

TORTURE

Journal on Rehabilitation of Torture Victims and Prevention of Torture

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Preface

It has been close to 60 years since the Universal Declaration on Human Rights and the U.N. Commission and its enforcement mechanisms gave progress and new emphasis on human rights for individuals and multilateral state relations. Unfortunately, however, the practice of torture is still one of the most serious human rights abuses of our time. It is critical that the international community becomes aware of the need to eradicate these abuses and to punish the perpetrators.

This thematic issue of TORTURE aims to provide some legal aspects of torture in today's world as well as demonstrate conditions of practice and assess the prospects for change.

The editor wishes to thank Nieves Molina Clemente for her initiative, contacts and discovering ability as guest editor for this issue. TORTURE would like to extend our gratitude to all authors for their contributions, which help to further the understanding of torture, and thereby the path for alleviating pain and misery and promoting redress.

As a uniform standard, literature references in TORTURE are typed in the Vancouver Standard system. This issue deviates from this principle, as standards for biomedical references differ much from legal literature tradition. Notes and references have been maintained in the articles as prepared by the authors.

From October 2006 TORTURE has been selected by the National Library of Medicine to be indexed and included in MEDLINE. Citations from the articles indexed, the indexing terms, and the English abstracts printed in the journal will be included in the databases.

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Overcoming legal challenges to access justice and to obtain reparation for human rights violations



Nieves Molina Clemente, Guest Editor

The volume that we are presenting compiles the opinions of several of the most renowned practitioners and academics in the field of human rights.

It is a matter of common knowledge that there exists treaties and international instruments which provide adequate reparation for individuals suffering injury from unlawful conduct of the state. The adoption by the United Nations General Assembly of the “Basic Principles and Guidelines on the right to a remedy and reparation for victims of the gross violations of international human rights law and serious violations of international humanitarian law” in 2005 without a vote, confirms the wide acknowledgement of the right to reparation. Unfortunately, however, the use of torture and other forms of ill-treatment is still prevalent and victims and survivors are still ignored and marginalised in many national jurisdictions.

The Basic Principles systematise already existing obligations and compile forms of substantive reparation such as compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. In cases involving human rights violations, the claimant is normally an individual or a group of individuals and the defendant is always the state. Although there are plenty of examples of states acknowledging wrongdoing and grant-

ing reparations to the claimant, more often victims and survivors only possibility would be to litigate their cases in criminal or civil actions. Furthermore, even in those cases where the state acknowledges the wrongdoing, there will be long negotiations to agree on the substance and form of the reparations. In addition, victims and survivors will face challenges in obtaining the enforcement of the resolution, and even in determining the form that this enforcement will take. The latter is especially relevant regarding the right to health rehabilitation. International courts have granted medical and psychological therapies as rehabilitation for survivors of torture and ill-treatment,¹ but there is passionate discussion on the obligation of states to guarantee such rehabilitation. While survivors would claim that the states have the obligation to pay for these therapies provided by experts of their choice, the states would maintain that their obligation is rather to establish the mechanisms to provide such therapies. Although states might be right in their claims, the mistrust that survivors feel for states and state mechanisms should not be disregarded.

1) See for example *Gutierrez Soler vs. Colombia* of the Interamerican Court for Human Rights (12 September 2005).

Realising that victims and survivors have a long process which involves legal challenges, litigation and extremely hard procedures in order to obtain acknowledgement, we conceived this special volume of torture. Here, the authors analyse different aspects which victims and survivors may encounter in their struggle to access justice, prove their cases against the perpetrators and obtain reparations:

Manfred Nowak has written on the difference between torture and inhuman and degrading treatment. This distinction has suddenly become relevant in the aftermath of September 11 and in the context of counter-terrorism measures in which a number of scholars have attempted to narrow the definition of torture, while at the same time maintaining that there is no absolute prohibition against inhuman and degrading treatment. Professor Novak successfully contributes to a clarification of the distinction.

Gabriela Echevarria looks into the right to reparation and the enforcement of reparation decisions. Although there might still be discussion on the context of the right to reparation, there is no doubt about its recognition in international legal instruments. Unfortunately, however, devising the enforcement mechanisms of the decisions has not received enough attention by human rights court mechanisms or even advocates. The political will to enforce decisions on reparation needs to exist. In addition, other factors should be taken into consideration, especially regarding the different forms of reparations that might be awarded, as enforcement might require the involvement of several organs of the state. Enforcement considerations should be taken into consideration by human rights mechanisms awarding reparations and by lawyers in their litigation strategies.

Carla Ferstman analyses the Convention on States Immunity that protects states or their agents against civil law suits for serious human rights abuses. The case of *House of Lords vs. Saudi Arabia* involves four British citizens who “were at the wrong place at the wrong time” in Saudi Arabia. They were detained and tortured by the Secret Service police. Although international instruments such as the UN Convention on Torture imposes obligations to investigate and provide reparation to survivors of torture, Saudi Arabia has failed to investigate the case and to provide any redress to the British citizens. The House of Lords rejected their claim that the United Kingdom, under the principle of universal jurisdiction, would have the obligation to seize Saudi Arabia properties in the U.K. to satisfy civil proceedings against this country.

Daniela Baro analyses the human rights perspective of children forced to witness the mistreatment of their parent or caregiver in different scenarios. Whether it happens recklessly or intentionally, the practice has proven to have long lasting psychological effects on the children. According to the author, this cruel practice constitutes inhuman and degrading treatment and under certain circumstances it would amount to torture.

Edouard Delaplace and Matt Pollard have contributed an article on the prevention of torture in places of detention. The Optional Protocol, entered into force this year, establishes mechanisms for visits to detention places. The authors analyse circumstances and elements that contribute to the prevention of torture, stressing the importance of “full implementation of international standards in processes of dialogue with NGOs and other international actors”. The authors defend the crucial role that the NGOs are to play in the guidance of such implementation.

Karen Sherlock describes the dilemma faced by NGOs and human right organisations between exposing individual cases to reinforce their advocacy campaigns and the right to privacy and dignity of the survivors. This is of special relevance for rehabilitation centres and programmes where the clause of confidentiality between the health professional and the client may apply, because health professional may also have an obligation to report human rights violations. Issues such as “informed consent” have not always been clear enough, as there may be clients that have difficulties realising the dimension of the publicity that their cases will achieve or the length of time that those records or reports might last. As such, a journal article might be kept on the Internet forever and the entire world will have access to the information provided on it. The author analyses this dilemma against the need to obtain funds and therefore justify projects.

Huyliya Ucpinar and Turkan Baycal analyse the use of the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, known as the Istanbul Protocol, as a tool to prevent torture and impunity. After describing the development process of the Istanbul Protocol, they analyse the impact that the protocol has had in international jurisprudence. Under the old principle, “no mater how delayed, justice should be reparative” the Istanbul Protocol has become a crucial tool for survivors of torture to obtain medical documentation on their physical or mental injuries. These medical reports are essential in any process intending to either bring perpetrators to justice or to claim the responsibility of the state in seeking reparations for state human rights violations.

Hatla Thelle describes the practice of torture and inhuman and degrading treatment

in China as “fairly widespread”. She analyses its roots, providing a very interesting description of a “weak system of justice” along with a tradition of uncontested and coercive bureaucratic power. According to the author, there exists a broad gap between the existing legislation which prohibits the practice of torture and the implementation of such legislation by the law enforcement officers.

I wish to express my gratitude to the contributors who have brought their experiences, their views, and their thoughts to this special issue of Torture. Our hope is that more professionals will join us in our work to prevent the use of torture. An important part of this, we believe, it is to prevent impunity and to provide victims and survivors with their inherent right to a full and adequate reparation. Ulpiano² said that “Justice was the constant and permanent will to give to everyone, that that belongs to them”. International law is on their side; we still need to work for enforcement and the political will to guarantee victims and survivors their rights and entitlements.

2) Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.

The distinction between torture and cruel, inhuman or degrading treatment

Manfred Nowak* & Elizabeth McArthur**

Abstract

The present article seeks to clarify the distinction between torture and cruel, inhuman or degrading treatment. The author argues that the decisive criteria for distinguishing torture from CIDT is not, as argued by the European Court of Human Rights and many scholars, the intensity of the pain or suffering inflicted, but the purpose of the conduct and the powerlessness of the victim and that as such the distinction is primarily linked to the question of personal liberty. He concludes that the *scope of application* of CIDT is a relative concept, that outside a situation of detention and similar direct control, the prohibition of CIDT is subject to the proportionality principle. Here, only excessive use of police force constitutes CIDT. In a situation of detention or similar direct control, however, no proportionality test may be applied. Any use of physical or mental force against a detainee with the purpose of humiliation constitutes degrading treatment or punishment and any infliction of severe pain or suffering for a specific purpose as expressed in Art. 1 CAT amounts to torture.

Key words: CIDT, torture, human rights, personal liberty, police force

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Introduction

The human right to personal integrity is usually defined as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (CIDT). Not only is it non-derogable in times of war and emergency in the various regional and universal treaties, it is also ensured without any restriction whatsoever¹. In my report to the UN Commission on Human Rights in December 2005² I sought to make clear the distinction between torture and cruel, inhuman or degrading treatment (CIDT). This issue is one of extreme importance in the present climate as we have observed an increasing number of governments, in the aftermath of 11 September 2001 and other terrorist attacks, adopting a legal position which, while acknowledging the absolute nature of the prohibition of torture, puts the absolute nature of the prohibition of CIDT into question. In particular, it has been argued that certain harsh interrogation methods falling short of torture might be justified for the purpose of extracting infor-

1) Cf. Art. 5 UDHR; Art.3 of all four Geneva Conventions 1949; Art. 3 and 15(2) ECHR; Art. 7 and 4(2) CCPR; Art. 5(2) and 27(2) ACHR; Art. 5 ACHPR.

2) See Chapter IV, UN Doc.E/CN.4/2006/6.

mation aimed at preventing future terrorist acts that might kill innocent people. Most notably the US administration has courted intense criticism in its attempts to re-define torture in a highly restrictive sense while simultaneously distinguishing it from other forms of CIDT.³ This refers, in this context, to its reservations concerning Articles 7 CCPR (Covenant for Civil and Political Rights) and 16 CAT, according to which CIDT shall be interpreted in the sense of cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendment to the US Constitution.⁴ Certain European Governments, including the Netherlands, as well as both the Human Rights Committee and the Committee against Torture consider these reservations as incompatible with the object and purpose of the respective treaties and, therefore, null and void.⁵

Definitions

Article 1 CAT defines torture as any act which consists of the intentional infliction of severe pain or suffering (physical or mental), involving a public official (directly

or at the instigation or consent or with the acquiescence of a public official, or another person acting in an official capacity), and for a specific purpose (i.e. extracting a confession, obtaining information, punishment, intimidation, discrimination). Article 1 has to be read in conjunction with Article 16, which requires States parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1”. It follows from a combined reading of both provisions that torture is an aggravated form of cruel, inhuman or degrading treatment or punishment. Acts falling short of the definition in Article 1, particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise cruel or inhuman treatment under Article 16 of the Convention while acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.

The distinction between torture and less serious forms of ill-treatment, all of which are absolutely prohibited under Article 7 CCPR, other international and regional treaty provisions as well as customary international law, was introduced because some of the specific State obligations laid down in CAT were meant to apply to torture only (above all, the obligation to criminalize acts of torture and to apply the principle of universal jurisdiction in this regard). Other obligations aimed at prevention, in particular by means of education and training, by systematically reviewing interrogation rules and practices, by ensuring a prompt and impartial ex officio investigation, and by ensuring an effective complaints mechanism, as laid down in Articles 10 to 13, must be equally applied to other forms of ill-treatment as well.

3) For a discussion on this issue see Nowak, /What Practices Constitute Torture?: US and UN Standards./, 28 Hum. Rts. Q. 809 (Nov. 2006) (unpublished).

4) See /Multilateral Treaties deposited with the Secretary General/, Status as at 31 Dec. 2004. Vol. 1, 183 and Vol. 1, 286 for the text of reservations to Art. 7 CCPR and 6 CAT respectively. On the ticking time bomb scenario see also REDRESS: /Terrorism, Counter-Terrorism and Torture. International Law in the Fight against Terrorism, 25. /London/, /July 2004. <http://www.redress.org/publications/TerrorismReport.pdf#search=%22terrorism%20counter%20terrorism%20and%20torture%20redress%22>.

5) See e.g. Concluding Observations of the CAT (A/55/44 para. 179 (b)) and the HRC (CCPR/C/79/Add.50 paras. 278 and 279).

The argument behind the legal distinction between torture and CIDT

The argument behind the legal distinction between torture and CIDT runs as follows. Whereas torture might be considered as absolutely prohibited, CIDT by definition is a relative concept. The beating of a detainee with a truncheon for the purpose of extracting a confession must be considered as inhuman or degrading treatment, but the beating of demonstrators in the street with the same truncheon for the purpose of quelling a riot or non-peaceful demonstration might be justified as lawful use of force by law enforcement officials. In other words, since the enforcement of the law against suspected criminals, rioters or terrorists necessarily demands the use of force and even of lethal weapons by the police and other security forces, only excessive use of force can be considered as CIDT. Whether the use of force is to be qualified as lawful or excessive, depends on the proportionality of the force applied in a particular situation. The application of the principle of proportionality is, however, an indicator of the non-absolute character of the right in question.

The principle of proportionality requires first of all the legality of the use of force under domestic law, which is usually regulated in police codes. Secondly, the use of force must aim at a lawful purpose, such as effecting the lawful arrest of a person suspected of having committed an offence, preventing the escape of a person lawfully detained, defending a person from unlawful violence, self-defence, or an action lawfully taken for the purpose of dissolving a demonstration or quelling a riot or insurrection. Thirdly, the type of weapons used and the intensity of the force applied must not be excessive but necessary in the particular circumstances of the case in order to achieve any of the lawful purposes outlined above.

This means that the law enforcement officers must strike a fair balance between the purpose of the measure and the interference with the right to personal integrity of the persons affected. If a thief, for example, has been observed stealing a toothbrush in a supermarket, the use of firearms for the purpose of effecting his or her arrest must be considered as disproportionate. But for the purpose of arresting a person suspected of having committed murder or a terrorist attack, the police may, of course, use firearms if other less intrusive methods have proven non-effective. Firearms, however, should always be used as a measure of last resort and should not be used to kill the person being arrested but only to prevent him or her from escaping. Nevertheless, to shoot into the legs of a person as a least intrusive measure to effect his arrest or prevent his escape causes serious physical injuries and severe physical pain and suffering. While it would definitely constitute an interference with the human right to physical integrity, as a proportional measure it would not constitute CIDT. In other words, since the right to personal integrity and dignity has been defined in both absolute and negative terms, the proportionality test is not applied in relation to a limitation clause which explicitly would allow for lawful and proportional interference, but one step earlier, i.e. in relation to the definition of the scope of application of the right. If the police uses non-excessive force for a lawful purpose, then even the deliberate infliction of severe pain or suffering simply does not reach the threshold of CIDT.

Having concluded that the scope of application of CIDT is a relative concept, the following question is only logical: Why should the same proportionality test not be applied to the use of physical or mental force against a detainee for the purpose of extracting information which might be es-

essential for the prevention of a crime and/or the protection of the life, security and health of other people? Is the interrogation of suspected criminals not as legitimate a purpose of policing as dissolving a demonstration or effecting the arrest of a suspected criminal? Does a little beating of a detainee with the result of obtaining a confession or important information for the criminal investigation or for preventing future criminal offences not cause less severe pain or suffering than shooting into the legs of a person for the purpose of preventing his escape? Are we not applying double standards?

These are difficult questions to answer. Some authors, including Herman Burgers who chaired the Working Group drafting the CAT in the 1980s, have argued that victims of the prohibition of torture and CIDT in the sense of Art. 1 and 16 CAT “must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment”.⁶ This interpretation would, however, exclude excessive use of police force outside detention and similar factual control from the scope of application of this important human right. The European Court of Human Rights, the Committee against Torture and the Inter American Commission on Human Rights has not followed this approach. There are cases in which the excessive use of police force out-

side detention, by applying the proportionality test, has been found to constitute CIDT.⁷ If such use of force is disproportionate in relation to the purpose to be achieved and results in severe pain or suffering, it amounts to cruel or inhuman treatment or punishment. If such force is used in a particularly humiliating manner, it may be qualified as degrading treatment even if less severe pain or suffering is thereby inflicted.

Torture, on the other hand, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness of the victim which usually means deprivation of personal liberty or a similar situation of direct factual power and control by one person over another.⁸ Here I agree with Herman Burgers and Hans Danelius. A thorough analysis of the *travaux préparatoires* of Art. 1 and 16 CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture has led me to the conclusion that the decisive criteria for distinguishing torture from CIDT is not, as argued by the European Court of Human Rights and many scholars, the intensity of the pain or suffering inflicted, but the purpose of the conduct and the powerlessness of the victim.

In other words, as long as a person is at liberty and able to resist the lawful use of force by law enforcement officials, the proportionality test applies and even the use of

6) JH Burgers & H Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other cruel, Inhuman or Degrading Treatment of Punishment* (1988), 149.

7) See, e.g., the cases of *R.L. and M.-J.D. v. France* (application no. 44568/98) concerning ill-treatment during police intervention in a dispute at a restaurant which resulted in a violation

of Art.3 ECHR; See *CAT/C/29/D/161/2000* the case where a mob demolished a Roma settlement with the knowledge of the local police and without the police preventing its occurrence that was found to be a violation of Art. 16 CAT. See the *Corumbiara Case*, IACHR No. 11556 of March 11, 2004. Report No 32/04.

8) See, e.g., Burgers & Danelius 120; Ingelse 211; Art. 7(2)(e) of the ICC Statute.

weapons might be justified in the particular circumstances of the case. Although such use of force undoubtedly constitutes an interference with the right to personal integrity, it falls outside the scope of the prohibition of CIDT. As soon as the person concerned is, however, under the direct control of the police officer by being, for example, arrested and handcuffed or detained in a police cell, the use of physical or mental force is no longer permitted. If such force results in severe pain or suffering for achieving a certain purpose, such as extracting a confession or information, it must even be considered as torture. It is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure. That is why such pressure must be considered as directly interfering with the dignity of the person concerned and is, therefore, not subject to any proportionality test.

Conclusion

In conclusion, the distinction between torture and CIDT is an important one and relates primarily to the question of personal liberty. Outside a situation of detention and similar direct control, the prohibition of CIDT is subject to the proportionality principle. Only excessive use of police force constitutes CIDT. In a situation of detention or similar direct control, no proportionality test may be applied and the prohibition of torture and CIDT is absolute. Any use of physical or mental force against a detainee with the purpose of humiliation constitutes degrading treatment or punishment. Any infliction of severe pain or suffering for a specific purpose as expressed in Art. 1 CAT amounts to torture.

Redressing torture: a genealogy of remedies and enforcement

Gabriela Echeverria*

Introduction

In national and international society the rights and interests of victims of torture and other serious violations of human rights are still largely overlooked and ignored. Numerous victims continue to suffer in silence. Yet, in recent times the victim's perspective appears to be gaining ground. Notably the United Nations General Assembly adopted in December 2005 the "*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*" (the Basic Principles and Guidelines)".¹ This instrument confirms that, under international law, there is a clear right to a remedy and reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law. The victims' right to redress includes access to an effective procedural remedy and adequate forms of reparations.

Still, access to justice for victims of torture and other gross abuses is difficult in practice. In the majority of cases there are no

effective remedies in the state where the act was committed. These crimes are systematic and/or widespread precisely in the countries where there are no remedies and safeguards in place to prevent and deter violations. On the other hand, there may be no access to international remedial mechanisms, as the state where the act occurred might not have agreed to their jurisdiction. Similarly, procedural bars like state immunity may affect the success of obtaining reparations in foreign courts. But more importantly, even if the applicant successfully obtains a judgment or decision in his/her favour, enforcing it can be as difficult, or even more difficult, than obtaining the reparation award itself.

Interestingly, while the victims' access to justice has been addressed with some degree of success over the course of recent years there has been only limited analysis by the interested legal community relating to how judgments, awards or other decisions won by

Key words: Enforcement procedures, reparation measures, monitoring mechanisms, victims rights

1) On 10 November 2005 the General Assembly adopted without a vote the "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" (A/C.3/60/L.24) [Hereinafter "Basic Principles and Guidelines"].

*) Consultant to the open society

survivors of torture and other international crimes are then enforced. In practice and legal doctrine, little attention has so far been paid to the position of the applicant who has taken the long road to justice and finally won his/her case. Does he or she see any improvement in his/her position? While acknowledgment of the wrong done by an international court or body might bring some degree of redress and satisfaction, if the reparation measures foreseen are never implemented, can it be said that the applicant obtained reparation beyond the “paper” judgment?

This article looks at the intricate relationship between the right to reparation (the forms of reparation and the remedies available to victims) and the degree of enforcement of reparations decisions. It argues that the concept of reparation foresees enforceable remedies, and therefore, enforceable decisions, but that so far international treaties, courts, human rights bodies, and victim’s advocates have failed to integrate the enforcement aspect of reparation when establishing remedial mechanisms, when enacting reparation decisions, and when devising litigation strategies. While this is to some degree understandable – as progress in obtaining the initial judgments in favour of victims of gross abuses has been very slow and thus efforts have concentrated in overcoming the major barriers impeding access to justice – it

is now clear how necessary it is to also focus attention on the enforcement procedures.

While there are various remedies available to torture victims, such as national and foreign courts, truth and reconciliation commissions, as well as the International Criminal Court,² this article will only focus on the enforcement procedures of international human rights bodies (including regional courts and UN monitoring mechanisms). Despite the obvious import of all available remedies, the legal framework applicable to enforcement differs between domestic judgments and administrative awards – including foreign judgments – and international decisions. As well, states (as opposed to individuals in international criminal proceedings) are responsible to afford reparation and thus present a specific set of issues in regards to the enforcement and implementation of reparation decisions. The purpose of this article is to analyse the types of reparation measures that can be awarded in individual human rights decisions and how they are implemented in practice. The analysis will cover the enforcement framework for material and non-materials awards,³ exploring the enforcement of preliminary/provisional measures, the enforcement of restitution and compensation (monetary awards) and the enforcement of other non-monetary awards such as rehabilitation,⁴ satisfaction and guarantees of non-repetition.

2) On 17 July 1998 the Statute of the International Criminal Court (ICC) was adopted. Perhaps the most significant aspect of the Rome Statute is that it established a permanent body, without the temporal and contextual restrictions that characterized the ad hoc Tribunals. Another important difference, and key element of the Rome Statute, is that the ICC acknowledges the rights of victims to participate in the proceedings as interested parties (not only as witnesses of the crimes), and to seek reparations before the Court [Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9].

3) The different forms of reparation recognised under international law include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. See Annex 1.

4) Rehabilitation (medical/psychological) services may be provided “in kind” or the costs may form part of a monetary award. It is important to distinguish between indemnity paid as way of compensation and money provided for rehabilitation purposes. See supra note 1, Sourcebook on Reparation pg. 18.

The article is divided into three parts. The first part analyses the right to reparation for victims of torture and other international crimes. It examines the legal sources, scope, and content of this right, reviewing then the standards codified by the Basic Principles and Guidelines. In particular, it describes the different forms of reparation and the type and nature of effective procedural remedies. In the second part, the article looks at the implementation of intentional decisions, analysing briefly some common aspects of enforcement of human rights decisions, the different international remedial mechanisms available to torture survivors and their enforcement procedures. Finally the third part outlines some conclusions referring to areas where enforcement of reparation awards/decisions for survivors of torture and other international crimes could be improved.

I. The right to a remedy and reparation

The right to reparation for victims of torture and other human rights/international humanitarian law violations exists under

international law. Reparation is a fundamental principle of general international law. As established by the Permanent Court of International Justice and upheld by international jurisprudence, the breach of an international obligation entails the duty to make reparations.⁵ The International Law Commission reaffirmed this principle in its 53rd Session when it adopted its “Draft Articles on the Responsibility of States for International Wrongful Acts”.⁶ The responsibility of states to provide reparation also applies to international human rights law. This is supported by international human rights treaties and declarative instruments.⁷ Reparation for human rights violations has also been recognised by the International Court of Justice and by an array of international tribunals and human rights bodies.⁸ Similarly, a violation of the norms of international humanitarian law gives rise to a duty to make reparations.⁹

The victims’ right to reparation is largely based on established principles of state responsibility (and the consequent duty of

5) See *Factory at Chorzow*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29 ; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228.

6) See Report of International Law Commission - 53rd session (23 April - 1st June, 1 June and 2nd July - 10 August 2002) Official document of the General Assembly, 56th Session, Addendum No. 10 (A/56/10).

7) At the universal level it is possible to find among others: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art.2.3 and art 9,5 14.6), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention of the Rights of the Child

(art. 39), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art.14) and the Rome Statute for an International Criminal Court (art. 75); as well as in several regional instruments, e.g. the European Convention on Human Rights (art 5,5 13 41) the Inter-American Convention on Human Rights (arts 25, 68 and 63,1), the African Charter of Human and Peoples’ Rights (art. 21,2).

8) See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 ICJ ___, 45 I.L.M. 271 (2006); See also ICJ Advisory Opinion on the Wall in Occupied Palestinian Territory, footnote 14 and accompanying text. For international human rights courts see, e.g. ruling of the Inter-American Court of Human Rights on the Velásquez Rodríguez Case. Serial C, No 4 (1989), par. 174 – and *Papamichalopoulos vs. Greece* /(Art. 50) E.C.H.R. Serial A, No 330-B (1995), pg. 36.

states to make reparation) because the right to reparation developed initially in an interstate context. The theory of international remedies originally advanced in this context; focusing on claims and arbitral proceedings mostly as lodged between belligerent states. A state had the right (but not the obligation) to take up the claims of its nationals before an international body. The claims were determined by negotiation, mediation, arbitration, adjudication, and the state maintained full control over them. Although direct injuries to states and injuries to its nationals were considered differently when estimating damages, the reparation was awarded solely to the state as the injured party.¹⁰

After World War II the same standards were applied in human rights proceedings and other reparation mechanisms (like

claims commissions awarding compensation or restitution of property).¹¹ In this context, the standards were further developed to include specific principles to afford adequate redress to individuals (like rehabilitation as a form of reparation and the right to procedural remedies).¹²

The standards on reparation are now being applied in the area of international criminal law,¹³ where victims are not only recognised as a subject of international law with the capacity to claim an injury caused by the breach of an international obligation, but individuals can also be held liable under international law. Similarly, the right to reparation has been recognised for victims of violations of international humanitarian law. The International Court of Justice recently established in its Advisory Opinion on the

9) See ICJ Advisory Opinion on the Wall in Occupied Palestinian Territory, footnote 14. Under international humanitarian law, the Hague Convention regarding the Laws and Customs of Land Warfare (article 3, 1907 Hague Convention IV) includes requirements to pay compensation. Likewise, the four Geneva Conventions of 12 August 1949 contain a provision of liability for grave breaches and the 1977 Additional Protocol I (Art. 91) specifically provides for liability to pay compensation. Finally, the Rome Statute of the ICC used the Principles and Guidelines as a reference to the right of victims of crimes under its jurisdiction to obtain reparation (A/CONF.183/C.1/WGPM/L.2/Add.7, 13/07/1998, p. 5, note 5)

10) See *Chorzow Factory Case*, *ibid.*; see also *Lusitania Cases (US v. Germany)*; *Mixed Claims Commission 1923*. The violation that was redressed was not the injury to the individual victim(s), but the violation (and its consequences) of the international duty to respect certain rights of the nationals of that State. If the State was awarded monetary compensation, it would normally then turn the award over to the injured national. For example, the General Claims Commission (Mexico and the United States), constituted in 1923, was mandated to settle claims arising after 4 July 1868 against one government by nationals of the other for losses or damages suffered by

such nationals or their properties and for losses or damages originating from acts of officials or others acting for either government and resulting in injustice. The Treaty of Peace with Germany (Treaty of Versailles) established mixed arbitration tribunals for private claims against Germany [Treaty of Versailles, June 28, 1919, 1 Bevans 43]..

11) Several claims commissions have been established to afford compensation as well as restitution of property. The United Nations Compensation Commission has specifically developed principles relating to compensation (<http://www.unog.ch/uncc>.) Its Governing Council identified six categories of claims comprising four categories of claims of individuals, one for corporations and one for Governments and international organisations, which also includes claims for environmental damage. See also *Bosnia and Herzegovina's Commission for Real Property Claims of Displaced Persons and Refugees (CRPC)*.

12) For a discussion of the development of human rights law and the right to a remedy, see Dinah Shelton, *Remedies In International Human Rights Law* pp. 143-152 (Oxford University Press, 2nd ed. 2005).

13) See Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9.

Wall in Occupied Palestinian Territory¹⁴ that natural and legal persons have a right to reparation for violations of human rights and international humanitarian law.¹⁵

Even so, while the right to reparation for victims of human rights and international humanitarian law violations rests on the well established principle that the breach of an international obligation entails the duty to make reparations,¹⁶ there is still a degree of uncertainty on the exact status, scope, and content of this right. In particular, the individuals' capacity to claim an injury based on a breach of international humanitarian law (as opposed to human rights law) has been questioned.¹⁷ It is not clear a) whether the right to reparation arises as a consequence of the nature of international humanitarian law violations (wrongful acts under international law); b) whether specific rules of international humanitarian law provide for some forms of reparation;¹⁸ c) whether this right is extended to international humanitarian law, as a consequence of the general applicability of human rights law in armed

conflicts while international humanitarian law operates as *lex specialis*;¹⁹ or d) if it is as a matter of international criminal law – as serious violations of human rights and international humanitarian law constitute crimes under international law irrespective of the context in which they are committed (armed conflicts, peace time, internal strife).²⁰

In addition to issues related to international humanitarian law, there are still other remaining questions in regards to nature and scope of the right to reparation. For example: is the right to reparation absolute or can exceptions like amnesties and immunities sometimes apply? Does the right to reparation enjoy the same status as the primary rule giving rise to the obligation to afford reparation? Should the substantive right be distinguished from the right to invoke a breach of that right? Is it a matter for the particular primary rule to determine whether and to what extent persons or entities other than states are entitled to invoke responsibility of their own account? Is everyone within a targeted group a victim entitled

14) Legal Consequence of the Construction of a Wall in the Occupied Palestinian territory, Advisory Opinion of 9 July 2004, 43 ILM 1009 (2004). See E. Lambert-Abdelgawad, *L'Avis Consultative sur le Mur en Palestine: La CIJ et le Droit à Réparation des Victimes Individuelles de Graves Violations*, 60 *Revue de Science Criminelle et de Droit Pénal Comparé* 155 (2005).

15) *Id.*, para. 152.

16) *Factory at Chorzow idem.*

17) In its explanatory vote of resolution 2005/35 on the Principles and Guidelines, Germany stated that: "Under certain regimes, violations of human rights could lead to individual claims for reparations, but the same was not true for violations of international humanitarian law."

18) For a discussion on this subject see Carnegie Endowment for International Peace. *The Hague Conventions and Declarations of 1899 and 1907*. New York, 1915, Oxford University Press; F.

Kalshoven, "Constraints on the waging of war", ICRC, Geneva, 1987; Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977", 9 *Netherlands Yearbook of International Law* 107, 111 (1978); Pierre d'Argent, "Les réparations de guerre en droit international public. La responsabilité internationale des États à l'épreuve de la guerre", *Prix Suzanne Bastid, Préface de Joe Verhoeven, Bruxelles/Paris, Bruylant/LGDJ*, 2002, pp. 902. (at pp. 441-449 and pp. 784-788).

19) The International Court of Justice decided in the *Nuclear Weapons Advisory Opinion*, that international humanitarian law acts as *lex specialis* to determine whether there has been an arbitrary deprivation of the right to life. *Legality of the Threat to Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ REP. 226 (July 8).

20) See article 75 of the ICC Statute

to reparations (for example in the case of genocide)? Should reparation be afforded collectively as affected groups or/and only to those who have suffered a personal, specific and identified harm?

There is also a certain degree of ambiguity in the manner that the right to reparation operates in practice. For instance, the relationship between the principle of access to justice for victims and the principle of state immunity is still unclear; the recently adopted “UN Convention on the Jurisdictional Immunities of States and their Properties” is silent on how state immunity and international human rights relate. In the small number of cases in which a foreign state has been sued for serious human rights violations, domestic courts have diverged in their analysis of the application of state immunity and on the end result. In some cases domestic courts have denied the applicability of immunity where cases concerned serious violations of human rights,²¹ but in others, domestic courts have interpreted their national laws granting immunity to states as barring the right of victims to access to civil remedies.²²

Additionally, despite the existence of a primary violation, the secondary right to reparation under international law has been questioned in cases where there is no international procedural remedy available to the victim (as there is no international court

with competence to entrain claims of individual breaches under general international law).²³ Similarly the non-binding nature of some international procedures and the general lack of enforcement mechanisms available to victims have hindered a comprehensive interpretation of the scope and nature of the right to a remedy and reparation.²⁴

1. *The Basic Principles and Guidelines on Reparation*

The Basic Principles and Guidelines were adopted by the UN General Assembly on 16 December 2005. Although the instrument does not cover nor solve all the different aspects of the right to reparation, it is the first international instrument codifying the rights of victims under international law and a step in the right direction. The Basic Principles and Guidelines outline a comprehensive regime for redress based on general principles of international law as well as other recent developments on the subject.

The key elements that the Basic Principles and Guidelines cover are:

- *Definition of “victim” and “victims’ rights”:*
 - who is a “victim”;
 - the treatment of victims;
 - the right to an effective procedural remedy and access to justice;
 - the right to reparation and forms of adequate reparation;

21) The *Distomo* case in Germany, BGH, Decision of 26 June 2003, III ZR 245/98, published in NJW 2003, 3488; The *Ferrini* case in Germany, BUNDESVERFASSUNGSGERICHT 2 BVR 1379/01 vom 28.6.2004, Absatz-Nr. (1-45).

22) In *Ron Jones v Saudi Arabia*, an English case currently on appeal to the House of Lords, the Court of Appeal found that the Kingdom of Saudi Arabia enjoyed immunity for civil proceedings relating to torture but denied the protection of immunity to the individual State officials.

23) According to Tomuschat, as long as there is no procedural remedy, there can be no secondary right. See A. Randelzhofer, “The Legal Position of the Individual under Present International Law”, in: State responsibility and the individual: reparation in instances of grave violations of human rights, A. Randelzhofer/C. Tomuschat (eds.), 1999.

24) See for example Dinah Shelton “Commitment and Compliance, the Role of Non-Binding norms in the international legal system” (2000).

- the principle of non-discrimination amongst victims.
- *International responsibility and states' obligations:*
 - the obligation of states to afford reparation for breaches of international human rights law and international humanitarian law;
 - the obligation of non-state actors are responsible under international law to afford reparation;
 - the scope and limits of states' obligations in the areas of prevention, investigation, punishment, remedy and reparation; and
- *Procedural issues:*
 - the continuing obligation of states to afford effective procedural remedies and the nature of these remedies (judicial, administrative or other);
 - the incorporation of appropriate provisions providing universal jurisdiction over crimes under international law (extradition, judicial assistance and assistance and protection to victims and witnesses) within domestic law;
 - the applicability of statutes of limitations and the treatment of continuing violations (like disappearances).

While there are many similarities with the reparation provisions of the recent Draft Articles on the Responsibility of States for International Wrongful Acts adopted by the International Law Commission,²⁵ there are also important divergences. The ILC Articles were drawn up in the context of inter-state

relations and are not focused on the relationship between states and individuals, though there are still important parallels to draw. For example, cessation of a breach is included in Principle 22 (a) of the Basic Principles and Guidelines as a form of satisfaction, while the ILC Articles do not include cessation on the reparation section. According to the structure of the ILC Articles, cessation is part of the general obligation to conform with the norms of international law not a form of reparation. Then again the Basic Principles and Guidelines add rehabilitation as a form of reparation, which is not a form of reparation recognized at the inter-state level. But rehabilitation is an important component of an individual's reparation and it is a right specifically recognized in international instruments.²⁶ Similarly, other forms of non-monetary remedies such as satisfaction and guarantees of non-repetition, which are not perceived as essential forms or reparation at the inter-state level, are extremely important in human rights cases. This is reflected in the Basic Principles and Guidelines where satisfaction includes measures such as truth telling or recovery/reburial of victims' remains, and guarantees of non-repetition includes measures to strengthen national institutions under the rule of law.

The fact that the Basic Principles and Guidelines are restricted to the most serious violations does not mean that the right to reparation only arises in these limited cases. There is a right to an effective remedy and adequate forms of reparation for any breach of human rights or international humanitarian law. As Principle 26 states: “[...]In

25) Report of International Law Commission - 53rd session; see footnote 6.

26) See for example the UN Convention on the

Rights of the Child and its Optional Protocol; UN Convention against Torture; Declaration on Enforced Disappearances; Declaration on the Elimination of Violence against Women.

particular, it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. [...]”.

However, the legal consequences arising from gross violations of international human rights and serious violations of international humanitarian law (which constitute crimes under international law) are very specific: the right to a judicial remedy, universal jurisdiction, the non-applicability of statutes of limitations, and so on. These are the standards codified in the Basic Principles and Guidelines.²⁷ The aim of this instrument is to define the scope of the right to a remedy and reparation, and allow for the future development of procedural remedies and substantive reparations. Importantly, the instrument does not define what constitutes a violation of international human rights law or international humanitarian law, but only describes the legal consequences (the rights and duties) arising from these violations and establishes appropriate procedures and mechanisms to implement them.

The Basic Principles and Guidelines

27) Other types of violations give rise to different legal consequences. For example, a breach of the right to freedom of expression by the unjustified censoring of a newspaper or using the flags of neutral States in an armed conflict are violations of international human rights/humanitarian law but do not necessarily constitute crimes. In these cases, there is not necessarily an obligation to prosecute perpetrators - administrative remedies might be sufficient - and statutes of limitation might be applicable to control the timeframe to bring claims. However, if the use of such symbols is accompanied by an unlawful attack it might constitute a war crime. See “Law of Armed Conflict”, International Committee of the Red Cross, 2002.

28) As highlighted by Professor Theo van Boven: “the issue of State responsibility comes into play when a State is in breach of the obligation to

confirm that the responsibility to provide reparation arises when there is a breach of an international obligation, whatever its origin. As explained earlier, committing an international human rights or humanitarian law violation gives rise to a new international obligation to afford reparation.²⁸ And “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”²⁹ The Basic Principles and Guidelines set out the forms that reparation may take, which include restitution, compensation, rehabilitation, satisfaction and guarantees of non-description.³⁰

At the same time, international law requires states to provide effective procedural remedies under domestic law to guarantee adequate reparation to victims. In other words, the right to reparation for torture and other human rights/international humanitarian law violations includes both the right to substantive reparations (such as compensation) *and* the right to effective procedural remedies to enable victims to access substantive reparations (e.g., access to civil,

respect internationally recognized human rights. Such obligation has its legal basis in international agreements and/or in customary international law, in particular those norms of customary international law which have a peremptory character (jus cogens).” See Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. Theo van Boven, U.N. Doc. E/CN.4/Sub.2/1993/8, July 2, 1993, para. 41. This Final Report provided the basis for the first draft of the Principles and Guidelines.

29) Case concerning the Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (Ser. A) No.17, at p. 47.

30) See Basic Principles and Guidelines.

administrative and criminal remedies). This right is recognised in the Basic Principles and Guidelines and is firmly embodied in all major international human rights treaties and declarative instruments.³¹

The right to a remedy for a violation of a human right protected under any of the international instruments is itself a right expressly guaranteed by the same instruments and, in the case of fundamental human rights, it has been recognised as non-derog-

able.³² Accordingly, there is an independent and continuing obligation to provide effective domestic remedies to protect human rights - during peace or war, and irrespective of states of emergency. Human rights instruments guarantee both the procedural right to an effective access to a fair hearing (through judicial and/or non-judicial remedies)³³ and the substantive right to reparations (such as restitution, compensation and rehabilitation).³⁴ The European Court of Human

31) For example, art. 8 Universal Declaration of Human Rights, GA Res. 217 A (III) of 10 December 1948; art.2 (3), art 9(5) and 14(6) International Covenant on Civil and Political Rights, (entry into force 23 March, 1976); art 6 International Convention on the Elimination of All Forms of Racial Discrimination (entry into force 4 January 1969); art. 39 Convention of the Rights of the Child, (entry into force 2 September 1990) ; art. 14 Convention against Torture and other Cruel Inhuman and Degrading Treatment, (entry into force 26 June 1987) and art. 75 of the Rome Statute for an International Criminal Court (entry into force 1 July 2002, UN Doc A/CONF.183/9). It has also figured in regional instruments, e.g. the European Convention on Human Rights (entry into force 3 September 1953, art 5(5), 13 and 41); the Inter-American Convention on Human Rights (entry into force 18 July 1978) (arts 25, 68 and 63(1)); the African Charter on Human and Peoples' Rights (entry into force 21 October 1986) (art. 21(2)). See also, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), GA Res. 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women. GA Res. 48/104 of 20 December 1993.

32) See, for example, General Comment 29 on States of Emergency (Art. 4) of the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 14: "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is

not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." The Committee considered further that "It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights (...)" Similarly the Inter-American Court of Human Rights explained that the judicial remedies to protect non-derogable rights are themselves non-derogable. (Advisory Opinion OC-9/87 of 6 October 1987. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 25(8) American Convention on Human Rights. Series A No. 9).

33) Some instruments explicitly call for the establishment of judicial remedies for the rights they guarantee; the African Charter on Human and Peoples' Rights for example, provides that all remedies should be judicial. See Art. 7 of the African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

34) See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q.235.

Rights established that: “A remedy must be effective in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by acts or omissions by national authorities”.³⁵

The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief for such violations.³⁶ As explained by the UN Human Rights Committee, “administrative remedies cannot be deemed to constitute adequate and effective remedies [...], in the event of particular serious violations of human rights”.³⁷ Therefore, in cases of serious abuses, non-judicial remedies, such as administrative or other remedies, are not considered sufficient to fulfil states’ obligations under international law. This is

reflected in the Basic Principles and Guidelines which establish that: “12. *A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.[...]*”.³⁸ Accordingly, even if a torture victim wishes to apply for compensation through an administrative procedure, he/she should also have the right in law and the ability in practice to bring a civil claim against the individual and state in a court of law.³⁹ Of course the relevant procedures may take into account compensation already awarded to the victim in order to determine whether the claimant has received full and adequate reparation.⁴⁰

In sum, remedies available at the national level should comply with international standards. Although there are different

35) See *Aksoy v. Turkey*, 21987/93 [1996] ECHR 68 (18 December 1996).

36) According to the ECtHR. Article 13 requires: “the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief” although States have some discretion as to how to comply (para 69) *D v. United Kingdom* App. No. 30240/96 Judgment of 2 May 1997 (referring to *Soering v. United Kingdom* App. No. 14038/88 Judgment of 7 July 1989 and *Vilvarajah v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991). The UN Human Rights Committee commented on Finland’s report (CCPR/C/95/Add.6) regarding the obligation under Art 2(b) of the ICCPR that “while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98 CCPR/C/79/Add. 91).

37) *Nydia Bautista v Colombia* No. 563/1993

U.N. Doc. CCPR/C/55/D/563/1993 (1995); José Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia No. 612/1995 UN Doc. CCPR/C/60/D/612/1995 (14 June 1994).

38) Basic Principles and Guidelines, footnote 1.

39) See *Albert Wilson v. Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003).

40) For example, the benefit to those persons who were detained in Argentina before 10 December 1983 by virtue of the state of siege and who were in the custody of the Executive (under Decree No. 10/90 and Law 24.043), was extended to cover persons who had initiated legal action and won their cases, but who had received compensation lower than that awarded by the reparations laws. Decree Num. 131/94 of 1 August 1994. For a general overview of the reparation process in Argentina, see Guembre, “Economic Reparations for Grave Human Rights Violations: the Argentine Experience” in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford: Uxford University Press, 2006).

domestic legal systems, the Basic Principles and Guidelines establish that states are obliged to afford within their national procedures effective access to justice and adequate reparation proportional to the harm suffered (including rehabilitation and compensation). For example, a national human rights commission might serve as a supervisory body to guarantee the impartiality of police investigations, but it cannot be a substitute for criminal proceedings when allegations reveal the perpetration of crimes. The same applies to administrative boards or commissions which may provide compensation to victims of crime; as explained, such boards cannot override the right of victims to bring civil proceedings before a court.

2. *International remedies/mechanisms*

If states fail to diligently prevent and/or respond to human rights violations they become legally responsible under international law.⁴¹ In other words, a state is responsible at the international level to afford reparation if: a) it breaches a human rights or international humanitarian law obligation; b) there is material and/ or moral damage; and c) it fails to provide complete or adequate reparation domestically (particular weight should be given to the procedural requirements of expeditiousness and effectiveness).

In other words, international law recognises that states should have an opportunity to redress human rights and international humanitarian law violations for which they

are responsible before an international body can exercise jurisdiction.⁴² Consequently, international procedures for individual complaints require effective domestic remedies to be exhausted.⁴³ But there is currently no general international human rights court where individuals can bring claims against states, so the forum to bring these claims varies depending on the international remedies/mechanisms made available by each country.

States have to specifically agree to the jurisdiction of an international court or body to allow individuals injured under their jurisdiction to bring challenges against them. While claims before the regional human rights bodies may be brought on behalf of individuals as a matter of adherence to the Conventions that underpin the bodies (e.g. the European or Inter-American Courts of Human Rights), states that have already ratified a UN Convention have to specifically agree to the monitoring bodies' jurisdiction to review claims from individuals (e.g. the Human Rights Committee and the Committee Against Torture).

When exercising their jurisdiction, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (ICtHR), as well as the newly established African Court on Human and Peoples Rights (ACtHPR), have the power to order the state to afford reparation directly to victims. This differs from the African Commission on Human and Peoples Rights, the

41) E/CN.4/Sub.2/1993/8 page 61.

42) Local remedies will be considered to have been "exhausted" once all appropriate internal remedies have been sought or, when it is considered that local remedies are ineffective or cannot provide fair and adequate reparation. This principle does not apply for systematic and/or massive violations of human rights. For more

information see G. Echeverria, *Reparation – A Sourcebook For Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, REDRESS, March 2003, available at <http://www.redress.org/publications/SourceBook.pdf> (REDRESS' Sourcebook on Reparation).

43) *Ibid.*

Inter-American Commission on Human Rights, the UN Human Rights Committee, or the UN Committee against Torture. These bodies can only make recommendations to the state concerned to provide reparation to victims and/or enact views on the violations committed and the obligation of states to redress them adequately. As will be discussed in the next part, the enforceability of these decisions rests on the assumption that they reflect states' treaty obligations, since the bodies enacting such decisions are officially charged with interpreting such treaties.

II. Enforcement of reparation decisions

The effective enforcement of reparations judgments or decisions is an essential part of the right to a remedy and reparation. In order to be effective, remedies need to be enforceable. The execution of judgments, as explained by the Inter-American Court of Human Rights in *Baena-Ricardo* "should be considered an integral part of the right to access to justice, understood in its broader sense, as also encompassing full compliance with the...decision".⁴⁴ Without the possibility of implementation, the remedy is simply ineffective. For this reason, it is important to analyse the effectiveness of such remedies in terms of their enforceability.

While considering the willingness of the state to implement the decision as a crucial aspect of enforcement, there are other important aspects that must be analysed as underlying basis for problems with enforcement. These include the nature of the decisions or judgments and whether they are themselves legally binding, the forms of

reparation contemplated in the decisions and the extent to which these pose any particular challenges for implementation, and the effectiveness of the remedial mechanisms and its capacity to follow-up with states on enforcement issues. Each of these issues will play a part in the degree to which views, decisions or judgments are enforced in practice.

1. *The nature of the obligation of states to implement reparation measures ordered by Human Rights Bodies*

The nature of the obligation of states to implement reparation measures plays an important part in enforceability. The fact that a particular decision is legally "binding" will not necessarily mean that enforcement will be easy or obvious. Similarly, the fact that a particular mechanism is by its nature "non-binding" will not preclude enforcement.

In cases where the decisions are legally binding (such as the European or Inter-American Court of Human Rights), there is often a tension between the binding force of the decisions and the finality of domestic decisions. There is no established collateral procedure for cases in which international courts and tribunals find a violation by a domestic decision (particularly when it has been reviewed by the highest judicial body of the state). In practice, a respondent state's political and judicial divisions are mobilised to varying degrees depending on the nature of the judgments, views or decisions: Do they require purely executive remedial action or legislative and/or judicial action? It appears that compliance depends on the extent to which each governmental division rallies to respond to a specific judgment and on the pressure that each international enforcement procedure is able to exercise over the state.

Still, the clearer the obligation to enforce (i.e. the legal basis) the easier it becomes to implement the decision. Whilst decisions of

44) *Baena-Ricardo Case*, para 72, cited in Shelton, *Remedies in International Law*, Oxford, Second Edition (2005), pg. 383.

quasi-judicial bodies like the Inter-American Commission of Human Rights, the African Commission on Human and Peoples Rights and the UN treaty-body mechanisms (such as the Human Rights Committee and the Committee Against Torture) are not themselves binding *stricto sensu*, they provide an authoritative interpretation of conventional obligations which are arguably, in themselves, legally binding. A state is effectively bound by treaty to make the requisite changes and provide the necessary redress to give effect to its obligations under the treaty. States have accepted the role of these bodies as the interpreters of the conventions.

Some of the mechanisms, themselves, have read in an obligation to comply. In this regard, the Inter-American Commission has interpreted the obligations contained in Articles 1 and 2 of the American Convention as imposing a duty on states to comply with the recommendations made by the Commission. The Commission has explicitly urged states to “*comply with the recommendations made in its reports on individual cases and to abide by the request of provisional measures*” and “*to adopt legal mechanisms for the execution of the recommendations of the Commission in the domestic sphere*”.⁴⁵ Some domestic tribunals have also begun to acknowledge the importance of both the Court’s judgments and Commission’s resolutions.⁴⁶

45) Inter-Am. Comm. H.R., Annual Report of the IACHR 1997, at Ch. VII, para. 12 and 13, OEA/Ser.L/V/II.98 doc.6 rev. (1998) Cited in Shelton 2003.

46) E.g. Colombian Constitutional Court (inter alia, T 558-03 regarding precautionary measures or T 327-04, in relation to San José de Apartadó); Argentinean Supreme Court (Ekmekdjian, Miguel Angel c/ Sofovich, Gerardo y Otros).

47) Resolution.240 AHG/(XXXI).

Correspondingly, the Organisation of African Unity/African Union has made general calls for states to cooperate with the African Commission.⁴⁷

Importantly, both the African and Inter-American Human Rights Systems have a court with the power to issue legally binding decisions. This means that there is always the possibility to recourse to the regional court if the recommendations by the Commissions are not implemented by the incumbent state (which is not the case with UN treaty-bodies decisions).⁴⁸

1.1. The legal nature of decisions by UN treaty bodies

Constitutional or other legal barriers may stand in the way of giving effect to UN treaty body decisions in individual cases. States may sometimes be able to provide remedies by means of executive or administrative action, while in other cases it may be necessary to reopen court proceedings, to overturn verdicts, or to enact legislation in order to provide an appropriate remedy, or the remedy recommended by the treaty body. Although this applies generally to other international courts, tribunals, and human rights bodies, the status of the treaty bodies themselves (i.e. as bodies which are not courts and adopt “Views” which are not binding judgments in formal terms) may

48) The African Court on Human and Peoples Rights is yet to be fully established. It will eventually operate as the second of the dual protective mechanisms for human rights in Africa alongside the Commission. It is mandated to undertake effective adjudication, render enforceable judgments and remedies to victims and make states more accountable for violations of human rights. According to the Preamble to the Protocol on the African Court, by doing this the Court is meant to “enhance the efficiency of the African Commission” and “to complement and re-enforce its functions” specifically in terms of its protective mandate.

also be a factor which impedes the implementation of a “View” in the domestic legal system.

In general, domestic courts have noted that while treaty bodies are not courts, their findings are relevant and useful in some contexts. However, they have usually stopped short of concluding that they are obliged to follow treaty body interpretations, even in cases in which the treaty body has expressed a View on a specific case or law from the jurisdiction in question. An example of the approach taken by courts is *The Queen v. William Hung* in which it was held:⁴⁹ “*Further, we can bear in mind the comments and decisions of the United Nations Human Rights Committee – ‘The Committee’. I would hold none of these to be binding upon us though in so far as they affect the interpretation of Articles in the Covenant, and are directly related to Hong Kong legislation, I would consider them as of the greatest assistance and give to them considerable weight.*”

Whilst the decisions by treaty bodies or Views are not themselves binding strictu sensu they provide an authoritative interpretation of treaty obligations which are, in themselves, binding. A state is effectively bound under a treaty to make the necessary changes and provide the necessary redress to give effect to its obligations under the same. Article 26 of the Vienna Convention on the Law of Treaties stipulates: “*26. Every treaty in force is binding upon the parties to it and must be performed by them in good faith (pacta sunt servanda).*” This has been recognised by domestic courts when examining the compliance of treaty provisions, for example, in *R (European Roma Rights Centre) v Im-*

*migration Officer at Prague Airport*⁵⁰ it was observed that: “*19. [...] article 26 of the Vienna Convention, entitled pacta sunt servanda, [which] requires that a treaty in force should be performed by the parties to it in good faith and also on the requirement in article 31(1) that a treaty should be interpreted in good faith. Taken together, these rules call for good faith in the interpretation and performance of a treaty, and neither rule is open to question.*”

It is clear, however, that the decisions of the treaty monitoring bodies in individual communication procedures are different to those of human rights courts like the ECtHR or the IACtHR. Treaty Bodies only interpret the binding instruments (conventions, treaties, covenants) and have the authority to decide when a state has breached an obligation contained therein. After that the Treaty Bodies can only refer back to the obligations under the instruments to afford adequate remedies domestically. In contrast, the human rights courts have the power to order specific reparation when a member state has breached their conventional obligations, and such awards are binding.

Still, the Views adopted by the UN treaty bodies cannot be seen as mere recommendations, and some domestic courts have implemented them accordingly.⁵¹ Additionally, as will be described, some countries have adopted specific legislative procedures to give effect to the Views in individual cases. It is clear that states are bound to comply with their international obligations (conventional and customary) and if an interpretative body, recognised by the state, establishes that there has been a breach, in principle the state should comply with its obligations

49) [1992] HKCFI 95; HCCC000032/1991, 14 April 1992, per Duffy J.

50) [[2003] EWCA Civ 666 [2004] QB 811.

51) See e.g. Finland KHO (Supreme Administrative Court) 1993 A 25 and KHO 15 April 1996 No. 1069, both based on Committee views in individual cases.

under the specific convention by redressing the breach within the means established by the same. States have accepted the role of treaty bodies as the interpreters of the conventions, and international courts and tribunals as well as domestic courts have referred to their jurisprudence when interpreting the obligations under the respective treaties.⁵²

There are positive and negative examples of enforcement of findings made by the UN treaty bodies in torture cases. For example, in *Dzemajl et al. v. Serbia and Montenegro*,⁵³ Montenegro, in compliance with a decision by the Committee Against Torture (CAT), awarded compensation in the order of one million euros to a group of Roma whose rights under the Convention against Torture were found to have been violated. Similarly, in *Villacres Ortega v. Ecuador*⁵⁴ the HRC concluded that the complainant had been tortured and ill-treated in detention and the state of Ecuador later advised that it agreed to pay the complainant US\$25,000 compensation or in *Pinto v. Trinidad and Tobago*,⁵⁵ where the HRC found that the complainant, a former death row inmate, had been ill-treated in detention and the petitioner later informed the HRC that he had been released as a direct result of the finding. However, in the case of *Ltaief et. al. v. Tunisia*,⁵⁶ the Tunisian Government has consistently challenged the *ratio decidendi* of the CAT's Views adopted in November 2003

In addition, in the case of *Ahani v. Canada*⁵⁷ concerning the deportation of an Iranian national from Canada to Iran on national security grounds, Canada has challenged the findings and denied that there had been any violation of Canada's obligations under the treaty, despite the fact that the HRC found violations of articles 7 and 13 of the ICCPR.

In common-law countries it has been argued that ratifying international treaties creates a legitimate expectation that states will comply with them, and therefore, will enforce the findings of treaty bodies. In the High Court of Australia case of *Minister of State for Immigration and Ethnic Affairs v Teoh*,⁵⁸ it was held that an immigrant had a legitimate expectation that the state would broadly comply with the Convention on the Rights of the Child (the CRC) on the grounds that Australia's ratification of the CRC was "an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers would act conformably with the convention." There have been attempts in other human rights cases to use the legitimate expectation argument established in *Teoh* to enforce substantive rights, but these have been unsuccessful (although subject to an important qualification as outlined below).

The most relevant perhaps is *Kavanagh v. Governor of Mountjoy Prison*,⁵⁹ in which the Supreme Court of Ireland rejected an

52) See e.g. the recent decision of the House of Lords in *A* and the US Supreme Court in *Rasul*.

53) *Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002).

54) *Ortega v. Ecuador*, Communication No. 481/1991, U.N. Doc. CCPR/C/59/D/481/1991 (8 April 1997).

55) *Pinto v. Trinidad and Tobago*, Communication

No. 512/1992, UN Doc. CCPR/C/57/D/512/1992 (1996).

56) *LTAIEF v. Tunisia*, Communication No. 189/2001, U.N. Doc. CAT/C/31/D/189/2001 (2003).

57) *Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004).

58) (1994-1995) 183 CLR 273.

argument based on legitimate expectation which attempted to enforce a view of the Human Rights Committee (HRC) that the applicant's right to equal protection under the law had been breached. The applicant sought on this basis to have his conviction quashed but the Court held that to do so would greatly exceed the reach of legitimate expectation, although it did state that: *"Depending on circumstances, it is conceivable that application of the doctrine [of legitimate expectation] will have the effect of conferring substantive rights, but that will necessarily be an indirect consequence. The decision-maker, confronted with the duty to take created expectations into account may find it difficult or even impossible credibly to reject an application for a particular result."*⁶⁰

However, this case turned on the fact that the particular provisions had not been incorporated into domestic law. The Court decided against the applicant ultimately on the basis that it would *"incorporate an unincorporated treaty by the back door"* thereby contravening Ireland's constitutional arrangements and the separation of powers. At the same time the Court accepted that *"the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms."*⁶¹ Therefore it can be concluded that the case accepts the principle of legitimate expectation, but only provides good authority for the application of the legitimate expectation doctrine where

state has incorporated the treaty in question.

By contrast, in *McVeagh v Attorney-General*⁶² the New Zealand Court of Appeal dismissed an appeal against the striking out of a proposed cause of action based directly on article 9 of the ICCPR by a person who had been detained in a psychiatric hospital, noting that not only was it contrary to principle but that McVeagh had already unsuccessfully brought a communication before the HRC in *A (name withheld) v New Zealand*.⁶³

A number of recent cases against Spain before the HRC have also highlighted potential difficulties in giving effect to decisions of treaty bodies in countries with monist systems, but have also shown that dialogue between the HRC and national courts can result in the adaptation of national laws to conform with the ICCPR.⁶⁴ As in any monist county, international treaties ratified by Spain form part of the internal legal order (without the need to enact implementing legislation). However, treaty body decisions are not directly enforceable by domestic courts, particularly when the remedy involves the revision of a domestic judgment or decision. In such cases, implementation of these decisions requires recourse to a special procedure (*amparo*) of the Constitutional Court.⁶⁵

The first case where enforcement of a treaty body decision was addressed by the Spanish courts arose from the communication submitted to the HRC by Michael and Brian Hill.⁶⁶ The authors challenged their

59) (2002) IESC 13.

60) *Ibid.* para. 38.

61) *Ibid.* para. 43.

62) [2002] 1 NZLR 808; 2001 NZLR LEXIS 88.

63) Communication No 754/997, views of 3 August 1999.

64) Natalia Alvarez Molinero, Turku Paper cited in the Final Report on the Impact of Finding of the United Nations Human Rights Treaty Bodies, Para 42, ILA (2004).

65) *Idem.*

66) Hill and Hill v Spain, Communication No 526/1993, views of 2 April 1997.

conviction in Spain and the HRC, after concluding that there had been violations of a number of provisions of the ICCPR,⁶⁷ established that the authors were “entitled to an effective remedy, entailing compensation”.⁶⁸ Following that decision Brian Hill brought his case back to the Spanish courts, seeking to quash his conviction and to be granted a new trial. The case eventually was reviewed by the Spanish Supreme Court⁶⁹ which held that a decision of the HRC or a judgment of the European Court of Human Rights does not constitute new evidence to reopen criminal proceedings.⁷⁰

A second case decided by the HRC against Spain, *Gómez Vázquez v Spain*,⁷¹ gave rise to a number of discussions in the Spanish Constitutional Court on how to approach HRC decisions. The HRC acknowledged the author’s claim that the Spanish Criminal Procedure Act⁷² breached Article 14(5) of the ICCPR and concluded: “[T]he lack of any possibility of fully reviewing the author’s conviction and sentence, [...] the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met” and therefore, “The

author’s conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5, of the Covenant.” On 14 December 2000, the Supreme Court held that the case should be re-evaluated in a revision procedure, but subsequently reversed its decision, deciding that a re-evaluation of the case would automatically be made by one of the judges of the Court. This procedure however did not require any re-assessment of the facts.

The HRC’s Views in *Gómez Vázquez* have been discussed in a number of other Constitutional Court decisions, where HRC’s interpretation of article 14(5) has been challenged by the Court, especially in light of divergent European case law. The HRC on the other hand, has subsequently adopted Views in a number of other cases against Spain asserting its position in *Gómez Vázquez*.⁷³ While the discrepancies between the Spanish courts and the HRC were not solved in the judicial fora, on 23 December 2003 Spain amended its law to conform to the HRC’s Views.⁷⁴ Interestingly, the publication of the law in the Official Bulletin expressly refers to the HRC’s jurisprudence.⁷⁵

67) Articles 9 (3), 10 and 14 (3)(c) and (5) of the ICCPR, in respect of both Michael and Brian Hill and of article 14(3)(d), in respect of Michael Hill only.

68) Hill and Hill v Spain, Communication No 526/1993, views of 2 April 1997, para. 16.

69) Supreme Court (Tribunal supremo), auto 69/2001, 25 July 2002.

70) The Supreme Court also stated that the Human Rights Committee had not explicitly recommended that Spain annul the earlier criminal sentence, but rather left the matter open to the assessment of domestic courts as to the most appropriate way provide an effective remedy.

71) 45Communication 701/1996, 11 August 2000.

72) Ley de Enjuiciamiento Criminal.

73) Sineiro Fernández v Spain, Communication No. 1007/2001, views of 7 August 2003, UN Doc CCPR/C/78/D/1007/2001, para 7; Semey v Spain, Communication No. 986/2001, views of 30 July 2003, UN Doc CCPR/C/78/D/986/2001, para. 9.5.

74) Ley Orgánica 19/2003, de 23 de diciembre, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial [Organic Law 9/2003, modifying Organic Law 6/1985 on the Judicial Power] Boletín del Estado, No 309, 26 December 2003, p. 46025.

2. *Enabling legislation to enforce international decisions*

Enabling legislation at the domestic level facilitates implementation of reparation measures in compliance with international decisions. However, there are very few states that have enacted specific legislation, and the existing examples of enabling legislation generally fail to take into account all of the existing international human rights bodies, and/or do not necessarily take into account the varied forms of reparation measures. For example, Colombia passed enabling legislation in 1996 for the domestic enforcement of awards of “compensation” made by international bodies, such as the Human Rights Committee and the Inter-American Court and Commission of Human Rights.⁷⁶ Peru had legislation for the implementation of Views of the Human Rights Committee before taking it off the books in the late 1990’s, although law no. 23506 on *amparo* and *habeas corpus* recognises the binding nature of the Inter-American Court.

There is also a special team in Colombia in charge of the security of persons in favour of whom the Inter-American Commission or the Court has ordered interim/precautionary measures. In Costa Rica, the headquarters agreement of the Inter American Court provides that decisions of the Court or the President have the same effect as judgments

handed down by the domestic judiciary upon their transmission to the domestic administrative and judicial authorities.

In Hungary, while there is no specific provision allowing international decisions to be given direct effect, the Code on Criminal Procedure provides that the decisions of international human rights organs are to be considered as “new evidence” for the purpose of reopening criminal cases.⁷⁷

In the Czech Republic under Act No. 517/2002 Coll. of Laws on Some Measures in the System of Central State Organs, the Ministry of Justice has been charged with the co-ordination of the implementation of the Views of the UN Human Rights Committee.⁷⁸

More generally, the Honduran Constitution proclaims the validity and mandatory execution of international judicial decisions. Similarly, the Guatemalan, Nicaraguan and Argentinean constitutions specifically recognise human rights treaties as overriding domestic legislation, which facilitates the implementation of international judgments. But despite these legal provisions and initiatives, there is still a general sense among national authorities that international law is irrelevant to the domestic context, which normally impedes a swift enforcement of international reparation measures.

75) Id.

76) Law 288 of 5 July 1996, (http://www.minddefensa.gov.co/politica/legislacion/normas/1996_288_ley_con.rtf) enables the enforcement of awards of compensation made by international bodies such as the Human Rights Committee to be enforced in domestic law. In the Czech Republic under Act No. 517/2002 Coll. of Laws on Some Measures in the System of Central State Organs, the Ministry of Justice has been charged with the co-ordination of the implementation of the views of the UN Human Rights Committee.

77) A similar provision was expected to be included in a new Code on Civil Procedure. See Final Report on the Impact of Finding of the United Nations Human Rights Treaty Bodies, Para 42, ILA (2004).

78) Mahulena Hofmann, “impact of the views of the UN Human Rights Committee in the national legal order of some eastern and central European countries”, available at <http://www.abo.fi/institut/imr/research/seminars/ILA/Hofmann.doc>.

3. Monitoring mechanisms

3.1. Specific follow-up procedures

The existence of a monitoring mechanism or follow-up procedure has in practice greatly improved prospects for enforcement. At times, monitoring mechanisms are established by the laws or treaties setting up the court, commission or treaty body. One example is the European Convention, which establishes a procedure for automatic and systematic supervision by the Committee of Ministers. Another example is the Inter-American Court, which in accordance with Article 65 of the Inter-American Convention, retains jurisdiction for follow-up.

There are advantages and disadvantages to either approach. The direct role of the Inter-American Court has some obvious advantages. It is not always easy for the Committee of Ministers of the Council of Europe, which is not a judicial body, to determine whether the legislative or other measures undertaken by a particular state do in fact fully comply with the European Court's decisions.⁷⁹ On this issue, it remains to be decided whether a case can come back to the Court for review of enforcement measures; the Evaluation Group appointed to study further reforms to the system opposed the idea on the ground that it could result in a blurring of the respective responsibilities of the Court and Committee of Ministers and draw the Court into an arena outside its purview.⁸⁰

But, the lack of oversight by a "political" body of the Organisation of American States to match the Committee of Ministers has made it more difficult to tackle political obstacles to implementation, including

the lack of political will. Under Article 65 of the American Convention, if a state does not comply with a judgment of the IACtHR, the Court shall note the specific instances of non-compliance and formulate pertinent recommendations in its annual report to the General Assembly of the Organisation of American States (OAS). However, this procedure falls rather short from the required enforcing powers that the Court needs to command executions of its judgments. An example of this is the account of the Court's attempted use of the procedure to force Honduras to comply with its judgment as interpreted in the *Vélásquez Rodríguez* and *Godínez Cruz* cases, which was unsuccessful. Although Honduras had paid the compensation originally ordered by the Court in these cases, albeit late, it refused to pay the Court-ordered interest and additional amount resulting from its failure to make the payment on time, before the devaluation of its currency. Consequently, the Court included a resolution detailing Honduras' non-compliance in its yearly report, which it expected to present to the General Assembly of the OAS. Due to the extensive lobbying campaign of Honduras, however, this statement was never officially presented to the General Assembly. Honduras reportedly threatened to withdraw its acceptance of the contentious jurisdiction of the Court if the General Assembly were to read the Court's condemnation. Although after an extended delay, the Honduran Government fully paid the compensation ordered by the Court,⁸¹ its successful campaign to block OAS efforts to oversee compliance with Court judgments may make that avenue untenable.

79) See Robertson and Merrills (1993), cited in Shelton (2005), supra note 1.

80) Shelton (2005), supra.

81) Shelton 2003.

3.2. Implied follow-up procedures

Certain laws/treaties have failed to mention or explicitly establish follow-up procedures, and here, the mechanisms have interpreted their mandates in order to establish such procedures and enhance enforcement of their decisions. In 1993, for example, the Human Rights Committee (HRC), recognising that the absence of a follow-up mechanism was a serious *lacuna* in the IC-CPR monitoring machinery, instituted a follow-up procedure to ensure implementation of its decisions, calling on states to provide information within ninety days about the measures taken in connection with its Views. According to the HRC “*the word ‘consider’ in Article 5, paragraph 1 of the Optional Protocol need not be taken as meaning consideration of a case only upon the adoption of a final decision, but consideration in the sense of engaging in those tasks deemed necessary to ensure implementation of the provisions of the Covenant*”.⁸² As part of this mechanism it also created a Special Rapporteur for Follow-Up on Views, whose mandate is for a two-year (renewable) term.

The HRC based its authority to establish such a procedure on the doctrine of implied powers, pursuant to which any international organ must enjoy certain implied powers to be able to carry out its functions. According to the HRC, States Parties ratify the Optional Protocol in good faith, intending to respect the Views of the HRC, and therefore the Committee would not act *ultra vires* by monitoring their implementation. Indeed, the HRC has emphasised the close link between the good faith fulfilment of the treaty obligations contained in Article 2 (3) of the ICCPR and compliance with the Views concerning remedies when a violation has been

found in an individual case. Importantly, no State Party has challenged this legal authority to engage in follow-up activities.

Similarly, since mid-2002, the following paragraph is added to all decisions in which the CAT has found a violation/s of the Convention: “*The Committee urges the State party to ... provide an appropriate remedy and, in accordance with rule 112, paragraph 5, of its rules of procedure, to inform it within 90 days from the date of transmittal of the decision, of steps taken in response to the Views*”. The CAT revised its Rules of Procedures and adopted the mandate of a Follow-up Rapporteur pursuant to Article 22 of the Convention (which establishes the individual complaints procedure), establishing that the follow-up Rapporteur should engage in the following activities: 1) monitor compliance by dispatching *notes verbales* to States Parties inquiring about measures taken pursuant to the CAT’s decisions; 2) recommend to the CAT appropriate action on responses received from governments on situations of non-response, and upon the receipt of letters from complainants about the non-implementation of the CAT’s decisions; 3) meet with State Party representatives to encourage compliance with the CAT’s decisions and to ascertain whether technical assistance from the Office of the High Commissioner for Human Rights (OHCHR) would be appropriate or desirable; and 4) prepare periodic progress reports to the Committee on her/his activities.

Though the African Commission has no official or formal policy on follow-up or other powers with which to coerce compliance with its decisions, it has used mechanisms within its procedures to this end. For example, the Commission has used its promotional visits to countries, as well as missions prompted by protective reasons or on site investigations, to monitor imple-

⁸² A/CONF. 157/TBB/3 (1993)

mentation of the Commission's findings and recommendations resulting from prior communications. Although primarily fact-finding missions are to gather information about pending communications,⁸³ they also serve as opportunities to secure amicable settlement of pending communications⁸⁴ and as an opportunity for follow-up. This procedure has been used in relation to Togo, Senegal, Sudan, Mauritania and Nigeria.⁸⁵ This mechanism has been developed under the authority given to the Commission by Article 46 of the Charter to "resort to any appropriate method of investigation" and these missions are similarly opportunities for pressure to be exerted on states to implement the Commission's decisions.⁸⁶

Clear follow up policies generally assist in identifying the areas of concern and lack of enforcement. For example the Committee of Ministers of the Council of Europe has a clear record of the number of member states that have adopted constitutional, legislative, regulatory reforms, or other general measures to comply with the Court's judgments, and how many of such reforms or measures it is currently supervising. Likewise a designated follow-up authority/body has proven useful not only within the European System but also with the UN treaty body mechanisms. A position of Follow-Up Officer was established in 2003 within the Office of the High Commissioner for Human Rights, and consequently the follow-up procedure under the Optional Protocol to the ICCPR

and under the procedure governed by article 22 of the Convention against Torture has improved. There is at present no Special Rapporteur tasked with follow-up of African Commission decisions, though this has been strongly recommended.

3.3 Victims participation in the follow-up procedures and avenues to challenge non-compliance Although victims have in fact participated in certain cases, their role before the European Committee of Ministers is still not formally established. Victims do have a role in the Inter-American Court's procedure to ensure compliance with its judgments or provisional measures (although this procedure is not formally established but has been developed by the Court itself). The procedure consists of the responsible state presenting reports on compliance as requested by the Court and the Inter-American Commission and the victims, or their legal representatives, submitting comments on these reports.

The possibility to challenge non-compliance and the procedure to do so are equally relevant to guaranteeing effective enforcement. On this issue for example, while it remains to be decided whether a case can go back to the European Court for review of enforcement measures, the Inter-American Court on the other hand has held public hearings on compliance and has sometimes modified the reparations decisions (e.g. to authorise the parties to invest in term-deposit certificates rather than to create a trust

83) For example the protective mission to Sudan to establish facts pertaining to pending communications nos. 48/90 and 50/91, see section V, pg. 19 of the Report of the African Commission on Human and People's Rights Mission to the Sudan DOC/OS/35a(XXII).

84) For example the mission report to Nigeria reports '[i]t had been agreed to at the beginning

of the mission that the cases against Nigeria before the Commission would be taken up with the appropriate authorities. The hope was that all of them would be settled amicably.' See pg. 17 of the Mission Report to Nigeria DOC/OS/(XXV)/99.

85) Louw 2005.

86) Ibid.

fund, because this was the most favourable arrangement for the minor beneficiaries⁸⁷).

4. Enforcement of the different forms of reparation awarded by international bodies

The form of reparation, whether it is a monetary or a non-monetary award, also plays an important role in its enforceability. Monetary awards such as compensation can be implemented directly without affecting the structural system of the state, and in this respect may be easier to implement for some states. Still, not all states are willing to afford monetary compensation, particularly in situations of massive and/or systematic violations or where the state has severe economic constraints. In contrast, non-monetary awards calling for legal or institutional reforms (e.g. cancelling an amnesty decree to make way for the prosecution of alleged torturers, affording victims with new opportunities to challenge the legality of detention, removal of the immunity of senior officials) will usually require a series of procedural steps within the legislative and/or judicial branches of the government, and for this reason it will invariably take more time and be more complicated for the state to implement such awards.

In general, there is a different compliance rate for monetary compensation as compared with other forms of reparation. This is in part because the types of actions that need to be taken by states to implement non-monetary measures are more complex. In practice, the Committee of Ministers of the Council of Europe pays particular atten-

tion to states' compliance with the obligation to implement general measures, since it considers that such measures constitute the essence of the European Convention of Human Rights. The Committee has stressed on several occasions that "*the necessity of taking such measures is all the more pressing in the case of repeated violations as serious as those (...) resulting from torture, inhuman treatment, destruction of property, illegal killings and disappearances.*"⁸⁸ In the same way, the Inter-American Court has ordered a variety of measures dealing with structural, institutional and legal reforms that aim to redress the victim(s) and to eradicate the circumstances that allowed the violations to occur in the first place.

In the European system, the implementation procedure in cases where the violations reveal a structural problem requires the respondent state to identify under the supervision of the Committee of Ministers the appropriate measures to prevent new similar violations. Once such measures are identified, the Committee assesses their efficiency to achieve the result required and supervises their adoption. However, the experience of the Committee, particularly with respect to Turkey, has shown that the prevention by states of torture and other serious abuses is a multi-dimensional and time-consuming process. Following the first finding of the violation of Article 3 in *Erdagöz v Turkey*,⁸⁹ the Committee closed its supervision of general measures after comprehensive legislative reforms and administrative measures which *prima facie* appeared to significantly

87) Caballero Delgado and Santana Case, compliance with judgment. Order of the IACHR of 4 Dec. 2001 and Note CDH-10.319/643 of 20 Jan. 1999.

88) Interim Resolutions DH(99)434 and

DH(2002)98 concerning the action of the Turkish security forces.

89) 21890/93 [1997] ECHR 85 (22 October 1997).

strengthen the protection against torture and ill-treatment in police custody.⁹⁰ Later judgments of the Court and reports of the Commission showed that the measures adopted following the *Erdagöz* case were insufficient for the effective prevention of torture and ill-treatment in Turkey. Additional serious shortcomings were revealed in the regions subject to the emergency rule in the south-east of the country. The factual context of the violations can also engender difficulties. For example, violations committed during a large-scale military conflict present particular complexities. The circumstances in which these violations occurred, their massive character and the long time that lapses since the event, may make it more difficult to conduct effective domestic investigations in accordance with the remedial measures ordered by the Court. The factual context of the violations can also engender difficulties.

Since 1997, when Peru complied with the Inter-American Court's order to release a Petitioner from prison⁹¹, a new level of state compliance was reached within the Inter-American System. In subsequent cases in which the Inter-American Court declared a domestic law or judgment to be in violation of the American Convention, States amended laws⁹², domestic courts declared laws to be unconstitutional⁹³, and/or an-

nulled domestic judgments.⁹⁴ However, the Inter-American Court, in almost every case, has also ordered the state to investigate, prosecute and punish the individuals responsible for the human rights violations. These latter orders are rarely fulfilled. In many states impunity still reigns, and the state structures lack the means or the will to bring the perpetrators to justice.⁹⁵

5. The specificity of the findings and remedial measures

Although it would seem clear that the degree of precision with which findings are recorded and the specificity of the remedial measures will impact upon the extent to which the measures will be enforced, in practice, human rights bodies and courts have generally seen their role as declaratory.⁹⁶ These organs have tended to identify the violations/articles breached in their decisions and called upon states to implement 'appropriate' remedies in accordance with their domestic legal systems. For example, the UN Human Rights Committee and Committee against Torture express their Views in very general terms: appropriate compensation, release of the prisoner, amendment of legislation, etc.

While this might be appropriate in certain cases⁹⁷, there are some measures which require a minimum degree of specificity in

90) See Resolution (96)17.

91) *Loayza Tamayo v. Peru (Merits)*, Judgment of September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), para. 84, op. para. 5.

92) *Cantoral Benavides v. Peru (Reparations)*, Judgment of 3 December 2001, Inter-Am. Ct HR, Ser.C No. 88, para. 76.

93) *Suarez Rosero v. Ecuador (Reparations)*, Judgment of 20 Jan 1999, Inter-Am Ct HR Ser.C. No. 44 paras. 81-83.

94) *Cesti-Hurtado v. Peru (Reparations)*, Judgment of 31 May 2001, Inter-Am Ct HR Ser C, No. 78, para. 15.

95) Pasqualucci, *The Practice and Procedure in the Inter-American Court of Human Rights* (Cambridge, 2004).

96) See e.g. *Assanidzé v. Georgia* 71503/01 [2004] ECHR 140 (8 April 2004).

97) At times, the recommendation for an appropriate remedy is left deliberately vague. See e.g. *Views of the Committee against Torture in Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) at para. 15.

the decisions and/or clarification on the legal principles that should be applied by the enforcing state. For example, when international bodies order criminal investigations, these measures are hardly ever enforced. Domestic statutes of limitation commonly bar criminal investigations⁹⁸ even though international law stipulates that limitation periods are not applicable to some of the most serious international crimes, and in other cases the extension of the limitation periods may be appropriate. As well, states have argued that it is not possible to reopen already closed investigations or to retry individuals, as this would breach the principle of *res judicata*. The Committee of Ministers of the Council of Europe has taken the position that the extension or removal of limitation periods may be appropriate in respect of future cases but that it is difficult to apply it to the case in question because of the problem of retroactivity (cf. Article 7 of the ECHR). In such cases the Committee has explored other remedial measures (e.g. disciplinary proceedings)⁹⁹ but such measures may also encounter similar legal obstacles and might not be sufficient to adequately redress the

violation(s)¹⁰⁰. The Inter-American Court recently ruled that trials in breach of due process guarantees and which are not held with the objective of truly bringing perpetrators to justice and to punish them cannot be considered as valid proceedings capable of raising issues of *res judicata*.¹⁰¹

Whereas the practice of the European Court is also to establish the existence of a violation and the process of giving effect to that finding is left to the state concerned and Committee of Ministers, the recent practice of the Court indicates a willingness to give some guidelines to the responsible states on how best to remedy consequences of a particular violation of the Convention. In a similar way, the African Commission has further developed a practice whereby it not only lists the articles violated by a state but also recommends remedial measures to be adopted by the state concerned. The primary aim of this procedure has been expressed by the Commission as the initiation of “a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice, complained of”.¹⁰²

98) E.g. *Pantea v. Romania*, judgment of 3 June 2003, CM/Del/OJ/DH (2005)922 Vol. I Public, p.24; *Kmetty v. Hungary*, judgment of 16 December 2003, CM/Del/OJ/DH(2005)928 Vol. I Public, p.13; *Bati and others v. Turkey*, judgment of 3 June 2004, p. 26.

99) *Bati and others v. Turkey*, *ibid* note 98.

100) ECHR, *Pantea v. Romania*.

101) According to the Court, “the development in the legislative and international jurisprudence [...] has allowed the assessment of the so called sham trial (“cosa juzgada fraudulenta”) which is the result of either a trial that has not respected due process guarantees, or of lack of judicial independence and impartiality. It has been probed beyond doubt [...] that the domestic trial in this case was contaminated for such vices. Therefore, according

to the standards of the American Convention, the State cannot invoke the domestic judgments issued without the above-mentioned requirements as an excuse that would free it from its international responsibility to duly investigate and sanction the perpetrators of human rights violations. [...]” ICtHR, *Case of Carpio Nicolle Vs. Guatemala*. Judgment of 22 November 2004. Series C No. 117, at paras. 131 and 132 (unofficial translation).

102) *Free Legal Assistance Group Case (1996) (Merits)*, communication no.25/89, see also communication no.16/88, *Comite Culturel pour la Democratie au Benin v. Benin (Merits)* joined with communication no.17/88, *Hilaire Badjougoume v. Benin (Merits)* and communication no.18/88, *El Hadj Boubacar Diawara v. Benin (Merits)*, adopted at the 16th ordinary session of the Commission in October 1994.

At the same, it is important to note, that while states have failed greatly in implementing reparation awards and decisions, sometimes the time frame or measures envisaged are not precise or realistic. As already mentioned, the HRC gives a State Party ninety days to provide information on measures taken to comply with its Views, but in practice the 90-day deadline is generally insufficient for the majority of states to provide adequate follow-up information. Similarly, some orders by the Court or human rights bodies have been unrealistic (e.g. that a state's Criminal Code be reformed in 30 days), since in order to comply with the judgments or decisions different organs within the state apparatus have to implement these measures.

III. Conclusion

There are still some remaining questions in regards to nature and scope of the right to reparation. Among other factors, the non-binding nature of some international procedures and the general lack of enforcement mechanisms available to victims have hindered a comprehensive interpretation of the scope and nature of the right to a remedy and reparation.¹⁰³ It is clear notwithstanding that right to reparation entails the right to effective remedies. This in turn calls for the swift enforcement of reparation decisions. While political will is important to ensure implementation of reparation decisions, there are a series of other matters that need to be considered when assessing the enforcement of reparation decisions, in particular the different forms of reparation that may be awarded (restitution, compensation,

rehabilitation, satisfaction and guarantees of non-repetition) and the subsequent required involvement of different organs of the state in the enforcement stage.

For these reasons it is important to enable collateral mechanisms of enforcement at the domestic level, as well as effective procedures, to challenge non-compliance. At the same time, it would seem useful for human rights bodies to be more specific in the remedial measures required in each individual case as well as the legal principles applicable when implementing such measures. It would appear easier for authorities (and follow-up bodies) to ensure that the impugned shortcomings are remedied when these are characterised accurately by the Courts or other decision making bodies. Similarly, enforcement would appear easier if human rights bodies are more succinct, precise, and realistic when ordering or recommending forms of reparation awarded – taking into account the amount of time and the type of activities that are required to implement the measures. In other words, more guidance from the human rights bodies is required to effectively enforce reparation decisions in cases of torture and other international crimes.

103) See for example Dinah Shelton "Commitment and Compliance, the Role of Non-Binding norms in the international legal system" (2000).

Annex 1

Forms of Reparation

a) Restitution

This form of reparation consists of re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. However, it is generally not possible to restore victims to their original situation before the violations occurred since it is not possible to “undo” the pain and suffering caused by the violations; though certain aspects of restitution might be possible – such as restoring an individual’s liberty, legal rights, social status, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.¹⁰⁴ The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation within the legal system of the respon-

sible state. Such cases include revocation, annulment or amendment of a constitutional or legislative provision enacted in violation or a rule of international (human rights) law. In some cases, both material and juridical restitution may be sought. For example, the return of exiled persons to their country and the restoration of their rights, including property rights and if possible, the return of their property or the compensation of its value at the time of the indemnification. What will be required in terms of restitution will often depend on the content of the primary obligation that has been breached. Restitution, as the first of the forms of reparation,¹⁰⁵ is of particular importance where the obligation breached is of a continuing character. In the case of unlawful detention or disappearance, for example, the state will

104) E/CN/4/2000/62, para 22. See also, Principles 8–10 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

105) Because restitution most closely conforms to the general principles that the responsible state is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by the Permanent Court in the *Factory Chorzow* case

when it said that the responsible state was under “the obligation to restore the undertaking and, if this not possible, to pay its value at the time of the indemnification, which value is designated to take the place of restitution which has become impossible”. For this reason the terms “restitution” or “restitution in integrum” are many times used as a synonymous to “full reparation”. According to Inter-American Court of Human Rights for example, “compensation under Article 63(1) of the [American] Convention must attempt to provide restitution in integrum for the damages caused by the measure or situation that constituted a violation of human rights”. See *Velásquez Rodríguez Case*, Annex D.

be required to put an end to the situation either as a matter of cessation or restitution.

b) Compensation:

Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured party as a result of the breach. The scope of this obligation is delimited by the capacity that the damage has to be evaluated in financial terms.¹⁰⁶ The appropriate heads of compensable damage and the principles of assessment to be applied in quantification can vary in accordance with the content of the primary obligations and the evaluation of the respective behaviour of the parties and more generally, in order to reach an acceptable outcome.¹⁰⁷ The Inter-American Court of Human Rights held in the *Velásquez Rodríguez Case* that “*it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms [...]*.”¹⁰⁸ Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc.) and non-material or moral damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of

companionship or consortium), the latter usually quantified on the basis of an equitable assessment.

An international court or tribunal which has jurisdiction with respect to a claim of state responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.¹⁰⁹ Compensation is for any damage caused by the act, whether material or moral.¹¹⁰ “Moral damage” to an injured state and “moral damage” to the injured individuals receive different treatment from the point of view of international law.¹¹¹ The distinction between payment of monies by way of compensation and payment of monies for other purposes is commonly emphasized in relevant literature; explicit indications in the same sense are also to be found in jurisprudence.¹¹²

The function of compensation, as its title indicates, is purely compensatory. Compensation corresponds to the financially assessable damage suffered by the injured party (whether a state or an individual). It is not concerned with the punishment of the responsible state, nor does compensation have

106) Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts; Report of the International Law Commission on its Fifty-third Session, GA, Supplement No. 10 (A/56/10); cph. IV.E.

107) Cf. GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), p. 242.

108) *Velásquez Rodríguez Case*, Interpretation Of The Compensatory Damages Judgment, Judgment Of 17 August 1990, Inter-Am. Ct. H.R. (Ser. C) No. 9 (1990). Para. 27.

109) See *Factory at Chorzow* note; *Fisheries Jurisdiction*, (Federal Republic of Germany v. Iceland), Merits, ICJ Reports 1974, p. 175; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v/. United States)*, Merits ICJ Reports 1986, p. 14.

110) The applicable principles of international law for moral damage caused to individuals are reflected in the *Lusitania* opinion See Reports of International Arbitral Awards, Vol. 7, p. 32,40 (1923).

111) Non-material and moral damage to states may in certain cases be redressed by satisfaction. However, moral damage caused to individuals should be redressed by an award of compensation as long as it is assessable in economic terms. See commentary to the Draft Articles on State Responsibility;

112) This difference is generally addressed in the context of compensatory or exemplary damages. The second is not considered part of reparation. See for example the *Lusitania Case*, supra., n. 7

an expressive or exemplary character. In this regard, the Inter-American Court of Human Rights held that international law did not recognise the concept of punitive or exemplary damages.¹¹³

Compensation for personal injury has been dealt with extensively by arbitral, regional and international tribunals, including human rights bodies, in particular the European and Inter-American Courts of Human Rights. The decisions of these human rights bodies on compensation draw on principles of reparation under general international law.¹¹⁴ Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc) and non-material or moral (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium) suffering, the latter usually quantified on the basis of an equitable assessment.

c) Rehabilitation

Rehabilitation is an important component of reparation and it is a right specifically recognised in international human rights instruments.¹¹⁵ The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that: “victims should receive the necessary material, medical, psychological and social assistance and

support.” The Special Rapporteur on the right to reparation has noted that reparation should include medical and psychological care and other services as well as legal and social services.¹¹⁶ Rehabilitation may be provided “in kind” or the costs may form part of a monetary award. It is important to distinguish between indemnity paid by way of compensation (for material and/or moral damage) and money provided for rehabilitation purposes.

A number of decisions have specifically included rehabilitation in reparations awards. The Committee against Torture, for instance, recommended that the Government of Zambia establish rehabilitation centres for victims of torture,¹¹⁷ and advised the Government of Indonesia to “take immediate steps to address the urgent need for rehabilitation of the large number of victims of torture and ill treatment in the country.”¹¹⁸ The Inter-American Court has been the most active of the regional courts in referring to the importance of rehabilitation in the overall framework of reparations. A series of judgments have awarded rehabilitation as part of broader awards. In the *Barrios Altos* case, the Court approved the agreement signed by the state and the victims wherein the state recognised its obligation to provide “diagnostic procedures, medicines, specialized aid, hos-

113) Velásquez Rodríguez, *supra*.

114) See e.g. the decision of the Inter-American Court in the Velásquez Rodríguez. Cf. also Papamichalopoulos v. Greece (Article 50), ECHR, Series A. No. 330-B (1995).

115) See for example the UN Convention on the Rights of the Child U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, and its Optional Protocol U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002; UN Convention against Torture U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987; Declaration

on the Protection of All Persons from Enforced Disappearances GA Res. 47/133 of 18 December 1992 ; Declaration on the Elimination of Violence against Women GA Res. 48/104 of 20 December 1993.

116) Principle 24, Final report of the Special Rapporteur, Professor M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000.

117) CAT/C/XXVII/Concl.4, 23 November 2001.

118) CAT/C/XXVII/Concl.3, 22 November 2001.

pitalisation, surgeries, labouring, traumatic rehabilitation and mental health.”¹¹⁹ In other cases, the Court provided for the future medical treatment of victims where there was a direct link between the condition and the violation.¹²⁰

d) Satisfaction and guarantees of non-repetition

Satisfaction and guarantees of non-repetition refer to the range of measures that may contribute to the broader and longer-term restorative aims of reparation. A central component is the role of public acknowledgment of the violation, the victims’ right to know the truth and to have the perpetrators held accountable.¹²¹ The Basic Principles on Reparation lists measures such as cessation of continuing violations, judicial sanctions against persons responsible for the violations, an apology, including public acknowledgement of the facts and acceptance of responsibility, commemorations and tributes to the victims, and implementing preventative measures, such as ensuring effective civilian control of military and security forces, and protecting human rights defenders and persons in the legal, media and other related professions.

The Basic Principles and Guidelines list

certain measures that constitute both guarantees of non-repetition and satisfaction to victims. The following are some examples:

- Cessation of continuing violations;
- Apology, including public acknowledgement of the facts and acceptance of responsibility;
- Judicial or administrative sanctions against persons responsible for the violations;
- Commemorations and tributes to the victims.¹²²

The Tribunal in the Rainbow Warrior arbitration pointed out that: “There is a long established practice of states and international courts and tribunals using satisfaction as a remedy or form of reparation (in the wide sense) for the breach on an international obligation ...”¹²³ Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology, a declaratory judgment or another appropriate modality. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.¹²⁴

One of the most common forms of satisfaction is a declaration of the wrongfulness of the act by a competent court or tribunal.

119) *Chumbipuma Aguirre et al. vs Peru (Barrios Altos Case)*, Series C No. 87, Reparations, Judgment of 30 November 2001, para. 40.

120) See, for example, *Cantoral Benavides Case vs Peru*, Series C No. 88 Reparations Judgment of 3 December 2001; *Durand and Ugarte Case vs Peru*, Series C No. 89 Reparations agreement between the victims and the State, 3 December 2001.

121) Question of the impunity of perpetrators of human rights violations (civil and political); E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para. 17.

122) See also, Joinet report, para. 42, who notes that, “on a collective basis, symbolic measures intended to provide moral reparation, such as formal public recognition by the state of its responsibility, or official declarations aimed at restoring victims’ dignity, commemorative ceremonies, naming of public thoroughfares or the erection of monuments, help to discharge the duty of remembrance.”

123) *Rainbow Warrior (New Zealand/France)* UNRIAA, vol. XX, p. 217 (1990) at pp. 272-273, para. 122.

124) *Ibid.*

Given that any court or tribunal which has jurisdiction over a dispute has the authority to make a declaration of its findings, as a necessary part of the judicial process, a declaration may sometimes act as a precondition to other forms of reparation, or it may be the only remedy sought. In some instances, the European Court of Human Rights has held that a finding of a violation is sufficient “just satisfaction”, even when the petitioner has specifically sought compensation;¹²⁵ though in others, the Court awarded the full amount of compensation sought for pecuniary and non-pecuniary damages “in view of the extremely serious violations of the Convention [...] and the anxiety and distress that these undoubtedly caused.”¹²⁶

Implementing guarantees of no-repetition to prevent future violations and/or generally safeguards to prevent violations is a common obligation included in human rights instru-

ments. For example, the specific obligation to prevent torture is present in the Convention against Torture and the Inter-American Convention to Prevent and Punish Torture.¹²⁷ The vital role of prevention, as one means of reparation, has been enshrined by the European Convention on the Prevention of Torture,¹²⁸ as well as the newly adopted Optional Protocol to the Convention against Torture¹²⁹ and the Robben Island guidelines.¹³⁰ Prevention is also cited in the Istanbul Protocol¹³¹ as the first legal obligation that states must respect to ensure protection from torture. The *Velasquez Rodriguez* decision importantly recognised the legal duty of a state: “to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation.”¹³²

125) For example, *Chahal v. United Kingdom*, App. No. 22414/93, Judgment of 15 November 1996; *Ahmed v. Austria*, App. No. 25964/94, Judgment of 17 December 1996.

126) For example, *Aksoy v. Turkey*, App. No. 21987/93, Judgment of 18 December 1996 para 113; *Aydin v. Turkey*, App. No. 23178/94, Judgment of 25 September 1997; *Selmouni v. France*, App. No. 25803/92, Judgment of 28 July 1999.

127) A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992).

128) *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Council of Europe, *European Treaties Series*, ETS No. 126.

129) *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. A/RES/57/199 adopted 18 December 2002.

130) *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*, African Commission on Human and Peoples' Rights, 32nd Session, 17–23 October, 2002: Banjul, The Gambia. Significantly, Article 14 of the Guidelines notes that “States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.”

131) *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment*, submitted to the United Nations High Commissioner for Human Rights, 9 August 1999, para 10(a): “Taking effective legislative, administrative, judicial or other measures to prevent acts of torture. No exceptions, including war, may be invoked as justification for torture...”

132) para 174. Judgment, *Inter-American Court of Human Rights*, Series C, No. 4 (1988).

Reparation for torture?

Considering the impact of the decision of the UK House of Lords in Jones v Saudi Arabia¹

Carla Ferstman*

Introduction

John Pugh (Southport) (LD): “Now that Ron Jones and others have lost the right to sue Saudi officials for torture, what meaningful legal redress is there for any Briton tortured abroad in the light of the Law Lords’ ruling?”

Tony Blair (Prime Minister): “May I point out to the hon. gentleman that we intervened in this case in order to ensure that the rules of international law and state immunity are fully and accurately presented and upheld? That is important for us as a country and for others. But our strong position against torture remains unchanged: we utterly condemn it in every set of circumstances.”²

Governments continue to steadfastly condemn the heinous practice of torture and courts have followed suit. In the landmark decision named *A (FC) and others v. Secretary of State for the Home Department before the UK House of Lords*, Lord Bingham of Cornhill noted that “there can be few issues on which international legal opinion is more

clear than on the condemnation of torture.”³ What is less clear, as is evidenced by the House of Lords’ later regrettable ruling in *Jones et al. v. Saudi Arabia*,⁴ is the practical import of this universal condemnation as regards survivors’ ability to assert their right to effective and enforceable remedies against

Key words: Immunity, international law, civil proceeding, access to justice

1) This paper benefits in large part from an international study prepared by Lorna McGregor for REDRESS, entitled: IMMUNITY v. ACCOUNTABILITY: Considering the Relationship between State Immunity and Accountability For Torture and Other Serious International Crimes (December 2005) and REDRESS, Amnesty International, Interights and Justice’s’ third party intervention before the UK House of Lords in the case of *Jones v. Minister of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia); *Mitchell and others v. Al-Dali and others* and the *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia) [2006] UKHL 26.

2) Prime Minister’s Question Time, 10 Downing Street, 14 June 2006.

3) *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004) *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)* (Conjoined Appeals) (2005) UKHL 71, at para. 33.

4) *Supra*, n. 1, [2006]UKHL 26.

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their abusers. Torture can be condemned, but if it is not adequately redressed, have we devalued the absolute prohibition of torture of all meaning? As was indicated by the solicitor of Mr. Mitchell, Mr. Sampson and Mr. Walker at the time of the handing down of the ruling on 14 June 2006, “The House of Lords have chosen to support the rights of states, including those who torture, over the rights of torture victims.”⁵

Effective and enforceable remedies for torture, be they criminal sanctions, civil awards for restitution and compensation, administrative sanctions or other guarantees of non-repetition, are an essential precondition to the eradication of the odious ill that is torture once and for all. Equally, such measures serve to quell survivors’ feelings of powerlessness and disenfranchisement and acknowledge that what was done to them was wrong and deserving of punishment.

Ideally, reparations claims proceed in the location where the torture occurred. Yet torture by its very nature can be state-sanctioned and is often allowed to thrive in an environment where the rule of law and the independence of the judiciary is markedly absent. This may render illusory national prospects for accountability and redress. The significant barriers facing survivors who wish to access justice in the location in which the torture took place, coupled with few opportunities to bring a case at the international level, often makes the national courts of other states the only other prospect for some measure of justice.

The *Jones et al. v. Saudi Arabia* case, which involves four British torture survivors’ search for justice, has inspired legal pundits and great controversy, yet at its heart is the

experiences of four individuals: Scottish tax accountant Ron Jones, anesthetist Alexander Mitchell, marketing consultant Dr. William Sampson, and housing and compound manager Leslie Walker. All of these individuals were long-time residents in Saudi Arabia, but were people in the wrong place at the wrong time, as they were caught up in the Saudi Government’s campaign to defuse attention after a spate of bomb attacks in Riyadh. All of the victims allege that they were regularly subjected to torture during their time in prison and all have complained of ongoing psychological and physical damage as a result of the torture.

Ron Jones was rushed to hospital after being injured by a bomb attack and was later taken away by the Saudi secret police still wearing his hospital gown. He alleges that he was kept in solitary confinement, shackled, repeatedly beaten on the soles of the feet and hung from a bracket. He was released 67 days later without any charge or any legitimate reason being given for his detention. Mitchell, Sampson and Walker were kept in solitary confinement for more than two and a half years. The stress and abuse led to their televised confessions to the bombings and to acting as spies under orders from the British Government, and ultimately to their closed court conviction without legal representation at first instance. Death sentences by Al Haad (partial-beheading and strained suspension on an X-frame) were issued against Mitchell and Sampson and an 18 year sentence was issued for Walker. They were eventually released on an order of clemency after more than 900 days of captivity.

It remains impossible for any of these survivors to access justice in Saudi Arabia, and indeed there has been a complete failure on the part of the Saudi Government to institute any official investigation at all, despite

5) Statement of Tamsin Allen of Bindmans & co., 14 June 2006.

the clear and convincing evidence of torture. Consequently, claims were lodged in UK courts for damages including aggravated and exemplary damages for assault and battery, trespass to the person, torture and unlawful imprisonment against the Saudi officials said to be responsible for the torture, and the Saudi Ministry of the Interior, the principal Government agency responsible for the treatment of prisoners and detainees.

The Saudi Government asserted that it and its officials were immune from civil suit in the United Kingdom on the basis of the UK State Immunity Act, which exempts states from the jurisdiction of UK courts aside from enumerated exceptions. The UK Government (Secretary of State for Constitutional Affairs) intervened in support of the Saudi case, to argue that foreign states and their officials should be entitled to immunity in this case, notwithstanding that what is at stake is the torture of British nationals. After a series of twists and turns, the UK House of Lords decided on 14 June 2006 that immunities blocked the claims against the Saudi State and the individual officials involved.

The absolute prohibition against torture

Torture has been recognized as one of the worst human rights violations in which all states have a duty under international law to take all possible steps to prevent, punish and afford effective remedies and reparation to victims. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment⁶

recognizes in Article 5(2) that “Each State Party shall ... take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him ...”.

Equally, the prohibition of torture has been accorded the highest status under international law. As was stated by the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* judgment,

“... because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules ... Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.”⁷

The obligation of states to afford a civil remedy to victims of torture, irrespective of where the torture took place, has been subject to much debate. Article 14 of the Convention against Torture specifies that each State party must “ensure in its legal system that the victim of an act of torture obtains

6) 1984, G.A. res.39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987.

7) *Prosecutor v. Furundzija*, Case. No. IT-95-

17/1-T (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia since 1991, Dec. 10, 1998) at paras. 153-4.

redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” This right to reparation is reinforced by the recent adoption of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁸ Yet the extent to which Article 14 extends to torture perpetrated outside of the State called upon to exercise jurisdiction has been controversial. In *Bouzari v. the Islamic Republic of Iran*, the Ontario Court of Appeal found that the text of the Convention Against Torture “does not provide clear guidance” on the territorial reach of Article 14(1),⁹ and this lack of clarity on the scope of Article 14 led it to find in favour of the clear rule of state immunity, enshrined by its domestic state immunity act.

The United Nations Committee against Torture, the official interpretive body of the UN Convention against Torture, had occasion to comment on the scope of Article 14(1) of the Convention in its review of Canada’s State party report, which was considered shortly after the Ontario Court of Appeal decided the *Bouzari* appeal. The Committee against Torture criticised, “the absence of effective measures to provide civil compensation to victims of torture in all cases” and recommended that Canada, “review its position under article 14 of the

Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture.”¹⁰ The English Court of Appeal in *Jones et al v Saudi Arabia* opined that:

“One possible interpretation of article 14(1) is certainly that it is only concerned to ensure a right of redress in the state where an act of torture is committed. The civil redress required under article 14(1) would on that basis mirror the criminal jurisdiction required to be introduced under article 5(1). But, since torture is by definition an act inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a public capacity, it would seem curious if each state were not required to ensure a civil right of redress in respect of torture committed abroad by one of its officers – paralleling the criminal jurisdiction required under article 5(1)(b) in each state in respect of an alleged offender who is a national of that state.”¹¹

The English Court of Appeal made the distinction between claims against the State and against the individual officials involved, holding that Article 14(1) was at least obliging States parties to afford remedies against the latter category, irrespective of where the torture occurred. Lord Hoffmann, a member of the UK House of Lords committee which unanimously overturned the decision of the English Court of Appeal in *Jones et*

8) C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005).

9) *Bouzari v. Iran (Islamic Republic)* Ont. C.A. (2004), at paras. 68–95.

10) Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recom-

mendations of the Committee against Torture, 34th Session (May 2005), CAT/C/CO/34/CAN at paras. C (4)(g) and D(5)(f).

11) *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya (The Kingdom of Saudi)* and another *Mitchell and others v. Al-Dali and others* [2004] All ER (D) 418 (Oct.), at para 20.

al. v. Saudi Arabia, noted somewhat gratuitously in respect of the Committee against Torture's findings and recommendations in relation to Canada that "as an interpretation of article 14 or a statement of international law, I regard it as having no value."¹²

The House of Lords decided that there is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should. In other words, whilst they recognize the existence of the prohibition against torture as a peremptory norm, they were not prepared to go so far as to recognize the tools to give it practical effect. Since the rule on immunity is well understood and established, and no relevant exception is generally accepted, the rule prevails.¹³

State immunity

The principle of state immunity – that states cannot be subjected to the judicial processes of other states – prevents a state being made a party to proceedings in the courts of a foreign state and will protect its property from being seized to satisfy a judgment. The principle is premised on the equal sovereignty and dignity of states and is designed to protect the conduct of foreign relations. Yet over time, this once absolute doctrine has evolved to recognize a number of exceptions, including waiver of immunity, the commercial activities exception, and civil proceedings arising from death or personal injury occurring within the forum State. A more modern and

restrictive understand of the principle recognizes that immunity will only be accorded for acts carried out by a state in the exercise of its sovereign authority (as opposed to purely commercial or private transactions).

When considering the relationship between state immunity and civil proceedings for torture occurring outside the forum state, a question arises as to whether torture can properly be characterised as a sovereign act of the State to which immunity would apply. While there may be a limited category of officials (an acting head of state or a foreign minister) who might be entitled to a form of immunity on the basis of their status whilst they remain in office, this differs from any immunity which might appropriately be accorded to a State, which relates only to those acts that can properly be considered to be within the sphere of government or sovereign authority. The act of committing torture – a clear violation of international law – cannot be considered to be a legitimate exercise of authority.

In the Pinochet case, Lord Browne-Wilkinson determined that torture could not be considered to be a state function,¹⁴ which would merit function immunity. To him, the idea of affording immunity *ratione materiae*, or immunity that relates to acts carried out as a state function was nonsensical in torture cases given the definition of torture which requires some level of involvement or acquiescence of state officials; if one could consider torture as qualifying as an official act then it would undermine the entire regime of the torture convention designed to ensure accountability for torture. The claimants' in *Jones et al* argued that for the aforementioned reasons, torture

12) *Supra.*, n. 1 at para. 57.

13) *Ibid.*, at para. 27.

14) *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3)*, [1999] 2 All ER 97 at 114-115.

by a state official (or other person acting in a public capacity) cannot be regarded as a function of such an official or person; and that consequently, the state cannot claim state immunity in respect of an official or other agent committing such torture. This reasoning was adopted by the minority of the Grand Chamber in *Al-Adsani v United Kingdom*.¹⁵ The House of Lords, however, picked up on the anomaly of requiring some involvement of torture to satisfy the definition of torture – the essence of torture is its “officialness”, whilst at the same time arguing that there can be no functional immunity for torture:

“In my opinion, this reasoning is unassailable. The reason why General Pinochet did not enjoy immunity *ratione materiae* was not because he was deemed not to have acted in an official capacity; that would have removed his acts from the Convention definition of torture. It was because, by necessary implication, international law had removed the immunity. ... The acts of torture are either official acts or they are not. The Torture Convention does not ‘lend’ them an official character; they must be official to come within the Convention in the first place. And if they are official enough to come within the Convention, I cannot see why they are not official enough to attract immunity.”¹⁶

By distinguishing criminal torture proceedings (to which no immunity *ratione materiae*

applied because international law removed the immunity) and civil claims for damages in torture cases, in which an international law rule removing immunity was not deemed to have been clearly established, the House of Lords concluded that immunity in the latter case remained.

Several cases which have considered the relationship between State immunity and *jus cogens* norms have examined whether extra-territorial tort claims fit within the enumerated exceptions of national immunity legislation, and from a straight reading of the usual enumerating exceptions (commercial transactions, tort in the forum state...), torture occurring outside the forum clearly falls outside. In *Al Adsani v. Kuwait*,¹⁷ the applicant sought to show that part of the tort continued on UK soil; in *Bouzari v. Iran* (Islamic Republic), the applicant sought to fit the claim within the commercial exception, given the allegation that the basis for the torture related to pressure for business gain.¹⁸ In both cases, the respective courts rejected these attempts to come within the enumerated exceptions. The claimants further argued that even if they could not fit their factual circumstances into the enumerated exceptions, there was an implied exception to state immunity in relation to *jus cogens* violations: by committing or fostering torture the states in question have impliedly waived their immunity. Whilst this argument had met with some success in a decision of the Greek Supreme Court,¹⁹ the

15) (2001) 34 EHRR 273.

16) *Supra.*, n. 1 at paras. 81 and 83.

17) *Al-Adsani v. Government of Kuwait and Others*, CA 12 March 1996; 107 ILR 536.

18) *Bouzari v. Iran* (Islamic Republic) Ont. C.A. (2004).

19) *Prefecture of Voiotia v. Federal Republic of Germany*. Case No. 137/1997. The facts of this case are described in *Ilias Bantekas*, Case report: *Prefecture of Voiotia v. FRG*, 92 *Amer. J. Int'l L.* 765 (1998); *Maria Gavouneli*, War reparation claims and state immunity, 50 *Revue hellénique de droit international* 595 (1997). Whilst the case succeeded at the jurisdiction phase, in a separate decision, immunity was held to operate as a bar at the enforcement phase.

UK and Canadian courts did not concur, and found the respective national immunity legislation to constitute comprehensive codes. The implied waiver theory was flatly rejected by the UK House of Lords in *Jones v. Saudi Arabia*.²⁰

Another strong feature of the jurisprudence in the argument that when two different norms conflict, the hierarchically higher norm should prevail. By implication, *jus cogens* norms such as the prohibition of torture should trump the principle of state immunity, which though recognized as an international law principle, is a procedural rule of lower status. This was the position taken in *Pinochet* in respect of criminal cases, though the European Court of Human Rights in *Al Adsani*, followed by the Ontario Court of Appeal in *Bouzari* and the House of Lords in *Jones et al.*, distinguished civil and criminal cases, and determined that no similar rule of international law had emerged with respect to the immunity of States in the context of civil proceedings.²¹ The House of Lords in *Jones et al.* followed the *Al Adsani* line of cases in rejecting the hierarchy of norms argument, however its sphere of argumentation is probably one of the most worrying aspects of the judgment. The House of Lords recognizes the *jus cogens* nature of the prohibition against torture yet reads in no obligation to ensure the practical effectiveness of the prohibition in practice. Lord Hoffmann notes at para. 44 of the judgment as follows:

20) *Supra.*, n. 1 at paras. 38 – 63.

21) The contrary position was taken by the Italian Supreme Court in *Ferrini v. Federal Republic of Germany* (Cass Sez Un 5044/04), the 8-9 dissent in the Grand Chamber in *Al Adsani v. the United Kingdom*, 35763/97, ECHR 2001^11, 79, at 111 et seq.: which opined: “It is not the nature of the

The *jus cogens* is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not. As Hazel Fox has said (*The Law of State Immunity* (2002), 525): “State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a *jus cogens* mandate can bite.”

The right of access to court

In *Al-Adsani v. the United Kingdom*, the Grand Chamber recognized that the right of access to justice was called into question by the grant of immunity from extraterritorial civil suit in torture cases. While the Chamber indicated that this was not an absolute right, it did not enter into detail about the rights to be balanced to determine whether the restriction of the right of access to court was legitimate and proportionate. In its judgment of 28 October 2004, the UK Court of Appeal held in *Jones et al. v. Saudi Arabia* that blanket subject matter immunity (*immunity rationae materiae*) for State officials (as opposed to the State itself) in torture

proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere.”

cases would deprive the right of access to a court under Article 6 of the European Convention of Human Rights of real meaning in a case where the victims of torture have no prospect of recourse in the state whose officials committed the torture. The Court of Appeal was able to distinguish the Grand Chamber's decision in *Al-Adsani* which had only considered the immunity of the State.

The House of Lords in *Jones et al. v. Saudi Arabia*, however, disagreed with the conclusion of the Court of Appeal. Its view was that upholding state immunity, which is an accepted norm of international law, would only breach Article 6 if it was disproportionate, and that the provision of state immunity in relation to a civil action which alleged torture was not so disproportionate as to amount to a breach of Article 6.

The representative of the UK Secretary of State in his oral arguments before the House of Lords noted, in relation to the proportionality test, that there were other possibilities for the survivors to satisfy their claims, inferring to the potential for the UK Government to espouse the claim on behalf of its nationals. Yet, the likelihood of espousal is minimal, given that the decision to espouse is at the discretion of the Government and it has shown little genuine interest in the survivors' claims to date.

Conclusions

The righteous abhorrence that governments publicly extol for the practice of torture is exceedingly difficult to rationalise with their seeming disinterest and disaffection for torture survivors: their rights, their needs, their futures. The principle of immunity was designed to protect foreign relations and the dignity of states, yet the decision of the House of Lords in *Jones et al. v. Saudi Arabia* causes one to pause and to ask – Whose dignity are we interested in protecting? That

of the torturers, responsible in this case for torturing nationals of the forum state? There is no dignity in that.

Children witnessing atrocities against parents or caregivers, a human rights perspective

Daniela Baro*

Introduction

“They shot my father right in front of me... They came to our house and told him they had orders to kill him because he allowed me to go to school ...” (15-year-old girl, Kabul)¹

The incident described above is not as exceptional an occurrence as one may hope. In fact, cases of torture or murder of civilians in front of children are often reported. It is not clear, though, to what extent this is primarily done deliberately, for instance to initiate children as killers, demean a target population by humiliating parents, cause terror in the community, or as a reckless, though inadvertent, side effect of carrying out orders.

Studies undertaken in different conflict and post-conflict zones reveal the harmful effects of such experiences on children, especially if the crimes they witness are committed against their parents or caregivers. Research, resources and public attention in this area have mainly focused on the final stages of the problem: the *effects* of witnessing atrocities on children and adequate *rehabilitation* responses. This focus, especially

insofar as it relates to the emphasis given to studying Post-Traumatic Disorders (PTSD) since the 1980s, has been among the awareness raising achievements after the adoption of the 1990 UN Convention of the Rights of the Child (CRC) and the recommendations of the global study led by Ms. Graca Machel on the Impact of Armed Conflict on Children.²

However, still, insufficient attention seems to be paid, in the ambit of human rights’ monitoring and reporting, to whether children are forced or recklessly tolerated to witness the crimes or human rights violations being reported or investigated.³ Yet, from a human rights perspective, there are a few questions regarding the issue of children witnessing atrocities that need to be addressed.⁴ First, is the witnessing of crimes against parents by children an inevitable though regrettable aspect of war, or is it a deliberate or reckless act that could be prevented? Secondly, is forcing or recklessly

Key words: Forced witnesses, children torture, child rights, conflict zones, sexually torture

1) Amnesty International (AI), ASSA 11/013/1999.

2) Impact of Armed Conflict on Children, A/51/306 26 Aug. 1996.

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allowing children to watch crimes against their parents itself an unlawful act in relation to the child, i.e. is this conduct prohibited by existent law? Third, if such conduct is unlawful, who bears responsibility for the wrongful act and its effects? Is the individual perpetrator alone liable or is the responsibility of the State engaged? Finally, if such conduct itself is a human rights violation or a crime against the child, should remedies be made available to the child to obtain reparation?

It is through determining whether such conduct is unlawful and who bears responsibility that prevention and rehabilitation may be addressed more effectively. Surely a human society owes at least this much to both the current victims and its future generations of children. Yet, the issues of responsibility and reparation are accompanied by difficult questions, the most important of which is the adequate protection of children throughout any process of information gathering, reporting and eventually testifying at trial. Such obstacles though should not be relied upon to avoid addressing the issue; nevertheless, it is acknowledged that they

can constitute a real challenge and thus any attempt to seek truth and justice about such abuses require finding appropriate ways of protecting children witnesses of crimes to the maximum extent possible.

The purpose of this paper is hence to study the act of making children witness crimes against their parents or caregivers from a human rights perspective and its consequences from the point of view of accountability and reparation. I will therefore examine whether making children witness crimes against parents or caregivers is a violation of children's rights and if so what could be done as deterrence to prevent such acts occurring in the future and to bring redress to child victims. It is beyond the scope of this paper to discuss in depth the psychosocial or other effects of witnessing crimes on children or their families.

The paper is thus structured as follows. I will present first the factual situation (Part A) providing some hints on the actual occurrence of forcing children to witness crimes against parents/caregivers in situations of armed conflict, internal strife or state repression (A.a). This part also in-

3) As an indication, in Skopje, Macedonia, April/June 1999, the main international organisations taking statements from Kosovar refugees, namely UN, OHCHR, OSCE, Human Rights Watch, Amnesty International and the American Bar Association, some collaborating with the ICTY, did not include within the scope of their human rights' assessments the question of forced/reckless witnessing of atrocities by children. On the author's raising this issue with the above, they confirmed that they only took account of children being forced to watch crimes when this was occasionally spontaneously mentioned by the interviewees, but, even then, those acts were not highlighted or even reported as distinct specific abuses against children. Mental health teams at the time were assisting many children affected by witnessing crimes. Most testimonies of a child witnessing atrocities against parents found, some

herein mentioned, were mainly retrieved in reports about "trauma" and adverse effects of conflict on children, or in descriptions of the circumstances in which other unlawful acts were reported. One notable exception is the case of reports on "child soldiers", where witnessing and committing crimes against parents was specifically examined as part of the recruitment process and the use of children by armed forces or groups.

4) Hereinafter when I refer to witnessing crimes, I refer to those committed against parents or caregivers (who can be siblings, family members, friends, neighbours). Children can also be highly affected by witnessing atrocities against strangers, but I will focus on the protection link; the child may feel especially endangered or destroyed when witnessing a parent or caregiver threatened, killed or degraded.

cludes a general overview of the possible effects on children of making them witness crimes against their parents/caregivers (A. b). I will then analyse the above facts from a human rights perspective (Part B). First, I will study whether making children witness crimes against parents/caregivers constitutes an unlawful act under international law (B.a). Then I will look at the consequences of such act if considered unlawful, with a focus on the question of accountability and reparation (B.b). Finally, I will explore some possible preventative actions. Given the limits of this paper, I will examine international norms and international caselaw applicable to the conduct under study. However, a comparative study of existing national laws, jurisprudence and policies addressing this subject would highly enrich the international law perspective.

A. The situation

A.a. Occurrence of children witnessing crimes against parents/caregivers

In 1998, Save the Children and Amnesty International claimed that at least ten million children had witnessed acts of war or brutality.⁵ A well-known example is that of Rwanda. A UNICEF survey among 3,030 Rwandan children (1995)⁶ revealed that nearly 80% of the children had lost immediate family members and more than one third of these had actually witnessed the murders.⁷ The UN Special Rapporteur

on Rwanda⁸ confirmed that children “were doubly victimised, either as perpetrators used by the belligerents ... or as innocent victims *witnessing atrocities against their parents*”. Similar studies were undertaken in Angola and Mozambique,⁹ the latter showing that one third of the children surveyed had seen close relatives being killed.

Forcing children to witness crimes seems to take place in a number of typical scenarios, this being too often deliberately sought with a specific purpose.

Children associated with armed forces or armed groups

Forcing children to witness crimes against their parents has been reported to be part of the initiation of children as combatants (sometimes as young as seven), such as in Sierra Leone, the Democratic Republic of Congo (DRC), Liberia and Uganda, where tens of thousands of girls and boys have been recruited into armed forces or groups. The recruitment process, which in most cases is done through abduction, manipulation or force, at times also includes forcing children to commit horrific acts, such as killing of family members. This is done with the idea that such acts will break their spirit, turn them into ruthless soldiers, cause them to be ostracized by their community and prevent them from returning home,¹⁰ as illustrated below. Human Rights Watch (HRW)¹¹ reported that child combatants

5) Save the Children Fund, *Children at War*, 1998.

6) UNICEF, *Exposure to war-related violence among Rwandan children and adolescents*, Rwanda, Feb. 1996.

7) UNICEF, *The State of the World's Children 1996*.

8) E/CN.4/1997/61 20 Jan. 1997, par. 32.

9) See *Reaching Children in War, Sudan, Uganda and Mozambique*, Ed. Cole, P. Dodge & M. Raundalen, Sigma Forlag, Norway, 1991, p.22.

10) Singer at 70-71 at Eduardo Arboleda, “UN-HCR response to advisory opinion”, September 2005.

in Liberia and Sierra Leone were forced to kill companions as an initiation process to “enter the group”: “... boys from both factions have told us that there were initiation procedures when they joined... they were actually forced to witness the execution of family members or their friends. If they screamed or cried, they were killed. Boys have told us of being lined up to watch executions and being forced to applaud.”¹² Sierra Leonean children have reported to the SL Truth and Reconciliation Commission having been forced to kill family members, for example: “One boy was abducted at the age of eight and forced to watch his parents mutilated and killed. Then he was drugged until he didn’t know what he was doing and ordered to “wash”, or kill, his remaining family members. He was taken as a fighter in the Revolutionary United Front until he was later captured by the Sierra Leonean army and again recruited by force into its ranks.”¹³ Similar acts have been reported as practised by Uganda’s Lord Resistance Army¹⁴ (LRA) or UNITA¹⁵ in Angola. Children abducted by the LRA were made to carry out raids, loot and burn houses and kill civilians and

other child soldiers. A boy who escaped the LRA reported: “One boy tried to escape but he was caught. His hands were tied and then they made us, the other new captives, kill him with a stick. I felt sick. I knew this boy from before; we were from the same village. I refused to do it and they told me they would shoot me. They pointed a gun at me, so I had to do it... I see him in my dreams and he is saying I killed him for nothing, and I am crying.”¹⁶

Witnessing atrocities against their families can also be a leading factor for the children to join voluntarily opposing forces. In Burma, children witnessed “parents, relatives, and friends being tortured or killed. There were cases where boys as young as 12 joined rebel armies so they could avenge such atrocities.”¹⁷

Children have been even forced to watch or commit cannibalism, to undo family ties and bond with the armed group. Examples from the DRC include a child associated to an ethnic based armed group being forced to mutilate his mother’s breast for a ritual ceremony where body organs were eaten by the group.¹⁸ In Sierra Leone, “... B saw

11) In Sierra Leone it is estimated that between 10,000 and 30,000 children were recruited by all parties to the civil war. At times the vast majority of the Revolutionary United Front fighters were children, some as young as nine, most of which were abducted, joined by force or fear of reprisals. As with the RUF, in Liberia thousands of children under 15 were used by the NPFL led by Charles Taylor and some were forced to kill or torture family members. Enrique Restoy, “Sierra Leone - the Revolutionary United Front, trying to influence an army of children”, July 2006. 9) See *Reaching Children in War*, Sudan, Uganda and Mozambique, Ed. Cole, P. Dodge & M. Raundalen, Sigma Forlag, Norway, 1991, p. 22.

12) AFRICANEWS-Issue 45, Dec. 1999, at www.reliefweb.int and Human Rights Watch, *Easy Prey: Child soldiers in Liberia*, 1994.

13) Sierra Leone Truth and Reconciliation Commission, Children’s version website, <http://www.trcsierraleone.org/children/chapterthree.htm>.

14) See www.amnesty.org/ailib/intcam/children/kids99/kidreport.htm.

15) See World Vision “Position Paper on Children in Armed Conflict” June 1999, p. 6.

16) Coalition to Stop the Use of Child Soldiers, *Global Report 2004*, Uganda.

17) Aliran’s statement before the UN HR Commission, Press Release HR/CN/917.

18) Interview held by the author with an NGO officer working with demobilised children in DRC.

his father and brother beaten to death and their internal organs removed and given to his mother to prepare as a meal. The mother obeyed or else she would also have been killed. When the meal was ready, the rebels asked B and his mother to join them in eating the meal."¹⁹

Manipulation of children as witnesses, to surrender or humiliate parents
 Manipulating children as witnesses appears to be used as a tool to degrade and morally undermine a target population by weakening its fundamental social cell, the family. A head of family is demeaned by becoming powerless to protect his/her family and being unable to spare them from watching his/her suffering or humiliation. This also appears to be done in order to terrorize families and thus force them to subdue or to flee. For instance, a clear strategy used by Serbian forces in Kosovo in 1999 was to threaten or attack civilians in front of their families. Various human rights organisations confirmed that it was part of the systematic abuses on the civilian population to take Kosovar children as hostages or threaten them with death until the parents produced money or jewels. The parent would be beaten or killed in front of the children if they failed to do so.²⁰ Médecins Sans Frontières (MSF), describing the forced deportation process from Kosovo, specified: "those who do not hand over their money or car quickly enough, or those who do not have

any more money to give, are executed in front of the others."²¹

It is not uncommon to force family members to watch atrocities or to commit crimes deliberately in front of them to show the community what can occur to them if they resist or collaborate with the enemy. In Sierra Leone, children watched amputations, infanticide and killings of family members, as this girl's account illustrates: "While I was being raped, the rebels found my three male relatives who were hiding under their beds. They stabbed them with their bayonets and then shot them. They raped me in my bedroom and then brought me into the living room. Three men and three women were also brought into the room. They were put in line and then the rebels gave them the choice between their life or their money. The rebels strip searched each one and then killed them on the spot. The group was forced to watch as each was killed."²²

As gender-based violence

In her global study on the impact of armed conflict on children, Graca Machel maintains that children affected by gender-based violence also include those who have *witnessed the rape* of a family member and those who are ostracised because of a mother's assault.²³

Forcing children to watch their mothers or other family members being (gang) raped has been a common tool to inflict maximum humiliation on the victim, the family

19) Nick Heeren, "Sierra Leone, and civil war, neglected trauma and forgotten children", 2004, Handicap International, article available at www.child-soldiers.org/resources.

20) OSCE, Report on the Human Rights Situation in Kosovo, June-October 1999. at www.osce.org.

21) MSF, "Kosovo: Accounts of a deportation", Apr 1999, at www.reliefweb.int.

22) Human Rights Watch interview, Freetown, May 25, 2000. See <http://www.hrw.org/reports/2003/sierraleone/sierleon0103-06.htm>.

23) *Supra* n.1 as n. 92.

and the whole community. For instance, the widespread and systematic use of rape and other sexual violence on thousands of girls and women in ten year long conflict in Sierra Leone has been well documented, including cases where children were forced to watch such abuses. A Sierra Leonean witness reported: "In the evening, M.S. was locked in the guardroom at the CDF office with nine other women and her young child: Twenty CDF came to the guardroom and told us, the women, that we could choose between [being] raped or killed. I was raped by a young CDF on the ground of the guardroom. I told him that I was a suckling mother but he did not care. My baby was in the room when he raped me. He made me stoop like an animal. He said, 'I am a government man so no one will ask me anything about this.'"²⁴ "M.F., the thirteen-year-old who was raped by five rebels, witnessed how her stepmother's mother was beaten by the RUF with a long pestle in Momoria village in Koinadugu district in 1998. The rebels then shoved the pestle into her anus. M.F. said that her stepmother's mother was still alive when they left her with the pestle in her anus, which was bleeding"²⁵.

UNICEF has also reported that widespread rapes and other sexual violence inflicted on women and girls in the Democratic Republic of Congo are committed in front of the husbands, fathers and children of the victims.²⁶ For instance, during the

uprising of rebel forces in Bukavu, in Eastern DRC, in June 2004, Human Rights Watch reported that "international and local sources reported dissident forces going from house-to-house raping and looting. In Bukavu, soldiers raped a mother and her three-year-old daughter on June 3 in the center of town. The mother was gang raped by six soldiers in front of her husband and other children ..."²⁷

HRW also reported that Serbian forces in Kosovo "entered women's homes and raped them either in the garden, in an adjoining room, or in front of family members". MSF confirmed this, reporting cases of women being raped in their own homes where their families were forced to watch.²⁸ Likewise during the conflict in Haiti the Inter-American Human Rights Commission (I-AHRC) reported that "... often, a violation occurred in the home of the victim, in front of the children and other family members, and thus not only the woman, but the entire family was terrorised... mothers were raped in the presence of their children."²⁹ Hundreds of women and girls have been abducted and raped during the conflict in Darfur, Sudan. For example, "on 20 June 2006, X armed with a J3 gun and riding a camel attacked a woman, her daughter aged three and her uncle whilst they were collecting firewood outside Doumma IDP camp. X threatened the uncle with death and then proceeded to flog the woman and her child

24) Human Rights Watch, Sexual violence against women and girls during the civil war, at <http://www.hrw.org/reports/2003/sierraleone/sierleon0103-06.htm>.

25) Human Rights Watch interview, Kabala, March 7, 2002.

26) UNICEF press release on systematic rape in DRC.

27) "D.R. Congo: War Crimes in Bukavu", Human Rights Watch Briefing Paper, June 2004.

28) HRM, "Kosovo: rape as a weapon of 'ethnic cleansing'", at www.hrw.org/hrw/reports/200/fry/Kosov.

29) I-AHRC, Report on the situation of Human Rights in Haiti, at <http://www.cidh.oas.org/countryrep/enha95/eh95p1.htm>, para. 122.

all over their bodies before abducting them. X took the woman and her child to a nearby forest where he repeatedly raped her.”³⁰

Breaking cultural norms, for instance by forcing children not only to watch but to actually rape their mothers, or hold them while they are being raped, or the rape of old women in front of their sons and husbands, has been used in many cases to degrade and create terror in the community. In Sierra Leone, men have been forced to rape members of their own family under threat of being mutilated by having their “hands or arms cut off.”³¹ Rebels also forced children into incestuous practices, one of the biggest taboos in any society: “They witnessed sons forced at gun point to rape their own mothers.”³² “One survivor witnessed the RUF trying to force a brother to rape his sister in Sambanya village in Koinadugu district. When the brother refused to do so, the rebels shot him. Fathers were forced to rape their daughters. Fathers were forced to dance naked in front of their daughters and vice versa.”³³ This was also part of the recruitment process into the rebel forces. Children themselves report: “Many of us were forced to kill or rape our own family members, in order to ruin our moral sense and destroy our identity and our family

ties.”³⁴ Forced incest has been documented in other conflicts as well, such as Bosnia Herzegovina, Rwanda and Haiti. Testimonies were collected from Bosnian “young children who watched from hiding as chetniks raped their mothers and sisters, or forced men to rape their own family members”³⁵, particularly men being forced to rape their own sons³⁶ and daughters. In Haiti, “in many cases, the woman was forced to witness the rape or murder of her daughter or other family member before being herself raped. In one case of which the IACHR was informed, a 15 year-old was forced to rape his own mother.”³⁷

Upon perpetration of enforced disappearances The Inter American Human Rights Commission³⁸ found, based on numerous cases, that during the perpetration of disappearances in Peru, “generally, the soldiers or police paid little attention to the witnesses and proceeded to do what they came to do anyway. Arrest in people’s home was usually carried out in front of whoever happened to be there: wives, children ...”. In Argentina, the truth and reconciliation Commission (CONADEP) gathered consistent testimonies of kidnapping and torture conducted by the military in front of the children of the

30) UNMIS Child Protection report, June 2006.

31) Reported by Amnesty International.

32) See Speech delivered by the Vice President Berewa at the conference on “the Rule of Law and the Legacy of Conflict” at Gabarone, Botswana from 16th-19th January 2003.

33) Human Rights Watch, Sexual violence against women and girls during the civil war, available at <http://www.hrw.org/reports/2003/sierraleone/sierleon0103-06.htm>.

34) <http://www.trcsierraleone.org/children/chapterthree.htm>.

35) “Mass Rape in Bosnia Breaking the Wall of Silence” an interview with Seada Vranic.

36) Comment by Kate Mose on novel by Slavenka Drakulic, Witness for the persecution.

37) Inter-American Commission on Human Rights, Chapter V, Human Rights Situation in Haiti, available at <http://www.cidh.oas.org/women/Haiti95women.htm>.

38) Report N°54/99, Peru, April 13, 1999, para. 81.

victims. The Commission's report indicates that "parents were taken from their homes and put in cars to unknown destinations in front of their children".

A survivor reports the following: "... we had an electric fan that they used as a 'picana', but to make the electric blow more effective they opened mineral water bottles to throw water on my mother, who had been tied to a chair. While conducting this savage act, another one flagged her with a belt to the point of making her body bleed and deform her face. After a long while they decided to take us all, except for Viviana who was 6 months old and who was left at home with my 13 year old sister"³⁹

Watching torture

during interrogation and detention

It has been argued that "generally speaking, torture already starts in the home at the time of arrest. Brutal policemen or soldiers break into the home and smash the furniture, beat up and perhaps rape the wife in front of the husband and children ..."⁴⁰ In Argentina, testimonies of survivors and witnesses of torture indeed indicate that "the interrogation of victims started in the victims' own residence, without waiting to take them to the Clandestine Detention Centres, in presence of their family members, who were thus victims too of the cruel treatment". In many cases children are kept in detention together with their parents.⁴¹ Family groups are often tortured together, sometimes separately but

in view of one another, or in different cells, while one is aware of the other being tortured.⁴² In Argentina sometimes the children were also driven to the "Clandestine Detention Center", a torture center, where they were present while their parents were being tortured, or else the children themselves were tortured in front of their parents. Some people reported that while being interrogated they could hear the screaming of their family members being tortured. A survivor reported: "Many times we were threatened to witness the torture upon family members and in some occasions this happened. In my case, I had to watch how they tortured my husband. Another detainee, named X, was forced to witness the torture of her son who was 12 years old ..."⁴³

The situations just described provide indications on the circumstances in which children are forced to watch atrocities against parents or family members and why. These circumstances are not uncommon. It must be borne in mind that at least 300,000 children under 18 are estimated to be serving in armed forces or rebel groups in approximately 30 countries, and that torture is reportedly practised in at least in 92 countries.⁴⁴

A.b. Effects on children of witnessing crimes against parents or caregivers

The wide range of symptoms of PTSD and therapeutic responses, are beyond the scope of this study, which focuses on the legal as-

39) Nunca Mas, Informe de la Comisión Nacional sobre la Desaparición de Personas, Testimony of C.A.C (Legajo N° 1806).

40) I. Genefke, I. Lunde, J. Ortman, B. Sorensen, "Rehabilitation of Torture Victim" in *Torture*, Supp. No. 1, 1992.

41) *Supra*. n. 18.

42) J. Timerman, *Prisoner without a Name: Cell without a Number*, Weidenfield & Nicholson, London, 1981. p.148.

43) Nunca Mas, Informe de la Comisión Nacional sobre la Desaparición de Personas, in "Secuestros en presencia de los niños".

44) D. Summerfield, *ibid* at 392-401.

pects of making children witness crimes.⁴⁵ Yet, the legal qualification of such conduct and the reparation obligations towards the victims are very much linked to the suffering and potential prejudice caused to children by the conduct.

UNICEF revealed the conclusions from a 1997 study on Kabul Afghan children, where almost all of the children interviewed had witnessed acts of violence. Most children surveyed were suffering from nightmares, anxiety and concentration problems, which also affected their appetite and their ability to play. MSF in Sierra Leone reported that witnessing events such as torture, execution, (attempted) amputations and public rape often results in traumatic stress or even PTSD. Traumatic stress associated with physical complaints like headaches and body pains was reported more frequently.⁴⁶

Similar results are found in studies on Vietnamese, Lebanese,⁴⁷ Palestinian, Israeli, Irish, Afghan, Pakistani, Sri Lankan, Ugandan,⁴⁸ Rwandan, Colombian, Angolan,⁴⁹ Liberian and Mozambican children. Some of the PTSD symptoms often reported are difficulty in sleeping, pessimism about the

future, depression, aggression, low self-esteem and shame and guilt at not having intervened more effectively.⁵⁰

In particular, there is increasing evidence among psychiatrists that children witnessing severe violence inflicted on a family member show signs of PTSD,⁵¹ most gravely in cases of forced separation from parents and witnessing violence against parents.⁵² It is argued that it can be even highly traumatic for a child if 'soldiers' only threaten to kill his/her mother and the child believes that they will do so, since "it is the child's subjective experiences, the meaning that the child gives to the event, that is important"⁵³.

An analogy can be drawn with situations of children witnessing violence in the ambit of the private sphere (domestic violence), which has often been addressed by domestic courts (e.g. deciding on parent contact) and by social welfare systems. In such cases, research⁵⁴ and surveys have revealed adverse behavioural, psychological, social and emotional effects on children who witness violence within the family. Actually, observance of serious and sustained domestic violence has been argued as producing, in some cases, an emotional state on children

45) See Wilson, J.P & Raphael, B. Eds, *International Handbook of Traumatic Stress Syndromes*, Plenum Press, New York, 1993.

46) Medecins Sans Frontieres, "Assessing Trauma in Sierra Leone", 11 Jan. 2000, at www.relief.org.

47) See study "The Grapes of Wrath", at www.unicef.org/lebanon.

48) Amnesty International, Uganda, "Breaking God's commands", 18 Sept. 1997, AI Index: ASA 04/01/98.

49) See UNICEF, "The Trauma of the War" in *The State of the World's Children 1996*.

50) See D. Black and M. Newman, "The Effects

on Children of Witnessing Violence Perpetrated Against their Parents or Siblings" in *Childhood Abuse*, Ed. G. Van Bueren, Dartmouth Publishing Ltd., 1998, pp. 211-215.

51) D. Fish, "Domestic Violence and Children", in *Fam. Law*, Feb (1995), pp. 82-84.

52) M. Snipstad and Dr. L. Williamson, UNICEF, Skopje (March-June 1999).

53) See M. Raundalen *supra*, n. 9 at p. 29.

54) See D. Wolfe, "other forms of Child Maltreatment", *Child Maltreatment*, CL, Mille-Perrin & R.D., Perrin, Sage Pub. London, 1997, p. 197-212.

indicative of actual *psychological abuse of the child*.⁵⁵

It should be noted though that the actual impact of traumatic experiences on children depends on various factors, such as age, developmental stage, religious beliefs and the different cultural and family/community coping mechanisms.⁵⁶ It should be also noted that “some children show signs of traumatisation only in the short-term and not in the long-term, some children show few signs immediately but have delayed reactions, and some children are traumatised in both the long and short-term. Furthermore, some children may never be traumatised by events that have profound pathological effects on other children.”⁵⁷

Bearing in mind the above cultural and individual differences, it cannot be ignored or dismissed though, that exposure to cruel violence against parents/caregivers is proved to cause stress or mental suffering that may result in adverse consequences on children’s immediate or longer-term health, intellectual, psychological and social development.

Moreover, it has been shown that in fact children often witness crimes not just accidentally, but as part of a deliberate plan or pattern of abuse with a purpose, such as demeaning or humiliating families and communities, or initiating children as combatants. What are the implications in international law of the above findings; what can be done about it under international law?

55) H. Conway, “Emotional Abuse in Domestic Violence Cases”, in *Fam. Law*, Sept. 1996, p. 570-72.

56) Summerfield, in *Rethinking the Trauma of War*, Ed. Patrick J. Bracken, C. Petty and SCF, Free Association Books, London, 1998, p. 9-38.

B. The human rights aspect of forcing children to witness crimes

The practical interest of defining the act of making children witness crimes against parents as a human rights violation or a crime against the child, and of arguing the need for accountability and reparation to children as victims of a crime distinct from the one they witness, can be questioned. This is legitimate since, regardless of legal definitions, children who have been exposed to witnessing atrocities, in general or specifically against close family members or friends, often receive some assistance through community support or from health, psychosocial or rehabilitation programmes. This support implies an acknowledgement of the suffering and the adverse effects caused on children’s lives by making them watch such crimes. And at the same time they do not expose children to potential re-traumatising effects or to security risks by participating in human rights’ reporting or justice processes. However, it can also be argued that unless forcing children to watch crimes is acknowledged itself as an abuse against the child and those responsible for stopping or punishing it are made aware, it is less likely that such abuses will be stopped or prevented in the future.

B.a. Is making children witness crimes unlawful under international law?

It seems clear, especially during armed conflicts, that children witnessing crimes can be the consequence of a deliberate act or a reckless omission, which results in, or is in-

57) S. Eldebour, R.t. Bensele and D.T. Bastien, “Ecological Integrated Model of Children of War: Individual and Social Psychology”, in *Child Abuse and Neglect*, Vol.17, 1993, pp. 805-819.

tended to produce, suffering distress on children. Can such act or omission constitute torture or inhuman treatment against the child? Indeed, forcing parents to watch cruel treatment inflicted on their children has been used as a form of torture against the parents. Likewise, and even more so given the special vulnerability of children, it could be argued that it amounts to torture to force children to watch the torture inflicted on their parents. Even if the intention, by doing so, were not to torture the child but the parents, it could be implied the intention to cause suffering on the children by making them watch their parents being tortured and through that, cause greater pain to the parents who are aware of the child's suffering and cannot prevent it. Yet, to sustain this conclusion, I will first analyse the definition of torture and inhuman treatment according to international law, and examine whether the conduct under study falls under such definition.

Since torture is understood as constituting "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment",⁵⁸ I will first examine the concept of inhuman treatment (which comprises degrading and ill treatment). However, it must be noted that in several cases certain regional and international human rights bodies, namely the UN Human Rights Committee (HRC) and the European Court on Human Rights (ECHR), refer to torture and or inhuman treatment without distinguishing in which circumstances it was one

or the other. Making this distinction is difficult in practice and may not be necessary from a practical point of view.⁵⁹

According to the ECHR, for treatment to be inhuman it must be intended to cause "severe suffering, mental or physical, which in the particular circumstances is unjustifiable"⁶⁰. These distinctive elements, have been interpreted as follows:

- *It may cause mental suffering* "by creating a state of anguish and stress by means other than bodily assault".⁶¹ The prohibition of torture and inhuman treatment has been actually interpreted by the HRC as "relating not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."⁶²
- *The suffering must be severe.* The term severe leaves scope for interpretation, as for instance, the pain of a child can be, under equal circumstances, higher than the suffering of an adult. In particular, the difficulty with mental suffering is that the degree of suffering is not susceptible to precise gradation, as opposed to physical suffering.⁶³ The ECHR's caselaw consistently maintains that ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the European Convention on Human Rights which prohibits inhuman treatment. But it also maintains that the assessments of this minimum are relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical

58) Declaration on Torture (1975), Art.1(2).

59) Human Rights Committee, General Comment No.7, para. 2(1982).

60) 12 Yearbook, The Greek Case 504 (1969), at 186.

61) 12 Yearbook, The Greek Case 461 (1967).

62) General Comment No. 20 (1992).

63) See N. Rodley, The treatment of prisoners under International Law, Clarendon Press, Oxford, 1999, p. 94.

and/or mental effects, and in some cases, the sex, age ...⁶⁴

- *Causing suffering must be deliberate.* This intentional element may be often difficult to prove. Can negligence, though, suffice to allege inhuman treatment? The International Criminal Tribunal for the former Yugoslavia (ICTY) defined cruel treatment as “an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,”⁶⁵ and the International Criminal Tribunal for Rwanda has alleged responsibility for mental suffering caused by deliberate negligence⁶⁶. Also the Special Rapporteur on Torture maintains that “negligent behaviour leading to severe suffering [...] might well incur condemnation as inhuman and/or degrading treatment”⁶⁷.

We can conclude from the above that for violent or abusive behaviour to be considered inhuman treatment, the conduct should be intended to cause severe mental (or physical) suffering. It is not necessary, hence, that the conduct results in actual injuries, impairment or mental disorders, as proof of the suffering sought. Therefore, children subjected to watching crimes against parents can be victims of inhuman treatment because of the mental suffering intended by such conduct, regardless of whether the children present or not post traumatic stress

disorders or other symptoms of emotional suffering.

As to whether certain ill treatment amounts to torture, I depart from the definition of torture under International Human Rights Law stated in the Torture Convention⁶⁸ since there is evidence that there is now general acceptance of its main elements.⁶⁹ The latter defines torture as “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 pains 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...”

The intentional element of torture deserves particular consideration. The EHRC⁷⁰ has judged that the purpose is a constitutive element of torture, in particular to obtain information or confessions or punishment. The UN Convention Against Torture (CAT) adds amongst the possible purposes of torture “any reason based on discrimination of any kind” (Art.1). The Inter-American Torture Convention (Art.2) goes even further defining torture “as a means of intimidation” or “for any other purpose”, and the ICTY stated that “humiliation” can be a purpose

64) Northern Ireland v. UK, Series A, No. 25,41, para. 162.

65) Celebici Judgement 16 Nov. 1998, para. 552.

66) ICTR, Kayishema & Ruzindana, Case No. ICTR-95-1-T, 1995, para. 151.

67) Rodley, supra n. 46, p. 78.

68) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT), entered into force June 26, 1987, Art.1 (1).

69) Sustained by the ICTY in Furundzija, Judgement of 10 Dec. 1998, para. 160-161.

70) See supra n. 43.

of torture.⁷¹ Other broader interpretations include that of Judge Matscher, in his separate opinion in the *Northern Ireland* case, suggesting that purpose may include “other reasons” such as “sadism”. In particular, the intentional element of torture has been interpreted more broadly when it applies to suffering inflicted on children. Referring to torture of Filipino children, the World Organisation Against Torture (OMCT) alleged the purpose was “to sow fear in the community”.⁷² And it argues that “to the extent to which torture is applied to children it is necessary to take into consideration not only intention, but also what is clearly gross negligence”.⁷³

Further, for the particular case of making children witness crimes against their parents or caregivers, two specific elements need closer analysis in light of the above constitutive elements of inhuman treatment and torture: the act of *making someone watch* ill treatment inflicted upon a third person and secondly, the relevance of the *family* or *care link* between the witness and the person whose ill treatment is being witnessed.

As of the first element, the act of making someone witness a crime, it was addressed by the ICTY in the *Furundizja* case.⁷⁴ “Witness D was then forced to watch Accused B’s sexual attacks on Witness A. The physical attacks upon witness D, as well as the fact that he was *forced to watch sexual attacks on a woman*, in particular a woman whom he knew as a friend, cause him severe physical and mental suffering”. It adds: “in this

regard both witnesses were *humiliated*”⁷⁵ The Court failed though to distinguish whether the act of forced witnessing was itself inhuman treatment.

The Torture Convention’s definition of torture actually does appear to be applicable in cases of *forced witnessing of crimes*, as follows: torture is “any act by which severe pain or suffering (as the one caused to the child witness by forcing him/her to watch ill treatment upon a third person, e.g. family member) whether physical or mental, is intentionally inflicted on a person (in this case the child witness) for such purposes as obtaining from him or a third person (in this case the third person whose ill treatment the child is witnessing) information.” Indeed, the need for flexibility in the interpretation of human rights norms has been invoked by the EHRC in the *Selmouni* case, referring to torture and inhuman treatment. The Court said that the Convention is a “living instrument, which must be interpreted in the light of present-day conditions”.⁷⁶

As for the second element, the family link, it has been manipulated to make both the witness and the person being tortured suffer.

There are various examples where courts or quasi-judicial bodies have acknowledged the suffering inflicted on individuals by making them watch or listen to their children or relatives being tortured. For instance, in the *Akayesu* case a witness said “her mother begged the men... to kill her daughters rather than rape them in front of her...”⁷⁷

71) See supra n. 40 at p. 162.

72) Supra n. 47.

73) Eric Sottas, OMCT Bulletin No. 62&63, September 1997, p. 67.

74) Supra. n. 40 para. 267 (ii).

75) Ibid. Para. 127.

76) *Selmouni v France*, Judgement of 28 September 1999, para. 101.

77) *Akayesu*, Judgement 2 Sept. 1998, at para. 5.5

In the *Estrella case*,⁷⁸ the alleged psychological torture consisted “... in threats of torture or violence to relatives or friends or... in threats of making us witness the torture of friends...”

In the *Celebici case*, the ICTY seems to sustain that the manipulation of the family link in the commission of the crime aggravates the crime, amounting to cruel and inhuman treatment. The Trial Chamber, based on the findings that the defendant forced two brothers to commit *fellatio* with each other and ordered a father and son to beat one other, stressed “the heinous nature of the acts involved and the depravity of mind necessary to conceive of and inflict such forms of suffering”. It especially found that “...the deliberate act of forcing them, *father and son*, to beat one other repeatedly over a period of at least ten minutes constitutes inhuman treatment under Art. 2 of the Statute and cruel treatment under Art. 3 of the Statute.”⁷⁹

The relevance of the family link has been particularly emphasised by the HRC in cases of enforced disappearances. Close family members of disappeared persons have been recognised as victims of inhuman treatment by the government responsible, for the “anguish and stress” caused by “the continuing uncertainty concerning (his) her fate and whereabouts... *The mother is a victim of the violations suffered by her daughter*” (emphasis added).⁸⁰ The Inter American Human Rights Court has consistently granted compensation to the families of disappeared on similar grounds. Also, the EHR Court has found

violation of Art. 3 (inhuman treatment), against the families of the disappeared. In the *Caciki case*, the Court specified that whether a family member of the disappeared is a victim of inhuman treatment will depend on the existence of special relevant factors, such as “the proximity of the family tie- in that context, a certain weight will attach to the parent-child bond – (and) ... *the extent to which the family member witnessed the events in question ...*” (emphasis added).⁸¹

The UN Special Rapporteur on Torture has also acknowledged the importance of the family link by including among examples of psychological torture as “...most powerful of all in many cases, the threat that physical abuses will be extended to *persons close to the prisoner*” (emphasis added).⁸² It can be argued that *forcing* someone to witness physical abuse against persons close to him/her would cause as much or even greater suffering than *threatening* the person with committing such physical abuse. In that sense, forcing a person to watch physical abuse against a family member can certainly be psychological torture.

Finally, with regard to the specific situation under study, the I-AHRC has set a clear standard by specifically qualifying the witnessing by children of crimes against parents as torture. It stated: “... The two women ... were beaten and decapitated in front of the three children. The victimisers then opened the stomachs of the victims, from the waist to the neck ... These actions obviously constitute acts of physical torture

78) *Estrella v Uruguay* (74/1980), GAOR, HRC 38th session, Supplement No. 40 (1983), Annex XII.

79) *Celebici*, Judgement of 16 November 1998, para.1276 and 1070.

80) *Quinteros v Uruguay* (107/1981), HRC Re-

port, GAOR, 38th session, Supp No.40 (1983), Annex XXII, pp.119-120.

81) *Caciki v Turkey*, Judgement of 8 July 1999, para.98.

82) *Supra* n.46, at p. 10.

against those who are killed *as well as psychological torture against those who are forced to witness these events...*⁸³

Summing up, it can be argued that deliberately or recklessly (gross negligence) committing crimes in front of a child, so as to inflict severe mental suffering on the child, for any purpose (such as humiliation, intimidation or even sadism), is *inhuman treatment* against the child. In most severe cases, for instance when a child is forced to watch cruel treatment inflicted on his/her parent, such behaviour would amount to *torture*, since mental torture can involve “the infliction of severe pain or suffering through threats or the compelling of the victim to watch his or her family being tortured.”⁸⁴

The recognition of certain acts considered inhuman treatment as amounting to torture can have significant implications in terms of individual and state responsibility, as we will see later. In this light, then, it is worth emphasizing that forcing children to witness crimes against their parents can be considered torture against the child.

Each type of conduct, inhuman treatment and torture, is certainly unlawful: each is prohibited by most national legal systems, and as an absolute prohibition – i.e. even in state of war or public emergency⁸⁵ under International Human Rights Law.⁸⁶ Torture, in particular, is prohibited under general international law, as a peremptory norm allowing

no derogation by other norms (i.e. by treaty law and even by “ordinary” customary law), unless by those with the same customary force – i.e. *ius cogens*).⁸⁷

In times of armed conflict, inhuman treatment and torture are also expressly prohibited under International Humanitarian Law. All four 1949 Geneva Conventions (GC) prohibit torture and other ill treatment of persons protected by them. In particular, some especially heinous acts are defined as “grave breaches” of the Conventions,⁸⁸ and these grave breaches include “torture or inhuman treatment” and “wilfully causing great suffering or serious injury”. But the GC apply in international armed conflicts, while in most cases children witness crimes in internal conflicts, which comprise most of today’s armed conflicts. Protocol I (PI) to the GC actually provides that internal wars of national liberation should also be considered as international conflicts (Art. 1(4)), and therefore the grave breaches’ regime would be applicable. Moreover, in any non-international armed conflict, Common Art. 3 to the Geneva Conventions applies as a minimum standard, and it expressly prohibits “cruel treatment and torture and outrages upon personal dignity, in particular humiliating and degrading treatment” against those who do not take part in hostilities. Common Art. 3 is now well established as belonging to the corpus of customary

83) I-AHRC, Third Report on the HR Situation in Colombia, <http://www.cidh.oas.org/countryrep/colom99en/chapter-4htm>, para. 303.

84) L. Sunga, *The Emerging System of International Criminal Law*, Ed. Cluewer Law Int., 1997 p. 1333.

85) Included as non-derogable rights in ICCPR, Art. 4 and EUCHR, Art. 15, also in CAT, Art. 2 (2).

86) See UDHR, Art. 5, ICCPR, Art. 7, EUCHR, Art.3, IACHR, Art. 5(2), ACHR, Art. 5, I-A Convention for the Prevention of Torture (1987), European Convention for the Prevention of Torture (1989), Torture Declaration (1975) and CAT (1987).

87) See Rodley, *Supra* n. 46, at p. 62-74.

88) Arts.49, GCI; 50;GCII;129;GCIII;146;GCIV and Art. 85, PI

international law, and is moreover applicable both to state and non-state actors.⁸⁹

Having concluded that making children witness crimes against parents or caregivers is unlawful as it constitutes inhuman treatment, or in severe cases torture, against the child, I will now examine the implications of this unlawful conduct in terms of accountability for the state concerned and the individual perpetrators.

B.b. The question of accountability

B.b.1. State responsibility

State responsibility arises from the breach of an international obligation. In practice, the acts herein studied are often perpetrated by members of armed forces, paramilitary or law enforcement officials. Since the state acts through its representatives, their conduct is imputable to the state. Furthermore, the state would be responsible even if it did not specifically order the wrongful conduct concerned and even if its servants acted in ways beyond their orders, or beyond their powers (*ultra vires*), or in violation of national/international law.

What about state responsibility if such unlawful acts are committed by private individuals (e.g. rebels)? The state would also be held responsible for their acts if it encouraged them or endorsed them as its own. For the cases of armed conflict, the ICTY has expressly declared that "...under current

international humanitarian law, in addition to individual criminal liability, state responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torture".⁹⁰ It is now well established that state responsibility will also arise if it failed to exercise the *due diligence* which could reasonably have prevented such conduct by private individuals.⁹¹ The I-AHRC confirmed that state responsibility is engaged in the case of its lack of diligence to prevent, investigate and punish abuses⁹² by private individuals, either by its complicity, support and acquiescence of unlawful acts or by its failure to prevent and punish them. In this light, some have even defined domestic violence as "domestic torture", seeking to underline the state responsibility in the so-called "private sphere" when it fails to stop, punish or prevent abuses perpetrated in the home (e.g. wife beating, which in some cases has been assimilated by its clear analogies to political torture in cells).⁹³

Children witness crimes in situations of internal or international armed conflict, during internal disturbances and in peacetime. I will thus examine the state's obligations to protect children from torture and other ill treatment in such situations.

Under International Human Rights Law⁹⁴

I will examine states' obligations to protect children specifically under the UN Conven-

89) Nicaragua v U.S.A. (Merits), 1986 I.C.J Reports 14, pp.113-114, para.218. Further, Protocol II to the GC (PII), which develops and supports Common Art.3, prohibits "violence to the life, health and physical or mental well being of persons" in internal armed conflicts (Art.4). However, PII sets a high threshold for its applicability, such as requiring a certain level of territorial control by rebel forces (Art. 1).

90) Furundijza, Supra.40, para. 142.

91) See R. Higgins, Problems and Process, Clarendon Press, Oxford,1999, pp. Also see T. Meron, Human Rights, Humanitarian Norms and Customary Law, Clarendon Press, Oxford 1989, p. 170-171.

92) Velazquez Rodriguez, 21 July 1989, Ser C No. 7, para. 172-73.

93) See Claudia Hasanbegovic, "Cruel but not unusual" in Trouble and Strife, No. 39, 1999.

tion on the Rights of the Child (CRC), due to its to virtually universal standing (ratified by 191 states) and its comprehensive protection of children. It will be shown that the protection obligations under the CRC implicitly include the state obligation to protect children from being made deliberately or recklessly witness atrocities.

Article 6(2) of the CRC says: "States Parties shall ensure to the maximum extent possible the survival and development of the child". This introduces a dynamic⁹⁵ aspect to the right to life, including preventative action and refers not only to physical but also to mental, emotional, psychological, social and cultural development.⁹⁶ Art. 24 recognises the child's right "to the enjoyment of the highest attainable standard of health". Health has also been widely interpreted broadly as both physical and *mental* well being. Moreover, states parties shall "ensure that no child shall be subjected to torture or other cruel or degrading treatment or punishment" (Art. 37), and shall..."protect the child from *all forms* of physical or *mental violence*, injury or abuse, neglect or negligent treatment, maltreatment..."(Art. 19). This provision thus includes protection not only from physical but also from psychological violence. Finally, states are obliged, "in accordance with their obligations under international humanitarian law, to ensure the protection and care of children who are affected by an armed conflict" (Art. 38(4)).⁹⁷

95) General Guidelines Regarding the Form and Contents of Periodic Reports to be submitted by States Parties under article 44, paragraph 1 (b) of the Convention, 11 Oct. 1996.

96) See D. Reichenberg, S. Friedman in *International Responses to Traumatic Stress* Ed. By Y. Danieli, N. Rodley and Lars Weisaeth, Bayswood Pub., New York, 1996, p. 315.

This would include protecting children from being targeted during conflict such as forcing them to watch atrocities upon parents/caregivers.

The above provisions imply various positive obligations, grounded on Art. 2 which obliges states parties to "*respect*" and "*ensure*" the rights guaranteed in the Convention. From the premise that making children witness atrocities violates children's rights, particularly to be protected from inhuman treatment, torture and all forms of violence including in armed conflict, states have hence a positive obligation to ensure that those violations don't occur. Such positive obligations, says the CRC Committee, include "taking preventive measures to ensure the health and full development of children, making complaint procedures and remedies available to the child, awareness campaigns, education and training to prevent torture, and establishing an independent monitoring system".⁹⁸ Further, the HER Commission said in the *Costello case* that states parties to the EUCHR "do have an obligation under Art.1 of the Convention to *secure* that children within their jurisdiction are not subjected to torture, inhuman or degrading treatment or punishment contrary to Art.3 of the Convention". In 1998, in *A v UK*,⁹⁹ the HER Court went further, holding that the states' obligation rising from Art.1 extended to treatment administered by *private individuals*.

97) Note that the African Charter on the Rights and Welfare of the Child (Art. 22(3)) goes further, providing for the special protection of children caught up in "tension and strife".

98) Recommendations on the implementation of Art.19, CRC/C/58, para. 61.

99) *A v UK*, Judgement of 23 Sep. 1998, Preports 1998-VI, no. 90.

Also, as to inhuman treatment in general, under International Human Rights Law states are obliged to investigate complaints, establish responsibility of the individual perpetrators and provide effective remedies to victims. Moreover, in the specific case of torture, it implies bringing perpetrators to justice, compensating the victims and adopting measures to prevent recurrence.¹⁰⁰

In short, International Law intends to bar not only actual breaches but also potential breaches by prohibiting “not only torture but also the failure to adopt the national measures necessary for implementing the prohibition.”¹⁰¹

Under International Humanitarian Law Beyond the above examined obligations under the Geneva Conventions and the additional Protocols prohibiting inhuman treatment and torture, a customary principle of the law and customs of war, is that of sparing combatants and civilians from *unnecessary suffering*.¹⁰² This is reflected, *inter alia*, in the norms ruling lawful targeting¹⁰³ during attacks and the choice of means and methods of warfare¹⁰⁴. This principle to avoid unnecessary suffering underlies certain special measures protecting children, such as their evacuation from conflict areas¹⁰⁵ and the creation of hospital or safety areas for the most vulnerable, including young children.¹⁰⁶ Such provision for “safe zones” developed into the concept of *children as “zones of peace”* (initially for vaccination/aid access

purposes), promoting the idea of protecting children from attacks. Most specifically, PI, Art. 77(1) expressly provides that “children shall be the object of *special respect* and shall be protected from any incident assault” (emphasis added).

The above norms specifically protecting children reveal that the parties to the Geneva Conventions and Protocols are bound both by *positive* and *negative* obligations, respectively to *protect* and *respect* children.¹⁰⁷ As of children witnessing atrocities, states would be hence positively obligated to take preventive measures, such as military training on the above applicable laws so as to prevent forcing children to watch violent acts or cruel treatment against parents or caregivers. Parties to the conflict also have a negative obligation to refrain from inflicting inhuman treatment on children, this including refraining from forcing children to witness crimes.

B.b.2. Individual criminal liability

A second question, beyond the state responsibility, is whether the authors of crimes committed deliberately or recklessly in front of the children of the victim can also be held criminally responsible for forcing the children to watch those crimes.

It has been concluded above that making children witness crimes against their parents/caregivers constitutes itself inhuman treatment and even torture against the child. Under domestic laws, torture and other forms

100) Rodley, *supra* n. 46.

101) ICTY, *supra* n. 40 para. 148.

102) Hague Convention IV, Art. 23; PI, Art. 35.

103) PI, Arts. 51,52,54 and 56.

104) PI, Art. 35.

105) Art. 78 PI, Art. 4 (3)(e), PII.

106) Art. 14, GCIV.

107) Positive obligations are such as to provide food and health (PI, Art. 70.1). Negative obligations include, for example, refraining from recruiting children under 15 years of age into armed forces (PI, Art. 77(2); PII, Art. 4, para.142).

of ill treatment against children often constitute criminal offences entailing individual liability. Under Humanitarian Law, the GC expressly¹⁰⁸ establish that any state should either try or extradite to stand trial the perpetrator of grave breaches¹⁰⁹ of the Conventions and its additional Protocols (i.e. mandatory universal jurisdiction). Special attention should be paid to the individual liability in internal armed conflicts, where children witnessing crimes seems to most often occur. A number of developments indicate that violations of Common Art. 3 (applicable in internal armed conflicts) are war crimes.¹¹⁰ Moreover, the ICTY sustained in the *Tadic case* that even “*customary international law* (emphasis added) imposes criminal liability for breaches of Common Art. 3.”¹¹¹ Therefore, grave breaches of the laws of war, which include inhuman treatment and torture, both in international and internal armed conflicts, are crimes under international law and allow for universal jurisdiction. Further, if forcing children to witness crimes can amount to torture, due to the inherently universal character of its prohibition, CAT recognises mandatory universal jurisdiction and thus States are obligated to extradite or prosecute the perpetrators of torture, both if it was committed in conflict or peacetime.¹¹²

Moreover, the Statutes of the ICTY,

ICTR and the Sierra Leone Court, have expressly included torture and inhuman treatment within grave breaches of the Geneva Conventions, violations of Common Art. 3 and crimes against humanity under their jurisdictions. The Statute of the International Criminal Court (ICC) has further confirmed this recognition of torture and inhuman treatment as war crimes and crimes against humanity under the Court’s jurisdiction¹¹³ (this with a virtually universal application, i.e. not limited only to crimes committed in specific countries and over specific periods of time as the above tribunals).

Hence, if making children witness crimes against parents/caregivers constitutes inhuman treatment or torture and/or “wilfully causing great suffering or serious injury to body or health”, in conflict situations it constitutes a *war crime*. Further, torture and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” when committed as part of a widespread or systematic attack directed against any civilian population,¹¹⁴ in war, internal strife or in peacetime, have been recognised as *crimes against humanity*. This is particularly relevant for the case under study, since forcing children to witness crimes against parents in many situations has been a pattern of abuse and part of systematic attacks

108) See Arts.50, GCII;51. GCII; 130, GCIII; 147, GCIV; Art. 85, PI.

109) See supra. n. 69.

110) See Art. 3, ICTY Statute, Art. 4, ICTR Statute, Art. 5, ICC. Also T Meron, “International Criminalization of Internal Atrocities”, 89 AJIL, 544(1995).

111) *Tadic*, 2 Oct. 1995, para. 134.

112) CAT, Arts. 5 (2) and 7. See Rodley, supra n.

46, p. 130.

113) Article 8 of the Rome Statute of the International Criminal Court stipulates: “the Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes”. The acts subsequently listed as constituting war crimes include torture or inhuman treatment.

114) Cf. article 7.1 of the Statute of the International Criminal Court.

against a civilian population. Torture can also amount to genocide if the constitutive intentional element of genocide (to destroy a group) is present.¹¹⁵

This has obvious implications for national and international courts or transitional justice mechanisms with jurisdiction over war crimes, crimes against humanity and genocide, particularly those currently dealing with situations where forcing children to watch crimes against parents has been consistently reported and to a certain extent documented. The issue of making children witness crimes is thus particularly relevant to the ICC, for crimes being investigated in the DRC and Uganda, the ICTR, ICTY and the Special Court of Sierra Leone. Moreover, the fact that enlisting or conscripting children into armed forces or groups has been expressly recognised as a war crime under the Statute of the International Criminal Court, and that the Court's first indictment in the DRC has actually been on charges of child conscription, can have a positive impact on addressing impunity for forcible child witnessing of atrocities against parents/family as part of the recruitment process and use of children by armed forces/groups in DRC. Likewise for the Special Court in Sierra Leone which has prosecuted individuals for child recruitment.

Finally, for the specific situation of criminal liability for making children witness crimes, the questions of proof of intention, negligence, command responsibility and superior orders need to be raised. First,

is whether a public official or an insurgent commits an atrocity in front of the victim's children *intentionally*. The intention, by so doing, to inflict suffering *on the children* should be proved, which may be difficult. Yet, I would argue that if the purpose sought by making the child watch a crime against the parent was proved to be actually inflicting pain on or humiliating the parent (not the child) by making the child watch, it is implied the perpetrator's intention to make the child suffer by forcing him/her to watch, and by causing such suffering to the child further humiliate or punish the parent. Second, on the question of negligence, the public official or insurgent may *recklessly* commit atrocities, in disregard of the fact that the victim's children are watching and of the obvious or foreseeable impact of such conduct on the children. In this case, we may ask whether it was foreseeable that the children would be present, whether the perpetrator could anticipate the suffering and potential harm caused to the child by witnessing a crime against her/his parent, and whether the perpetrator could have done something to prevent it. Finally, whether the latter knew or should have known that making children witness was an unlawful act.

It appears that, by common sense, brutally murdering or raping a mother or father in front of their children would cause significant mental suffering to the children. Yet, inflicting this pain on the child witness may not necessarily be perceived as manifestly illegal or a crime itself against the child. Could the perpetrator invoke superior orders? In order to bear criminal responsibility, the superior order must be obviously criminal. If the soldier was ordered to force children to witness crimes, as a means of *torture* against the child or the parent, superior orders would certainly not be a defence;

115) Acts of genocide include "causing serious bodily or mental harm to members of the group" committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group", cf. art. 2 of the Convention on the Prevention and Punishment of the crime of genocide, entered into force Jan. 12, 1951.

superior orders is no defence to any form of torture.¹¹⁶

Could the commander be held accountable for his failure to act? Commanders have a duty to act if they know or should have known that the soldiers under their charge commit unlawful acts, and are responsible if they fail to do something about it.¹¹⁷ If soldiers recklessly or intentionally committed atrocities in front of children, and the commander knew or, under reasonable diligence, should have known this, her/his omission to intervene would constitute culpable negligence, based on her/his duty to ensure that troops under his command observe the law.

In conclusion, under International Human Rights Law and International Humanitarian Law, the individual who makes children witness atrocities, can be held criminally liable for torture or inhuman treatment against the children, as an ordinary crime of torture, a war crime or a crime against humanity, depending on the situation. The state can also be held responsible if it endorsed such conduct by its forces or by private individuals and failed to prevent, investigate or punish it.

*B.c. The question of reparation*¹¹⁸

From the above arguments it is clear that children forced to watch serious crimes

116) CAT, Art. 2(3).

117) Commanders should prevent, suppress, report, raise awareness and initiate penal or disciplinary action (PI, Art.87). See Green, L.C., "War Crimes, Crimes against Humanity and Command Responsibility" in *Essays on Modern Law of War*, Transnat. Publishers, New York, 19.

118) It is acknowledged that the examination of the victim's rights deserves a more comprehensive treatment. The purpose sought in this section is just to raise the issue of the child witness of crimes against parents or caregivers being him/herself too a victim of human rights' violation and or/a crime.

against their parents/ caregivers have been subjected to inhuman treatment or torture and (regardless of their resilience) they are thus victims of a crime or human rights violation. According to the so called "Victims' Declaration", "victim means persons who, individually or collectively, have suffered harm, including physical or *mental injury*, *emotional suffering*, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of national criminal laws and of international human rights norms." Such victims are entitled to redress.¹¹⁹

The child witness, as a victim of a crime or a human rights violation is entitled hence to seek and obtain reparation.¹²⁰ Reparation, in practice, may include access to justice, physical and psychological rehabilitation, financial compensation and other means of moral reparation. Some of these means of reparation are discussed below.

Acknowledgment of the truth

Recognition of the victim's suffering plays an important role in the victim's coming to term with his/her experience.¹²¹ "The victims know that individual therapeutic intervention is not enough. They need to know that their society as a whole acknowledges what happened to them".¹²²

119) Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, G.A.40/34, annex, 40, a/40/53 (1985).

120) See Redress, "The need for Redress, Why seek a remedy?", *Torture*, Vol. 6, No. 1, 1996.

121) Welsh, James, *supra* n.74 at p. 150.

122) D. Becker, E. Lira, M.I. Castillo, E. Gomez and J. Kovalskys, "Therapy with victims of Political Repressions in Chile", *Journal of Social Issues*, 1990, 40; 3, pp. 133-149.

From the individual victim's perspective, documenting the abuses is thought by many to already go a long way towards addressing the consequential traumatic-stress, and testimony can thus become an individual cathartic process. It must be stressed, though, that despite the fact that testifying may have in itself a healing/rehabilitation power for children, in some cases (as in less verbal cultures) retelling/sharing past experiences are not as therapeutic, or can even be counterproductive.

From the public interest perspective, ultimately, it is through public awareness of the occurrence, extent and circumstances of human rights violations that necessary changes in legislation, policies and practices may occur. This then leads to the prevention of further abuses and addresses the perpetuation of impunity for certain acts.

Justice and aggravation of the sentence
 "...Justice, even if long delayed is reparative"¹²³
 Some argue that the potential prejudices for the individual children concerned, and for children in general, of denouncing having been forced to watch crimes against parents outweigh its potential benefits. They sustain that if actual or potential human rights violators were made aware of the fact that forcing children to witness crimes against their parents is unlawful, and that if such acts were reported, documented, denounced and punished, child witnesses might well get killed, disappeared, punished or threatened in order to eliminate potential witnesses in court. Such argument is legitimate insofar as any denunciation of crimes or human rights violations can put the victims and witnesses

in real danger or at risk. With the same token, though, authors of crimes and human rights violations may decide to get rid of any other person who witnessed the crimes, not just the victim's children. This witness protection argument is legitimate and must be addressed but should not prevent raising general awareness, not only of the damaging effects on children of making them watch atrocities, but also of the unlawful and even criminal character of such behaviour towards the child. By raising awareness of this legal aspect, some children may be able to get reparation. Certain authors may be actually charged for inhuman treatment or torture as an independent offence against the child witness, this having a potential deterrent and reparative effect (even if by just acknowledging the truth). At least the sentences against such author may be aggravated for having forced children to watch the crimes being judged.

Indeed, forcing children to witness crimes can be a qualitative aggravating factor of the crime witnessed. Acknowledging this in sentence and in the determination of "just satisfaction" can bring indirect reparation to the child (included in the compensation). For instance, in *State v Kindem*,¹²⁴ the Court decided that the cruelty to the victim, as well as the fact that a *person close to the victim was forced to witness the attack*, were aggravating factors in the sentencing. In *State v Gaines*, where the applicant was robbed, beaten and forced to witness his wife being raped, one of the aggravating factors was "treating the victim with particular cruelty during the offence..."¹²⁵

123) D. Summerfield, Addressing human response to war and atrocity: major themes for health workers, Medical Foundation for the Care and Victims of Torture, London, 1993.

124) 313 N.W.2d 6,7 (Minn. 1981).

125) No. CX 87-160 Court of Appeals of Minnesota, 408 N.W. 2d 914; 1987.

Having said that, the risks for children's safety and of re-traumatisation by making them provide information or even participate in a trial may be very high, if victim/witness protection is not ensured before, during and after the proceedings. Specific protective and support measures for children have been hence established within national and international victims and witness protection programmes and standards.¹²⁶

Compensation

It has been shown that making children witness atrocities against their parents/caregivers can adversely affect children's health and development. These children should hence be entitled to receive compensation for the prejudices caused. Even where children display strong resilience,¹²⁷ they should be able to seek compensation for the emotional distress caused, as "non-pecuniary" or "moral damage"¹²⁸, perhaps even as a symbolic remedy for a state or individual wrong. Compensation aims not only at the survivor's regaining a better or normal life (e.g. costs for medical or other necessary assistance), but also at the state's assuming responsibility for its act/omission as a penalising element. In this regard, the Special Rapporteur on Extra judicial, Summary or Arbitrary Executions has stated clearly that compensation "is a recognition of the state's responsibility

for the acts committed by its personnel..." and "the right of the victim is important not as an instrument of revenge, but in order to ensure respect for the rule of law".¹²⁹

In particular, the entitlement to compensation has been consistently recognised to victims of torture.¹³⁰ In relation to forced witnessing of crimes, it is particularly relevant to mention certain decisions by national courts in civil proceedings where compensation has been granted specifically to *witnesses of death or severe pain of family-members*. For example, in the UK, civil liability has been recognised for damages caused to "secondary victims", which were interpreted to be those meeting the requirement of proximity to the primary victim by links of love and affection and proximity to the incident in time and space.¹³¹ Yet, as shown above, it can be argued that children negligently or forcibly exposed to witness atrocities are not just secondary victims but also *primary victims* of inhuman treatment or torture. Likewise, certain USA Courts have ordered civil compensation for witnesses of family-members' death on grounds of "*negligent infliction of emotional distress*". In the leading case *Thing*,¹³² the Court said that a "plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if ... said plaintiff: (1) is closely related to the injured victim;

126) See UN Guidelines on child victims and witnesses of crime, see Social Council resolution 2005/20 of 22 July 2005.

127) See *Recovering from 30 years of war: Refugee Women and Children in Angola*, WCRWC, Dec. 1996.

128) This was recognised by the EUHR Court in *Aksoy v Turkey*, Judgement of 19 Dec. 1996, para.113, also I-AHR Court in *Velazquez Rodriguez*, 21 July 1989, Ser. C No. 7, para. 39.

129) E/CN.4/1999/39, 6 Jan. 1999.

130) See Art.14 CAT and *Estrella* case, supra n. 59.

131) See notes on the *Alcok* case, "Health & Safety Bulletin" 242, Feb. 1996.

132) *Thing v La Chusa* (1989) 48 Cal. 3d 644, 257Cal. Rptr. 865, 771.

(2) is present at the scene of the injury-producing event at the time it occurs and is aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress”.

However, often compensation is not (fully) available from insolvent offenders. For that reason the establishment, strengthening and expansion of national compensation funds has been promoted¹³³ and various states have compensation schemes for victims of torture or other serious crimes.¹³⁴ The European Convention on the Compensation of Victims of Violent Crimes (1983) indeed “encourages the development of compensation schemes, specially when the offender has not been identified, cannot be prosecuted or punished or is without resources.” It must be noted though that poor states or states ravaged by conflict are frequently unable or unwilling to set up compensation schemes. The setting up of voluntary funds, like the UN Fund for Victims of Torture, could allow compensation for children witnesses of crimes in cases of insolvent or non-identified perpetrators and of unable/unwilling states. Also, reparative measures for children victims of atrocities, including those forced to watch them, could be inserted in peace agreements.

It must be noted though that compensation schemes can be too expensive or counter productive, for example causing the loss of interest by the victim to engage/continue in the prosecution of the offender, or impeding a better use of those funds for prevention purposes, or leading to children’s manipula-

tion by their families to claim being witnesses and thus get compensation in order to obtain some economic relief.

Conclusions

Making children witness atrocities committed against their parents or caregivers, deliberately or recklessly, is generally considered as a particularly cruel behaviour towards the children. It has been shown moreover that such cruel behaviour can have adverse consequences on children, such as increased anxiety, developmental delays, sleep disturbance and nightmares, lack of appetite, withdrawn behaviour, learning difficulties, and aggressive behaviour. Further, it has been shown, that thus causing mental suffering for children can constitute inhuman treatment and, in some cases, amount to torture against the child. Parting from that premise, making children witness atrocities against parents/caregivers can constitute a war crime or a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population. Apart from thus leading to individual criminal liability, the responsibility of the state is also engaged when its officials or private individuals commit such acts and the state is complicit, endorses or tolerates them or fails to investigate, bring perpetrators to justice, or take possible steps to prevent them. Finally, as victims of crimes and/or human rights violations, children forced to watch atrocities against parents/caregivers are entitled to seek and obtain prompt redress, such as compensation.

These conclusions are relevant not only to governments, courts and transitional justice mechanisms but also to organisms and individuals responsible for protecting children, given the range of necessary responses to the phenomenon of making children witness crimes. In this light, the measures

133) *Supra* n.99, para. 12 and 13.

134) Such as in Germany, for holocaust survivors, Chile or Argentina. See R.B. Lillich, “Damages for gross violations of international human rights by US Courts”, in *Torture Vol. 6*, Nov. 1996.

described below seem to be little applied while appearing to be particularly needed to help diminish the occurrence of the conduct under study.

Training and education

The question of the unlawfulness and potential effects of forcing children to witness atrocities should be included in awareness raising initiatives targeting relevant authorities and civil society. In particular, training on the lawful use of force, human rights and humanitarian law to the military, police, law enforcement officials, all state security forces and UN peacekeepers, should include awareness and understanding of all obligations implied in the duty of “special respect” and “protection” owed to children during conflict, of the implications of the customary principle of avoiding unnecessary suffering during conflict and of relevant child protection provisions under national and international law. Awareness should also extend to armed opposition groups’ members, legally bound to respect civilians under international humanitarian law.¹³⁵ Those specifically working with children (e.g. humanitarian and medical staff, educators, social workers) should be also reminded of the unlawful nature of making children witness atrocities and its implications, given their possible important contribution to advocacy and rehabilitation initiatives.

Monitoring and reporting

Awareness among human rights and child rights organisations on the state obligations and the criminal aspect of forcing children

to witness atrocities is particularly needed. Human rights workers could thus include within the scope of their human rights monitoring, investigation, documentation and reporting work, the question of whether children were made witness the abuses reported. Also within their advocacy work, they could promote the implementation of prevention, rehabilitation and, if appropriate for justice, responses. It is therefore crucial to establish effective exchange and co-operation in this matter between human rights and humanitarian organisations who work with victims of human rights abuses.

The underlying objective of including forced child witnessing of crimes in the above human rights monitoring, reporting, and justice seeking work, is ultimately to afford children the maximum protection possible from abuse. With the same purpose, the best interest of the children should be the primary consideration while weighing the risks and benefits of such human rights undertakings. Finally, children themselves should be listened to, as much as possible, when trying to determine what is in their best interest.

135) N. Rodley, “Can Armed Opposition groups Violate Human Rights?”, in *Human Rights in the 21st century*, Mahoney & Mahoney, London, 1992.

List of acronyms

CAT: UN Convention Against Torture
 CRC: UN Convention on the Rights of the Child
 ECHR: European Court on Human Rights
 I-ACHR: Inter American Commission on Human Rights
 ICC: International Criminal Court
 ICTY: International Criminal Tribunal for the Former Yugoslavia
 ICTR: International Criminal Tribunal for Rwanda
 HRC: UN Human Rights Committee
 GC: Geneva Conventions of 1949 regarding protection in armed conflict
 PI: Protocol I addition to the Geneva Conventions of 1949
 PII: Protocol II addition to the Geneva Conventions of 1949
 UDH: Universal Declaration of Human Rights.

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Torture prevention in practice

*Association for the Prevention of Torture*¹

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1. Introduction

1.1 Overview

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”: so states article 5 of the 1948 Universal Declaration of Human Rights.²

The absolute prohibition proclaimed in article 5 has rarely been questioned. On the contrary, the prohibition of torture and ill-treatment has been enhanced by a unique normative and institutional proliferation. States have adopted an impressive framework of legal and political instruments, and international courts have generated jurisprudence, elaborating a substantive *legal framework* for the prevention of torture. At the same time, a network of institutions for the prevention, investigation, and redress of torture and other ill-treatment has gradually emerged. To determine whether this legal framework and these institutions have a real

impact on the incidence of torture and other ill-treatment, however, it is necessary to consider the *practical* measures available for the prevention of torture.

This paper first describes the context in which torture prevention measures operate, setting out the international legal framework and introducing relevant international institutions. In its second section, the paper reviews a range of existing practical measures for the prevention of torture, including implementation of basic procedural safeguards in connection with arrest and trial, the material conditions of detention, training and empowerment, oversight and monitoring, and a variety of domestic legal measures flowing from international and regional treaties, including criminalization of torture. In its third section, the paper considers strategies for improving the prevention of torture in practice, including reinforcing existing

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2) Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

mechanisms, better implementing international and regional norms, emphasizing the role of national actors such as non-governmental organizations (NGOs), national institutions, and judges and prosecutors, and promoting the monitoring of places where there is deprivation of liberty. Finally, the paper will extract general characteristics and trends from the examples provided in the preceding sections.

1.2 International legal framework

Every general human rights treaty has

included the prohibition of torture and ill-treatment.³ States have also adopted international instruments that focus specifically on torture and ill-treatment.⁴ States and international organizations have promulgated more detailed prescriptions, in the form of “basic principles,” “minimum rules,” and “codes of conduct,” that elaborate and give further effect to the prohibition of torture and ill-treatment.⁵

An extensive jurisprudence regarding the prohibition of torture and ill-treatment has emerged through decisions taken in in-

3) [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, article 3; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, article 7; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), article 5; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, article 5.

4) Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (hereafter “UNCAT”); Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 83 (1992); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, entered into force Feb. 1, 1989.

5) Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977); Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979); Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988); Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990); European Prison Rules, Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe (12 February 1987); Recommendations on Prison Education, Recommendation No. R (89) 12 of the Committee of Ministers of the Council of Europe (13 October 1999); Recommendations on prison overcrowding and prison population inflation, Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe (30 September 1999).

dividual cases by international human rights courts and commissions. These include the legally-binding decisions of the European and Inter-American Courts of Human Rights, and the politically important decisions of the Inter-American Commission on Human Rights and African Commission on Human and Peoples' Rights. The recently established African Court of Human and Peoples' Rights will soon provide another source of case law.⁶ As the prohibition against torture and ill-treatment also forms part of international criminal law and the international law of armed conflict, its elaboration has been further accelerated by the judgments of international ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia,⁷ and by criminal prosecutions undertaken by individual states in their domestic courts acting under international universal jurisdiction.⁸

1.3 International institutions

States, at the urging of human rights organizations and other members of civil society, have also created international mechanisms designed to give force to the legal framework described above. The purpose of such organs is to prevent torture and to identify and condemn violations of the international prohibition.

The 1984 Convention against Torture and

Other Cruel, Inhuman and Degrading Treatment (UNCAT)⁹ established the Committee against Torture. The Committee against Torture is a group of experts empowered to examine periodic mandatory country reports that outline what states are doing to prevent and punish torture and other ill-treatment. The Committee also receives and investigates individual and inter-state complaints about violations of the UNCAT, and can conduct confidential inquiries, including carrying out visits to places of detention, in states where torture is allegedly systematic.¹⁰

In 1985 the UN Commission on Human Rights created the position of Special Rapporteur on Torture. This is an independent expert who issues public reports on both the general situation and specific issues in relation to torture, sends urgent appeals to governments requesting that they take concrete steps to protect individuals at risk of torture or ill-treatment, and carries out visits to places of detention in any country, with the government's consent. Examples of the issues on which the Special Rapporteur has issued Reports and urged state action in recent years include anti-terrorism measures,¹¹ and the trade in and production of equipment which is specifically designed to inflict torture.¹²

The prohibition of torture and ill treatment also benefits, at the regional level, from a prevention mechanism that is uniquely

6) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), in force 25 January 2004.

7) Furundzija, IT-95-17/1, judgment of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, 10 December 1998, paragraphs 134 et seq.

8) See Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement*

legislation, AI Index IOR 53/013/2001 (London, September 2001), Chapter Ten "Torture: State practice at the national level".

9) Note 4 above.

10) Convention against Torture, note 4 above, Part II.

11) Reports of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/69; UN Doc. A/58/120.

12) Report of the Special Rapporteur on Torture, UN Doc. E/CN.4/2003/69, 13 January 2003.

practical: the European Committee for the Prevention of Torture (CPT). The CPT is an independent body of experts empowered to make regular visits to places of deprivations of liberty within each state of the Council of Europe, and in fact carries out some 170 to 180 days of inspections per year. A similar independent preventive mechanism at the global level will soon be added to the array of actors in the prohibition against torture and ill-treatment, when the Optional Protocol to the UN Convention against Torture (OPCAT) comes into effect, establishing a Subcommittee on Prevention.¹³ Like the CPT, the UN Subcommittee on Prevention will be empowered to carry out visits, whenever and wherever it chooses, in states that become parties to the OPCAT.

2. Practical measures for the prevention of torture

2.1 Introduction

While readers are invited to consult more comprehensive and detailed sources where necessary,¹⁴ the following paragraphs provide specific examples and an overall flavour of existing practical measures for the prevention of torture.

2.2 Basic procedural safeguards for those deprived of liberty

From the moment a person is deprived of their liberty, he or she should be guaranteed by law and provided in practice with certain

procedural safeguards. For instance, notification of the detention should be given to a relative or other appropriate third person. An independent medical examination should be conducted to establish whether the person requires medical attention, to establish a baseline for determining whether subsequently-identified injuries occurred during detention, and to monitor for signs of abuse. Individuals should be provided immediate access to a lawyer, and notified of their rights in a language the person understands.

There are a variety of steps that states must take, and NGOs should monitor, to implement safeguards during arrest and other pre-trial processes. For instance, states should prohibit and punish the use of secret, unauthorised or unofficial places of detention, as well as the use of incommunicado detention. States should also ensure that all persons deprived of their liberty have access to legal and medical services and have the right to be visited by and correspond with family members. In particular, states should provide detainees with the right to have a lawyer or another third person present during interrogation, and the right to access a lawyer throughout the investigation, pre-trial, and trial process. These measures help prevent torture because, as the former UN Special Rapporteur on Torture, Sir Nigel Rodley, has pointed out, torture is usually perpetrated while the victim is isolated from the outside world.¹⁵ NGOs can play a role

13) Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, adopted Dec. 18, 2002 [reprinted in 42 I.L.M. 26 (2003)].

14) For instance, see Association for the Prevention of Torture, *Monitoring Places of Detention: A Practical Guide* (Geneva: Association for the Prevention of Torture, 2004), <http://www.ap.torture>.

[ch/pub/library/Monitoring%20Guide%20EN.pdf](http://www.essex.ac.uk/pub/library/Monitoring%20Guide%20EN.pdf). Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (Colchester: University of Essex Human Rights Centre, 2003), <http://www.essex.ac.uk/combatingtorturehandbook/>.

15) Nigel Rodley, *The Treatment of Prisoners Under International Law* (2nd ed.) (Oxford: Oxford University Press, 2002) at 11.

by drawing public attention to places or facilities in which it is suspected that persons are being held unofficially or in secret. For instance, reports by Human Rights First, Human Rights Watch, and Amnesty International published in 2004 drew attention to allegations that suspects and prisoners in the “war on terror” were being held in secret and/or at secret facilities.¹⁶

Judicial oversight provides a second important safeguard during pre-trial processes. Thus, states must immediately inform every detained person of the reasons for the detention, promptly inform every person arrested of any charges, and immediately bring every person deprived of his or her liberty before a judicial authority. In addition, all persons deprived of their liberty have the right to challenge the lawfulness of their detention; thus, procedures such as *habeas corpus* or *amparo* should be expressly provided for in national law. Individuals should have the right to defend themselves or to be assisted by legal counsel of their own choice, publicly-funded where necessary.

Record-keeping constitutes a further practical measure that can help prevent torture. First, mandatory record-keeping creates a paper-trail for accountability purposes. Second, where legal or administrative rules require records to be kept, but no or insufficient records are kept in a particular case, judicial and other fact-finding authorities can justifiably shift the burden of proof to the state, requiring the state to prove that the individual was *not* tortured or otherwise

mistreated. This can help rectify the situation where an individual would otherwise be unable to substantiate a valid claim of torture because by the very nature of such ill-treatment, the torturers exercise complete control over any evidence.

Therefore, states must keep, at each place of detention, comprehensive written records concerning all those deprived of their liberty – detailing at minimum the date, time, place and reason for the detention – and provide the detainee, legal counsel, and independent inspectors with access to such records. More specifically, states should make and retain comprehensive written records of all interrogations, which include the identity of all persons present during the interrogation and video tape and/or audio tape record interrogations where feasible. For instance, in India, in response to directions from the National Human Rights Commission and government officials, cameras have been installed in police stations to monitor and deter police brutality.¹⁷

To reduce the usefulness of information obtained through torture,¹⁸ and thus to eliminate a key incentive for state officials to commit torture, states must prohibit the admission into evidence, in any proceedings, of any statement obtained through the use of torture, or other cruel, inhuman or degrading treatment or punishment (except against persons accused of torture as evidence that the statement was made). Also, where it is alleged by a defendant that a statement was obtained through torture, or other cruel, inhuman or

16) Human Rights First, Ending Secret Detentions, June 2004, http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf; Human Rights Watch, The United States’ “Disappeared”: The CIA’s Long-Term “Ghost Detainees”, 12 October 2004, <http://hrw.org/backgrounder/usa/us1004/index.htm>; Amnesty International, Human dignity denied: Torture and

accountability in the ‘war on terror’, AI Index: AMR 51/145/2004, 27 October 2004.

17) R. Lakshmi, “In India, Torture by the Police is Frequent and Often Deadly”, Washington Post 5 August 2004, Page A11.

18) Rodley, n. 15 above, at 10-11.

degrading treatment or punishment, the burden of proof should shift to the state, such that the evidence is automatically excluded unless the state proves that the interrogation was free of any torture or other ill-treatment.

2.3 Improving conditions of detention

As seen above, international law prohibits not only torture per se, but *all* forms of cruel, inhuman or degrading treatment or punishment, of which “torture” is only the most severe category. Improving the general conditions of detention can also help to prevent torture. To these ends, states should ensure that the treatment of all persons deprived of their liberty is in conformity with international standards, the UN Standard Minimum Rules for the Treatment of Prisoners being of key importance.¹⁹

In particular, states should improve conditions in places of detention, specifically in respect of food, outdoor exercise, hygiene and health care, family visitation, religious facilities, condition of buildings and housing, conditions of and voluntariness of prisoners’ work, and complaint mechanisms regarding disciplinary sanctions and ill-treatment. This requires that states provide adequate resources (budget, staff, and facilities) to the proper administration of prisons, and that those resources be appropriate: e.g. states should develop, implement, and follow-up training programmes for prison staff, which includes specific training on human rights. States should hold pre-trial detainees separately from convicted persons, and only hold juveniles, women, and other vulnerable groups in appropriate and separate detention facilities. Finally, states should reduce overcrowding in places of detention by, among

other things, limiting the length of periods in remand, promoting alternatives to pre-trial custody, and encouraging the use of non-custodial sentences for minor crimes.

2.4 Developing training and empowerment

States should also establish and support training and awareness-raising programmes which reflect human rights standards and emphasise the concerns of vulnerable groups. States should furthermore devise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in contact with persons deprived of their liberty such as lawyers and medical personnel. NGOs, national human rights institutions, community-based organizations and (where relevant) traditional leaders, regional and international bodies, and other human rights experts should be given an opportunity to meaningfully participate in the development of such programmes, materials and codes. NGOs should participate in the development and delivery of training materials, monitor compliance with codes of conduct and ethics, and assist in drawing the attention of disciplinary authorities to breaches of such codes.

States should establish, encourage, and provide financial and other support to public education initiatives and awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons. States should also support (and certainly must not interfere with) the work of NGOs and the media in public education, dissemination of information, and awareness-raising concerning the prohibition and prevention of torture and other forms of ill-treatment. NGOs should also conduct research and studies on the situation of torture and other forms of ill-treatment in their country and/or region, provide training for relevant

¹⁹ UN Standard Minimum Rules for the Treatment of Prisoners, n. 5 above.

groups in the community, and provide counselling services to victims of torture.

2.5 Establishing mechanisms of oversight and monitoring

All law enforcement officials must be accountable to independent judicial and disciplinary authorities. This must be coupled with a combination of independent and internal oversight and complaint mechanisms that undertake regular visits to places of detention. The very possibility of a visit can have a deterrent effect on torture, particularly where the visiting body itself determines where to visit and is empowered to carry out visits without prior notice. Recommendations arising from visits can also ground constructive dialogue with prison officials.

A key step states can take towards ensuring adequate oversight and monitoring of treatment of persons deprived of liberty is to ratify the OPCAT, so as to empower international and national visiting mechanisms with the mandate to visit all places where people are deprived of their liberty. States should also undertake diplomatic efforts to promote ratification of the Optional Protocol by other states.

With or without ratification of OPCAT, states can further implement torture prevention through the creation of an independent national institution with a mandate and will to prevent torture. National institutions should be empowered to carry out independent investigations and visits to prisons, police stations and other places of detention, to make recommendations to relevant authorities to prosecute and/or discipline officials who torture or mistreat persons deprived of liberty, and to make pro-active recommendations to prevent recurrence.²⁰ States should promptly cooperate with and comply with all recommendations of such national institutions, and

ensure the effective and active functioning of the institution.

2.6 Measures relating to the prohibition of torture

States should ratify, and NGOs should promote ratification of, regional and international instruments, including:

- the UNCAT and the OPCAT;
- the International Covenant on Civil and Political Rights and the First Optional Protocol thereto;
- the Rome Statute establishing the International Criminal Court;
- applicable regional instruments such as the Inter-American Convention to Prevent and Punish Torture, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Protocol to the African Charter of Human and Peoples' Rights establishing an African Court of Human and Peoples' Rights.

Ratifications should be made without "reservations" that seek to avoid application of certain provisions, and states should also make any declarations necessary to accept the jurisdiction of associated treaty bodies. For instance, states should make declarations accepting the jurisdiction of the Committee against Torture under Articles 21 and 22 of UNCAT and recognizing the compe-

20) For additional detailed guidance see: UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights, UN A/Res/48/134, 20 Dec. 1993; and Inter-American Institute of Human Rights and Association for the Prevention of Torture, Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention (San José/Geneva: IHR/APT, 2004).

tency of the Committee to conduct inquiries pursuant to Article 20 of UNCAT.

A variety of measures can help states to co-operate with international mechanisms. States should issue standing invitations to UN and regional human rights bodies, allowing them to conduct country visits at any time.²¹ They should submit periodic reports on time to treaty bodies and should designate a particular department with responsibility for drafting periodical reports. States should move quickly to implement the conclusions and recommendations of treaty bodies and regional or international special mechanisms such as the Special Rapporteurs. States should consult with national, international and regional human rights institutions and organisations when preparing periodic reports.

For their part, NGOs can facilitate co-operation with international mechanisms by submitting information, alternative reports and individual cases to treaty bodies and other relevant mechanisms, by following up on conclusions and recommendations by treaty bodies and other relevant mechanisms, and by making sure all relevant government, NGO and International Organisation documents are publicly available and widely disseminated. The Robben Island and European Guidelines processes described in greater detail below are practical examples of NGO work in this regard.

“Non-refoulement” is the technical term for the obligation on states not to extradite or otherwise transfer a person to a state where he or she faces a risk of torture. States can implement this obligation in part by ensuring that extradition treaties and

procedures prevent return in such circumstances, and by ensuring an effective appeals process against the decision to return, expel or extradite.

Impunity allows perpetrators of torture to escape personal or criminal liability and responsibility under national or international law. The Convention against Torture specifically requires each State Party “to ensure that all acts of torture are offences under its criminal law.”²² A similar requirement was also included in the UN Declaration against Torture.²³ The requirement to create such offences ensures that the prohibition of torture is expressly and directly enforceable against individuals under domestic laws. The next section of this paper considers the requirement of criminalization in greater detail.

To combat impunity, states should also ensure that national legislation and regulations allow full access to justice for victims of torture, including financial and other forms of compensation, establish effective complaints and investigations procedures, and designate specific government authorities as responsible for such investigations.

2.7 Criminalization of torture

In addition to the Convention against Torture and the UN Declaration against Torture, a number of international instruments require states to ensure that torture is a criminal offence under domestic law.²⁴ Although some or all conduct amounting to torture may already be covered by other existing criminal offences (such as assault), it is strongly preferable, perhaps mandatory, that each state creates a separately defined

21) As of 14 October 2004, 51 countries had extended a standing invitation to the UN thematic procedures: <http://www.ohchr.org/english/bodies/chr/special/invitations.htm>.

22) UNCAT, n. 4 above, article 4(1).

23) *Ibid.*, article 7.

offence specifically named “torture.”²⁵ The offence must also cover acts constituting complicity or participation in torture, not solely the individual who directly causes pain or suffering.²⁶ The seriousness of the offence also requires that a sufficiently severe penalty be applied in all cases of torture.²⁷

A number of defences that may normally be applicable in respect of regular criminal offences must be specifically disallowed in respect of torture. “Exceptional circumstances”, also known as “necessity”, can sometimes be invoked in regular criminal proceedings where the impugned act took place in the context of war, protection of the public, or self-defence; however, such situations can provide no defence to a charge of torture,²⁸ nor can a plea that one was only following the orders of a superior, even under military command.²⁹

Under an international legal doctrine known as “universal jurisdiction,” states also have the right to arrest, charge, and prosecute an individual who is accused of torture, even if the act of torture occurred

outside the territorial jurisdiction of the state and even if neither the perpetrator nor his victims are nationals of the state.³⁰ For instance, in 2004, pursuant to its domestic criminal law implementing UNCAT, the UK prosecuted an Afghani national, Faryadi Sarwar Zardad, for torture he is alleged to have inflicted in Afghanistan on other Afghani nationals.³¹ While the jury in the first trial was dismissed after it failed to reach a verdict, a retrial is being sought.³² The ability to hold torturers criminally responsible throughout the world is intended to establish that there is no “safe haven” to which torturers can flee so as to escape responsibility for their acts.³³

The creation of a worldwide net of criminal responsibility is an important practical measure for the prevention of torture. Individuals will be less likely to commit acts of torture the greater the certainty that they will ultimately be publicly and severely held responsible for acts of torture. Even if they are acting under authorization or orders by a regime that currently permits torture, a rigorous international and domestic crim-

24) 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, arts. 129 and 130; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, arts. 146-147; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, n. 4 above art. 7; Inter-American Convention to Prevent and Punish Torture, n. 4 above, art. 6.

25) The UN Committee against Torture, for its part, now views this as a requirement, at least for States that are party to the Convention against Torture. See Chris Ingelse, *The UN Committee against Torture: An Assessment* (The Hague, 2001), 222 and 340. In the several years following publication of Ingelse’s book, the Committee has continued to consistently direct states to adopt a separate offence of torture.

26) UNCAT, n. 4 above, article 4(1).

27) *Ibid.*, article 4(2); Ingelse, n. 25 above, 341-342.

28) UNCAT, article 2(2).

29) *Ibid.*, article 2(3).

30) J.H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, 1988), 131-138.

31) BBC, 18 November 2004, http://news.bbc.co.uk/2/hi/uk_news/4023349.stm.

32) Guardian Online, 26 November 2004, “Retrial for Afghan Warlord” <http://www.guardian.co.uk/afghanistan/story/0,1284,1360178,00.html>.

33) Burgers and Danelius, n. 30 above, 131.

inalization of torture establishes a deterrent through the constant possibility of criminal prosecution by a subsequent regime, or in the course of travelling to another state.

3. Improving the prevention of torture in practice

3.1. Introduction

Torture and ill-treatment are still practiced worldwide despite the institutional and normative proliferation of the prohibition against torture, the identification of relevant preventive measures and a strong mobilization of civil society. The following sections of this paper consider strategies for improving the prevention of torture in practice, examining in turn how states and civil society can work together in order to:

- reinforce existing mechanisms;
- better implement international and regional norms;
- emphasize the role of national actors such as NGOs, national institutions and judges and prosecutors; and
- promote the monitoring of places of deprivation of liberty by international, regional and domestic mechanisms.

3.2 Reinforcing existing mechanisms

When, some twenty years ago the Special Rapporteur on torture, the Committee against Torture and the CPT started their activities, the cooperation of governments was not always forthcoming. Thus, the visit to Turkey undertaken in 1992 by the Com-

mittee against Torture faced difficulties in several respects.³⁴ It had been difficult at the outset to get the agreement of the Turkish government to allow the visit.³⁵ Once in the country, members of the Committee encountered a number of difficulties, including denial of access to certain places of detention.³⁶ In the same manner, on several occasions in the early years of its activities, the CPT had been confronted with the problem of police or penitentiary officers refusing to grant access to places of detention under their control.

Today it is rare to see a government refusing outright to cooperate with these mechanisms. For instance, states almost always provide their consent to the publication of CPT visit reports, which would otherwise remain confidential, though the European Convention does not require that such consent be given.³⁷ While the shift in attitudes is to be welcomed and constitutes a positive step towards the prevention of torture and ill-treatment, the practical effect of international and regional mechanisms cannot be assessed solely on the basis of whether a spirit of goodwill prevails during presentation of a report or hosting of a visit. Such goodwill and openness have little actual impact if they are not linked with effective and efficient implementation at the national level of the recommendations of international mechanisms.

Consequently, international institutions are beginning to establish follow-up with states after recommendations have been

34) Activities of the Committee against Torture pursuant to article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Turkey (15 November 1993), A/48/44/Add.1

35) Ibid. paragraphs 6 to 12.

36) Ibid. paragraph 15.

37) However, regarding especially the CPT, governments decide when they want that publication to be made available to the general public.

made. Thus, the Human Rights Committee has created a working group on follow-up that is empowered to ask governments about measures they have taken to implement their recommendations. In a similar manner, the Committee against Torture may ask a government to send it information related to the implementation of the Committee's recommendations, six or twelve months after the recommendations were made. The Special Rapporteur on Torture also established a process to monitor implementation of recommendations following his visits.³⁸

It is important that such measures not remain restricted to an exchange of information between the relevant body and the government. The appropriate focus should be at the national level and include information from the civil society within the state. A good example of this was achieved by NGOs in 2003, reporting on the follow up to the visit to Brazil made by the Special Rapporteur on Torture in 2001.

National, regional and international NGOs met to discuss and adopt a report that provided information on what Brazil had done in response to the Special Rapporteur's recommendations. The NGO report was submitted on a confidential basis to the Special Rapporteur. The Special Rapporteur then invited a response from Brazil. This process in turn led to the publication

by the Special Rapporteur of a specific "follow-up" addendum to his next Report. The addendum described the information supplied by the government and NGOs describing the specific steps Brazil had taken, or had failed to take, to implement each of the Special Rapporteur's recommendations.³⁹ For instance, Brazil had promulgated a National Plan to Fight Torture, which included a National Campaign against Torture.⁴⁰ The Campaign involved the creation of a national hotline to denounce incidents of torture and a national network for collecting and following cases, training of the national network staff, and dissemination of information about the Campaign to raise awareness among the general public. Brazil had reportedly also established a mobile visiting organization to visit places of detention where torture had been alleged, though it did not appear that it had actually carried out any visits.⁴¹ A variety of other recommended measures did not appear to have been fully implemented.⁴²

The Geneva-based Association for the Prevention of Torture (APT), together with the national NGOs, ultimately published the NGO follow-up report, releasing it simultaneously in Brazil and at the session of the UN Commission on Human Rights in Geneva.⁴³ The Brazilian Minister for Human Rights attended the Commission

38) "Guidelines for the Submission of Information on the Follow-up to the Country Visits of the Special Rapporteur on Torture (08/07/04)", <http://www.ohchr.org/english/issues/torture/rappporteur/docs/guideline.doc>.

39) Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Addendum: Follow-up to the recommendations made by the Special Rapporteur, Visits to Azerbaijan, Brazil, Chile, Mexico, Romania, Turkey and Uzbekistan, UN Doc. E/CN.4/2004/56/Add.3 (13 February 2004).

40) Ibid at paragraph 23.

41) Ibid. at paragraph 25.

42) Report, n. 39 above.

43) Association for the Prevention of Torture (APT), Centro pela Justiça e o Direito Internacional (CEJIL), Grupo Tortura Nunca Mais do Rio de Janeiro (GTNN-RJ), Tortura no Brasil: Implementação das Recomendações do Relator da ONU (Rio de Janeiro: CEJIL, 2004).

and declared his intention to pursue a dialogue with the Rapporteur towards further implementation of the 2001 Recommendations. The opportunity for NGOs and the Special Rapporteur to follow-up with the state in this fashion creates additional pressure on the state to take concrete and effective measures towards the prevention of torture.

Another example is the work of NGOs in Moldova to promote implementation of recommendations of the European Committee for the Prevention of Torture (CPT). In May 2003, the APT organized a workshop meeting in Moldova to identify concrete measures that could be taken by the authorities to address the recommendations made by the CPT during its three visits to Moldova in the period from 1998 to 2001. Before the meeting the NGOs prepared a detailed analysis of the conditions of detention in the country. The meeting was attended by international human rights academics and practitioners and supported by key domestic actors including civil society, the Ministry of Justice and the Department of Penitentiary Institutions.

The workshop discussion resulted in a written "Plan of Action to Improve Prison Conditions in Moldova" which was agreed upon with all of the actors, including both state authorities and NGOs. The Plan of Action was sent to a range of domestic and international actors, including the Moldovan authorities, civil society, foreign embassies, international donors, international human rights institutes and intergovernmental bodies such as the Council of Europe and the European Union. In Government Decision No. 1624 of 31 December 2003, the Moldovan authorities officially adopted the Plan of Action, formally committing the government to specific steps to reduce overcrowding, enhance the status of prison

staff, tackle inter-prisoner violence, and to improve the nutrition and healthcare of detainees.

Throughout 2004 the APT continued to work with the Moldovan authorities and civil society to identify various means to facilitate the implementation of the Plan of Action. An important aspect of the work was to match the needs of the Moldovan penal system with external sources of funding and other technical assistance. During follow-up visits by the APT, meetings were arranged with various potential international donors in order to introduce them to the Plan of Action and the various initiatives being undertaken on the ground in Moldova to implement it. International representatives took part in visits to facilities where they saw first-hand the poor conditions of detention. The APT continued to work closely with the Department of Penitentiary Institutions on various aspects of the government's overall long-term penal reform process, the ten-year "Plan of Measures for the Reform of the Penitentiary System 2004-2013."

The APT delegation also held in-depth discussions with representatives of civil society active in the fields of torture prevention and penal reform. In particular, the APT cooperated with the Coalition for the Support of Penitentiary Reform (CORSIP), four non-governmental organizations with proven track records in torture prevention and penal reform. Each NGO drafted funding proposals for one or more aspects of the Plan of Action for presentation to international donors, and will assist in implementing those aspects of the Plan. Examples include:

- development of enhanced training materials for prison managers and rank-and-file prison personnel, and the implementation of such training programmes;

- provision of activities for prisoners in the areas of education, sport and leisure;
- promotion of alternatives to detention and the prevention of recidivism through the improved social reintegration of former prisoners; and
- implementation of various harm reduction activities aimed at combating HIV/AIDS in detention facilities.

The Brazil and Moldova processes are good examples of how existing mechanisms, such as the CPT, can be made more effective through concrete follow-up procedures involving cooperation between state and non-state, international and local actors. Further, such follow-up actions should be systematized both by NGOs and by UN country teams, as part of the “Plan of Action” for Action 2 of the UN Reform programme on mainstreaming human rights.⁴⁴

3.3 Towards a better implementation of existing norms

Recent years have seen a shift in strategy and techniques for the prevention of torture. An earlier phase focussed primarily on establishing the universal, non-derogable and fundamental nature of the prohibition against torture, under both treaty-based and customary international law, and identifying and legislating international standards to that end. While that project is by no means complete, there has been general recognition that action must also be taken now to advance the implementation of the international stand-

ards. This section describes several processes through which implementation measures were developed in regional contexts, and then identifies certain common characteristics of the techniques. The two processes selected for examination here are:

- the African Commission’s Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment in Africa (Robben Island Guidelines);⁴⁵
- the European Union’s Guidelines on Torture.⁴⁶

3.3.1 Robben Island Guidelines

The Robben Island Guidelines were formulated at the initiative of the Association for the Prevention of Torture during a workshop organized jointly by the APT and the African Commission on Human and Peoples’ Rights (ACHPR) on Robben Island, South Africa, in February 2002. The Guidelines were subsequently adopted by the ACHPR during its 32nd session in October 2002. In its resolution adopting the Guidelines, the ACHPR called for the establishment of a Follow Up Committee including the ACHPR, the APT and such prominent African Experts as the African Commission may determine, with the mandate to promote the adoption and implementation of the Guidelines.

In the African Commission’s 2003–2004 Activity Report, which included a report on its 2002 fact-finding mission to Zimbabwe, the ACHPR specifically referred to an

44) UN Secretary General, “Strengthening human rights-related United Nations action at country level: National human rights promotion and protection systems, Plan of Action” at <http://www.un.org/events/action2/action2plan.pdf> <accessed 12 December 2005>.

45) Guidelines and Measures for the Prohibition

and Prevention of Torture and Cruel, Inhuman or Degrading Treatment in Africa, adopted by the ACHPR during its 32nd session in October 2002.

46) Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, Adopted by General Affairs Council - Luxembourg 09/04/01.

on-going practice of torture and ill-treatment in Zimbabwe and recommended that Zimbabwe consider and implement the Robben Island Guidelines.⁴⁷ The fact that the ACHPR has taken “ownership” of the Guidelines in their development and application helps to reinforce their acceptance by African States as an “African solution” implementation instrument. Indeed, the consideration of the ACHPR reports by the African Union (AU) Council of Ministers in July 2004 attracted worldwide media interest. While Zimbabwe subsequently succeeded in delaying substantive consideration or publication of the critical ACHPR report on human rights in Zimbabwe, they could not dismiss the report as European propaganda and imperialist interference in African affairs.⁴⁸ The consideration and adoption of the ACHPR reports by the Council of Ministers, comprised of foreign ministers of the 63 member States of the African Union, illustrates the wide acceptance by AU member States of the legitimacy of ACHPR’s concerns and that the Robben Island Guidelines are an appropriate African implementation mechanism for regional and international standards for the prevention of torture.

3.3.2 European Union Guidelines on Torture

The APT is making use of similar techniques in relation to implementation of the EU Guidelines on Torture.⁴⁹ The EU Guidelines were adopted by the EU on 9 April 2001, and are intended “to provide

the EU with an operational tool to be used in contacts with third countries at all levels as well as in multilateral human rights fora in order to support and strengthen on-going efforts to prevent and eradicate torture and ill-treatment in all parts of the world.” The Council’s Political and Security Committee adopted a working paper in December 2002 proposing the introduction of systematic reporting by EU Heads of Mission on possible patterns of torture in third countries. This reporting would, it was contemplated, help the EU to determine appropriate action to combat torture in a particular country on the basis of the guidelines.

The EU Guidelines make general provision for a three-tiered process of periodic monitoring, analysis and reporting by EU Heads of Mission, assessment by the Council Working Group on Human Rights (CO-HOM), and consequent EU “actions” in its relations with third countries. The forms of action contemplated include political dialogue, demarches and public statements urging relevant third countries to undertake effective measures against torture and ill-treatment and requests for information, as well as bilateral and multilateral co-operation (though no specific forms of co-operation are enumerated or provided for illustration).

The Guidelines state that the EU will urge third countries to take steps to, among other things, prohibit and condemn torture and ill-treatment (including criminalization), prohibit production and trade of torture

47) 17th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Doc. EX.CL/109 (V) as described in “Executive Summary of the Report of the Fact-finding Mission to Zimbabwe” (Posted on the web on 12th July 2004), <http://www.zimbabwedemocracytrust.org/outcomes/details?contentId=1941>.

48) Decisions of the Assembly of the African Union, Decision on the 17th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Third Ordinary Session, 6–8 July 2004, Addis Ababa, Ethiopia, Assembly/AU/Dec.49(III).

49) Guidelines, n. 46 above.

equipment, adhere to international norms and procedures, adopt and implement safeguards and procedures relating to places of detention, combat impunity, establish domestic complaints and reports processes, provide reparation and rehabilitation for victims, allow visits by qualified representatives of civil society, establish national institutions, provide effective training, support the work and independence of medical professionals, and consistently conduct autopsies.

In a submission to the EU Forum on Human Rights in late December 2002,⁵⁰ the APT noted that the Guidelines were not being implemented by most EU diplomats in the field, partly due to a lack of awareness, but also due to uncertainty as to how to incorporate the Guidelines into their method of work with national authorities. The APT thus offered suggestions as to how the Guidelines could be used in practice.

The APT proposed that effective implementation of the Guidelines be part of a process composed of several stages: an initial report providing an overview of the situation in the particular country with respect to torture and ill-treatment, followed by a setting of priorities in the application of the Guidelines to the particular country, identification of actions to be taken by the Heads of Mission, and finally follow-up at the EU level. Further, as the Guidelines cover a wide range of measures but at a fairly general level, the APT suggested a series of more specific questions and actions for EU diplomats to consider in implement-

ing the Guidelines. As with the Robben Island Guidelines, the APT provided a series of detailed questions EU diplomats could ask themselves with respect to the particular state involved, so as to evaluate the existing situation before deciding what actions to take. The APT is currently providing further suggestions as to actions EU actors might take that would be particularly appropriate in relation to each aspect of implementation of the EU Guidelines.

3.4 Emphasizing the prevention of torture at the national level

At the national level a variety of national actors are already involved in the prevention of torture and ill-treatment in practice. Their efforts should be strengthened.

3.4.1 NGOs

In some countries non-governmental organizations (NGOs) have extensive experience in monitoring places of detention. For instance, in Morocco the Observatoire Marocain des Prisons (OMP – Moroccan Prison Monitor), an independent NGO, visits prisons with the mandate of monitoring compliance with both national and international standards.⁵¹ The OMP inspects facilities and interviews officials, prisoners and prisoners' families, then addresses its concerns to both local officials and the government.⁵²

In Nepal, prison visits are carried out by the independent Center for the Victims of Torture Nepal (CVICT).⁵³ Their visits led directly to the transfer of severely men-

50) Association for the Prevention of Torture "Implementation of the EU Guidelines on Torture", Submission to the EU Forum on Human Rights, Copenhagen, 20-21 December 2002, <http://www.apr.ch/europe/euforum.pdf>.

51) Amnesty International, "Preventing Torture at Home – A Guide to the Establishment of Na-

tional Preventive Mechanisms", AI Index: IOR 51/004/2004 (1 May 2004).

52) Ibid.

53) See B. Sharma, M. Van Ommeren, "Preventing Torture and Rehabilitating Survivors in Nepal", *Transcultural Psychiatry* (March, 1998).

tally ill prisoners from a prison where they received no care to another facility where a psychiatrist visits monthly to provide and monitor medication.⁵⁴ Based on a number of years of experience the CVICT decided in 2004 to expand its visit programme to cover a wider range of detention facilities.⁵⁵ Examples of similar work include the Georgia Young Lawyers Association,⁵⁶ the Peace and Justice Service (SERPAJ) of Uruguay,⁵⁷ the Bulgarian Helsinki Committee,⁵⁸ and the Independent Medico Legal Unit (IMLU) in Kenya.⁵⁹

The difficulties experienced by local NGOs in carrying out visits and practical solutions to those problems are illustrated in context in a Report published by the Association for the Prevention of Torture as a follow-up to a regional seminar in the Caucasus.⁶⁰ In the Report, the experience of an Azerbaijan NGO, the Centre of Programmes for Development "EL", in monitoring prisoners right to health is presented as a case study. Among the issues considered are the methodology for selection of sites to visit, qualifications and preparation of the visiting team members, the specific methods for carrying out visits (visits with individuals as well as general inspections, receipt of written complaints, contacts with prison staff, etc.), design and use of questionnaires for prisoners

and prison personnel, video and audio interviews with prisoners and staff, comparison of collected information with official statistics, and the forms of reporting and follow-up.

Further, NGOs can promote best practices and methodology on visiting places of detention. For instance, the Association for the Prevention of Torture has published *Monitoring Places of Detention: A Practical Guide*⁶¹ and, together with the Inter-American Institute of Human Rights, the *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention*.⁶²

NGOs can lobby for necessary changes to legislation, monitor implementation, and establish or assist with a system of monitoring places of detention. NGOs are also able to raise awareness among the public in general, and legal and medical professionals in particular, of the rights of persons deprived of their liberty. NGOs may also assist in translating the rights of persons deprived of liberty into relevant languages.

For instance, the Human Rights Centre at the University of Essex, funded by the United Kingdom Foreign and Commonwealth Office, has produced several human rights education handbooks to provide practical resources for judges, lawyers and

54) *Ibid.*

55) www.cvict.org.np/legal.html.

56) www.gyla.ge.

57) <http://www.serpaj.org.uy/>.

58) http://www.bghelsinki.org/index_en.html.

59) <http://www.imlu.org/>.

60) Association for the Prevention of Torture, *Prevention of Torture in the Caucasus: Role and*

Experience of National NGOs (Geneva: Association for the Prevention of torture, 2003), available at <http://www.apt.ch/pub/library/Caucasus.pdf>.

61) *Monitoring Places of Detention: A Practical Guide* (Geneva: Association for the Prevention of Torture, 2004).

62) *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (San José/Geneva: IIHR/APT, 2004).

human rights activists to prevent torture.⁶³ One of the handbooks has been translated into more than 20 languages and has been extensively distributed and used by NGOs and other actors worldwide. The Human Rights Centre is also developing a handbook aimed specifically at health care professionals, a project being carried out in close collaboration with the Medical Foundation for the Care of Victims of Torture.⁶⁴ Another example is Amnesty International's publication *Combating Torture: a manual for action*.⁶⁵

NGOs can also lobby for the ratification of OPCAT and for its full implementation. The persistent targeted efforts of the Association for the Prevention of Torture in promoting, advocating, and lobbying individual states to ratify OPCAT, provides a practical illustration. The APT actively lobbied almost all of the States that went on to become the first States Parties and signatories to the OPCAT.

In addition to lobbying for and raising awareness of the above measures, NGOs can themselves facilitate access by persons deprived of liberty to legal advice and practical assistance. For instance, the Georgia Young Lawyers Association⁶⁶ provides free legal assistance to persons deprived of their liberty.

NGOs and other members of Civil Society can contribute to the establishment and maintenance of prison conditions that comply with international norms in a variety of ways.

A key measure is to establish programmes to carry out visits to detainees and prisoners and, where necessary, to supply their needs. For instance, during prison visits the independent Center for the Victims of Torture Nepal provides free mobile medical services to prisoners.⁶⁷ NGOs can also raise awareness among the general population about the situation and needs of prison populations and lobby relevant authorities (prison officials, government officials, parliamentarians) for improvement of prison conditions.

3.4.2 National institutions

The National Human Rights Commission in India has statutory authority to visit and inspect places of detention, although it must give advance notice. The Commission directed that cameras be installed in police stations to monitor and deter police brutality.⁶⁸ At least in some urban areas, such cameras have been installed, though their long-term effect in preventing torture remains to be seen.⁶⁹ The Commission has also required, since 1993, that it be informed within 24 hours of the death of any person while in police, judicial or prison custody, and that it receive post-mortem reports, magisterial inquest reports and videography reports of the post-mortem within two months in every case.⁷⁰ In given cases the Commission also directs the government to take action against police officers that perpetrate torture.

63) Camille Giffard, *The Torture Reporting Handbook* (Colchester: University of Essex Human Rights Centre, 2000) and at <http://www.essex.ac.uk/torturehandbook/>; Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors* (Colchester: University of Essex Human Rights Centre, 2003), <http://www.essex.ac.uk/combatingtorturehandbook/>.

64) http://www2.essex.ac.uk/human_rights_centre/research/projects/med.shtm.

65) *Combating Torture: a manual for action* (London: Amnesty International, 2003).

66) www.gyla.ge.

67) www.cvict.org.np.

68) R. Lakshmi, n. 17 above.

69) *Ibid.*

The Constitution of the Republic of Uganda establishes a Human Rights Commission and specifically provides for visits to jails, prisons, and places of detention or related facilities with a view to assessing and inspecting conditions of the inmates and making recommendations.⁷¹ The Commission carries out visits without prior notice to the government or prison officials, and interviews prisoners in private; it seeks to determine, among other things, whether torture is occurring.⁷² By addressing its concerns to authorities and monitoring implementation after the visit, the Commission has improved the conditions of detention.⁷³ South Africa⁷⁴ and Fiji⁷⁵ also provide their national Human Rights Commissions with similar powers to visit and monitor places of detention. In South Africa the Commission has not focussed on torture as a specific issue, although it has raised concerns about assaults on prisoners as a general matter.⁷⁶

In Argentina, the Procurador Penitenciario (Ombudsman of prisons) carries out weekly visits and interviews with prisoners in private, without prior notice, in order to fulfil his mandate of protecting prisoners' rights including the right to be free from mistreatment.⁷⁷ A similar role is played by the Om-

budsman in Poland⁷⁸ and the Chancellor of Justice in Estonia.⁷⁹ In other countries a specialized ombudsman for prisons may have the right to visit places of detention and interview prisoners, but only after providing advance notice to authorities.⁸⁰

3.4.3 Judges and lawyers

Judges, prosecutors and defence lawyers can also play an active and practical role in the prevention of torture. Though judges and prosecutors may not traditionally have been considered as playing a proactive role in the prevention of torture, they are uniquely positioned to play a preventive role if sensitised and educated with respect to international standards and practical indicators of torture and ill-treatment.

The judge may be the only supervising authority in a position to ascertain whether a detainee's rights have been protected. Thus, when detainees are brought before them, judges can do much more than simply ascertain whether the detention is *prima facie* lawful under national laws. Prosecutors, on the other hand, are often actively involved in the process of collection of evidence, and may be present at interrogations of detainees. Both the prosecutor and judge will be

70) See <http://nhrc.nic.in/sec-1.pdf> and letter addressed to the Home Secretaries of all States/ Union Territories, all Directors General of Prisons and all Directors General of Police by Shri N. Gopalaswami, Secretary General of the Commission, on 5 January 2001, <http://nhrc.nic.in/dispar-chive.asp?fno=157>.

71) The Constitution Of The Republic Of Uganda 1995, article 52(1)(b).

72) Amnesty International, "Preventing Torture at Home", n. 51 above.

73) Ibid.

74) www.sahrc.org.za.

75) www.humanrights.org.fj.

76) See Report of The National Prisons Project of the South African Human Rights Commission (1998). http://www.sahrc.org.za/prisons_report.pdf.

77) See Procuracion Penitenciaria, Ley 25.875 (20 January 2004), Articles 15-21, <http://infoleg.mecon.gov.ar/txtnorma/92063.htm>.

78) Act of 15 July 1987 on the Commissioner for Civil Rights Protection, Article 13, <http://www.brpo.gov.pl/index.php?e=1&poz=360>.

79) <http://www.oiguskantsler.ee/>.

80) E.g., United Kingdom, <http://www.ppo.gov.uk/>.

concerned with the admissibility of evidence and, thus, both should actively satisfy themselves that all evidence has been collected without torture or other ill-treatment. Judges and prosecutors must both be sensitive to signs that witnesses have been mistreated and be prepared proactively to initiate investigations of any suspicions.

Information about the duties and roles of judges and prosecutors in relation to torture prevention, and detailed practice advice, is provided in a recent publication of the University of Essex Human Rights Centre, *Combating Torture: A Manual for Judges and Prosecutors*.⁸¹

3.4.4 Police training

The Association for the Prevention of Torture has focussed its work in Africa, and to some extent in Europe, on developing codes of conduct for the police as potential tools to prevent torture and ill-treatment. The APT is co-operating with the SARPCCO (Southern African Regional Police Chiefs Co-operation Organisation) on the promotion and implementation of its regional Code of Conduct for Police Officials.⁸² The Code was drafted during a workshop jointly organised by the APT and SARPCCO in Harare, Zimbabwe, in July 2001. The SARPCCO Police Chiefs then adopted the Code, becoming the first regional police organisation to apply a uniform Code of Conduct for its member states. The programme has attracted international attention: Interpol has expressed

interest in duplicating this model in other regions.

The APT also offers assistance to national police services to train and inform their officers and thus commence the process of using and applying the Code. To this end, from 17 to 25 November 2003, the APT and the Botswana Police Service, jointly organised three workshops on the implementation of the Code. The workshops were intended to:

- better integrate human rights into police practice;
- improve the capacity of Botswana Police Officers in human rights and policing by ensuring they know and use the SARPCCO Code of Conduct;
- study, test and consider the Code and to come up with strategies for its implementation in the day-to-day duties of the police;
- make the officers aware that in protecting human rights, the police are actually facilitating effective and fair enforcement of the law, not impeding law enforcement;
- promote the concept that in protecting human rights, the police will gain respect, efficiency, professionalism and effectiveness; and
- emphasise the importance of working with the community and not against it, thereby enhancing the social role of the police.

The APT provided technical and financial support for the three workshops. It provided two experienced police trainers (from South Africa and the U.K.) who conducted the workshops. The APT also sponsored the publication of a pocket-size booklet containing the SARPCCO Code of Conduct and the Botswana Police Mission of Statement and Values, which was distributed to the

81) *Combating Torture: A Manual for Judges and Prosecutors*, n. 63 above.

82) Harare Resolution on the SARPCCO Code of Conduct for Police Officials, Southern African Regional Police Chiefs Co-operation Organization 6th Annual General Meeting, 27-31 August 2001, Mauritius.

attendees of the three workshops. The practical booklet will also be disseminated to each Botswana police officer. The Mauritius Police have now invited the APT to assist them to conduct a similar training exercise in 2005.

Similarly, the International Rehabilitation Council for Torture Victims undertook a project in collaboration with Ukraine from 2001 to 2003, training Ukrainian law-enforcement personnel, Ombudsman, and NGOs on standards and practices for the prevention of torture.

3.5 International monitoring of places of detention

3.5.1 History of the monitoring concept

The 1949 Geneva Conventions give the ICRC the right to visit places where prisoners of war are detained pursuant to an international armed conflict.⁸³ The ICRC also has experience in carrying out such visits in situations of internal armed conflict or other civil disruption. These visits have demonstrated their ability to prevent torture and ill-treatment of prisoners of war in international armed conflicts, and other detainees in non-international conflicts.

It was explicitly on the basis of this experience that Jean-Jacques Gautier, a Swiss banker and founder of the Association for the Prevention of Torture, decided to promote the idea of visits to places of detention as a tool to prevent torture and ill-treatment for all detained persons. Considering the efficiency of such preventive approach and the conventional limits of the ICRC, Jean-Jacques Gautier proposed in the late 1970's to establish an international visiting mechanism that would be empowered to prevent torture and ill-treatment in situations not covered by international humanitarian law. A subsequent campaign in support of his idea resulted in the successful adoption of

the European Convention for the Prevention of Torture and inhuman or degrading treatment or punishment in 1987, and the adoption by the UN General Assembly of the Optional Protocol to the UN Convention against Torture on 18th December 2002.

3.5.2 CPT

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is established by article 1 of the European Convention with a mandate to "by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." Established in 1989, the CPT is now competent to undertake regular, follow-up and ad hoc visits within the 45 States Parties to the Council of Europe. In 2004 the CPT undertook 169 days of visits, representing a direct force for preventing torture and ill-treatment in the institutions it has visited. The CPT has also played a major role through its annual reports, in which it compiles its findings so as to aid the development of general standards related to the deprivation of liberty.⁸⁴

The CPT primarily makes visits to States Parties. Each country visit lasts on average 2 weeks and allows the Committee to visit several places of detention. States are visited on a periodic basis, on average once every five years, though the frequency may vary with the size of the state. The Committee can also revisit places visited on a previous occasion,

83) See also Article 5-2-d of the Statutes of the International Committee of the Red Cross, International Review of the Red Cross no. 324, p. 537-543.

84) <http://www.cpt.coe.int/en/docsstandards.htm>.

in order to verify that its recommendations have been implemented. At the end of the year the Committee establishes a list of states that will be visited in the coming year. For example, on November 30, 2004, the CPT announced that it would visit Albania, Belgium, Germany, Greece, Hungary, Norway, Russian Federation, San Marino, Slovakia and Ukraine during 2005.

However, the CPT can also decide at any time to visit states not on the list. The Committee may receive information that the situation in a particular prison is urgently poor, that a specific person is detained and that people are concerned about his or her situation, or that the general situation in a region requires its visit. For instance the CPT made several unscheduled visits in Turkey during a period of hunger strikes and riots in some specific prisons. On another occasion, on learning that Spanish authorities had taken a separatist into custody, the CPT immediately carried out an unscheduled visit to ensure that he was treated with respect for his human dignity. Exceptionally among international human rights mechanisms, the Committee has also been able to visit Chechnya in recent years to assess detentions arising from the conflict between local paramilitaries and federal Russian forces.

A few days before each periodic visit, the CPT provides the state with a list indicating the specific places of detention that it intends to visit. However, this list is only an indication; the Committee can and does visit other places of detention that do not appear on the list. When the Committee arrives in the country it meets with relevant government authorities, such as the Ministry of Justice or Ministry of the Interior. It also meets with NGOs and representatives of civil society in order to gather an overview of the situation in the country in general

and of people deprived of their liberty in particular. After these initial consultations, the delegation of the Committee often divides itself into sub-groups in order to visit a greater number of places of detention. Members usually go in pairs, accompanied by interpreters, members of the secretariat of the Committee and external experts who are retained to provide the delegation with specific expertise.

According to the European Convention, each State party must guarantee the delegation unlimited access to all places of detention, and fully cooperate in a variety of other ways:

A Party shall provide the Committee with the following facilities to carry out its tasks:

- a) access to its territory and the right to travel without restriction;
- b) full information on the places where persons deprived of their liberty are being held;
- c) unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction;
- d) other information available to the Party that is necessary for the Committee to carry out its task.⁸⁵

The Convention also provides that within each place of detention the Committee has the right to “interview in private persons deprived of their liberty” and “may communicate freely with any person whom it believes can supply relevant information.”⁸⁶

85) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment n. 4 above, article 8.2.

86) *Ibid.* article 8.3.

At the end of the visit the Committee usually meets with the authorities again in order to present its general views on the situation of persons deprived of liberty in the country. It can also, if need be, draw the attention of the authorities to the situation of a particular place of detention about which the Committee is very concerned, and invite the authorities to take immediate measures.

The Committee then drafts a report on its visit. A copy of the report is sent to the state, normally six months after the visit. The state authorities usually draft a “response” in which they describe how they intend to implement the recommendations included in the Committee’s report. The state response may also identify areas of disagreement with the Committee’s assessment of the situation.

It is on the basis of this exchange – visit, report, response – that co-operation is established with a view to improving the situation. In some cases, however, the co-operative process cannot be established, or breaks down, due to an unwillingness on the part of the state to give serious attention to the Committee’s views and recommendations; in such cases the Committee can decide to make a public statement.

The tools that the Convention provides the Committee to deal with uncooperative states are generally persuasive rather than coercive. Within the framework of the Convention, public statements are a form of sanction through which the Committee can seek to harness public pressure by publicly condemning any lack of co-operation on the part of the authorities. A public statement may be triggered by non-cooperation during or after a visit.

First, the Committee may encounter obstacles during a visit: difficulties in obtaining information, or limitations on access to places or people. A government may not provide enough cars for the delegation, so

that the delegation logistically cannot get to a specific place of detention. A government official might formally refuse to provide access to a place of detention. In such situations the delegation, during the visit, first privately complains to the authorities; if the situation does not improve it may decide to make a public statement.

Second, a lack of co-operation can occur after the visit because the government does not answer properly to the Committee’s report, or does not take measures to implement its recommendations. Again the Committee can decide to make a public statement in an effort to encourage positive action. To date the Committee has issued 4 public statements: 2 regarding Turkey⁸⁷ and 2 regarding the Russian Federation, specifically concerning the situation in Chechnya.⁸⁸

In the course of its visiting activities the CPT has also developed general standards regarding the deprivation of liberty. Initially the objective of these standards was primarily internal: delegations to different countries were composed of different combinations of Committee members, so it was necessary to find a way to avoid inconsistencies in the findings and recommendations generated by each group. However these standards are now known and used throughout the Council of Europe, including by the European Court on Human Rights and other actors involved in the prevention of torture and ill-treatment.⁸⁹ The standards represent a very useful reference tool on a

87) CPT/Inf (96) 34 (6 December 1996); and CPT/Inf (93) 1 (15 December 1992).

88) CPT/Inf (2003) 33 (10 July 2003); and CPT/Inf (2001) 15 (10 July 2001).

89) See for instance *Kalashnikov v. Russia*, (47095/99) [2002] ECHR 591 (15 July 2002).

wide range of issues: police custody, imprisonment, training of law enforcement personnel, health care services in prisons, foreign nationals detained under aliens legislation, involuntary placement in psychiatric establishments, juveniles deprived of their liberty, women deprived of their liberty, training of law enforcement officials and combating impunity.⁹⁰

The work of the CPT has contributed to reforms and concrete improvements in a number of states. Turkey, for example, has been visited by the CPT on numerous occasions since 1990. In an 18 June 2004 Report, the CPT noted that the Turkish Government had recently “engaged in a vast programme of legislative reform” and that this reform “included numerous positive changes in areas related to the CPT’s mandate.”⁹¹ These reforms implemented a number of CPT recommendations and included:

- reductions to the maximum period of police custody in respect of certain offences;
- additional requirements that a judge hear from the detainee before deciding whether to extend police custody;
- extending the right of the detainee to have the government notify a relative or other designated person of the fact of detention;
- a formal right of immediate access to a lawyer for all detained persons regardless of what their suspected offence were;

- the ability for prosecutors to instigate proceedings under the torture and ill-treatment offence provisions of the Criminal Code without having to seek authorisation from an administrative authority. Procedural amendments have been adopted to ensure the speedy investigation and prosecution of such offences, and sentences imposed under those Articles can no longer be converted into a fine or suspended.⁹²

The CPT found that, with some important exceptions, these reforms were generally being respected in practice by 2004,⁹³ and was able to conclude that:

the legislative and regulatory framework necessary to combat effectively torture and other forms of ill-treatment by law enforcement officials has been put in place; the challenge now is to make sure that all of the provisions concerned are given full effect in practice.⁹⁴

Further, as regards the factual situation prevailing in Turkey by 2003, the CPT stated that “the Government’s message of ‘zero tolerance’ of torture and ill-treatment has clearly been received, and efforts to comply with that message were evident, including a recognized ‘sharp reduction’ in the incidence of ‘heavy torture.’”⁹⁵ As regards conditions of detention, the CPT stated in 2003 that

90) CPT/Inf/E (2002) 1 - Rev. 2004.

91) CPT, Report to the Turkish Government on the Visit to Turkey from 7 to 15 September 2003 (18 June 2004), CPT/Inf (2004) 16 (“2004 Turkey Report”), paragraph 6.

92) Ibid. and CPT, Report to the Turkish Government on the Visit to Turkey from 21 to 27 March and 1 to 6 September 2002 (25 June 2003), CPT/Inf (2003) 28 (“2003 Turkey Report”), paragraph 28.

93) 2004 Turkey Report, n. 91 above, paragraphs 14 to 27.

94) Ibid., paragraph 7.

95) Ibid., paragraph 8.

96) Ibid., paragraph 35.

“progress continues to be made towards improving conditions of detention in law enforcement establishments” and that “in practically all of the establishments visited, material conditions of detention were on the whole adequate for the periods of custody involved.”⁹⁶ However, the CPT also identified, in respect to virtually all areas of its mandate, areas where considerable improvement on the part of Turkey is still required.

3.5.3. OPCAT

On the basis of the experience of the European CPT, in 1991 the UN Commission on Human Rights created a Working Group to establish an Optional Protocol to the Convention against Torture that would incorporate a visiting mechanism similar to the CPT but operating at the universal global level. After a decade of negotiations, on 18 December 2002 the UN General Assembly adopted the OPCAT by 127 votes in favour, 42 abstentions and four against. The protocol will actually enter into force after twenty states have ratified. The provisions of the Protocol will only apply to states that are already party to the Convention against Torture, and choose additionally to ratify or accede to the Protocol. One innovative feature of the OPCAT is that it not only requires states to allow an international visiting mechanism (the Subcommittee on Prevention) unrestricted access to places of detention, it also requires states to establish independent visiting mechanisms at the *national* level with similarly unrestricted powers (National Preventive Mechanisms).⁹⁷

3.5.3.1 National preventive mechanisms

Article 3 of the OPCAT requires each State Party to “set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment

or punishment.” These national institutions are known as National Preventive Mechanisms (NPMs). A state may have one or several NPMs designated under OPCAT, but every place of detention in the state must be subject to the jurisdiction of one or more NPMs. For instance, in a federal state, the NPM requirement may be met by designating a combination of regional and federal mechanisms (such as where the state constitution internally divides jurisdiction over places of detention),⁹⁸ but the failure of even one region or institution to be subject to visiting by some designated mechanism would constitute a violation of OPCAT.

The State Party must guarantee the independence of its NPM(s) and ensure that NPM members have appropriate expertise. At a minimum, the state must empower its NPM(s) to regularly examine the treatment of persons deprived of liberty, in order to strengthen protections against torture and other ill-treatment, to make recommendations to the relevant authorities, and to provide advice on existing or proposed legislation.⁹⁹ The state must also ensure that the NPM has the powers necessary to effectively carry out its mandate. In particular, in order to enable the national preventive mechanisms to fulfil their mandate, states must give the NPMs:

- unrestricted access to information concerning the persons deprived of their liberty, and the places where they are held;
- access to all places of detention and their installations and facilities;

97) OPCAT, n. 13 above, article 1.

98) *Ibid.*, article 17.

99) *Ibid.*, article 19..

- the right to interview detainees, or any other person, confidentially and without witnesses;
- freedom to choose the places they want to visit and the persons they want to interview;
- the right to exchange information and to meet with the international Subcommittee on Prevention.¹⁰⁰

As we will see below, if the state fails to fulfil these obligations the international Subcommittee on Prevention is empowered to address the issue to the relevant authorities.

NPMs will also have an advisory role. This is apparent from the text of the Protocol; the OPCAT recognizes that the NPM will naturally play a consultative role where the government is developing new legislation.¹⁰¹ However, the NPM will also fulfil advisory functions in other areas not expressly identified in the Protocol itself; for instance, the NPM may help to develop training activities for law enforcement officials.

3.5.3.2 Subcommittee on prevention

The Subcommittee on Prevention is the key international component of the prevention system established under OPCAT. The Subcommittee will be composed of 10 independent experts elected by States Parties to OPCAT, though this number would increase with the number of ratifications. Though it is formally constituted as a “subcommittee” of the Committee against Torture established under UNCAT, it is clear from the text of OPCAT that the Subcommittee on Prevention will in fact function as an independent body, not subject to general direction or control by the Committee against Torture.

The Subcommittee is to be independent and have a relevant professional knowledge

in the field of deprivation of liberty.¹⁰² Thus, one would expect Subcommittee membership to include lawyers, doctors, psychiatrists, former law enforcement officials, and specialists in human rights or humanitarian law.

The Subcommittee is given a broad authority to carry out in-country inspections. Under articles 4, 11 and 12, each State Party must allow the visiting mechanisms access to “any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority, or at its instigation or with its consent or acquiescence.” The Subcommittee is to establish a programme of regular visits, drawn up at first by random. If appropriate, the Subcommittee can propose a short follow-up visit in addition to the regular periodic visit.

The OPCAT requires states to provide the Subcommittee with the same unrestricted access to individuals, places of detention, and information that was described above in relation to NPMs.¹⁰³ A state can object to a visit by the Subcommittee only in respect of a *particular* place of detention, only temporarily, and only in the following limited circumstances:

- the grounds for delaying any visit must be “urgent and compelling”;
- the only permissible grounds are national defence, public safety, natural disaster or serious disorder;

101) *Ibid.*, article 19.

102) *Ibid.*, article 5.

103) *Ibid.*, article 14(1).

104) *Ibid.*, article 14(2).

- the grounds must exist “in the place to be visited,”
- the general existence of a declared state of emergency as such cannot be invoked by a State Party as a reason to object to a visit.¹⁰⁴

Following its visit, the Subcommittee will send a report to the authorities on a confidential basis. The Subcommittee will also submit an annual report to the Committee against Torture. Where there has been a lack of co-operation on the part of a State Party, the Subcommittee can refer the matter to the Committee against Torture, which can then decide to issue public statements to condemn the State Party’s non-compliance and create pressure for renewed co-operation.

The Subcommittee will also be able to provide assistance to National Preventive Mechanisms. Assistance can be provided directly, through exchange of information or through a training session for the NPM members. Assistance may also be provided indirectly in that the Subcommittee can report to the government that the national preventive mechanism is not functioning as intended by the OPCAT (for instance because members are not independent or its visiting powers are restricted) and can make corrective recommendations which, if not implemented, can lead to a public statement by the Committee against Torture. Once the national mechanisms are in existence, the Subcommittee is to maintain contact with them and offer training, technical assistance, and other advice or recommendations. Further, Article 11 also provides for the Subcommittee to co-operate generally with relevant UN bodies, as well as with other international, regional and national institutions or organisations working to prevent torture.

4. Conclusion

Certain general characteristics and trends can be extracted from the preceding examples of recent efforts to ensure effective implementation of international standards for the prevention of torture.

First, the techniques demonstrate the importance of pursuing full implementation of international standards and monitoring by regional and national actors. Such processes demand that NGOs and other international actors view their work as only partially completed once international standards are established and ratified; actual prevention of torture requires an ongoing process of cooperative dialogue between states, human rights mechanisms, and civil society. The African Commission’s Robben Island Guidelines implementation process, the European Guidelines implementation process and follow-up to the Special Rapporteur’s Brazil visit provide examples of the opening up of such a crucial dialogue.

Second, such processes are not focussed on setting further or more detailed standards. Rather, their aim is to identify, solve, clarify and make concrete recommendations to states and other actors as to the practical measures, such as monitoring, that can be taken to help prevent torture (and so better to comply with the already-established international standards). The work of the European CPT is a good example of this.

Third, the processes outlined above underline the necessity for states and local actors to begin with an assessment of the situation as it currently exists, in order to identify practical measures that are likely to work within the particularities of a given national or regional setting.

Fourth, the processes selected for examination demonstrate the leading role that NGOs and other civil society actors can take in guiding implementation strategies and

maintaining pressure on state and regional actors to put measures into effect, thus giving international standards concrete reality on the ground.

Fifth, the processes generally involve confidential processes, whereby the state is given an opportunity to develop and implement its response, combined with transparency at the end of the process.

To return to the admonition in article 5 of the Universal Declaration of Human Rights with which we began this paper – “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” – states, international organizations, and all members of local, regional and international civil society, must continue to work together to find and implement practical measures for the prevention of torture, if the promise enshrined in the Declaration is truly to be fulfilled.

Ethical dimensions of using individual case history studies in campaigning, fundraising and publicity work

Karen Sherlock*

I. Introduction

For many non-governmental/charitable organisations the globalised world offers many opportunities, but it also raises some serious challenges. In an increasingly competitive environment, many organisations are seeking new donors and to influence the agendas of governments. To do this effectively they must remain relevant and visible to the wider public. As The International Rehabilitation Council for Torture Victims (IRCT) comes of age, and the torture rehabilitation movement continues to grow, these issues are becoming increasingly important for survival, being as they are dependent on exterior funding from international and national institutions, foundations and private donations. The focus of this article is to evaluate how the torture rehabilitation movement can ethically use the individual case histories of torture survivors (with their consent), to raise awareness, mobilise financial support and seek justice for victims of torture. The dilemma posed by the use of these cases in such work is that neither the work of centres nor the interests of the

victims should be put at risk, a point that forms the crux of the debate in this article.

II. Protection of clients and informed consent

It is clear that patients are protected adequately by ethical codes at the medical/treatment stage of the rehabilitation process; a fundamental principle is the duty of confidentiality. The confidentiality of the individual torture victim must always be respected to preserve the inherent dignity of the individual. However the multi-disciplinary working practices of many centres and programmes leave a question mark over the ethical protection surrounding the relationship between the patient/client and organisation in a social research context. Raising awareness of the issue of torture is a critical factor in both the protection (through rehabilitation) of survivors of torture and the prevention of torture, through increased public awareness of the issue. This dichotomy highlights a potential conflict between the needs of the victim to assimilate normally back into society and the needs of the organisation to make public the work it does in assisting such individuals to recover

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their lives. The balance of interests therefore lies between the collective interests of the rehabilitation movement and the vulnerability of the individual survivor of torture who views the organisation as “protector”. It is the imbalance of power in this relationship, which should be addressed.

To a greater extent, the issue revolves around informed consent between the organisation and the individual in the non-therapeutic relationship context. As a cornerstone of ethical practice the organization requires the individual’s full consent. However, it also has to make an assessment of the capacity of the individual to cope with public disclosure. Because all necessary measures must be taken to prevent adverse effects of disclosure for the torture survivor or their family, other questions arise about how informed consent is gained in the non-therapeutic relationship. Informed consent is defined as valid only when an appropriately informed person, who has the capacity to consent to the envisaged request in question, who furthermore must “comprehend and retain information material to the decision”¹, gives it voluntarily. Informed consent therefore focuses on the content and process of consent. To what extent does the individual, or the organisation, understand about what informed consent means and its possible consequences? Informed consent to do what exactly, and for how long and on what basis? If an individual’s identity is used in a case history, can it really be disguised so they are truly unidentifiable? Those organisations working in the field may be exposing themselves and their clients to danger as governments, who may themselves be currently complicit in human rights abuse, sometimes take direct or indirect action to attack centres or individuals willing to speak out publicly against torture. Social science academics and practitioners are increas-

ingly grappling with these ethical dilemmas as events move quickly in the faced-paced, globalised media, because outcomes are not easy to predict, and the makes *really* informed consent a thorny issue.

Institutions such as the World Health Organisation (WHO), London School of Hygiene and Tropical Medicine, UK Crown Prosecution Services and the British Medical Association have made valuable contributions in the form of ethical guidelines, particularly for interviewing vulnerable groups such as trafficked women and also children/unaccompanied minors. Increasingly, non-governmental organisations, particularly those heavily involved in campaigning/research or fieldwork, are realising that their methodologies may not be as ethical as they could, or need to be, and they are dedicating themselves to review these issues. Organisations such as Medicines Sans Frontiers (MSF) and Amnesty International are in the vanguard of this work and they have been carefully examining their own guidelines of how to collate and disseminate information taken from testimonies given by victims of human rights abuse in the course of their fieldwork. Whilst the aim of these organisations is to “do no harm” to the victim of human rights abuse, precisely how *best* to protect them ethically is debatable and it is still a steep learning curve for many of these organisations.

Within social research methodologies, Humphries and Martin argue in their critical study that orthodox statements of ethics “show their limitations and the ways they support the interests of dominant groups”.²

1) IRCT, Draft policy position paper, 2006.

2) Research in Social Care and Social Welfare, ed. B. Humphries, 2000, Ch. 6: Disrupting Ethic in Social Research. Jessica Kingsley Publications.

The balance of power between the institution and the individual poses challenges in drawing up social research methodologies, principally because the institutions have a vested interest in offering the researched information for public consumption as previously noted. The individual, who's case study may be used as an example, conversely may be grateful, beholden or have unrealistic expectations of the outcome they can expect from the organisation, thus consenting to any process too readily. There may also be cultural differences in the understanding of the nature of consent. Following her research with indigenous peoples Tuhuiwai Smith posits that indigenous cultures have a different approach to the issue of consent "Consent indicates trust and the assumption is that the trust will not only be reciprocated but constantly negotiated – a dynamic relationship rather than a static decision"³ which denotes a distinct need for the individual to be part of the methodological process from an indigenous cultural perspective. Benhabib summarises the aim of ethical research as "a reversing of perspectives and a willingness to reason from the other's (Other's) point of view, does not guarantee consent; it demonstrates the will and the readiness to seek understanding with the other and to seek some reasonable agreement in an open-ended moral conversation".⁴ In this brief snapshot of the issue of consent, it is clear that it is a complex process in the social science context, requiring flexibility and negotiation. The onus however, is on the organisation to monitor its role carefully in

3) Decolonising Methodologies: research and indigenous peoples, Tuhuiwai Smith, L 1999 (and reprints) Zed Books.

4) Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics. Benhabib. S (1992), Cambridge Polity Press.

the negotiation as the balance of power tilts heavily in its favour.

With particular regard to the media, the use of case stories can enhance the amount of media coverage and thus the general visibility of the organisation. The general rule in journalism is that the more details told of a personal story, the more effective the message and its impact. Likewise the opposite is true; fewer details are less effective. Therefore, the objective of communicating effectively must be taken into consideration. One approach is to find torture survivors who are "already public" meaning that they have already presented their case to the media and thereby to the public, and don't run the risk of suffering negative effects from their revelations. A preferred approach may be to mix a number of anonymous statements up into a collection of personal stories made up of various elements, but this is not considered an effective communication, as it is often regarded as "too general" and "too de-personalized" by the media. The external influence of the media is therefore driving the need for detailed, sensitive and sensational stories. Likewise, similar arguments enhancing the importance of case story coverage for the media can be used in lobbying campaigns aimed at donors or politicians, who also respond positively to a personal story rather than general points. In a competitive environment it is necessary to "play the game" but there again there is a limit that must be decided upon by the organisation itself as to how far it will comply with this and at what point does it feel that sensationalism has taken over from the basic aim of communicating. It can be particularly harmful to an organisation's reputation if this matter is not handled sensibly and sensitively.

The Medical Foundation for the Victims of Torture, a torture rehabilitation centre in the UK, has substantial experience of

publicising its work using individual case histories of victims of torture. According to Press Officer Andrew Hogg, the Medical Foundation has certain procedures that it adheres to, particularly when patients/clients talk to the press. In all instances the clinician has to give their professional opinion about the individual's capacity to speak to the media, and where appropriate (i.e. if it is an asylum case) the individual's lawyer is consulted too. If their approval is given and the individual agrees and wishes to tell their story, the Press Officer then interviews the individual to assess their capacity to handle a media interview. Once they are satisfied that the person can be interviewed by the media without being re-traumatised, the individual is informed about what the implications of consent are. For example the person has to be aware that their case may remain on the Internet for perpetuity, something that has caused a great deal of concern in child pornography cases. They are asked to define the level of confidentiality they wish to agree to, such as do they allow their real name and details to be used or will they allow themselves to be photographed. They are also asked to sign a release form, so the contract between the organisation and the individual is binding and transparent for both. Finally, in any interview with the media there is always a representative of the Medical Foundation Press Office present to ensure support and bear witness. Interestingly, in recent consultation interviews with victims of torture, it emerged that some patients/clients actually want to tell their stories, something that Hogg points out is "often not recognised". As the Medical Foundation demonstrates, the patient's/client's and the organisation's needs can both be met through strong communication, clear procedures, good political judgement, professional expertise and constant negotiation

and consultation both internally within the organisation and externally with the patients/clients, clinicians and lawyers.

III. Conclusions

In the multi-disciplinary working practices of torture rehabilitation centres, as well as in the torture rehabilitation movement I will be more general and not directed exclusively to the IRCT. At the end of the day you are an employee, the debate needs to begin about how best to enter (from an organisational perspective) into negotiated and informed consent with individuals willing to have their case histories used for awareness raising purposes. There is a need to establish parameters about how the relationship between the collective and individual should be handled. In particular, it is clear that the organisations bear the responsibility to establish some procedures or codes of conduct in order to manage the conflict of interests, which it sets up itself in wanting individuals to talk about their experiences. Debates can be had about the efficacy of using individual case histories in the media, to seek justice in the courts, mobilise political support or fundraise, and each of these areas in turn open up further debates about how the best way to do it. However, at the same time it is important to ensure that the victims of torture themselves are included in these debates, to allow them to have a part in the process and understand better, and thus be more informed, about matters that affect them directly.

Human rights organisations and organisation dealing with traumatised survivors of torture should explore these issues and there are three key areas that require defining: a code of conduct; security guidelines for centres; and a standardised informed consent procedure. Whilst this may be a time-consuming and/or complex process, the reputation and image of the organisation, from

its base to its peer's, ultimately hinges on its own ethical behaviour. Leaving these issues unresolved until a problem forces attention on it could be a highly counter-productive strategy for all concerned. It is hoped that the debates will commence within the reha-

bilitation movement about these issues to help inform the investigations. Above all it is important to ensure that any procedures, informed consent, or security measures adhere to fundamental ethical standards, which is in everyone's best interests.

Errata

In the letter to the editor "Children and Torture", published in *Torture* 2006;16:136-7 the numbers 1-4 in paragraph 2 should be in a parenthesis, as it refers to the references in general. The numbers 1, 2, 3, 4 in the following four paragraphs should be omitted.

The letter has two authors:

Jørgen Cohn, Professor Emeritus of pediatrics, health and human rights, Ærøskøbing, Denmark and

Pusjka Helene Cohn, Psychologist, Department of Child and Adolescent Psychiatry, Copenhagen County Hospital, Glostrup, Denmark, puheco01@glostruphosp.kbhamt.dk

Neither Pusjka Helene Cohn as co-author to the letter nor Jørgen Cohn are connected with the IRCT.

Margriet Blaauw, answering the letter, has, however, references to the IRCT.

An important step for prevention of torture

The Istanbul protocol and challenges

Hulya Ucpinar* & Turkcan Baykal**

Introduction

Torture has been consistently prohibited by human rights and humanitarian law for more than half a century. This prohibition is so absolute that no exceptions, including public emergency and times of war, might be accepted. There is no ground for legitimization of torture and other forms of ill treatment.

Torture and other forms of ill treatment, however, continue to occur in more than half of all countries in the world, despite a plethora of reports and declarations issued by non governmental and intergovernmental organizations, human rights and humanitarian instruments (conventions, regulations, recommendations, rules) declared and adopted both universally and regionally by intergovernmental organizations, and decisions and judgments by regional and international bodies. Following the incidents of September 11, states' unwillingness to abide by the prohibition of torture and other

forms of ill treatment, within the concept on "war on terror", is perilous for detainees that are under the protection of humanitarian and human rights law.

"The striking disparity between the absolute prohibition of torture and its prevalence in the world today demonstrates the need for States to identify and implement effective measures to protect individuals from torture and ill treatment. The Istanbul Protocol, (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) was developed to enable states to address one of the most fundamental concerns in protecting individuals from torture and other forms of ill treatment: investigation and effective documentation."¹ The effective investigation and reporting of psychological and physical findings is a *sin qua non* in preventing torture, penalizing perpetrators and redressing grievances.

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Key words: Documentation, international guidelines, legal codes, medical examination

1) Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Istanbul Protocol (IP), Professional Training Series No.8/Rev.1, UNHCHR, 2004, Introduction.

“International law requires States to investigate allegations of torture and to punish those responsible. It also requires that victims of acts of torture obtain reparation and have an enforceable remedy to fair and adequate compensation, restitution of their rights and as full rehabilitation as possible. The Istanbul Protocol is a manual on *how* to make investigations and documentations of torture *effective* in order to punish those responsible, to afford adequate reparation to the victims and more generally, to prevent future acts of torture.”²

During the past two decades, much has been learned about torture and its consequences, but no international guidelines for documentation were available prior to the preparation of this manual.³ The Istanbul Protocol is intended to serve as international guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative bodies.

1. What is the Istanbul Protocol.

The Istanbul Protocol is the first set of international guidelines for the effective psychological, physical and legal investigation and documentation of allegations of torture and ill treatment based upon the needs of daily life. The Protocol provides comprehensive and practical guidelines that describe in detail the steps to be taken by states, investigators, legal and medical experts to ensure the prompt and impartial investigation and

documentation of complaints and reports of torture.⁴ It gives details of procedure to be followed in the medical and psychological examination of alleged victims.⁵

The Protocol also provides “The Principles for the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Principles)” as an annex. The Principles reflects prominent aspects of the Protocol as well as minimum standards for States to carry out effective, impartial investigations and documentation of torture allegations. However, the guidelines contained in the Manual are not presented as a fixed protocol. Rather, they represent an elaboration of the minimum standards contained in the Principles and should be applied in accordance with a reasonable assessment of available resources.⁶

Laws evolve and so do the rules on investigation, which become more refined in response to the needs revealed by the cases brought before the international courts.⁷ Since the Protocol and its Principles are not narrow and stagnant there might have already been practical and creative additions to the existing provisions of the Protocol and the Principles. The Protocol is certainly open to any kind of contribution because it was developed to be used for the daily needs of practitioners.

2. The development of the Istanbul Protocol

The Istanbul Protocol was drafted by more

2) Istanbul Protocol training material; “Action against Torture- A Practical Guide to the Istanbul Protocol”, REDRESS, August 2004, p. 3.

3) See footnote 1.

4) Combating torture-UN fact sheet no4/rev1.

5) Combating Torture: a manual for action; Amnesty International, p.179.

6) IP Introduction, last para.

7) Thanks to Anna-Lena Svensson McCarthy for the formulation.

than 75 experts in law, health and human rights through three years of common efforts. The initial steps to work on a manual for effective investigation and documentation of torture and other forms of ill treatment were taken during an international meeting organized by the Turkish Medical Association (TMA) in 1996. All organizing efforts were initiated and coordinated by Human Rights Foundation of Turkey (HRFT) and Physicians for Human Rights USA (PHR USA).

The conceptualization and preparation of the manual was the collaborative effort of forensic scientists, physicians, psychologists, human rights monitors and lawyers working in different countries with the involvement of more than 40 organizations.⁸ The organizations involved from the outset of the preparation of the manual approached the work from starting points which emerged from their own practical needs or targets. The HRFT and Society of Forensic Medicine Specialists (SFMS) in Turkey were inspired by the desire to give meaning to the tragic death of Baki Erdoğan in custody.

The development of the Istanbul Protocol began with a volunteer group of lawyers, doctors and human rights activists who got together and implemented any related guidance of the Minnesota Protocol⁹ at every level. This led the working group to a real achievement at national and international levels.¹⁰

These were the years when torture and other forms of ill treatment and extrajudicial killings were very much a part of the daily lives and agendas of human rights activists, law and health professionals who sought ef-

fective instruments to struggle against these human rights violations. Being effective at every single step motivated the group and the related organizations (HRFT, TMA, SFMS) to question the need for a manual. The international meeting, organized by the TMA in 1996, was a perfect opportunity to share this concern and perspectives with participants of other organizations from different countries.

That is to say that the Istanbul Protocol was inspired by the Minnesota Protocol and derived from the needs of daily practices from the perspective of the contributors from Turkey.

3. The content of the Protocol

The Istanbul Protocol is composed of six chapters and four annexes:

- Relevant International Legal Standards
 - Relevant Ethical Codes
 - Legal Investigation of Torture
 - General Considerations for Interviews
 - Physical Evidence of Torture
 - Psychological Evidence of Torture
-
- Annex 1: “Istanbul Principles”
 - Annex 2: Diagnostic Tests
 - Annex 3: Anatomical drawings
 - Annex 4: Guidelines for the medical evaluation

The chapters of “International Legal Standards”, “Legal Investigation of Torture” and “Ethical Codes” are important for the law professionals; the “General Considerations for Interview” is of special importance.

8) See footnote 1.

9) Minnesota Protocol-United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

10) Aydin (1st) Assize Court, 19994/69 E (2000/18E.), European Court of Human Rights; Erdoğan v. Turkey, 26337/95, <http://cmiskp.echr.coe.int/tkp197/view>.

It is clearly stressed in the Protocol that "...general considerations apply to all persons carrying out interviews, whether they are lawyers, medical doctors, psychologists or psychiatrists, human rights monitors or members of any other profession."¹¹ Interviews can be made for judicial or medical purposes as well as documentation, however, the "broad purpose of the investigation is to establish the facts related to alleged incidents of torture".¹²

Although some content was written in relation to the medical investigation that might provide useful evidence for legal processes, the general results of any interview held by any related professionals is also listed:

- “1) Identifying the perpetrators responsible for torture and bringing them to justice;
- 2) Support of political asylum applications;
- 3) Establishing conditions under which false confessions may have been obtained by State officials; and
- 4) Establishing regional practices of torture. Medical evaluations also may be used to identify the therapeutic needs of survivors, and as testimony in human rights investigations.”

It would not be appropriate to understand the content above as indicating that “only interviews for medical purposes provide evidence for legal procedures”, since interviews at the legal level also provide various findings for the medical area. It is possible for legal professionals to have contact with and to interview alleged victims in custody more than once to help and provide information. The intervention of medical and legal professionals in the process provides opportunities for interaction and mutual support. This interaction is also taken into consideration when the section “General Considerations

of Interview” takes up a “common ground” and attempts to put it into different contexts that may arise when investigating torture and interviewing victims of torture.¹³

All the experts from related professions are determined to pay special attention to the following issues during interviews: “Techniques of Questioning”, “Taking the History”, “Psychosocial History, Pre-arrest”, “Summary of Detention(s) and Abuse”, “Circumstances of Detention(s)”, “Prison/ Detention Place Conditions”, “Methods of Torture and Ill Treatment”, “Assessment of the History”, “Review of Torture Methods”, “Risk of Retraumatization of the Interviewer”, “Use of Interpreters”, and “Gender Issues”.¹⁴ The other important issue concerning legal matters is “Procedural safeguards with respect to detainees” under “General Considerations for Interview”.

At first sight, the safeguards undertaken in this topic seem medical. Professionals involved, however, are not only health professionals but also public prosecutors and other relevant officials, (i.e. law enforcement officials, police, soldiers, prison officers). The issues of concern include: transportation of a detainee, authorization of requests, requests for medical evaluations, evidence seeking, documentation of torture and ill treatment incidents, supervision of responsible officers, physical conditions of medical examination, falsification of a report, transmission of a report, requesting a medical report, access to a lawyer and access to a doctor.

11) IP, para. 120.

12) IP, para. 121.

13) See footnote 11.

14) IP, para. 136-156.

4. The Istanbul Protocol in the UN system

The Istanbul Protocol was submitted to the UN High Commissioner for Human Rights on 9 August 1999 after the above mentioned processes.

Both the General Assembly and the Commission on Human Rights adopted the Principles as annexes to their resolutions on 4 December 2000,¹⁵ following the recommendation of the Special Rapporteur during the fifty sixth session, 2 February 2000, of the UNHCR.¹⁶

Publishing and disseminating the Protocol was also discussed during the same session. It was finally published in UN-OHCHR's Professionals Training Series in April, 2001 in the six official languages of the UN.

The Special Rapporteur on Torture stressed once more the importance of the Istanbul Principles within the context of establishing independent national authorities for investigation; promptness and independence of investigations; independence of forensic medical services from governmental investigatory bodies; obtaining forensic evidence in his General Recommendations¹⁷ (see also the box).

Subsequently, the United Nations Commission on Human Rights, in its resolution on human rights and forensic science, drew the attention of governments to these Principles and strongly encouraged them to reflect upon the Principles as a useful tool in combating torture (on 23 April 2003).¹⁸ This would be accomplished by establishing thorough, prompt and impartial procedures of investigation and documentation (on 19 April 2005).¹⁹

The UNHCR resolution on the competency of national investigative authorities in preventing torture also stresses the Istanbul Principles as a useful tool in efforts to combat torture.²⁰ Supervening the UNHCR

General Recommendations of the Special Rapporteur on torture

... Independent national authorities, such as a national commission or ombudsman with investigatory and/or prosecutorial powers, should be established to receive and to investigate complaints. Complaints about torture should be dealt with immediately and should be investigated by an independent authority with no connection to that which is investigating or prosecuting the case against the alleged victim. Furthermore, the forensic medical services should be under judicial or another independent authority, not under the same governmental authority as the police and the penitentiary system. Public forensic medical services should not have a monopoly on expert forensic evidence for judicial purposes. In that context, countries should be guided by the Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (the Istanbul Principles) as a useful tool in the effort to combat torture.

15) General Assembly Resolution 55/89, 4 December 2000; UNCHR Resolution 2000/43, 20 April 2000.

16) E/CN.4/2000/9, 2 February 2000.

17) E/CN.4/2003/68, para. 26.

18) Human Rights Resolution 2003/33, 57th meeting, 23 April 2003 [E/CN.4/2003/L.11/Add.4].

19) Human Rights Resolution 2005/26, 56th meeting, 19 April 2005 [Adopted without a vote. See chap. XI, E/CN.4/2005/L.10/Add.11.

20) Human Rights Resolution 2005/39.

meeting, the General Assembly adopted this UNHCR resolution on torture.²¹

5. International recognition of the Istanbul Protocol

In addition to the UN some regional bodies also adopted the Protocol.

The African Commission on Human and Peoples' Rights deliberated on the importance of the Istanbul Protocol during its 32nd ordinary session and concluded that investigations into all allegations of torture or ill treatment shall be conducted promptly, impartially and effectively, guided by the Istanbul Principles.²²

The European Union elaborated on the Protocol and referred in the "Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" adopted by the General Affairs Council²³ (see the box). Other institutions and organizations reiterated the recommendations of the UN and other regional bodies in their reports, statements, comments, etc.

These references could be summarized in three categories:

- a useful tool in the efforts to combat torture where governments are strongly encouraged to reflect upon the principles in the Istanbul Protocol;
- the recommendation that investigations and documentation of torture allegations should be conducted promptly, impartially and effectively, guided by the Istanbul Principles;
- the recommendation that states should establish and operate effective domestic procedures in accordance with the Protocol.

Apart from this generalization, some other documents refer to the Istanbul Principles in

the context of power of investigative authority, the content and public character of the reports and the obligation of the State to reply to the report and declare which steps have been taken.²⁴

"Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" adopted by the General Affairs Council

...

- conduct prompt, impartial and effective investigations of all allegations of torture in accordance with the Istanbul Rules annexed to CHR resolution 2000/43
- Allow domestic procedures for complaints and reports of torture and illtreatment
- establish and operate effective domestic procedures for responding to and investigating complaints and reports of torture and ill treatment in accordance with the Istanbul Rules

21) General Assembly (A/Res/59/182), (A/Res/60/148).

22) Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, The African Commission on Human and Peoples' Rights, meeting at its 32nd ordinary session, Banjul, The Gambia, from 17th to 23rd October 2002.

23) General Affairs Council – Luxembourg, 09/04/01.

24) e.g. see; Advisory Council of Jurists, The Asia Pacific Forum of National Human Rights Institutions, Reference on Torture, Final Report, Ulaanbaatar, Mongolia, 24 – 26 August 2005.

6. The practical value

The Istanbul Protocol is not a binding document and does not include any sanctions.

However

- International law obliges governments to investigate and document incidents of torture and other forms of ill treatment and punish those who are responsible comprehensively, effectively, promptly and impartially.
- The Istanbul Protocol demonstrates international standards for implementing such investigations and documentations.
- States that are against torture and ill treatment must follow the standards set out in the Protocol for effective prevention. To achieve credibility for the claim of being against and being in an effort to prevent torture and ill treatment effectively, states must follow the standards set out in the Protocol.
- All medical examinations, evaluations and reports concerning allegations of torture and ill treatment should be in accordance with the principles and the standards in the Protocol.

In order to reach these goals, and for the legal investigation to be “effective”, the Istanbul Protocol obligates states to fulfill minimum requirements:

- to seek to obtain statements from the victims of alleged torture;
- to recover and preserve evidence, including medical evidence, related to the alleged torture which will aid in any potential prosecution of those responsible;
- to identify possible witnesses and obtain statements from them concerning the alleged torture;
- to determine how, when and where the alleged incidents of torture occurred as

well as any pattern or practice that may have been observed about torture.

The Protocol sets the purposes of an effective legal investigation and documentation of torture and other forms of ill treatment²⁵ as:

- Clarification of facts and establishment and acknowledgement of individual and state responsibility for victims and their families;
- Identification of measures needed to prevent recurrence;
- Facilitation of prosecution or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible, and demonstrating the need for full reparation and redress from the state, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

Although the Protocol itself does not lay out a supervisory mechanism to ensure state engagements, other mechanisms and bodies fulfill supervisory function on the state applications in their decisions, reports, recommendations, and the like.

The area of application for the Istanbul Protocol is not restricted to medico-legal investigation and documentation of torture. It can be broadened to the investigation and documentation of other violations of human rights and monitoring such as: cases of asylum seekers, cases of forced “confession” via torture, identification of therapeutic needs of victims, and the need for reparation and redress by the state. In the case of health professionals who are coerced into neglect, misrepresentation or falsification of evidence

25) IP, para 78.

of torture, this manual also provides an international point of reference for health professionals and adjudicators alike.²⁶

7. The Istanbul Protocol in judgments

The Istanbul Protocol and its Principles have started to be taken into consideration by regional courts and commissions. In the general outset of judgments, the states found to have inadequacies on the conduct of medical and legal investigations and documentation are named. They are then urged to follow the Principles in the Protocol during the investigations and documentations of torture and other forms of ill treatment. Another issue which is common in the decisions is the inadequacy of government practices in implementing the Istanbul Protocol.

A. *The European Court of Human Rights*

The first judgment of the Court that elaborated on the Protocol and the Principles, is the case of *Bati and others v. Turkey*, June 2004. The Court has subsequently referred to the case of *Bati and others* in plenty of following judgments.²⁷

a. *Case of Bati and others v. Turkey*²⁸

The case is about fifteen people detained (some were also arrested) in February 1996. All the persons complained that they were tortured and one had a miscarriage as a result of torture during their period in custody. All detainees, except two, had various med-

ical reports supporting their allegations of torture and ill treatment.²⁹

The incriminated police officers remained on duty during the whole pre trial investigation and court proceedings. Although some of the applicants formally identified the police officers during one of the hearings, the court rejected the applicants' request to remand the police officers.³⁰

The investigatory procedure had begun in March 1996 and the applicants' representatives asked the domestic court to speed up the proceedings, as there was a danger that the prosecution of the offences would become statute-barred in October 2002. The demands of the applicants were not taken into account. Thus, the defendants, except for one, could not be sentenced due to the statute of limitations that had expired in February 2003.

The Court (ECHR), having adopted the standards derived from the European Convention on Human Rights and the Istanbul Protocol, concluded that the criminal investigation conducted by the Turkish authorities was ineffective since the decision of the domestic court was taken in the absence of two of the defendants, one of whom was sentenced to two years of imprisonment.³¹

One of the main bases of the Court's judgment is the Istanbul Protocol. The Court concluded that the Protocol contains full practical instructions for assessing persons who claim to have been victims of torture or ill treatment, for investigating suspected cases of torture and for reporting

26) IP, Introduction.

27) e.g.; *Case of Karayigi v. Turkey*, 63181/00; *Case of Yavuz v. Turkey* 67137/01; *Case of Celik and Imret v. Turkey* 44093/98.

28) *Case of Bati and Others v. Turkey*, 33097/96 and 57834/00, 3 June 2004, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=>

[1&portal=hbkm&action=html&highlight=33097/96&sessionid=8353642&skin=hudoc-en](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=33097/96&sessionid=8353642&skin=hudoc-en).

29) *Bati*, para. 10-65.

30) *Bati*, para. 73, 80 and 145.

31) *Bati*, para. 73, 92 and 145.

the investigation's findings to relevant authorities.³²

The Court stressed the purposes of an effective investigation and documentation of torture and other forms of ill treatment:³³

State obligation to conduct prompt and effective investigation; the obligation to undertake an investigation even at times of lack of a complaint where appropriate; independence and power and obligations of investigators; the requirement of removal from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation of the potentially implicated officers in torture and other forms of ill treatment; the right to receive and access to information relevant to the investigation and present evidence.

Since the domestic court neglected the failure of the doctors' order for further forensic examination with regards to some of the applicants, the ECHR referred to the standards on medical investigation and documentation from the Protocol.³⁴

The Protocol requires the prompt preparation of a written medical report, with details of examination (time, date, location, circumstances, place and other relevant factors); detailed story of the person; physical and

psychological findings (appropriate diagnostic tests, coloured photographs); interpretation of probable relationship of the physical and psychological findings to possible torture and ill treatment and recommendation for any necessary treatment; and identity of the person who carried out the examination and a signature.

The Court also commented on the substantial delay of the investigation and the court proceedings which was ended by statute of limitations for four of the defendants.

Therefore, the Court found *inter alia* that "the Turkish authorities cannot be considered to have acted with sufficient promptness or with reasonable diligence, with the result that the main perpetrators of acts of violence have enjoyed virtual impunity, despite the existence of incontrovertible evidence against them."³⁵

b. Case of Mehmet Emin Yüksel v. Turkey³⁶
Mehmet Emin Yüksel, a medical student at the time of the events, complained of ill treatment while in custody. He was then taken to a state hospital and received a medical report stating that the applicant had "an oedema and an ecchymosed lesion as a result of trauma identified on the nose" after being examined by a doctor.³⁷

The Government had argued that the applicant's injuries occurred when, due to lack of sleep, he inadvertently fell and hit his

32) Batu, para. 100.

33) Batu, Para .100, and also see in Istanbul Protocol, Annex 1, para. 1.

34) See footnote 33.

35) Batu, para. 147,148.

36) Case of Mehmet Emin Yüksel v. Turkey, 40154/98 20 July 2004, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Mehmet%20%7C%20Emin%20%7C%20Y%FCksel&sessionid=8353642&skin=hudoc-en>.

37) Yüksel, para. 12, 27.

nose on a sink. The medical report did not indicate the cause of the injuries.³⁸

However the Court (ECHR) referred to the Istanbul Protocol (and the case of *Bati v. Turkey*) which states that “an opinion by medical experts on a possible relationship between physical findings and ill treatment is a requirement for the effective investigation of ill treatment.”³⁹

The Court, *inter alia*, found the State responsible, on the basis of the evidence deduced in the present case, under Article 3 of the Convention for the ill treatment suffered by the applicant in police custody.⁴⁰

B. Inter-American Court of Human Rights (IACHR)

a. Case of *Tibi v. Ecuador*⁴¹

Daniel Tibi was arrested for drug trafficking and was struck, burned and suffocated several times by police officers in the period of custody in 1995. In the conclusion of the Tibi case the Court expressed a requirement of a training campaign for prison, police, and judicial officials, as well as for doctors and psychologists, on how to prevent torture and document allegations of torture. For this purpose the Court cited provisions set out in the Istanbul Protocol.

The Court also assessed the need for the establishment of a committee to define and conduct the training programmes on human rights and treatment of detainees.

b. Case of *Gutierrez Soler v. Colombia*⁴²

Gutierrez Soler was detained and tortured by a private individual as well as police officers in 1994. One issue in this case is the forensic medical examinations of Soler conducted during his period of custody.

The medical expert whom the Court summoned found the report insufficient, since no photographs were taken and no anal examination was carried out. Medical examination was limited to external physical description of anatomical areas. The wounds, which would be significant for the courts’ assessment during judicial proceedings, were not explained in detail in one of the reports.⁴³

It was also discussed that some torture methods hardly leave signs and are hard to detect. With respect to relevant incidents, such as anal sexual abuse, the Court states that detained persons should periodically be submitted to physical examinations. The doctor should not be limited with the complaints of the person because many times s/he may be aware of the correlation between her/his sufferings and the causes.⁴⁴

The medical expert before the IACHR emphasized the importance of the Istanbul Protocol concerning the conduct of medical examination and preparation of medical reports. She suggests these standards be followed to avoid insufficient examination and impunity.⁴⁵

38) Yüksel, para. 30.

39) Yüksel, para 29.

40) Yüksel, para 38.

41) Case of *Tibi v. Ecuador*, 7 September 2004; http://www.cidh.org/migrantes/tibiseriec_114_esp.doc.

42) Case of *Gutierrez Soler v. Colombia*, Sep.

2005; Case 12.291, Report No. 76/01, OEA/Ser./L/V/II.114 Doc. 5 rev. at 155 (2001), www.corteidh.or.cr/docs/casos/articulos/seriec_132_esp.doc.

43) Soler, para. 109.

44) Soler, para. 44, in *Peritajes*.

45) Soler, para. 109.

Finally, the IACHR concluded that states are under the obligation to investigate, to identify, and to judge the responsible persons of torture and other forms of ill treatment and should follow international norms of human rights law and standards set in the Istanbul Protocol throughout these processes.⁴⁶

The IACHR also reached a conclusion that the State should establish a programme for the doctors that carries out its functions in the official detention centers and to the officials of the National Institute of Legal Medicine and Forensic Sciences, as well as to the public prosecutors and judges responsible for the investigation. The dissemination and implementation of the standards established in the Istanbul Protocol can contribute efficiently to the protection of the right to personal integrity in Colombia as a measure of prevention of repetition of the facts in this case.⁴⁷

C. The Inter-American Commission of Human Rights

*Case of Perez v. Mexico*⁴⁸

The discussion of the case was on medical reports prepared in accordance with the standards set out in the Istanbul Protocol but ignored by the Mexican authorities because of an unreasonable and arbitrary decision on the case of three sisters who were raped by military personnel in 1994. The doctor showed sufficient effort to receive the applicants' informed consent giving detailed explanation of what the check would entail.

The medical report provides a detailed description of the medical examination done on the three sisters, as well as of the circumstances surrounding the case.⁴⁹

The IACHR found the conduct of the medical examination in accordance with the Istanbul Principles. According to the prin-

ciples, the conduct of doctors should, at all times, be in line with "the strictest ethical guidelines" and the consent of the person to be examined should be obtained. Examinations shall take place in accordance with medical practices, and "never in the presence of security agents or other government officials." The "reliable report" should be prepared immediately by medical experts.

A reliable report should include, at a minimum:⁵⁰

- Circumstances of the interview;
- History, including detailed story, alleged methods and times of torture or ill treatment, all complaints of physical and psychological symptoms;
- Physical and psychological examination including findings from the clinical examination with appropriate diagnostic tests and, where possible, color photographs of all injuries;
- Opinion on the probable relationship of the physical and psychological findings to possible torture or ill treatment and a recommendation for any necessary medical and psychological treatment and/or further examination should be given;
- Identity of those carrying out the examination must be clear and the report should be signed.

46) Soler, para. 100.

47) Soler, para 110.

48) Case of Perez v. Mexico, Report no:53/01, <http://www.cidh.org/annualrep/2000eng/chapteriii/merits/mexico11.565.htm>.

49) Perez, para. 33.

50) Perez, para. 39 and also see in IP para. 83.

The Commission found that the reports contained detailed information of in-depth professional examination, the circumstances of interviews were determined, the data given was precise and consistent, professional opinions as well as recommendations on possible treatment were also given and that the reports were authorized by the doctors who conducted the medical examinations. All these points provide the minimum basis for a reliable medical report.⁵¹

The Commission concluded on the basis of these reports that Perez sisters were, *inter alia*, subjected to physical abuse and rape. The Commission also reached an assessment that the Mexican authorities did not fulfill the requirement of conducting effective and prompt investigation of torture and other ill treatment allegations by independent, competent and impartial investigators as it has been stated in the Istanbul Principles.⁵²

8. Examples from Turkey

The Istanbul Protocol is quite well known in Turkey since the problem of torture and other forms of ill treatment is still widespread and the struggle against such unlawful behavior by public officers is fairly strong. The solidarity among some bar associations, Contemporary Lawyers Association,⁵³ the Group for Prevention of Torture,⁵⁴ medical chambers, human rights organizations and individual experts have

brought some serious achievements including the implementation of the standards in the Istanbul Protocol.

The positive changes in the conduct of lawyers, especially those who work in the Group for Prevention of Torture, have also forced and created some changes among the investigatory authorities such as:

- Witness statements/interviews were received in a more detailed way and with more care to try to reduce the risk of re-traumatization, in accordance with the standards in the Istanbul Protocol. This helped perpetrators to be identified;⁵⁵
- Interference, notification, persuasion and insistence for medical examinations should be fulfilled in accordance with the provisions of the Istanbul Protocol;⁵⁶
- Elaboration on the official forensic reports and whether they meet with the standards in the Istanbul Protocol; sending these incomplete and deficient reports to the medical centers, having facilities to make comprehensive evaluation during prosecution and court proceedings;⁵⁷
- Accompaniment of the victim in order to urge medical doctors to conduct a comprehensive examination and prepare their reports in accordance with the Istanbul Protocol standards as well as the preparation and signing of written records

51) Perez, para. 33 and 38.

52) Perez, para. 78.

53) Contemporary Lawyers Association, a volunteer organisation for the establishment of rule of law and human rights in Turkey.

54) Izmir Bar Association Group for Prevention of Torture was a volunteer group of lawyers established in 2001, nevertheless, abolished by the Izmir Bar Association Board of Directors in

2004. The lawyers, although not as a formal group anymore, still follow and intervene in the cases of torture and ill treatment cases voluntarily.

55) Izmir 6th Assize Court, 2002/398 E; and Izmir 6th Assize Court, 2003/224 E.

56) Izmir 7th Assize Court, 2003/79 E.

57) Menemen Criminal Court of First Instance, 2002/132 E

when the conditions of examination are inappropriate (e.g. applicant handcuffed; police inside). The lodging of relevant criminal and disciplinary complaints about doctors (and/or the police officer on duty) or the submission of these records to the court proceedings when the doctor spends inadequate time for the examination;⁵⁸

- The lodging of complaints and the submission of other proceedings against doctors and related institutions when the official forensic reports and the conduct are incomplete and deficient;⁵⁹
- The provision of the transfers of persons for required expert examinations where the persons had no access to an appropriate medical examination at a medical center, by the use of the previously provided case history during interviews and other findings;⁶⁰ Transference of detainees to a place other than the place of detention if the forensic medical examination supports allegations of torture.⁶¹

9. A critical challenge: implementation of the Istanbul Protocol

In spite of its international standing, awareness on the Istanbul Protocol is still relatively limited to the relevant bodies, legal,

58) Kusadasi Criminal Court of 1st First Instance, 2004/494 E.

59) Menemen Criminal Court of First Instance, 2003/199 E. and, Menemen Criminal Court of First Instance, 2003/199 E., and, Documentation of the Izmir Bar Association Group for Prevention of Torture , file no.113 (2003)

60) Izmir Criminal Court of 8th First Instance , 2005/463 E.

61) see the footnote 56- 2002/398 E; and, Documentation of the Izmir Bar Association Group for Prevention of Torture , file no.180 (2003).

health and human rights experts. Those who know about the Protocol likely consider it a manual for health professionals, not a manual for multidisciplinary purposes in the prevention and investigation and documentation of torture and other forms of ill treatment.

Although the Protocol is closely related with the conduct of health and law professionals, as has been widely established by the Inter-American Court of Human Rights in the aforementioned decisions, the Istanbul Protocol is known and used by only a limited number of professionals in daily practices in a few countries. For these reasons, Protocol trainings are being organized around the world. So far the Protocol has been endorsed by various international bodies including the World Medical Association, World Psychiatry Association, PHR USA and International Rehabilitation Center for Torture Victims.

A. Trainings in Turkey

It is health professionals and legal experts who will put the Istanbul Protocol into practice. It is extremely critical that health professionals and legal experts know the Protocol, use it in daily practice and demand its' utilization. Therefore, a two dimensional effort has been accomplished through awareness raising and training programmes. All aspects were, and are, carried out in coordination by the joint Istanbul Protocol team of the TMA, SFMS and the HRFT.

a. Training activities

After the completion of the Istanbul Protocol and its adoption by the UN, the focus shifted to the organization of trainings. A training module targeting health professionals and legal experts was formed in 2001. One objective was to launch trainings that prompt an effective implementation in

practice. It was aimed to create a motivation for a change of attitude and conduct, next to the accumulation of knowledge and sensibility. The trainings were designed with the intention to create interactive trainings in accordance with mentioned aims.

A training series of joint and concurrent trainings aiming to increase the interaction and cooperation between health professionals and legal experts was adopted, based on the experience that the struggle against torture can only be effective with the cooperation of health professionals and legal experts. The training programme was structured in parallel and plenary sections in order to facilitate the discussion of specific professional problems as well as common problems. Pilot trainings were carried out between November 2001 and April 2002, targeting health professionals and legal experts in five provinces, with the training module and material created for their context.

The training module and materials were revised based on the provided experiences. Later further trainings were offered in various provinces:

- A series of seminars were conducted by the TMA, HRFT and SFMS upon the request of the provincial directorate of the Ministry of Health between December 2002 and June 2003. The training group consisted of general practitioners who were officially issuing forensic medical reports. The second training in the series was discontinued when security forces interrupted it and started an investigation against the organizers and trainers of the training.
- SFMS organized trainings for forensic medicine specialists.
- Trainings targeting lawyers were conducted in cooperation with the bar

associations and the Association of Contemporary Jurists. These trainings were enriched by contributions from the Protocol and forensic reporting. The trainings organized by the Group for the Prevention of Torture in Izmir constitute an important example. Approximately four hundred lawyers were trained on the Protocol with the training module, which was developed in cooperation with the physicians.

- The Istanbul Protocol became part of the curriculum in some medical faculties such as the Istanbul University Faculty of Medicine, the 9th September University Faculty of Medicine, and Cukurova University Faculty of Medicine. It was included in the curriculum of the forensic medicine, psychiatry and ethics departments.

b. Awareness raising activities

There are continuous efforts to extend and spread the following activities:

- Seminars, conferences and panels for various groups on IP.
- Presentations in programmes where human rights, torture and medical ethics are discussed.
- Presentations on the Protocol in scientific symposiums.
- Distribution of the Turkish translation of the Protocol to members of related professions.
- Introduction of the Protocol and the full translation in Turkish on the websites of the TMA and HRFT.
- Publishing articles in periodicals and newspapers.
- Organizing activities where the Protocol is introduced on special occasions such as "Human Rights Day" and "Day in Support of Victims of Torture".

B. International programmes on trainings and awareness rising

Many health and legal professionals have little or no training in the investigation and documentation of torture, which requires specific technical skills and knowledge of both medical and legal procedures in order to be conducted effectively. Two international training projects have been launched.

a. The Istanbul Protocol Implementation Project This Project, which aims to increase awareness, national endorsement and tangible implementation in five countries (Sri Lanka, Georgia, Uganda, Morocco and Mexico), was implemented between 2003 and 2005. The target groups of training seminars were health and legal professionals. The Project was funded by the European Commission (EC). The proposal was submitted by IRCT and WMA and the project was coordinated by IRCT, WMA, HRFT and PHR USA.

The goal of the project was to establish a framework for the universal implementation of the Istanbul Protocol, and to begin the implementation process in five selected countries.

The objectives of the project were as follows:

- To develop training methodology and materials, including a torture detection format for health and legal professionals, reflecting consensus among all national and international partners to the project.
- To train a total of 250 health and 125 legal professionals in the five countries selected and equip participants with the necessary knowledge and tools to implement the Istanbul Protocol and promote the capacity for future trainers.
- To develop awareness on torture in general and on the Istanbul Protocol, the

existing monitoring tools and reporting mechanisms in particular.

- To evaluate the impact of project activities in each of the five countries and to provide a set of final recommendations to the relevant national and international authorities.

b. Prevention through documentation project This Project was prepared with the aim of engaging health and legal professionals and mobilizing knowledge in torture rehabilitation centers for efficient prevention of torture. This was accomplished through the implementation of the Istanbul Protocol through systematized and high quality documentation of torture by IRCT. The Project is funded by EC for the period of 2005-2007. WMA, PHR USA, REDRESS and HRFT are the contributing partners of the Project. HRFT is responsible for the coordination of the trainings.

The programme embraces a range of activities in ten target countries, two in each of the following five regions: 1) Central and Eastern Europe and New Independent States (Georgia and Serbia), 2) Middle East and North Africa (Morocco and Egypt), 3) Sub-Saharan Africa (Uganda and Kenya), 4) Asia (Sri Lanka and the Philippines), and 5) Latin America (Mexico and Ecuador).

The Project embraces a range of activities concerning training/capacity-building and advocacy targeted at health and legal professionals, staff at rehabilitation centers, journalists and human rights organizations in ten target countries. It also has a strong training-of-trainers component and focuses on regional collaboration, which will ensure a significant multiplier effect within the programme period and facilitate replication and extension beyond the three-year programme period:

- Increased and improved investigation, documentation and reporting on torture;
- Increased general awareness about torture, documentation and the Istanbul Protocol;
- Assessment of the potential impact of effective documentation in the prevention of torture.

Activities could be summarized as follows:

- Health professionals and legal experts in ten target countries apply international standards on investigation and documentation of torture and increasing collaboration is taking place between the two professions;
- Involved rehabilitation centers/programmes in ten target countries systematically document, analyze and report on cases of torture (taking into consideration any security concerns);
- Rehabilitation centers/programmes and human rights organizations collaborate and exchange information on cases of torture in ten target countries and examples of good practices have been compiled relating to how rehabilitation may add to prevention;
- Relevant decision-makers in ten target countries have a focus on torture and knowledge of the related international obligations and instruments;
- Increased public debate on the prevalence of torture and the relevant legal rights in ten target countries;
- Overview of the Istanbul Protocol as a practical prevention tool (with a special focus on ten target countries).

Conclusion

The Istanbul Protocol is a very important, useful and effective document. But even the most precious standards, protocols, docu-

ments are only written on paper, unless the people, the communities, the governments show determination, to implement them. Participation and/or support of health and legal professionals are of crucial importance for the abolition of torture and other forms of ill treatment. Therefore, health and legal professionals and their professional organizations bear an important responsibility in the efforts of prevention. To show a collaborative effort, taking this responsibility into consideration, is a prerequisite for the elimination of torture.

A multidisciplinary approach, in terms of collaboration of health and legal professions, is also vital for the prevention and elimination of torture and other forms of ill treatment. It is important to enhance the collaboration between these professions for the purpose of prevention and elimination. There is a lot to do for the implementation of the Istanbul Protocol on national and international levels, including, but not only, international trainings and efforts on awareness rising. It is necessary to join forces to be effective in this task.

Torture in China

Hatla Thelle*

Abstract

Torture and inhuman and degrading treatment of persons by state functionaries in China is documented by both international and domestic sources as being fairly widespread. It takes place in pre-trial detention as well as in prisons and labor camps. Its roots are to be found firstly in a weak legal system; the fair trial guarantees are still not observed in the Chinese legal system and the courts are not sufficiently independent from political and economic interests. Secondly, a tradition of coercion and uncontested bureaucratic power, inherited from communist and imperial times, is still alive. Thirdly, China lacks efficient monitoring mechanisms, like complaints boards and a free press. The legislation prohibiting torture is relatively clear, compared to so many other countries, but a huge gap between black-letter-law and practice mar all parts of Chinese society, including the legal procedural system. There are efforts taken by public authorities, legal professionals and activists to combat the use of torture, but these are met with opposition and inertia, especially from the police system, and there is still a long way to go.

Key words: China, torture, legal system, tradition

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Introduction

In April 1998 police officer Du Peiwu from the Southern provincial capital of Kunming in China was charged with murdering his wife and her lover, both police officers like himself. He denied the accusation but was subjected to 21 days of sleep deprivation, beatings, manacled and uninterrupted interrogation and then he admitted his guilt. In February 1999 he was sentenced to death but the court of appeal commuted the sentence to death with two years suspense.¹ In June 2000 a gang of people were arrested and admitted to having murdered Du's wife and her lover, along with having committed several other serious crimes. Du Peiwu was released after 26 months in prison and was granted back wages of 38,500 Yuan (approximately \$4,800 USD) by the local government. After being released Mr. Du suffered terrible headaches and doctors said his brain had been damaged. The two police officers held responsible for the torture were charged in court and given suspended sentences of 18 and 12 months in prison, respectively, and it was reported that they no longer held posts in the criminal defence department in the local police district.²

This case is, sadly enough, far from unique in the Chinese legal system and it exhibits certain characteristics common to many torture cases in China. The special

thing about it is that it was published in the media and triggered a debate on miscarriages of justice, which continues with more and more vigor until the present day. Ill-treatment or torture of persons in state custody in China takes place in detention facilities during the pre-trial phase for the sake of extracting a confession and in prisons, notably in Xinjiang and Tibet; it is not especially related to suspects of thought crimes or dissident activities³ but is used as a “regular” way of solving cases and a way of disciplining inalcitrant inmates. If for some reason a case is exposed the perpetrators are given very light punishments, as in the case referred to above.

Documentation

For obvious reasons it is not possible to judge the extent of the problem, even though official statistics quote the (extremely low) number of cases brought to trial and the number of persons convicted of torture or ill-treatment of detainees and inmates.⁴ The fourth report from the Chinese government to the Committee Against Torture (CAT) states that concerning extortion of confessions, the number of sentences fell from 143 cases convicting 178 persons in 1999 to 53 cases convicting 82 persons in 2004.⁵ These figures have to be compared to the total number of cases in the legal system which is more than 5 million per year.⁶ According to official statistics, the number of people who have received state compensation in 2003 – of all kinds, not necessarily in torture cases – is a little more than 1,000.⁷

In November to December 2005, UN Special Rapporteur (SR) on torture and other cruel, inhuman or degrading treatment or punishment, Professor Manfred Nowak, visited China as the first SR on torture to do so. In preceding years negotiations on such a visit had failed to produce a result as

the Chinese government would not comply with the rules of the UN system concerning unhindered access to all detention facilities, etc. The SR report was published 10 March 2006 with the conclusion that “the Special Rapporteur believes that torture remains widespread in China”.⁸ At the same time the report takes notice of the willingness of the Government to address the problem and undertake measures to combat torture and ill-treatment and expresses the opinion that the use of torture has declined in recent years. Along the same lines the 2006 report from Amnesty International says that “Torture and ill-treatment continued to be reported in a wide variety of state institutions”⁹ and other international organizations as well as academic research have pointed to an unacceptably high rate of miscarriages of justice in the Chinese legal system.¹⁰

The international community, or key institutions in it, thus finds it documented that torture is widespread in China. Within the country itself the political leadership, the academia and the public admits to an unacceptable prevalence of ill-treatment of detainees, especially with the aim of extracting confessions. Several international cooperation projects have addressed the issue. Since 1998, the Danish Institute for Human Rights has cooperated with Chinese academic institutions on torture prevention, funded by the Danish Ministry of Foreign Affairs. Lately the European Union has funded a three year program with the aim of collecting data on the overall situation of forced confessions and exploring practical models of torture prevention in China and elsewhere.¹¹ The Chinese government acknowledges the problem and expresses its willingness to address it, not only by engaging in international cooperation but also through law reform and institutional measures.

The legal basis

China signed the Convention Against Torture in October 1988 and delivered its fourth periodic report in February 2006, five years late as it was due in 2001. The various periodic reports enumerate legislative and educational measures taken against the practice of torture and demonstrate how the number of cases of forced confessions allegedly has declined. From the second report in 1995 to the third in 1999 China has revised both its Criminal Law (CL) and its Criminal Procedure Law (CPL). The principle of presumption of innocence has been established and the date for entry of a lawyer into a case has been advanced. Rules for police use of weapons have been issued, and the methods of executing death sentences have been changed, so it is now permitted to use injections instead of shooting. A practice of open trials has been codified in provisions from the Supreme People's Court. Campaigns and education of law enforcement personnel had been intensified in recent years and public security organs have set up watchdog bodies to oversee the conduct of policemen.¹² In the period from 1999 to 2005 China has included protection of human rights as a new paragraph 33 in the Constitution. A whole range of new laws and regulations have been adopted and entered into force: New laws on juvenile justice and extradition; regulations on legal aid; a directive on administration of urban vagrants; many circulars regulating the behavior of the police. In addition, decisions have been made on strengthening the monitoring system, etc. Education and training of law enforcement personnel have continued, also with foreign support.

Looking at laws on the books, the protection against ill-treatment at the hands of officials in the Chinese legal system is not that bad. The Constitution, which stems

from 1982 but has been amended several times, guarantees freedom of the person as well as freedom of speech, assembly, association, the press, etc. Torture is explicitly forbidden – though not defined¹³ – in the 1997 Criminal Law article 247 and Criminal Procedure Law article 43, and can in serious cases be punished by life imprisonment or death. Already in 1989 an Administrative Litigation Law was passed which empowered people to protest against certain administrative acts.¹⁴ A State Compensation Law (SCL) from 1994 enables victims of torture to claim compensation¹⁵ and the 1996 Law on Administrative Penalty makes it possible to charge the perpetrators.¹⁶ Furthermore, a whole range of administrative regulations, circulars and judicial interpretations have promulgated controlling the behavior of public security personnel and other involved authorities. Finally, a net of legal aid institutions is under construction within the Ministry of Justice in which (poor) victims can get legal counsel for free.¹⁷

Thus, we see that on paper many safeguards exist and even comply with the international obligations under relevant treaties, as it is also reflected in the periodic state reports. But in reality suspects and detainees in China are often without effective protection against abuse of power, most often at the hands of police officers.

Causes

Taking for granted that the international and domestic concerns are justified, one can ask about the reason for this presumably high number of torture instances in the Chinese legal system. The root causes can be found in weaknesses in resource allocation as well as the judicial procedures, a strong tradition of coercion and re-education of deviants and the lack of monitoring mechanisms, complaints boards and other institutions,

including a free press, which could bring incidences of torture out in the open. Generally a big gap between law and practice mar Chinese society.¹⁸ The establishment of a Western legal system only began three decades ago and it began almost from scratch. The Communist government had ruled society from 1949 to 1979 through a tight net of controlling institutions with few written codes. People were held in check by a household registration system, a net of neighborhood committees with a policing mandate and a work unit system responsible for all aspects of daily life.¹⁹ The reform policy initiated from the beginning of the 1980s necessitated a legal system compatible with the rest of the world. An enormous amount of laws and regulations have been designed and adopted since then. But laws need to be underpinned by tradition and institutions, so it will be a long time before the new principles and concepts are integrated into the minds of Chinese citizens and the structures of Chinese society.

Seen from the socio-economic angle it must be understood that the Chinese investigative institutions are under-manned, police receive low pay and enjoy low status, and judges are still often badly trained and some do not even possess a law degree. The courts are not independent from either the party or the government. The party exerts influence over general policies but does not often interfere in individual cases, except for highly profiled political ones.²⁰ But the local government can influence court decisions for causes of local protectionism. Judges and prosecutors are appointed, paid and supervised by the people's congresses,²¹ which might have a stake in sentences involving local interests, like economic cases against important local companies paying taxes and employing labor power in the region. Local entrepreneurs often have direct or indirect

ways of influencing local political decisions. Other internal conflicts play a part, most importantly that the Ministry of Public Security (MPS), which is responsible for the police, is a powerful organ having more weight than either the Ministry of Justice or the Supreme Court and Procuratorate. The MPS protects its own area and fights – like in all countries – for wider discretion in means of social control.

Legal system

From the more judicial angle the use of torture can remain without consequences because the role of the defence side in the trial procedure is still rather weak. Suspects are often not told of their rights to have a defence lawyer; and the courts are only obliged to appoint a defence lawyer for free if the suspect is minor, handicapped or charged with a death penalty crime. In other cases the defendant must hire a lawyer at his or her own expense; can defend him/herself, or get another person to defend him/her. Revisions to the CPL in 1997 moved forward the point of intervention of a lawyer in a case, so he or she can now enter from the day the suspect is first interrogated or subject to compulsory measures. But the lawyer is seldom allowed to speak in private with the client as interrogations are overseen by one or more policemen; and the lawyer has to ask the prosecutor to provide the files of the case and can only get what the prosecutor wants to disclose to him or her.²² Lawyers are threatened of being charged with falsifying evidence if the client changes his statement after having met with him or her.²³ Article 306 of the CL on “assisting parties concerned in destroying, falsifying evidence, threatening, luring witnesses to contravene facts, change their testimony or make false testimony” are used to punish lawyers whose clients withdraw a confession.

The status of lawyers as a profession is low. In general they are regarded with suspicion as they defend (understood as collude with) criminals and are thought to earn a lot of money, while the salaries of prosecutors and judges follow government rules and therefore are restricted.²⁵

Other problems emerge during the trial which also affect the possibilities of staging a proper defence. Witnesses seldom appear in court; only in around 10% of all trials does the witness appear to be questioned by the judge or the lawyer. The witness testimony is normally read aloud by the prosecutor, so the defence lawyer is unable to probe deeper into the statement made by a witness. Prosecutors claim they are unable to make witnesses appear in court because they dislike being associated with legal proceedings or are not willing to risk a day's income to go to the courtroom.

A third factor concerns the collection of evidence. Confessions extracted through torture are generally used as valid evidence, though the practice is strictly forbidden in article 43 of the CPL, as mentioned above. In Chinese legal circles there has for some time been a heated debate on the subject of the admissibility of illegally obtained evidence, especially on whether it could be acceptable to use illegally obtained evidence if other evidence supports it. The term illegally obtained evidence includes extortion of confessions by torture, but also search without a warrant, etc.²⁶ Doubt about whether to accept illegally obtained evidence can lead judges to the conclusion that confessions under duress is valid in the courtroom.

A fourth problem often mentioned in relation to torture is the presumption of innocence, related to the right to remain silent. Chinese law stipulates that a person shall not be deemed guilty without being judged as such by the court (CPL, article 12),

amounting to the principle of presumption of innocence contained in Western legal systems. The principle implies that the burden of proof is in the hands of the prosecution and in Western systems the suspect is not obliged to help providing the proof through the provisions in Western laws on the right to remain silent. According to the Chinese CPL article 93, however, a suspect "shall answer the investigator's questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case". Thus the suspect has to answer questions relevant to the case truthfully and he can be punished if he does not do so. The suspect is obliged to help the public prosecutor prove the charges against him/herself. This provision is regarded by legal scholars as contributing to the risks of using torture to obtain a confession and it is generally recommended that the right to silence shall be incorporated in the soon-to-come revisions of the CPL.²⁷

Tradition

Besides these procedural weaknesses in safeguarding the right to liberty and security of the person, another possible factor is that the basic thinking on rule of law and the fair trial principles contained in the international standards are not ingrained in the minds of neither the legal personnel nor the population at large. One could say they are "naturally" not ingrained as the view on crime and criminals in the Chinese traditions – the imperial and the communist legacies reinforce each other on this point – was dominated by the idea of reforming (or in reality forcing individuals into conforming to the social norm), be it as the emperor's subject or as a communist comrade. A few decades ago suspects were viewed as guilty, the moment they came into contact with the authorities, and convicts were meant to be

transformed by group pressure, education, families and through collective labor.²⁸ The stress on coercion and transformation of the individual lends legitimacy to a culture of violence conducive to torture, as Manfred Nowak also points out in his report summary. The report refers to political prisoners, but in the view of this author the analysis goes just as much for other suspects and convicts: "The combination of deprivation of liberty ... with measures of re-education through coercion, humiliation and punishment aimed at the admission of guilt and altering the personality of detainees up to the point of breaking their will, constitutes a form of inhuman or degrading treatment or punishment, which is incompatible with the core values of any democratic society based upon a culture of human rights."²⁹

Another point is that Chinese police have for many years partly operated on the basis of a campaign-like tradition, where certain crimes are singled out for special focus for a certain period of time. The campaigns are called 'strike hard' campaigns and they have been launched at irregular intervals since 1983. During a campaign the political leadership will set targets for number of arrests, sentences and executions and the results are publicized with great fanfare in the media. The intense atmosphere in the police corps and the set targets during such a campaign makes miscarriages of justice more likely to appear than during more quiet periods.

Monitoring mechanisms

On top of weaknesses in criminal procedures and a tradition of coercion, the lack of real monitoring mechanisms adds to the possibilities of torturing persons in custody and getting away with it. Media coverage today is much more varied and dynamic than the boring hallelujah stories of People's Daily during the Mao period, but still there is no

truly free press in China. Problems can be brought to light and can also in special instances lead to policy changes, but the norm is that in the end the Party decides what people shall know and what they shall not be told. As an exception, there is a very special and famous case from 2003 where a migrant worker was beaten to death in a detention centre under a so called "custody and repatriation system" used to round up vagrants and send them back to their places of origin. The system concealed a whole range of abusive and corruptive practices. A paper in South China reported the story of the death in custody against the order of the provincial censorship and the story created so strong a public reaction that the central government decided to abolish the whole system.³⁰ A new more "service-minded" system was set up for repatriating unemployed peasants from cities. Various other avenues of complaining exist; all public institutions have the so called letters and visits offices, where everyone can go and lodge a complaint. Regulations from 2003 oblige local governments to set up local legal aid centers where poor people can be advised for free and even get a defence lawyer in a criminal case if they meet certain criteria. Universities, law firms and social organizations, like the Women's Federation, run clinics and groups where individuals can enter from the street and protest over ill-treatment. Finally, cases can simply be reported to the police for prosecution. But the mechanisms are not effective and resources are scarce. The letter and visits offices only have the mandate to forward complaints to other relevant organs, but do not have the ability to follow up on the cases. The legal aid centers are not well known, the criteria for getting a case accepted are too strict and the lawyers on duty there are of low quality as it is a legal obligation for them to have a few pro bono cases per year.

If they do not obey their licenses will not be renewed. Non-governmental organizations do a proper job but they are short of funds and qualified personnel. The basic problem is, on the one hand, that the state invests too little – both money and political muscle – in establishing effective mechanisms to report torture cases and obtain remedies. On the other hand the state restricts reporting and monitoring by other actors for political reasons or for reasons that are grounded in local protectionism.

Conclusion

Like anywhere else in the world the use of torture in China is no new phenomenon; it is rooted in an imperial and communist tradition of rule by man or rule *by* law, i.e. where law is used as a weapon by the ruler against his people, not rule *of* law. During the recent decades enormous social and economic changes have taken place. The whole structure of society has been torn apart and is in the process of being re-assembled in a new form, meaning the old power structures are disappearing and new ones are emerging. The process is basically one of *individualization*. At the economic, social, spiritual and legal levels the freedom of the individual vis-a-vis the state has greatly expanded, creating a necessity to regularize new social relations, in short to make laws and make laws work. Laws are, and have been, made in abundance, with the aim of putting an end to prevailing practices of torture, but this is not enough. Making people obey the laws is much more difficult.

Torture and inhuman and degrading treatment of persons by state functionaries is documented by both international and domestic sources as being fairly widespread. It takes place in pre-trial detention as well as in prisons and labor camps. Its roots are to be found in a weak legal system, a tradition

of violence and a lack of efficient monitoring mechanisms. Efforts to combat the use of torture have been taken by public authorities, legal professionals and activists, but these are met with opposition and inertia, and there is still a long way to go.

Notes

1. A special Chinese penalty, where a death sentence is only carried out if the convict commits new crimes or does not behave well in prison during the two years following the verdict. In practice very few of those receiving this sentence are executed.
2. The case is reported in South China Morning Post, 6 August 2001.
3. Political crimes do not exist as a category in the Chinese Criminal Law, but it is a well-known fact that critics of the government can be given long prison terms for peaceful exercise of freedom of speech, assembly, etc. They are often charged with crimes of “endangering state security” or “disturbing public order”, etc. There has been a tendency in human rights reporting to focus on the plight of the comparatively few dissidents suffering ill-treatment and enduring long term imprisonment and pay less attention to the many “ordinary” suspects or criminals being treated inhumanely. See e.g. Dikötter F, *Crime and Punishment in Post-Liberation China: The Prisoners of a Beijing Gaoi in the 1950s*. The China Quarterly 1997; 149: 159.
4. CAT/C/CHI/4. Chinese version of fourth periodic report to CAT, submitted in February 2006. At the time of writing no English version has been processed.
5. Chinese version of fourth periodic report, pages 36-40.
6. Of these 4,5 million are civil cases and around 600,000 are criminal cases. Law Yearbook of China, 2004: 1054.
7. Law Yearbook of China, 2004: 1055.
8. E/CN.4/2006/6/Add.6, page 2.
9. Amnesty International Report 2006, page 90.
10. Seymour JD, Anderson R (eds). *New Ghosts Old Ghosts. Prisons and Labor Reform Camps in China*. Armonk, NY: M.E. Sharpe, 1998. See also Washington Post Foreign Service, 14 June 2001, page A01 and website of Human Rights in China, a rights group based in New York, www.hrichina.org.
11. For details see website of Great Britain-China Centre, London, www.gbcc.org.uk.
12. CAT/C/39/Add.2, pages 6-8.

13. In the third periodic report, pt 59, the Chinese government declares that "The relevant stipulations of the Criminal Law fully cover the definition of 'torture' as given in article 1 of the Convention", and continues in pt 64 that "... Chinese law defines a practitioner of torture in an even broader sense than the Convention", CAT/C/39/Add.2, pages 19 and 20. The Committee Against Torture nevertheless recommends in its Concluding Observations to the third periodic report (9 May 2000) that China incorporate a definition of torture into its domestic law. As a response the same points as the above mentioned are repeated by the Chinese government in the fourth report pt. 125-129.
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29. E/CN.4/2006/6/Add.6, page 2.
30. Sun Zhigang's brutal killers sentenced. *China Daily* 2003; 6 October: 1.