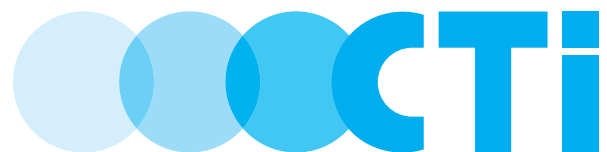




association pour la prévention de la torture
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Guide on anti-torture legislation



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

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

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

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The **Convention against Torture Initiative** (CTI) was launched in March 2014 by the Governments of Chile, Denmark, Ghana, Indonesia and Morocco. Its aim is to secure the universal ratification and implementation of the UN Convention against Torture by 2024 through constructive engagement and sharing experiences between States.

For more information on the CTI, including how to join the CTI Group of Friends, visit www.cti2024.org

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Introduction

When a State accedes to or ratifies the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention or the UNCAT) it agrees to fight impunity by making torture a crime and investigating and prosecuting allegations of torture; to provide redress to victims, to exclude statements acquired through torture from all proceedings, and to take legislative and other measures to prevent torture, among other things. One part of implementing the Convention against Torture at the national level is analysing the body of existing domestic laws to determine whether the State already meets its obligations in terms of legislative frameworks, and then, as necessary, amending existing laws or drafting entirely new laws.

The United Nations Committee against Torture (the Committee or the CAT), as the body assigned responsibility under the treaty for monitoring implementation of the Convention by States parties, regularly recommends to States reporting to it to enact legislation, including, in particular, legislation that makes torture a crime in accordance with articles 1 and 4 of the Convention. The Committee has also referred to the need to enact implementing legislation in its General Comments. While there is continued focus at the United Nations' level on the importance of enacting legislation that implements the Convention against Torture, there are few practical tools and examples of good practices that are easily accessible for national level actors to consult.

In order to bridge this information gap and support adoption of anti-torture legislation that implements the Convention against Torture at the national level, the Convention against Torture Initiative (CTI) commissioned the Association for the Prevention of Torture (APT) to draft this guide on anti-torture legislation. In a practical format, this document is primarily intended to assist lawmakers in drafting specific anti-torture legislation or in revising existing domestic laws, such as criminal codes, laws on reparations for criminal acts or on civil procedures, etc. It is hoped that this guide will assist States to give effect to their obligations under the Convention. It might be also useful for actors from civil society or international and regional organizations advocating for the adoption of a legal framework on torture at the national level. The guide also promotes existing good practices by providing examples of national legislation drawn from different regions and in different languages.

How to use this guide?

With a view to identifying the elements of national legislation that provide the most relevant and meaningful protection, the guide uses State obligations under the Convention as a starting point. Therefore, State parties to the UNCAT are the primary targets of the guide to assist them to fulfil their conventional obligations. As a multilateral treaty with the object and purpose of eradicating torture and combatting impunity, the Convention is indeed a primary and compelling source for norms to combat torture. The Committee against Torture has a special role

in substantiating the obligations of States under the Convention. In particular, the Committee's General Comments as well as its jurisprudence and concluding observations to State party reports are authoritative sources of the content of Convention obligations. Sources outside the Convention framework have also been reviewed. This included the work of other human rights treaty bodies: of special guidance as a comparison was the Human Rights Committee (the CCPR), the body tasked with interpreting the International Covenant on Civil and Political Rights (the ICCPR), including the Covenant's article 7 on the prohibition of torture. Relevant jurisprudence of courts, scholarly articles, non-governmental organisations' reports, and reports arising out of expert meetings are also referenced in the guide.

The substantive part of the document is divided by thematic chapters, each starting with the relevant articles of the Convention the guide refers to. Differences are made between four categories of elements:

- Elements where States parties have an obligation to legislate according to the Convention (when the Convention explicitly requires State parties to do so);
- Elements where the CAT considers that States must legislate in order to respect the Convention;
- Elements that States parties should implement according to recommendations made by the CAT, the CCPR or other bodies and courts;
- And other elements that States parties are encouraged to consider implementing.

In each chapter, several elements that legislation should contain are listed. Argumentation on why those elements are needed is given after each element. When available, examples from various countries are given, to illustrate how States have legislated on those elements in their national legislation. The examples given are not exhaustive but are rather positive illustrations of national practice. Efforts were made to gather examples from countries in different regions, from different legal traditions and from countries with different languages. Direct quotes from articles are inserted whenever an official English translation exists. If this is not the case, the content of the legislation is summarised and links to the legislation in its original version are given in footnotes. After each chapter, a summary of all elements is given, clearly mentioning if the element is a primary element, a recommended element or an optional one.

One annex follows the substantive part: a compilation of all the elements contained in the substantive part, presented as a list regrouping the 31 elements.

Chapter 1 - Definition of torture

Relevant Articles from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 1

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

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

Article 2

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

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

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

Article 4

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

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

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

1. The Convention requires States parties to criminalise torture as a separate and specific crime

The requirement that a State criminalise the act of torture is a basic obligation under the Convention. Under article 4 of the Convention, every State party “shall ensure that all acts of torture are offences under its criminal law”. This article is understood to oblige State parties to criminalise torture as a specific crime, separate from other types of offences found in criminal law. In its General Comment N°2, the Committee against Torture emphasised that torture must be made a distinct crime as this will “directly advance the Convention’s overarching aim”.²

Many States have adopted a separate and specific crime of torture in their national legislation. Examples of those States will be given under section 2 below on the definition of torture. Here, the Philippines and the Maldives have clearly stated in their national legislation that the crime of torture shall be considered a criminal offence separate from other crimes.³

Article 3(a) of **Maldives’** Act on the Prohibition and Prevention of Torture also specifies that torture shall be considered a separate criminal offence.⁴

Section 15 of the **Philippines’** Anti-Torture Act provides specifically that “torture as a crime shall not absorb or shall not be absorbed by any other crime or felony committed as a consequence, or as a means in the conduct or commission thereof. In which case, torture shall be treated as a separate and independent criminal act whose penalties shall be imposable without prejudice to any other criminal liability provided for by domestic and international laws.”⁵

2. The Convention requires States parties to define torture in a manner that, at a minimum, adopts all the elements of article 1 of the Convention

The first step in understanding how a State can best draft anti-torture legislation is by clarifying the definition of torture under the Convention. The Committee clearly requires domestic legislation to follow, at a minimum, the definition contained in article 1 of the UNCAT. The Committee recommends in almost every

² CAT, General Comment N°2: Implementation of Article 2 by States Parties (24 January 2008) UN Doc. CAT/C/GC/2, § 11.

³ All of the examples given in this guide are from a country with a separate crime of torture. Examples include: the Philippines, the Maldives; Australia, Canada, Luxembourg, Morocco, New Zealand, Madagascar, South Africa, Uganda, Panama, Brazil, Argentina, Paraguay, El Salvador, Norway, Sri Lanka and Germany.

⁴ Maldives, Act on the Prohibition and Prevention of Torture 2013, Law 13/2013 (23 December 2013), Law 13/2013, article 11, available at <http://mvlaw.gov.mv/pdf/ganoon/chapterVIII/13-2013.pdf> (last accessed in February 2016).

⁵ Philippines’ Anti-Torture Act of 2009, Republic Act N°9745 (10 November 2009), section 15, available at http://www.congress.gov.ph/download/ra_14/RA09745.pdf (last accessed February 2016).

concluding observation that a State shall enact the crime of torture “as defined by the Convention”⁶ or that the “definition encompasses all the elements of article 1 of the Convention”.⁷ In its General Comment N°2 on how to introduce effective measures to prevent torture, the Committee asserted that States shall draft their domestic legislation “in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention”.⁸ Although it is the view of the Committee that States parties adopt a definition similar to the one contained in the Convention, they also acknowledge that States have the possibility to provide a definition that is even more protective and that “advances the object and purpose of the Convention”.⁹

So what are the elements contained in the definition that need to be reflected in the definition of torture? Article 1 of the Convention defines torture as follows: “For the purposes of this Convention, the term “torture” means:

- any act by which **severe pain or suffering, whether physical or mental,**
- is **intentionally inflicted** on a person,
- **for such purposes as** obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,
- when such pain or suffering is **inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,**
- It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” (*emphasis and format added*)

The definition of torture - Four cumulative elements

Severe mental or physical suffering must be inflicted: article 1 of the Convention clarifies that “the term “torture” means any act by which severe pain or suffering, whether physical or mental is intentionally inflicted (...)”. It is difficult to assess the severity element through objective criteria. Rather, to meet the condition that torture must be “severe”, it is widely accepted that this is to be interpreted in light of the facts of each case, taking into account the particulars of each victim and the context in which those acts were committed.¹⁰

Act or omission must be inflicted intentionally: the act or omission causing suffering must be intentional. Torture cannot be committed negligently. However, although there is no mention in the Convention of a crime of omission, it is recommended in international law that the definition does include an offence by

⁶ CAT, Concluding observations of the Committee against Torture on Bosnia and Herzegovina (20 January 2011), UN Doc. CAT/C/BIH/CO/2-5, § 8.

⁷ CAT, Concluding observations of the Committee against Torture on Germany (12 December 2011), UN Doc. CAT/C/DEU/CO/5, § 9.

⁸ CAT, General Comment N°2, op. cit. 1, § 8.

⁹ Ibid, § 9.

¹⁰ European Court of Human Rights (ECtHR), *Ireland v. United Kingdom*, App. N°5310/71, ECHR (series A) N°25, judgement of 18 January 1978, § 162; see also ECtHR, *Selmouni v. France*, App. N°25803/94, ECHR 1999-V, judgement of 28 July 1999, § 160.

omission – for example by depriving a detainee medicine on purpose – to respect the object and purpose of the Convention.¹¹ In its General Comment N°3, the Committee also advises that “acts and omissions” are included in the crime of torture.¹²

For a specific purpose: article 1 provides that torture is any act that “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”. Torture is therefore the infliction of pain done with a special motive or purpose behind it. Article 1 lists the most commonly found purposes, however, this list is not exhaustive as indicated by the words “for such purposes as” and States are free to add any other purposes to the list, as long as it remains open and flexible, to include other purposes that would fall within the article 1 definition. The purpose and intent requirements however do not involve a subjective inquiry into the motivation of the perpetrators, but rather must be objective determinations taking into account all the circumstances.¹³

By a public official or with the consent or acquiescence of a public official: the article 1 definition does not encompass private acts by persons that have no connection with the State. The obligation to criminalise torture under the Convention is for acts or omissions of public officials, or with their consent or acquiescence or by anyone acting in an official capacity: the link with a State agent is part of the article 1 definition. However this does not mean that the definition should be understood as only covering public officials. As a matter of fact, the Committee has clarified that the article 1 definition is broad, and has expressed concern where States define “public official” too narrowly.¹⁴ Article 1 encompasses abuse committed by non-State or private actors if public officials knew or have reasonable grounds to believe that acts of torture are being committed by non-State or private actors and they fail to exercise due diligence to prevent, investigate, prosecute or punish such non-State or private actors, the officials should be considered as authors, complicit or otherwise responsible for consenting to or acquiescing in such impermissible acts.¹⁵ The Committee has also interpreted the language “acting in an official capacity”, for example, to include de facto authorities, including rebel and insurgent groups which “exercise certain prerogatives that are comparable to those normally exercised by legitimate governments”.¹⁶

The lawful sanctions clause

Article 1 of the Convention also explicitly excludes from the definition of torture “pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

¹¹ Nigel Rodley and Matt Pollard, *Criminalisation of torture: State obligations under the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment* (2006), E.H.R.L.R. 115, p. 120.

¹² CAT, General Comment N°3: Implementation of Article 14 by States Parties (13 December 2012), UN Doc. CAT/C/GC/3, §§ 3, 23 and 37.

¹³ CAT, General Comment N°2, op. cit. 1, § 9.

¹⁴ CAT, Report of the Committee against Torture, 51st and 52nd sessions (2013-2014), UN Doc. A/69/44, pp. 38, 113, 114 and 121.

¹⁵ CAT, General Comment N°2, op. cit. 1, § 18.

¹⁶ CAT, *Elmi v. Australia* (25 May 1999), UN Doc. CAT/C/22/D/120/1998, § 6.5.

Lawful sanctions are acts considered legal under a State's law and international standards. Today, it is resolved that this permission exclusion refers to sanctions that are considered lawful as determined by both national and international standards, and should be interpreted narrowly.¹⁷ A narrow interpretation of lawful sanctions protects persons at risk of torture and ill-treatment by ensuring that detainees are only subjected to punishments as legitimate exercises of State authority.

When domesticating the crime of torture, many States have decided to incorporate the definition contained in article 1 of the Convention, with some slight modifications. Examples include:

The penal code of **Bosnia-Herzegovina** also criminalises and defines torture, using the elements of the Article 1 definition.¹⁸

Canada has explicitly added in its criminal code that “*torture* means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (a) for a purpose including (i) obtaining from the person or from a third person information or a statement, (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and (iii) intimidating or coercing the person or a third person, or (b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.”¹⁹

In **Colombia**, the criminal code also criminalises torture and the definition used is similar to the Article 1 definition.²⁰

In **Ireland**, the Criminal Justice Act criminalises torture as follows: “Torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (a) for such purposes as (i) obtaining from that person, or from another person, information or a confession, (ii) punishing that person for an act which the person concerned or a third person has committed or is suspected of having committed, or (iii) intimidating or coercing that person or a third person, or (b) for any reason that is based on any form of discrimination, but does not include any such act that arises solely from, or is inherent in or incidental to, lawful sanctions.”²¹

Luxembourg in article 260-1 of the criminal code based its torture definition on the Convention against Torture.²²

Madagascar in article 2 of the anti-torture law against torture and other cruel, inhuman or degrading treatment or punishment used the definition of torture contained in article 1 of the Convention verbatim.²³

¹⁷ Rodley and Pollard, op. cit. 10, pp. 120 and 121; Association for the Prevention of Torture, The Definition of Torture: Proceedings of an Expert Seminar (Geneva, 10–11 November 2001), p. 28.

¹⁸ Bosnia-Herzegovina, Penal Code of 2003, as last amended in 2015, article 190, available at <http://www.legislationline.org/documents/section/criminal-codes/country/40> (last accessed February 2016).

¹⁹ Canada Criminal Code, R.S., c. C-34, s.1, article 269.1(2), available at <http://laws-lois.justice.gc.ca/eng/acts/C-46/> (last accessed February 2016).

²⁰ Colombia, Penal Code of 2000, Law 599 of 2000, article 178, available at http://www.oas.org/dil/esp/Codigo_Penal_Colombia.pdf (last accessed February 2000).

²¹ Ireland, Criminal Justice (United Nations Convention against Torture) Act of 2000 (Act N°11, 2000), section 1, available at <http://www.irishstatutebook.ie/eli/2000/act/11/enacted/en/print.html> (last accessed February 2016).

²² Luxembourg criminal code 1879, as amended by Law of 24 April 2000, article 260-1, available at http://www.legilux.public.lu/leg/textescoordonnes/codes/code_penal/codepenal.pdf (last accessed in February 2016).

²³ Madagascar, Loi N°2008-008 du 25 juin 2008 contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, chapitre 1, article 2, available at <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/89308/102562/F1528680668/MDG-89308.pdf> (last accessed February 2016).

The penal code of **Morocco** introduced a definition of torture in 2006 and used the article 1 definition as a basis: the term torture encompasses the four elements, i.e. the severity, the intention, the specific purpose and the involvement of a public official.²⁴

In **Mali**, the criminal code makes torture a crime and defines it using the Article 1 definition verbatim.²⁵

New Zealand defines torture in section 2 of the Crimes of Torture Act: “*act of torture* means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (a) for such purposes as (i) obtaining from that person or some other person information or a confession; or (ii) punishing that person for any act or omission for which that person or some other person is responsible or is suspected of being responsible; or (iii) intimidating or coercing that person or some other person; or (b) for any reason based on discrimination of any kind.”²⁶ The Act also addresses the lawful sanction clause and specifies that lawful sanctions need to be consistent with the ICCPR: “but does not include any act or omission arising only from, or inherent in, or incidental to, any lawful sanctions that are not inconsistent with the Articles of the International Covenant on Civil and Political Rights”.²⁷

The **Philippines** defines torture in section 3 of the Anti-Torture Act: “*Torture* refers to an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession; punishing him/her for an act he/she or a third person has committed or is suspected of having committed; or intimidating or coercing him/her or a third person; or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a person in authority or agent of a person in authority. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”²⁸

In **Uganda**, Section 2 of the Uganda Prevention and Prohibition of Torture Act provides: “(1) In this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as (a) obtaining information or a confession from the person or any other person; (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.”²⁹

²⁴ Morocco, Penal Code, as last amended by Law of 15 September 2011, article 231-1, available at <http://www.ilo.ch/dyn/natlex/docs/SERIAL/69975/69182/F1186528577/MAR-69975.pdf> (last accessed February 2016).

²⁵ Mali, Penal Code of 2001, Law N°01-079 of 20 August 2001, article 209, available at <http://www.droit-afrique.com/upload/doc/mali/Mali-Code-2001-penal.pdf> (last accessed in February 2016).

²⁶ New Zealand, Crimes of Torture Act of 1989, Act N°106 (13 November 1989), section 2, available at <http://www.legislation.govt.nz/act/public/1989/0106/latest/whole.html> (last accessed February 2016)

²⁷ Ibid, section 2(1)(b).

²⁸ Philippines' Anti-Torture Act of 2009, op. cit. 4, section 3.

²⁹ Uganda, the Prevention and Prohibition of Torture Act (18 September 2012), section 2, available at http://www.ulii.org/ug/legislation/act/2012/3/prevention_prohibition_of_torture_act_no_3_of_2_17440.pdf (last accessed February 2016).

3. The Convention requires States parties to explicitly affirm the absolute prohibition of torture; the defence of superior orders is to be excluded

Under the Convention, torture is never justified: no state of war or emergency, internal political instability or any other threats to the State can be invoked as a justification for torture.³⁰ Defences of military or superior orders may also never be raised in a criminal prosecution as a justification for torture per article 2(3) of the Convention. This norm is fully supported in international law. The prohibition of justifications for torture is also explicit in regional human rights treaties,³¹ the UN Human Rights Committee has held that the same principle holds true for the prohibition of torture in the International Covenant on Civil and Political Rights,³² and international criminal law severely limits the individual defence of superior orders.³³ Prohibiting defences for torture is an important normative element for protecting persons at risk: disallowing defences in anti-torture legislation can be a strong deterrent.³⁴ States are advised to review their criminal code to confirm it contains no general defences that will conflict with this prohibition.³⁵

Australia provides in section 274.4 of the criminal code that “It is not a defence in a proceeding for an offence under this Division that: (a) the conduct constituting the offence was done out of necessity arising from the existence of a state of war, a threat of war, internal political instability, a public emergency or any other exceptional circumstance; or (b) in engaging in the conduct constituting the offence the accused acted under orders of a superior officer or public authority (...).³⁶

Canada’s criminal code similarly states that “it is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.”³⁷

³⁰ Articles 2§2 and 2§3 UNCAT; See also CAT General Comment N°2, op. cit. 1, §§ 5 and 26; See also UN Committee against Torture, Concluding observations of the Committee against Torture on the United States of America (25 July 2006), UN Doc. CAT/C/USA/CO/2, §14.

³¹ Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987), OAS Treaty Series, N°67 (1985), articles 4 and 5; European Convention on Human Rights (entered into force on 3 May 1953), article 3 (allows no exception); League of Arab States, Arab Charter on Human Rights (adopted 15 September 1994) Article 4.

³² CCPR, General Comment N°20, Article 7 in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (29 July 1994), UN Doc. HRI/GEN/1/Rev.1.

³³ Rome Statute of the International Criminal Court (entered into force on 1 July 2002), A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, article 33.

³⁴ J. Herman Burgers and Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (M. Nijhoff, 1988), p. 124.

³⁵ Association for the Prevention of Torture, Report: Experiences, Advice and Good Practices – Key Issues in Drafting Anti-Torture Legislation, Expert Meeting 2-3 November 2012 (2013), p. 45.

³⁶ Australia Criminal Code Act 1995, as amended by the Crimes Legislation Amendment (Torture Prohibition and death Penalty Abolition) Act 2010, section 274.4, available at <https://www.comlaw.gov.au/Details/C2010A00037> (last accessed February 2016).

³⁷ Canada criminal code, op. cit. 18, article 269.1(3).

Madagascar states in article 14 of its anti-torture law that no situation can be invoked to justify torture (be it a state of war, a state of emergency, national necessity, martial law, etc. Article 15 further specifies that an order of a superior officer cannot constitute a defence to torture.³⁸

In the **Philippines**, the Anti-Torture Act of 2009 also clearly states that torture is non-derogable: “Torture and other cruel, inhuman and degrading treatment or punishment as criminal acts shall apply to all circumstances. A state of war or a threat of war, internal political instability, or any other public emergency, or a document or any determination comprising an “order of battle” shall not and can never be invoked as a justification for torture and other cruel, inhuman and degrading treatment or punishment“.³⁹

Sri Lanka also provides in the Convention against Torture Act that “For the avoidance of doubts it is hereby declared that the fact that any act constituting an offence under this Act was committed (a) at a time when there was a state of war, threat of war., internal political instability or any public emergency; (b) on an order of a superior officer or a public authority, shall not be a defence to such offence.”⁴⁰

Uganda mentions in section 3 of its Prevention and Prohibition of Torture Act that: “Notwithstanding anything in this Act, there shall, be no derogation from the enjoyment of the right to freedom from torture. (2) The following shall not be a defence to a charge of torture (a) a state of war or a threat of war; (b) internal political instability; (c) public emergency; or (d) an order from a superior officer or a public authority.”⁴¹

4. States parties may consider defining torture to include non-state and private actors

The Committee has clarified what it understands from the article 1 definition and the notions of “public official or anyone acting in an official capacity” (see section 1 on definition of torture). The obligation of the Convention is to criminalise acts of torture that have a nexus with State or quasi-State authorities, which may include when a public official knew or reasonably ought to have known about acts of torture and fails in his or her obligations of due diligence.⁴² However, some States, when criminalising torture, have decided to also include the possibility of having non-state or private actors, without a nexus to a State or quasi-State entities, as possible perpetrators of torture. States have no obligation to do so but are free to adopt a different definition and different liability, as long as the minimum elements of the article 1 definition and the different modes of liability envisaged by the Convention are included. States that have criminalised torture by private actors have usually provided penalties that are more severe for State actors than private persons (see Brazil in the example below).

³⁸ Madagascar, *Loi contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, op. cit. 22, articles 14 and 15.

³⁹ Philippines' Anti-Torture Act of 2009, op. cit. 4, section 6.

⁴⁰ Sri Lanka, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994, Act N°22 of 1994, article 3, available at http://hrcls.lk/PFF/Library_Domestic_Laws/Legislations_related_to_Torture/Convention%20against%20Torture%201994%20of%2022.pdf (last accessed February 2016).

⁴¹ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 3.

⁴² CAT, General Comment N°2, op. cit. 1, § 18.

Article 144(3)(1) of the **Argentina** Penal Code also contains a penalty for torture committed by private individuals.⁴³

In the **Brazil's** law on the Crimes of Torture, the crime of torture includes acts by both State officials and private actors. However, when torture is committed by a public official, the penalty is increased by one third.⁴⁴

In the Prevention and Prohibition of Torture Act of **Uganda**, the definition of torture consists of an act 'inflicted on a person (...) by any person whether a public official or other person acting in an official or private capacity.'⁴⁵

5. States parties may consider criminalising cruel, inhuman or degrading treatment or punishment

One of the recurrent questions is whether there is an obligation on States to criminalise cruel, inhuman or degrading treatment or punishment (CIDTP). The wording of article 16 of the Convention requires that State parties "shall undertake to prevent [...] other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." The separation of torture and CIDTP into distinct articles in the Convention was deliberate, because the drafters intended some of the State obligations to apply only to torture.⁴⁶ In particular, the obligation in article 4 to criminalise torture through domestic legislation was not intended to apply to CIDTP.⁴⁷ In rare concluding observations, the Committee has commented on the absence of national law provisions criminalising CIDTP,⁴⁸ but the Convention is not generally considered to require that States criminalise such treatment as a separate offence.⁴⁹

States are therefore free to adopt a legislation criminalising CIDTP as a separate crime but as seen in the introduction, States have in any case the obligation under article 16 of the Convention to prevent such acts. The Committee has in its General Comment N°3 indicated that victims of CIDTP have a right to an effective remedy and redress.⁵⁰ If States decide to criminalise CIDTP as a separate crime, the Committee has recommended keeping the notion separate from the notion of torture.⁵¹ Along the same lines, it is advised that comprehensive legislation be more explicit than the Convention as to what constitutes CIDTP as there is no precise definition of CIDTP in international law. States that have criminalised CIDTP have chosen to adopt different approaches. Some have defined CIDTP, some have not defined it in their legislation while others have left it to judges to

⁴³ Argentina, Penal Code, Consolidated text of Law N°11.179 approved by Decree N°3992/84 of 21 December 1984 as last amended by Law N°26.842 of 19 December 19 2012, article 144(3)(1), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=283801 (last accessed in February 2016).

⁴⁴ Brazil, Law N°9.455 of 7 April 1997, article 1, available at http://www.planalto.gov.br/ccivil_03/leis/L9455.htm (last accessed in February 2016).

⁴⁵ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 2(1).

⁴⁶ Manfred Nowak and Elizabeth McArthur, the United Nations Convention against Torture: A Commentary (Oxford University Press 2008), pp. 229 and 230.

⁴⁷ Ibid, p. 247.

⁴⁸ CAT, Concluding observations on Ukraine (11 December 2014), UN Doc. CAT/C/UKR/CO/6, § 134; CAT, Concluding observations on Sweden (6 June 2002), UN Doc. CAT/C/CR/28/6, § 7(a); CAT, Concluding observations on Kazakhstan (12 December 2014,) UN Doc. CAT/C/KAZ/CO/3, § 7(a).

⁴⁹ Rodley and Pollard, op. cit. 10, § 118.

⁵⁰ CAT, General Comment N°3, op. cit. 11, § 1. See also chapter 8 of the guide on the right to redress.

⁵¹ CAT, Concluding observations on Germany (12 December 2011), UN Doc. CAT/C/DEU/CO/5, § 9.

determine what amounts to CIDTP (see examples below). Penalties for the crime of CIDTP should usually bear a lighter sentence than torture.

In the **Maldives'** Act on the Prohibition and Prevention of Torture, the provision on CIDTP provides that cruel, inhumane, degrading actions shall be considered, as any action or incident that does not fall under the acts of torture. CIDTP inflict extreme pain or actions that may kill the persons spirit of survival, or actions to convince a person that the person is below the limits of human dignity, inflicted upon a person under the care of a State official, or upon the orders of such an official, or with the consent of such an official, or upon the notification of such an official or with the knowledge of such an official.⁵²

In the **Philippines**, the Anti-Torture Act defines CIDTP as follows: "Other cruel, inhuman and degrading treatment or punishment refers to a deliberate and aggravated treatment or punishment not enumerated under Section 4 of this Act, inflicted by a person under his/her custody, which attains a level of severity causing suffering, gross humiliation or debasement to the latter. The assessment of the level of severity shall depend on all the circumstances of the case, including the duration of the treatment or punishment, its physical and mental effects and, in some cases, the sex, religion, age and state of health of the victim."⁵³

In **Uganda**, the Prevention and Prohibition of Torture Act criminalises CIDTP and left it to judges to determine what CIDTP can amount to: "for the purposes of determining what amounts to cruel, inhuman or degrading treatment or punishment, the court or any other body considering the matter shall have regards to the definition of torture as set out in section 2 and the circumstances of the case (...)"⁵⁴ Penalties are foreseen up to seven years.⁵⁵

6. The Convention requires State parties to penalise torture with punishments commensurate to the gravity of the crime. The Committee recommends that States parties penalise torture with punishments ranging from a minimum of six years of imprisonment

Article 1, dealing with the definition of the crime of torture, enshrines the gravity of the crime. Article 2 creates the obligation upon States to, *inter alia*, pass legislative measures to prevent the occurrence of this crime in their territories. More specifically, article 4 of the Convention creates the obligation upon States to "make these offences punishable by appropriate penalties which take into account their grave nature."⁵⁶ Indeed, the penalties provided for in national legislation are to reflect the extreme gravity of the crime in question, and discourage any practice of torture.

The Committee has clarified that "serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity."⁵⁷ While making important points on the necessity of

⁵² Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 11.

⁵³ Philippines' Anti-Torture Act of 2009, op. cit. 4, section 3(b).

⁵⁴ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 7.

⁵⁵ Ibid.

⁵⁶ See also CAT, General Comment N°2, op. cit. 1, § 8.

⁵⁷ Ibid, § 9.

ensuring severe punishment in line with the gravity of the crime, there is no formal standard to follow in terms of the number of years.

In 2002, the Committee recommended sentences of between six and twenty years.⁵⁸ Since this 2002 recommendation, it seems that the Committee has not set down appropriate penalties or specific ranges although it keeps the approach of reminding States parties that some measures do not suffice or are not in line with the gravity of the crime. The Committee has stated that acts of torture shall incur the heaviest punishments. This statement reinforces the idea that the penalties shall be a matter taken seriously by States, and that at least the minimum parameters raised in the 2002 recommendation shall be respected. States have regularly provided a scale of penalties with heavier penalties when the crime resulted in the death of the victim or in permanent disabilities or when inflicted on a pregnant woman or a child under the age of 18 (in other words, States may impose heavier penalties for aggravated circumstances).

The criminal code of **Australia** foresees a penalty of 20 years for the crime of torture.⁵⁹

In the **Maldives** Act on the Prohibition and Prevention of Torture Act, different penalties are provided ranging from 5 years to 25 years depending on the consequence of acts of torture on the victim: 5 years for a victim of torture with a medical treatment of more than 90 days; 10 to 15 years if the victim lost his/her sense of taste or his/her sight, hearing, ability to speak, etc.; 15 to 20 years if torture caused insanity, loss of memory, etc.; 15 to 25 years if the victim was mutilated, raped, etc.; 25 years if the victim was murdered or rape with as a consequence a loss of memory, insanity, etc.⁶⁰

The General Civil Penal Code of **Norway** provides that “any person who commits torture shall be liable to imprisonment for a term not exceeding 15 years. In the case of aggravated and severe torture resulting in death, a sentence of imprisonment for a term not exceeding 21 years may be imposed. Any person who aids and abets such an offence shall be liable to the same penalty.”⁶¹

In the **Panama** penal code, the crime of torture bears a penalty of between 5 to 8 years.⁶²

⁵⁸ CAT, Summary Report of the 93rd Meeting of the Committee, UN Doc. CAT/C/SR.93 [this document, while cited by scholars for the numerical parameter, is not available in the records of the Committee].

⁵⁹ Australia Criminal Code Act 1995, op. cit. 35, section 274.2(1) et (2).

⁶⁰ Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 23.

⁶¹ Norway, the General Civil Penal Code, Act of 22 May 1902 N°10, with subsequent amendments, the latest made by Act of 21 December 2005, No. 31, section 117(a), available at <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19020522-010-eng.pdf> (last accessed in February 2016).

⁶² Panama, Penal Code adopted by Law 14 of 2007, with subsequent amendments introduced by Law 26 of 2008, Law N°5 of 2009, Law N°68 of 2009 and Law N°14 of 2010, article 156, available at https://www.oas.org/juridico/mla/sp/pan/sp_pan-int-text-cp.pdf (last accessed in February 2016).

Summary of the elements – Chapter 1 – Definition of torture

Primary elements

- ↪ A separate and specific crime of torture in national legislation is to be adopted.
- ↪ The definition of torture in national law is to encompass, at a minimum, the elements contained in the article 1 definition: torture is any act by which severe mental or physical pain or suffering is intentionally inflicted for a particular purpose by a public official or with his or her consent or acquiescence or by anyone acting in an official capacity.
- ↪ National legislation is to contain provisions affirming the absolute nature of the prohibition of torture; the defence of superior order is to be excluded.
- ↪ The penalty for the crime of torture is to take account of the grave nature of the crime.

Recommended elements

- ↪ In order for the penalty for the crime of torture to be commensurate with the gravity of the crime, a minimum penalty of six years is to be imposed.

Optional elements

- ↪ National legislation includes acts of non-state and private actors in the definition of torture.
- ↪ National legislation criminalises cruel, inhuman or degrading treatment or punishment.

Chapter 2 – Modes of liability

Relevant Articles from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 1

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

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

Article 4

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

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

7. The Convention requires States parties to criminalise the commission and the attempt to commit torture, complicity in torture, other forms of participation in torture, instigation of, and incitement to torture, as well as acts by public officials that acquiesce or consent to torture

The Convention provides for different types of liability. Articles 1 and 4 of the Convention specify the different possible forms of involvement in acts of torture. Article 1 of the Convention provides responsibility for torture that includes infliction, instigation, consent and acquiescence. Article 4 of the Convention further requires States to include in its legislation criminal liability for “attempt” to commit torture, “complicity” and other forms of “participation”.

In order to combat impunity for acts that support torture, a State’s legislation must include modes of liability beyond the direct commission of the offence. In its concluding observations and general comments, the Committee regularly includes mention of modes of liability in addition to commission. In its General Comment N°2, The Committee has stated that States “are obligated to prevent

public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention”.⁶³ As part of the article 4 obligation, the Committee has clearly stated that a State party shall make the “necessary modifications [...] to explicitly criminalise attempts to commit torture and acts constituting complicity or participation in torture and to define them as acts of torture.”⁶⁴ For these forms of liability, the Committee does not draw a distinction between the gravity of the offence; “any person committing such an act, whether perpetrator or accomplice, shall be personally held responsible before the law.”⁶⁵ The Committee has also referenced the terminology in article 1, and has developed a recommendation specifically to criminalise the act by a public official of instigating, consenting, or acquiescing to torture.⁶⁶

New Zealand criminalises all these modes of liability in its Crimes of Torture Act: “(1) Every person is liable upon conviction to imprisonment for a term not exceeding 14 years who, being a person to whom this section applies or acting at the instigation or with the consent or acquiescence of such a person, whether in or outside New Zealand, (a) commits an act of torture; or (b) does or omits an act for the purpose of aiding any person to commit an act of torture; or (c) abets any person in the commission of an act of torture; or (d) incites, counsels, or procures any person to commit an act of torture. (2) Every person is liable upon conviction to imprisonment for a term not exceeding 10 years who, being a person to whom this section applies or acting at the instigation or with the consent or acquiescence of such a person, whether in or outside New Zealand, (a) attempts to commit an act of torture; or (b) conspires with any other person to commit an act of torture; or (c) is an accessory after the fact to an act of torture.”⁶⁷

In the **Philippines**, the Anti-Torture Act provides for different types of liability depending of the status of the perpetrator: “Any person who actually participated or induced another in the commission of torture or other cruel, inhuman and degrading treatment or punishment or who cooperated in the execution of the act of torture or other cruel, inhuman and degrading treatment or punishment by previous or simultaneous acts shall be liable as principal. Any superior military, police or law enforcement officer or senior government official who issued an order to any lower ranking personnel to commit torture for whatever purpose shall be held equally liable as principals. The immediate commanding officer of the unit concerned (...) and other law enforcement agencies shall be held liable as a principal to the crime of torture or other cruel or inhuman and degrading treatment or punishment for any act or omission, or negligence committed by him/her that shall have led, assisted, abetted or allowed, whether directly or indirectly, the commission thereof by his/her subordinates. If he/she has knowledge of or, owing to the circumstances at the time, should have known that acts of torture or other cruel, inhuman and degrading treatment or punishment shall be committed, is being committed, or has been committed by his/her subordinates or by others within his/her area of responsibility

⁶³ CAT, General Comment N°2, op. cit. 1, § 17.

⁶⁴ CAT, Concluding observations on Gabon (17 January 2013), UN Doc. CAT/C/GAB/CO/1, § 8; UN Committee against Torture, Concluding observations on Morocco (21 December 2011), UN Doc. CAT/C/MAR/CO/4, § 5.

⁶⁵ CAT, Concluding observations on Guinea (20 June 2014), UN Doc. CAT/C/GIN/CO/1, § 7.

⁶⁶ CAT, Concluding observations on Kyrgyzstan (20 December 2013), UN Doc. CAT/C/KGZ/CO/2, § 6; UN Committee against Torture, Concluding observations on Andorra (20 December 2013), UN Doc. CAT/C/AND/CO/1, § 6.

⁶⁷ New Zealand, Crimes of Torture Act of 1989, op. cit. 25, section 3.

and, despite such knowledge, did not take preventive or corrective action either before, during or immediately after its commission, when he/she has the authority to prevent or investigate allegations of torture or other cruel, inhuman and degrading treatment or punishment but failed to prevent or investigate allegations of such act, whether deliberately or due to negligence shall also be liable as principals.”⁶⁸

In **South Africa**, all those modes of liability are also provided for in the Prevention of Combating and Torture of Persons Act: “Any person who (a) commits torture; (b) attempts to commit torture; or (c) incites, instigates, commands or procures any person to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life. (2) Any person who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.”⁶⁹

In the Prevention and Prohibition of Torture Act of **Uganda**, several modes of liability are foreseen: “A person who, whether directly or indirectly (a) procures; (b) aids or abets; (c) finances; (d) solicits; (e) incites; (f) recommends; (g) encourages; (h) harbours; (i) orders; or (j) renders support to any person, knowing or having reason to believe that the support will be applied or used for or in connection with the preparation or commission or instigation of torture (...).”⁷⁰

Summary of the elements – Chapter 2 – Modes of liability

Primary elements

- ↳ National legislation criminalising torture is to include explicit criminal liability for:
- the commission of torture;
 - attempt to commit torture;
 - complicity in torture;
 - other forms of participation;
 - instigation of torture;
 - incitement to torture;
 - the commission of acts of torture by public officials who acquiesce or consent to torture.

⁶⁸ Philippines’ Anti-Torture Act of 2009, op. cit. 4, section 13.

⁶⁹ South Africa, Act N°13 of 2013, Prevention of Combating and Torture of Persons Act (29 July 2013), section 4, available at <http://www.justice.gov.za/legislation/acts/2013-013.pdf> (last accessed in February 2016).

⁷⁰ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 8.

Chapter 3 – The exclusionary rule

Relevant Article from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 15

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

8. The Convention requires States parties to explicitly exclude evidence derived by torture in all proceedings

The exclusionary rule is a legal safeguard for detainees, providing that evidence seized by law enforcement using torture shall not be subsequently used in any proceeding. Evidence derived by torture is unquestionably tainted given the absolute condemnation of torture. By explicitly stating the exclusionary rule in its legislation, a State takes a significant measure in protecting persons at risk. As a normative function, following the exclusionary rule ensures that the justice system as a whole is untainted by the illegality of individual actors and endorses the respect for human rights and the rule of law inherent in the prohibition of torture. As a practical function, the exclusionary rule bars a potential torturer from benefiting from his or her offence since any evidence produced will be unusable, and thus acts as a deterrent to torture.

Article 15 of the Convention explicitly mandates that States parties must enact the exclusionary rule in relation to statements that are procured by means of torture. This applies to all proceedings, except against a person accused of torture in order to prove that the statement was in fact elicited.

Concluding observations and jurisprudence of the Committee reiterate the exclusionary rule, recommending that State legislation should explicitly provide that statements obtained as a result of torture may not be used or invoked as evidence in any proceedings.⁷¹ In the aftermath of 11th September 2001, when some States sought to adopt more stringent laws and practises related to counter-terrorism, the Committee reminded all State parties in its General Comment N°2 that the obligation in article 15 is non-derogable.⁷² There are many good national laws that put the Convention’s rule into effect.

⁷¹ See examples in the CAT, Report of the Committee against Torture 47th-48th sessions (2011-2012), UN Doc. A/67/44, pp. 53, 68, 80, 87 and 156; Report of the Committee against Torture 51st-52nd sessions (2013-2014), UN Doc. A/69/44, p. 127; See also CAT, *Ali Aarrass v. Morocco* (24 June 2014), UN Doc. CAT/C/52/D/477/2011, § 10.8.

⁷² CAT, General Comment N°2, op. cit. 1, § 6.

In **Cambodia**, the code of criminal procedure provides that “Unless it is provided otherwise by law, in criminal cases all evidence is admissible. The court has to consider the value of the evidence submitted for its examination, following the judge’s intimate conviction. The judgment of the court may be based only on the evidence included in the case file or which has been presented at the hearing. A confession shall be considered by the court in the same manner as other evidence. Declaration given under the physical or mental duress shall have no evidentiary value. Evidence emanating from communications between the accused and his lawyer is inadmissible.”⁷³

In **Ecuador**, the code of criminal procedure provides that evidence cannot be admissible if they were obtained under torture or by any other means that undermined the will of the person.⁷⁴

In **Equatorial Guinea**, the Law on the Prevention and Sanctions of Torture forbids the use of confession or information obtained under torture.⁷⁵

In **Guatemala**, the criminal procedure code provides that evidence obtained illegally, such as under torture, are not admissible.⁷⁶

In **Madagascar**, the anti-torture law clearly states that any statement obtained under torture cannot be used in a court of law.⁷⁷

In the Act on the Prohibition and Prevention of Torture of the **Maldives**, the same rule applies: A statement submitted to a Maldivian court, or a statement of confession to a crime, or an admission to an action that was obtained by means of torture will be deemed evidence obtained contrary to laws and regulations. The evidence shall not be used against the accused at any judicial proceeding or process of court.⁷⁸

The **Philippines** Anti-Torture Act also provides for the exclusionary rule in section 8 that reads that “any confession, admission or statement obtained as a result of torture shall be inadmissible in evidence in any proceedings, except if the same is used as evidence against a person or persons accused of committing torture”.⁷⁹

The Convention against Torture Act of **Sri Lanka** explains that “a confession otherwise inadmissible in any criminal proceedings shall be admissible in any proceedings instituted under this Act, for the purpose only of proving the fact that such confession was made.”⁸⁰

In **South Korea**, the criminal procedure act provides that “Confession of a defendant extracted by torture, violence, threat or after prolonged arrest or detention, or which is suspected to have been made involuntarily by means of fraud or other methods, shall not be admitted as evidence of guilt”.⁸¹

⁷³ Cambodia, Code of Criminal Procedure of the Kingdom of Cambodia, article 321, available at <http://www.wipo.int/wipolex/fr/details.jsp?id=10629> (last accessed February 2007).

⁷⁴ Ecuador, Code of Criminal Procedure of 2000 (R.O. 360-S of 13 January 2000, article 83, available at http://www.oas.org/juridico/mla/sp/ecu/sp_ecu-int-text-cpp-ro360s.html (last accessed February 2016).

⁷⁵ Equatorial Guinea, Law on the Prevention and Sanctions of Torture of 2006 (Law N°6/2006, 2 November 2006), article 8, available at http://www.cesge.org/index.php?option=com_phocadownload&view=category&id=13&Itemid=79# (last accessed February 2016).

⁷⁶ Guatemala, Criminal Procedure Code of 28 September 1992, article 183, available at https://www.unodc.org/tldb/pdf/Guatemala_Cdigo_Procesal_Penal.pdf (last accessed February 2016).

⁷⁷ Madagascar, *Loi contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, op. cit. 22, article 6.

⁷⁸ Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 5.

⁷⁹ Philippines’ Anti-Torture Act of 2009, op. cit. 4, section 8.

⁸⁰ Sri Lanka, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994, op. cit. 39, article 5.

⁸¹ South Korea, Criminal Procedure Act (Law N°341 of September 23, 1954, as last amended by Law N°9765 of June 6, 2009), article 309, available at <http://www.wipo.int/wipolex/en/details.jsp?id=12936> (last accessed February 2016).

In **Uganda**, the Prevention and Prohibition of Torture Act provides that “any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against person in any proceeding (...)”.⁸²

9. The Committee considers that the exclusionary rule is to be extended to evidence derived by CIDTP

While article 15 of the Convention only references the exclusion of statements obtained through torture, the Committee has taken the view that article 15 is obligatory “as applied to both torture and ill-treatment.”⁸³ This view is strongly supported outside the Convention framework as well, in particular by the UN Special Rapporteur on torture⁸⁴ and by the UN Human Rights Committee that has also recommended in a General Comment that this rule extends to “other prohibited treatment” to discourage any violations of the general prohibition of torture.⁸⁵ The European Court on Human Rights explicitly held that the use of statements obtained as a violation of article 3 (prohibition of torture and CIDTP) render the proceedings an automatic breach of the right to a fair trial, “irrespective of the classification of the treatment as torture, inhuman or degrading treatment.”⁸⁶ The Inter-American Court on Human Rights has not been so explicit, but has read CIDTP to be part of their article 10 on the exclusionary rule.⁸⁷ Other authoritative documents on torture, including the Robben Island Guidelines and the 1975 General Assembly Declaration against Torture, explicitly include CIDTP as well.⁸⁸

In **Germany**, the criminal procedure code explicitly states that the exclusionary rule applies to evidence obtained under CIDTP.⁸⁹

10. The Committee considers that the burden of proof is on the prosecution to show that evidence was collected lawfully, where there is an allegation that evidence was obtained by torture

Article 15 of the Convention requires that a statement be excluded if it is “established” to be elicited by torture, but does not address which party holds the burden of proof on this issue. The Committee places the burden on the State to ascertain

⁸² Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 14.

⁸³ CAT, General Comment N°2, op. cit. 1, §§ 3 and 6. See also the CAT report on its Confidential Art. 20 inquiry in Turkey, UN Doc. A/48/44/Add.1, § 28.

⁸⁴ UN Special Rapporteur on torture, Interim Report to the General Assembly, UN Doc. A/59/324 (1 September 2004), §§ 13-16; See also J. Herman Burgers and Hans Danelius, op. cit. 33, p. 148.

⁸⁵ CCPR, General Comment N°20 on Article 7, HRI/GEN/1/Rev.9 (Vol. I), § 12.

⁸⁶ ECtHR, *El Haski v. Belgium*, App N°649/08 (25 September 2012), § 85.

⁸⁷ IACtHR, *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico*, Case N°12, 449 (26 November 2010), §§ 134–136.

⁸⁸ African Commission on Human and Peoples Rights, Robben Island Guidelines: Resolution On Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment In Africa (2008), article 4; UNGA Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX), Annex, 9 Dec. 1975, article 12.

⁸⁹ Germany, Criminal Procedure Code, as amended by Act of 23.4.2014, section 136(a), available at http://www.gesetze-im-internet.de/englisch_stpo/ (last accessed in February 2016).

whether or not statements were made under torture, where an individual makes such an allegation.⁹⁰ In *P.E. v. France*, the Committee found that the State authorities bear the burden of proof as an implicit consequence of the absolute prohibition of torture.⁹¹ According to the Committee, State authorities have to verify the content of a complainant's allegations, and where it does not refute the allegations nor include any information on this question in its observations to the Committee, it may be found to have violated its obligations under article 15 of the Convention.⁹²

11. The Committee considers that the exclusionary rule applies to all forms of evidence

Article 15 of the Convention explicitly bans “statements” made as a result of torture, but is silent as to evidence otherwise derived from those statements, i.e. derivative evidence (when the evidence is the direct or indirect result of a confession made earlier under torture or ill-treatment). It is clear that the Convention, and general international law, requires the exclusion of more than statements obtained under torture and ill-treatment. The Committee regularly comments on the procedural requirements for suppressing all evidence obtained by the use of torture, even where the Convention only mentions “statements.”⁹³

The Inter-American Court on Human Rights has been more robust, stating that “the absolute character of the exclusionary rule is reflected in the prohibition of granting probative value not only to the evidence obtained directly under duress, but also to evidence deriving from the said act.”⁹⁴

Given that the practice of using derivative evidence significantly weakens both the deterrent and normative value of the exclusionary rule, a complete ban on the use of derivative evidence is a solid means of protecting detainees from torture.

Summary of the elements – Chapter 3 – The exclusionary rule

Primary elements

- ↪ National legislation is to exclude explicitly evidence obtained by torture in all proceedings.
- ↪ National legislation is to reflect that the burden of proof is on the prosecution to show that evidence was collected lawfully, where there is an allegation that evidence was obtained by torture.
- ↪ National legislation is to reflect that the exclusionary rule applies to evidence obtained by CIDTP.
- ↪ National legislation is to reflect that the exclusionary rule applies to all forms of evidence.

⁹⁰ CAT, *P.E. v. France* (19 December 2002), UN Doc. CAT/C/29/D/193/2001, § 6.3; CAT, *G.K. v. Switzerland* (15 May 2003), UN Doc. CAT/C/30/D/219/2002, § 6.10.

⁹¹ CAT, *P.E. v. France*, op cit. 89, § 6.3.

⁹² CAT, *Ktiti v. Morocco* (5 July 2011), UN Doc. CAT/C/46/D/419/2010, § 8.8.

⁹³ See examples in the Report of the Committee against Torture 47th-48th sessions, (2011-2012), UN Doc. A/67/44, pp. 53, 68, 80, 87 and 156.

⁹⁴ IACtHR, *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v. Mexico*, Case N°12, 449 (26 November 2010), § 167.

Chapter 4 – Jurisdiction

Relevant Article from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise 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 pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

12. The Convention requires States parties to establish competence over any alleged case of torture committed on territory under their jurisdiction, or a ship or plane under its flag

Article 5 of the Convention explicitly provides for different types of jurisdiction. Article 5(1)(a) of the Convention requires States to establish competence over cases of torture committed “in any territory under its jurisdiction or on board a ship or aircraft registered in that State”. This common form of jurisdiction is also known as the territoriality and flag principle.

The Committee elaborated on the scope of article 5 in its General Comment N°2 and explained that the territory under its jurisdiction includes not only the sovereign territory of the State, but also all areas over which it “partly exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control.”⁹⁵ In his 2015 report to the UN General Assembly, the UN Special Rapporteur on torture also clarified the notion of “under its jurisdiction”: “the Convention (...) limit to any “territory under a State’s jurisdiction” (...) a small number of positive obligations, the implementation of which is necessarily dependent on the exercise of a sufficient measure of control over an individual, area, place or situation. In this sense, it is uncontroversial that the Convention obliges States to take certain

⁹⁵ CAT, General Comment N°2, op. cit. 1, § 16. See also CAT, *J.H.A. v. Spain*, UN Doc. CAT/C/41/D/323/2007 (21 November 2008), § 8.2

positive measures only when they exercise sufficient authority to be able to do so.”⁹⁶ When providing for jurisdiction in legislation, it is important to remember that there are different ways to establish jurisdiction (see further below).

The **Madagascar** anti-torture law provides for the territoriality and flag principle in article 18(1) to (3).⁹⁷

The **New Zealand** Crimes of Torture Act provides for this type of jurisdiction: “No proceedings for an offence against any of the provisions of section 3 shall be brought unless (...) (c) the act or omission constituting the offence charged is alleged to have occurred in New Zealand or on board a ship or an aircraft that is registered in New Zealand.”⁹⁸

In **Uganda**, this jurisdiction is also stipulated in the Prevention and Prohibition of Torture Act: “The Chief Magistrates Court of Uganda shall have jurisdiction to try the offences prescribed by this Act, wherever committed, if the offence is committed (a) in Uganda; (...); (i) in any territory under the control or jurisdiction of Uganda; (ii) on board a vessel flying the Uganda flag or an aircraft which is registered under the laws of Uganda at the time the offence is committed; (iii) on board an aircraft, which is operated by the Government of Uganda, or by a body in which the government of Uganda holds a controlling interest, or which is owned by a company incorporated in Uganda (...).”⁹⁹

13. The Convention requires States parties to establish jurisdiction over any alleged case of torture committed by one of its nationals

Another jurisdiction that States shall establish to consider cases of torture is when an act of torture is committed by one of its nationals. This is known as the active nationality principle, a well-established form of jurisdiction in criminal law. This obligation derives directly from article 5(1)(b) of the Convention that requires States to establish jurisdiction “when the alleged offender is a national of that State”.

The **Madagascar** anti-torture law provides for the active nationality principle in article 18(4).¹⁰⁰

The **New Zealand** Crimes of Torture Act provides for the active nationality principle: “No proceedings for an offence against any of the provisions of section 3 shall be brought unless (a) the person to be charged is a New Zealand citizen (...).”¹⁰¹

The **Sri Lanka** Convention against Torture Act also provides for this type of jurisdiction: “(1)(b) the person alleged to have committed the offence is a citizen of Sri Lanka (...).”¹⁰²

⁹⁶ UN Special Rapporteur on torture, Interim report to the General Assembly, UN Doc. A/70/303 (7 August 2015), § 28.

⁹⁷ Madagascar, *Loi contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, op. cit. 22, articles 18(1) to 18(3).

⁹⁸ New Zealand, Crimes of Torture Act of 1989, op. cit. 25, section 4.

⁹⁹ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 17(1)(a) and (b).

¹⁰⁰ Madagascar, *Loi contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, op. cit. 22, articles 18(4).

¹⁰¹ New Zealand, Crimes of Torture Act of 1989, op. cit. 25, section 4.

¹⁰² Sri Lanka, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994, op. cit. 39, article 4.

In **Uganda**, this jurisdiction is also stipulated in the Prevention and Prohibition of Torture Act: “The Chief Magistrates Court of Uganda shall have jurisdiction to try the offences prescribed by this Act, wherever committed, if the offence is committed (c) by a citizen of Uganda or by a person ordinarily resident in Uganda (...).”¹⁰³

14. The Convention requires States parties to establish universal jurisdiction over any alleged offender present in the territory under its jurisdiction

The crime of torture is recognised to be so heinous, that it is one of a limited category of so-called “international crimes” in which all countries have an obligation to see that perpetrators do not escape justice. Under this head of jurisdiction, domestic judicial systems have the ability to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals, or against one of its nationals. It would be preferable for victims of international crimes to find redress in the courts of the states where the crimes were committed but universal jurisdiction was created to act as a “safety net” when the territorial state is unable or unwilling to conduct an effective investigation and prosecution. The application of universal jurisdiction reduces the existence of “safe havens” where a person responsible for grave crimes could enjoy impunity.

This form of jurisdiction for the crime of torture is foreseen by the Convention and is found in article 5(2), which provides for universal jurisdiction. This article requires States to either prosecute or extradite the alleged offender if he/she is present in any territory under its jurisdiction (even if the alleged offender is not a national of the State or even if the crime was not committed on the State’s territory). The only requirement is that the alleged offender is found on the territory of the State and the State decides not to extradite him/her. In that case, the State shall establish jurisdiction to make sure that no alleged offender evades justice.

In this context the term “cornerstone” of the Convention is often used, either by the Committee or by those commenting on its work.¹⁰⁴ This is in line with the idea of the Convention creating a system where torturers cannot find a place to hide. The Committee insists unambiguously on the implementation of universal jurisdiction,¹⁰⁵ going beyond the criminal procedure law by requesting administrative regulations also to support the implementation.¹⁰⁶

¹⁰³Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 17(1)(c).

¹⁰⁴ CAT, *Suleymane Guengueng et al. v. Senegal* (18 April 2001), UN Doc. CAT/C/36/D/181/2001, § 5; Lene Wendland, A Handbook on State Obligations under the UN Convention against Torture (APT 2002) p. 37; the term “cornerstone” comes from the Swedish delegation drafting the Convention: Burgers and Danelius, op. cit. 33, p. 58.

¹⁰⁵ CAT, Concluding observations on Mexico (11 December 2012), UN Doc. CAT/C/MEX/CO/5-6, § 11.

¹⁰⁶ CAT, Concluding observations on United Kingdom of Great Britain and Northern Ireland (24 June 2013), UN Doc. CAT/C/GBR/CO/5, § 8.

The **Luxembourg** criminal procedure code stipulates that someone suspected of torture present in its territory can be prosecuted in Luxembourg.¹⁰⁷

The **Madagascar** anti-torture law provides in article 18(6) for universal jurisdiction when the alleged perpetrator is in Madagascar.¹⁰⁸

The **Sri Lanka** Convention against Torture Act also provides for this type of jurisdiction: “(2) The jurisdiction of the High Court of Sri Lanka in respect of an offence under this Act committed by a person who is not a citizen of Sri Lanka, outside the territory of Sri Lanka, shall be exercised by the High Court holden in the Judicial Zone nominated by the Chief Justice, by a direction in writing under his hand.”¹⁰⁹

In **Uganda**, this jurisdiction is also stipulated in the Prevention and Prohibition of Torture Act: “The Chief Magistrates Court of Uganda shall have jurisdiction to try the offences prescribed by this Act, wherever committed, if the offence is committed (e) by a stateless person who has his or her habitual residence in Uganda; or (f) by any person who is for the time being present in Uganda or in any territory under the control or jurisdiction of Uganda.”¹¹⁰

15. The Convention and the Committee recommend that States parties establish jurisdiction over cases where their nationals have been victim of torture

According article 5(1)(c) of the Convention, States may establish jurisdiction when the victim is a national of that State “if that State considers it appropriate”. This form of jurisdiction is also referred to as the passive nationality principle. Although article 5(1)(c) is not obligatory, it is recommended that the possibility to exercise jurisdiction by the State on behalf of its nationals be provided in national law to avoid persons responsible of torture to escape justice and to permit such prosecutions to take place. The Committee also recommends during countries’ reviews that State parties add this type of jurisdiction in legislation.¹¹¹

The **Madagascar** anti-torture law provides for the passive nationality principle in article 18(5).¹¹²

The **Sri Lanka** Convention against Torture Act also provides for this type of jurisdiction: “(...) (c) the person in relation to whom the offence is alleged to have been committed is a citizen of Sri Lanka.”¹¹³

¹⁰⁷Luxembourg criminal procedure code 1808, as amended by Law of April 2015, article 7(3), available at http://www.legilux.public.lu/leg/textescoordonnes/codes/code_instruction_criminelle/cic.pdf (last accessed in February 2016).

¹⁰⁸Madagascar, *Loi contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, op. cit. 22, articles 18(6).

¹⁰⁹Sri Lanka, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994, op. cit. 39, article 4.

¹¹⁰Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 17(1)(e).

¹¹¹CAT, Report of the Committee against Torture, 47th session (31 October-25 November 2011), 48th session (7 May-1 June 2012), UN Doc. A/67/44, p. 51; CAT, Report of the Committee against Torture, 51st session (28 October-22 November 2013), 52nd session (28 April-23 May 2014), UN Doc. A/69/44, p. 143.

¹¹²Madagascar, *Loi contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, op. cit. 22, articles 18(5).

¹¹³Sri Lanka, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994, op. cit. 39, article 4.

In **Uganda**, this jurisdiction is also stipulated in the Prevention and Prohibition of Torture Act: “The Chief Magistrates Court of Uganda shall have jurisdiction to try the offences prescribed by this Act, wherever committed, if the offence is committed (d) against a citizen of Uganda (...).”¹¹⁴

Summary of the elements - Chapter 4 - Jurisdiction

Primary elements

In establishing jurisdiction, legislative provisions are to include all heads of jurisdiction in article 5 of the Convention, namely:

- ↳ The territoriality and flag principle over alleged cases of torture in any territory under a State’s jurisdiction;
- ↳ Jurisdiction for cases committed by a State’s national;
- ↳ Universal jurisdiction over any alleged offender present in the territory under a State’s jurisdiction.

Recommended elements

- ↳ National legislation provides for jurisdiction over cases where a State’s national has been a victim of torture.

¹¹⁴ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 17(1)(d).

Chapter 5 – Complaints, investigations, prosecutions and extradition

Relevant Articles from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 7

- 1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.*
- 2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.*
- 3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.*

Article 8

- 1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.*
- 2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.*
- 3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.*
- 4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.*

Article 9

- 1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.*
- 2. States Parties shall carry out their obligations under paragraph 1 of this*

article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

16. The Convention requires States parties to ensure a right to complain to competent authorities and protect victims and witnesses against reprisals

States parties must also ensure that impartial and effective complaints mechanisms are established to enable any persons to lodge a complaint.¹¹⁵ This right to complain is to be found in article 13 of the Convention.¹¹⁶ This right to complain is fundamental to combat torture and ill-treatment as it enables any person to make a complaint that will trigger a prompt and impartial examination into the facts. This obligation is also part of the procedural aspect of the right to redress in article 14.¹¹⁷

The Committee has affirmed in its General Comment N°3 that to satisfy this obligation, States are to enact legislation.¹¹⁸ The Committee also addressed the issues in several concluding observations.¹¹⁹ Importantly, the Committee recommends the establishment of an independent body to investigate allegations of torture committed by State agents, such establishment ordinarily to be enacted through legislation.

In order to ensure this right, persons lodging a complaint shall be protected against any form of reprisals, as clearly stated in article 13 of the Convention. Therefore States shall take steps to “ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of his complaint or any

¹¹⁵ CAT, General Comment N°3, op. cit. 11, § 23.

¹¹⁶ Ibid.

¹¹⁷ Ibid, § 5.

¹¹⁸ Ibid, §§ 23 and 25.

¹¹⁹ CAT, Concluding observations on Germany (12 December 2011), UN Doc. CAT/C/DEU/CO/5, §§ 6 and 12; CAT, Concluding observations on Canada (25 June 2012), UN Doc. CAT/C/CAN/CO/6, § 7; CAT, Concluding observations on Portugal (23 December 2013), UN Doc. CAT/C/PRT/CO/5-6, § 4; CAT, Concluding observations on Switzerland (25 May 2010), UN Doc. CAT/C/CHE/CO/6, § 4.

evidence given”. Steps to prevent retaliation may include removing personnel accused of torture and ill-treatment from active duty or moving the person who made the complaint to a safe location (for example witness protection, safe houses, etc.).

In the **Maldives’** Act on the Prohibition and prevention of Torture, any victim who files a complaint to the national human rights commission has a right to have it investigated in a non-biased and impartial manner with reasonable promptness.¹²⁰

In **Uganda**, the right to complain is also enshrined in the Prevention and Prohibition of Torture Act and enables any person to lodge a complaint to the Human Rights Commission, the police or any other relevant institution or body.¹²¹

In the **United Kingdom**, the Police Reform Act set up the Independent Police Complaints Commission, in charge of handling complaints on the police. This Commission is independent from the police and it is a requirement for the Commissioners not to have worked for the police.¹²²

17. The Convention requires States parties to ensure prompt and impartial investigations of allegations of torture

Whenever a State is obliged to establish jurisdiction under article 5(2)¹²³ this triggers a primary duty of the State to investigate, and potentially prosecute, all allegations of torture. Article 12 of the Convention provides for this obligation to “ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”.

A victim’s complaint should always trigger an investigation and be considered as “reasonable ground”. Allegations from NGOs, information collected from fellow detainees, family members, lawyers, medical staff, national human rights institutions should also trigger such investigations.¹²⁴

The investigation also needs to be “prompt and impartial” according to the same article but these terms are not defined in the Convention. The Committee has clarified that, in order to fulfil this conventional obligation, States should immediately start investigating when an allegation of torture is brought forward.¹²⁵ In order for investigations to be impartial, they must not be conducted by their own colleagues. It is therefore important to set up independent bodies, separate from law enforcement or other authorities, to carry out those investigations.¹²⁶

The Manual on the Effective Investigation and Documentation of Torture and

¹²⁰Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 18(a).

¹²¹Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 11.

¹²²United Kingdom of Great Britain and Ireland, Police Reform Act 2002, 2002 Chapter 30, Part 2 Complaints and Misconducts, available at <http://www.legislation.gov.uk/ukpga/2002/30> (last accessed February 2016).

¹²³ See above section 16 on universal jurisdiction.

¹²⁴ Manfred Nowak and Elizabeth McArthur, op. cit. 45, pp. 4413-415.

¹²⁵ See CAT, *Halimi-Nedzibi v. Austria*, UN Doc. CAT/C/8/D/8/1991, §13; CAT, *Blanco Abad v. Spain*, UN Doc. CAT/C/20/D/59/1996, § 8.

¹²⁶ Manfred Nowak and Elizabeth McArthur, op. cit. 45, p. 436.

Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)¹²⁷ is a good basis for any investigation into allegations of torture and ill-treatment. The Istanbul Protocol provides a set of guidelines for documenting and investigating allegations of torture and ill-treatment and for reporting to investigative bodies or to the judiciary.

In the **Maldives'** Act on the Prohibition and Prevention of Torture, any victim who files a complaint to the [human rights] commission has a right to have it investigated in a non-biased and impartial manner with reasonable promptness.¹²⁸

In the **Philippines**, section 9 of the Anti-Torture Act clarifies this obligation to open investigations into allegations of torture: "A victim of torture shall have the following rights in the institution of a criminal complaint for torture: (a) To have a prompt and an impartial investigation by the CHR [Commission on Human Rights] and by agencies of government concerned such as the Department of Justice (DOJ), the Public Attorney's Office (PAO), the PNP, the National Bureau of Investigation (NBI) and the AFP. A prompt investigation shall mean a maximum period of sixty (60) working days from the time a complaint for torture is filed within which an investigation report and/or resolution shall be completed and made available."¹²⁹

In the Prevention and Prohibition of Torture Act of **Uganda**, as soon as a complaint of torture is made, "a prompt investigation into the complaint shall be conducted (...)"¹³⁰

18. The Convention requires States parties to prosecute alleged perpetrators of torture, or extradite them

The Convention requires States to prosecute any persons alleged to have committed torture provided that they do not extradite them.¹³¹ One of the main objectives of the Convention is to combat torture and to fight impunity: prosecuting perpetrators of torture and ill-treatment is therefore a natural consequence of the obligation to establish jurisdiction over the crime of torture. The Convention addresses the obligation to prosecute or extradite in article 7: the Convention leaves States the possibility to prosecute or extradite alleged offenders of torture, but establishes the duty to do one of the two in any case of alleged torture. However, the Committee has clarified that prosecution is not dependant on an extradition request: "the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition".¹³² The choice between prosecuting and extraditing a person therefore only exists when an extradition request is made. Otherwise, States are expected to investigate and prosecute those persons. Extradition is at all times subject to the prohibition on refoulement (see Chapter 7 below).

¹²⁷ UN Office of the High Commissioner of Human Rights, Professional Training Series N°8/Rev. 1, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf> (last accessed February 2016).

¹²⁸ Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 18(a).

¹²⁹ Philippines' Anti-Torture Act of 2009, op. cit. 4, section 9(a).

¹³⁰ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 11.

¹³¹ Article 7 of the Convention.

¹³² CAT, *Guengueng et al. v. Senegal*, Communication N°181/2001, UN Doc. CAT/C/36/D/181/2001 of 19 May 2006, § 9.7.

19. The Convention requires States parties to enable the extradition of alleged torturers

States shall include the crime of torture in their extradition agreements as an extraditable offence,¹³³ subject to the prohibition of non-refoulement in article 3. According to article 8(2) of the Convention, the potential extradition may not be dependent on the existence of an extradition treaty and the Convention may be considered as the legal basis for extradition.

The **Luxembourg** criminal procedure code provides that authorities must either extradite or prosecute an alleged perpetrator.¹³⁴

In the **Maldives**, the Prohibition and Prevention of Torture Act stipulates that the crime of torture should be included in extradition agreements. If there is no extradition agreement, the Convention should serve as a basis for extradition between two State parties.¹³⁵

In **Sri Lanka**, the Convention against Torture Act clearly explains that if no extradition treaty exists, the Convention shall be treated as an extradition arrangement: “(1) Where there is an extradition arrangement in force between the Government of Sri Lanka and the Government of any other State, such arrangement shall be deemed, for the purposes of the Extradition Law, N°8 of 1977, to include provision for extradition in respect of the offence of torture as defined in the Convention, and of attempting to commit, aiding and abetting the commission of, or conspiring to commit, the offence of torture as defined in the Convention. (2) Where there is no extradition arrangement made by the Government of Sri Lanka with any State, in force on the date of the commencement of this Act, the Minister may, by Order published in the Gazette, treat the Convention, for the purposes of the Extradition Law, N°8 of 1977, as an extradition arrangement made by the Government of Sri Lanka with the Government of that State, providing for extradition in respect of the offence of torture as defined in the Convention and of attempting to commit, aiding and abetting the commission of, or conspiring to commit, the offence of torture as defined in the Convention.”¹³⁶

The Prevention and Prohibition of Torture Act of **Uganda** provides that “torture is an extraditable offence”.¹³⁷

20. The Convention requires States parties to afford one another mutual judicial assistance in criminal proceedings related to torture

As explained previously, one of the objectives of the Convention is to make sure that persons responsible for acts of torture do not escape justice. In order to implement this overall goal at the national level, article 9 of the Convention requires States to support one another in connection with criminal proceedings related to torture. It is common for States to establish mutual judicial assistance treaties to enable them to assist another State in the investigation of a criminal matter. Those treaties would typically include provisions regarding the sharing

¹³³ Article 8(1) of the Convention.

¹³⁴ Luxembourg criminal procedure code 1808, op. cit. 107, article 7(4).

¹³⁵ Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 42.

¹³⁶ Sri Lanka, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act of 1994, op. cit. 39, article 9.

¹³⁷ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 22(1).

of evidence, taking statements, executing searches and seizures, providing any relevant documents, etc. Those treaties can be established according to the Model Treaty on Mutual Assistance in Criminal Matters.¹³⁸

Summary of the elements – Chapter 5 – Complaints, investigations, prosecutions and extradition

Primary elements

- ↪ National legislation is to include:
- ↪ Provisions ensuring that individuals can exercise their right to complain to an independent body and to be protected against reprisals;
- ↪ Prompt and impartial investigations of all allegations of torture are available and undertaken;
- ↪ Provisions to prosecute alleged perpetrators of torture, or extradite them, subject to the prohibition on refoulement;
- ↪ Provisions on the extradition of alleged torturers, subject to the prohibition on refoulement;
- ↪ Provisions on mutual judicial assistance in criminal proceedings related to torture are to be included.

¹³⁸ Model Treaty on Mutual Assistance in Criminal Matters, adopted by General Assembly resolution 45/117, subsequently amended by General Assembly resolution 53/112, available at https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf (last accessed February 2016).

Chapter 6 – Amnesties, immunity, statute of limitations and other impediments

Relevant Articles from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 2

1. *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
2. *No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*
3. *An order from a superior officer or a public authority may not be invoked as a justification of torture.*

Article 4

1. *Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*
2. *Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*

21. The Committee considers that States parties are not to enact any amnesties which extend to cases of torture

In cases of amnesties, no investigations, prosecutions or convictions take place. As such, amnesties are incompatible with the obligations of the Convention. The Committee considers that amnesties violate the non-derogable nature of the prohibition of torture as stated in its General Comment N°2: “The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”.¹³⁹ Amnesties also violate the right to redress for victims of torture.¹⁴⁰

In **Brazil**, the law on the crimes of torture stipulates that amnesties are not possible for the crime of torture.¹⁴¹

In the **Philippines**, the Anti-Torture Act provides that “in order not to depreciate the crime of torture, persons who have committed any act of torture shall not benefit from any special amnesty law or similar measures that will have the effect of exempting them from any criminal proceedings and sanctions.”¹⁴²

¹³⁹ CAT, General Comment N°2, op. cit. 1, § 5.

¹⁴⁰ CAT, General Comment N° 3, op. cit. 11, § 38.

¹⁴¹ Brazil, Law N°9.455 of 7 April 1997, op. cit. 43, article 1(6).

¹⁴² Philippines’ Anti-Torture Act of 2009, op. cit. 4, section 16.

The Prevention and Prohibition of Torture Act of **Uganda** clearly states that a person accused of torture shall not be granted amnesty.¹⁴³

22. The Committee considers that immunity for the crime of torture is to be excluded

In its jurisprudence, the Committee has argued against immunity for former heads of State: “In the Committee’s view, that paragraph (article 5§2) conferred on States parties universal jurisdiction over torturers present in their territory, whether former heads of State or not, in cases where it was unable or unwilling to extradite them”.¹⁴⁴ The Committee has expressed that granting immunity for torture cases would violate the principle of non-derogability.¹⁴⁵ The Committee also considers that the obligations to prosecute cases of alleged torture under the Convention are incompatible with immunity.¹⁴⁶ The Committee has reiterated that immunity for acts of torture is incompatible with the Convention, in relation to the obligation to provide redress for victims: “granting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14.”¹⁴⁷

23. The Committee considers that States parties are not to provide for statute of limitations with regards to the crime of torture

Because of the extreme gravity of the crime of torture, and the risk that victims do not come forward until it is safe to do so, the Committee against Torture has repeatedly taken the position, in its General Comment N°3 and in numerous concluding observations, that there should be no statutes of limitations for the crime of torture.¹⁴⁸

In order for any legislation to be in line with international standards, the Committee recommends that they should clearly preclude the application of a statute of limitations for the crime of torture.

¹⁴³ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 23.

¹⁴⁴ CAT, Third periodic report of the United Kingdom of Great Britain and Northern Ireland and dependent territories, CAT/C/SR. 354 (18 November 1998), § 39.

¹⁴⁵ CAT, General Comment N°2, op. cit. 1, § 5.

¹⁴⁶ CAT, General Comment N°2, op. cit. 1, § 5.

¹⁴⁷ CAT, General Comment N°3, op. cit. 11, § 42.

¹⁴⁸ CAT, General Comment N°3, op. cit. 11, § 38; See also CAT, Report of the Committee against Torture, 51st and 52nd sessions (2013-2014), UN Doc. A/69/44, pp. 27, 39, 46, 102, 114, 121 and 130.

El Salvador was congratulated by the Committee against Torture for making torture a crime without a statute of limitations.¹⁴⁹

In **Germany**, all the crimes contained in the Code of Crimes against International Law, including torture, bears no statute of limitations.¹⁵⁰

The Constitution of **Paraguay** clearly stipulates that the crime of torture can never be subjected to statute of limitations.¹⁵¹

24. The Committee considers that States parties are not to allow other impediments to prosecution and punishment for torture

The Committee considers in General Comment N°2 that “(...) impediments that preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”.¹⁵²

In **Brazil**, the law on the crimes of torture stipulates that pardons are not possible for the crime of torture.¹⁵³

Summary of the elements - Chapter 6 - Amnesties, immunity, statute of limitations and other impediments

Primary elements

- ↳ National legislation on amnesties and immunities are to preclude torture.
- ↳ National legislation is not to extend statute of limitations to the crime of torture.
- ↳ Other impediments to prosecution and punishment are not to be available for cases of torture.

¹⁴⁹ CAT, Report of the Committee against Torture, 23rd and 24th session (November 1999 and May 2000), UN Doc. A/55/44, § 158(a).

¹⁵⁰ Germany, Code of Crimes against International Law (*Völkerstrafgesetzbuch*) of 26 June 2002, article 5, available at <http://www.gesetze-im-internet.de/bundesrecht/vstgb/gesamt.pdf> (last accessed in February 2016).

¹⁵¹ Paraguay, Constitution of the Republic of Paraguay of 1992, article 5, available at http://www.bacn.gov.py/CONSTITUCION_ORIGINAL_FIRMADA.pdf (last accessed in February 2016).

¹⁵² CAT, General Comment N°2, op. cit. 1, § 5.

¹⁵³ Brazil, Law N°9.455 of 7 April 1997, op. cit. 43, article 1(6).

Chapter 7 – Non-refoulement

Relevant Articles from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 3

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

25. The Convention requires States parties to incorporate the principle of non-refoulement

Under the Convention, a State party has an explicit duty not to remove an individual from its territory where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁵⁴ As a *jus cogens* norm of international law, the prohibition on *refoulement* to torture is also applicable to all States regardless of their ratification or accession to the UNCAT. *Non-refoulement* is one of the strongest ways a State can prevent torture from occurring: by not acting to remove a person at risk of torture to another country. The prohibition against *refoulement* applies to both the proposed country of immediate removal, as well as to any other country to which the person may be subsequently removed.¹⁵⁵

The prohibition on *refoulement* is not only a substantive norm, requiring all measures to be taken to prevent *refoulement*, it also carries procedural requirements, not least that the individual is entitled to a fair hearing regarding their proposed removal, per article 3(2). Article 3(2) of the Convention is a starting point, stating that the competent authorities determining whether removal can take place shall take into account all relevant considerations, including where applicable “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

The Committee’s reference source on non-*refoulement* is General Comment N°1, which guides the determination of how a State can ensure that it does not fall foul

¹⁵⁴ Article 3 of the UNCAT.

¹⁵⁵ CAT, General Comment N°1: Implementation of Article 3 of the Convention on the context of article 22 (16 September 1998, UN Doc. A/53/44, annex IX, § 2 [Please note that, at the time of drafting, the Committee is currently developing a General Comment on article 3]. See also ICCPR General Comment 31 (Eightieth Session, 2004): Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. A/59/40 (2004) 175, § 12.

of its article 3 obligation.¹⁵⁶ The Committee has held that the non-*refoulement* obligation must be assessed on the merits of each individual case.¹⁵⁷ The Committee is also consistent that the information in article 3(2) of the Convention is not alone sufficient, and the risk of torture must also be “foreseeable, real and personal” to the individual.¹⁵⁸ The United Nations Human Rights Committee also addressed the question in its General Comment N°31, stating that States parties to the International Covenant on Civil and Political Rights have “an obligation not to extradite, expel or return a person who will establish that there are substantial grounds for believing that there is a real risk of irreparable harm”.¹⁵⁹

The Committee, in General Comment N°1, places the initial burden on the applicant to establish an arguable case that they would be at substantial risk of torture if removed, which is reinforced by their own jurisprudence.¹⁶⁰ This position is in line with general principle that the burden rests on the person making an assertion. In terms of the standard of proof, the grounds must go beyond mere theory or suspicion in establishing a danger, but the risk “does not have to meet the test of being highly probable.”¹⁶¹ Only when the applicant has provided a sufficient level of detail may the burden of proof shift to the State.¹⁶²

Even though the non-*refoulement* obligation in article 3 of the UNCAT applies to asylum-seekers and refugees as a jurisdictional matter,¹⁶³ they are also protected by the specific non-*refoulement* obligation under international refugee law, namely the prohibition on return to threats to life or freedom (persecution) contained in article 33 of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, and as recognised as a principle of customary international law.¹⁶⁴ In developing legislation to protect against *refoulement* to torture, States ought to consider how relevant laws – such as those relating for example to border control, immigration, refugees, subsidiary or complementary forms of protection and extradition – are to be adapted, and to ensure that they are closely synchronised. For example, where the State has adopted a framework for providing protection to persons who do not qualify for refugee status yet cannot be removed owing to a risk of torture, it is recommended that the determination proceedings be heard in a single procedure.¹⁶⁵

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, § 7.

¹⁵⁸ CAT, *X.Q.L. v. Australia* (20 June 2014), UN Doc. CAT/C/52/D/455/2011, § 9.3; CAT, *Y.G.H. et al v. China* (17 December 2013), UN Doc. CAT/C/51/D/434/2010, § 8.2; CAT, *A.R. v. Netherlands* (14 November 2003), UN Doc. CAT/C/31/D/203/2002, § 7.3.

¹⁵⁹ CCPR, General Comment N°31: The Nature of the General Legal Obligation Imposed on states Parties to the Covenant (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, § 12.

¹⁶⁰ CAT General Comment N°1, op. cit. 154, §§ 4–6; See also CAT, *Zare v. Sweden* (12 May 2006), UN Doc. CAT/C/36/D/256/2004, § 9.5.

¹⁶¹ Ibid, § 6.

¹⁶² CAT, *A.S. v. Sweden* (15 February 2001), UN Doc. CAT/C/25/D/149/1999, § 8.6.

¹⁶³ CAT General Comment N°1, op. cit. 154.

¹⁶⁴ Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, adopted on 13 December 2001 at the Ministerial Meeting of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees, preamble, § 4, available at <http://www.refworld.org/docid/3d60f5557.html> (last accessed February 2016).

¹⁶⁵ See, for example, United Nations High Commissioner for Refugees, UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), August 2010, available at <http://www.refworld.org/docid/4c63ebd32.html> (last accessed February 2016).

In the **Maldives'** Act on the Prohibition and Prevention of Torture, this principle is also included, clarifying that if authorities have evidence that shows that by sending a person to the relevant country, there is the fear that person might be subjected to torture, then handing over or deporting the person to that country is prohibited.¹⁶⁶

In the **Philippines**, section 17 of the Anti-Torture Act provides for the non-refoulement principle: "No person shall be expelled, returned or extradited to another State where there are substantial grounds to believe that such person shall be in danger of being subjected to torture. For the purposes of determining whether such grounds exist, the Secretary of the Department of Foreign Affairs (DFA) and the Secretary of the DOJ, in coordination with the Chairperson of the CHR, shall take into account all relevant considerations including, where applicable and not limited to, the existence in the requesting State of a consistent pattern of gross, flagrant or mass violations of human rights."¹⁶⁷

In **South Africa**, the Prevention of Combating and Torture of Persons Act also incorporated the principle of non-refoulement using the wording of the Convention: "(1) No person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, all relevant considerations must be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights".¹⁶⁸

In **Uganda**, the Prevention and Prohibition of Torture Act stipulates that: "(1) A person shall not where there are reasonable grounds to believe that a prisoner or detainee is likely to be tortured (a) release, transfer or order the release or transfer of a prisoner or detainee into the custody or control of another person or group of persons or government entity; (b) transfer, detain or order the transfer or detention of a prisoner or detainee to a non-gazetted place of detention; or (c) intentionally or recklessly abandon a prisoner or detainee, in any place where there are reasonable grounds to believe that the prisoner or detainee is likely to be tortured."¹⁶⁹ and "(...) (2) Notwithstanding subsection (1) and the provisions of the Extradition Act, a person shall not be extradited or deported from Uganda to another state if there are substantial grounds to believe that that person is likely to be in danger of being subjected to torture. (3) For the purposes of subsection (2), it shall be the responsibility of the person alleging the likelihood of being tortured to prove to the court the justification of that belief. (4) In determining whether there are substantial grounds for believing that a person is likely to be tortured or in danger of being subjected to torture under subsection (2), the court shall take into account all factors including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the state seeking extradition or deportation of the person."¹⁷⁰

¹⁶⁶Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 42(a).

¹⁶⁷Philippines' Anti-Torture Act of 2009, op. cit. 4, section 17.

¹⁶⁸South Africa, Prevention of Combating and Torture of Persons Act, op. cit. 68, section 8.

¹⁶⁹Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, sections 16.

¹⁷⁰Ibid, section 22.

26. The UN Human Rights Committee and other bodies and courts considers applying the principle of non-*refoulement* to risks of CIDTP

The views of the UN Committee against Torture appear to be inconsistent on whether non-*refoulement* in article 3 extends to risks of CIDTP.¹⁷¹ Unlike the Committee against Torture, other human rights bodies and courts have applied the principle of non-*refoulement* where an individual faces a real risk of CIDTP in the receiving State. The Human Rights Committee for example considers that States parties to the ICCPR “must not expose individuals to the danger of torture or (CIDTP) upon return to another country by way of their extradition, expulsion or *refoulement*.”¹⁷² The Committee on the Elimination of Discrimination against Women (CEDAW) has stated that the duty [in article 2(d) of the Convention on the Elimination of All Forms of Discrimination against Women] “encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of discrimination against women, including gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party”.¹⁷³ The European Court of Human Rights has held that article 3 of the European Convention would be violated if the applicant were to be extradited, because he/she would be exposed to a “real risk” of inhuman or degrading treatment or punishment.¹⁷⁴ Article 13 of the Inter-American Convention to Prevent and Punish Torture explicitly provides that a person shall not be extradited nor returned to a State when there are grounds to believe he/she will be subjected to CIDTP.

International law is quite consistent in accepting that the principle of non-*refoulement* applies to risks short of torture. Despite the Committee against Torture’s views on article 3, States are advised to be aware of the trend of international law when developing their legislative and other frameworks.

¹⁷¹ CAT, General Comment N°2, op. cit. 1, § 19. See also Concluding observations on Kazakhstan (12 December 2014), UN Doc. CAT/C/KAZ/CO/4, § 16; Concluding observations on Togo (11 December 2012), UN Doc. CAT/C/TGO/CO/2, § 16; Concluding observations on Syrian Arab Republic (25 May 2010), UN Doc. CAT/C/SYR/CO/1, § 18; Concluding observations on Cameroon (19 May 2010), UN Doc. CAT/C/CMR/CO/4, § 28; compared to CAT, *Y v. Switzerland* (12 July 2013), UN Doc. CAT/C/50/D/431/2010, § 7.7; CAT, *M.V. v. The Netherlands* (13 May 2003), UN Doc. CAT/C/30/D/201/2002, § 6.2; and CAT, *T.M. v. Sweden* (2 December 2003), UN Doc. CAT/C/31/D/228/2003, § 6.2.

¹⁷² CCPR, General Comment 20 on Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (29 July 1994), UN Doc. HRI/GEN/1/Rev.1, § 9. See also CCPR, *Kindler v. Canada* (30 July 1993), UN Doc. CCPR/C/48/D/470/1991, § 15.3 and CCPR, *Ng v. Canada* (5 November 2013), UN Doc. CCPR/C/49/D/469/1991, §§ 16.1-16.4.

¹⁷³ CEDAW, General Recommendation N°32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, UN Doc. CEDAW/C/GC/32 (14 November 2014), §§ 17-23.

¹⁷⁴ ECtHR, *Soering v. United Kingdom*, App. N°14038/88 (7 July 1989), §§ 91 and 92; see also ECtHR, *Chahal v. United Kingdom*, App. N°22414/93 (15 November 1996), § 96. See also ECtHR, *Saadi v. Italy*, App. N°37201/06 (28 February 2008), § 138; ECtHR, *Hirsi Jamaa and others v Italy*, App. N°27765/09 (23 February 2012), § 146; ECtHR, *M.S.S. v. Belgium and Greece*, App. N°30696/09 (21 January 2011), § 342. Please note a number of cases concerning expulsion on the grounds of an applicant’s ill-health have required exceptional circumstances: ECtHR, *D. v. the United Kingdom*, Case N°146/1996/767/964 (2 May 1997); ECtHR, *N. v the United Kingdom*, App. N°26565/05 (27 May 2008).

Summary of the elements - Chapter 7 - *Non-refoulement*

Primary elements

- ↳ The principle of *non-refoulement* is to be reflected in national legislation.

Recommended elements

- ↳ National legislation is to reflect that the principle of *non-refoulement* applies to risks of CIDTP.

Chapter 8 – Redress

Relevant Article from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 14

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

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

27. The Convention requires States parties to enact legislation recognising a right to redress for victims of torture

The Committee's General Comment N°3 explains and clarifies the content and scope of the obligations for States parties under article 14 of the Convention against Torture. In order to respect their obligations under the Convention, "States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions (...)".¹⁷⁵ The right to redress is composed of a procedural and a substantive part.¹⁷⁶ Legislation needs to provide victims of torture with an effective remedy (procedural part) and reparation (substantive part). 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 also provide important guidance.¹⁷⁷

In **Equatorial Guinea**, the law on the Prevention and Sanctions of Torture provides reparation and a right to compensation and rehabilitation to victims of torture and cruel, inhuman and degrading treatment or punishment.¹⁷⁸

In **Madagascar**, the anti-torture law provides for a right to reparation for victims of torture.¹⁷⁹

¹⁷⁵ Ibid, § 5.

¹⁷⁶ CAT, General Comment N°3, op. cit. 11, §§ 2 and 5.

¹⁷⁷ Article I(2) of the Basic Rules provides that: "If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by: (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system; (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice; (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below; (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations." Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

¹⁷⁸ Equatorial Guinea, Law on the Prevention and Sanctions of Torture of 2006, op. cit. 74, article 10.

¹⁷⁹ Madagascar, *Loi contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, op. cit. 22, article 21.

In the **Maldives**, the Act on the Prohibition and Prevention of Torture provides for economic and non-economic compensation for victims of torture.¹⁸⁰

Nepal has introduced a specific Compensation of Torture Act that provides for redress for victims of torture, as well as victims of CIDT: “(2) Definition: In this Act, unless the context otherwise requires, (a) “Torture” means physical or mental torture inflicted upon a person in the course of investigation, inquiry, or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her; (b) “Victim” means any person upon whom torture is inflicted.”¹⁸¹

In the **Philippines**, victims of torture have a right to claim for compensation in the Anti-Torture Act: “Any person who has suffered torture shall have the right to claim for compensation as provided for under Republic Act N°7309 (...)”.¹⁸²

In **Uganda**, the Prevention and Prohibition of Torture Act provides for compensation, rehabilitation and restitution for victims of torture.¹⁸³

28. The Committee considers that States parties are to enact legislation recognising a right to redress for victims of CIDTP

In its General Comment N°3, the Committee “considers that article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment (...)”.¹⁸⁴ The Committee does not distinguish between torture and CIDTP as regard to a right to redress and considers that it should apply to all victims of torture and CIDTP so that they can obtain adequate and appropriate redress.¹⁸⁵

In **Equatorial Guinea**, the law on the Prevention and Sanctions of Torture provides reparation and a right to compensation and rehabilitation to victims of torture and cruel, inhuman and degrading treatment or punishment.¹⁸⁶

In **Nepal**, the Compensation of Torture Act provides for redress for victims of torture, as well as victims of CIDT: “(2) Definition: In this Act, unless the context otherwise requires, (a) “Torture” means physical or mental torture inflicted upon a person in the course of investigation, inquiry, or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her; (b) “Victim” means any person upon whom torture is inflicted.”¹⁸⁷

¹⁸⁰Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 29 to 35.

¹⁸¹Nepal, Compensation Relating to Torture Act, 20153 (1996), Act Number 14 of the year 2053 (1996), 2053-9-3 (18 December 1996), article 2, available at <http://www.lawcommission.gov.np/en/documents/2015/08/compensation-relating-to-torture-act-2053-1996.pdf> (last accessed in February 2016).

¹⁸²Philippines’ Anti-Torture Act of 2009, op. cit. 4, section 18.

¹⁸³Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 6.

¹⁸⁴Ibid, § 1.

¹⁸⁵Ibid, § 20.

¹⁸⁶Equatorial Guinea, Law on the Prevention and Sanctions of Torture of 2006, op. cit. 74, article 10.

¹⁸⁷Nepal, Compensation Relating to Torture Act, op. cit. 180, article 2.

29. The Committee considers that States parties are to ensure forms of reparation that include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition

The right to means of reparation is the substantive aspect of the right to redress and includes several forms of reparation.¹⁸⁸ In terms of States' obligations, General Comment N°3 reminds State parties that full redress includes five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. States shall provide for all these forms of reparation in legislation.¹⁸⁹

Restitution: this form of reparation is intended to place the victim in the situation before the violation took place.¹⁹⁰

Compensation: States shall provide for monetary compensation, for the damage and loss suffered by the victim.¹⁹¹ Monetary compensation alone is not a sufficient mean for redress. Examples of compensation include: reimbursement of medical expenses, pecuniary and non-pecuniary damage resulting from the damage and loss caused, legal or specialist assistance for the victims, etc.¹⁹²

Rehabilitation: Rehabilitation should "aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society."¹⁹³ Rehabilitation should be holistic and include medical and psychological care, as well as legal and social services. States should adopt measures to make sure that adequate and effective rehabilitation is available to victims.¹⁹⁴

Satisfaction: This form of redress provides for judicial and non-judicial measures taken by States to recognise that human rights violations occurred. It includes investigation and prosecution as seen in sections 17 and 18 of this document. Other measures that can be taken by States include a public apology by the perpetrator or the State; the search, recovery, identification and burial of the bodies of dead victims of torture and ill-treatment; commemorations and tributes, etc.¹⁹⁵

Guarantees of non-repetition: they are part of the right to redress but they are also included in specific obligations to prevent torture in the Convention (articles 1 and 16). States are therefore required, when implementing the Convention, to respect those obligations and to take a number of measures to make sure that torture will not take place in the future. They can decide to include some of those measures in anti-torture legislation. The Committee gives a number of measures that States can adopt: training of law enforcement officials, military and Judiciary on human rights and the prohibition of torture more specifically (including on the Istanbul Protocol); strengthening the independence of the judiciary; establish a system of

¹⁸⁸ CAT, General Comment N°3, op. cit. 11, §§ 2 and 5.

¹⁸⁹ Ibid, § 6.

¹⁹⁰ Ibid, § 8.

¹⁹¹ Ibid, § 9.

¹⁹² Ibid, § 10.

¹⁹³ Ibid, § 11.

¹⁹⁴ Ibid, §§ 13 to 15.

¹⁹⁵ Ibid, §§ 16 and 17.

independent monitoring of places of detention; revise codes of conduct; protect professionals assisting victims of torture (legal, medical and other professionals), etc.¹⁹⁶

In **Madagascar**, the anti-torture law provides for a right to reparation that would include compensation and rehabilitation.¹⁹⁷

In the **Maldives**, the Act on the Prohibition and Prevention of Torture provides for economic and non-economic compensation, giving concrete examples such as compensation for any financial loss suffered, any past, present or future medical treatment of the victim, for any court process for torture cases or compensation for any bodily damage suffered or loss of the function of an organ for instance. A programme of rehabilitation is also foreseen and the Act tasks the Ministry of Health and other authorities to set up such a programme.¹⁹⁸

In **Uganda**, the Prevention and Prohibition of Torture Act provides for compensation, rehabilitation and restitution. Restitution may include the return of property confiscated, the payment for harm or loss suffered, etc. Compensation is provided for “any economically assessable damage such as material damage, lost opportunities, costs for legal or expert assistance, etc. Rehabilitation includes medical and psychological care or legal and psycho-social services.¹⁹⁹

30. The Committee recommends that States parties ensure civil reparation without prior criminal proceedings

A victim should be able to claim civil compensation regardless if the perpetrator is identified, investigated or prosecuted.²⁰⁰ Countries with a system that do not provide for civil proceedings would need to amend their domestic legislation to enable victims to obtain civil reparation. In the meanwhile, they should ensure that criminal proceedings are not unduly delayed so that the victim can obtain redress swiftly.²⁰¹

In **Uganda**, the Prevention and Prohibition of Torture Act provides that “The court may, in addition to any other penalty under this Act, order for reparations (...)”. Criminal proceedings are not necessary to obtain redress.²⁰²

31. The Committee considers that victims entitled to redress are all those who suffered from torture, suffered while trying to prevent torture and family and dependents of immediate victims

The General Comment N°3 defined the term “victim”, as follows: “Victims are persons who have:

¹⁹⁶ Ibid, § 18.

¹⁹⁷ Madagascar, *Loi contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, op. cit. 22, article 21.

¹⁹⁸ Maldives, Act on the Prohibition and Prevention of Torture 2013, op. cit. 3, article 29 to 35.

¹⁹⁹ Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 6.

²⁰⁰ CAT, General Comment N°3, op. cit. 11, § 26.

²⁰¹ Ibid.

²⁰² Uganda, the Prevention and Prohibition of Torture Act, op. cit. 28, section 6.

- Individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention.
- A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrators and the victim.
- The term “victim” also included affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization”.²⁰³

A broad definition of the term victim are to be included in legislation, encompassing the person who suffered harm, his immediate family or dependants as well as other persons who may have suffered harm when assisting the victim. All of those victims have a right to redress and not only the situation foreseen in article 14.

Summary of the elements – Chapter 8 – Redress

Primary elements

- ↳ The right to redress for victims of torture is to be included in national legislation.
- ↳ National legislation on the right to redress also applies to victims of CIDTP.
- ↳ Forms of reparation in national legislation are to encompass restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
- ↳ The term victim is to encompass not only the immediate victim, but also his or her family and dependants and anyone who suffered harm while assisting the immediate victim. All those victims have a right to redress to be recognised in national legislation.

Recommended elements

- ↳ Legislative provisions enable victims of torture to obtain civil reparation without the prior conclusion of criminal proceedings.

²⁰³ CAT, General Comment N°3, op. cit. 11, § 3. Format changed from the original.

Addendum – The compiled list of elements

Definition of torture

Primary elements

- A separate and specific crime of torture in national legislation is to be adopted.
- The definition of torture in national law is to encompass, at a minimum, the elements contained in the article 1 definition: torture is any act by which severe mental or physical pain or suffering is intentionally inflicted for a particular purpose by a public official or with his or her consent or acquiescence or by anyone acting in an official capacity.
- National legislation is to contain provisions affirming the absolute nature of the prohibition of torture; the defence of superior order is to be excluded.
- The penalty for the crime of torture is to take account of the grave nature of the crime.

Recommended elements

- In order for the penalty for the crime of torture to be commensurate with the gravity of the crime, a minimum penalty of six years is to be imposed.

Optional elements

- National legislation includes acts of non-state and private actors in the definition of torture.
- National legislation criminalises cruel, inhuman or degrading treatment or punishment.

Modes of liability

Primary elements

- National legislation criminalising torture is to include explicit criminal liability for:
 - the commission of torture;
 - attempt to commit torture;
 - complicity in torture;
 - other forms of participation;
 - instigation of torture;
 - incitement to torture;
 - the commission of acts of torture by public officials who acquiesce or consent to torture.

Exclusionary rule

Primary elements

- National legislation is to exclude explicitly evidence obtained by torture in all proceedings.
- National legislation is to reflect that the burden of proof is on the prosecution to show that evidence was collected lawfully, where there is an allegation that evidence was obtained by torture.
- National legislation is to reflect that the exclusionary rule applies to evidence obtained by CIDTP.
- National legislation is to reflect that the exclusionary rule applies to all forms of evidence.

Jurisdiction

Primary elements

- In establishing jurisdiction, legislative provisions are to include all heads of jurisdiction in article 5 of the Convention, namely:
 - The territoriality and flag principle over alleged cases of torture in any territory under a State's jurisdiction;
 - Jurisdiction for cases committed by a State's national;
 - Universal jurisdiction over any alleged offender present in the territory under a State's jurisdiction.

Recommended elements

- National legislation provides for jurisdiction over cases where a State's national has been a victim of torture.

Complaints, investigations, prosecutions and extradition

Primary elements

- National legislation is to include:
 - Provisions ensuring that individuals can exercise their right to complain to an independent body and to be protected against reprisals;
 - Prompt and impartial investigations of all allegations of torture are available and undertaken;
 - Provisions to prosecute alleged perpetrators of torture, or extradite them, subject to the prohibition on *refoulement*;
 - Provisions on the extradition of alleged torturers, subject to the prohibition on *refoulement*;
 - Provisions on mutual judicial assistance in criminal proceedings related to torture are to be included.

Amnesties, immunity, statute of limitations and other impediments

Primary elements

- National legislation on amnesties and immunities are to preclude torture.
- National legislation is not to extend statute of limitations to the crime of torture.
- Other impediments to prosecution and punishment are not to be available for cases of torture.

Non-refoulement

Primary elements

- The principle of non-*refoulement* is to be reflected in national legislation.

Recommended elements

- National legislation is to reflect that the principle of non-*refoulement* applies to risks of CIDTP.

Redress

Primary elements

- The right to redress for victims of torture is to be included in national legislation.
- National legislation on the right to redress also applies to victims of CIDTP.
- Forms of reparation in national legislation are to encompass restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
- The term victim is to encompass not only the immediate victim, but also his or her family and dependants and anyone who suffered harm while assisting the immediate victim. All those victims have a right to redress to be recognised in national legislation.

Recommended elements

- Legislative provisions enable victims of torture to obtain civil reparation without the prior conclusion of criminal proceedings.

The **Guide on anti-torture legislation** is a joint publication of the Association of the Prevention of Torture (APT) and the Convention against Torture Initiative (CTI).

When a State accedes to or ratifies the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it agrees to fight impunity by making torture a crime. While there is continued focus at the United Nations' level on the importance of enacting legislation that implements the Convention against Torture, there are few practical tools and examples of good practices that are easily accessible for national level actors to consult. This guide was therefore drafted to bridge this information gap and support adoption of anti-torture legislation.

This guide is primarily intended to assist lawmakers and other actors in drafting specific anti-torture legislation or in revising existing domestic laws, such as criminal codes, laws on reparations for criminal acts or on civil procedures.

With a view to identifying the elements of national legislation that provide the most relevant and meaningful protection, the guide uses State obligations under the Convention against Torture as a starting point. The work of the UN Committee against Torture, as well as other treaty bodies, courts, special procedures and scholars' articles were also used to substantiate and identify what are the elements national legislation ought to include.



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