisprudence that sees torture as a separate offence. The Brazilian anti-torture law qualifies the "infliction of severe physical or mental pain or suffering" by linking it to "violence or serious threats".[153] In Sri Lanka, the definition of torture omits the word "suffering".[154] Some definitions of torture, such as that of Turkey, do not include any specific intent or purpose (it also covers negligence).[155]

Several acts do not include all the purposes recognised in article 1 UNCAT. Jordan's criminal law, though amended in 2007, reflects the classical understanding of torture, which limits its purpose to obtaining a confession.[156] The Senegalese penal code does not recognise the purpose of obtaining a confession for an act that a third person is suspected of having committed, or for intimidating a third person.[157] The criminal laws of the Dominican Republic, Guatemala, Honduras, Mexico, Peru and Tunisia do not include the element of discrimination (with the exception of racial discrimination in Tunisia), thereby excluding an important component of the definition where torture is used as part of discriminatory practices.[158]

Laws are also deficient in respect of the public official requirement, which is defined either too narrowly or potentially too broadly. In some countries, such as in Ethiopia's revised Criminal Code, the Lebanon Criminal Code 2001 or in Libya's 2013 anti-torture law, the definition of torture is seemingly confined to acts done by public officials in a custodial situation, which excludes acts committed in other contexts. This creates a loophole and may result in torture being displaced to places other than detention facilities. In countries such as Algeria, Armenia, Belgium, Brazil, Russia, the definition of torture does not

[150] Article 424 of the Revised Criminal Code 9 May 2005 of Ethiopia.
[151] Article 2 Law Criminalising Torture, Enforced Disappearances and Discrimination 9 April 2013 of Libya.
[152] Article 295-1 Penal Code of Senegal of 1965.
[153] Article 1 Law No. 9.455 of Brazil of 1997.
[154] Article 12 the Convention Against Torture Act, No. 22 of 1994 of Sri Lanka.
[155] Article 94 Criminal Code of Turkey of 2004.
[156] Article 208(1) Criminal Code of Jordan of 1960 (as amended).
[157] Article 295 Penal Code of Senegal.
[158] *Americas Report*, above note 17, p.32; *MENA Report*, above note 42, p.32.

distinguish between torture committed by officials and private actors.[159] While this broadening of the definition captures torture by non-state actors, it may in practice result in a weakening of the offence, especially where the broad scope results in a lack of focus on official actors.[160] In addition, as a result of the broad definition, states may not have data, i.e. crime statistics, allowing them to distinguish between torture committed by state and non-state actors.

The laws of several countries do not cover all forms of liability stipulated in article 1 UNCAT, excluding in particular the element of "acquiescence", for example in the Dominican Republic and Ethiopia. This may result in an accountability gap, particularly in regard to superiors. Conversely, recent anti-torture laws such as in the Philippines and Uganda include the principle of command/superior responsibility for torture,[161] which is recognised in international criminal law,[162] and broadens liability to capture those in a position of authority.

(iii) No "extradite or prosecute" provision in line with articles 5-7 UNCAT

A number of countries, particularly those that do not recognise an offence of torture, do not have legislation providing for universal jurisdiction over acts of torture, even though they may have such jurisdiction for other crimes under international law.[163] However, a considerable number of states have enacted relevant legislation. Such legislation typically enables authorities to prosecute torture committed elsewhere, when the suspect is present in the territory of the state seeking to prosecute. Such legislation typically takes the form of specific UNCAT implementing legislation or acts incorporating the ICC Rome Statute in national law (which provides for the prosecution of torture, when it is an element of genocide, crimes against humanity or war crimes). This applies to most European states,[164] and several states in Africa, such as Senegal and Uganda,[165] in the Americas, such as the US

[159] Article 263bis of Algeria's Penal Code of 8 June 1966; article 119 of Armenia's Criminal Code of 18 April 2003; article 417bis of Belgium's Penal Code 1867; article 1 of Brazil's Law No. 9.455 of 7 April 1997; article 117 of Russia's Criminal Code of 5 June 1996.
[160] Where legislation adopts a broad definition of torture covering both state and non-state actors, the abuse of office inherent in the involvement of public officials should be recognised as an aggravating circumstance.
[161] Section 13 Philippines Anti-Torture Act 2009 (Republic Act no. 9745); Article 3(2)(d) of Uganda's Prevention and Prohibition of Torture Act (Act No. 3 of 2012).
[162] See article 28 of the ICC Rome Statute.
[163] See Amnesty International, *Universal jurisdiction: The duty of States to enact and implement legislation*, 2001; REDRESS and FIDH, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010, available at: http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf.
[164] *Europe Report*, above note 24, p.5.
[165] Article 2 of Senegal's Law No. 2007-05 of 12 February 2007; Article 17 of Uganda's The Prevention and Prohibition of Torture Act (Act No. 3 of 2012).

and Canada,[166] and in the MENA region, including Algeria,[167] Jordan,[168] Morocco,[169] Iraq,[170] and Tunisia.[171] Notably, several recently enacted anti-torture laws – though not in the Philippines - explicitly provide for universal jurisdiction. For example, Uganda's anti-torture law stipulates that "[t]he Chief Magistrates Court of Uganda shall have jurisdiction to try the offences prescribed by this Act [torture and cruel, inhuman or degrading treatment or punishment], wherever committed, if the offence is committed … by any person who is for the time being present in Uganda or in any territory under the control or jurisdiction of Uganda."[172]

Even where the requisite legislation exists, its effectiveness can be hampered by legislation that does not capture the definition of torture in line with article 1 UNCAT, which may result in excluding certain acts from its ambit.[173] Other legal obstacles include statutes of limitation or immunities for officials, beyond what is recognised under international law. Moreover, in response to political pressure resulting from the attempted prosecution of high-level suspects from countries such as the USA and Israel, several states have curtailed universal jurisdiction legislation. The laws in Spain and Belgium, for example, now require a nexus to the forum state, including a residence requirement.[174] There are also restrictions on who may initiate a case. States such as Belgium and France have restricted the civil party mechanism and the UK made the issuance of an arrest warrant sought by a private party subject to the consent of the Director of Public Prosecutions. . These are examples of states moving to assert greater control over universal jurisdiction proceedings, also with a view to minimising the risk of political fallout.

In addition to legal and political challenges, extraterritorial investigations and prosecutions are often hampered by practical challenges. Often, the institutional set up is lacking. Without special investigation units knowledgeable about international crimes, skilled in the

[166] *Americas Report*, above note 17, p.22.
[167] Articles 582-584 Criminal Procedure Code 2007 of Algeria.
[168] Article 10(1) and 10(4) Criminal Code 1960 of Jordan.
[169] Article 10 Criminal Code 1962 of Morocco.
[170] Article 10 Criminal Code 1969 of Iraq.
[171] Tunisia has taken the position that the principle of universal jurisdiction has been incorporated into domestic law as a result of article 32 of the Constitution which provides that agreements approved or ratified by the President have greater authority than national laws, and universal jurisdiction is part of the UNCAT as well as the Geneva Conventions, to which Tunisia is a State party. See *Report sent to UN Secretary-General on the scope and application of universal jurisdiction*, 16 June 2010, pp.5-6, available at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Tunisia_E.pdf.
[172] Article 17(f) Uganda Prevention and Prohibition of Torture Act (Act No. 3 of 2012) ; similar provision in Article 6 of South Africa's Prevention of Combating and Torture of Persons Act (Act No.13 of 2013, coming into force on 29 July 2013, available at http://www.info.gov.za/view/DownloadFileAction?id=195533.
[173] See above at pp.33-35.
[174] See REDRESS and FIDH, *Extraterritorial Jurisdiction*, above note 163, p.3.

collection of overseas evidence and able to make arrangements to protect victims and witnesses, prosecutions can and do fail.[175]

Notwithstanding these challenges, a number of extraterritorial prosecutions have been undertaken, notably in respect of suspects from Afghanistan, Algeria, Argentina, Cambodia, Chad, Chile, DRC, Guatemala, Mauritania, Nepal, Rwanda, Tunisia, the former Yugoslavia and Zimbabwe.[176]

(iv) Stipulating punishments that do not reflect the seriousness of torture

Criminal offences of torture are subject to a wide range of punishments, many of which do not reflect the severity of the crime.[177] Under Jordan's criminal law, for example, unless the torture results in death, the crime is considered a misdemeanour carrying punishments ranging from six months to three years.[178] Several countries provide no or limited minimum sentences. In Serbia, for example, torture is subject to a punishment of between one to eight years imprisonment[179] and in Bosnia and Herzegovina from one to ten years.[180] In Madagascar, absent any aggravating circumstances, torture is subject to a punishment of two to five years imprisonment.[181] In Brazil, the regular punishment ranges from two to eight years in prison.[182] In Russia, a conviction for torture carries a maximum prison term of three years, unless there are certain "aggravating" factors.[183] As the offence of torture carries a lesser punishment than abuse of office, Russian prosecutors have an incentive not to call for the application of the offence of torture when seeking adequate punishment, provided that an act can be classified as abuse of office.[184] While the absence of minimum punishments provides judges with discretion, there is a risk that sentences will be at the lower end of the spectrum. This is frequently borne out by the practice.

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[175] See in particular REDRESS and FIDH, *Strategies of the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units*, December 2010, available at: http://www.redress.org/downloads/publications/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf.

[176] See for relevant cases in Europe in particular REDRESS and FIDH, *Extraterritorial Jurisdiction*, above note 163.

[177] See Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International, The Hague/London/Boston, 2001), p.342, finding, on the basis of Committee against Torture sources, that a sentence of between six and twenty years imprisonment would be appropriate under article 4(2) UNCAT.

[178] Article 208 of Criminal Act of Jordan.

[179] Article 137(3) of Serbia's Criminal Code of Serbia.

[180] Article 190 of the Criminal Code of Bosnia and Herzegovina of 2003.

[181] Article 10 Law against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Law No.2008-008 of 25 June 2008) of Madagascar.

[182] Article 1 of Brazil's Law No.9455.

[183] NGO Report, *Russian Federation: On the implementation of the ICCPR*, p.3, December 2008, available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/RCATRussian_95.pdf.

[184] See on this point also Polina Levina, 'Links between Criminal Justice Procedure and Torture: Lessons from Russia', *New Criminal Law Review,* 16 (2013) 1, pp.104-142, at p.114.

Anti-torture legislation responding to identified shortcomings

States frequently argue that their national systems are well capable of holding perpetrators of torture to account, even in the absence of a specific offence of torture. However, ordinary offences, such as "extortion of confessions", "grievous bodily hurt" and "coercion", do not fully capture the seriousness and stigma of torture. This concern can also apply to sexual offences. However, some progress has been made in this regard, for example as a result of regional initiatives in many Southern African countries, which have adopted clear definitions and made involvement of an official an aggravated circumstance.[185] Criminal legislation must reflect international standards or risk loopholes that all too often lead to jurisprudence and practices that fail to adequately respond to allegations of torture.

The recognition of legislative shortcomings, which have been repeatedly highlighted by human rights treaty bodies and NGOs alike, has resulted in concerted efforts to adopt legislation that implements a state's obligations under international law. Making torture a criminal offence, whether by amending the criminal law concerned or by adopting specific anti-torture legislation, is at the heart of such initiatives. The need to comply with UNCAT has prompted certain states to reform their legislation. In the last seven years alone, this has resulted in the recognition of torture as a criminal offence in line with article 1 UNCAT in countries such as Burundi, the DRC, El Salvador, Georgia, Morocco, Madagascar, the Philippines and Uganda, with the latter three countries adopting comprehensive anti-torture laws.[186] These laws have a number of important features, with several setting out a list of aggravating circumstances for torture, stipulating that superior orders are no defence and broadening liability, particular of superiors. Further reform initiatives were underway in several countries at the time of writing, including Bangladesh, Hungary, India, Kenya, and Nepal.[187]

A definition of torture in line with article 1 UNCAT does not automatically ensure that perpetrators will be adequately held to account. Indeed, there are a number of examples, such as Greece or Sri Lanka,[188] where prosecution services and/or the judiciary prosecuted or convicted individuals for lesser offences even though the elements of article 1 UNCAT

[185] See Rashida Manjoo, Gift Kweka and Suzzie Onyeka Ofuani, 'Sexual Violence and the Law: Comparative Legal Experiences in Selected Southern African Countries', in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, Farnham, 2011), pp.269-295.

[186] Article 204 Burundi Penal Code 2008; article 48bis DRC Penal Code (Law No. 11/008 of 9 July 2011); articles 243, 262 El Salvador Criminal Procedure Code 1996; article 2 Madagascar Law against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Law No.2008-08 of 25 June 2008); article 4 Philippines Anti-Torture Act of 2009 (Republic Act No.9745); article 4(1)(c) South Africa Prevention of Combating and Torture of Persons Act of July 2013; article 2 Uganda Prevention and Prohibition of Torture Act, 2012.

[187] See for example Kenya's efforts to reform its criminal justice system, 'Committee Against Torture examines report of Kenya', 16 May 2013, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13337&LangID=E.

[188] Article 137A Greece Penal Code 1950; section 12 Sri Lanka Act No. 22 of 1994 (The CAT Act).

appeared to be met in the given case. This has been attributed to broader failings, evidenced by a reluctance to charge officials with torture and to impose the lengthy imprisonment that a conviction may require under law (in Sri Lanka, for example, torture carries a minimum punishment of seven years imprisonment).[189] While these experiences show that anti-torture legislation will not in and of itself result in changes, having a definition of torture in line with article 1 UNCAT is an important starting point. It provides a clear basis for accountability, can contribute to a better understanding of the meaning of torture and may in time result in a practice reflecting a state's commitments under UNCAT.

Inhuman, cruel or degrading treatment

National legislation is even less clear on the definition of cruel, inhuman or degrading treatment. In many jurisdictions, such treatment fits into categories of "assault", "abuse of office" or similar offences, which may not, however, cover all forms of ill-treatment. In Germany, for example, in the Gäfgen case, the perpetrators - two police officers who had threatened Gäfgen with torture, which the ECtHR found to constitute ill-treatment, were convicted of the offence of "coercion".[190]

Even anti-torture legislation, such as in Madagascar and Sri Lanka, has at times not included any separate offence of ill-treatment. Where it has, states have grappled to develop a clear definition. The Philippines Anti-Torture Act of 2009 defines other cruel, inhuman and degrading treatment or punishment as:

> A deliberate and aggravated treatment or punishment not enumerated under Section 4 of this Act [torture], inflicted by a person in authority or agent of a person in authority against another person in custody, which attains a level of severity sufficient to cause suffering, gross humiliation or debasement to the latter. The assessment of the level of severity shall depend on all the circumstances of the case, including the duration of the treatment or punishment, its physical and mental effects and, in some cases, the sex, religion, age and state of health of the victim.

Article 7 of Uganda's Prevention and Prohibition of Torture Act provides that:

> (1) Cruel, inhuman or degrading treatment or punishment committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official or private capacity, which does not amount to torture as defined in section 2, is a criminal offence and shall be liable on conviction to

[189] Section 2(4) Sri Lanka Act No. 22 of 1994 (The CAT Act).
[190] *Gäfgen v. Germany*, (2010) 52 EHRR 1, para.249.

imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.

(2) For the purposes of determining what amounts to cruel, inhuman or degrading treatment or punishment, the court or any other body considering the matter shall have regard to the definition of torture as set out in section 2 and the circumstances of the case.

These examples show that cruel, inhuman or degrading treatment or punishment is primarily defined in negative terms – i.e. conduct not amounting to torture. The Philippines Anti-Torture Act of 2009 does include a definition: "deliberate and aggravated treatment or punishment … which attains a level of severity causing suffering, gross humiliation or debasement" to a person under the custody of an authority. This definition is both broad (potentially capturing a large number of acts) and narrow (confining ill-treatment to the custodial context, thereby excluding a number of other situations such as destruction of a person's home and demonstrations recognised in international jurisprudence). The Ugandan law, in contrast, leaves considerable discretion to the body considering the matter, and refers it back to the definition of torture, which does not help in clarifying how ill-treatment should be understood.

This difficulty is partly due to the lack of a clear definition in international law and jurisprudence.[191] The limited guidance means that states have considerable leeway in defining ill-treatment which may respond to concerns in the national context but may equally fail to cover categories or forms of ill-treatment that have been recognised in international case law. This may in turn result in an accountability gap, particularly where the ill-treatment in question is not subject to other adequate sanctions.

3.2. Legal barriers to accountability for torture and ill-treatment

3.2.1. Legislative developments

Accountability for torture and ill-treatment, however defined in national legislation, is often frustrated by legal barriers, particularly amnesties and immunities for torture, as well as statutes of limitation. Even though international human rights treaty bodies have recognised that these barriers are incompatible with international obligations,[192] several states have either retained them where in place or adopted them afresh.

[191] See Committee against Torture, *General Comment No.* 2, above note 11, para.3, available at: http://www2.ohchr.org/english/bodies/cat/comments.htm and Rodley and Pollard, above note 84, pp.125-144.

[192] See e.g. Committee against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012, paras.38, 41, available at:

Defences

Defences may act as a bar to accountability for torture, such as the defence of superior orders, for example in Israel[193] and China.[194] Anti-torture provisions or laws may also contain provisions incompatible with UNCAT, which acknowledges that there should be no defence for torture.[195] However, section 134(4) of the UK Criminal Justice Act 1988, for example, allows for a defence of "lawful authority, justification or excuse" against a charge under section 134 (torture) and section 135(5) provides for a defence for conduct permitted under a foreign law, even if unlawful under UK law, which raises concerns about its compatibility with the absolute prohibition of torture.[196]

Some security legislation recognises defences applicable in cases of torture. Section 1004(a) of the US 2005 Detainee Treatment Act introduced a limited defence for "an officer, employee, member of the Armed Forces, or other agent of the United States Government" who had engaged in "specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted." The provision is clearly aimed at the detention and interrogation using so-called "enhanced" techniques in the context of the "war on terror". The relevant provision stipulates that it shall be a defence that the individual in question "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." It is further specified that "good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful." That reference would appear to be intended to make clear that reliance on the so-called "torture memos" issued by the Department of Justice under the Bush Administration constitutes a defence. These memos stated that particular interrogation techniques did not amount to torture and were not otherwise unlawful under US domestic law.[197]

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http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f3&Lang=en; Committee against Torture, *Concluding Observations on the fifth periodic report of Chile*, UN Doc. CAT/C/CHL/CO/5, 23 June 2009, para.12.

[193] Penal Law 5737-1977, Chapter 5(A): Restrictions on Criminal Liability, Title 2: Restrictions on Criminal Nature of Act; Article 34M(2), available at: http://www.oecd.org/dataoecd/15/58/43289694.pdf.

[194] See *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to China*, UN Doc. E/CN.4/2006/6/Add.6, 10 March 2006, para.19.

[195] See articles 2(2) UNCAT and 2(3) UNCAT, and, on these articles, Committee against Torture, General Comment No.2, above note 12, paras.5 and 26.

[196] See Committee against Torture, *Concluding observations on the fifth periodic report of the United Kingdom*, above note 95, para.10.

[197] See *Security Report*, above note 5, p.64.

The 2005 US Detainee Treatment Act indicates that the effect of the provision is not "to provide immunity from prosecution for any criminal offense by the proper authorities."[198] However, it does provide an absolute defence to criminal liability (and to civil claims) in circumstances in which the particular state agent can show that he or she was not aware of the illegality of the conduct in question. It thus, exceptionally, provides a defence of ignorance of the law. The defence is not absolute, insofar as it does not extend to conduct which either was subjectively known to be unlawful by the individual in question, or which objectively "a person of ordinary sense and understanding" would know was unlawful. However, it has created a dangerous grey area in which criminal liability may be excluded for a wide range of acts, including waterboarding, which amount to torture or other cruel, inhuman or degrading treatment under international law but were not recognised as such in the 'torture memos'. Such a defence is not only incompatible with article 2(2) UNCAT,[199] but also runs counter to the general obligation of states to take effective legislative measures to prevent acts of torture (article 2(1) UNCAT)).

Immunities

The legislation of several countries provides immunities, beyond those commonly granted in constitutions to organs such as the head of state and parliamentarians, to certain types of officials. These laws, which are in place in many South Asian countries, such as Bangladesh, India, Nepal and Pakistan,[200] and elsewhere, such as in Burundi, Tanzania, Sudan and Zimbabwe, exempt the officials concerned from criminal (and civil) liability for anything done in good faith in the performance of their duties.[201] In Sudan, for example, security forces, the police and the army enjoy immunity, which can only be lifted by the head of the forces in question.[202]

Immunity provisions have also been a notable feature of security legislation. Immunities are particularly problematic in these contexts because they are frequently coupled with broad executive powers, thereby contributing to a climate characterised by a lack of transparency and accountability. In Thailand, the 2005 Emergence Decree grants broad immunity to "competent officials" having powers of arrest, detention and deportation in cases of emergency situations. In Pakistan, the 2011 Action (in Aid of Civil Powers) Regulations

[198] Section 1004(a), 2005 Detainee Treatment Act.
[199] Article 2(2) UNCAT: "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."
[200] *Asia Report*, above note 15, pp.22-23.
[201] *Africa Report*, above note 24, p.24.
[202] See REDRESS and Sudanese Human Rights Monitor, *Comments to Sudan's 4th and 5th Periodic Report to the African Commission on Human and Peoples' Rights: The need for substantial legislative reforms to give effect to the rights, duties and freedoms enshrined in the Charter*, April 2012, p.10, available at: http://www.redress.org/downloads/publications/1204%20Commments%20to%20Sudans%20Report%20-%20Legislative%20Reforms.pdf.

(AACPR) confers judicial and executive authority upon the military for operating in the Federal Administered Tribal Areas (FATA) as well as broad immunity. In Bangladesh, the 2003 Joint Drive Indemnity Act provided retroactive immunity, i.e. a de facto amnesty, for members of the Rapid Action Battalion for any violations committed in the course of an anti-crime programme undertaken between 2002 and 2003, which resulted in an estimated 60 persons killed, 3,000 injured and around 45,000 arrested by law enforcement agencies,[203] covering prosecution for involvement in any casualty, damage to life or property, violation of rights, physical or mental damage.

The supposed rationale of immunity, that is protecting public servants against unwarranted complaints, does not bear out on close scrutiny. The very fact that many countries do not grant immunities to officials suggests that legal systems are seen as being capable of addressing complaints against officials fairly. In addition to the questionable need of having an added layer of protection, immunities have in practice turned into insurmountable obstacles that both facilitate the perpetuation of torture and deny justice. International treaty bodies and courts have therefore been unequivocal in holding that immunities are incompatible with the duty to investigate and prosecute torture.[204]

Amnesties

Discussions surrounding the question of amnesties, and in some instances pardons, have been a prominent feature of political transitions. Following the South African example of conditional amnesties for politically motivated offences, amnesty laws have been contemplated, and adopted, in a number of contexts, ostensibly to facilitate peace processes and the transfer of power. Amnesty laws have been particularly prominent in the Latin American context, such as in Argentina, Brazil, Chile, El Salvador, Honduras and Peru but have also been adopted elsewhere such as in Algeria, Sierra Leone, and Uganda. In Colombia, the Justice and Peace Law (Law No. 975 of 2005) provided demobilised paramilitaries with significantly reduced sentences for confessing their crimes, even if they amount to war crimes or crimes against humanity.

Most of these amnesty laws were challenged, and several of them, such as in the case of Argentina and Peru, were declared invalid on the grounds that they are incompatible with the duty to investigate and prosecute serious international crimes, including torture.[205]

[203] Asia Pacific Human Rights Network, 'Operation Clean Heart: Dhaka's Dirty War', March 2003, available at: http://www.hrdc.net/sahrdc/hrfchr59/Issue1/bangladesh.htm.

[204] *Prosecutor v. Furundzija*, ICTY Judgment of 10 December 1998, IT-95-17/1, para.157; *Barrios Altos v. Peru* Judgment of the Inter-American Court of Human Rights, Merits, 14 March 2001, Series C No. 75, para.41; Human Rights Committee, General Comment No. 31, above note 59, para.18; Committee against Torture, General Comment No. 3, above note 192, para.42.

[205] See '*RECURSO DE HECHO Simón, Julio Héctor y otros s/privación ilegítima de la libertad',* Causa Nº 17.768 (Poblete), Corte Suprema de Justicia de la Nación, 14 June 2005 and Martín Rivas, 4587-2004-AA/TC, Peru,

Equally, the UN made clear that it would not endorse amnesties, as happened with the Lomé Peace Agreement in Sierra Leone.[206]

However, amnesties are still often proposed in times of transition. In Yemen, Law No. 1 was adopted in January 2012, which exempted former president Ali Abdullah Saleh and his subordinates from criminal prosecution for "politically motivated acts" carried out during the course of their official duties, which seemingly includes torture.[207] Controversial amnesties have been granted in Algeria, under the Charter for Peace and National Reconciliation 2005, adopted through Law 06-01. The Charter provides that "no proceedings may be instituted individually or collectively against any of the components of the defence and security forces of the Republic for actions taken to protect persons and property, safeguard the nation and preserve the institutions of the Republic of Algeria." The Charter negates the possibility of bringing legal claims against alleged perpetrators of torture and ill-treatment during this period, and furthermore its article 46 empowers the Government to prosecute any victims who attempt to bring a case against an alleged perpetrator. Under the provisions of the Charter, families of the disappeared wishing to obtain compensation are required to sign a death certificate of their missing loved ones, which nullifies any possibility of investigations into the disappearance, and compels indirect victims to effectively give up their right to determining the truth. In Libya, the National Transitional Council (NTC) adopted Law No. 38 in 2012, in a process lacking transparency and consultation, which grants amnesty to all persons who committed "acts made necessary by the 17 February revolution" for its "success and protection", whether military, security or civilian in nature. This law perpetuates the culture of impunity. To date, no supporters of the uprising have been held accountable for human rights violations, despite credible reports that militias were involved in widespread abuses, including torture and ill-treatment.[208]

An amnesty in Nepal – whose scope was unclear but which appears to cover torture – was included in the 2013 'Ordinance on Investigation of Disappeared Persons, Truth and

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Constitutional Court, 29 November 2005, following the Barrios Altos ruling of the Inter-American Court of Human Rights (above note 204). See also the decision of the Sierra Leone Special Court on the question of amnesty, *Prosecutor v. Morris Kallon & Ors*, Decision on Constitutionality and Lack of Jurisdiction- SCSL-04-15-AR72(E) [2004] SCSL 4 (13 March 2004).

[206] *Seventh report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, UN Doc. S/1999/836, 30 July 1999, para.7: "I instructed my Special Representative to sign the [Lomé Peace] agreement with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."

[207] Law No. 1 2012 on the Granting of Immunity from Legal and Judicial Prosecution.

[208] Lawyers for Justice in Libya, 'LFJL strongly condemns new laws breaching human rights and undermining the rule of law', 7 May 2012, available at: http://www.libyanjustice.org/news/news/post/23-lfjl-strongly-condemns-new-laws-breaching-human-rights-and-undermining-the-rule-of-law/.

Reconciliation Commission'.[209] This ordinance, which reflected a political consensus adverse to accountability, had been adopted without consultation with civil society and was suspended by the Nepalese Supreme Court on 1 April 2013 pending review of its constitutionality.[210]

While amnesties may promote truth-telling, as a matter of international law, amnesties may be acceptable only in relation to certain crimes and under certain conditions. Torture and ill-treatment may not be subject to amnesties under any circumstances.[211] Recently adopted anti-torture legislation underscores this point. Section 16 of the Philippines Anti-Torture Act of 2009 provides that: "[i]n order not to depreciate the crime of torture, persons who have committed any act of torture shall not benefit from any special amnesty law or similar measures that will have the effect of exempting them from any criminal proceedings and sanctions." Article 23 of Uganda's Prevention and Prohibition of Torture Act makes clear that: "[n]otwithstanding the provisions of the Amnesty Act, a person accused of torture shall not be granted amnesty."

Statutes of Limitation

Under ordinary law, prescription periods are put in place to promote legal certainty and avoid the difficulties that the passage of time carries for the safeguarding of evidence. However, in torture cases, victims of torture may be too traumatised, legal institutions may not be responsive or available, such as during conflict, and there may be a lack of protection which may impede victims from coming forward soon after the commission of the offence.

Statutes of limitation which bar prosecutions after the passage of stipulated periods of time can therefore constitute another obstacle to accountability in torture cases.[212] A number of states retain limitation periods that apply to torture cases. This may range from forming the upper limit of prescription applying to other serious offences, for example 30 years in Colombia, 20 years in Sri Lanka and 15 years in Belgium, Poland and Spain. In other states, torture is subject to general rules of prescription, which means that it cannot be prosecuted

[209] Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission 2069 (2013).
[210] Advocacy Forum,'Stay TRC Ordinance: SC', 2 April 2013, available at: http://www.advocacyforum.org/news/2013/04/stay-trc-ordinance-sc.php.
[211] Human Rights Committee, General Comment No. 31, above note 59, para.18; Committee against Torture, General Comment No. 2, above note 12, para.5. See also, *Skeleton argument on behalf of the Redress Trust (REDRESS), The Lawyers Committee for Human Rights and the International Commission of Jurists Pursuant to Rule 74*, 24 October 2003, available at: http://www.redress.org/downloads/casework/AmicusCuriaeBrief-SCSL1.pdf
[212] See on the treatment of limitation periods under international law for serious violations of human rights and humanitarian law, REDRESS, *Submission on behalf of interveners in respect of limitation*, High Court of Justice, *Ndiku Mutua and Others -v- The Foreign and Commonwealth Office,* 14 March 2011, pp.49-57, available at: http://www.redress.org/Mutua_and_others_v_the_Foreign_Office.pdf.

after the passage of 2-5 years in Sudan, 8-15 years in Turkey (depending on whether the torture is considered to be systematic), 10 years in Algeria, Bahrain and Jordan, or 12 years in Indonesia for the offence of 'coerced confession'.[213] In Mexico, all states apply the general norms of prescription to the crime of torture, which is seven and a half years.[214]

In Haiti, the statute of limitation applying to torture and related crimes is ten years. In June 1986, following the end of the Duvalier regime, a decree stipulated that crimes against persons committed during the period of 22 October 1957 to 7 February 1986 would prescribe ten years after the adoption of the decree. As a result, in 2012, Jean Claude Duvalier was charged with corruption but not torture or enforced disappearances. The prosecution argued that the human rights abuses were time barred under Haitian law, which was criticised on the grounds that international crimes should not be subject to prescription. In addition, enforced disappearances could and should have been prosecuted; in relation to such ongoing crimes, statutory limitations should not apply.[215] The decision to apply the statute of limitations to the charges of crimes against humanity was appealed, and the Court of Appeals has taken testimony from both Duvalier and torture survivors.[216]

In Nepal, statutes of limitation are unduly short, only 35 days, which falls short of international standards and has contributed to the perpetuation of impunity.[217] In a number of cases, including rape as a form of torture, the 35 day limitation has prevented victims – who were often facing threats and were at continued risk of ill-treatment, particularly during the ongoing conflict - from bringing complaints in time.

Authorities may also categorise acts of torture as lesser offences and/or deliberately delay investigations to the point that the claims are out of time. In Turkey, for example, investigations concerning 24 individuals in relation to acts of torture and the excessive use

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[213] *Europe Report*, above note 24, p. 34; *Asia Report*, above note 15, p. 70; *MENA Report*, above note 42, pp. 39- 40; REDRESS, Sudanese Human Rights Monitor and CLRS, *Comments to Sudan's 4th and 5th periodic Report to the African Commission on Human and People's Rights: The need for substantial legislative reforms to give effect to the rights, duties and freedoms enshrined in the Charter*, April 2012, p. 10, available at: http://www.redress.org/downloads/publications/1204%20Commments%20to%20Sudans%20Report%20-%20Legislative%20Reforms.pdf.

[214] Article 105 Mexico, Federal Criminal Code of 1931: "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."

[215] Human Rights Watch, *Rendevouz with History: The Case of Jean-Claude Duvalier*, 14 April 2011, available at: http://www.hrw.org/sites/default/files/reports/haiti0411Web.pdf.

[216] The Center for Justice & Accountability, 'The 'Baby Doc' Duvalier Prosecution', available at: http://www.cja.org/article.php?list=type&type=552.

[217] *Purna Maya v. Nepal* (submission filed by Advocacy Forum and REDRESS to the Human Rights Committee, 19 December 2012, on file with REDRESS). See also Advocacy Forum & REDRESS (2011), *Held to Account: Making the Law Work to Fight Impunity in Nepal*, November 2011, pp.70-76, available at: http://www.redress.org/downloads/publications/Nepal%20Impunity%20Report%20-%20English.pdf.

of force were dropped between 2005 and 2009 on the grounds that the crimes had prescribed.[218]

3.2.2. Jurisprudence: Removing obstacles to criminal accountability

Courts play an important role in overcoming obstacles to criminal accountability. They have repeatedly been called upon to rule on the validity of laws that provide amnesties, immunities or statutes of limitation. In Latin American states, such as Argentina and Peru, courts have invalidated amnesty laws and, in Argentina, held that statutes of limitation do not apply to international crimes.[219] However, national courts elsewhere have been reluctant to strike down amnesty laws, notably in South Africa,[220] Brazil, El Salvador and Guatemala[221] as well as Uganda.[222]

In Colombia, the constitutionality of various aspects of the Colombian Peace and Justice Law was challenged in *Gustava Gallón y otros.*[223] The law provided "alternative punishments" for paramilitaries in the form of suspended sentences and alternative sanctions, which were conditional on the paramilitaries' "collaboration with justice".[224] According to Colombia's Constitutional Court, this "collaboration with justice" needed to be "directed towards ensuring victims' effective rights to truth, justice, reparation and non-repetition".[225] The Court further clarified that provisions of the law on the right to truth and the rights of victims are to be interpreted in conformity with relevant international standards.[226]

Courts have also upheld immunity provisions, which have contributed to, if not directly resulted in, a lack of prosecutions and impunity. The Indian Supreme Court, in a case

[218] Information provided to REDRESS. See in this regard also Izci v. Turkey, above note 86.
[219] See in particular *RECURSO DE HECHO Simón, Julio Héctor y otros s/privación ilegítima de la libertad',* Causa Nº 17.768 (Poblete), Corte Suprema de Justicia de la Nación, 14 June 2005. See for a detailed examination of jurisprudence in the region, Due Process Foundation, *Digest of Latin American Jurisprudence on International Crimes*, 2010, available at: http://www.dplf.org/sites/default/files/1285861527.pdf
[220] *Azanian Peoples Organization (AZPO) and Others v. The President of South Africa and Others*, Constitutional Court of South Africa, Case CCT 17/96 (1996).
[221] See for a review of recent jurisprudence, *Gomes Lund et al v. Brazil*, Judgment of the Inter-American Court of Human Rights, 24 November 2010, Preliminary Objections, Merits, Reparations and Costs, Ser. C, No.219, paras.134-36, 149, and 163-69.
[222] The amnesty provisions of Uganda's Amnesty Act did, however, expire in 2012. Mark Schenkel, 'Uganda: Amnesty Act without amnesty', Radio Netherlands Worldwide, 3 June 2012, available at: http://www.rnw.nl/international-justice/article/uganda-amnesty-act-without-amnesty.
[223] *Gustava Gallón y otros* (18 May 2006), Sentencia C-370/2006, Expediente D-6032 (Colombian Constitutional Court).
[224] Article 3 of Law 975/2005 of Colombia.
[225] *Gustava Gallón y otros*, para.6.2.1.5.2, as cited in Julián Guerrero Orozco and Mariana Goetz, 'Reparations for Victims in Colombia: Colombia's Law on Justice and Peace', in Carla Ferstman, Mariana Goetz, Alan Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making* (Martinus Nijhoff Publishers, Leiden/Boston, 2009), pp.435-58, at p.442.
[226] Ibid., p.443.

concerning extra-judicial killing in the South Kashmir village of Pathribal, had to decide whether section 7 of the Armed Forces (Special Powers) Act 1990, applicable in Jammu and Kashmir, barred proceedings against army personnel.[227] The provision stipulates that: "[n]o prosecution, suit or legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act." The Court held that "[t]he question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him."[228] The language is striking and troubling as complaints are portrayed as "unnecessary harassment" and complainants branded as "unscrupulous persons" whereby officials are in need of protection. This state-centric paradigm invariably skews the balance against complainants and does not reflect concern for human rights protection. The Court further held that the authorities have "absolute power" to determine whether an act was done in the performance of a duty, irrespective of its nature, i.e. including in cases where such an act may amount to torture. This means that the judiciary cannot exercise any effective control, as it holds itself bound to the security paradigm reflected in the act.

In Sudan, Farouk Ibrahim, who alleges he was tortured by security forces in 1989 and 1990, had repeatedly complained about the acts he had been subjected to. In 2008, the Sudanese Constitutional Court held that immunity laws applicable in the case did not constitute a denial of the right to litigate because immunities are conditional and can be lifted by the head of the respective forces, even though there was no effective judicial review and no practice of lifting immunities.[229] It also upheld the applicable statutory limitations, which meant that the alleged perpetrators could not be prosecuted any longer under Sudan's criminal procedure law. Both cases are examples of judicial deference to the executive. They illustrate a failure of judicial bodies to consider the context in which such laws operate, particularly the history of allegations of serious human rights violations, whereby immunity frequently equates impunity.

[227] General Officer Commanding v. CBI and Anr., Criminal Appeal No. 257 of 2011, Supreme Court of India, Judgment of 1 May 2012, available at http://judis.nic.in/supremecourt/helddis3.aspx. See also Security *Report*, above note 5, p.62.
[228] Ibid.
[229] *Farouq Mohamed Ibrahim Al Nour v. (1) Government of Sudan; (2) Legislative Body. Final order by Justice Abdallah Aalmin Albashir*, President of Sudan's Constitutional Court, 6 November 2008.

3.3. Investigations and prosecutions in cases of torture and ill-treatment

3.3.1. Complaints Procedures and Investigations

Overview: Challenges and responses

Under international law, a person alleging that he or she has been tortured or ill-treated has a right to complain and to have this complaint investigated promptly, impartially and effectively. Even without a complaint, states have a duty to investigate cases in line with these standards where they come to hear credible allegations of torture or ill-treatment.[230]

In practice, complaints procedures frequently fall short of these requirements for a number of reasons, but in particular a combination of inadequate legislative frameworks and institutional shortcomings. In many states, torture is not defined as a separate offence in line with article 1 UNCAT, and complaints procedures often are the same as for ordinary offences. Allegations are investigated by the same body whose officers are implicated and protection measures are lacking. Investigative bodies also frequently lack the requisite expertise to document torture and ill-treatment in line with best practice, including the Istanbul Protocol.

In addition to these generic problems, some laws severely curtail the possibility of bringing effective complaints. This is particularly the case where detainees have no right to *habeas corpus* and/or timely access to a lawyer of their choice, as this prevents them from lodging a complaint before a judge and/or from considering how best to pursue complaints. Under Sudan's national security act, for example, access to a lawyer can be barred if it is "not in the interest of the investigation" and detainees can be held for up to four and a half months without access to a judge.[231] In Thailand, a claim by Mr. Suderueman Malae that he had been tortured was dismissed primarily due to inconclusive medical reports. One of the officers being investigated then lodged a counter-claim for issuing a "false complaint", which, in August 2011, resulted in the conviction and sentencing of Mr. Malae to two years imprisonment, in stark contrast to the impunity routinely accorded to those accused of torture.[232] In addition, in several countries, the police have resorted to filing counter-charges, such as "obstructing the police", in response to complaints filed by victims.[233]

[230] See Committee against Torture, General Comment No. 3, above note 192, para.23.
[231] See articles 50, 51 of Sudan's National Security Act, 2010.
[232] '*Black Case No. 2161/2552*, translated excerpts available in, the 'Thailand: Persecution of torture victims and the legalization of impunity in Thailand', A written Statement submitted by the Asian Legal Resource Centre (ALRC) to the Human Rights Council, Eighteenth session, September 2011, available at: http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc18/ALRC-CWS-18-03-2011. See also *Asia Report*, above note 15, p.133.
[233] See for example, *Borbala Kiss v. Hungary*, Application no. 59214/11, ECtHR Judgment of 26 June 2012, paras.13-16.

Authorities also threaten victims or their families with bringing separate, usually fabricated charges such as possession of drugs, if they do not stop pursuing complaints. Victims often find these charges difficult to challenge.[234]

Anti-torture legislation has been far from consistent in addressing these shortcomings. Several acts, such as in Libya, Madagascar or Sri Lanka, make torture a criminal offence but do not include any reference to complaints procedures. In practice, a failure to alter the institutional set-up, either by law or in subsequent practice frequently translates into lack of effective investigations. Other laws, such as in Uganda, set out complaints procedures in detail, albeit within the existing institutional framework, raising concerns about its effectiveness in responding to torture allegations.[235] In addition, while Uganda's law allows private prosecutions before a Magistrate, such prosecutions often depend on the availability of evidence that can only be obtained through official investigations, and are in any case subject to the discretion of the Public Prosecution which may discontinue proceedings at any stage.[236] The Philippines' anti-torture law, while basing investigations in regular government agencies, gives the Commission on Human Rights a stronger role to support complaints, sets a 60 day time limit for completion, specifies protection mechanisms and provides for medical examinations. Yet, three years since it came into force, effective investigations have been hampered by delays, difficulties of identifying and locating perpetrators, access to timely medical examination and the risk of reprisals.[237] These concerns highlight the challenge of making anti-torture laws effective. On the basis of experiences to date, complaints procedures located within regular investigative structures and procedures risk ineffectiveness if they are not complemented by fundamental institutional reforms.

Independent complaints procedures

In many countries, agencies dealing with complaints lack independence because they belong to the same authorities accused of having committed acts of torture and/or ill-treatment. This frequently happens to be the default mode where no special mechanisms are in place as the police in particular are often tasked with investigating complaints, including those lodged against their colleagues. The same applies to the military, which typically has jurisdiction over all service related offences, including allegations of torture and ill-treatment said to have been carried out by the military. The lack of responsiveness and

[234] See *Asia Report*, above note 15, p.30, for the example of Shahidul Islam and Monirul Islam Monir in Bangladesh.
[235] Article 11(1) The Prevention and Prohibition of Torture Act (Act No. 3 of 2012) of Uganda.
[236] Ibid., at article 12.
[237] Medical Action Group (MAG), Balay Rehabilitation Centre, International Centre for the Rehabilitation of Torture Victims, *Torture and Ill-Treatment in the Philippines, Implementation of the Anti-Torture Act*, 2012, available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/BRCMAG_IRTC_Philippines_HRC106.pdf.

transparency of investigations frequently adds to the frustration of victims and/or their families, particularly where they form part of a broader culture of impunity. This is of particular concern where there are suggestions of interference with investigations and prosecutions.

In one high profile case, Sergey Magnitsky, an auditor at a Moscow law firm who had discovered massive fraud by tax officials and police officers, was detained in 2008 and died in custody in 2009. In 2011, Russia's Presidential Human Rights Council found that he had been severely beaten. He had also received inadequate medical care. Notwithstanding the evidence of ill-treatment, if not torture, in detention, the Russian authorities dropped the investigation in March 2013. Bizarrely, Magnitsky himself was posthumously tried and convicted in 2013 on charges of defrauding the Russian state.[238]

Resort to freedom of information laws has helped to obtain further information about relevant statistics, including resources spent, and about what law enforcement agencies have done or failed to do. Indian lawyers, for example, have used India's Right to Information Act in torture cases to establish the nature and outcome of official responses.[239]

The growing awareness of shortcomings in policing has resulted in calls for reforms in many countries. In India, for example, in 2006 the Supreme Court ordered a series of measures, including the establishment of a Police Establishment Board, a Police Complaints Authority and a National Security Commission, in *Prakash Singh vs. Union of India.* This was done "[h]aving regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of Rule of Law; (iii) pendency of even this petition for last over ten years; (iv) the fact that various Commissions and Committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced…"[240] The Supreme Court made a number of follow-up orders in 2007 and 2008 and requested the Indian states to report on compliance in 2012, following concerns over inadequate implementation.[241] In July 2013, the Supreme

[238] Reuters, 'Dead Russian lawyer Sergei Magnitsky convicted of tax evasion', *Guardian*, 11 July 2013, available at: http://www.guardian.co.uk/world/2013/jul/11/sergei-magnitsky-convicted-tax-evasion?INTCMP=SRCH.
[239] European Commission, 'CSOs in India use the Right to Information Act for Accountability and Transparency', 25 January 2013, available at: http://capacity4dev.ec.europa.eu/article/csos-india-use-right-information-act-accountability-and-transparency: "The People's Vigilance Committee on Human Rights (PVCHR) - a human rights organisation based in Northern India fighting for the rights of marginalised people - is using the RTI [right to information] ACT in a different way…In 2012 alone, the organisation supported over 204 people in submitting RTI applications. The RTI applications are used, for example, to check if disciplinary action was taken against police personnel involved in torture, to ask for progress reports of investigations or to get the reasoning behind a decision (not) to provide compensation for cases of police violence. In many cases, the RTI applications have helped victims get ahead in their struggle for justice."
[240] *Prakash Singh v. Union of India Writ Petition* (civil) 310 of 1996 (22 September 2006).
[241] 'SC asks states to file affidavit on police reforms', *Hindustan Times*, 16 October 2012, available at: http://www.hindustantimes.com/India-news/NewDelhi/SC-asks-states-to-file-affidavit-on-police-reforms/Article1-945679.aspx; 'SC takes first step towards implementing police reforms', *Times of India*, 12

Court went as far as summoning the Chief Secretaries of Uttar Pradesh, Maharashtra, Tamil Nadu and Andhra Pradesh for their failure to provide information on the implementation of the Prakash Singh judgment.[242] In the UK, concerns over miscarriages of justice and death in custody have resulted in the establishment of an Independent Police Complaints Procedure, albeit with mixed results.[243]

Countries that have undergone political transition, such as South Africa, Eastern European countries and Northern Ireland, have carried out police reforms, including by means of re-structuring and vetting, with varying degrees of success. In South Africa, police reform included community policing and police oversight. However, subsequent developments, particularly in response to rising crime, have undermined the impact of reforms.[244]

The Jamaican experience is instructive of the factors resulting in the establishment of independent bodies and the challenges they face. The Independent Commission of Investigation (INDECOM) is responsible for investigating alleged abuses by agents of the State. It was established in 2010 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. INDECOM is an independent body that is not subject to the direction or control of any other person or authority.[245] However, INDECOM has faced considerable institutional resistance. Its current director has lamented the poor practices of the Jamaican police force, including the unwillingness of police officers allegedly involved in abuse or killings to give statements to INDECOM investigators and collusion

April 2013, available at: http://articles.timesofindia.indiatimes.com/2013-04-12/india/38490935_1_security-commission-state-police-police-act.

[242] 'SC raps states on police reforms', *Zee News*, 17 July 2013, available at: http://zeenews.india.com/news/nation/sc-raps-states-on-police-reforms_862568.html, and 'Upset at non-compliance of police reforms, Supreme Court summons chief secretaries', *DNA*, 18 July 2013, available at: http://www.dnaindia.com/india/1862763/report-upset-at-non-compliance-of-police-reforms-supreme-court-summons-chief-secretaries.

[243] See Paul Peachey, 'IPCC chief calls for extra powers to investigate police officers', *The Independent*, 4 July 2012, available at: http://www.independent.co.uk/news/uk/crime/ipcc-chief-calls-for-extra-powers-to-investigate-police-officers-7906973.html; Stephen Savage, 'Thinking Independence: Calling the Police to Account through the Independent Investigation of Police Complaints', *British Journal of Criminology*, (2013), Vol. 53(1), pp. 94-112.

[244] Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: South Africa, UN Doc. A/HRC/WG.6/13/ZAF/3, 12 March 2012, para.48: "ICJ and AI noted that the Independent Complaints Directorate (ICD), responsible for investigating allegations of torture and unlawful killings by police, had now been reestablished on the basis of its own independent legislation. However, AI was concerned that it was still not sufficiently independent and resourced. AI further noted that a climate of impunity had been fostered by public statements by senior politicians and officials, including national commissioners of police over the last three years. ICJ indicated that police abuses had rarely been investigated and few perpetrators effectively punished, leading to a state of near-impunity. As a result, victims often had little faith in the system…" [footnotes omitted].

[245] See article 5 of the INDECOM Act 2010.

amongst police officers when providing statements, which impedes investigations and prosecutions.[246] It does not have the power to prosecute perpetrators and 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.[247] 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 of two men, after the officers refused to cooperate with INDECOM's investigation into the case. The Federation argued that the INDECOM Act violated the officers' right not to incriminate themselves and the presumption of innocence until proven guilty.[248] 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.[249]

The problems faced by independent complaints bodies are to some extent mirrored by prosecution services that establish special independent units. Russia, for example, following a series of adverse ECtHR judgments, changed its system in 2007 and established an Investigative Committee under the Office of Public Prosecutor to break the close links between the prosecution and police in respect of crimes allegedly committed by police officers. In practice, however, when the investigator opens a case, the police continues to play a leading role. Nevertheless, also due to the work of civil society and human rights lawyers, there have been a number of successful prosecutions of police officers in respect of acts of torture, with the exception of crimes allegedly taking place in Chechnya.[250] This suggests that persistent advocacy and litigation have had some impact in bringing about changes, despite the problems that remain.

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[246] 'Groups call for greater accountability for police shootings', *The Gleaner*, 17 January 2013, available at: http://jamaica-gleaner.com/gleaner/20130117/lead/lead3.html.

[247] 'Let us prosecute them – INDECOM boss', *The Gleaner*, 16 May 2013, available at: http://jamaica-gleaner.com/gleaner/20130516/lead/lead2.html; Alicia Dunkley, 'Parliament moves to quell ODPP, INDECOM conflict', *Jamaica Observer*, 3 June 2011, available at: http://www.jamaicaobserver.com/news/Parliament-moves-to-quell-ODPP--INDECOM-conflict_8949848.

[248] 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.

[249] 'Court rules in favour of INDECOM', *The Gleaner*, 3 May 2012, available at: http://jamaica-gleaner.com/gleaner/20120503/lead/lead2.html.

[250] See for example regular updates by the Nizhny Novgorod Committee on Torture, at: http://www.pytkam.net/web/index.php?newlang=en. In contrast, on Chechnya, see Russian Justice Initiative and Centre of Assistance to International Protection, 'Submission to the Committee of Ministers of the Council of Europe Concerning the Functioning of Article 125 of the Russian Code of Criminal Procedure in Implementation of Judgments from the *Khashiyev and Akayeva* Group', 18 April 2013, available at: http://www.srji.org/files/Implementation/18%20April%202013%20SUB%20COM.pdf; Committee against Torture, *Concluding Observations: Russian Federation*, UN Doc. CAT/C/RUS/CO/5, 11 December 2012, para.13.

Complaints procedures and investigations in the security context

Many security forces operate with an almost complete lack of transparency, oversight and accountability. In Sudan, for example, national security and intelligence services (NISS) have extremely wide powers to arrest and detain persons for up to four and a half months without judicial review while simultaneously enjoying immunity from civil or criminal proceedings.[251] In practice, NISS can literally "do what they like", operating in plain clothes, arresting and detaining individuals seen as a threat to the government at will, holding them incommunicado and reportedly routinely torturing them with impunity.[252] Such patterns are not confined to particular states. As demonstrated by the US rendition programme, and previous instances of security collaboration in Latin America, states have frequently given security forces carte blanche to use virtually all means "necessary" while shielding them from responsibility. Secrecy has often meant that calls for investigations have been unsuccessful.

Victim and Witness Protection

Victim and witness protection is an integral prerequisite for effective investigations. In many countries, victims, witnesses and human rights defenders working on behalf of victims have been subject to a range of reprisals, from threats to beatings and murder. In Sri Lanka for example, two torture survivors, Gerald Perera and Sugath Nishantha Fernando, who pursued complaints in what became well-known cases, were both murdered in 2004 and 2008 respectively. Sri Lankan journalists who have uncovered violations, have also been threatened and in several cases forcibly disappeared or murdered. The home of a senior human rights lawyer was also attacked and another lawyer was subjected to repeated death threats and his office set on fire in January 2009.[253] As the perpetrators have not been held to account, and a victim and witness protection law had not been adopted in Sri Lanka despite being on the agenda for several years,[254] any victim of torture takes a significant risk when complaining about torture, as do human rights defenders and journalists when exposing torture. This is a worldwide problem.[255] Many states do not have formal victim and

[251] Article 50 National Security Act 2010 of Sudan.
[252] See REDRESS, Sudan Democracy First and African Centre for Justice and Peace Studies, *Comments to Sudan's 4th and 5th Periodic Report to the African Commission on Human and Peoples' Rights: Article 5 of the African Charter: Prohibition of torture, cruel, degrading or inhuman punishment and treatment*, April 2012, available at: http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf.
[253] Asian Human Rights Commission, 'Sri Lanka: Human rights lawyer's office burnt down', 31 January 2009, available at: http://www.humanrights.asia/news/press-releases/AHRC-PRL-008-2009.
[254] See Committee against Torture, *Concluding Observations: Sri Lanka*, UN Doc. CAT/C/LKA/CO/3-4, 8 December 2011, para.19.
[255] See REDRESS Regional Reports, http://www.redress.org/reports/reports and Europe Report, above note 24, pp.35-36.

witness protection laws or protection services for victims of serious human rights violations, including torture. In the MENA region, for example, this includes Algeria, Bahrain, Egypt, Libya, Morocco and Yemen, countries marked by impunity for torture.[256] Where victim and witness protection programmes do exist, such as in the Philippines, they have often been ineffective due to lack of resources. Also, they often operate in an environment where victims and witnesses have limited confidence in state institutions and the judiciary.[257] In Indonesia, the effectiveness of the Witness and Victims Agency has been undermined by financial and logistical constraints as well as concerns over the agency's independence.[258] In Brazil, Provita Law No. 9807 of 2007 establishes a protection programme, which is, however, only implemented in six provinces, making it inaccessible to many victims. The programme has been criticised for being overly bureaucratic, and for failing to protect human rights defenders who face constant threats and harassment.[259] In Colombia, a number of victim and witness protection programmes are in place,[260] including programmes to protect witnesses and victims who have taken part in criminal proceedings against demobilised paramilitaries in the context of the Justice and Peace Law.[261] However, lack of access to victims, delays, restrictive criteria in assessing risks and necessary security measures, and a failure to take into consideration the specific circumstances of certain victims, such as women, have undermined their effectiveness.[262] 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 which has, however, been criticised for its lack of

[256] *MENA Report*, above note 42, pp.42-44.
[257] *Asia Report*, above note 15, p.111.
[258] *Ibid.*, p.22, 69.
[259] *Americas Report*, above note 17, p.38.
[260] 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 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.
[261] 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.
[262] 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/pronunciamientos/pro_2012-05-07.pdf.

independence.[263] In Egypt, there is currently no programme of protection, but a draft Witness Protection law places the responsibility for safeguarding witnesses on the same police who were accused of abuse.[264]

These examples show that legislation on victims and witness protection frequently falls short of needs where the existing system is not well-equipped and/or responsive. In many instances, it is human rights organisations, human rights defenders and others who provide the needed protection.

Another important dimension is action taken against human rights lawyers and others who frequently face adverse repercussions for taking up cases, without enjoying adequate protection under national laws, particularly concerning the exercise of their freedom of expression and association. In Syria, Muhanad Al-Hasani, a lawyer and president of the Syrian Human Rights Society was detained in 2009 for publishing reports about court cases involving allegations of torture, tried for "spreading false information" and "weakening national sentiment". He was convicted and sentenced to three years imprisonment in June 2010. In Sudan, ten journalists who reported on the case of Safia Ishag Mohamed, a student protester, who alleged that she was raped by members of the National Intelligence and Security Forces in January 2011, were prosecuted on charges such as "publication of false news", with two of the journalist convicted and sentenced to one month imprisonment.[265] These cases illustrate how authorities use repressive criminal law to stifle publicity surrounding torture practices, and to hamper support for victims. In addition, laws regulating NGOs have in several countries adversely impacted on their ability to demand accountability for torture.[266]

Medical evidence

Medical evidence plays an important role in corroborating allegations of torture. The Istanbul Protocol sets out applicable standards on documenting the physical and psychological consequences of torture and ill-treatment, and on their use as evidence in

[263] Foundation for Integral Rehabilitation of Victims of Violence (PRIVA), *Alternative Report on Torture and Ill-Treatment of Prisoners in Social Rehabilitation Centres,* CAT Submission, October 2010, pp.7-8, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/PRIVA_Ecuador45.pdf.
[264] Bel Trew, 'Nowhere to hide: Egypt's vulnerable witnesses', *Al Jazeera*, 24 June 2013, available at: http://www.aljazeera.com/indepth/features/2013/06/201362311540416311.html.
[265] See *Safia Ishag Mohamed v. Sudan* (submission by REDRESS and Africa Centre for Justice and Peace Studies, February 2013, on file with REDRESS).
[266] See on concerns expressed in this regard, *Report of the UN Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya*, UN Doc. A/HRC/13/22, 30 December 2009, para.34, and resolution adopted by the UN Human Rights Council, *Protecting Defenders*, UN Doc. A/HRC/22/L.13, 15 March 2013, para.4.

legal proceedings.[267] According to the Protocol, findings can be "not consistent, consistent, highly consistent, typical of, or diagnostic of" torture.[268] Even where a medico-legal report credibly shows that a person has been tortured, however, courts have acquitted the accused police officers known to have been present at the time when the torture took place. This happened in the Gerald Perera case.[269] Medical evidence therefore needs to be viewed as part of the multiple types of evidence that investigative bodies need to compile for an investigation into alleged torture or ill-treatment to be called effective.[270]

Medical evidence may consist of medico-legal reports prepared by experts or any other relevant documentation, such as entries made on admission to a hospital or clinic and types of injuries noted by emergency services, photographs or materials. The admissibility of, and weight given to this evidence is frequently set out in criminal procedure laws and developed in the jurisprudence of the courts of the country concerned. Practice varies widely.

At times, there is no procedure, and/or corresponding right, of arrested and detained persons to undergo regular medical examination, including upon entering and leaving a place of detention. While such a procedure is important for preventive purposes, its absence frequently also translates into a lack of availability of timely medical evidence. In addition, authorities may delay or restrict access to medical examinations, particularly under security legislation, but also under the regular criminal procedure laws in some countries. In Jordan, for example, article 66(1) of the Code of Criminal Procedure allows the public prosecution to ban all contact with a detainee for renewable periods of up to ten days at a time, effectively making it possible for detention authorities to ban a detainee from seeing a doctor or other medical staff.[271] According to the UN Special Rapporteur on Torture, following his mission to Jordan in 2006, "[d]isregard for basic safeguards for detainees, such as notification for reasons of arrest, prompt access to lawyers and families, let alone any serious medical examinations, is reportedly common."[272;]

Often, officially recognised medical evidence falls short of providing a satisfactory account. In Sudan, for example, victims of acts such as rape or torture can obtain a one page medical

[267] *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Istanbul Protocol), (1999).
[268] Ibid., para.187.
[269] Asian Human Rights Commission, 'Sri Lanka: The Gerald Perera torture case – the accused to face retrial', 18 October 2012, available at: http://www.humanrights.asia/news/press-releases/AHRC-PRL-045-2012.
[270] Evidence that should be gathered in an effective investigation includes in particular eyewitness testimony, all available forensic evidence, and comprehensive medical reports. See e.g. *Salman v. Turkey* [2000] ECHR 21986/93, para.106; *Tanrikulu v. Turkey* [1999] ECHR 23763/94, paras.104-110; *Gul v. Turkey* [2000] ECHR, paras.89-91.
[271] Article 66(1) Criminal Procedure Code of Jordan: "The public prosecutor may decide to prevent contacting the detained defendant for a renewable period not exceeding ten days."
[272] *Report of UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Jordan*, UN Doc. A/HRC/4/33/Add.3, 5 January 2007, para.31.

form, to be filled in by a doctor (who often dowa not have the requisite expertise), which sets out only very basic findings. This form later serves as evidence, and may make it difficult to prove acts of torture as it is by its nature deficient and frequently misleading.[273] In Kenya, the medical form "G3" was amended in response to repeated concerns that it was inadequate for the purposes of documenting and investigating torture. However, the amended version still does not reflect relevant standards, such as those set out in the Istanbul Protocol.[274]

Other common problems are lack of capacity, particularly forensic expertise, a particularly pronounced problem in remote areas, and insufficient independence of those tasked with preparing medical reports. In Bahrain, for example, the only officially qualified personnel within the country are those employed by the General Directorate for Material Evidence, under the direction of the Attorney General. The blogger Zacharia Al-Ashiry was arrested and detained in Bahrain for allegedly attempting to run over a police officer during the 2011 protests. He died while in police custody and pictures of his body show marks that indicate he was tortured. However, the forensic report determined that he died of complications of sickle-cell anaemia, an illness that Al-Ashiry's family say he did not suffer from.[275] In Azerbaijan, two physicians reportedly had their licences revoked after providing a medical opinion that could be used against the police.[276] The adverse impact of such a measure on doctors' independence is readily apparent.

In Mexico, the medico-legal report of Israel Arzate Melendez failed to mention any physical evidence of abuse notwithstanding the clear signs on his body. The public defender failed to challenge this omission, although she reportedly was present during Melendez's taped "confession" at a military base.[277] In the case of Joerge Hernandez Mora and others, who were tortured in 2002 by the State Police of Tlazcala, the Public Prosecutor reportedly ignored a recommendation by the State Commission for Human Rights and closed the case before ordering a medical examination according to the Istanbul Protocol. In March 2009, Marcelino Coache, a union activist, was reportedly tortured in the State of Oaxaca. Owing to the lack of local forensic expertise, the medical examination was delayed by over a year and the medico-legal report did not produce any findings of physical injuries. Subsequently, the

[273] See *Safia Ishag Mohamed v. Sudan*, above note 265, also for references to further sources on the law and practice in Sudan.
[274] *Concluding observations on the second periodic report of Kenya*, adopted by the Committee at its fiftieth session (5-31 May 2013), Advanced Unedited Version, para.22
[275] Committee to Protect Journalists, *Zakariya Rashid Hassan al-Shiri*, 9 April 2011, available at: http://www.cpj.org/killed/2011/zakariya-rashid-hassan-al-ashiri.php.
[276] Information provided by participant during seminar organised by REDRESS in collaboration with the SOAS Centre of Human Rights Law: *Global Perspectives on Justice for Torture: Experiences, Challenges and Strategies*, 2 August 2013.
[277] Human Rights Watch, *Torture Report*, CAT 49, November 2012, p. 58-59, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/HRW_Report_Mexico_CAT49.pdf.

Prosecutor did not consider medical documentation from a hospital in which the victim had been given emergency treatment immediately after he had been tortured. In another case, Barbara Italia Mendez was only examined one year after she alleged having been subjected to sexual torture in what she experienced as a traumatising and humiliating examination.[278] The Mexican experience is disconcerting as there have been numerous training sessions on the Istanbul Protocol, which has been referred to as applicable standard for documentation. It demonstrates the difficulty of changing a practice that is still weighted against individuals alleging torture or ill-treatment.

Individuals do not always have a right to request a second medical opinion where they allege that the first medical report was inaccurate or misleading. The importance of obtaining a second medical report is illustrated by the case of Yousef Mowali in Bahrain. In the police report, Mowali's death was attributed to drowning and the Bahraini government resisted requests for a second report. It was not until an independent forensic expert was brought in, with the help and insistence of human rights organisations, that Mowali's obvious injuries and likely electrocution before death were documented.

Once a case makes it to court, judges may not give adequate weight to medical evidence, particularly in relation to the psychological consequences of torture. The Spanish Supreme Court, for example, cleared four Spanish police officers of torturing the Eta suspects Igor Portu and Mattin Sarasola, despite medical reports that showed Portu had been treated for two broken ribs and a punctured lung and claims by Sarasola that the police had pointed a gun at his head and beat him. The court decided that the men's injuries could have been caused by a "violent arrest" and the claims of torture were part of a "political-military strategy and procedure" by Eta.[279]

Recently adopted anti-torture legislation has addressed some of the shortcomings identified above. For example, section 12 of the Philippines' 2009 Anti-Torture law under the heading "Right to Physical, Medical and Psychological Examination" provides that:

> Before and after interrogation, every person arrested, detained or under custodial investigation shall have the right to be informed of his/her right to demand physical examination by an independent and competent doctor of his/her own choice. If such person cannot afford the services of his/her own doctor, he/she shall be provided by the State with a competent and independent doctor to conduct physical examination. The State shall endeavor

[278] CCTI and IRCT, *CAT Alternative Report: Mexico – Implementation of a Nation Wide System of Torture Documentation According to the Istanbul Protocol*, CAT 49, 2012, p.6, available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/CCTI%20&%20IRCT-CAT49_Mexico_.pdf.
[279] 'Four Spanish police cleared of torturing Eta militants', *BBC*, 15 November 2011, available at: http://www.bbc.co.uk/news/world-europe-15743175.

> to provide the victim with psychological evaluation if available under the circumstances. If the person arrested is a female, she shall be attended to preferably by a female doctor. Furthermore, any person arrested, detained or under custodial investigation, including his/her immediate family, shall have the right to immediate access to proper and adequate medical treatment. The physical examination and/or psychological evaluation of the victim shall be contained in a medical report, duly signed by the attending physician, which shall include in detail his/her medical history and findings, and which shall be attached to the custodial investigation report. Such report shall be considered a public document. Following applicable protocol agreed upon by agencies tasked to conduct physical, psychological and mental examinations, the medical reports shall, among others, include: (a) The name, age and address of the patient or victim; (b) The name and address of the nearest kin of the patient or victim; (c) The name and address of the person who brought the patient or victim for physical, psychological and mental examination, and/or medical treatment; (d) The nature and probable cause of the patient or victim's injury, pain and disease and/or trauma; (e) The approximate time and date when the injury, pain, disease and/or trauma was/were sustained; (f) The place where the injury, pain, disease and/or trauma was/were sustained; (g) The time, date and nature of treatment necessary; and (h) The diagnosis, the prognosis and/or disposition of the patient. Any person who does not wish to avail of the rights under this provision may knowingly and voluntarily waive such rights in writing, executed in the presence and assistance of his/her counsel.

However, other anti-torture legislation recently enacted or contemplated at the time of writing, such as in Libya, Kenya and South Africa, are largely silent on the question of medical examination and evidence.

The role of human rights defenders

Human rights lawyers and NGOs frequently face serious challenges when seeking to help those at risk of torture or victims, particularly where they cannot get timely access to individuals in detention. Even were they to get access, or following the release, human rights lawyers and NGOs may not have the capacity to document torture in accordance with best practices, particularly the Istanbul Protocol. These standards are well known in some countries, such as Georgia, Kenya, Mexico, the Philippines and Turkey, largely due to concerted efforts to train health and legal professionals. In other countries, such as Bahrain, human rights defenders have faced difficulties to build their capacity, also due to the hostile attitude of the authorities; several human rights lawyers, doctors and activists have faced

detention, ill-treatment, torture and prosecution for their human rights activities.[280] In some countries, rehabilitation centres are often the main point of contact for victims but these centres may have no or limited legal expertise and litigation experience. In Albania, for example, the work of the Albanian Rehabilitation Centre for Treatment and Torture (ARTC) began in the 1990s to help victims of the previous regime before later on engaging in broader advocacy relating to contemporary concerns over torture and ill-treatment. At present, it is working on strengthening its capacity, as well as that of other actors, to engage in strategic litigation addressing a series of problems identified in Albania's criminal justice system, including a failure to adequately investigate allegations of torture and ill-treatment. In addition, lawyers and/or NGOs pursuing cases on behalf of victims often have limited strategic focus. Many lawyers focus on defending individuals who are criminal suspects, and raise torture allegations in this context, but do not equally pursue complaints or other legal action to ensure reparation where this is not part of the strategy pursued and/or the main focus of the victim. In turn, this results in a lack of practice and experience of pursuing such cases.

3.3.2. Jurisprudence: Prosecutions

There have been few concerted efforts to hold perpetrators of torture and related violations to account. All too often, prosecutions of suspected perpetrators of torture do not result in convictions and commensurate penalties. Suspects are often lower or middle-ranking public officials (rather than their superiors) who are charged with lesser crimes than torture, such as assault, battery, coercion or abuse of office that carry relatively low punishments. In Jordan, for example a prison director was found guilty in a Police Court of "exercising unlawful authority resulting in harm" (not torture) for the mass beating of 70 inmates in August 2007, but was only fined JOD 120 (around $180 USD). Twelve prison guards who had participated in the beatings were acquitted on the grounds that they had simply been following orders.[281]

Prosecutions frequently fail because of the difficulties to prove torture, including securing witnesses for the prosecution, lacking, inadequate or conflicting medical evidence as well as threats of reprisals influencing victims and witnesses. In the case of David Amarasinghe, for example, where the victim was alleged to have been tortured to death in detention, Sri Lanka's Court of Appeal relied on an inconclusive medical report to halt the proceedings, notwithstanding considerable evidence before the Magistrate pointing to the culpability of the police.[282] In some cases, charges filed were undermined by lack of cooperation from the

[280] See *MENA Report*, above note 42, p.43.
[281] Human Rights Watch, *Jordan: Torture in Prisons Routine and Widespread*, 8 October 2008, available at: http://www.hrw.org/news/2008/10/08/jordan-torture-prisons-routine-and-widespread-0.
[282] See Amarasinghe Complaint, above note 26.

institutional actors. In the Philippines, for example, the prosecution of former military general Jovito Palparan for the enforced disappearance of two student activists in 2006 has been frustrated by military personnel.[283]

Prosecutions are often subject to lengthy delays, due to weaknesses in the administration of justice, delaying tactics and an apparent reluctance of prosecutors or judges to expedite cases. In Peru, for example, Amalia Tolentino Hipolo was gang raped by 10-12 men in 1994 and her husband was killed by soldiers when the couple were stopped at a military checkpoint. Her complaints at the time were ignored. In the course of the investigation of the case by Peru's Truth and Reconciliation Commission, the prosecutor in Aucayacu took up the case in 2003 and ordered a medical examination to be carried out in 2005. However, the medico-legal report found that the post traumatic stress disorder she suffered was due to her husband's death but could not be attributed to the gang rape. As there was no physical evidence given the long passage of time, the prosecutor decided to drop the case. Since January 2012, the case has been pending before the Second Supra-provincial court of Lima, with renewed attempts to secure psychological expert evidence.

Where punishments have been imposed, they have often consisted of short terms of imprisonment and/or have been reduced on appeal. In Germany, a police director and his subordinate had threatened Gäfgen, a law student who had kidnapped (and murdered) a boy (who the police at the time believed to be still alive), with torture. The Frankfurt am Main regional court convicted the subordinate for coercion and the police director for incitement to commit coercion. The Court imposed suspended fines, finding that there had been a series of mitigating factors.[284] The ECtHR found that:

> imposing almost token fines of 60 and 90 daily payments of EUR 60 and EUR 120, respectively, and, furthermore, opting to suspend them, cannot be considered an adequate response to a breach of Article 3 [of the ECHR], even seen in the context of the sentencing practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.[285]

[283] Human Rights Watch, 'Letter to Lt Gen. Jessie D. Dellosa, Chief of Staff of the Armed Forces of the Philippines', 2 April 2012, available at: http://www.hrw.org/news/2012/04/01/letter-lt-gen-jessie-d-dellosa-chief-staff-armed-forces-philippines.
[284] *Gäfgen v Germany*, above note 190, paras.49, 50.
[285] Ibid., para.124.

In the case of Zontul,[286] a Turkish migrant who had been raped with a baton by a Greek coastguard (D) and subjected to assaults by several others, a Greek Naval Tribunal, in 2004, convicted and sentenced the coastguards to short terms of imprisonment, which were suspended:

> D. was sentenced to 30 months' imprisonment for an offence against sexual dignity. Another officer received a sentence of one year and four months' imprisonment for aiding and abetting the offence, while the three others were sentenced to prison terms of 18 months for abuse of authority. The coastguard officers appealed. On 20 June 2006 the Naval Appeals Tribunal held that D. had inflicted bodily injury and impaired the health of a person under his authority, had engaged in unlawful physical violence against that person and had seriously undermined his sexual dignity with the aim of punishing him. The Appeals Tribunal sentenced D. to a suspended term of six months' imprisonment, which was commuted to a fine [of €792]. V., who had admitted aiding and abetting the offence, was sentenced to five months' imprisonment, suspended. His sentence was also commuted to a fine.[287]

The Appeals Tribunal failed to categorise the baton rape as torture, which is recognised as a separate crime in article 137A (1) of the Greek Penal Code and carries a heavier punishment than the offences for which D. was convicted.[288] Notably, it found that, for an act to constitute torture, the infliction of intense pain must be planned and repeated and durable (finding that this requirement was not met in the case).[289] This interpretation introduces elements that are not present in article 1 UNCAT and considerably raises the threshold for an act to be qualified as torture, effectively excluding "spontaneous" torture and treatment lasting for a short period of time, even if it inflicts severe pain or suffering. The ECtHR found a violation of article 3 of the ECHR on the grounds that this sentence was insufficient, lacked deterrent effect and could not be viewed as fair by the victim as it was clearly disproportionate.[290]

The use of special courts attached to security or military forces for the prosecution of officials suspected of having committed torture can be particularly problematic, given the lack of independence and transparency. This can be seen in several States, such as in the MENA region, including Jordan, Lebanon and Egypt, where the prevailing impunity for

[286] See above at pp.11, 12.
[287] European Court of Human Rights, 'European Court finds an illegal migrant was tortured by one of the Greek coastguard officers supervising him', Press Release, ECHR 017 (2011), 17 January 2012.
[288] See *Zontul v. Greece*, above note 45, paras.20-33.
[289] See REDRESS application in the case of Zontul v. Greece, April 2008, para.18, available at: http://www.redress.org/Application_to_the_European_Court_of_Human_Rights_April_2008.pdf.
[290] See *Zontul v. Greece*, above note 45, paras.107-109.

perpetrators of torture is facilitated by the use of special or military courts.[291] Principle 9 of the UN Principles Governing the Administration of Justice Through Military Tribunals states that "[i]n all circumstances, the jurisdiction of the military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes."[292] This is justified by the fact that human rights violations do not fall within the scope of duties performed by military officials and needed because "military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating 'guilty pleas' to victims' detriment."[293]

There have also been concerns over the failure of states to discharge their positive obligation to hold accountable members of forces accused of committing acts of torture abroad.[294] In the UK, for example, the trial for the torture and murder of Baha Mousa by British troops in Iraq resulted in one conviction for inhumane treatment of Corporal Donald Payne who pleaded guilty and was sentenced to one year imprisonment. The other seven defendants who had been charged with offences ranging from manslaughter to inhumane treatment and perverting the course of justice were acquitted, which has been attributed to shortcomings in the investigation and a closing of ranks of the officers involved. None of the defendants had been charged with torture under section 134 of the Criminal Justice Act. In another court martial in relation to ill-treatment in Camp Breadbasket, including sexual abuse, four soldiers were convicted for service offences. Fusilier Gary Bartlam, Corporal Daniel Kenyon, Lance Corporal Mark Cooley and Lance Corporal Darren Larkin, were convicted for service offences, like abuse and assault, but not torture. They were sentenced to jail terms ranging from 140 days to 2 years and dismissed from the army. Court martials in the cases of Ahamad Jabbar Kareem (who was beaten, thrown into a river and drowned, four soldiers accused) and Nadhem Abduallah (seven soldiers accused) ended in acquittals, in the latter case because the prosecution could not "identify any single defendant who applied unlawful force".[295] Prosecutions in other countries, such as in the United States in relation to torture and ill-treatment committed in Abu Ghraib, have been beset by shortcomings, particularly the restrictions on liability and the failure to hold higher-ranking

[291] *MENA Report*, above note 42, pp. 37-38.
[292] UNESC, *International Standard: Principles Governing the Administration of Justice Through Military Tribunals*, 2010, available at: http://www.dcaf.ch/Publications/International-Standard-Principles-Governing-the-Administration-of-Justice-Through-Military-Tribunals.
[293] Ibid.
[294] See for the extent of this positive obligation, Al-Skeini v. United Kingdom, above note 111.
[295] Own Bowcott and Richard Norton-Taylor, 'Paratroopers cleared of murdering Iraqi after judge says there is no case to answer', *Guardian*, 4 November 2005, available at: http://www.guardian.co.uk/uk/2005/nov/04/military.iraq.

officials to account.[296] The outcome, that is short prison sentences in a few cases for crimes other than torture, points to a failure of the system, particularly in light of a considerable number of allegations of torture, to ensure accountability that adequately reflects the seriousness of the crime.

There are several notable exceptions when accountability has prevailed. Argentina has been trying a number of alleged perpetrators of crimes committed in the period 1976-1983, and is in the process of developing a detailed jurisprudence on "state crimes".[297] Peru and Guatemala are further examples of countries which have prosecuted leading officials.[298] Political leaders and officials have also been prosecuted in Egypt, Libya and Tunisia in the wake of the Arab uprisings, though not primarily for torture.[299] The high profile nature of some cases and the political circumstances of trials in the region have raised concerns about respect for fair trial and overt politicisation, which can also be detrimental to the rights of victims, as demonstrated by the trial of Saddam Hussein by the Iraqi High Tribunal.[300]

[296] Scott Shane and Mark Mazzetti, 'Report Blames Rumsfeld for Detainee Abuse', *New York Times*, 11 December 2008, available at: http://www.nytimes.com/2008/12/12/washington/12detainee.html?ref=abughraib. See also Reuters, 'General Clears Army Officer of Crime in Abu Ghraib Case', New York Times, 11 January 2008, available at: http://www.nytimes.com/2008/01/11/washington/11abuse.html?ref=abughraib.

[297] Several hundred people accused of human rights violations committed during the 'Dirty Wars' are facing criminal proceedings in Argentina and many have already been convicted, including Reynaldo Bignone, a former military general, who was found guilty of torture, murder and several kidnappings. See Amnesty International, *Former Argentine president jailed for crimes against humanity,* 21 April 2010, available at: http://www.amnesty.org/en/news-and-updates/former-argentine-leader-gets-25-years-crimes-against-humanity-2010-04-21. See also Margarita K. O'Donnell, 'New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations' *New York University Law Review 84* (2009), pp. 333-374, available at: http://law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__journals__law_review/documents/documents/ecm_pro_061541.pdf

[298] In 2009, former Peruvian President Alberto Fujimori was convicted of human rights violations, including ordering two massacres, see for a translation of the judgment, *American University International Law Review,* 25 (2010), pp. 657-842, available at: http://www.auilr.org/pdf/25/25-Fujimori-Translation.pdf. See also Emi McLean, 'Guatemala's Rios Montt Genocide Prosecution: The Legal Disarray continues', *Open Society*, 18 June 2013, available at: http://www.opensocietyfoundations.org/voices/guatemalas-rios-montt-genocide-prosecution-legal-disarray-continues.

[299] *MENA Report*, above note 42, p.31.

[300] Human Rights Watch, *Iraq: Saddam Hussein Put to Death: Hanging after flawed trial undermines rule of law*, 30 December 2006, available at: http://www.hrw.org/news/2006/12/29/iraq-saddam-hussein-put-death.

Developments in Tunisia provide some evidence that government actors (some of whom have been victims of violations, including torture, themselves) are more receptive to calls for individual justice, accountability and broader reforms in times of transition. In Tunisia, when Fayçal Barakat, a 25-year-old man died in custody in 1991, the authorities claimed that he had died in a road accident. The case was brought before the UN Committee against Torture, which found a violation of the duty to undertake prompt and impartial investigations.[301] However, it was only reopened following the end of the Ben Ali regime. The person who brought the complaint to the CAT is now a presidential advisor and has obtained access to confidential files, which showed that the then Tunisian government had considered three responses to the 1999 CAT recommendation to exhume Fayçal Barakat's body in the presence of a foreign forensic pathologist: (1) no exhumation; (2) exhumation without a foreign expert; (3) exhumation with a foreign expert. The President chose option (2) to retain control and limit the fallout of the case, as option (3) would have exposed the collusion and cover up of the case. In March 2013, following political changes in Tunisia, Fayçal Barakat's body was exhumed and examined by an international forensic pathologist, Dr. Pounder (the same foreign expert who had been considered for the earlier exhumation) and three Tunisian forensic pathologists.[302] The reopening of this case sets an important precedent, forming part of broader efforts to make the investigation and prosecution of torture cases in Tunisia more effective.[303]

[301] *Barakat v. Tunisia*, UN Doc. CAT/C/23/D/60/1996 (10 November 1999).

[302] Information provided by Amnesty International on 3 June 2013 (the case will be covered in some detail in a forthcoming Amnesty International report on Tunisia). See for earlier reports,
Amnesty International, *Tunisia: Rhetoric versus reality*, January 1994, available at:
http://impact22.amnesty.org/en/library/asset/MDE30/001/1994/en/b7a1d6f4-f8c7-11dd-b40d-7b25bb27e189/mde300011994en.pdf.

[303] See in particular *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, Mission to Tunisia*, UN Doc. A/HRC/19/61/Add.1, 2 February 2012.

4. ACCESS TO JUSTICE AND REPARATION: CHALLENGES AND RESPONSES

4.1. Legislative developments

The right of torture victims to an effective remedy and rehabilitation is set out in article 14 UNCAT, and recognised in a number of treaties and other sources, including jurisprudence.[304] However, in many countries, the right is undermined if not altogether frustrated by shortcomings in the governing legal framework. Deficiencies include:

(i) No clear definition of torture and/or ill-treatment

As set out above, the laws of many countries do not provide for a definition of torture in line with article 1 UNCAT. This shortcoming contributes to limited awareness of torture in the system, which may result in inadequate awards, and frequently to impunity, which is an anathema to the right to reparation.

(ii) No explicit recognition of the right to reparation for torture

The legal systems of several countries do not recognise any right to reparation specifically for torture.[305] In some countries, a right to reparation for torture has been recognised in the constitution, such as in Yemen,[306] but implementing legislation is lacking. Some anti-torture laws cover the right to reparation but in other countries, legislation focuses primarily on criminalisation, such as in Sri Lanka or South Africa,[307] which means that victims of torture have to rely on constitutional remedies for the violation of fundamental rights and tort remedies respectively.

As international treaty bodies, particularly the Committee against Torture, have emphasised, states should enact legislation clearly setting out the right to reparation for torture. Such legislation should comprise recognition of the right, specify the right-holders and duty-bearers, provide for a range of reparation measures and identify a procedure

[304] See in particular, Committee against Torture, General Comment 3, above note 192.
[305] Including Egypt, Colombia, Mexico, Poland, Russia, Tanzania, and Nigeria. See REDRESS regional reports, available at: http://www.redress.org/reports/reports.
[306] Article 47 of the Constitution of the Republic of Yemen, 1994, as amended: "The law shall determine the punishment for whosoever violates any of the stipulations of this Article [which includes the prohibition of torture] and it shall also determine the appropriate compensation for any harm the person suffers as a result of such a violation."
[307] South Africa's Prevention of Combating and Torture of Persons Act (Act No.13 of 2013), coming into force on 29 July 2013, available at: http://www.info.gov.za/view/DownloadFileAction?id=195533.

through which torture victims can effectively claim and obtain reparation.[308] The lack of an explicit recognition of the right to reparation for torture in legislation, while not conclusive, is often indicative of a national system falling short of international standards.

(iii) The right to reparation for torture in national law falls short of international standards

Recently enacted legislation in Madagascar, the Philippines and Uganda include provisions granting a right of reparation for torture. While this is noteworthy, experiences such as in Nepal demonstrate the difficulties of putting an adequate and effective legal framework in place. Nepal's Torture Compensation Act of 1996 fails to clearly define key terms such as 'torture' ("[t]orture means physical or mental torture of any person who is in detention in the course of inquiry, investigation or hearing, or for any other reason. The term includes cruel, inhuman, or insulting treatment of such person") and 'victim' ("victim means a victim of torture"). It limits reparation to compensation, which is capped at 100,000 Nepalese Rupees (around $1,028), an amount that is clearly inadequate even if the general level of income in the country is taken into consideration. In terms of procedure, the law provides for an extraordinarily short time limit of 35 days within which claims have to be submitted (from the date of the infliction of torture or release from detention) and provides that the victim must submit a final decision for execution within one year or forfeit the right to compensation.[309] The restrictive nature of the Act is problematic[310] and serves as a stark lesson that ill-conceived torture reparation laws may narrow the rights of victims rather than strengthen them.

(iv) Lack of effective remedies enabling persons alleging to have been subjected to torture to access justice

In countries that do not have specific anti-torture legislation, the availability of effective remedies and reparation largely depends on the combination of a conducive legislative framework and a favourable judicial or administrative practice. Remedies that may be, and have been, used in lieu of torture-specific legislation include constitutional remedies, *partie civile* proceedings (bringing civil claims as part of criminal proceedings), tort claims, administrative procedures and proceedings before national human rights institutions.

In India and Sri Lanka, constitutional remedies have been used to award compensation for torture and demand steps to be taken to investigate violations. The Indian Supreme Court and High Courts have recognised the right to redress, including compensation and other measures, for victims of fundamental rights violations, including, where appropriate, their

[308] See in this context, Committee against Torture, General Comment No. 3, above note 192, paras.19-22.
[309] Articles 5(1) and 9(1) Torture Compensation Act of Nepal.
[310] See below at 4.2.

families.[311] In 2009, for example, the High Court of Punjab & Haryana ordered the state to pay 2,000,000 rupees (around $33,336 USD) compensation to each of the five appellants who had been subjected to false prosecution, illegal detention and torture.[312] While this jurisprudence is an important development, its impact across India is undermined by several factors. Access has proved difficult for the most marginalised and conflict-affected victims, jurisprudence has varied considerably over time, and implementation has been weak. Most importantly, jurisprudence has failed to bring about profound changes.[313]

Civil action has been successful in countries such as Egypt, Kenya, Peru, Russia and South Africa.[314] While such action can provide important remedies in individual cases, remedies are frequently circumscribed. The remedies are not torture specific and are often confined to compensation for torts such as battery or assault. This means that the judiciary applies a legislative framework that is frequently ill-equipped to address the nature of torture and fashion adequate reparation. This is also reflected in the limited amount of compensation awarded. [315] In a number of countries, the executive has failed to pay out compensation awards in a timely fashion, which contributes to frustrating if not entirely negating the reparative function of awards.

National human rights institutions have also played a role in providing reparation, either in the form of recommendations, such as in India, or through quasi-judicial mechanisms, as with the Ugandan Human Rights Commission (UHRC). The UHRC in particular has developed an impressive practice of awarding compensation in torture cases. However, a considerable number of these awards have not been paid by the government.[316] In other countries, national human rights institutions have only play a marginal role in terms of advocating, recommending or awarding reparation for victims of torture.[317]

For all their shortcomings, the systems considered above have at least provided a modicum of reparation. Others have completely failed. The following legal barriers, which are not necessarily torture specific, have proved particularly detrimental to bringing successful claims in torture cases:

[311] For an overview, Lutz Oette, 'India's International Obligations Towards Victims of Human Rights Violations, Implementation in Domestic Law and Practice,' in C. Raj Kumar and Haryana K. Chockalingam (eds.) *Human Rights, Justice & Constitutional Empowerment* (Oxford University Press, New Delhi, 2007), pp.462-485.
[312] *Nachhattar Singh alias Khanda and Ors v. State of Punjab,* High Court of Punjab & Haryana, Decision of 23 September 2009.
[313] *Asia Report*, above note 15, pp.46-47.
[314] For Peru, see the case of Manuel Cruz Cavalcanti, *Americas Report*, above note 17, p.48; Russian courts have awarded compensation ranging from €1,000 to €20,000, *Europe Report*, above note 24, p.39.
[315] See on this point further below at 4.2.
[316] *African Report*, above note 24, p.21.
[317] See *African Report*, above note 24, p. 21, *Americas Report*, above note 17, p. 28; *Asia Report*, above note 15, pp.17-18.

(i) the success of a civil action depends on the outcome of a criminal investigation, which frequently stalls claims where criminal investigations are ineffective;[318]

(ii) the state can only be sued with its consent, for example in the Philippines;[319]

(iii) immunities bar civil proceedings for any "act done…while or by reason of performing [official] functions or any duty assigned", which is often found in security legislation, for example Sudan's National Security Act;[320]

(iv) short statutes of limitation bar claims even where it had been impossible or too dangerous to take legal action at any earlier stage. This applies to both short criminal statutes of limitation having a bearing on civil claims and limitation periods under constitutions or statutory law. In Sri Lanka, for example, constitutional complaints, including for torture, have to be brought within one month.[321] In Nepal, claims under the Torture Compensation Act are prescribed after 35 days. While these are extreme examples, when tort law limitation periods are applied to torture cases, they are frequently short, such as the three year period under South African law.[322] Such periods give victims insufficient time to file cases and fall short of the standards developed by the Committee against Torture according to which torture claims should not be subject to prescription;[323]

(v) considerations relating to "national security", either as a matter of law or judicial practice, result in cases not being adjudicated, or severely undermine the ability of plaintiffs to bring/challenge evidence;[324]

(vi) the law may not provide a framework enabling torture victims to bring claims, particularly where no victim/witness protection programmes are in place, where legal aid is inadequate and where human rights defenders face obstacles to provide legal assistance;[325]

(vii) Limited availability of forms of reparation recognised under international law, particularly the right to rehabilitation

[318] For example, Burundi, Senegal, Cameroon, Mexico and Honduras require a criminal conviction before a civil case can be successful.
[319] Article 16(3) Constitution of the Philippines.
[320] Article 52(1) National Security Act of Sudan. See also *Security Report*, above note 5, pp.59-62.
[321] Article 126 (2) of the Constitution of Sri Lanka, 1978, as amended.
[322] Section 11(d) of the Prescription Act of 1969.
[323] Committee against Torture, General Comment No. 3, above note 192, para.40.
[324] *Security Report*, above note 5, pp.69-71.
[325] See above at 3.3.1.

Several constitutions and national laws provide courts and other bodies with the mandate to award or recommend reparation, commonly including restitution, compensation and, in some instances, forms of satisfaction. South Asian supreme courts, for example, have combined the award of compensation with orders that proceedings be instituted against the perpetrators of torture.[326] However, many laws do not meet international standards, particularly those set out in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*[327] and CAT's General Comment 3. This applies in particular to the right to rehabilitation and components of satisfaction and guarantees of non-repetition. The right to rehabilitation in particular is typically not set out in relevant legislation, as it still appears to be widely seen as a component of compensation ("future medical expenses"). This notion of rehabilitation does not adequately reflect the model set out in CAT's General Comment 3, which provides that "[s]tates parties' legislation should establish concrete mechanisms and programmes for providing rehabilitation to victims of torture or ill-treatment. Torture victims should be provided access to rehabilitation programmes as soon as possible following an assessment by qualified independent medical professionals."[328]

Recently adopted anti-torture legislation has used different approaches to address the right to rehabilitation. Article 21 of Madagascar's 2008 Anti-Torture law simply states that "[t]he state guarantees the right of obtaining reparation to victims of acts of torture."[329] It then sets out that this comprises the means needed by a victim to his or her restoration, as fully as possible, including adequate health care and social services, without, however, detailing how this right can be claimed and what rehabilitation "mechanisms or programmes" are put in place for victims.

Uganda's Prevention and Prohibition of Torture Act of 2012 stipulates that a court may order: "rehabilitation including— (i) medical and psychological care; or (ii) legal and psycho-social services to the victim in case of trauma".[330] The measures mentioned reflect the language of the *Basic Principles* and CAT's General Comment. However, the law does not specify that a state should establish rehabilitation mechanisms or programmes, nor does it provide further details as to what measures would satisfy the right to rehabilitation. This leaves Ugandan courts with wide latitude and places considerable responsibility on them in

[326] See below at 5.2.
[327] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN General Assembly Resolution 60/147, 16 December 2005, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.
[328] Committee against Torture, General Comment No. 3, above note 192, para.15.
[329] Translation by REDRESS.
[330] Article 6(1)(c) The Prevention and Prohibition of Torture Act (Act No. 3 of 2012) of Uganda.

an area where policy making and the development of programmes are considered a duty of the government and legislature.

The 2009 Philippines Anti-Torture Law, in contrast, provides for a clear duty for specified governmental bodies to formulate a rehabilitation programme:

> [w]ithin one (1) year from the effectivity of this Act, the Department of Social Welfare and Development (DSWD), the DOJ [Department of Justice] and the Department of Health (DOH) and such other concerned government agencies, and human rights organizations shall formulate a comprehensive rehabilitation program for victims of torture and their families. The DSWD, the DOJ and the DOH shall also call on human rights nongovernment organizations duly recognized by the government to actively participate in the formulation of such program that shall provide for the physical, mental, social, psychological healing and development of victims of torture and their families. Toward the attainment of restorative justice, a parallel rehabilitation program for persons who have committed torture and other cruel, inhuman and degrading punishment shall likewise be formulated by the same agencies.

However, in late 2012, after more than three years since the law was enacted, a working group was still in the process of developing the terms of reference for the rehabilitation programme. Leading rehabilitation centres have expressed concern regarding the design of the programme, including the lack of specificity in terms of lead agency and commitments, the absence of "clear provisions for separate allocation of funding for the rehabilitation programme", responsibility of local governments and its adverse impact on implementation, and the lack of coordination amongst agencies.[331] These shortcomings may point to more than inevitable "teething" problems as they highlight structural problems that risk altogether frustrating an effective rehabilitation programme.

The problems identified highlight the need for legislation to be more specific and clearer in setting out the objectives, nature and structure of rehabilitation programmes, including responsibility of various actors and funding.

(v) Limited grounds of jurisdiction for torture committed abroad

CAT, in its General Comment 3 on article 14, highlights that "article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has commended the efforts of States parties for providing civil

[331] MAG, Balay and IRCT, *Torture and Ill-Treatment in the Philippines,* see above note 237, pp.9, 10.

remedies for victims who were subjected to torture or ill-treatment outside their territory."[332]

Under the US Alien Tort Claims Act, victims of torture have been able to bring claims against defendants, for torture.[333] However, the April 2013 decision of the US Supreme Court in the case of *Kiobel v. Royal Dutch Shell Petroleum* emphasised a presumption against extraterritoriality. Nigerian refugees living in the US had 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. The Court held that the Alien Tort Claims Act only applied to human rights violations committed abroad if there is a strong connection with the United States, and the mere presence of a multinational corporation such as Royal Dutch Shell Petroleum is not a clear enough connection.[334] It is as yet unclear what bearing this decision will have on other torture cases brought under the Act. However, in a noteworthy concurring opinion, Justice Breyer stressed "that the statute provides jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and *that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer* or other common enemy of mankind."[335]

Beyond the US and a few other countries, there is limited practice of bringing extraterritorial torture civil claims. Beyond the question of jurisdiction, state immunity for torture continues to pose a major obstacle for torture survivors. With few notable exceptions,[336] courts have recognised state immunity and even the immunity of individual officials.[337]

(vi) Inconsistent practice in periods of transition

Several problems have been identified in the design and implementation of reparation programmes in the transitional context. Some programmes do not explicitly recognise torture survivors as beneficiaries, covering instead other categories of detainees and victims of enforced disappearance (e.g. Algeria and Argentina), victims of extrajudicial killings (including torture to death, e.g. in Chile's initial programme), or a combination thereof. When torture is not specifically recognised, torture survivors will only be eligible if they fall

[332] Committee against Torture, *General Comment No. 2,* above note 12, para.22.
[333] See for a selected overview, Center for Constitutional Rights, 'Factsheet: Alien Tort Statute', available at: http://ccrjustice.org/learn-more/faqs/factsheet%3A-alien-tort-statute.
[334] *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, Supreme Court of the United States of America, No. 10-1491, 17 April 2013.
[335] Ibid., Breyer concurring, p. 1671 (emphasis added).
[336] Italian Supreme Court, *Ferrini v. Republica Federale di Germania*, Joint Sections, Judgement 6 November 2003-11 March 2004, n. 5044.
[337] *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270; *Fang v. Jiang, ex p Application for Leave to Serve Statement of Claim and Notice of Proceeding outside New Zealand*, New Zealand, High Court, CIV 2004-404-5843 (2007) NZAR 420.

within any of the designated categories, and may only be entitled to compensation for time spent in custody, for example, rather than for torture as such. In addition, families of torture victims have often not been recognised as beneficiaries in their own right. Certain categories of persons have been excluded from reparation programmes, such as terrorist suspects who were found guilty in Peru, irrespective of whether or not they had been tortured.[338] Following the uprisings in the MENA region, calls for reparation have become extremely politicised, excluding torture victims who were "on the wrong side", that is belonging to the former regime, for example in Tunisia and Libya.[339]

There is a common concern that the reparation provided through large administrative programmes is not adequate. The amount of compensation is often limited, particularly where the number of victims is large. The amount of compensation needs to have some correlation with the nature of the violation so as not to become tokenistic, if not insulting.

Rehabilitation has frequently been subsumed under compensation. Some countries, such as Chile and Peru, have developed rehabilitation programmes as part of transitional efforts.[340] However, as the experience in other countries, such as Morocco and South Africa, shows, there is a genuine risk that reparation measures, such as provision of health services, become indistinguishable from general development/welfare measures and lose their distinctive victim focus. Others have sought to distinguish more clearly between reparation and other social and economic measures needed, as in the recommendations made by the African Union High-Level Panel on Darfur.[341]

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[338] The Peruvian Truth and Reconciliation Commission recommended reparations only for those "unfairly" indicted or prosecuted of terrorism, meaning effectively those who were acquitted, pardoned or released after being found innocent. Lisa J. Laplante, *Heeding Peru's Lesson: Paying Reparations to Detainees of Anti-Terrorism Laws*, 2006, p. 96, available at: http://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2006/reparationstoantiterrorismdetainees.pdf; International Center for Transitional Justice, *Reparations in Peru: From Recommendations to Implementation*, June 2013, p.7, available at: http://ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf.

[339] Statement by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 'Tunisia: UN expert calls for human rights to be at the heart of a transitional justice process owned by the entire society', 16 November 2012, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12800&LangID=E and United Nations Support Mission in Libya, 'Transitional Justice-Foundation for a New Libya', 17 September 2012, available at: http://www.unsmil.unmissions.org/LinkClick.aspx?fileticket=8XrRUO-sXBs%3d&tabid=3543&language=en-US.

[340] See Elizabeth Lira, 'The Reparations Policy for Human Rights Violations in Chile', in Pablo De Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006), pp.55-101; Lisa Laplante and Kimberly Susan Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru', *Human Rights Quarterly*, (2007) Vol. 29, pp.228-250.

[341] *Darfur: The Quest for Peace, Justice and Reconciliation*, Report of the African Union High-Level Panel on Darfur (AUPD), PSC/AHG/2 (CCVII) (29 October 2009), xix and xx, paras.27, 28. See further Lutz Oette, 'The African Union High Level Panel on Darfur: A Precedent for Regional Solutions to the Challenges facing International Criminal Justice?' in Vincent Nhemielle (ed.), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, The Hague, 2012), pp.353-374.

Several shortcomings were also evident in initial responses to the violations committed during the uprisings in the MENA region. In Egypt, for example, those who are officially considered victims of the revolution are entitled to monetary compensation, and a compensation fund was set up in this respect in June 2011. The government's official toll for persons eligible for such compensation was 913 in early 2013.[342] However, the fund to compensate victims has only provided monetary compensation, leaving out psychological assistance, care, nursing and other vital needs to rehabilitate victims or assist them legally. Families of the victims reported having suffered from increased bureaucratic procedures and difficulties when applying for their compensation.[343] According to one expert, "in the overall context of lack of recognition and justice for violations the compensation fund appears more designed to appease and silence dissent then to ensure accountability, justice and reconciliation."[344]

In Algeria, Presidential Decree No. 06-93 of 28 February 2006 provides for compensation for families of the estimated 4000-7000 persons who were forcibly disappeared during the civil war, referred to as the "National Tragedy," of the 1990s.[345] However, the process for receiving compensation has been heavily criticised as it requires a victim's family member to sign a document certifying that their relative is deceased and to request a death certificate—both documents must be presented when requesting compensation. Obtaining a death certificate effectively requires families to waive their right to the truth as to the fate of their loved ones, as this signals the end of any investigation into the enforced disappearance. A number of international bodies, including the CAT, have recognised that the ongoing suffering of families who are unaware of the fate of disappeared relatives can amount to cruel, inhuman or degrading treatment.[346]

Reparation programmes do not exist in isolation. For all their potential or actual value for victims, the measures taken may not signal a transition and change towards a system more respectful of human rights and the rule of law, if they take place in a setting where

[342] Al Akhbar, *After the Revolution: Egypt remembers its martyrs*, 25 January 2013, available at: http://english.al-akhbar.com/node/14766.

[343] Furthermore, the fund has fixed payments of thirty thousand Egyptian pounds ($5,000) for the families of those killed, fifteen thousand pounds ($2,500) for disabled protesters, and five thousand pounds ($833) for all others injured. See M. Hanna, 'Egypt's Search for Truth', *Cairo Review of Global Affairs*, available at: http://www.aucegypt.edu/gapp/cairoreview/pages/articleDetails.aspx?aid=90.

[344] Contribution by participant during seminar organised by REDRESS in collaboration with the SOAS Centre of Human Rights Law: *Global Perspectives on Justice for Torture: Experiences, Challenges and Strategies*, 2 August 2013.

[345] Décret Présidential No. 06-93 du 29 Moharram 1427 au 28 February 2006, available at:http://www.algeria-watch.org/fr/article/just/decret_06_93.htm.

[346] Committee against Torture, *Concluding Observations: Algeria*, UN Doc. CAT/C/DZA/CO/3, 26 May 2008, para.13; Human Rights Committee, *Concluding Observations: Algeria*, UN Doc. CCPR/C/DZA/CO/3, 12 December 2007, para.13.

structural factors remain in place that enable violations, particularly torture, to continue unabated.[347]

4.2. Jurisprudence: Remedies and reparation for torture and ill-treatment

While compensation frequently constitutes the primary or even only form of reparation, certain high courts have awarded broader forms of reparation, especially in the context of constitutional remedies.[348] However, only a few judgments engage in a detailed analysis of the factors to be considered in determining appropriate compensation[349] or awarding damages to vulnerable groups subjected to torture or ill-treatment.[350]

The Nepalese experience is instructive. In the first 12 years of the Torture Compensation Act's operation, compensation was awarded in only 52 of the 208 cases brought (25%), with the amount ranging from 5,000 Rupees ($51 USD) to 100,000 Rupees ($1,028 USD).[351] Only seven of the plaintiffs had actually received the money awarded, and no identified perpetrators were prosecuted. Awards have been made in other countries, such as China, Egypt, Georgia, India, Kenya, Nigeria, Peru and Serbia, but are seen by lawyers as being inconsistent, and often relatively low, even taking average incomes into account. In Russia, for example, amounts of compensation range from 1,000 - 50,000 Euros (1,300 - 66,500 USD) depending on the region and the degree of publicity.[352] In Peru, the police severely beat Manuel Cruz Cavalcanti, to obtain a confession for theft. As a result of the beating, he sustained permanent injuries to his feet and lasting psychological damage, rendering him unable to work and causing major strain on him and his family. He was awarded 10,000 Nuevo Soles (S.) (around 3,700 USD) by the trial court. On appeal the Supreme Court increased the amount of compensation from 10,000 S. to 15,000 S. (around 5,962 USD) in its

[347] Lorna McGregor, 'Transitional Justice and the Prevention of Torture', *International Journal of Transitional Justice* (2013) 7 (1), pp.29-51.
[348] See e.g. *Uttarakhand Sangharsh Samiti, Mussoorie v State of Uttar Pradesh* (1996) 1 UPLBEC 461 (the Indian State is vicariously liable for wrongful acts committed by its public officials and employees); *The 'Bhagalpur Blinding Case' Khatri v. State of Bihar* AIR 1981 SC 928 (discusses compensation for injuries received); *People's Union for Democratic Rights v. State of Bihar* AIR 1987 SC 355 (discusses quantum of damages); *De Silva v. Chairman Ceylon Fertilizer Corporation* [1989] 2 Sri L R 393, cited in Kishali Pinto-Jayawardene, *The rule of law in decline in Sri Lanka: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka* (RCT, Copenhagen, 2009), (establishes right to compensation for torture under Sri Lankan constitution). See also Lutz Oette, 'India's International Obligations', above note 311, pp.478-82.
[349] See for example, Elias, CJ, in *Taunoa and Ors v. The Attorney General and Anor*, Supreme Court of New Zealand, [2007] NZSC 70 SC6/2006/2007. See also *Falwasser v. Attorney-General* [2010] NZHC 410.
[350] See e.g., in Tonga, *Fa'aoso v. Paongo & Ors*, [2006] TOSC 37 ($10,000 for violation of article 37 Convention of the Rights of the Child) and Namibia, *Government of the Republic of Namibia v. Getachew* (SA 21/2006) [2008] NASC 4 (N$10,000 for unlawful detention and inhuman treatment).
[351] See in particular Advocacy Forum, *Hope and Frustration: Assessing the Impact of Nepal's Torture Compensation Act-1996*, 26 June 2008, p.1, available at: http://www.advocacyforum.org/downloads/pdf/publications/june26-report-english-2008.pdf.
[352] *Europe Report*, above note 24, p.39.

judgment of 20 January 2011.[353] This increase fell considerably short of the amount requested by the prosecutor (50,000 S.) and the victim's representatives (185,000 S.). The amount, which is less than the average annual salary in Lima – which was around 18,000 S. in 2011 – is on the face of it inadequate to compensate for the life-long damage, pain and suffering experienced by the victim.

Low amounts of compensation indicate a failure of the legal system and/or courts to adequately appreciate the seriousness of torture as a crime. This applies in particular to psychological forms of torture, which are often not recognised by courts as of sufficient gravity to constitute torture. The inferior status of harm that is not visible or computable is also evident in the practice of awarding extremely low amounts of non-pecuniary damages, if any damages are awarded at all.[354] This practice, apart from falling short of a state's obligations under international law, makes torture 'cheap' where its victims are marginalised and poor, as material damages tend to be lower compared to more affluent victims. In turn, it provides a disincentive for victims to seek justice, as they are often reluctant to engage in drawn out legal cases promising limited rewards.

In some cases, courts have awarded reparation that set precedents. In Thailand, on 14 March 2012, the Songkhla Administrative Court read out a verdict on a case filed by Mr. Rayu Dokor against the Ministry of Defence, Royal Thai Army, Royal Thai Police and Office of the Prime Minister. The military officials at the Wat Suan Tham Taskforce in Ruesoe District, Narathiwat, were accused of inflicting cruel treatment and torture while Dokor was held in custody in March 2008 together with the late Imam Yapha Kaseng, causing Dokor physical and mental damage. The Court found that the military officials had committed physical assault against Mr. Rayu Dokor, based on a medical examination report by physicians from the Ingkhayuth Borihan Army Camp Hospital and examination reports by medical experts from the International Rehabilitation Council for Torture Victims (IRCT). The state agencies were ordered to pay compensation for the physical and mental grievances sustained by the plaintiff during his detention and torture, amounting to 200,000 baht (around $6,395 USD) plus another 10,800 baht (around $345 USD) for his inability to earn his living and incurred interests. Altogether, the state agencies were ordered to provide 246,621.56 baht (around $7,919 USD) to Mr. Rayu Dokor.[355]

In Yemen, the Administrative Court of First Instance ruled on 14 November 2012 that the Government is obliged to pay demonstrators who had been injured during the 2011

[353] *Manuel Cruz Cavalcanti*, 2004-00140-0-1903-JR-PE-2 (00198-2005-0-1SP).

[354] See for example concerns by the Human Rights Committee concerning "the low number of cases where compensation for non-pecuniary damage" was awarded to victims of trafficking (which arguably falls within the definition of torture and ill-treatment) in Human Rights Committee, *Concluding Observations of the Human Rights Committee on The Former Yugoslavia Republic of Macedonia,* UN Doc. CCPR/C/MKD/CO/2, 3 April 2008, para.13.

[355] Information provided by IRCT, on file with author.

uprisings so that they can obtain treatment abroad, enabling victims to access rehabilitation services that are not available in Yemen.[356]

Courts in the US have awarded comparatively high amounts of punitive or exemplary damages in some torture cases, particularly under the Alien Torts Claim Act, which sends a symbolic message of the abhorrent nature of torture and, in theory, acts as a deterrent.[357]

The interplay between national and regional jurisprudence, where applicable, has given rise to distinctive concerns. Regional human rights courts have awarded amounts of compensation that are comparatively high when compared to national jurisprudence, though the scale and type of damages awarded differ considerably. This has proved a challenge where national courts, such as those in several Latin American and European countries, have not followed this practice. Domestic courts have awarded lower amounts of compensation, thereby effectively creating two classes of victims depending on where they take the case.[358]

A number of cases never reach courts, either because of obstacles to access justice or because they are settled out of court. The practice of settling cases is widespread but by its nature, remains largely anecdotal because settlements are often based on confidentiality. Such settlements can present profound dilemmas for victims and their families, particularly where one of the agreed upon terms is a promise to refrain from pursuing criminal complaints or speaking publicly about the incidents. This type of settlement constitutes by definition partial reparation only. Victims of torture and other violations have been divided on whether or not to accept such terms. For some, compensation may provide at least a measure of justice. In Croatia, family members of victims tortured and killed during the war obtained around €200,000 (266,180 USD) compensation as settlement, while the maximum ceiling of compensation that the Supreme Court can award is €30,000, which provides a strong incentive to settle out of court. The UK has also settled cases of torture by British troops (£2,2 million (3,376,780 USD) for Baha Mousa's family and nine others) and over £14 million (21,488,600 USD) to over one hundred Iraqi victims for various abuses, including torture.[359] Following the High Court ruling that claims brought by Mau Mau survivors of colonial torture during the 1950s were not time barred, the UK issued a statement

[356] Ahmed Dawood, 'Court Verdict Requires Government Fund Government Fund Injured Revolutionaries' Care', Yemen Times, 14 November 2012, available at: http://yementimes.com/en/1625/news/1611/Court-verdict-requires-government-fund-injured-revolutionaries%E2%80%99-care.htm.

[357] See e.g. *Siderman v. Republic of Argentina* ($ 2,707,515.63); *Trajano v. Marcos* ($ 4,407,966.99); *Letelier v. Republic of Chile* ($ 5,062,854.97); *Forti v. Suarez-Mason* ($ 8,000,000); *Martinez-Baca v. SuarezMason* ($21,170,699); and *Rapaport v. Suarez-Mason* ($ 60,004,852) (according to Richard B. Lillich, *Damages for gross violations of international human rights awarded by US Courts*, May 1993), available at: http://www.uu.nl/faculty/leg/nl/organisatie/departementen/departementrechtsgeleerdheid/organisatie/onderdelen/studieeninformatiecentrummensenrechten/publicaties/simspecials/12/Documents/12-20.pdf).

[358] See *Americas Report*, above note 17, pp.44-45.

[359] Cobain, *MoD pays out millions*, above note 112.

expressing its regret and agreed to pay out of close to £20 million (30,698,000 USD) in compensation to over 5,000 survivors.[360] Canada, for its part, paid Maher Arar 10.5 million CAD (10,116,582 USD) compensation for its role in his rendition and torture.

[360] REDRESS, 'The UK regrets torture and compensates Kenyan victims after more than 50 years', 6 June 2013, available at: http://www.redress.org/downloads/MauMapressrelease-060613.pdf.

5. THE INSTITUTIONAL AND POLITICAL CONTEXT

5.1. The role of institutions: Law-enforcement agencies, security forces and armed forces

Experiences worldwide have demonstrated that effective implementation of the prohibition of torture requires institutions that are vested with an adequate mandate by law and are able and willing to fulfil this mandate in practice. Corrupted, weak or failing institutions are therefore a key factor in perpetuating torture practices and the lack of accountability and justice. This applies particularly to law enforcement agencies that resort to torture and ill-treatment as routine practice, which is often considered "normal", in lieu of other methods of investigation. Such practices are particularly pronounced in – though by no means confined to - certain regions, such as parts of Eastern Europe and South Asia. Officials belonging to such agencies reportedly use torture as a short-cut to solving cases, as a means of social control and as a way of self-enrichment.[361] These practices may be an officially tolerated part of the system or demonstrate the limits of effective state authority where law enforcement agencies have become a law unto themselves.

Institutional concerns also apply to security forces and the army which in many countries operate pursuant to special security legislation, such as emergency laws and anti-terrorism laws, which provide no safeguards for potential victims while shielding members of the forces concerned from accountability. As a result, such forces frequently develop into powerful institutions in their own right, institutions which perpetuate patterns of arbitrary conduct and impunity, and are hostile to transparency, accountability and any reforms subjecting them to greater oversight.[362]

The role of institutions in perpetuating structures in which violations and impunity are rife has been the subject of a number of reports by truth and reconciliation commissions and similar bodies in times of transition.[363] Others, including NGOs, have also increasingly examined the nexus between institutional failings and a climate in which torture prevails.[364]

[361] See above at 2.1.3. and 2.1.5.
[362] *Security Report*, above note 5, pp.72-74.
[363] See Report of the Bahrain Independent Commission of Inquiry, 23 November 2011, paras.1693-94, available at: http://www.bici.org.bh/BICIreportEN.pdf; Pablo de Greiff, 'Articulating the Links Between Transitional Justice and Development: Justice and Social Integration', pp.29-75, in Pablo de Greiff and Roger Duthe (eds.), *Transitional Justice and Development: Making Connections*, (International Center for Transitional Justice, New York, 2009), available at: http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B1ed88247-585f-de11-bd80-001cc477ec70%7D.pdf ; Scott Sheeran, *Briefing Paper: Contemporary Issues in UN Peacekeeping and International Law*, (IDCR, 2 September 2010), available at: http://www.idcr.org.uk/wp-content/uploads/2010/09/02_11.pdf.
[364] See in particular the work of the Asian Human Rights Commission.

It is now widely acknowledged that police and security sector reforms are critical to build a system based on greater respect for human rights and the rule of law.

The nature and strength of political forces supporting or opposing certain policies and practices that facilitate or result in torture have been critical in determining the outcome of reform efforts. . In India, for example, political progress has been made towards abolishing the Armed Forces Special Powers Act in force in Jammu and Kashmir, which has been notorious for facilitating serious human rights violations, including torture, and perpetuating impunity. However, the army has remained opposed to any changes, resulting in a stalemate that maintains the status quo, which highlights the need to re-define the role of the army and overcome institutional resistance in order to bring about changes.[365] Similar developments have taken place in Manipur in the North-East of India where victims have, in addition to a long-standing campaign against the Armed Forces (Assam and Manipur) Special Powers Act, successfully challenged official accounts of "encounter killings". In September 2012, two organisations, the Extrajudicial Execution Victim Families' Association (EEVFAM)) and the Human Rights Alert (HRA), brought a complaint before the Supreme Court, setting out 1,526 cases of killings committed in Manipur since 1979. The Supreme Court set up a judicial commission of inquiry. The commission inquired into six cases and found that the allegations were credible, and that the victims – who were not associated with "terrorists" as had been claimed – had been extra-judicially killed.[366] These developments led to renewed calls for the abolishment of the Armed Forces Special Powers Act in Manipur.[367] The obstacles faced by the sustained and ongoing campaigns to reform the Armed Forces Special Powers Act in force in certain parts of India highlight the difficulty faced by victims and human rights defenders who challenge entrenched security paradigms.

Notably, as the example of Hong Kong shows, improvements in a state's human right record may not necessarily result from a response to human rights advocacy but may be the outcome of top-down policies, like the sustained anti-corruption campaigns beginning in the 1970s that led to greater transparency and accountability of the Hong Kong police force. Police, security sector and military reforms, which are often motivated by concerns about lack of trust and confidence that the services are efficient, clean and accountable, are therefore critical to create an environment in which there is a greater likelihood of respect for human rights.

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[365] 'Army defends Armed Forces Special Powers', *NDTV*, 14 June 2010, available at: http://www.ndtv.com/article/india/army-defends-armed-forces-special-powers-act-31642

[366] 'Court-appointed panel highlights misuse of AFSPA in Manipur', *The Hindu,* 17 July 2013, available at: http://www.thehindu.com/news/national/other-states/courtappointed-panel-highlights-misuse-of-afspa-in-manipur/article4921637.ece.

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

5.2. The judiciary and the prohibition of torture

National courts are frequently called upon to uphold the absolute nature of the prohibition of torture, provide measures of protection, rule on admissibility of evidence that may have been obtained through torture or ill-treatment, and hear habeas corpus applications. They also play a role in complaints procedures and investigations, try individuals accused of being responsible for acts of torture or ill-treatment, and rule on claims for reparation in the course of criminal, civil, administrative law or constitutional proceedings.[368]

The judiciary is often viewed as the bulwark and key player in ensuring the rule of law and human rights. In practice, the role of courts has been mixed. Some courts have emphasised the *jus cogens* nature of torture and affirmed the inadmissibility of evidence obtained by means of torture. [369] However, the impact of jurisprudence has been undermined by limited implementation. The Indian Supreme Court in *D.K. Basu v West Bengal* and Bangladesh's Supreme Court in *BLAST and others v Bangladesh and others* issued a set of guidelines on custodial safeguards and investigations, particularly in relation to deaths in custody, including, amongst others, medical examination upon entering and leaving detention facilities.[370] However, more than ten years on, the detailed recommendations made by the courts still await adequate implementation. Equally, a judgment of the Supreme Court of Nepal in 2007 that ordered the Government "to criminalize torture and make provisions to punish the perpetrators of torture as demanded by the petitioners,"[371] is yet to be implemented. In Russia, courts have repeatedly directed the Procuratura to re-open investigations, which have resulted in further inconclusive investigations.[372] Equally, some authorities, such as those in Sri Lanka, have not adequately followed court orders to investigate and prosecute individual suspects. In the Philippines, the Manalo Brothers were abducted, secretly detained by the military for 18 months between 2006 and 2007, and subjected to torture. They eventually succeeded with the very first writ of amparo (issued by the Supreme Court in 2007, also to counter secret detention and enforced

[368] See Lutz Oette, 'Implementing the prohibition of torture: the contribution and limits of national legislation and jurisprudence' *The International Journal of Human Rights*, 16(5), pp.717-736.

[369] See *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, UKHL 17 (24 March 1999) and *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71. However, when commenting on the judgment, CAT expressed concern that " the burden of proof on the admissibility of torture material continues to lie with the defendant/applicant (art. 15)." See Committee against Torture, *Concluding observations on the fifth periodic report of the United Kingdom,* above note 95, para.25.

[370] *D. K. Basu v. State of West Bengal* (1997), 1 SCC 416; *Bangladesh Legal Aid and Services Trust (BLAST) and others v. Bangladesh and others*, High Court Division (Special Original Jurisdiction), The Supreme Court of Bangladesh, Writ Petition No. 3806 of 1998; 55 DLR (2003) 383.

[371] *Rajendra Ghimire v. Council of Ministers et al.*, Supreme Court of Nepal, 17 December 2007.

[372] See *Mikheyev* v. Russia, [2006] ECHR 78, paras.36-55, 80, 114. See also Council of Europe, *16 cases against the Russian Federation mainly concerning ill-treatment of the applicants while in custody and the lack of an effective investigation*, Committee of Ministers 1100th DH meeting (2 December 2010).

disappearance), compelling the military to investigate their torture claims.[373] However, not a single military officer – including those identified by name and unit – has subsequently been disciplined or otherwise held accountable for the violations.[374] This lack of implementation indicates fundamental rule of law problems where legislative and executive bodies are unable or unwilling to follow court orders.

National judges have repeatedly failed survivors in torture case. This failure is often due to structural shortcomings in the administration of justice, particularly where the system is under-resourced, the judiciary is weak, courts lack independence and/or there is limited respect for notions of the rule of law. Judges are often seen as lacking awareness of the realities of torture. In several cases, judges have reportedly failed to act in the face of violations, be it arbitrary detention where, given the context, torture is expected or where allegations of torture were raised by defendants in criminal trials. In Sri Lanka, the High Court, in 1995, held admissible a confession made before a police officer under the Prevention of Terrorism Act, finding that Mr. Singarasa, the defendant, had not discharged the burden of proof to show that the confession had been extracted under torture. According to the UN Human Rights Committee, this ruling violated Mr. Singarasa's right to a fair trial, and he should therefore be released or re-tried.[375] However, the Sri Lankan Supreme Court subsequently held that Mr. Singarasa's conviction to 35 years imprisonment was final and that the views of the Human Rights Committee did not provide him with a legal basis for a revision/review of the High Court judgment.[376]

While judicial responses are attributable to multiple factors, inaction is frequently due to local power relations where magistrates and other judges themselves face threats or repercussions if they act on police misconduct or other allegations of torture. In one notable case, in April 2008, the Ascope Country magistrate in Peru ordered three police officers accused of the rape of Luis Alberto Rojas Marin to be detained.[377] However, following marches organised by family and friends in support of the officers, the authorities of the La Libertad Regional Judicial Court decided to release the suspects.[378] The torture to death of Michel Rahavana, a magistrate, by a group of police officers in the province of Tuléar, Madagascar, in 2011 is a particularly drastic example of how police react when one of their own is threatened with accountability. The attack took place after the refusal to heed demands by the group to release a police officer who had been convicted to five years of forced labour for arms trafficking and complicity in acts of banditry. The incident triggered a

[373] See Neri Javier Colmenares, *Initial Analysis of the Philippine Amparo*, Counsel for the Defence of Liberties, 2007, available at: http://bulatlat.com/main/2007/10/13/initial-analysis-on-the-philippine-amparo/.
[374] *Asia Report*, above note 15, p.108.
[375] *Singarasa v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 , 21 July 2004, paras.7.4-7.6.
[376] *Singarasa v. Attorney General*, S.C. SPL (LA) no.182/99 (2006).
[377] See on this case also above note 83.
[378] OMCT, 'Peru: Risk of impunity for police agents accused of rape in Ascope', 9 May 2008, available at: http://www.omct.org/urgent-campaigns/urgent-interventions/peru/2008/05/d19325/.

nationwide strike by the judiciary, demanding justice for what had happened. In another high profile case in Spain, the state brought charges against a judge in response to his efforts to ensure truth and accountability. Judge Baltasar Garzon was made to stand trial – and was later acquitted – on charges of having exceeded his jurisdiction for opening an investigation into violations committed during the Spanish civil war and Franco's regime which had been covered by an amnesty law and statutes of limitation.[379]

These examples demonstrate the importance of an independent judiciary that operates within the rule of law. Similar to police and security sector reform, judicial reforms are critical where the independence of judges has been impaired and/or where the administration of justice has suffered. However, as some of the above examples demonstrate, even in countries that purport to adhere to the rule of law, the judiciary may be subject to external influences and/or bias that result in decisions raising serious questions about their compatibility with the prohibition of torture. This applies in particular to the duty to "take effective … judicial … measures to prevent acts of torture".[380]

5.3. National human rights institutions

National human rights institutions (NHRIs) can offer an important complementary mechanism, or even alternative where other avenues fail. NHRIs, such as national human rights commissions, ombudspersons or similar bodies, have proliferated over the last two decades.[381] At least some of these bodies have played an important role in preventing and remedying torture, such as monitoring detention, particularly where they have been designated as national preventive mechanism under OPCAT; documenting torture and ill-treatment; investigating allegations of torture and ill-treatment; and recommending or awarding compensation, in addition to taking general measures aimed at prevention of torture.

However, the impact of NHRIs has frequently been limited. NHRIs are often only mandated to make recommendations following an investigation. Furthermore, they typically do not have the same powers to investigate and compel witnesses as the police, and may struggle to adequately document cases. The Commission on Human Rights in the Philippines, for example, has long suffered from such shortcomings, including lack of adequate capacity and cooperation, with limited implementation of its recommendations.[382] Even following the

[379] Giles Trimlett, 'Baltasar Garzon cleared over his Franco-era crimes inquiry', *Guardian*, 27 February 2012, available at: http://www.guardian.co.uk/world/2012/feb/27/baltasar-garzon-cleared-franco-crimes?newsfeed=true.
[380] Article 2 (1) UNCAT.
[381] See NHRI website, http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx.
[382] See REDRESS, *Action against Torture, A Practical Guide to the Istanbul Protocol for Lawyers in the Philippines*, November 2007, pp.30-36, available at: http://www.redress.org/downloads/publications/PhilippinesManualNov07.pdf.

adoption of the 2009 Anti-Torture law, problems persist.[383] Where a NHRI is not seen as effective, victims are prone to lose confidence, which can severely undermine the role of such institutions. In addition, some NHRIs are explicitly barred from investigating the conduct of certain forces. For instance, in India the national human rights commission does not have jurisdiction over the army.[384] Several NHRIs, such as in India and Uganda, have developed a practice of recommending or even awarding compensation in cases of torture and ill-treatment.[385] However, the effectiveness of these remedies has been hampered by delayed, or lack of full, implementation, which serves to undermine confidence in the mechanisms. In India, there have also been concerns over inconsistencies in the approach taken by the National Human Rights Commission and the state human rights commissions, and the latter's lack of effectiveness in adequately investigating allegations of torture.[386]

Many NHRIs have not fulfilled the high expectations. This has been due to insufficient independence, inadequate resources and lack of the requisite ability and willingness to challenge entrenched practices to secure justice and accountability. An example is the National Human Rights Commission in Sri Lanka, whose independence has been compromised by the present Government and which has, as a result, lost much of its credibility among civil society, besides being downgraded from A to B status (concerning its level of compliance with the Paris Principles that set out internationally recognised standards for NHRIs).[387]

The structural factors hampering NHRIs' effectiveness necessitate a careful evaluation of the role such institutions can play in combating torture. Depending on their mandate, powers and approach taken, NHRIs can provide an important avenue for victims and a partner for civil society working on behalf of victims and calling for an end to torture. However, it is clear that NHRIs cannot be a substitute for a functioning judiciary. Where the administration of justice is weak, NHRIs have struggled to succeed as they frequently face similar challenges besetting other institutions.

[383] MAG, Balay and IRCT, *Torture and Ill-Treatment in the Philippines,* see above note 237.
[384] See section 19 of the Protection of Human Rights Act 1993/
[385] For example, in Uganda UG.X127,900,000 (about $50,000 USD) was awarded as compensation for instances of torture and ill-treatment, out of UG.X 329,880,000 ($128,323 USD) total compensation awards (38%) in 2012. Uganda Human Rights Commission, *15th Annual Report of the Republic of Uganda*, 2012, available at: http://www.uhrc.ug/?p=1873.
[386] National meetings on the issue of torture in India organised and attended by project partners and REDRESS, 2013.
[387] Committee against Torture, *Concluding Observations for Sri Lanka*, UN Doc. CAT/C/LKA/CO/3-4, 8 December 2011, paras.16-17.

6. TACKLING THE CHALLENGES IDENTIFIED: STRATEGIES AND PROSPECTS

Strengthening national frameworks

Victims of torture, and those working on their behalf, frequently come up against deep-seated structural barriers to justice and reparation. The comparative survey of laws and practices, based on the experiences of those working on torture cases, illustrates what has by now become evident. The assumption that states have a satisfactory rule of law system in place, which is a precondition for victims' rights to be effective, cannot be taken for granted. The implementation of international standards on the prohibition of torture therefore requires a twofold approach: (i) creating and/or maintaining the framework and structures needed to effectively exercise rights and ensure accountability, and, within such a system, (ii) an appreciation, reflected in legislation, institutional set-ups, judicial practice and any official measures taken, of what is required to prevent torture and to adequately respond to allegations of torture. The need for a comprehensive approach as set out in article 2(1) UNCAT: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" must therefore be understood to include a range of measures needed in the circumstances to make the specific rights and obligations, particularly those provided in articles 12, 13 and 14 CAT, more effective.

The comparative survey shows that the worldwide anti-torture movement has – for all the existing challenges – made important gains. At the normative level, the prohibition of torture has withstood repeated attempts at weakening it. At the same time, concerted efforts by a series of actors, which are to a considerable degree reflected in national, regional and international jurisprudence, have deepened the understanding of the nature of torture and its impact on victims, their families and communities. This development has also led to the elaboration of existing standards, both in terms of the specific content of certain rights and obligations, such as the right to an effective remedy, and of what steps states need to take in order to effectively implement those rights. At the national level, there is a growing momentum to strengthen legislation and monitoring mechanisms and, particularly in times of political transitions, to address legacies of torture. However, accountability of perpetrators and reparation for victims is still piecemeal, which highlights the difficulty of creating a conducive environment that minimises the legislative, institutional, political, societal and other obstacles that those seeking justice and accountability all too often face in practice.

Legislative reforms are important at both the symbolic and practical level; ideally, they signal commitment to the prohibition of torture and provide the means to exercise the rights and ensure the obligation of the standards set out in international law. Actual reform processes have produced mixed results. Laws that have largely failed to achieve their purported objective, such as Nepal's Torture Compensation Act (too narrow) and Sri Lanka's Anti Torture Law (lack of adequate institutional structure through which to implement), provide valuable reminders that effective legislative reforms are highly challenging. They need political momentum and support – at all stages of the process, including implementation - and benefit from the participation of a wide range of stakeholders. Experiences with recently enacted anti-torture laws, such as in the Philippines and Uganda, which resulted from sustained engagement by a cross-section of actors and therefore come with considerable "stakeholder" interest, are therefore particularly instructive.

In terms of substance, legislative reform efforts require a detailed understanding of international standards, the national legal system – to ensure coherence and "fit" – and local realties to determine how new laws can best address any problems identified, such as the use of secret detention facilities or shortcomings in complaints procedures. Guidance on the components and content of anti-torture legislation, which includes learning from comparative experiences, is important in order to avoid the many pitfalls that reform efforts can engender. It includes questions such as whether the law should take the form a single act or specific amendments, how to define torture and ill-treatment, and how to reflect the various rights and obligations, i.e. preventive measures, accountability and reparation. Model laws may serve as useful reference points, but there is also an apparent risk that they may prejudice outcomes and thereby run counter to the need for contextualized approaches.

Institutional reforms are critical to make the prohibition of torture effective. From the perspective of victims and those who seek reparation on their behalf, institutions that are accountable, effective complaints procedures and an independent judiciary are arguably the most important building blocks for the protection of their rights. Effective complaints procedures require that those investigating complaints are independent, professional and well-resourced and that effective victim and witness protection schemes are in place. Besides dealing with individual complaints, complaints procedures should be mandated to examine structural factors so as to enable bodies to undertake the necessary changes to guarantee non-repetition. The judiciary needs to be independent and impartial at all levels so as to avoid the development of lopsided systems where constitutional courts make important rulings, such as in several South Asian countries, but practice at the level of lower courts often fails victims. In addition to awareness and application of relevant international standards, it is important that the judiciary develops an understanding and a practice of what accountability and adequate reparation means in practice. This includes challenging practices that perpetuate impunity where it is within judges' discretion to do so, such as

ordering a second medical report, and developing jurisprudence that removes barriers to justice, such as immunities, and promotes adequate reparation, such as on the right to rehabilitation. It also includes a change in attitudes where deference to the executive or a position that is more mindful of the perceived needs of the state trumps the rights of victims and the absolute prohibition on torture.

These mechanisms will only be able to function effectively if the broader institutional rule of law infrastructure set about above (at 5.1. and 5.2.) is in place. It is therefore important to engage closely in processes aimed at reforming institutions, particularly the police, security services and the army, as well as changing institutional cultures and practices. This requires a detailed understanding of institutional shortcomings and comparative best practices, such as on internal disciplinary mechanisms and oversight, as well as the ability to use opportune moments to generate momentum for change, which may indeed be welcomed by some of the members of the institutions concerned.

A specific institutional aspect of the right to reparation that has been largely overlooked to date, even in countries that provide other forms of reparation, is the provision of rehabilitation by the state. Only few countries provide specialised rehabilitation services to victims of torture, which is in most cases offered by rehabilitation centres. However, General Comment 3 of the Committee against Torture makes it clear that the state itself should provide such services.[388] This requires changes in the healthcare systems, which would benefit from the experience of rehabilitation centres and other providers. However, to date, beyond the transitional justice context, limited advocacy efforts have been made to bring about such changes.

National human rights institutions can be important actors in combating torture and seeking justice and accountability. Forging links between civil society organisations and NHRIs is important to maximise impact as the experience in some countries, such as Uganda, demonstrate. While civil society organisations should critically monitor how NHRIs perform and contribute to the protection of human rights, it is important that any such criticism should be informed and come on the basis of prior efforts to ensure that NHRI's fulfil their mandate as best as possible, in line with the Paris Principles.

Situations of political transition are often seen as most conducive to ensuring accountability, reparation and broader changes. They provide a unique opportunity for civil society actors and others to advocate for, and participate in, mechanisms or processes aimed at identifying the causes and consequences of torture, providing compensation and other forms of reparation to victims, and initiating reforms. However, some of these processes have paid insufficient attention to torture-specific experiences and the multitude of actors involved may easily lead to a limited understanding of what specific reforms are needed to

[388] Committee against Torture, General Comment No. 3, above note 192, para.12.

combat torture more effectively and to ensure effective remedies.[389] Making the question of torture an integral part of these processes, and ensuring that torture victims and those working on their behalf have the space to share their experiences and the mechanisms to vindicate their rights, is critical so as not to repeat some of the past shortcomings of 'transitional justice'.

Strengthening regional and international mechanisms

Human rights defenders working on torture around the world frequently seek to use available supranational mechanisms to ensure protection against (further) torture and to secure accountability and reparation. One of the major shortcomings of the current system is that it is incomplete. There are no effective regional human rights bodies in Asia, including the Middle East (neither the Arab League nor ASEAN can hear individual complaints or have a record of effectively protecting rights). Many states, including the USA, India and China as well as entire regions, such as the Middle East with the exception of Egypt as party to the ACHPR, have not accepted individual complaints procedures at the international level. In several parts of the world accessibility to human rights treaty bodies is therefore extremely limited if not non-existent.

Even where individual complaints procedures exist, human rights lawyers and defenders experience a series of challenges. The procedure of treaty bodies is seen as slow and unresponsive, provides limited space for victims to participate and cases often take several years to complete. Even where decisions are favourable, implementation of UN treaty body decisions, and to a lesser extent regional courts and commissions, is weak. In the case of regional courts, while compensation is for the most part routinely paid, effective investigations or other structural changes are often not carried out.[390]

The implementation of treaty body decisions is therefore seen as a priority. Institutional responses at the UN and regional level have yielded limited results. Victims and those working on their behalf frequently find themselves in a position where they struggle, often unsuccessfully, to have a decision of a treaty body implemented. While such decisions constitute important satisfaction in their own right, vindicating the claims made, these gains may be negated by the very perpetuation of the lack of justice that they expose.

Nevertheless, human rights treaty bodies and courts have played an important role in combating torture and advancing accountability and reparation for victims, particularly by:

(i)Exposing practices and establishing an authoritative account of violations and victimisation, such as the European Court of Human Rights in relation to Russia and Turkey,

[389] Observations shared by participants in workshop on torture in Tunisia in April 2013 attended by author.
[390] Open Society Justice Initiative, *From Judgment to Justice, Implementing International and Regional Human Rights Decisions* (Open Society Foundations, New York, 2010), p. 10-11, available at: http://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf.

the Inter-American Court of Human Rights on Peru, the African Commission on Human and Peoples' Rights on Sudan and the Human Rights Committee on several states in Central Asia;[391]

(ii)Providing a clearer understanding of the nature and scope of violations, such as various forms of sexual violence;[392]

(iii)Providing authoritative assessments of legal and institutional responses to violations, particularly on the question of availability of effective remedies, thereby establishing an anatomy of legal systems, seen for example in the European Court of Human Rights' jurisprudence on investigations into torture cases in Russia, including Chechnya;[393]

(iv)Clarifying the rights of victims and obligations of states, including the right to participate in proceedings and the obligation of states both to refrain from torture and to protect individuals from torture;[394]

(v)Recognising state responsibility for a range of violations, including failure of due diligence and when acting abroad (where exercising 'effective control');[395]

(vi)Developing the right to reparation, including by awarding reparation both to individuals and collective entities, and by broadening the scope of victims, particularly in the jurisprudence of the Inter-American Court of Human Rights.[396]

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[391] See the jurisprudence of the respective bodies, including landmark cases of *Aksoy v. Turkey*, (1996) 23 EHRR 553; *Mikheiev v. Russia*, [2006] ECHR 78; *Barrios Altos v. Peru*, Merits, Inter-American Court of Human Rights, Judgment of 14 March 2001, Ser. C, no. 75; *Castro-Castro Prison, Miguel v. Peru*, Merits, reparations and costs, Judgment of 25 November 2006, Ser. C, no. 160; African Commission on Human and Peoples' Rights, *Curtis Francis Doebbler v. Sudan*, 236/2000 (2003); *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, 279/03-296/05 (2009); *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Manfred Nowak: Mission to Kazakhstan,* UN Doc. A/HRC/13/39/Add.3, 16 December 2009; Committee against Torture, *Gerasimov v. Republic of Kazakhstan,* Communication No. 433/2010.

[392] See REDRESS report on rape and ill-treatment as torture (forthcoming).

[393] See for a good overview of litigation on Chechnya and current status, Philip Leach, Jane Gordon, Jessica Gavron, 'Request for the Initiation of Infringement Proceedings by the Committee of Ministers in Relation to the Judgment of the European Court of Human Rights in *Isayeva v. Russia* (No. 57950/00)', 24 February 2005, available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2133031&SecMode=1&DocId=1916062&Usage=2; Russian Justice Initiative and Centre of Assistance to International Protection, 'Submission to the Committee of Ministers of the Council of Europe Concerning the Functioning of Article 125 of the Russian Code of Criminal Procedure in Implementation of Judgments from the *Khashiyev and Akayeva* Group', 18 April 2013, available at: http://www.srji.org/files/Implementation/18%20April%202013%20SUB%20COM.pdf.

[394] Committee against Torture, General Comment No. 2, above note 12.

[395] *González et al. ('Cotton Field') v. Mexico*, Inter-American Court Judgment of 16 November 2009, Preliminary objections, merits, reparations and costs, Series C No. 205; *Al-Skeini v. United Kingdom*, above note 111.

[396] Thomas M. Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond', *Columbia Journal of Transitional Law*, (2008) 46, pp.351-419 and Clara Sandoval-

Human rights defenders have increasingly used networks at the national, regional and international level to seek protection and justice in individual cases and to advocate broader changes to strengthen the rights of victims and the prohibition of torture. This includes a growing focus on the advocacy potential of cases, using the submission of complaints and positive decisions to highlight the need for change. Recourse human rights treaty bodies, as well as review of state party reports by UN committees and charter bodies, such as the Universal Periodic Review, can be a means of using international fora to exert diplomatic pressure on their respective states. However, these campaigns need to be carefully tailored to achieve specific outcomes,[397] and need domestic space for change in order to be effective.

Villalba, 'The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations', in Carla Ferstman et al., *Reparations for Victims of Genocide,* above note 225, pp.243-82

[397] See on the so-called spiral model, Risse et al., above note 98.