association pour la prévention de la torture
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Key Issues in Drafting Anti-Torture Legislation, Expert Meeting 2-3 November 2012

Report: Experience, Advice and Good Practices

October 2013

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Published in November 2013 by the Association for the Prevention of Torture.

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The Association for the Prevention of Torture (APT) is an independent non-governmental organisation based in Geneva, working globally to prevent torture and other ill-treatment.

The APT was founded in 1977 by the Swiss banker and lawyer Jean-Jacques Gautier. Since then the APT has become a leading organisation in its field. Its expertise and advice is sought by international organisations, governments, human rights institutions and other actors. The APT has played a key role in establishing international and regional standards and mechanisms to prevent torture, among them the Optional Protocol to the UN Convention against Torture.

APT's vision is a world free from torture where the rights and dignity of all persons deprived of liberty are respected.

ISBN 978-2-940337-60-6

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Acknowledgements

The APT would like to thank all of the experts for their participation in the workshop and for their thoughtful interventions and contributions during the two-day meeting. The APT would especially like to thank those who agreed in advance to speak on panels or serve as initial discussants in particular sessions. The APT looks forward to continuing to work with all of the experts on these issues.

The APT would like to acknowledge the role of the APT staff in the expert meeting, including Marcellene Hearn, UN & Legal Advisor, who was the lead organiser of the meeting and author of this report; Mark Thomson, Secretary General, who opened the meeting and moderated the first session; Edouard Delaplace, Special Advisor, Jean-Baptiste Niyizurugero, Africa Programme Officer, Matthew Sands, UN & Legal Advisor, and Esther Schaufelberger, MENA Programme Officer who moderated sessions; Catherine Felder and Nathalie Gillieron, who took care of logistics and travel arrangements and Clare Marty, UN & Legal Intern, who took notes during the meeting; as well as everyone not listed here who participated in planning the meeting.

Finally, the APT would like to thank the Canton of Geneva and the Foreign and Commonwealth Office of the United Kingdom for their support of this initiative.

Executive summary

In November 2012, twenty-one experts travelled from all over the world to the Centre Jean-Jacques Gautier in Geneva to an expert meeting on "Key Issues in Drafting Anti-Torture Legislation". During the two-day meeting the participants debated how to draft anti-torture laws, exchanged experiences concerning the long road to legal reform on torture, and discussed good practices and challenges in implementing existing laws.

The participants and the situation in each country

The experts came from different regions and included ministry officials, lawyers, prosecutors, and civil society advocates. Some were from countries that have already enacted anti-torture legislation and are working on implementation while others were from countries that are in the process of drafting new laws. They were joined by international experts including the Chair of the Committee against Torture, a member of the Human Rights Committee, and practitioners from the Office of the High Commissioner for Human Rights, the International Committee of the Red Cross, Amnesty International and Redress.

Legislative strategy: what works?

Advocates for legal reform on torture must make strategic decisions and identify partners from the beginning. One of the first issues for a legislative drafter to consider is whether to amend existing law(s) or to draft an entirely separate anti-torture law. This decision depends on the goal(s) the drafter is trying to achieve. The participants identified a number of circumstances where drafting a separate law might be the best approach, while acknowledging that there are valid reasons to pursue amendments of existing law(s), instead. The experts then learned about effective strategies used in recent anti-torture law campaigns in Uganda and the Philippines.

Constructing the crime of torture

One of the core obligations of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture" or the "Convention") is the obligation to make acts of torture a crime.

The first issue is how to define the crime of torture. The discussion opened with an argument for homogeneous application of the definition of torture in Article 1 of the Convention. Some states have chosen to include a list of acts constituting torture in the definition of the crime, but this practice was not supported by the majority of the experts.

While the Article 1 definition requires a nexus to a public official, other international treaties do not. Some states have broadened the crime of torture to include acts committed with no nexus to a public official. The experts did not reach agreement on whether this is a good practice or not, but they did agree that the penalties for public officials should be higher than the penalties for non-state actors who act without any nexus to a public official.

The next issue for the crime of torture is what behaviour, in addition to actually inflicting the mental or physical pain and suffering, should result in criminal liability. Here the participants discussed attempted torture, complicity or participation in torture and acquiescence.

Once the crime torture is defined penalties must be chosen. The crime of torture should be punishable by appropriate penalties that take into account its grave nature. The penalty should not violate other human rights and it was suggested that the death penalty is not appropriate given the evolving international consensus on the death penalty. Mitigation, aggravating circumstances, and the use of maximum and minimum sentences were also discussed.

Drafters also need to consider whether there are provisions related to defences, justification, immunities, amnesties and prescription in the criminal code or elsewhere that would serve to preclude liability for acts of torture.

Finally, a few countries have also made cruel, inhuman or degrading treatment or punishment a crime. The reason why and how this was done in Uganda and the Philippines was addressed.

Redress

It is not enough to make torture a crime; states must also implement the other obligations of the Convention. Anti-torture legislation should also recognise the right to redress, remove barriers to achieving redress and provide for a remedy that is independent of criminal proceedings and directly enforceable. While a state should always provide access to a judicial remedy the advantages and disadvantages for victims of judicial and quasi-judicial remedies were raised.

Torture in other international treaties

Torture is also defined and regulated in other international instruments. The definition of torture is different in each instrument but the scope of application can overlap, creating complexity for drafters when a state is a party to multiple instruments. The importance of ensuring internal coherence between different domestic laws was stressed and comparisons were made between the definitions of torture in the Rome Statute of the International Criminal Court and the Convention against Torture. Progressive provisions of the International Convention for the Protection of All Persons from Enforced Disappearance that could be imported into anti-torture legislation were also highlighted.

Challenges in implementing anti-torture laws

Even if a perfect anti-torture law is enacted by parliament, all of the hard work will be meaningless if the law is not implemented. Barriers to prosecution were discussed such as the fragility of evidence, the suppression of evidence or denial of access to victims by officials, as well as intimidation and reprisals. The phenomenon of judges reducing charges of torture to lesser crimes was also remarked upon.

There was general recognition that members of marginalised groups and persons with few financial resources are at high risk for torture and other ill-treatment and that efforts to combat torture should turn to ordinary prisoners.

The participants also identified good practices to promote implementation such as drafting internal guidelines on the prosecution of torture, promoting the use of the Istanbul Protocol, and mandatory training of prosecutors and police. With respect to who should investigate torture, the participants generally agreed that it should be the prosecutor's office.

Brainstorming and next steps

The expert meeting was the first part of the Association for the Prevention of Torture ("APT's") project on anti-torture laws. The next step is the development of a torture law toolbox, an on-line resource containing materials for practitioners who are drafting anti-torture laws or analysing existing laws to determine if they conform to the Convention against Torture. The experts agreed that the toolbox should contain a list of basic elements for an anti-torture law. Consensus was not reached on whether to draft a model law or laws, but it was agreed that the first step should be the creation of the list of elements.

Introduction

In November 2012, twenty-one experts on drafting and implementing anti-torture laws travelled from all over the world to the Centre Jean-Jacques Gautier in Geneva to exchange information and experiences on how to draft and implement anti-torture laws that domesticate the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention" or "Convention against Torture").[1]

The experts came from different regions and included ministry officials, lawyers, prosecutors, and civil society advocates. Some were from countries that have already enacted anti-torture legislation and are working on implementation while others were from countries that are in the process of drafting new laws. They were joined by international experts including the Chair of the Committee against Torture, the UN body charged with monitoring implementation of the Convention; a member of the Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights ("ICCPR")[2]; and practitioners from the Office for the High Commissioner of Human Rights, the International Committee of the Red Cross, Amnesty International and Redress.

When a state joins the Convention against Torture it agrees to fight impunity by making acts of torture a crime and investigating and prosecuting allegations of torture, to provide redress to victims, to exclude statements acquired through torture from all proceedings, and to take legislative and other measures to prevent torture, among other things.

Implementation of the Convention inevitably involves analysing existing laws to determine whether the state already meets its obligations and then making amendments or drafting entirely new laws. The Association for the Prevention of Torture ("APT") is developing an on-line tool or "anti-torture law toolbox" for practitioners containing materials that will provide guidance on how to do this. The expert meeting in Geneva was the first step in this project.

During the two-day meeting the participants engaged in friendly and sometimes provocative debate about what to include in an anti-torture law, exchanged experiences concerning the long road to achieving legal reform, and discussed good practices and challenges in implementing existing laws. The agenda for the meeting is attached as Annex 1.

This report is an annotated summary of the discussions held during the expert meeting. The points made have been summarised, edited, and re-organised for readability. Contextual information has been added for readers who did not attend the meeting. The report has been organised according to the themes raised in discussion questions circulated by the APT in advance of the meeting and not according to the sessions of the expert meeting.

[1] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 UN GAOR Supp. (No.51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85 ("Convention againt Torture").

[2] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

The APT has attributed remarks to specific experts only for introductory remarks made by each participant during a tour de table in the first session, for presentations made during panel discussions and for remarks made by initial discussants. These remarks have also been re-organised according to theme. The APT endeavoured to be accurate in summary of the expert meeting but all mistakes are those of the APT.

1. The participants and the situation in each country

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1.1. Introduction

This section of the report introduces the participants and the situation in each country with respect to the adoption and implementation of laws against torture, drawing from a "tour de table" in the first session and from the responses to a questionnaire circulated in advance. The participants are grouped alphabetically by country, followed by the participants from international organisations and international non-governmental organisations.

A chart of the status of torture laws in each country, including the date of ratification/accession of the Convention against Torture, appears at the end of this section.

1.2. Argentina

Mary Beloff, Attorney General on Criminal Policy, Human Rights and Community Service, Attorney General´s Office, Argentina

Ms. Beloff is Argentina's Attorney General on Criminal Policy and Human Rights. She drafted the first general instructions that prescribe how prosecutors in Argentina should proceed in cases of torture, ill treatment and illegal pressure. The instructions focus on prompt investigation, protection of witnesses and include a gender-based approach. The instructions include a protocol that regulates the use of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) at the domestic level.[3]

With respect to the situation in Argentina, after the dictatorship ended in 1983 there was a huge transformation in law and practice both at the federal and state levels. Argentina ratified all the main human rights treaties including the Convention against Torture which was accorded constitutional status (1986).[4] Argentina also ratified the Inter-American Convention to Prevent and Punish Torture which has a wider definition of torture but has not been accorded constitutional status (1988).[5] Argentina also modified its criminal laws and there is now a crime of torture as well as other related crimes.[6] The legal framework is there and the country has started to change its practices, but there is still a lot of work to do.

[3] Office of the High Commissioner for Human Rights, Professional Training Series NO.8/Rev.1, *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2004), *available at* http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[4] Constitution of the Argentine Nation, § 75.22, *available in* APT Torture Law Compilation, at http://www.apt.ch/content/countries/argentina.pdf.

[5] Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series N°67; reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003).

[6] *See* Penal Code of Nation of Argentina, art. 144 (b) *et. seq*., Law No. 11.179, *available in* APT Torture Law Compilation, http://www.apt.ch/content/countries/argentina.pdf.

1.3. Brazil

Nivia Monica da Silva, Public Prosecutor at the Centre of Support for Human Rights in Minas Gerais, Brazil

Ms. da Silva has been a prosecutor in Brazil since 1999 and a human rights prosecutor in the State of Minas Gerais for the last three years. Her goal is to identify cases where torture or cruel, inhuman and degrading treatment or punishment ("CIDT") is an issue and her work is focused on the incarcerated population.

Since 1997, Brazil has had a statute concerning the crime of torture which does not conform with the Convention. The definition of torture is not the Article 1 definition and covers more than the minimum required in the Convention definition.[7] The problem in Brazil is not the law, but implementation.

Ms. da Silva observed that torture is very deep inside Brazil's culture and that unfortunately Brazil had similar experiences as Argentina.

Ms. da Silva explained that a Truth and Reconciliation Commission would start work in January 2013 to examine the human rights breaches that occurred during the Brazilian military government (1964 to 1988), but that the Commission would not punish past acts because of a 1979 amnesty law that prevents charges, prosecutions or convictions for such crimes committed prior to 1988. In April, 2010 the Brazilian Supreme Court decided that the amnesty legislation is not to be amended to allow for the prosecution of those suspected of torture and organisation of militias. However, the Federal Prosecutors have filed a complaint arguing that enforced disappearance is a continuing crime and that its commission continued after the amnesty period. A final verdict has not yet been reached in this matter.

Ms. da Silva said she hoped the Truth and Reconciliation Commission would address cases of torture. She also noted that today the people who suffer most from torture in Brazil are those with the least economic power and those who, for different reasons, are marginalised.

In Brazil prosecutors have the mandate to monitor all places where persons are deprived of their liberty, including prisons, homes for the elderly, rehabilitation clinics, shelters for children, among others. Ms. da Silva is currently working with prosecutors from other states to develop a training course on detention monitoring for early career prosecutors, using APT's detention monitoring model.

1.4. Indonesia

Rafendi Djamin, Indonesian Representative, ASEAN Intergovernmental Commission on Human Rights and Executive Director, Human Rights Working Group, Indonesia

Indonesia has been in transition since the fall of the authoritarian/military regime in 1999 and proposals to address torture have been part of the reform efforts.

This was reflected in Law No. 39 of 1999 Concerning Human Rights which established the National Commission on Human Rights; however, while there is a definition of torture in Law

[7] *See* Lei No. 9.455, de 7 de Abril de 1997, *available at http://www.planalto.gov.br/ccivil_03/Leis/L9455.htm; see also* APT Torture Law Compilation, http://www.apt.ch/content/countries/brazil.pdf.

No. 39, there is no criminal penalty.[8] It was also reflected in Law No. 26 of 2000, which forms the basis for the establishment of human rights courts which can be permanent or ad hoc. Law No. 26 of 2000 includes torture only in the context of crimes against humanity; thus, an act of torture can only be brought to the human rights court if it is an element of a crime against humanity.[9] Today, there are four permanent human rights courts in different regions, but there have been no cases in these courts of torture as a crime against humanity. There were some cases in the ad hoc court for Timor Leste and also related to a particular massacre; however, all of the perpetrators were acquitted.

The problem of the definition of torture is a long-standing problem in the Indonesian penal code. Today, there is only a crime of maltreatment with a penalty of 1 to 1.5 years.

There is a 700-page draft revision of the entire criminal code which contains a very good definition of torture that has been going back and forth between the parliament and the government. Since there has been no movement on the overall amendment of the criminal code, civil society groups have proposed a special amendment to the existing criminal code to make torture a crime. Negotiations are currently underway concerning this proposal.

Mr. Djamin shared further political context concerning the domestication of international law in Indonesia. An effort to adopt the Rome Statute of the International Criminal Court ("Rome Statute")[10] was deliberated in the previous parliament but it failed and was transferred to the current parliament where it is no longer a priority. Apparently some of the military exerted their influence to stop the dialogue on the Rome Statute and on the draft law on the ratification on the International Convention for the Protection of All Persons from Enforced Disappearance ("enforced disappearance convention").[11]

1.5. Lebanon

Judge Khaled El Akkari, Ministry of Justice, Lebanon

Judge Akkari is a sitting magistrate and a member of the Restart Center for Rehabilitation of Victims of Torture and Violence.

Lebanon acceded to Convention against Torture in 2000. There is no specific crime of torture in the Lebanese criminal code. There are two related, but rarely used articles: (1) an article that criminalises the use of violence to gain information during an investigation but does not use the Convention definition and has low penalties (3 months to 3 years); and (2) the *délit* of "*coups et blessures*" (misdemeanour of assault and battery).

Non-governmental organisations (NGOs) in Lebanon have been working for some time on criminalising torture. In his capacity as a member of Restart, Judge Akkari drafted a bill on the criminalisation and investigation of torture in collaboration with civil society. The draft

[8] *See* Law No. 39 Year 1999, Concerning Human Rights, art. 1 (English translation) *available at* http://indonesia.ahrchk.net/news/mainfile.php/hrlaw/19.
[9] *See* Law No. 26 Year 2000, Concerning Human Rights Courts, art. 9 (English translation) *available at* http://indonesia.ahrchk.net/news/mainfile.php/hrlaw/18?alt=english.
[10] Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 ("Rome Statute").
[11] International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), adopted Dec. 20, 2006 ("enforced disappearance convention").

legislation was submitted to the ministry of justice and to the commission on human rights in the parliament. Judge Akkari then participated in a parliamentary subcommission in which the results of the previous project were discussed. The subcommission has adopted a draft with a definition of torture identical to that in Article 1 of the Convention and a penalty from 7 to 15 years of imprisonment, with a sentence up to life imprisonment in cases involving the death of the victim. The draft also covers some procedural issues concerning investigation of the crime.

The draft has now been transferred to the parliament. While it is not clear what changes parliament may make, it is certain that civil society will continue to follow the bill and engage in lobbying.

1.6. Madagascar

Marie Solange Razanadrakoto, General Director of Reforms and Judicial Affairs, Ministry of Justice, Madagascar

Ms. Razanadrakoto is a lawyer and the General Director of Reforms and Judicial Affairs in the Ministry of Justice. She participated in drafting Madagascar's anti-torture law, Law No. 2008-08 of 25 June 2008, and advocated for its passage with a team in front of the parliament.[12] She is now promoting the effective implementation of the law (including through joint activities with the APT).

Madagascar ratified the Convention in 2005. APT and a national NGO, ACAT-Madagascar, lobbied the government to implement the Convention. Subsequently, a seminar attended by all of the stakeholders was held to identify key actions with regard to implementation. The seminar recommended that two committees be established in the Ministry of Justice, one on drafting legislation and one on communications and training. Preliminary drafts of legislation were provided to the APT for its comment and inputs.

Next, two workshops for pre-validation of the draft legislation were held, which Ms. Razanadrakoto insisted upon, in order to promote the ownership and participation of relevant stakeholders in the process, including members of parliament, civil society, police, prison administration, etc. Finally, in 2008 the law was enacted and torture became a separate crime.

Some strengths of the law are that there are no justifications for torture; it foresees measures to prevent torture and other ill-treatment; it includes fundamental guarantees for persons deprived of their liberty; and prohibits refoulement. Some weaknesses are that there is not a schedule of penalties for ill-treatment; prescription was not addressed; and although the definition of torture is in conformity with the Convention against Torture, it does not integrate relevant jurisprudence.

Now, efforts are focused on intensifying the training of relevant actors. The Ministry of Justice is drafting a training module on human rights and the prevention and eradication of torture with the support of the APT. It will be sent to training centres and schools for the police, the gendarmerie, lawyers, penitentiary administrators, judges, and the military, etc.

[12] Law No. 2008-08 of 25 June 2008, *available in* APT Torture Law Compilation, http://www.apt.ch/content/countries/madagascar.pdf.

1.7. Morocco

Driss Belmahi, Legal Studies Officer, Centre for the Study of Human Rights and Democracy, Morocco

Mr. Belmahi attended the expert meeting as a representative of the Centre for the Study of Human Rights and Democracy. At the time that the law to criminalise torture was under consideration, Mr. Belmahi was a director in the Ministry of Human Rights.

Before 2005 there was no crime of torture in Morocco. Similar to Lebanon, the criminal code was derived from the French criminal code and contained only the offences of assault and battery.

During the 2000s there were numerous changes in Morocco. One change was a truth and reconciliation commission which shed light on the grave violations of human rights which had occurred in Morocco since independence. Among the commission's recommendations was to conform Moroccan law, including the definition of torture, to Morocco's treaty obligations.

Mr. Belmahi assisted with the launching of the process until there was a change in government in 2004. The changes in Morocco also coincided with the war on terrorism. In 2003 there were terrorist actions in Casablanca, and as a result it was not a great climate to encourage the government to take steps on torture. Even so, in 2005 there was a reform of the penal code and torture was included as a crime.[13]

The Moroccan law conforms to Article 1 of the Convention against Torture. The Convention, however, is not just Article 1 and the legal framework needs to be compatible with the entire Convention.

The new constitution adopted in 2011 provides arguments in favour of further changes to the legal framework. In particular, Article 22 prohibits the violation of any person's physical or moral integrity, in any circumstance whatsoever, by any party, whether public or private; prohibits the infliction of cruel, inhuman or degrading treatment or punishment under whatever pretext, and states that the practice of torture in all its forms by anyone is a crime.[14] Since the article covers torture by private actors and CIDT, an amendment to the law is necessary. There is currently a working document to broaden the criminalisation of torture and also include war crimes and crimes against humanity.

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[13] *See* Penal Code (Morocco), art. 231-1, *et. seq*. (consolidated version dated 15 September 2011 in French), *available at* http://adala.justice.gov.ma/FR/Legislation/TextesJuridiques.aspx.

[14] Article 22 reads:

> *Il ne peut être porté atteinte à l'intégrité physique ou morale de quiconque, en quelque circonstance que ce soit, et par quelque partie que ce soit privée ou publique.*
>
> *Nul ne doit infliger à autrui, sous quelque prétexte que ce soit, des traitements cruels, inhumains, dégradants ou portant atteinte à la dignité humaine.*
>
> *La pratique de la torture, sous toutes ses formes et par quiconque, est un crime puni par la loi.*

La Constitution (Morocco)(2011), *available at* http://www.parlement.ma/fe/images/CONST/constitution%20du%201er%20juillet%202011.pdf.

1.8. Nepal

Mandira Sharma, Advocacy Forum, Nepal

Ms. Sharma works for an NGO, Advocacy Forum, which monitors police detention and provides legal assistance to victims of torture.

Nepal acceded to both the Convention against Torture and the ICCPR (both in 1991). In 1996 Nepal adopted the Compensation Relating to Torture Act which provides compensation to victims of torture, but it does not define torture as a crime.[15] Since then Advocacy Forum has been advocating for comprehensive legislation that would make torture a crime and also provide for reparations for the victims.

There have been various different drafts of bills to which civil society provided inputs. Civil society also drafted its own model legislation because legislation was not tabled in the parliament. In 2012, the government tabled a bill to criminalise torture in the parliament. Unfortunately, the parliament was subsequently dissolved so there is no prospect of the law being passed. There were several issues with the tabled bill such as the definition of torture victims and perpetrators as well as the penalty and reparation for the victims. The maximum sentence in the proposed bill was 5 years with a fine of less than $600.

1.9. Philippines

Ellecer "Budit" Carlos, Advocacy Officer, Office of the Chairperson, Commission on Human Rights, Philippines

The Philippines acceded to the Convention against Torture in 1986 and the struggle for the anti-torture law lasted 23 years.

Mr. Carlos is currently an Advocacy Officer at the Commission on Human Rights Chairperson's Office. From 2006 to 2011, through the Balay Rehabilitation Center, he was a representative and spokesperson for the United Against Torture Coalition, a group of 27 civil society organisations working against torture, which drafted the anti-torture bill that developed into the Anti-Torture Act of 2009, R.A. 9745 ("Anti-Torture Act of 2009").[16]

Mr. Carlos was subsequently a member of the drafting committee for the Implementing Rules and Regulations for the Anti-Torture Act of 2009. Together with Attorney Cristobal he was also involved in the ground work, including drafting Rules of Procedure, for the establishment of the oversight committee institutionalised by the Act.[17]

The Anti-Torture Act of 2009 is a stand-alone law. It establishes a crime of torture that cannot be absorbed by other crimes. The definition is faithful to the Convention except for the fact that the term "public official" is replaced by the term "person in authority" and "other person acting in an official capacity" is replaced by "agent of the person in authority".

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[15] *See* Compensation Relating to Torture Act, 2053 (1996), *available at* http://www.lawcommission.gov.np/en/prevailing-laws/prevailing-acts/func-startdown/423/; *see also* APT Torture Law Compilation, http://www.apt.ch/content/countries/nepal.pdf.

[16] Anti-Torture Act of 2009, R.A. 9745 ("Anti-Torture Act of 2009") *available in* APT Torture Law Compilation, http://www.apt.ch/content/countries/philippines.pdf.

[17] *See* Anti-Torture Act of 2009, § 20.

The strengths of Anti-Torture Act of 2009 are as follows. The drafting process was participatory; the law is liberally construed in favour of torture survivors and covers most of the obligations under the Convention against Torture. There is a reaffirmation of the exclusionary rule, a ban on refoulement, and procedural safeguards. It is strong on command responsibility and prescribes timely adjudication of *habeas corpus* and *amparo* cases. The law also prescribes the Istanbul Protocol as the foremost instrument for the investigation, documentation and reporting of torture.

The law has some weaknesses. It does not cover the entire accountability range in terms of non-state actors. There is no special fund established for the compensation of torture survivors. CIDT is a separate crime, but the penalty is too low (1 to 6 months).

There have been challenges in implementation. First, fraternal loyalty is strong among state security forces which have difficulties in policing their own. Second, it has been difficult to establish the program of rehabilitation provided for in the law because the department of health has yet to take this responsibility seriously. For now it is the Commission on Human Rights that is steering this process forward. Third, Section 21 on mainstreaming training and education on torture has also not yet been implemented. Finally, there is not an effective system to protect individuals from reprisals and the existing witness protection program does not enjoy the trust of the public.

Two proposed amendments to the law have been filed in the House of Representatives, House Bills 2824 and 3384, which would amend the definition of torture, essentially adopting the definition in the Rome Statute and leaving out the state actor and purpose elements. The aim of the proposed amendments is to cover non-state actors in the Anti-Torture Act.

The Philippines also has a law that domesticates international humanitarian law, R.A. 9851, which contains a different definition of torture for war crimes and crimes against humanity.[18] The Philippines also recently ratified the Rome Statute, and R.A. 9851 must be harmonised with this new development. Further, after many years, both chambers of the Congress have passed an enforced disappearance law.

Milagros Isabel Cristobal "Attorney Milabel", Executive Assistant, Attorney, Office of the Chairperson, Commission on Human Rights Philippines

Attorney Cristobal is the Executive Assistant to the Chair of the Commission on Human Rights. She previously served as a member of the Free Legal Assistance Group which filed cases against perpetrators even without an anti-torture law.

Attorney Cristobal sits with the Commissioner on a panel that is part of the Department of Justice and an institute of the University of the Philippines which is drafting a prosecutor's manual for the prosecution of human rights offences. The Commission is also working with the Medical Action Group, an NGO, and the Department of Justice and the Philippine National Police to train state prosecutors and police investigators on the use of medical and scientific evidence because of problems that have arisen in initial attempts to prosecute torture under the anti-torture law.

[18] *See* Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity of 2009, R.A. 9851, *available at* http://www.congress.gov.ph/download/ra_14/RA09851.pdf.

There is also a current initiative by the Department of Justice to amend the criminal code and it is critical to ensure that all of the special laws, such as the Anti-Torture Act of 2009, are integrated into this revision.

1.10. South Africa

Clare Ballard, Researcher, Attorney, Community Law Centre (Civil Society Prison Reform Initiative), South Africa

Ms. Ballard is a Researcher and Attorney at the Civil Society Prison Reform Initiative ("CSPRI") of the Community Law Centre which is based in the law faculty at the University of the Western Cape.

At the time of the meeting, South Africa did not yet have a specific crime of torture in its criminal code, although it ratified the Convention in 1998. After almost a decade of lobbying a bill was tabled in the parliament in 2012. CSPRI made a number of submissions including at a parliamentary hearing. For example, CSPRI drafted a submission on behalf of 15 academic institutions and NGOs (including APT).[19]

According to Ms. Ballard, there were a number of issues with the draft legislation. For example, it did not deal with non-refoulement, exclusion of evidence acquired through torture, and exemptions from common law rules related to evidence. While there have been Constitutional Court cases about non-refoulement and the exclusionary rule, CSPRI felt that these issues should be provided for in the legislation. As it stood, the bill criminalised torture in an adequate way but it was hoped that additional items would be added.

Johan De Lange, Principal State Law Adviser, Department of Justice and Constitutional Development, South Africa

Mr. De Lange works in the branch of the Department of Justice and Constitutional Development that deals with legislative development. In this capacity, he is the senior Departmental official responsible for representing the Department and assisting the parliament concerning The Prevention and Combatting of Torture of Persons bill.

Mr. De Lange explained that the bill had been introduced in the National Assembly. If approved, it would go to the second house where there was a possibility for amendment.

Update: On 24 July 2013 President Zuma signed the Prevention and Combating of Torture of Persons Act.[20]

[19] *See* website of the Article 5 Initiative, http://a5i.org/wp-content/uploads/2011/12/CSPRIs-Submissions-on-the-SA-Combating-of-Torture-of-Persons-Bill.pdf.

[20] Act. No. 13 of 2013: Prevention and Combating of Torture of Persons Act, 577 Government Gazette, No. 36716 (29 July 2013) ("Prevention and Combating of Torture of Persons Act"). The final law includes a provision related to non-refoulement (section 8) but does not include provisions related to the exclusion of evidence or exceptions to common law rules of evidence.

1.11. Thailand

Nareeluc Pairchaiyapoom, Justice Officer, Department of Rights and Liberties Protection, Ministry of Justice, Thailand

Ms. Pairchaiyapoom is the Justice Officer responsible for the Convention against Torture and has four main duties: (1) to educate and provide awareness to stakeholders about the Convention; (2) to ensure implementation of the Convention; (3) to suggest amendments to laws; and (4) to draft the national report for the Committee against Torture (Thailand acceded to the Convention in 2007).

As of the expert meeting, there was a draft law on torture, drafted by a senior Thai legal expert, which would amend the criminal code and the criminal procedure code. Civil society proposed a separate stand-alone law, but the legal committee within the Ministry determined that the best way to proceed would be to amend the penal code and criminal procedural code because these are the key laws used daily by the relevant actors.

One of the main challenges in Thailand is that the process of proposing amendments to laws is very long. The draft legislation had passed the legal committee of the Department of Rights and Liberties Protection, had gone through the Ministry of Justice legal committee, and was waiting for the review of the Minister. After that, it would go to the Council of State and then back to the Ministry; next to the House of Representatives and back to the Ministry; then to the Senate; and then finally to the Prime Minister.

The Ministry of Justice draft includes a specific offence of torture, making torture a crime of universal jurisdiction. In Ms. Pairchaiyapoom's view, the bill does not cover all the obligations of the Convention, specifically on compensation and rehabilitation of the victim.

It is hoped that the process will be completed in the next 2 years. Thailand also committed in the Universal Periodic Review process at the UN Human Rights Council to amend its criminal laws to be in conformity with the Convention and to study ratification of the Optional Protocol to the Convention against Torture ("OPCAT").[21]

1.12. Uganda

Paul Okirig, Senior State Attorney, Ministry of Justice and Constitutional Affairs, Office of First Parliamentary Counsel, Uganda

Mr. Okirig is a Senior State Attorney in the Ministry of Justice where he focusses on legislative drafting.

[21] *See* Human Rights Council, Report of the Working Group on the Universal Periodic Review, Thailand, ¶¶ 88.3, 88.4, 93, UN Doc. A/HRC/19/8 (8 Dec. 2011); Human Rights Council, Report of the Working Group on the Universal Periodic Review, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, Thailand, ¶ 4, UN Doc. A/HRC/19/8/Add.1 (6 March 2012).

Mr. Okirig played two roles with respect to The Prevention and Prohibition of Torture Act (Act No. 3 of 2012).[22] First, he was approached by the Coalition Against Torture to look over the draft anti-torture bill and to turn it into acceptable legal language. The bill was a private member's bill which means it did not go through the government.

Second, once the bill was in parliament, Mr. Okirig advised the parliament concerning the legislation.

The law is effective as of 18 September 2012. The next task is implementation. Usually, the Ministry of Justice creates user guides for the judiciary, state attorneys and the police.

Nicholas Opiyo, Member/Expert, Coalition Against Torture, Uganda

Mr. Opiyo explained that he wears two hats. He is an individual member of a loose coalition of NGOs called the Coalition Against Torture, which since 2005 has been campaigning for the eradication of torture in Uganda. He also chairs the human rights and legislation committee of the Uganda Law Society, Uganda's bar association.

After a lot of hard work over six years, with the support of APT, Redress and others, the campaign for an anti-torture law in Uganda finally succeeded. The Ugandan parliament enacted a specific law on torture, The Prevention and Prohibition of Torture Act of 2012.

Mr. Opiyo was among the initial drafters of the law and authored the first version of the act. He was a key player in popularisation of the law with different stakeholders. He trained judges, lawyers, police and prison services, held workshops with Members of Parliament and took part in many radio and TV talk shows directed at educating the public on the importance of the law.

Mr. Opiyo said that benchmarking visits made by several Members of Parliament to the Philippines and Burundi to see what was done there were very helpful in moving the legislation along. The MPs interacted with lawmakers ad civil society organisations in these countries and observed the benefits of such a law first-hand.

Mr. Opiyo also described some current projects regarding implementation of the new law. He is currently working with the Ugandan Police Force to draft internal guidelines for the police on preventing and detecting torture and on accountability. In addition, the Coalition Against Torture, the Uganda Human Rights Commission and the Uganda Law Society are rolling out a giant campaign to teach police officers, soldiers, judges, prosecutors, and lawyers about the new law and are seeking partners for this project.

[22] The Prevention and Prohibition of Torture Act (Act No. 3 of 2012) ("The Prevention and Prohibition of Torture Act"), *available in* APT Torture Law Compilation, http://www.apt.ch/content/countries/uganda.pdf.

1.13. International organisations

1.13.1 Committee against Torture

Claudio Grossman, Professor of Law and Dean of American University Washington College of Law, United States and Chair, United Nations Committee against Torture

Mr. Grossman is the Dean of the Washington College of Law. He has been a member of the Committee against Torture since 2003 and is currently the Chair.[23]

He was also a member of the Inter-American Commission on Human Rights from 1993 until 2001 where he served in numerous capacities including as President (1996-97 and 2001), Special Rapporteur on Women's Rights (1996-2000), and Special Rapporteur on the Rights of Indigenous Populations (2000-2001).

Satyabhooshun Gupt Domah, Member, Committee against Torture

Judge Domah has been a Member of the Committee against Torture since 2012 and is Judge of Appeal of the Republic of Seychelles and a Judge of the Supreme Court of the Republic of Mauritius. He is also a Lecturer at Associate Professor Level in Constitutional and Administrative Law at the University of Mauritius.

Joâo Nataf, Secretary, United Nations Committee against Torture, Switzerland

Mr. Nataf is the Secretary of the Committee against Torture and has worked with the United Nations since 2001. He formerly worked in East Timor for the United Nations where he headed a legislative drafting unit that dealt with how to incorporate international law into national law.

1.13.2 Human Rights Committee

Sir Nigel Rodley, Professor of Law and Chair, Human Rights Centre, University of Essex, United Kingdom and Chair, United Nations Human Rights Committee

Professor Rodley is the Chair of the Human Rights Centre and Professor of Law at the University of Essex in the United Kingdom. He is also a member of the Human Rights Committee (subsequent to the expert meeting, he was elected Chair). He was previously the UN Special Rapporteur on Torture (1993 to 2001).[24]

1.13.3 Office of the High Commissioner for Human Rights

Nidal Jurdi, Human Rights Officer, Office of the High Commissioner for Human Rights, Middle East Region

Mr. Jurdi is a Human Rights Officer at the OHCHR in Beirut. He explained that the OHCHR has been involved for more than two years in the efforts in Lebanon to draft a bill to criminalise

[23] The views expressed by Professor Grossman are his own and not necessarily those of the Committee against Torture.
[24] The views expressed by Professor Rodley are his own and not necessarily those of the Human Rights Committee.

torture. In particular the OHCHR has been facilitating an informal working group within the parliament and with civil society.

1.14. Civil Society

Sarah Fulton, International Legal Officer, Redress, United Kingdom

Ms. Fulton is the International Legal Officer with Redress. Redress has been involved for a long time in advocacy on anti-torture laws and reform of other laws that put barriers in the way of obtaining justice. Like APT, Redress has been increasingly asked to provide input into draft anti-torture laws including in Nepal, Uganda, Philippines, and the Maldives. Redress focuses particularly on the remedy and reparation aspects.

In 2006, Redress produced an implementation guide for the Convention against Torture which considers many of the issues to think through in drafting legislation.[25]

Ms. Fulton added that she is originally from Queensland, Australia which defines the crime of torture with no official actor requirement.[26]

Matt Pollard, Senior Legal Advisor, Amnesty International, United Kingdom

Mr. Pollard is a Senior Legal Advisor at Amnesty International.

Mr. Pollard is originally from **Canada**. Canada established universal jurisdiction over torture about 25 years ago and amended its criminal code about 12 years ago to include a definition of the crime of torture that is almost identical to the one in the Convention against Torture. Not surprisingly, the Committee against Torture has said that the definition complies with the Convention.[27] The Canadian law also explicitly includes a provision excluding a defence of superior orders or exceptional circumstances.[28] The problem is that there have only been two domestic prosecutions and no prosecutions using universal jurisdiction. Mr. Pollard commented that the policy seems to be to deport people against whom there is evidence of torture abroad rather than to prosecute them.

Jamie Allan Williamson, Legal Advisor, Advisory Services on International Humanitarian Law, International Committee of the Red Cross, Switzerland

Mr. Williamson is a Legal Advisor for the Advisory Service of the ICRC which works with countries around the world on the implementation of international humanitarian law. He previously was the Legal Advisor for the ICRC in Washington, DC and also worked at several international tribunals on some of the early cases.

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[25] Redress Trust, *Bringing the International Prohibition of Torture Home: National Implementation Guide for the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2006), *available at* http://www.redress.org/downloads/publications/CAT%20Implementation%20paper%2013%20Feb%202006%203.pdf.

[26] *See* APT Torture Law Compilation, http://www.apt.ch/content/countries/australia.pdf.

[27] *See* Committee against Torture, Conclusions and recommendations, Canada, ¶ 3, UN Doc. CAT/C/CR/34/CAN (7 July 2005).

[28] *See* Criminal Code (R.S., c. C-34, s. 1), art. 269.1, *available in* APT Torture Law Compilation, http://www.apt.ch/content/countries/canada.pdf.

1.15. Table: comparison of status of anti-torture laws

Country	Ratification/Accession to Convention against Torture	Status of Laws
Argentina	24 Sept. 1986	Torture is a specific crime in Argentina (Penal Code of Nation of Argentina, art. 144 (b) *et. seq*., Law No. 11.179).
Brazil	28 Sept. 1989	Torture is a specific crime in Brazil (Law No. 9.455, of 7 April 1997).
Indonesia	28 Oct. 1998	The revision of the entire criminal code, including a provision on torture is before the parliament.
Lebanon	5 Oct. 2000	A draft law on investigation and criminalisation of torture has been prepared by a parliamentary subcommission.
Madagascar	13 Dec. 2005	Madagascar adopted a comprehensive anti-torture law in 2008 (Law against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Law No. 2008-08 of 25 June 2008).
Morocco	21 June 1993	Torture is a specific crime in Morocco since 2005 (Penal Code, art. 231-1, *et. seq*.).
Nepal	14 May 1991	The parliament was dissolved after a draft law on criminalisation of torture was tabled. Nepal enacted a law concerning compensation for victims of torture in 1996. (Compensation Relating to Torture Act, 2053 (1996)).
Philippines	18 June 1986	The Philippines enacted a comprehensive anti-torture law in 2009. (Anti-Torture Act of 2009, R.A. 9745).
South Africa	10 Dec. 1998	Torture is a specific crime in South Africa (Act. No. 13 of 2013: Prevention and Combating of Torture of Persons Act). The Act also prohibits refoulement and mandates training and education on torture.
Thailand	2 Oct. 2007	There are several draft bills. As of this writing a bill has not yet been introduced in the parliament.
Uganda	3 Nov. 1986	Uganda enacted a comprehensive anti-torture law in 2012 (The Prevention and Prohibition of Torture Act (Act No. 3 of 2012)).

For more information on each country and copies of enacted laws, please refer to the APT's Torture Law Compilation, available at http://www.apt.ch/en/compilation-of-torture-laws/.

2. Legislative strategy: what works?

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2.1. Introduction

The adoption of laws on torture is never fast or easy and advocates for reforms must make strategic decisions and alliances from the beginning. One of those decisions is whether to amend existing laws or to draft a new law.

This section of the report details the experiences of the participants regarding strategies they used to achieve legislative reform, with a focus on Uganda and the Philippines.

2.2. Stand-alone anti-torture law versus amending existing laws

One of the first decisions a legislative drafter must make is whether to propose to amend existing law(s) or to draft a completely new law. In the context of the domestication of the obligations in the Convention against Torture, the question is sometimes phrased as whether it is better to propose a "stand-alone" anti-torture law or to amend the relevant sections of existing legal codes. As a technical matter, depending on the legal system, a third option may also be available, namely enacting an omnibus torture bill that amends several relevant sections of the existing code.

This decision is not just a matter of form. The drafter must think strategically: what type of legislation is likely to be adopted in the current political climate? He or she also needs to think ahead to implementation: where are the relevant actors such as judges, prosecutors, law enforcement most likely to look? Finally, he or she must, of course, conform to the legislative conventions in the country.[29]

Discussion Question: From a strategic perspective is it better to draft a stand-alone, comprehensive anti-torture law or to amend sections of existing laws?

Judge Akkari opened the discussion of this topic by acknowledging that there are valid arguments for either approach. The question arose in **Lebanon** in the sub-commission of the parliament that reviewed a proposed draft law and arguments were made for both options.

Judge Akkari said that in order to make this decision it is important to take stock of the situation in the country. Is the existing law effective in preventing torture? If not, what are the lacunae?

Further, he observed that special crimes necessitate special legislation. Torture is not an ordinary crime: the victim is in a situation of powerlessness; medical evidence disappears quickly; and it is difficult to gather evidence because torture takes places in closed places, without witnesses. All of these factors mean that a special law may be warranted.

During the discussion, the experts identified circumstances where a stand-alone law is the best approach:

[29] For further discussion of the advantages and disadvantages of various approaches, *see* Redress Trust, *supra* n. 25, at 26-36.

- If the goal is to implement more than one part of the Convention such as criminalisation plus non-refoulement, then a stand-alone law may be the better choice.
    - In the **Philippines**, NGOs chose to push for a stand-alone law that not only made torture a crime, but also addressed issues such as remedy and reparation, the exclusionary rule, etc. It simply made more practical sense to draft a comprehensive, stand-alone law.
- If the goal includes creating new programs such as educational programs or victim compensation programs, it may be preferable from a budgetary perspective to have a stand-alone law.
- If the penal code needs a general overhaul, drafting a stand-alone law that focuses only on torture will prevent reforms from getting bogged down in a long amendment process for the full penal code and keep the focus on torture.
    - In **Uganda** proponents of the anti-torture law decided to draft a stand-alone law rather than attempting to open up the entire penal code for amendment because there were many issues in the penal code that needed to be fixed such as crimes related to domestic violence and sexual offences.
- On the other hand, it was observed that amending the penal code may prevent gaps in enforcement.
    - In **Argentina**, the penal code includes several offences, including torture, and other related crimes. When there is not enough evidence to convict the perpetrator for torture, it may be possible to convict him or her for a lesser offence, thus preventing total impunity.

Finally, in order to make this fundamental decision, it was recommended to involve someone experienced in drafting laws in that country from the very beginning of the process.

Good practice

➲ Involve an experienced legislative drafter at an early stage. An experienced legislative drafter will be able to review the goals of the legislative campaign and determine whether they can be achieved by amending existing laws in the country or whether a new law is necessary.[30]

[30] The "good practices" highlighted in this report are those suggested by the participants in the meeting and do not necessarily represent the APT's institutional position on any particular issue.

2.3. Strategies that worked: experience of Uganda and the Philippines

Uganda and the **Philippines** enacted comprehensive, stand-alone anti-torture laws after long legislative campaigns in 2012 and 2009, respectively.

> ***Discussion Questions:***
>
> ***What strategies have been successful in obtaining legal reform on torture? Are there particular arguments that were effective in gaining support for the anti-torture law in your country? Were there particular challenges you faced in advocating for legal reform and how did you overcome those challenges?***
>
> ***Does international pressure make a difference in this area? For example, does leveraging the UN human rights system help, hurt, or have no effect on the pace of reform on the domestic level? Did you or have you used an international strategy in your work?***

Based upon the experience in **Uganda**, **Nicholas Opiyo** made the following recommendations for others working on a campaign for an anti-torture law.

- Create outrage among the public and get involved with the press to keep the public debate alive.
    - The Coalition Against Torture highlighted the most heinous cases in the media to create public support for saying "no" to torture.
- Confront the government at every level including at the regional and international level.
    - The Coalition Against Torture drafted shadow reports for the African Commission on Human and Peoples Rights ("African Commission") and the Committee against Torture. This strategy worked because the government then made commitments at the various international bodies.
- Capitalise on the visits of international experts to the country to put pressure on the government.
    - The Coalition Against Torture capitalised on the visits of the Special Rapporteur on Torture and the Special Mechanism on the Robben Island Guidelines of the African Commission.
- Find partners inside government to help, particularly technical officers who advise the senior people in government. Other participants echoed this advice: in their experience it was critical to find allies in government including technicians working in the parliament, the courts, and in the ministries.
- Work with the National Human Rights Institution.
    - The Uganda Human Rights Commission listed torture as the worst human rights violation in the country in their annual report for ten years which was very useful.
- Make contacts at foreign missions to leverage international support.

- Argue that there is a financial benefit for the state in prohibiting and preventing torture because it will no longer have to pay compensation to victims.

Ellecer Carlos explained that the anti-torture campaign in the **Philippines** had three prongs: adoption of the Anti-Torture Act of 2009, ratification and implementation of the OPCAT, and promotion of the use of the Istanbul Protocol. He shared further strategy recommendations based upon the Philippine experience.

- Build contacts with the "work-horses" in government who will be there in the long-term, such as parliamentary committee secretaries and mid-level ministry officials who draft legislation.
    - In the **Philippines** there is a history of antagonism between civil society and the government but it was important that there was a paradigm shift between civil society and the government in order for the anti-torture campaign to be successful. The Balay Rehabilitation Center calls this "transformative engagement".
- Demonstrate that there is public support at the outset of the campaign.
    - In the **Philippines** proponents of reform engaged in a torture free zone strategy in which small government units declared "torture free zones." More than 300 such resolutions were sent to Congress which demonstrated public support.
- Create a media plan and use "red letter" days like the International Day in Support of Victims of Torture (June 26).
- Create a torture survivor and family centred campaign and involve survivors and their families in the campaign.
- Work with other related coalitions.
    - In the **Philippines** the sister campaign to the anti-torture campaign is the campaign against enforced disappearance.
- Develop a political mapping instrument to track the stances of various parliamentarians and to help anticipate key persons who will support or oppose the legislation.

During the discussion, the issue of statistics arose. Good data concerning the occurrence of torture can be used in support of anti-torture legislation. Unfortunately, it was observed that in some countries the occurrence of torture is not tracked precisely because it is not a separate, specific crime. For example, one participant from **South Africa** tried to bring statistics on torture to the meeting, but data was only being collected concerning police violence in general.

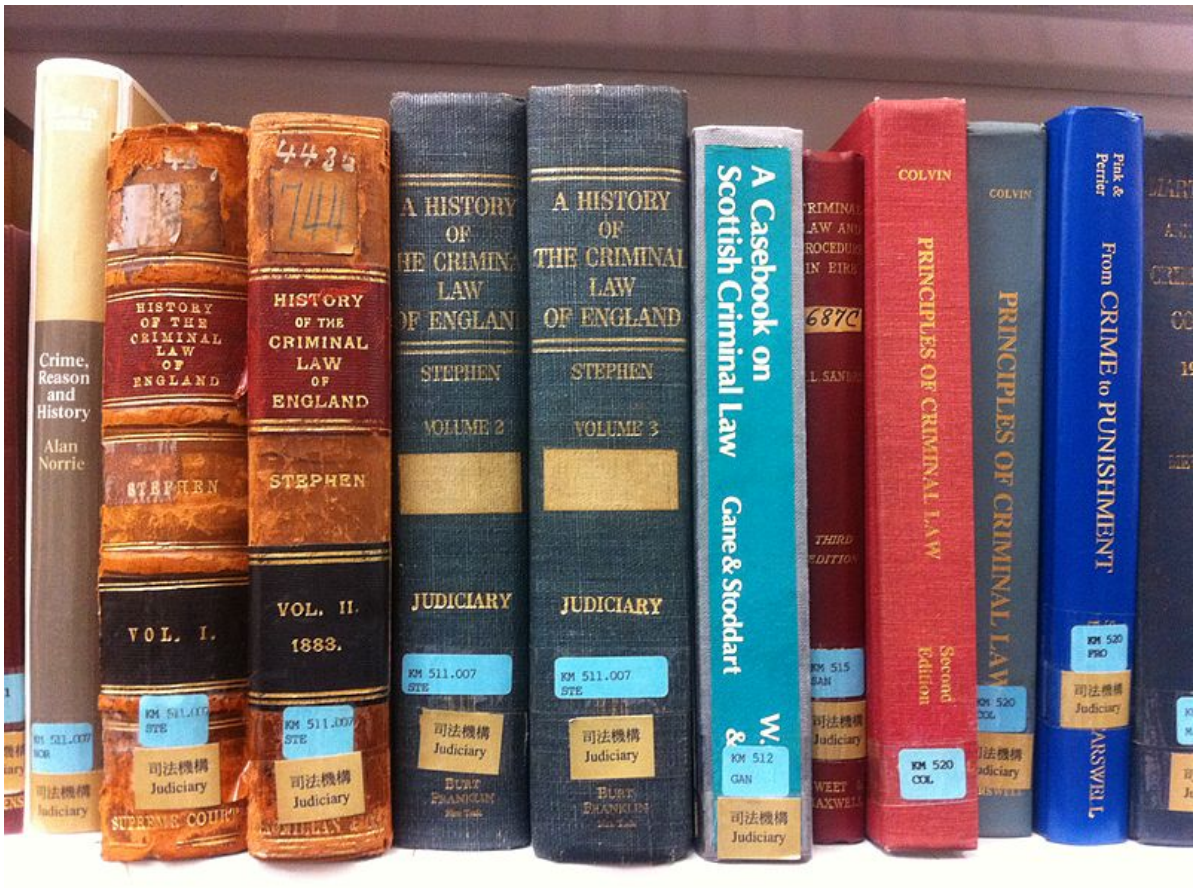
    - In **Nepal** the Advocacy Forum has been documenting the occurrence of torture through systematic and sometimes daily monitoring of police detention. They now have a database that shows the routine practice of torture in Nepal which has forced the government to agree to a stand-alone torture law.

One challenge raised by participants: how to be heard by the general public in a context where there is a high crime rate and some media are arguing for a return to the death penalty?

Good Practices

- Work with partners inside government, particularly technical officers who advise more senior government officials.
- Work with the National Human Rights Institution.
- Form partnerships with groups and coalitions working on related human rights.
- Involve survivors and their families in the campaign.
- Create a media plan.
    - Keep the issue in the public eye.
    - Highlight the worst cases to create public outrage.
    - Use "red-letter" days such as June 26, international day in support of victims of torture.
- Create and demonstrate public support.
    - Engage in a strategy whereby smaller governmental units make declarations or pass local ordinances in order to demonstrate public support.
- Confront the government at every level: local, regional, and international. Capitalise on visits by or reports to UN and regional human rights mechanisms.
- Leverage support from other countries that are influential in the region.
- If there are no statistics on torture in the country, document the prevalence of abuses.

3. Constructing the crime of torture



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3.1. Introduction

Article 4 of the Convention against Torture requires each State Party to ensure that all acts of torture are crimes in its criminal law.

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

During the meeting, the participants discussed different aspects of drafting the crime of torture. What should be the definition or elements of the crime of torture? Who should be held criminally liable? What should be the penalty? Is it permissible to have defences, justifications, immunities, amnesties or statutes of limitations?[31]

3.2. Introduction to drafting anti-torture laws

Dean Grossman stressed that torture is not only about the definition of torture. It is also important to address the role of confessions in the criminal process, jurisdiction, legal and procedural safeguards, legal aid, due process rights, etc.

He also emphasised the importance of establishing the superiority of international law in the constitutional framework of a country because of the rule of statutory interpretation that a statute later approved will invalidate a prior statute. He noted that this occurred in many Latin American countries as a result of the transition processes.

In addition, it is also important to provide for direct applicability of the provisions of the Convention against Torture in domestic law which would mean in practice that any individual could ask a judge for the direct application of a provision of Convention against Torture in a concrete case. For example, the language in Article 15 concerning the use of confessions is very clear; a judge should not need further clarification in the form of a statute.

Finally, it is also important for states to accept Article 22 of the Convention which allow individuals to make direct complaints to the Committee against Torture.[32]

3.3. Definition of torture

The heart of the crime of torture is the definition of torture. Article 1 of the Convention defines torture for the purpose of the Convention but is it useable "as is" in a domestic criminal code or do changes need to be made?

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[31] The following article by Rodley and Pollard was circulated in advance of the meeting as background material and contains further guidance on criminalising torture. Sir Nigel Rodley and Matt Pollard, *Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2 E.H.R.L.R. 115 (2006).

[32] *See* Convention against Torture, art. 22.

The definition of torture in Article 1 contains four elements:

- "an **act** by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person"
- The ***mens rea*:** "intentionally inflicted"
- The **purpose**: "such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind"
- The **link to a public official**: "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

There is also the **exclusion** also known as the lawful sanctions clause.[33]

Article 1(2) also contains a **savings clause** stating that the definition "is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".

Discussion Question: Should legislative drafters use the Article 1 definition of torture verbatim as the elements of the crime of torture in domestic law? Are there particular parts of the Article 1 definition that pose problems when applied in a domestic context?

Dean Grossman opened the discussion on the question of whether legislative drafters should use the Article 1 definition verbatim.

He explained that one condition for the legitimacy of international treaties is homogeneous application. If every state used the same definition, this would be an important factor for legitimacy and allow for comparison. In practice, states sometimes treat things that are torture as something less than torture, like "abuse of authority" or "excessive use of force", which carries a lesser penalty. If every state used the same definition for torture, then that homogeneity would contribute to states treating the same fact patterns in the same way. This is more important than the valid criticisms concerning the Article 1 definition.

Of course, judicial interpretation is inevitable and valuable because what is meant by "severe pain or suffering" today is not the same as one hundred years ago. If interpretation is not

[33] Article 1 of the Convention against Torture reads in full:

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

allowed for, one would have to draft and redraft legislation and redrafting is "very heavy machinery."

With respect to the question of whether particular parts of the definition pose problems when applied in the domestic context, Dean Grossman observed that problems are unavoidable. States might have an argument that using a term like "discrimination of any kind" would not work in a criminal statute, because the meaning of discrimination is developing in international law. A defendant who is being prosecuted for engaging in torture motivated by a newly recognised form of discrimination might argue that the prosecution violates the principle of legality (prohibition on retroactive prosecution for acts not in the law at the time). This type of situation would be an argument for including a list of the forms of discrimination in a domestic criminal statute.

3.3.1 Acts and omissions

Should omissions be criminalised?

Dean Grossman noted his view that omissions should be criminalised and cited a case in which the Committee against Torture found a violation of article 16 where police officers watched while others, who may or may not have been public officials, beat a Roma man.[34]

In the discussion it was noted that crimes of omission are more common in civil law systems than in common law systems. The participants were referred to the example of failing to provide food and water to prisoners in the Rodley and Pollard article; however it was noted that this could also be an intentional act.[35] (Note this discussion is closely related to the discussion on negligence and conditions of detention in 3.2.3 below).

Should lists of acts constituting torture be included in a criminal statute?

The issue of whether to include a list of illustrative acts constituting torture in the definition of torture in a criminal statute generated a lot of discussion.

> ***Discussion Question: Some states have used a list of illustrative acts constituting torture in their criminal statute. What are the plusses and minuses of this approach?***

None of the participants supported including a closed list of acts in the statute. Most were not in favour of using an open list of acts, but some pointed out practical reasons why a list might be useful.

The anti-list group argued that:

- Using a list is virtually an invitation for torturers to create new forms of torture.
- Even if the list not exhaustive, judges may read it that way.

[34] *See* Committee against Torture, *Osmani v. Serbia*, Comm. No. 261/2005, ¶ 10.5, UN Doc. CAT/C/42/D/261/2005 (25 May 2009).
[35] Rodley & Pollard, *supra* n. 31, at 120.

- A list would create an opening for a good defence lawyer to argue that the conduct of his or her client is not of the same nature of the acts on the list.
- A list might preclude judges from looking at the totality of the circumstances in situations in which each individual act might not rise to the level of torture but would when taken together.
- In some countries an open list is unconstitutional in a criminal statute.

Other experts pointed out that a list of illustrative acts in the statute could function to address the knowledge gap about what torture means and wondered whether the presence of list would deter judges from charging lesser crimes when the conduct in the case is on the list of acts of torture.

How have countries approached this issue in practice?

- In **Nepal**, civil society supported including a non-closed list of acts that could amount to torture in the draft law in order to address a knowledge gap among judicial actors concerning what is torture. However, the issue of penalties and what is meant by "severe pain or suffering" is left to the discretion of the judiciary in the draft.
- The **Ugandan** law includes a list of illustrative acts in a schedule but uses a general definition in the statute, which leaves the issue of what other acts constitute torture up to judicial discretion. The judge and courts will be able to expand the list depending on emerging practices and the circumstances in particular cases.[36]

3.3.2 Who should be held liable for the crime of torture?

Non-state actors

The Convention against Torture limits the definition of torture, for the purposes of the Convention, to acts committed by state actors or at their instigation, or with their consent or acquiescence. There is no such limit in the ICCPR or the Rome Statute and customary international humanitarian law prohibits torture by non-state actors, at least during an armed conflict.[37]

The question therefore arises whether acts of torture by non-state actors should also be criminalised in statutes that are implementing the Convention against Torture.

Discussion Question: Should the definition be expanded to include acts by private actors with no nexus to a public official?

[36] *See* The Prevention and Prohibition of Torture Act 2012, Second Schedule.
[37] *See* Human Rights Committee, General Comment No. 20, ¶ 2 (10 Mar. 1992); Rome Statute, arts. 7, 8; Rule 90, Torture and Cruel, Inhuman or Degrading Treatment, ICRC Customary IHL Database, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90.

The experts did not reach a conclusion on this issue, but it was generally agreed that if torture by non-state actors with no nexus to a public official is included in the crime of torture then the penalty for torture by state actors should be higher than the penalty for torture by non-state actors.[38] One expert posited that it is ultimately a policy decision concerning what draws the stigma of torture, the content of the act or the identity of the perpetrator.

In practice, several states have criminalised torture committed by non-state actors with no nexus to a public official and the issue has been debated by others.

- In **Brazil** the crime of torture covers acts by both state officials and private actors; however when the crime is committed by a public official the penalty is increased by one-third.[39]
- In **Uganda** the definition of torture includes an act inflicted "by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity".[40]
- In the **Philippines**, there was a big debate in the human rights community on whether to include non-state actors. In the end, the definition from the Convention was used, but some advocates think this is not the best definition in a context in which de facto state authorities engaged in purges, torture and enforced disappearance. The result is impunity and a reparation gap for acts committed by non-state actors. Interestingly, there is a parallel effort to make enforced disappearance a crime in advance of the accession to the enforced disappearance convention. Article 3 of that convention obliges states to investigate and bring to justice non-state actors who commit acts of enforced disappearance so once the Philippines accedes the obligation to address acts by non-state actors will follow.[41]
- The issue of non-state actors was also raised in discussions on draft anti-torture legislation in **India** in the context of caste violence and violence against women.

[38] The related point of whether the higher state actor penalty should apply to private actors who act with State acquiescence was not considered.

[39] *See* Lei No. 9.455, de 7 de Abril de 1997, art. 1.

[40] The Prevention and Prohibition of Torture Act 2012, § 2.

[41] Article 2 and 3 of the enforced disappearance convention read:

Article 2

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

Good practice

➲ If torture committed by a non-state actor with no nexus to a public official is a crime, then the penalty should be higher when torture is committed by public officials.

3.3.3 Mens rea

There was a short discussion of the *mens rea* for the crime of torture. The Convention against Torture uses the words "intentionally inflicted". Would it be appropriate to also provide for a *mens rea* of recklessness or negligence?

Discussion Question: The definition of torture in Article 1 defines torture as intentional conduct. Should the crime of torture include reckless or negligent conduct? Is acquiescence a form of recklessness?

During the discussion it emerged that the choice of *mens rea* is an issue of national law and may be quite different between civil law and common law jurisdictions. In general, negligence crimes are more common in civil law systems than in common law systems.

The issue of conditions of detention as torture was raised. There are times when the conditions of detention reach the level of torture, especially when a person is being held in pre-trial detentions in conditions that are so bad that they are predicated to break the person before he or she is interrogated. Should the concept of torture by negligence be introduced to capture cases concerning the conditions of detention?

One participant thought that negligence would not work as a *mens rea* for torture, because it would be impossible as a legal matter in his legal system for a person to negligently do something for a specific purpose. Another participant said that placing someone in terrible conditions could be captured by a progressive reading of intent, if the perpetrator deliberately put the person in the terrible conditions for one of the purposes in Article 1.

- In **Brazil**, there is a pending prosecution in which a prisoner died when prison officials failed to provide medical care even though the prisoner repeatedly asked for help. The case is now being prosecuted and one possible outcome is a conviction for mistreatment followed by death which is a crime with a *mens rea* of negligence, rather than a conviction for torture.

The next question would be who to hold criminally responsible in such cases? Should it be the director of the prison? What if the director is not given the resources to improve conditions in the detention facility? Should it be the department responsible for prisons?

One participant asked whether it would it be possible to hold an institution, such as the department responsible for prisons, criminally responsible for failing to ameliorate conditions of detention that have reached the level of CIDT or even torture? This issue was not discussed extensively, but one response was that the ability to hold entities criminally liable is a question of national law. If the national system already recognises the concept of criminal liability for legal persons (i.e., corporations, organisations, etc.) then there is nothing in the Convention against Torture that would bar such criminal liability in the case of torture.

3.3.4 What should be criminalised beyond inflicting severe pain or suffering?

Article 4 of the Convention states that "all acts of torture", "attempt" as well as acts "which constitute[] complicity or participation in torture" must be offences.[42]

Article 1 of the Convention defines torture as an act committed "**by"** a public official or other person acting in an official capacity. It also includes acts committed by non-public officials when they are done "**at the instigation of** or with the **consent** or **acquiescence** of a public official or person acting in an official capacity."[43]

Complicity or participation and acquiescence

What exact conduct should be captured by complicity or participation in Article 4? What is the relationship between acquiescence in article 1 and complicity or participation in Article 4?

Discussion Questions:

Article 4 states that acts of torture, as well as attempt, complicity and participation should be made crimes. Article 1 defines torture to include acts committed "by" a public official or other person acting in an official capacity but also includes acts committed at their instigation or with their consent or acquiescence. What modes of liability should the crime of torture include?

What does "complicity or participation" mean in the context of the Convention?

How to criminalise acquiescence?

Sir Nigel Rodley said in his opening remarks that the most extreme reading of the interplay between Article 1 and 4 would be that a state is required to legislate for the criminality of complicity or participation in the act of, the instigation, consent, or acquiescence to torture. The "act" of torture is not just the infliction of the pain or suffering but is the infliction of the pain *plus* the purpose element *plus* the perpetrator element.

During this discussion, one expert advanced the view that the role of the word "acquiescence" in Article 1 is to define the kinds of links to state authority that make a private actor who inflicts the pain or suffering subject to the Convention. Complicity or participation then plays the role of capturing those who did not directly inflict the act but had some duty to step in.

One participant asked where to draw the line for criminal liability using the concept of acquiescence? Would acquiescence cover a situation where the political leaders of a country are well aware that torture is occurring and would drawing the line too broadly then make it politically difficult to have the word "acquiescence" included in the definition of the crime of torture?

[42] Convention against Torture, art. 4.
[43] *See* Convention against Torture, art. 1.

Several participants responded that in their countries a person is held criminally responsible when he or she has a legal duty of care to prevent an act, a principle that is not limited to torture. In these systems the person is considered to be an accomplice to the crime. For example, if the director in charge of a place of detention knows that officer X is committing an act of torture and does nothing to prevent it, then he would be criminally liable as an accomplice. Others noted that in international law responsibility is accorded to those with command responsibility who had some form of knowledge and did not exercise their duty of care. Therefore, political leaders who had no duty of care *vis à vis* the victim or supervisory power over the perpetrator and only knew generally that torture was occurring in the country would not be criminally liable.

There was also a discussion of a hypothetical fact pattern in which the officials of Country A go to Country B and watch while a person is tortured by agents of Country B. Would this be acquiescence in torture or complicity for the officials of Country A? Some felt this was complicity while others felt this was acquiescence.

Attempt

Article 4 also specifies that attempted torture should be a criminal offence. In his initial comments, **Professor Rodley** noted that "attempt" is an inchoate offence (an offence where criminal liability is applied even though the underlying act is not completed).

What would constitute attempted torture?

Professor Rodley listed some examples of where criminalising attempt might be useful in practice. One example would be a case in which the perpetrator intended to cause severe pain or suffering but for some reason the victim did not actually experience severe pain and suffering, either because he did not feel pain or had received some sort of resistance training.

Another place where the concept of attempt might be helpful is with respect to mental torture. Mental torture is difficult to prove and not everyone experiences the same effects. In the United States mental torture is further limited to cases in which the individual suffers long-term serious effects.[44] In such cases, the use of techniques that are calculated to cause the level of mental suffering that constitutes torture, but do not in a particular case, would be caught through the concept of attempt.

During the discussion, one participant objected to tying liability to the subjective condition of the victim (the case of the person who feels no pain), and said that attempt is when the

[44] The United States issued the following understanding when it ratified the Convention:

> *(1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.*

United Nations Treaty Collection database, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en (emphasis added).

perpetrator intended to do the act, but is not able to complete the act due to an outside cause. Another participant observed that this discussion was theoretical because it is difficult enough to prove the crime of torture when the act is completed.

In terms of drafting a law, it was stressed that if concept of an attempted crime is already in a state's general criminal law then it does not need to be included again in the anti-torture law.

3.4. Penalties, aggravating and mitigating circumstances

Once torture has been defined and the various acts that will incur criminal liability have been delineated, the next step is to determine the penalty. Sentencing is a complex issue that varies depending on the legal culture in a particular country, but the Convention and the Committee against Torture have offered some guidance.[45]

Discussion Questions:

1. What should be the penalty for torture? How much discretion should be granted to judges in sentencing? Must penalties for torture comply with other human rights standards?

2. Aggravating/Mitigating Circumstances. What are good practices with regard to including aggravating or mitigating circumstances in the crime of torture?

Professor Rodley started the discussion of penalties with a reality check. Even when all of the barriers are overcome and a person is convicted of torture, there is a real problem of courts issuing light sentences of a few months with a suspension from work. Such light sentences conflict with Article 4, which states that torture should be "punishable by appropriate penalties which take into account their grave nature."[46] This language means that the crime of torture should be punishable by the maximum penalty under national law that is consistent with international law.

One participant asked whether the death penalty would be an appropriate sentence for the crime of torture. Professor Rodley responded that while the United States statute does provide for the death penalty it was written at a different time.[47] More recently, an increasing number of countries have abolished the death penalty; the UN General Assembly has issued several resolutions calling for a moratorium;[48] and the Rome Statute was adopted which does not include the death penalty.[49] Another participant added that the Special Rapporteur on Torture issued a report to the UN General Assembly in 2012 on the relationship between the

[45] *See* Rodley and Pollard *supra* n. 31, at 128.
[46] Convention against Torture, art. 4.
[47] The crime of torture in the United States allows for but does not mandate the application of the death penalty for the crime of torture. *See* 18 U.S.C. § 2340A. Note that the crime of torture only applies to torture or attempted torture that occurs outside of the United States.
[48] *See e.g.,* G.A. Res. 67/176, UN. Doc. A/RES/67/176 (20 Mar. 2013) (adopted by a vote, 111 in favour, 41 against, 34 abstentions) *available* at http://www.un.org/en/ga/67/resolutions.shtml.
[49] *See* Rome Statute, art. 77, 78.

death penalty and torture in which he concluded that "the evolving practice of states shows a clear trend towards abolition of the death penalty."[50]

It is permissible to accord different penalties for different components of the crime such as complicity, participation, and attempt.

In terms of aggravation and mitigation, if the crime of torture covers acts committed by private actors, then it is essential to provide for aggravation when the act is committed by a public official.

Professor Rodley also stressed the importance of mitigation. A person who threatens someone with torture in order to find and save the life of a child who has been kidnapped should not receive the same sentence as someone who actually inflicts the torture and tortures someone to death. The only way to defend the principle that there is no defence to torture is to allow for flexibility when it comes to sentencing.

Finally, sentencing depends on the legal system of the country; there is not one international answer. Different legal systems allow for more or less judicial discretion when it comes to applying a penalty in a particular case. For example, some systems would not give a judge total discretion between a life sentence and no sentence.

During the discussion, the participants discussed a number of issues related to sentencing including the inclusion of mandatory minimum and maximum penalties, and whether mitigating or aggravating circumstances should be included in an anti-torture law.

Two important themes emerged:

- When drafting a code section on torture it is critical to look at the general provisions of the criminal law in the country because issues such as sentences, aggravating and mitigating circumstances (and also defences, justifications, excuses, etc.) are often contained in provisions that are applicable to all crimes; and
- There is a real variation in judicial culture concerning sentencing between countries which must be taken into account when drafting criminal provisions on torture.
    - For example, the discussion revealed that although **Morocco** and **Lebanon** are both civil law countries whose legal systems are based upon the French system, in **Morocco** judges almost always sentence the person to the maximum sentence, whereas in **Lebanon** judges usually start with the minimum sentence and then apply mitigating circumstances.

With respect to minimum sentences, one participant observed that if the mandatory minimum penalty for torture is too high, this sometimes leads to lesser crimes being charged. High mandatory minimums can also lead to lawyers going to great lengths to avoid conviction and pleading out for lesser crimes.

With respect to aggravating and mitigating circumstances, some participants felt that that aggravating circumstances could be proscribed for torture, but that listing specific mitigating circumstances for torture might invite their application.

[50] Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ¶ 73, UN Doc. A/67/279 (9 Aug. 2012).

In practice, states have taken very different approaches to penalties:

- In **Morocco** all of the crimes related to torture have both a minimum and a maximum penalty. The sentencing level starts at 5 years. There are also specific aggravating circumstances.[51]
- In **Uganda** the anti-torture law includes a sentence of 15 years with a sentence of life imprisonment for certain aggravated circumstances.[52]
- The draft bill in **South Africa** includes a sentence of imprisonment up to life. There is a separate law that regulates mandatory minimum sentences.[53]
- In the **Philippines** there is a sentence range for each criminal offence and provisions related to aggravating and mitigating circumstances are contained in general provisions related to criminal law. If there are aggravating circumstances in a particular case the person gets a sentence at the top of the range; and if there are mitigating circumstances, at the bottom of the range.[54]
- In **Brazil** there are specific aggravating circumstances listed for the crime of torture, but mitigating circumstances are in the general criminal code. An example of an aggravating circumstance is if the act was committed by a public official. This causes an increase in the penalty by one-third.[55]

3.4.1 Other issues: the term "criminalisation" and crime vs. délit

In countries whose laws are derived from the French system, there is a distinction between *crimes* and *délits* (crimes and misdemeanours). The question arose whether the Convention requires that acts of torture must be crimes or would it be permissible for some acts of torture to be classified as *délits*.

The response was that the terms of Article 4 only require that acts of torture are criminal offences under national law, using the term generally. In practice since the penalties for *délits* are usually low, labelling an act of torture as a *délit* would probably run up against the requirement that the penalty for the offence must be commensurate with the grave nature of the crime.

One reason this question was raised was that the term "criminalisation" is apparently somewhat confusing when translated into French. After the meeting one of the participants suggested using the term "incrimination" rather than "criminalisation".

3.5. Defences, justifications, immunities, amnesties, and prescription

When drafting a criminal law on torture, legislative drafters need to consider and be aware of provisions related to defences, justifications, immunities, amnesties and prescription that may exist in the general criminal laws or elsewhere in the laws of the country, according to the

[51] *See* Penal Code (Morocco), art. 231-1, *et seq*.
[52] *See* The Prevention and Prohibition of Torture Act 2012, §§ 4, 5.
[53] This is also true of the adopted law. *See* Prevention and Combating of Torture of Persons Act, § 4.
[54] *See* Anti-Torture Act of 2009, § 14.
[55] *See* Lei No. 9.455, de 7 de Abril de 1997, art. 1.

participants. Because these types of provisions serve to preclude criminal liability for torture they are generally understood to violate the Convention against Torture.[56]

Discussion Questions

Defences. Are there any defences to the crime of torture that are permissible in international law? Should the anti-torture law specify that certain defences are not available for the crime of torture?

Justifications. While Article 2(2) states that there may be no justification for torture and Article 2(3) explicitly states that a superior order is not a justification for torture, can a superior order be a mitigating circumstance at sentencing?

Prescription. The Committee against Torture has said that statutes of limitations are incompatible with the Convention, but many national laws nevertheless still include statutes of limitations. Is there any statute of limitations that is acceptable?

Amnesties & peace agreements. Amnesties are also incompatible with the absolute prohibition on torture. What is the best way to proceed in situations where there is a pre-existing amnesty law or peace agreement that may excuse persons who have committed torture?

Matthew Pollard provided introductory remarks on this subject which were based on a hand-out, "background materials on impermissible defences to torture", which listed Committee against Torture concluding observations on this topic since the 2006 Rodley and Pollard article on the criminalisation of torture.[57]

Mr. Pollard started by saying that the trends identified in the article in 2006 have been reinforced since then:

- Article 2(2) has been repeatedly and consistently interpreted by the Committee against Torture to rule out any possibility of a "ticking time bomb" defence.[58]
- The Committee against Torture systematically addresses the prohibition of a defence of justification for having received superior orders (Article 2(3)).[59]
- The Committee against Torture has been "unequivocal" on the prohibition on amnesties for torture, including those granted to resolve an armed conflict.

[56] *See* Rodley & Pollard, *supra* n. 31 at 126-28.
[57] *See* Rodley & Pollard, *supra* n. 31.
[58] Article 2(2) of the Convention against Torture reads: "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."
[59] Article 2(3) of the Convention against Torture reads: "An order from a superior officer or a public authority may not be invoked as a justification of torture."

He noted that is critical for drafters of anti-torture laws to review the full criminal code to confirm that there are no general defences that apply to all crimes, such as the defence of necessity, which might conflict with Article 2(2). Further, one argument in favour of drafting a separate, specific crime of torture is to have a place to put provisions ruling out general defences that conflict with the Convention.

3.5.1 Defences

Several examples of good and not-so-good practice were pointed out by Mr. Pollard and during the discussion.

- On the positive side, the Committee against Torture has said that the **Canadian** statute complies with the Convention. It includes a specific clause that precludes defences.[60]
- On the negative side, the **United Kingdom** law on torture includes a specific defence if the person can "prove that he had lawful authority, justification or excuse for that conduct".[61] NGOs have taken this issue up but it is still in the law.[62]
- In **South Africa** the draft bill uses the Article 2(2) language concerning "no exceptional circumstances whatsoever."[63]
- In **Lebanon** a proposal was made for the crime of torture to be imprescriptible, and not subject to amnesties or defences other than self-defence. The proposal for no defences other than self-defence was retained but the draft includes a statute of limitations that will run from the time the person is released from custody and has no provision related to amnesties.

[60] Section 269.1(3) of the Criminal Code reads:

> *(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the at or omissions is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.*

Criminal Code (R.S., c. C-34, s. 1), art. 269.1(3); *see also* Committee against Torture, Conclusions and recommendations, Canada, ¶ 3, UN Doc. CAT/C/CR/34/CAN (7 July 2005).

[61] Criminal Justice Act of 1998, § 134 (4), *available at* http://www.legislation.gov.uk/ukpga/1988/33/section/134.

[62] The Committee against Torture continues to raise this issue in its concluding observations regarding the United Kingdom. *See e.g.,* Committee against Torture, 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), at ¶ 10.

[63] This provision was retained in the final law. *See* Prevention and Combating of Torture of Persons Act, § 4(4).

Good Practices

- Review the full criminal code to confirm there are no general defences that conflict with Article 2(2) of the Convention.
- Include provisions which explicitly preclude defences of superior orders, necessity or justification in exceptional circumstances for the offence of torture.

3.5.2 Immunities

The issue of immunities was discussed both with respect to immunities in international law when one state seeks to prosecute a political leader from another and to those granted at the domestic level.

Mr. Pollard compared two International Court of Justice opinions *Democratic Republic of the Congo v. Belgium (Arrest Warrant)* and *Belgium v. Senegal* which both related to attempts by Belgium to exercise universal jurisdiction over international crimes.

In the *Arrest Warrant* case, the DRC sought and obtained a judgment that Belgium had violated international law by issuing an arrest warrant against a sitting Minister of Foreign Affairs for war crimes and crimes against humanity. The Court held that certain high level officials including a Minister of Foreign Affairs are immune from prosecution in another country during their term of office even for international crimes.[64]

In the *Senegal* case the International Court of Justice ruled that Senegal breached Article 7(1) of the Convention against Torture by failing to prosecute the former President of Chad, Hissène Habré.[65] Chad had already waived Mr. Habre's immunity so the case did not impact the doctrine on immunity.

Mr. Pollard stressed that domestic immunities that block prosecution of state officials for torture in domestic courts would violate the Convention against Torture.

During the discussion, **Mandira Sharma** pointed out that domestic immunities are an issue in South Asia. They are used to bar prosecutions of human rights violations, including torture, and to suspend investigations. The Advocacy Forum together with the International Commission of Jurists is doing a study on the link between immunities and impunity in the region.

It was also pointed out that the words "amnesty" or "immunity" are not always used in legislation.

- For example, in **Morocco** draft legislation on general guarantees for members of the military included a provision that military personnel who follow orders are not guilty of crimes, which would have been equivalent to full immunity. After lobbying by NGOs, the draft was changed but the final language will be decided during the parliamentary debate.

[64] *See Democratic Republic of the Congo v. Belgium, Case Concerning the Arrest Warrant of 11 April 2000,* Judgment, ¶¶ 53, 70 (I.C.J. 14 Feb. 2002).
[65] *See Belgium v. Senegal, Question Relating to the Obligation to Prosecute or Extradit*e, Judgment, ¶ 122 (I.C.J. 20 July 2012).

3.5.3 Amnesties

Participants discussed situations in which individuals or classes of individuals had been granted amnesties in exchange for ending a conflict or during a transition of power.

When states enact amnesties at the national level for political reasons, this does not relieve them of their international treaty obligations to investigate and prosecute torture, according to the participants. For example, the Inter-American Court of Human Rights held in the *Barrios Altos* case that amnesty laws enacted by **Peru** "lack legal effect" and are "inadmissible."[66] In addition in several countries in Latin America, such as **Chile** and **Argentina** amnesties or other barriers to prosecution were put into place initially, but perpetrators were prosecuted years later. In **Argentina**, for example, this was done by considering the crimes committed to be crimes against humanity for which there is no statute of limitations.

Moreover, the rest of the international community is not bound to respect domestic amnesties and the perpetrators could be prosecuted through universal jurisdiction.[67] Further, such domestic amnesties might amount to a state being deemed "unwilling or unable genuinely to carry out the investigation or prosecution" pursuant to the Rome Statute.[68] In terms of legislation,

- The draft NGO bill for **Nepal** contained provisions excluding amnesties and pardons for torture.
- The **Ugandan** law explicitly outlaws amnesties for the offence of torture.[69]

3.5.4 Statutes of limitations/prescription

While the Committee against Torture has taken the position that there should never be statutes of limitations for torture,[70] several of the experts said that there are statutes of limitations for torture in their countries:

- **Brazil** has a statute of limitations for torture, although there are two efforts to amend this. There are three crimes in Brazil that are imprescriptible: terrorism, racism, and the crime of paramilitary organisations. On the related crime of enforced disappearance, the issue of whether it is continuing offence, such

[66] *Case of Barrios Altos v. Peru*, Judgment on Merits, ¶¶ 41-44, (Inter-Am. Ct. H.R. 14 Mar. 2001). Note that the Court also said that statutes of limitations are without effect for torture cases.

[67] For example in the *Kallon* case the Special Court for Sierra Leone held that a domestic amnesty agreement made by Sierra Leone was "ineffective" to remove the jurisdiction of an international tribunal or another state with respect to crimes for which there is universal jurisdiction. *See Prosecutor v. Kallon*, No. SCSL-2004.15.AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 88 (Spec. Ct. for Sierra Leone 13 March 2004).

[68] Rome Statute, art. 17.

[69] Section 23 of the Prevention and Prohibition of Torture Act reads:

> *23. No amnesty for offence of torture.*
>
> *Notwithstanding the provisions of the Amnesty Act, a person accused of torture shall not be granted amnesty.*

[70] *See* Rodley & Pollard, *supra* n. 31 at 127-28.

that it is impossible to apply a statute of limitations is currently before the Supreme Court.[71]

- In the **Philippines**, the rules implementing the Anti-Torture Act of 2009 specify that there should be no prescription for torture, but since this provision is in the rules and not in the statute it is vulnerable to legal challenge. Otherwise, the most serious forms of torture would be accorded a statute of limitations of 20 years pursuant to a provision of general application in the criminal code.[72]

3.5.5 Other issues: traditional justice

Participants raised the question of whether other forms of justice such as traditional justice would meet the requirements of the Convention. One expert responded that each traditional justice structure should be reviewed using the criteria set out by the Human Rights Committee.[73]

The issue of traditional justice was also raised during the session on other international crimes and in that discussion one expert observed that it is important to consider what the victim considers to be justice and that it has been said elsewhere that providing amnesties might encourage the perpetrators to provide information on what happened to disappeared persons.

One expert noted that Article 53 of the Rome Statute could be read to leave room for traditional justice at least with respect to the crimes covered by the Rome Statute. Under Article 53, the Prosecutor of the International Criminal Court has some discretion on whether to initiate an investigation and can decline to do so, if "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." However, to date, this clause had been read very restrictively.

3.6. Criminalisation of CIDT

Article 16 of the Convention against Torture requires states "to undertake to prevent" cruel, inhuman or degrading treatment or punishment but the Convention does explicitly state that acts of CIDT must be a crime.

The anti-torture laws in the **Philippines** and **Uganda** both include a separate, specific crime of CIDT, so there was a short discussion on this issue during the meeting.

Paul Okirig explained that when **Uganda** criminalised torture a decision was made that there were acts that did not amount to torture that should also be criminalised as CIDT. The question then became how to distinguish between torture and CIDT in the law. The solution reached in Uganda was to insert a clause that said the court should "have regard to the definition of torture as set out in section 2 and the circumstances of the case" and to give the

[71] For information on the statute of limitations in Brazil *see* APT Torture Law Compilation, http://www.apt.ch/content/countries/brazil.pdf.
[72] *See* Implementing Rules and Regulations of the Anti-Torture Act of 2009 (Philippines), § 45 (10 Dec. 2010).
[73] *See* Human Rights Committee, General Comment N°32, ¶ 24, UN Doc. CCPR/C/GC/32 (23 Aug. 2007).

court discretion to convict the person of CIDT "where the court is of the opinion that the act complained of does not amount to torture."[74]

Nicholas Opiyo added that the debate over how to define CIDT lasted for five years and that the group working on the law in Uganda failed to find a definition. As a result the final decision was to leave it to the courts to define CIDT. The courts will have discretion to determine whether the act complained of amounts to torture or the lesser offence of CIDT, similar to murder and manslaughter. This has not yet been tested.

Ellecer Carlos explained that Section 5 of the Anti-Torture Act of 2009 establishing the crime of other cruel, inhuman and degrading treatment or punishment in the **Philippines** is narrower than Article 16 of the Convention in that it is limited to acts committed by a person in authority.[75] In addition, the penalty of one to six months in prison is too low.

He also pointed out that other acts related to torture such as establishing, operating and maintaining "secret detention places", causing prohibited forms of detention, and failing "failure to perform his/her duty to maintain, submit or make available to the public" updated lists of detention places have also been criminalised.[76]

During the discussion of this issue, it was suggested that if states wished to criminalise CIDT that international humanitarian law would be a good place to start to look for possible elements of the crime because there are war crimes that cover at least some parts of what is meant by CIDT in the human rights context.

A question was raised during the discussion on how CIDT could be made a crime in the context of a country like **Indonesia** where pursuant to an internal peace agreement, local governments are permitted to create local criminal laws and these local units have drafted

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[74] Section 7 of the Prevention and Prohibition of Torture Act reads:

7. Cruel, inhuman or degrading treatment or punishment

(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 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.

(3) In a trial of a person for the offence of torture the court may, in its discretion, convict the person for cruel, inhuman or degrading treatment or punishment, where the court is of the opinion that the act complained of does not amount to torture.

[75] Section 5 of the Anti-Torture Act of 2009 provides:

Other cruel, inhuman or degrading treatment or punishment refers to a deliberate and aggravated treatment or punishment not enumerated under Section 4 of this Act, 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.

[76] *See* Anti-Torture Act of 2009, §§ 7, 14.

laws where the penalty is caning. Another expert responded that there was a similar issue in the **Philippines** but that the peace agreement in question states that the local level law, called the Basic Law, must "meet internationally accepted standards of governance."[77]

[77] *See* 2012 Framework Agreement on the Bangsamoro (GPH Copy), § II.3., *available at* http://pcdspo.gov.ph/downloads/2012/10/20121007-GPH-MILF-Framework-Agreement.pdf.

4. Redress

© Guillaume Burlet, Courthouse of Chambéry, France

4.1. Introduction

Article 14 of the Convention against Torture provides that:

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

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

This section of the report details how to translate the obligation to provide redress into legislation.

4.2. Obligation to provide redress

Sarah Fulton made a short presentation on the obligations of states to provide redress, barriers to achieving redress, and what should be included in legislation on redress.

Ms. Fulton explained that the Committee against Torture had been working on a new general comment on Article 14 and previewed key aspects of the document (the general comment was released shortly after the expert meeting).[78]

- There are two parts of Article 14, *procedural*, i.e., putting in place mechanisms and ensuring that people have access to them and *substantive*, i.e., what the victim gets through and at the end of the process. These two aspects are closely linked.[79]
- Redress should be "adequate, effective and comprehensive" and proportional to the gravity of the crime and the physical and mental harm suffered.[80]
- In terms of what "reparation" includes, the Committee has recognised that it is not limited to the words in the Convention, "compensation", and "rehabilitation," but also includes restitution, satisfaction and guarantees of non-repetition, in line with the UN Basic Principles on Remedy and Reparation.[81]
- Article 14 is tied to the duties to prosecute and investigate torture. The victim should have the satisfaction of knowing that someone has been held accountable.[82]
- The words "each state shall ensure in its legal system" in Article 14 suggest that a state must enact legislation that actually makes it possible to achieve remedy and reparation.[83]

[78] Committee against Torture, General Comment No. 3, UN Doc. CAT/C/GC/3 (13 Dec. 2012).
[79] *See id.* at ¶ 5.
[80] *See id.* at ¶ 6.
[81] *See id.* at ¶ 6; 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (16 Dec. 2005).
[82] *See* Gen. Cmt. No. 3, at ¶¶ 16, 17, 23-28.
[83] *See id.* at ¶ 20; Convention against Torture, art. 14.

Ms. Fulton explained that in practice there are two types of remedies, judicial remedies and quasi-judicial or administrative remedies. While it is clear that there should always be a judicial remedy, many states have also set up administrative mechanisms for victims to make claims for compensation or for other remedies. Ms. Fulton emphasised that when trying to implement the obligation to provide redress in national law, one needs to think about the issue from the perspective of the victim. In other words, if I am a victim of torture and I wish to get the full range of reparation, what stands in my way?

Ms. Fulton identified common barriers to obtaining relief through judicial remedies:

- In systems that allow for victims to file a civil claim or constitutional claim, the victim must gather all of the evidence themselves which can be time-consuming and expensive. Further, it may be too much for a victim to contemplate going through a long court process only to lose at the end.
- In some countries civil proceedings are blocked until the criminal process is finished.
- Courts may not have the power to order all of the forms of relief required by the Convention. For example, a court may not be able to order guarantees of non-repetition.
- In systems where a civil claim can be adhered to a criminal case, the victim does not need to gather the evidence, but this requires the state to prosecute the case, which does not always happen.
- Other barriers include statutes of limitations, state secrecy doctrines, and immunities.
    - In **Nepal**, there is a law providing for a specific judicial procedure for victims of torture. In one case the lower court awarded compensation and disciplinary sanctions for the perpetrators. On appeal, the court of appeals upheld the order of compensation, but not the disciplinary sanctions, because the court said that without torture the police could not do their job.[84]

Ms. Fulton then discussed the plusses and minuses of administrative proceedings such as crime victim compensation boards or the quasi-judicial remedies offered by some national human rights institutions. While these proceedings may be advantageous for victims who want a simpler proceeding, in some cases the monetary value of the award may be limited, or may not be tied to a finding of accountability by the state.

4.3. Redress in anti-torture legislation

Ms. Fulton underscored that it is not enough under the Convention for states to make torture a crime. When countries are considering anti-torture legislation it is a good opportunity to ensure that the legal system provides for redress. Anti-torture legislation should therefore:

- Recognise the right to redress (see **Madagascar** and **Uganda**).[85]
- Remove barriers to achieving redress such as immunities.

[84] *See* Compensation Relating to Torture Act, 2053 (1996).
[85] *See* The Prevention and Prohibition of Torture Act 2012, § 6 (Uganda); Law No. 2008-08 of 25 June 2008 (Madagascar), art. 21.

- Provide for a remedy that is independent of criminal proceedings and directly enforceable.
- Specify how the remedy is to be delivered and include provision for funding.
- Address procedural issues such as the right to information and evidence in the state's possession.

Ms. Fulton listed some additional items for drafters of legislation on redress to consider:

- Prevention of re-traumatisation of victims during the proceedings.
- The definition of "victim". The general comment has adopted a broader definition of "victim" in line with that in the enforced disappearance convention.[86]
- Who is liable to provide redress? In some countries victims are required to make a claim against the individual perpetrator, but victims should be able to make a claim against the state where state officials are responsible.

During the discussion participants shared experiences in their own countries.

- The **Philippines** Anti-Torture Act of 2009 includes a provision requiring the creation of a rehabilitation program within one year of the effectiveness of the act, but it has not yet been created due to lack of political will by the agencies charged in the Act with creation of the program. While the Act did not create a special fund for victims of torture it does provide that victims can apply to an existing fund for victims of violent crimes. Victims can also seek assistance from the Commission on Human Rights.[87]
- In **Lebanon** a criminal tribunal has the power to apply civil law rules to award compensation for damages including moral and psychological damages.
- In **Morocco** it is now possible to request compensation from the perpetrator in a civil proceeding that proceeds in parallel to the criminal proceeding.

[86] *See* Gen. Cmt. No. 3, at ¶ 3. Article 24 of the enforced disappearances convention states:

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard [….]

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:

(a) Restitution;
(b) Rehabilitation;
(c) Satisfaction, including restoration of dignity and reputation;
(d) Guarantees of non-repetition [….]

[87] *See* Anti-Torture Act of 2009, §§ 18, 19.

The issue of how a court should determine at the outset how much and for how long a victim will need rehabilitation services was raised.

Good practice

➲ When drafting anti-torture legislation it is a good practice to consider both the substantive and procedural aspects of redress, either as part of the anti-torture legislation or in connection with the legislation.

5. Torture in other international treaties

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5.1. Introduction

The Convention against Torture is not the only treaty regulating torture. Torture is also defined and/or regulated in regional instruments, in the Geneva Conventions,[88] and in the Rome Statute. The definition of the act of torture is slightly different in each of these instruments but the scope of application can overlap, creating complexity for legislative drafters. Further, the UN General Assembly and others have concluded that enforced disappearance is a form of torture.[89] The enforced disappearance convention which entered into force in 2010 is a more up to date treaty and contains a number of provisions that should be considered for incorporation into anti-torture laws.

During the expert meeting, the participants considered lessons learned in efforts to domesticate the Geneva Conventions and the Rome Statute that could be applied to efforts to domesticate the Convention against Torture, pondered the challenge of achieving internal coherence in national law when there are parallel efforts to domesticate multiple, overlapping treaties, and discussed cases in which provisions from other treaties have been adapted for use in anti-torture laws.

Discussion Questions:

1. Should drafters of statutes criminalising torture look to the Rome Statute for inspiration? Are there positive elements to draw from international criminal law when drafting the crime of torture?

2. What can drafters of anti-torture laws learn from efforts to domesticate the Rome Statute or the war crimes (grave breaches) provisions of the Geneva Conventions?

[88] This report uses the term "Geneva Conventions" as shorthand for the four Geneva Conventions of 12 August 1949 and their Additional Protocols. For more information, *see* http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp.

[89] For example, Article 1(2) of Declaration on the Protection of all Persons from Enforced Disappearance states that enforced disappearance constitutes a violation of the prohibition on torture and CIDT.

> *2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and* ***the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment****. It also violates or constitutes a grave threat to the right to life.*

Declaration on the Protection of all Persons from Enforced Disappearance, art. 1(2), GA res. 47/133, 47 UN GAOR Supp. (No. 49) at 207, UN Doc. A/47/49 (1992) (emphasis added).

3. Some clauses in the Convention against Torture and the enforced disappearance convention are parallel, with the Convention against Torture referring to torture and/or CIDT and the enforced disappearance convention referring to enforced disappearance. In other cases, articles in each treaty have the same function, but the article in the enforced disappearance convention contains more detailed language, often reflecting more recent developments in international law. Is it a good practice to adopt the higher or more detailed standards in the enforced disappearance convention?

5.2. Specific challenges in implementing international humanitarian law

Jamie Allan Williamson outlined specific challenges in domesticating international humanitarian law.

- With more than 600 articles in the Geneva Conventions and its Additional Protocols, the challenge is to introduce core elements into effective domestic legislation. The four areas of focus for the ICRC are fundamental/judicial guarantees, detention frameworks, repression of war crimes, and oversight mechanisms.
- The ICRC has prepared a model law that can be used by states to draft a law implementing the Geneva Conventions.
- Practice has shown that incorporating the Geneva Conventions into domestic legislation can be a lengthy process despite the best intentions of national authorities.

The ICRC is also working with states on incorporation of the **Rome Statute** with a focus on three crimes, genocide, war crimes and crimes against humanity. A priori, incorporating these offences is fairly unproblematic, particularly because the Elements of Crimes of the Rome Statute facilitate drafting the definitions of the crimes.[90] Dealing with the issues of command responsibility, immunity for heads of state, and universal jurisdiction can be more complicated given their sensitive nature. Moreover, overcoming allegations of geographical bias has made it difficult to obtain full buy-in to enact national level statutes.

The **enforced disappearance convention** is relatively new and can be useful to drafters of anti-torture laws in many ways. It is strong on notification and monitoring, for example. If a state implements all of the safeguards and oversight in the enforced disappearance convention, torture will also be prevented.

There has not, however, been major buy-in for the enforced disappearance convention. There are only 40 States Party and it is not clear why there has not been a major global push for ratification.

5.3. Practical Issues

Mr. Williamson said that with there being multiple treaties that deal with the prohibition on torture, one challenge is ensuring internal coherence between the various pieces of legislation in a particular country. For example, in **South Africa** there is a law implementing

[90] Elements of Crimes, ICC-ASP/1/3(part II-B) (9 Sept. 2002) a*vailable at* http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

the Geneva Conventions and another implementing the Rome Statute both of which can deal with torture. Legislative drafters need to ensure that definitions and standards are consistent between such laws to prevent a form of "legislative forum shopping" in which defendants would argue a lower standard in one act to get off the hook for prosecution that should come under another act. The ideal solution would be to have one piece of legislation covering everything in one place; however, this might be impossible to do in practice.

In addition, even the simplest piece of legislation can take years to be enacted. Advocates should determine whether there are other levels at which to push for protections. Are there directives or regulations that could be adopted by law enforcement or armed forces that could be adopted and take effect more quickly?

5.4. Different definition of torture in Convention and Rome Statute

Nidal Jurdi began with a general comparison of the Convention against Torture and the Rome Statute and then analysed the differing definitions of torture in the two instruments.[91]

Comparisons

The crime of torture in the Convention against Torture and the crimes of torture in the Rome Statute share some common features:

- The concept that states must extradite or prosecute persons found in their jurisdiction.
- The non-applicability of statutes of limitations.
- The goal of ending impunity.

There are also some differences:

- In the Rome Statute, but not the Convention, superior orders can be a mitigating factor.
- In the Rome Statute there is the concept of "command responsibility" whereas for the Convention there is an ordinary concept of criminal responsibility.[92]
- The definition of "torture" is different in the two conventions.
- The duty to make torture a crime is explicit in the Convention, but not in the Rome Statute. The complementarity principle in Article 17 of the Rome Statute, whereby the International Criminal Court will step if a state is unwilling or unable to prosecute or investigate a case or is in a state of inaction, has the effect however of encouraging states to domesticate the crimes in the Rome Statute because a written criminal code provision is often a precondition for prosecution.[93]

[91] Mr. Jurdi pointed out during the discussion that the Rome Statute is a statute that was created to prosecute certain crimes. It did not create the crimes that are detailed therein. They already existed, either under treaty law such as the war crimes provisions in the Geneva Conventions, or in customary law for crimes against humanity.

[92] *See* Rome Statute, art. 28.

[93] Article 17 of the Rome Statutes reads:

Torture as a crime against humanity

The definition of the crime against humanity of torture is in Article 7 of the Rome Statute and is further elucidated in the Elements of Crimes.[94]

There are several differences between the definition of the act of torture in Article 7 and Article 1 of Convention against Torture:

- There is no official capacity (state actor) element.
- No specific purpose is required.

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

[94] Article 7 of the Rome Statute states:

1. For the purpose of this statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [....]

(f) torture [....]

2. For the purpose of paragraph 1 [....]

(e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

See also Elements of Crimes, art. 7(1)(f).

Crimes against humanity can be committed during armed conflicts and in times of peace. This raises the question of what definition of the act of torture to use during times of peace, the Article 1 definition in the Convention or the Article 7 definition in the Rome Statute?. What if a state used the broader, Rome Statue definition in its ordinary criminal code? Of course in order for torture to be a crime against humanity, the other elements of that crime must also be met such as that the act was committed as part of a widespread or systematic attack.

Mr. Jurdi also noted that the Rome Statute contains another crime against humanity, "other inhumane acts" which has a very broad definition and can be committed by any perpetrator (i.e., there is no state actor element).[95]

War crime of torture

The war crime of torture is in Article 8 of the Rome Statute and its definition includes a purpose element like the Convention. War crimes apply only during armed conflicts.[96]

Convention for the Protection of All Persons from Enforced Disappearance

The enforced disappearance convention has some progressive articles, for example:

- Article 5 on crimes against humanity.[97]

[95] The elements of the crime against humanity of other inhumane acts are:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.

3. The perpetrator was aware of the factual circumstances that established the character of the act.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Elements of Crimes, art. 7(1)(k).

[96] The elements of the war crime of torture (in an international armed conflict) are:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

4. The perpetrator was aware of the factual circumstances that established that protected status.

5. The conduct took place in the context of and was associated with an international armed conflict.

6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Elements of Crimes, art. 8(2)(a)(ii)-1.

- Article 6(b) allows for the concept of "command responsibility" which is a progressive development.[98]
- Victim's rights are envisioned.

During the **discussion**, the following additional points were raised.

- Articles 17 and 18 of the enforced disappearance convention may be useful to legislative drafters when it comes to implementing Articles 2 and 16 of the Convention against Torture which require states to take legislative and other measure to prevent torture and CIDT. Articles 17 and 18 contain a number of preventive measures, such as maintaining registers of detainees, ensuring access to a court to challenge the basis of the detention, access of persons to the outside world, etc., which are equally effective in preventing torture.
    - In the **Philippines**, the Anti-Torture Act of 2009 contains certain items that are required in the enforced disappearance convention such as a prohibition on secret detention and the creation and maintenance of registers of all detained persons.[99]
- It was agreed that it is a challenge to harmonise all of the international laws. If one also adds international jurisprudence, this becomes very complicated indeed.
    - In **Uganda**, some concepts from the Rome Statute were incorporated into the anti-torture law. For example, there is a clause on superior responsibility. In addition, the definition of torture includes non-state actors.[100]

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[97] Article 5 of the enforced disappearance convention reads:

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

[98] Article 6 of the enforced disappearance convention reads, in relevant part:

1. Each State Party shall take the necessary measures to hold criminally responsible at least: [….]

(b) A superior who:

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander [….]

[99] *Compare* Articles 17(1) & (3) of the enforced disappearance convention *with* Section 7 of the Anti-Torture Act of 2009.

[100] *See* The Prevention and Prohibition of Torture Act 2012, §§ 2, 10.

- It was noted that there are more than a hundred international humanitarian law committees in place in countries around the world which might be good resources for legislative drafters who are trying to achieve coherence in their country's legal codes.
- One participant asked whether the language in the Convention concerning consent or acquiescence left room for command responsibility for torture. Another responded that the Convention is not clear on this concept but that there is nothing that would bar a state from engaging in a more comprehensive approach at the national level.

6. Challenges in implementing anti-torture laws

© Fayerollinson, courtroom

6.1. Introduction

The final goal of any legal reform effort is that the new law or policy is applied and implemented. Therefore, it is important to consider implementation when a law is being drafted. This section of the report addresses barriers to prosecution, reprisals and retaliation, measures to promote implementation of anti-torture laws, changes to rules of evidence and who should investigate torture.

6.2. Barriers to prosecution

The best drafted criminal law on torture is useless if it is never used. What barriers do prosecutors face in practice in prosecuting torture cases?

> ***Discussion Question: What are the barriers to successful prosecutions of torture? Are these barriers legal, institutional, or cultural in nature? Are there steps that can be taken at the stage of drafting laws criminalising torture that can address some of these barriers?***

Nivia da Silva identified barriers to prosecution of torture cases in **Brazil**.

- Physical evidence of torture is fragile and difficult to obtain.
- Victims who are still in the custody of the perpetrator face intimidation.
- The perpetrators may suppress evidence.
- Judges often reduce the charge of torture to a less serious crime such as misfeasance or abuse of authority.
- Short statutes of limitations are also a barrier.

An added challenge is that the human dignity of incarcerated people is not taken seriously, and that there is prejudice against marginalised groups like members of minority groups or low-income people. There was a general recognition at the meeting that people with few financial resources and members of marginalised groups are at a high risk for torture and ill-treatment and that efforts to combat torture should turn to torture of ordinary prisoners.

Milagros Isabel Cristobal ("Attorney Milabel") explained there has not yet been a successful prosecution of torture under the Anti-Torture Act of 2009 in the Philippines and identified several practical challenges.

- It can be difficult to gain access to victims still in custody: how does the victim send out a call for help? Torture also occurs largely in secret detention places.
    - In one case, even though the national human rights institution has the legal authority to gain immediate access to places of detention, access was denied because the victim was accused of murder.
- People with a special expertise in forensic investigations of torture and a variety of specialties are critical to the success of an investigation and although medical officers around the country have been trained on the Istanbul Protocol there are still issues

with gaining timely access to the victim in order to conduct examinations. Other participants echoed the need for trained medical officers.

    - In one case the first medical team found that there was no evidence of torture but a specialised team that included a dermatologist was able to detect the signs of torture even after significant time had passed.

- Medical evidence is a double-edged sword; it can also be used against the victim when a medical officer finds no evidence of torture.
- Criminal cases require proof of individual criminal responsibility but when a victim is transferred from one authority to another, it can be impossible to prove which individual or authority inflicted the torture.
- It is impossible to identify the perpetrator visually when the victim is blindfolded.
    - In one case the investigation established that torture had occurred but was dismissed by the prosecution because the victim could not visually identify the perpetrator. The prosecution was not persuaded that voice identification would be effective.

Attorney Milabel also underscored the importance of educating relevant actors such as law enforcement officers and prosecutors to change their attitudes and mind-sets. She noted that law enforcement officers often ask in trainings how they can obtain information without resorting to torture or threats of torture because they do not have other methods. Other participants raised this issue as well.

During the discussion, participants identified additional barriers and challenges.

- Torture is committed by state actors and in some countries prosecutors are oriented towards defending the state so they may not exercise their prosecutorial discretion to bring torture cases against state officials.
- Similarly, there are strong links or personal relationships between investigating judges and the police or between prosecutors and the police, further reducing the chances that cases will be brought.
- Judges may refuse to issue orders for forensic exams.
- In some countries the only body that investigates crime is the police, so the police would in effect be investigating themselves in a case involving torture by police officers. If the police fail to conduct an investigation there may be no other body that can do an investigation sufficient to lead to a prosecution.

6.3. Reprisals and retaliation

The participants in the meeting agreed that reprisals against victims, witnesses, and participants in investigations and prosecutions, including lawyers, doctors and judges are a real issue in torture cases.

Discussion Question: Does the fear of reprisals by victims, witnesses and others inhibit successful prosecutions? What are good practices for preventing reprisals?

Nivia da Silva. Ms. Da Silva said that victims and witnesses fear reprisals when they are still in the control of the state and that if they are not protected it is not possible to prosecute cases of torture since evidence of torture is very fragile.

One way to deal with this is to move the victim to another prison before starting the prosecution. Brazil also has a witness protection program called Provita but it is expensive and may be personally difficult for victims who then lose contact with friends and family. Not every victim needs the same level of protection so in the state of Minas Gerais there is a plan to create another program.

During the discussion, the experts learned that the **Philippines** has a witness protection program that is administered by the Department of Justice. In addition, due to a general distrust of the official program, NGOs often pool resources in order to come up with improvised protection systems and shelters for victims and witnesses of human rights violations. The Philippine Commission on Human Rights also maintains a witness protection system that functions in tandem with the Department of Justice's program. The Commission's role and capacity is to address the immediate and short term protection and shelter of victims and witnesses who are later endorsed to the care of the Department of Justice. The Commission's role is thus part of the overall Philippine witness protection program.

In response to a question regarding whether prosecutors faced threats or other sanctions for bringing torture cases, **Ms. Da Silva** shared chilling examples in which a colleague was murdered and another in which a judge was murdered. She said that one practice adopted in **Brazil** to prevent reprisals against prosecutors is for each indictment to be signed by a large group of prosecutors.

Another participant discussed a case of judge who was tortured to death by a police officer in the court. The medical expert in the case did not dare to tell the truth because of fear of retaliation and instead reported that the judge died from a heart attack. The union of judges ordered a new medical report and three other experts concluded that the judge was tortured to death. The case underscores the importance of establishing systems to protect judges, witnesses and medical personnel.

Good practices

- ➲ Move victims to another place of deprivation of liberty before starting a prosecution.
- ➲ A group of prosecutors should sign each indictment together in order to reduce the risk of retaliation.

6.4. Measures to promote implementation of anti-torture laws

Mary Beloff began by identifying several developments that led to change in **Argentina**:

- Ratification of international human rights treaties.
- Reform of the penal code.
- Reform of the criminal procedure code to be more adversarial. Changing criminal procedural law is just as important as changing the substantive law – if the procedure is not changed, then the police will just continue to get information the old way.

- Education. The entire basis of how people are trained in the country has changed. Human rights are now taught in primary and secondary schools as well as in all professional schools. Every person who trains to be a lawyer learns about human rights.

Discussion Question: What mechanisms are being used in your country to promote implementation of anti-torture laws in general and/or to ensure that investigations and prosecutions occur when warranted?

Ms. Beloff also discussed some examples of measures in **Argentina** that promote the prevention of torture.

- Her office has drafted internal protocols to ensure that prosecutors prosecute cases of torture.
- There are mandatory training sessions for prosecutors and police officers.
- Prosecutors use the writ of habeas corpus when conditions of detention are particularly bad, sometimes together with the public defenders.

She also noted that in Argentina, prosecutors are obliged by law to visit places of detention but it is rarely done and she would like to provide incentives to prosecutors to use this power.

During the **discussion**, the participants recommended additional measures to promote implementation of laws.

Many of the participants discussed the importance of using the Istanbul Protocol in investigating torture. One argument to make in order to convince prosecutors to use the Istanbul Protocol is that using the Protocol would protect prosecutors and other investigators against claims that they have not done an adequate investigation.

Another expert recommended that legislative drafters consider the Istanbul Protocol when working on drafting anti-torture laws.

With regard to changing procedural rules, one participant cautioned that reformers may open themselves up to criticism that they are changing the legal traditions in the country.

Good practices

- ➲ Draft specific internal guidelines or protocols on investigating or prosecuting torture which refer to the Istanbul Protocols.
- ➲ Use the Istanbul Protocol in investigations of torture.
- ➲ Institute mandatory trainings for prosecutors and police officers on the prohibition on torture.
- ➲ Train prosecutors, who have a mandate to visit places of detention, in detention monitoring techniques.

6.5. Changes to rules of evidence

Because torture occurs behind closed doors, key evidence is in the hands of the authorities. Because of this imbalance, in the context of determining state responsibility for torture, human rights bodies have shifted the burden of proof to the state to provide "a plausible explanation of how [ ] injuries were caused" when "an individual is taken into police custody in good health but is found to be injured at the time of release."[101] Should the same be done in the context of individual criminal responsibility?

Discussion Question: Is it necessary or desirable to make changes in the rules concerning the burden of proof or rules of evidence?

This question was briefly discussed: some of the experts were "intrigued" by the proposal to adjust the burden of proof in criminal prosecutions for torture and wanted more details on how this could be done, while others expressed concern that this would infringe on the due process rights of those accused of torture and might not pass constitutional muster in their countries.[102]

In connection with pending legislation in **South Africa**, civil society organisations have proposed that in the absence of an independent medical record that demonstrates that a victim's injuries did not occur in custody, that it should be assumed that they did occur in custody. This would not be a shift in the burden of proof per se, but might relieve some of the burden of gathering evidence from indigent people who cannot afford independent medical exams.[103]

6.6. Who should investigate torture?

Discussion Question: Who should investigate cases of torture? Should torture be investigated by the general prosecutor's office or should special units or even separate bodies be created?

In general, participants agreed that investigation of torture cases should be done by the prosecutor's office. One reason for this is that it is often law enforcement officials who are accused of torture and that it may not be realistic for a law enforcement agency to investigate itself.

The participants thought that the creation of specially trained units within the prosecutor's office would be a good idea.

The participants also learned of an effort in **Brazil** to amend the Constitution to restrict the investigatory power to the police, which would exclude the possibility of investigations by the

[101] *Selmouni v. France*, No. 25803/94, ¶ 87 (E. Ct. H.R. 28 July 1999); *Khadzhialiyev & Others v. Russia*, No. 3013/04, ¶¶ 76, 79 (E. Ct. H.R. 6 April 2009).
[102] *See* Convention against Torture, art. 7(3).
[103] This proposal was not adopted in the final law.

prosecutor's office. The amendment was to be voted on in 2013 and it would, if passed have had an extremely negative impact on the investigation of cases of torture and ill-treatment.[104]

The participants did not discuss the possibility of creating a separate, special body to investigate cases of torture, but there was a general consensus that special courts should not be used to prosecute torture because special courts have been used to abuse human rights in many countries.

This related issue of who should be able to file a complaint was not discussed in great detail but one expert suggested exploring the possibility of allowing others like family members or civil society organisations to file complaints on behalf of victims who are in custody in order to move cases more quickly and to prevent impunity.

[104] The Chamber of Deputies voted on and rejected the amendment on 25 June, 2013. *See e.g., PEC é votada e rejeitada na Cámara dos Deputados,* O Globo País (25 june 2013) *available at* http://oglobo.globo.com/pais/pec-37-votada-rejeitada-na-camara-dos-deputados-8806597.

7. Brainstorming and next steps

© APT, during the Expert Meeting at Centre *Jean-Jacques Gautier* in Geneva

The expert meeting was the first step in the development by APT of a "torture law toolbox", an on-line resource containing materials for practitioners who are drafting anti-torture legislation or who would like to analyse whether proposed legislation or existing laws comply with the Convention against Torture.

The focus of the toolbox will be on the incorporation of the Convention against Torture but given the overlap between the Convention and other international instruments and the reality that many countries have ratified more than one instrument the toolbox will include information on other treaties where relevant.

At the end of the meeting there was a brainstorming session on next steps. There was clear agreement among the experts that the toolbox must contain a list of the basic elements that a law must have in order to comply with the Convention.

Some of the experts also suggested developing a model law; however consensus was not reached on whether there should be one model, or several. Some experts thought regional models should be created; whereas, others thought that there should be one model for civil law countries and one for common law countries. In the end, everyone agreed that the first step should be to generate a list of basic elements that can be applied in both civil and common law systems and then consider whether to proceed to working on a model law(s).

The experts suggested that APT synchronise its efforts with other similar efforts such as the Article 5 Initiative in Africa which is conducting baseline surveys on measures taken to implement the Convention against Torture and creating "Domestication and Implementation Packages" in 6 post-conflict countries in Africa.[105]

Other experts suggested:

- Providing links to laws that constitute best practices.
- Including a list of "accompanying measures" that assist in implementation of criminal laws on torture.[106]
- Creating something similar to the APT's materials on the OPCAT which contain recommendations.[107]
- Including a space for people to comment on their own experience.
- Including contact information for focal points in each country.
- Building in connections to other related treaties since most countries are party to more than one treaty.

Several experts also expressed an interest in continued contact among the group. Others volunteered to help APT in the development of the toolbox.

[105] For more information, *see* Article 5 Initiative website *available at* http://a5i.org/about/.
[106] One participant suggested to APT (after the meeting) that one such accompanying measure to prevent torture in police custody or during the preliminary investigation stage would be training on how to investigate crimes for criminal investigators.
[107] *See* APT, *Establishment and Designation of National Preventive Mechanisms* (2006).

8. Annexes

Annex 1: Agenda

Key issues in drafting anti-torture laws

Day 1: Friday, 2 November 2012

Session 1: Introduction

Moderator, Mark Thomson, APT

Tour de Table. Everyone

- Welcome: Mark Thomson, Secretary General APT
- Introduction, objectives & methodology for the meeting, Marcellene Hearn, APT.
- Tour de Table: current status of anti-torture laws in each country.

Session 2: Legislative Strategy: What Works?

Moderator, Esther Schaufelberger, APT

Initial Discussants: Judge Khaled El Akkari, Lebanon

Nicholas Opiyo, Coalition Against Torture, Uganda

Ellecer Carlos, Commission on Human Rights, Philippines

Session 3: Challenges in Implementing Anti-Torture Laws

Moderator, Jean-Baptiste Niyizurugero, APT

Speakers: Mary Beloff, Attorney General's Office, Argentina

Nivia Monica da Silva, Public Prosecutor, Centre of Support for Human Rights, Minas Gerais, Brazil

Milagros Isabel Cristobal, Commission on Human Rights Philippines

Session 4: Other International Crimes

Geneva Conventions, Rome Statute, Enforced Disappearance

Moderator, Matt Sands, APT

Speakers: Jamie Allan Williamson, International Committee of the Red Cross

Nidal Jurdi, OHCHR Middle East Region

Day 2: Saturday, 3 November 2012

Session 5: Constructing the Crime of Torture:

Part 1–The Definition of the Crime

Moderator, Marcellene Hearn, APT

Initial Discussant: Claudio Grossman, Chair, Committee against Torture

Session 6: Constructing the Crime of Torture:

Part 2–Definition Continued & Penalties

Moderator, Marcellene Hearn, APT

Initial Discussant: Sir Nigel Rodley, Human Rights Committee

Session 7: Constructing the Crime of Torture:

Part 3–Translating the Absolute Prohibition of Torture into Reality

Defenses, Justifications, Amnesties, Immunities, Prescription

Moderator, Edouard Delaplace, APT

Initial Discussant: Matt Pollard, Amnesty International

Session 8: Beyond Criminalisation of Torture (Remedies and Reparation and Criminalisation of CIDT)

Moderator, Edouard Delaplace, APT

Discussants: Sarah Fulton, REDRESS

Paul Okirig, Ministry of Justice and Constitutional Affairs, Counsel, Uganda

Ellecer Carlos, Commission on Human Rights Philippines.

Closing & Next Steps

Moderator, Esther Schaufelberger, APT

Closing: Marcellene Hearn, APT

Annex 2: Participant list

1. Clare Ballard, Researcher, Attorney, Community Law Centre (Civil Society Prison Reform Initiative), South Africa
2. Driss Belmahi, Legal Studies Officer, Centre for the Study of Human Rights and Democracy, Morocco
3. Mary Beloff, Attorney General on Criminal Policy, Human Rights and Community Service, Attorney General´s Office, Argentina
4. Ellecer Carlos, Advocacy Officer, Office of the Chairperson, Commission on Human Rights Philippines
5. Milagros Isabel Cristobal, Executive Assistant, Attorney, Office of the Chairperson, Commission on Human Rights Philippines
6. Johan De Lange, Principal State Law Adviser, Department of Justice and Constitutional Development, South Africa
7. Judge Satyabhooshun Gupt Domah, Member, Committee against Torture
8. Rafendi Djamin, Indonesian Representative, ASEAN Intergovernmental Commission on Human Rights and Executive Director, Human Rights Working Group, Indonesia
9. Judge Khaled El Akkari, Ministry of Justice, Lebanon
10. Sarah Fulton, International Legal Officer, Redress, United Kingdom
11. Claudio Grossman, Professor of Law and Dean of American University Washington College of Law, United States and Chair, United Nations Committee against Torture
12. Nidal Jurdi, Human Rights Officer, Office of the High Commissioner for Human Rights, Middle East Region, Lebanon
13. Joâo Nataf, Secretary, United Nations Committee against Torture, Switzerland
14. Paul Okirig, Senior State Attorney, Ministry of Justice and Constitutional Affairs, Office of First Parliamentary Counsel, Uganda
15. Nicholas Opiyo, Member/Expert, Coalition Against Torture, Uganda
16. Matt Pollard, Senior Legal Advisor, Amnesty International, United Kingdom
17. Nareeluc Pairchaiyapoom, Justice Officer, Department of Rights and Liberties Protection, Ministry of Justice, Thailand
18. Mandira Sharma, Advocacy Forum, Nepal

19. Nivia Monica da Silva, Public Prosecutor at the Centre of Support for Human Rights in Minas Gerais, Brazil

20. Marie Solange Razanadrakoto, *Directrice Générale des Affaires Judiciaires des Etudes et des Reformes*, Ministry of Justice, Madagascar

21. Sir Nigel Rodley, Professor of Law and Chair, Human Rights Centre, University of Essex, United Kingdom and Member, United Nations Human Rights Committee

22. Jamie Allan Williamson, Legal Advisor, Advisory Services on International Humanitarian Law, International Committee of the Red Cross, Switzerland

APT Participants

1. Mark Thomson, Secretary General, APT

2. Edouard Delaplace, Special Advisor, APT

3. Marcellene Hearn, UN & Legal Advisor, APT

4. Isabelle Heyer, Americas Program Officer, APT

5. Jean-Baptiste Niyizurugero, Africa Program Officer, APT

6. Ilaria Paolazzi, Africa Program Officer, APT

7. Matthew Sands, UN & Legal Advisor, APT

8. Esther Schaufelberger, MENA Program Officer, APT

In November 2012, twenty-one experts travelled from all over the world to the Centre Jean-Jacques Gautier in Geneva to an expert meeting on "***Key Issues in Drafting Anti-Torture Legislation***". During the two-day meeting the participants debated how to draft anti-torture laws, exchanged experiences concerning the long road to legal reform on torture, and discussed good practices and challenges in implementing existing laws.

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