

# A comparative study of the use of the Istanbul Protocol amongst civil society organizations in low-income countries<sup>i</sup>

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## Abstract

The Istanbul Protocol (IP) is one of the great success stories of the global anti-torture movement, setting out universal guidelines for the production of rigorous, objective and reliable evidence about allegations of torture and ill-treatment. The IP is explicitly designed to outline ‘minimum standards for States’. However, it is all too often left to civil society organizations to investigate allegations of torture and ill-treatment. In this context, important questions remain as to how and where the IP can be used best by such organizations. These questions are particularly acute in situations where human rights groups may have limited institutional capacity. This paper explores the practical challenges faced by civil society in using the IP in Low-Income Countries. It is based on qualitative research in three case studies: Nepal, Kenya and Bangladesh. This research involved over 80 interviews with human rights practitioners. The conclusions of the paper are that the Istanbul Protocol provides

a useful framework for documentation, but more comprehensive forms of documentation will often be limited to a very small – albeit important – number of legal cases. In many cases, the creation of precise and standardized forms of evidence is not necessarily the most effective form of documentation for redress or accountability. In the absence of legal systems willing and able to respond effectively to allegations of torture and ill-treatment, there are severe limitations on the practical effectiveness of detailed and technical forms of documentation.

*Keywords:* human rights documentation, Istanbul Protocol, Low-Income Countries, torture and ill-treatment.

## Introduction

The Istanbul Protocol (IP) represents the internationally recognised standard for the documentation of torture and ill-treatment.<sup>1</sup> With its origins in the Turkish human rights struggle, the final version was the collective product of over 75 human rights activists, lawyers and health workers from organizations in at least 15 different countries. The aim of the IP is to ‘enable States’ to bring ‘evidence of torture and ill-treatment to light so that perpetrators may be held accountable for their actions and the interests of justice may be served’ (p1). The Protocol describes,

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in great detail, the ‘minimum standards’ for legal investigation and the production of medical and psychological evidence (p2). It recommends obtaining victim statements, preserving evidence (including medical evidence), identifying possible witnesses and obtaining statements, in order to determine ‘how, when and where the alleged incidents of torture occurred’ (p17). More broadly, the experience of human rights activists tells us that torture and ill-treatment are inherently difficult to document.<sup>2,3</sup> Not only can states inflict torture in a way that leaves few marks, but claims of torture are also often met with cultures of denial.<sup>5,6</sup> The IP therefore attempts to address these issues by setting out a clear method through which torture and ill-treatment can be documented in a consistent, effective and impartial manner.

There is no doubt that the IP is one of the great success stories of the anti-torture movement. Since it was adopted by the UN in 1999, it has been recommended by the UN General Assembly, the UN Human Rights Council, the UN Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment or Punishment, the African Commission on Human and People’s Rights and the European Union, amongst others.<sup>i</sup> It has been translated into multiple languages. The IP has also spawned numerous guides and manuals designed to explain and clarify its 76 pages.<sup>6-9</sup>

The IP is explicitly designed to outline ‘minimum standards for States’. However, it is all too often left to civil society organiza-

tions to investigate and document allegations of torture and ill-treatment. The most comprehensive forms of documentation set out in the IP are resource-intensive, resources that are often unavailable to many civil society organizations. However, as the introduction to the IP explains, it is not designed as ‘a fixed protocol’, but rather as flexible ‘minimum standards... and should be used taking into account available resources’ (p2).<sup>1</sup> There are therefore important questions about how, in practice, to best to use the forms of documentation set out in the IP.

This article is the product of a two-year research project funded by the UK’s Economic and Social Research Council and the Department for International Development, carried out by the University of Edinburgh and Dignity: Danish Institute Against Torture.<sup>ii</sup> The overall project aims to explore the issues faced by civil society organizations in documenting torture and ill-treatment in Low-Income Countries (as defined by the OECD).<sup>13</sup> It examines the aims of civil society organizations in documenting torture, the techniques they use, and the problems they face in doing so. The IP is the most widely recognised human rights instrument used in the documentation of torture, setting international standards. It is therefore important to explore the potential scope and challenges of using the IP in practice. This particular paper asks: What role does the Istanbul Protocol play in the documentation of torture in Low-Income Countries? And what are the challenges and opportunities involved in doing so?

<sup>i</sup> For example: OHCHR Resolution 2003/33 of 23 April 2003; UN Special Rapporteur on Torture General Recommendations of 2003; 32nd ordinary session of the African Commission on Human and People’s Rights, October 2002; Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Affairs Council, 2001.

<sup>ii</sup> ESRC/DfID ES/L005395/1, May 1 2014 - April 30 2016. For more details please see: <https://torturedocumentationproject.wordpress.com/?s=documentst> last accessed 16 January 2016. Include in references

More broadly, the research addresses the challenges raised by attempts at standardisation in human rights work. Any move towards standardisation treads a careful line between principles that help set a general framework but risk becoming too broad to be meaningful in a particular context, on the one hand, and detailed guidelines that become too inflexible to take into account context-specific tactical demands, on the other.<sup>14</sup> Much human rights documentation implicitly assumes that more knowledge is of value. If we can produce rigorous evidence about particular incidents of torture, we will be in a better place to hold perpetrators to account. As such, the underlying assumption behind the IP is that production of detailed, objective and reliable legal evidence is central to the fight against torture. This is certainly true. Yet, at the same time, knowledge should always be thought of as a means to an end, rather than an end in itself; it is important because it helps human rights practitioners realise other more substantive goals, such as the eradication of torture. We therefore need to understand the role of particular forms of knowledge in working towards context specific goals. This means asking why civil society organizations use human rights instruments, what they want to achieve, and the issues they face when doing so.

The conclusions of the paper are that the IP provides a useful framework for documentation, but the practical impact of comprehensive forms of documentation will often be limited to a small – albeit important – number of legal cases. In a context where legal systems are often unresponsive or inefficient, documentation is more likely to be used for advocacy or rehabilitation than legal complaints. In the absence of legal systems willing and able to respond effectively to allegations of torture and ill-treatment, there are severe limitations on the practical

effectiveness of detailed and technical forms of documentation. The problem is not simply knowledge but also, political will. This paper does not seek to suggest that fear and risk should rule out human rights work. Neither is it suggesting that human rights standards should be lower in Low-Income Countries. What is being suggested is that, at a very practical level, in the face of a state's failure to live up to its obligations and in an environment of often scant resources, comprehensive documentation might not always be the most effective way of achieving the broader goals of human rights organisations.

### Methods

The project employs three case studies: Kenya, Bangladesh and Nepal. These three countries have been chosen for the following reasons: First, the OECD classifies them all as Low-Income Countries. Second, while they all have past and present histories of state-led violence including torture and ill-treatment, none of the countries are currently experiencing levels of violence that would make the research unfeasible. Third, all three case studies include vibrant human rights communities that struggle to document widespread and long-term abuses, and bring perpetrators to account, often under high levels of political pressure. All three case studies can therefore tell us a great deal about the aims and methods of human rights practitioners with limited institutional capacity, operating in hostile political environments, and their attempts to grapple with the dilemmas of human rights documentation.

In order to ensure that the research addresses the needs and interests of local and international stakeholders, the project was carried out in conjunction with collaborators in each case study, as well as researchers at

DIGNITY (Danish Institute against Torture) and the University of Edinburgh. Local partners, including human rights organizations in all three case studies, were involved in research design and implementation, with representatives from these organizations serving on the project advisory board.<sup>1</sup> In Kenya and Nepal, after an initial mapping of the field carried out in conjunction with our project partners, the main organisations involved in the documentation of torture were invited to stakeholder workshops. At the workshops, the project objectives and methods were explained, and participants provided feedback. The workshops also enabled us to identify other possible actors in torture documentation. In Bangladesh, political tensions at the time of the research meant workshops were not feasible. Bangladeshi interviewees were therefore identified on the basis of existing contacts and recommendations from human rights practitioners. Throughout the process, it was important to include all groups involved in the documentation of torture and ill-treatment, and not to assume that only formal human rights groups carry out such work. This initial step allowed us to map the organizations, people and bodies which are involved in documenting torture and ill-treatment, including NGOs, journalists, medical doctors, health workers, lawyers, and paralegals, as well as state officials. We identified 22 organizations in Kenya, 17 organizations in Nepal and 6 in Bangladesh.

The research used in-depth qualitative interviews, in the tradition of the ethno-

graphic and interpretive interview.<sup>15</sup> The interviews were carried out by CC in Kenya, JRS in Nepal and MKA in Bangladesh. In all three case studies, participants were interviewed from nearly all organizations identified as having a direct role in the documentation of torture and ill-treatment. They were identified as playing a central role in commissioning, carrying out or using the documentation of torture and ill-treatment in the organization. In many cases, they were lawyers, but clinicians and other human rights professionals were also included. As above, it was not assumed that it was only lawyers or clinicians who used documentation in practice. We carried out 80 interviews in total, with each interview lasting between one and three hours.

In this part of the larger project, the focus was on the general experiences and perceptions of human rights practitioners involved in the documentation of torture or ill-treatment with the aim of exploring the perception of the main issues and challenges. The interviews were open-ended and addressed broad themes agreed upon for all three case studies, including: the aims of torture documentation, the challenges involved in documenting torture, the instruments people use for documentation and the reasons they are used, and whether and how the IP is used, and by whom. We did not assume prior knowledge of the IP, but sought to examine how, why and where it was used by human rights organizations. Interviews covered the specific expertise of those involved, the instruments and techniques used by the organizations to document torture and ill-treatment, the organizations' objectives when documenting cases of torture and ill-treatment, the interviewees views and experiences around using the IP, and the problems and issues they face when doing so. In the footnotes we have provided broad

<sup>1</sup> The Advisory board consists of: Nigel Rodley, University of Essex; Stephanie David, FIDH; Mandira Sharma, Advocacy Forum; Mutuma Ruteere, CHRIPS; Saira Khan, Odhikar; Malcolm Evans, University of Bristol. Their participation should not be taken as endorsement of the views in this article.

details of the interviewees experience and position, without compromising their anonymity.

It is important to acknowledge the implications and limitations of the interpretive and qualitative methods and framework for analysis used in this article. The data consists of the opinions and views of human rights actors. These are necessarily subject to variation and disagreement, and do not necessarily represent actual practice. We have tried to capture these disagreements, where significant, but given limitations of space, we cannot represent the full range of opinions. As in all interviews, responses were also conditioned by the encounter between the interviewee and interviewer. It is possible that responses were shaped by, for example, a hope to increase funding. An alternative research strategy would have been to collect direct information on individual cases, but this would raise issues of confidentiality. We used purposive sampling given the small sample size.<sup>16</sup> Furthermore, given the size and nature of the sample frame, statistical information would not have been reliable or significant. Whilst it is not possible to generalize the findings to all low-income settings, the results raise issues that might be applicable in other cases. Indeed, generalization is not an aim of this paper, but rather to explore the context-specific use of the IP.

Carrying out research in contexts of violence and instability contains very real risks, both for the participants and the researchers. The utmost consideration was therefore given to potential negative repercussions arising from any research for respondents and researchers. The research went through an ethical audit and review by the Research Ethics Committee of the School of Social and Political Science at the University of Edinburgh, procedures in compliance with the Ethical Guidelines of

the Association of Social Anthropologists.<sup>17</sup> This process includes an audit of risk to researchers and participants, confidentiality and handling of data, informed consent and conflict of interest. Interviewees have accordingly been kept anonymous.

### Context

In this section we briefly set out the legal and political context in all three case studies. Such background information is essential to obtain an understanding of the practical challenges in using the IP for more comprehensive forms of documentation.

In Kenya, Articles 25, 26 and 29 of the 2011 Constitution guarantee the right to life and the absolute prohibition of torture. There is currently no specific legislation criminalizing torture. Human rights organizations report that torture is widely used as an interrogation method in places of detention.<sup>18-20, i</sup> In addition, al-Shabab activities in Somalia have spread into Kenya, resulting in an often brutal crackdown by Kenyan security forces on terror suspects. Ethnic Somalis have been particularly vulnerable to the violence of the police and security forces.<sup>21</sup> At the time of writing, the government was trying to expand its security powers, and in 2014, new legislation gave the police wide powers over suspects, although key clauses have been suspended by the High Court. There are a large number of organizations in Kenya involved in the documentation of torture and ill-treatment. Key organizations include the Independent

<sup>i</sup> lawyer and programme advisor for national human rights NGO, Nairobi, 6 August 2014; paralegal, national human rights NGO, Nairobi, 13 August 2014; lawyers and programme directors, national human rights NGO, Nairobi, 19 August 2014; head of field office of international human rights NGO, Nairobi, 28 August 2014; lawyer and director of national human rights NGO, 22 September 2014.

Medical Legal Unit (IMLU), Kenya Human Rights Commission, Amnesty International - Kenya and the Kamukunji Paralegal Unit. IMLU is the only organization that solely works on torture amongst the general Kenyan population. Four organizations offer medical examination and rehabilitation services for torture survivors, and three of these focus on specific populations such as children or refugees. Full-time, paid human rights workers are largely, but not solely, trained lawyers. Clinicians for medico-legal reports are largely recruited on a voluntary or consultancy basis and trained by IMLU. Individual cases are usually identified through media reports or by paralegals working in local communities. The documentation of security-related cases is widely perceived by human rights actors to be a more politically sensitive issue than the documentation of criminal cases.<sup>i</sup>

In Bangladesh, custodial torture became a specific crime in 2013, with the approval of the Torture and Custodial Death (Protection) Act 2013. The Bangladeshi security services have recently proposed amending the law to exclude mental suffering, to omit purposes including punishment, intimidation, coercion and discrimination, and to require that the police carry out the investigation of any complaint.<sup>ii</sup> Human rights practitioners report that torture and ill-treatment is a product of two processes.<sup>iii</sup> The first is harassment, extortion and interrogation by police offices.<sup>23</sup> Torture, custodial

death, extra judicial killings known as “cross fires” and enforced disappearances are widespread. The second is on-going political tensions between supporters of the Awami League government and its opponents, mainly in the Bangladesh National Party and the Jamaat-e-Islami.<sup>24-28</sup> There are three main organizations in Bangladesh involved in the documentation of torture and ill-treatment. Ain o Salish Kendra provides legal aid, documentation and advocacy, and operates in just under a third of Bangladesh’s districts. BLAST acts as a legal services organization, specializing in women’s and constitutional issues, and operates in under a third of the country’s districts.<sup>23</sup> Odhikar specializes in the documentation of torture and extra-judicial killings and has a network of supporters in two thirds of Bangladesh’s districts. Since 10 August 2013, Odhikar has come under increasing political and economic pressure from the Bangladeshi government.<sup>29</sup> With the exception of BLAST, human rights organizations rarely have branch offices, and rely on referrals by third parties and volunteer members of human rights networks.<sup>iii</sup> Human rights workers are usually either lawyers or journalists. Clinicians for medico-legal reports are recruited on a consultancy or voluntary basis.<sup>iii</sup> It is often difficult to persuade doctors to take up such work.<sup>iv</sup>

In Nepal, the Constitution of 1990, as well as the Interim Constitution of 2007, prohibits torture. The 1996 Torture Compensation Act (TCA) provides formal redress for victims of torture in places of detention. Besides the TCA, the National Human Rights Commission Act, 2068 (2012),

<sup>i</sup> lawyer and director of national human rights NGO, Nairobi, 22 September 2014.

<sup>ii</sup> See also: Written statement submitted by ODHIKAR - Coalition for Human Rights, Twenty-seventh session, Agenda item 4: Human rights situations that require the Council’s attention, 25 August 2014. Available at: [http://odhikar.org/wp-content/uploads/2014/09/Statement-Written\\_UN-HRC\\_Odhikar\\_25-August-14\\_Eng.pdf](http://odhikar.org/wp-content/uploads/2014/09/Statement-Written_UN-HRC_Odhikar_25-August-14_Eng.pdf), last accessed 20 January 2016.

<sup>iii</sup> director of investigation unit, national human rights NGO, Dhaka, 9 September 2014.

<sup>iv</sup> director of human rights organisation 24 March 2015, director human rights organisation 11 September 2014.

Evidence Act, 2031 (1974), and the National Code, 1963 (Muluki Ain, 2020) also contain important provisions against torture. There is no specific legislation that criminalises torture. Human rights practitioners report that torture was widespread during the Maoist insurgency of 1996–2006.<sup>30, 31</sup> Since this period, ‘politicised’ torture has generally, but far from completely, declined.<sup>32</sup> The police regularly use torture as an interrogation technique. There are a wide variety of organizations involved in the documentation of torture, many of them with roots in human rights work during the insurgency.<sup>i</sup> Only the Centre for Victims of Torture (CIVICT) specializes in torture, but several others, such as Advocacy Forum, INSEC and Terai Human Rights Defenders Alliance, have made torture a focus of their work. Other significant organizations involved in the documentation of torture include the National Human Rights Commission, and the Forum for the Protection of People’s Rights. All the above organizations focus on documentation, monitoring, advocacy, psychosocial counseling and legal cases.<sup>ii</sup> CIVICT, Transcultural Psychological Organization–Nepal, and the Centre for Mental Health and Counselling–Nepal provide rehabilitative services. The identifica-

tion of cases is largely carried out by district level caseworkers, networks of human rights defenders and journalists.<sup>iii</sup> Lawyers were initially prominent in the Nepali human rights movement, but an increasing number of therapists are now involved in rehabilitation.<sup>iv</sup> Clinicians for medico-legal reports are recruited on a consultancy or voluntary basis.<sup>v</sup> Much of the most detailed documentation of torture takes place in order to produce evidence for litigation under the Torture Prevention Act, with the aim of obtaining compensation and not for the purpose of holding perpetrators accountable.

## Results and Discussion

In all three case studies, our interviews suggest that human rights organizations document torture and ill-treatment for a wide range of often overlapping objectives. The reasons for documentation predominantly include, but are not limited to, media advocacy, issuing urgent appeals, developing training and education projects, alternative reports and complaints before regional and international mechanisms.<sup>vi</sup> Several organizations document solely as a way of identifying the medical needs of survivors.<sup>vii</sup> Crucially, the eventual end to which documentation will be put is not necessarily known at the start of the process.<sup>viii</sup>

Our interviews also suggest that in all three case studies, levels of awareness about

<sup>i</sup> head of documentation, national human rights NGO, Kathmandu, 11 June 2014; founder of national human rights NGO, Kathmandu, 2 September 2014.

<sup>ii</sup> interview with head of documentation, national human rights NGO, Kathmandu, 11 June 2014; lawyer and head of national human rights NGO, Kathmandu, 3 June 2014; director, national human rights NGO, Kathmandu, 7 August 2014.

<sup>iii</sup> lawyer, national human rights NGO, Kathmandu, 13 June 2014; programme officer, woman’s rights organization, Kathmandu, 4 August 2014; head of documentation, national human rights NGO, 13 February 2015.

<sup>iv</sup> programme director, children’s rights NGO, Kathmandu, 28 August 2014; director, national human rights NGO, Kathmandu, 7 August 2014.

<sup>v</sup> head of documentation, national human rights NGO, Kathmandu, 11 June 2014; programme director, children’s rights NGO, Kathmandu, 28 August 2014.

<sup>vi</sup> lawyer, international NGO, Nairobi, 18 August; lawyer and programme advisor for national human rights NGO, 13 August; 12 August 2014.

<sup>vii</sup> psychologist at international NGO, Nairobi, 26 August; interview with lawyer and director, national human rights NGO, Kathmandu, 18 November 2014.

<sup>viii</sup> medical professional and director of national human rights NGO, Kathmandu, 5 August 2014; director investigation unit, national human rights NGO, Dhaka, 9 September 2014.

the IP varied amongst human rights practitioners. Awareness was high amongst those organizations that explicitly dealt with cases of torture, and with higher levels of awareness amongst more senior employees. In general, awareness also seems greatest for those with strong relationships with international human rights organizations, as this is the main source of training on the topic.<sup>i</sup> In Kenya and Nepal, there has been a programme of training in the use of the IP, funded by international donors, and supported by international organizations.<sup>ii</sup> In Nepal, these training sessions have been aimed at clinicians, lawyers and other human rights workers. In Kenya, organizations report limited training for non-clinicians, apart from that reported by the IRCT.<sup>33</sup> There has been virtually no training in Bangladesh.

The general consensus amongst many of the human rights organizations we interviewed was that the IP provides a useful general set of guidelines for their work. Human rights practitioners also report that medico-legal reports in particular can have a crucial role to play in ensuring accountability and reparations for survivors.<sup>iii</sup> In those cases that go to court, cases without medico-legal reports will rarely get very far. This is especially the case in Nepal, where the Torture Compensation Act (TCA) provides a framework for civil compensation for people tortured in places of detention. Of the

total number of cases of litigation led by one Nepali human rights organization, 32.9% of cases were dismissed due to lack of medical evidence and insufficient documentation.<sup>34</sup> Those organizations with a specific focus on torture report that their documentation and screening processes are informed by the IP. However, interviewees also reported that there were severe limitations to using the more comprehensive forms of documentation set out in the IP. As one senior Nepali human rights activist put it "the IP does not work in Nepal without contextualizing it in the Nepali context".<sup>iv</sup> Interviewees reported that given limitations of time and resources, IP principles have been adapted to 'local conditions'.<sup>v</sup> In practice, few interviewees reported that their organisations followed the IP in any level of detail, although it remains a 'framework'. Interviewees reported four main issues, which are outlined below.

First, in all three case studies, interviewees reported that victims can be extremely reluctant to report their experiences.<sup>vi</sup> There is a widespread fear of negative, perhaps even violent reprisals for torture survivors.<sup>vii</sup> In all three countries there are long histories of impunity for police violence, with little protection offered to those making complaints about the police or military.<sup>viii</sup> The

<sup>i</sup> lawyer and head of national human rights NGO, Kathmandu, 3 June 2014; medical professional and director of national human rights NGO, Kathmandu, 5 August 2014; head of documentation, national human rights NGO, Kathmandu, 11 June 2014.

<sup>ii</sup> head of documentation, national human rights NGO, Kathmandu, 14 August 2014; head of documentation, national human rights NGO, Kathmandu, 11 June 2014; lawyer and head of national human rights NGO, Kathmandu, 3 June 2014.

<sup>iii</sup> lawyer and director of national human rights NGO, Nairobi, 27 June 2014; interview with human rights practitioner, Dhaka, 26 September 2014.

<sup>iv</sup> medical professional and director of national human rights NGO, Kathmandu, 5 August 2014.

<sup>v</sup> medical professional and director of national human rights NGO, Kathmandu, 5 August 2014; director, national human rights NGO, Kathmandu, 7 August 2014.

<sup>vi</sup> lawyer and director of national human rights NGO, Nairobi, 27 June 2014; head of documentation, national human rights NGO, Kathmandu, 13 February 2015; medical professional and director of national human rights NGO, Kathmandu, 5 August 2014; Nepal Stakeholder Workshop, 4 September 2014; interview with director of investigation unit, national human rights NGO, Dhaka, 26 February 2015; documentation officer, national human rights NGO, Dhaka, 11 September 2014; director investigation unit, national human rights NGO, Dhaka, 9 September 2014.

director of a Kenyan human rights NGO, for example, reported very high levels of intimidation by perpetrators, with the police routinely threatening to kill or detain survivors if they file an allegation.<sup>i</sup> A paralegal at a Kenyan human rights NGO based in a slum area similarly reported that in order to lodge an allegation of torture and ill-treatment survivors must report to a police station. They are reluctant to do so, as they have already been victims of police brutality.<sup>ii</sup> The head of documentation at one Nepali human rights NGO reported several cases where survivors had been tortured again following allegations resulting in a loss of trust amongst survivors with the legal process.<sup>iii</sup> In such contexts, the interviewees reported that survivors often are extremely reluctant to seek justice through formal

mechanisms.<sup>iv</sup> The director of a Bangladeshi human rights organization reported that torture survivors are often more interested in being released from detention than gaining compensation or accountability, and most survivors do not see remedy as a viable option.<sup>v</sup> Our interviewees reported that human rights organizations can therefore face great difficulty in persuading people to provide the level of detail that is necessary in order to document torture and ill-treatment according to IP principles.<sup>vi</sup> Ironically, it is relatively more straightforward to produce a forensic medical report if the victim has died.<sup>vii</sup> The main reason for this is that victims, and by definition the main witness, can no longer be intimidated.

Second, in all three countries studied the interviewees reported there was a shortage of medical professionals who are willing and able to produce medico-legal reports for human rights organizations. Writing medico-legal reports is seen as carrying limited professional prestige. There can also be high levels of intimidation and fear among medical professionals.<sup>viii</sup> If doctors write reports, they may be asked to give oral evidence, and therefore become visible to the police. A Nepali human rights activist, for example, reported that medical personnel are under pressure from the police and ‘don’t want to take active steps’.<sup>ix</sup> Furthermore,

<sup>vii</sup> lawyer and director of national human rights NGO, Nairobi, 22 September 2014; interview with director of investigation unit, national human rights NGO, Dhaka, 26 February 2015; documentation officer, national human rights NGO, Dhaka, 11 September 2014; director investigation unit, national human rights NGO, Dhaka, 9 September 2014; paralegal, national human rights NGO, Nairobi, 31 July 2014; head of national human rights NGO, Kathmandu, 3 June 2014; national human rights NGO, Kathmandu, 10 February 2015.

<sup>viii</sup> programme director, children’s rights NGO, Kathmandu, 28 August 2014; lawyer and project officer, national human rights NGO, Dhaka, 3 March 2015; independent human rights lawyer, Dhaka, 24 February 2015; independent human rights lawyer, Dhaka, 28 February 2015.

<sup>i</sup> lawyer and director of national human rights NGO, Nairobi, 22 September 2014.

<sup>ii</sup> lawyer and director of national human rights NGO, Nairobi, 27 June 2014.

<sup>iii</sup> head of documentation, national human rights NGO, Kathmandu, 11 June 2014.

<sup>iv</sup> paralegal, national human rights NGO, Nairobi, 6 August; lawyer and programme advisor for national human rights NGO, Nairobi, 13 August 2014; interview with lawyer and director, national human rights NGO, Kathmandu, 18 November 2014; interviews with independent human rights lawyer, Dhaka, 24 February 2015; independent human rights lawyer, Dhaka, 28 February 2015.

<sup>v</sup> director of national human rights NGO, Dhaka, 11 September 2014.

<sup>vi</sup> medical professional and director of national human rights NGO, Kathmandu, 5 August 2014; interview human rights activist, Dhaka, 11 September 2014.

<sup>vii</sup> lawyer and director of national human rights NGO, Nairobi, 22 September 2014.

<sup>viii</sup> director investigation unit, national human rights NGO, Dhaka, 9 September 2014; interview with founder of national human rights NGO, Kathmandu, 2 September 2014.

<sup>ix</sup> director, national human rights NGO, Kathmandu, 7 August 2014.

many clinicians are directly employed by government-funded hospitals, and therefore fear losing their jobs if they are critical of the state. The director of a Bangladeshi human rights NGO reported that doctors are often reluctant to become involved in lengthy legal cases and fear possible repercussions.<sup>i</sup> In Bangladesh, Kenya and Nepal, the independence of reports produced by government doctors is widely criticised by human rights organizations.<sup>ii</sup> One Kenyan paralegal, for example, reported that as prison doctors are also prison employees, they are reluctant to provide critical evidence supporting allegations of torture and ill-treatment.<sup>iii</sup> For those independent doctors who are willing to write medico-legal reports, it can be very difficult to access the medical records of survivors.<sup>iii</sup>

Third, the interviewees reported that following the IP can be very expensive and time consuming. One Nepali clinician described the IP as a "gold standard", but said that he simply did not have the capacity or the equipment to follow it step by step.<sup>iv</sup> The expenses involved in documenting cases can be so great that one Nepali human rights organization requires survivors to sign a document stating they will not back out of bringing a legal case.<sup>v</sup> This finding has been reflected in other work. One unofficial

estimate puts the time for an IP style examination at seven hours, leading some human rights organizations to develop less time-intensive screening methods that build on the IP, but do not require the same level of detail (p7).<sup>11, 12</sup>

Fourth, and perhaps most importantly, the interviewees reported that the level of detail in the most comprehensive forms of documentation set out in the Istanbul Protocol is often not needed.<sup>vi</sup> One Kenyan human rights practitioner commented that detailed documentation was something they did 'mainly for donors'.<sup>vii</sup> This is partly because individual legal cases are relatively rare. Only Nepal has signed up to individual complaints under the UN Human Rights Committee monitoring process, and even then only a handful of cases have been able to go forward.<sup>35</sup> Domestically, with the partial exception of Nepal, civil or criminal legal cases are also relatively rare. Delays are common in the domestic legal system, meaning that the few cases that do make it to the courts, take years to do so.<sup>viii</sup> One senior lawyer with a Kenyan human rights organisation reported that many survivors prefer to settle cases out of court as they get frustrated with the long delays.<sup>ix</sup> A senior lawyer at a Bangladeshi woman's rights organisation explained that the length of the legal process means that many survivors will prefer to make informal settlements with perpetrators, if at all.<sup>x</sup> If civil or criminal cases do reach

<sup>i</sup> director of national human rights NGO, Dhaka, 11 September 2014.

<sup>ii</sup> senior investigator, national human rights NGO, Dhaka, 16 September 2014; interview with lawyer, woman's rights NGO, Nairobi; director, national human rights NGO, Kathmandu, 8 August 2014; interview with interview with lawyer and director, national human rights NGO, Kathmandu, 18 November 2014; interview with medical doctor, Kathmandu, 18 November 2014.

<sup>iii</sup> paralegal, national human rights NGO, Nairobi, 6 August 2014.

<sup>iv</sup> head of documentation, national human rights NGO, Kathmandu, 17 November 2014.

<sup>v</sup> director, national human rights NGO, Kathmandu, 8 August 2015.

<sup>vi</sup> programme director, children's rights NGO, Kathmandu, 28 August 2014.

<sup>vii</sup> lawyer and programme coordinator, national human rights NGO, Nairobi, 20 August 2014.

<sup>viii</sup> head of field office of international human rights NGO, Nairobi, 28 August 2014; lawyer and project officer, national human rights NGO, Dhaka, 3 March 2015.

<sup>ix</sup> senior lawyer, national human rights organization, Nairobi, 13 August 2014.

court, judges can also be antipathetic to claims of torture, or themselves placed under political pressure.<sup>1</sup> In Bangladesh, at the time of writing, no one has been convicted under the Torture and Custodial Death (Protection) Act 2013, although several cases of custodial death are pending. Nepal stands in partial contrast, where the Torture Compensation Act has resulted in victims filing relatively large numbers of civil cases in the courts. However these are for compensation and do not include the possibility of holding perpetrators to account. A report published in 2014 by a local human rights organization in Nepal shows that out of 146 cases filed under Torture Compensation Act by the organization since 2003, 31 (21%) were granted compensation, 48 (32.9%) were dismissed, 61 (41.8%) were awaiting decision and 6 (4.1%) were withdrawn.<sup>34</sup> In Kenya and Bangladesh, even when cases are won, the government can fail to pay the agreed compensation.<sup>ii</sup>

More broadly, rather than formal legal action, the mobilization of political and economic pressure often seems to be the most practically effective form of accountability for local human rights organizations concerned with addressing perpetration in the absence of the wider rule of law. In Bangladesh and Nepal, for example, human rights practitioners report perpetrators to the UN Department of Peacekeeping Operations (DPKO). Both countries are amongst the

largest contributors of personnel to UN Peacekeeping Missions and the armed forces earn a great deal of income through this work. Crucially, the reports used by human rights organizations in such cases are often very short, and require only a very limited level of detail to be effective. Human rights organizations in Nepal in particular, have used this tactic successfully; resulting in the removal of police and army officers from UN missions.<sup>iii</sup> At the time of writing, the tactic has not resulted in action against individual police officers in Bangladesh, but has seen an increase in political pressure against human rights organizations.<sup>iv</sup> More broadly, in Kenya, Nepal and Bangladesh, the most effective forms of documentation help human rights organizations to mobilize political connections, often, but not always, in the shape of lobbying the media and international donors. The director of one Nepali human rights organization, for example, reported that lobbying donors and local politicians was the most effective way to get a response from the Nepali state.<sup>v</sup> Crucially, this work can be done with relatively limited evidence.

## Conclusion

The central objective of the IP is to provide guidelines for States for the effective investigation and documentation of allegations of torture and ill-treatment. In so doing, it is hoped that such documentation will establish facts, identify those responsible, facilitate protection, and/or

<sup>x</sup> senior lawyer, woman's rights organization, Dhaka, 25 March 2015.

<sup>i</sup> head of field office of international human rights NGO, Nairobi, 28 August; social worker, national human rights and refugee NGO, Nairobi, 19 August 2014; interview with lawyer and director, national human rights NGO, Kathmandu, 18 November 2014.

<sup>ii</sup> lawyer, international NGO, Nairobi, 18 August 2014; lawyer and director national human rights NGO, Dhaka, 24 March 2015.

<sup>iii</sup> human rights practitioner, Kathmandu, 19 November 2014.

<sup>iv</sup> Human Rights Watch. World Report 2016: Bangladesh. Available at: <https://www.hrw.org/world-report/2016/country-chapters/bangladesh>. Accessed 21 September 2016.

<sup>v</sup> lawyer and head of national human rights NGO, Kathmandu, 3 June 2014.

obtain redress for victims. In the face of the all too common failure of States to carry out suitable investigations, civil society organizations often take the lead. The questions therefore are what is the best way for civil society organizations to document torture and ill-treatment, and what role can the IP play in this process? If human rights documentation is to be treated as a means to an end, rather than an end in itself, it is important to examine how effective particular forms of documentation are in particular contexts.

Looking at the interviews as a whole, we can infer that several processes have to come into line for comprehensive forms of documentation to be practical and effective: the survivor must have documentable sequelae and be willing and able to make contact with a human rights organization; a trained clinical professional must be willing and able to provide a comprehensive medico-legal report; the survivor must be willing and able to pursue a case over an often lengthy period; and, above all, there must be empowered legal actors who are willing and able to respond to documented allegations of torture and ill-treatment, as well as act against the perpetrators and provide redress to the survivors. In the three countries studied, all these factors were the exception rather than the rule.

This research has potential implications for how the IP is used for documenting torture and ill-treatment in low-income countries. Whilst the IP provides a useful broad framework for torture documentation and sets standards to which States can be held to account, the practical significance of more comprehensive forms of documentation appear restricted to a small – albeit perhaps strategically important – number of legal cases. High levels of evidence are often of limited practical use, as documentation is

actually being carried out for reasons other than legal redress, such as lobbying international donors, that in practice require less detail. Given that the major obstacles to accountability and redress are political, rather than linked to knowledge and expertise, the impact and role of training around more comprehensive forms of documentation will therefore likely remain limited. The overall problem is not one of professionalized expert knowledge, but of political will. In this context, one possible future avenue is to think systematically about forms of human rights documentation that are not aimed at criminal prosecutions or litigation. Rather than developing universal standards, this could involve sharing the myriad of examples of effective good practice that already exist around the world which can be adopted to local contexts.

The research upon which this is based should be seen as an initial attempt to explore the practical use of the IP in low-income settings. It can possibly be extended in several ways. Studies could move beyond the opinions and views of human rights practitioners, to explore if, when and how the IP is used in the documentation of particular cases, and the factors that impact upon this – although this could raise confidentiality issues. The three case studies could also be compared with other contexts, for example, how relative forms of poverty, institutional capacity, human rights awareness and the rule of law impact on the effective use of the IP. Additionally, the relative impact of certain factors, such as improvements in the rule of law, human rights awareness and training of human rights practitioners amongst other things, could be tracked over time, although causation will be extremely hard to measure.

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