



CONVENTION AGAINST TORTURE INITIATIVE
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Technical workshop on legislative drafting for anti-torture laws for English speaking (common law) sub-Saharan African States

Entebbe | Uganda | 12-14 September 2017

Meeting Report

Organised by:

Convention against Torture Initiative (CTI)

The Redress Trust

African Commission on Human and Peoples' Rights

In partnership with



I. Introduction

1. From 12 – 14 September 2017, the Convention against Torture Initiative (CTI), in partnership with The Redress Trust (REDRESS) and the African Commission on Human and Peoples’ Rights (ACHPR or Commission), held a technical workshop on legislative drafting for anti-torture laws for English speaking (common law) sub-Saharan African States in Entebbe, Uganda. The workshop brought together experienced drafters of law reform commissions, Offices of the Attorney General and Ministries of Justice of eight African common law countries (The Gambia, Ghana, Lesotho, Liberia, Malawi, Seychelles, Sierra Leone and Swaziland) as well as a member of the Indian Law Commission, supported by the experiences of Mauritius and Uganda.
2. The workshop was organised in direct follow up to the CTI Regional seminar held in Accra, Ghana, from 5-6 April 2016 on “[Promoting the Implementation of the UN Convention against Torture and the Robben Island Guidelines: the Obligation to Criminalise Torture.](#)” The workshop responded to specific requests for the sharing of additional expertise on legislative drafting techniques and anti-torture legislative frameworks that had been developed in some countries and could serve as useful practice for other States embarking on reforms.
3. All of the States represented except for one, have ratified the United Nations Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and all countries are party to the African Charter on Human and Peoples’ Rights (African Charter).¹ None of the countries represented as participants have a stand-alone anti-torture law or an otherwise comprehensive anti-torture framework. However, all State representatives made clear that legal reforms are either underway or being contemplated, with a view to bringing national legislation closer in line with obligations under UNCAT and the African Charter. The workshop provided an opportunity for participants to exchange information on drafting skills and experiences generally, and to learn about the experiences and the approaches taken to adopt anti-torture legal frameworks elsewhere (in particular Uganda, which adopted a stand-alone torture law and Mauritius, which amended pre-existing legislation). Participants discussed specific challenges in their respective national contexts in one-to-one surgeries with experts aimed at assisting participants to consider options to address challenges with the drafting and/or adoption process in the country.
4. The [programme](#) covered the following themes: (1) drafting principles and techniques; (2) international and regional legal elements of the absolute prohibition of torture and other prohibited ill-treatment; and (3) strategies to initiate, gain support for and enact anti-torture legal frameworks.
5. The workshop was held under Chatham House rules to encourage and foster open and frank dialogue and debate among participants. All participants received background material to help prepare and guide the sessions and discussions and to allow participants to consult relevant sources when developing anti-torture frameworks.² Participants were also asked to complete a detailed questionnaire on their respective country’s anti-torture legal framework in advance of the workshop.

¹ The Gambia has yet to ratify UNCAT. President Adama Barrow [stated](#) on 1 November 2017 that his government intends to ratify UNCAT within the next few months.

² This included a binder with international and regional instruments (e.g. UNCAT; African Charter; Robben Island Guidelines); examples of national legislation in Uganda; South Africa; Madagascar, Kenya and Mauritius; the [Guide on Anti-Torture Legislation developed by the Association for the Prevention of Torture and CTI](#); the REDRESS Report: [Legal Frameworks to prevent torture in Africa: Best practices, shortcomings, options for the way forward](#) as well as articles on legislative drafting.

II. Objectives

6. The workshop sought to:
 - continue dialogue and cooperation among common law States in sub-Saharan Africa with a view to advancing legislative reforms to better implement UNCAT and other international and African anti-torture instruments;
 - identify the key elements needed to develop comprehensive anti-torture legislation and to share and examine in detail examples of various national anti-torture laws;
 - practice the technical skills of legal drafting in the context of torture prevention and redress and to receive feedback from an experienced legislative drafter; and
 - obtain one-on-one advice from experts in this field.
7. This report summarises some of the main aspects of the discussions and presentations, with the view to support and inspire other countries. It is hoped that similar workshops will be arranged for other regions/countries, subject to needs and interests.

III. Drafting principles and techniques

8. Ms Olive Zaale, a legislative drafting consultant from Uganda, set out the process, principles and techniques of good legislative drafting. Specifically regarding process, Ms Zaale emphasised that upon receiving drafting instructions from relevant government departments, ministries or the Parliament, the legislative drafter should review the existing legislative framework and consider whether it would be appropriate to amend existing legislation or whether it is best to introduce a new, separate piece of “stand-alone” legislation. The process should include early consultation with a wide range of stakeholders to identify the best option in the relevant country’s context. Ms Purnima Dunpath, a senior legislative drafter in the Office of the Attorney General of Mauritius, explained Mauritius’ approach of amending existing laws to criminalise torture, while Ms Ruth Ssekindi, Director of Complaints, Investigations and Legal Services at the Uganda Human Rights Commission, explained why Uganda opted for stand-alone anti-torture legislation.
9. Whichever option is chosen, the legislative drafter should aim to apply the key principles of good legislative drafting: clarity; precision; and consistency. Legislative provisions or separate draft legislation should be drafted to set out the relevant terms in gender neutral language, give effect to the intended policy, respond to a specific need and a legislative gap and communicate clearly to the broader public the relevant policy and its effects.
10. Subsequent discussions highlighted that it can be difficult to balance the need for precision and clarity where broad definitions may be preferable, such as for instance regarding the definition of torture. Article 1(1) of UNCAT provides for a broad definition of torture,³ yet this leaves a certain discretion to allow judges to look at the facts and take into account the circumstances of each individual case so as to assess whether a specific act falls within the definition.

³ Article 1 (1) UNCAT provides in relevant part that “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 or an act he or a third person has committed or is suspected for 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 persons acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

11. During discussions, participants considered the benefits and drawbacks of using schedules in legislation for instance to highlight different forms of treatment constituting torture such as what was appended to Uganda's Prevention and Prohibition of Torture Act of 2012.⁴ While it is impossible to list every act that may constitute torture, such a schedule can help to explain what kind of treatment may constitute torture and illustrate the gravity of certain acts. However, there is also a risk that a prosecutor or judge may consider such schedules as exhaustive, and exclude treatment because it is not listed in the relevant schedule. Where the legislative drafter decides to include a schedule to list example acts of torture, the schedule should therefore be clearly designated as being non-exhaustive, and it should be informed by in-depth research on the forms of torture prevalent in the relevant country and/or understood as forms of torture under international law.
12. Participants also discussed the differences between monist and dualist legal systems, and whether it was necessary for monist countries to introduce legislation to incorporate international treaty obligations. It was highlighted that irrespective of the legislative system, enabling legislation in the form of amendments to existing legislation or through a separate legislative act is usually required to ensure that international obligations are known (legal certainty), implemented and applied in practice by relevant practitioners, such as law enforcement officials, prosecutors and judges. Specific anti-torture frameworks can also help to capture the extent of the practice of torture at national level and map relevant government responses, also facilitating State reporting to for instance the African Commission and the UN Committee Against Torture.

IV. The Prohibition of Torture under the Convention Against Torture and the African Charter

13. Participants were then introduced to the essential elements of anti-torture legislation in light of States' obligations under the African Charter and UNCAT. Honourable Med K. Kaggwa, Commissioner of the African Commission, Member of the Commission's Committee for the Prevention of Torture in Africa and Chairperson of the Ugandan Human Rights Commission highlighted States' obligations under the African Charter pertaining to the absolute prohibition of torture. He explained the ACHPR's role in supporting and encouraging States to implement those obligations, including for example through country missions and review of States' periodic reports to the Commission.⁵ Commissioner Kaggwa also highlighted relevant instruments adopted by the Commission which could provide drafters with relevant guidance on the various aspects of the absolute prohibition of torture under the African Charter, such as the Robben Island Guidelines⁶ and the CPTA's General Comment N°4 on victims' right to redress.⁷

⁴ See Uganda, The Prevention and Prohibition of Torture Act of 2012, Second Schedule, at https://www.ulii.org/ug/legislation/act/2012/3/prevention_prohibition_of_torture_act_no_3_of_2_17440.pdf.

⁵ See for example, on the State reporting to the African Commission: <http://www.achpr.org/states/> and on the Commission's mandate to carry out missions to States Parties <http://www.achpr.org/mission-reports/>.

⁶ See African Commission, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) of 23 October 2012, at <http://www.achpr.org/instruments/robben-island-guidelines-2008/>.

⁷ African Commission, General Comment N°4 on the African Charter on Human and Peoples' Rights: the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted 28 February 2017 (General Comment N°4), at http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no_4_english.pdf.

14. Dr Carla Ferstman, Director of REDRESS, identified in detail the different elements needed for a comprehensive anti-torture legal framework, including: criminalising and punishing torture; modes of liability; the exclusion of evidence obtained under torture; jurisdiction over torture and other prohibited ill-treatment; providing victims with an opportunity to complain; affording protection to victims; the obligation to investigate and prosecute allegations of torture; extradition of torture suspects; amnesty, immunity and statutes of limitation as well as other impediments to accountability and redress; non-refoulement and redress for victims of torture.⁸
15. As legislative drafters, it is important to bear in mind that the incorporation of these different obligations will have an impact on the overall legal framework in the country and to consider which existing pieces of legislation will be affected. This is true irrespective of whether a separate, stand-alone anti-torture law is being introduced, or the existing legal framework is amended. Existing laws to consider in this context include for example the penal and civil codes, the criminal and civil procedural codes, the evidence act, the extradition act, mutual legal assistance instruments etc.
16. During discussions in plenary as well as during relevant group work, participants considered how best to define torture, and in particular the meaning of the term “severity.” While the term may lack clarity, it allows national practitioners to analyse the severity of a given act in view of the overall context in which it is carried out as well as the impact it has on the victim, bearing in mind the victim’s individual characteristics (e.g. age, gender, health, vulnerability).
17. During the debate, the participants also considered whether only acts linked to an official should be considered as torture as provided for in Article 1 (1) UNCAT. It was agreed that this might depend on the specific national context. In Uganda, the drafters of the Prevention and Prohibition of Torture Act of 2012 decided to broaden the definition to also include acts committed by private individuals in light of extremely egregious crimes committed for example by the Lord Resistance Army during the conflict in Northern Uganda.
18. Another issue that was considered was whether domestic legal frameworks could incorporate amnesty provisions for torture. It was acknowledged that this is a sensitive issue in particular in post-conflict contexts or following a transition from an authoritarian regime. However, under international law, the position is clear that an amnesty for torture is incompatible with the non-derogable nature of the absolute prohibition of torture and with the country’s other obligations, including in particular the obligation to investigate and prosecute torture as well as to afford redress to victims.⁹ Other options that some countries have employed, include to introduce a partial amnesty for lesser crimes, which excludes amnesties for serious human rights violations such as torture.¹⁰

⁸ These obligations are further discussed in REDRESS, Legal Frameworks in Africa Report, as well as the CTI – APT Guide on anti-torture legislation. The latter Guide sets out different elements of anti-torture laws into primary, recommended or optional provisions.

⁹ The UN Committee Against Torture held in its General Comment No.2 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,” see General Comment No.2: Implementation of Article 2 by States Parties, 24 January 2008, para. 5.

¹⁰ The African Commission for instance considers that “[A]mnesty laws in relation to acts of torture violate the victims’ right to judicial protection and to have their cause heard under Article 7 (1) of the African Charter. This is particular the case where the State has not met its obligations of investigating the violations, prosecuting the perpetrators, providing victims with redress for injuries suffered, and acting to stop the recurrence of such atrocities. Hence, States should not extend blanket amnesty to individuals for acts of torture,” General Comment N°4 on the African Charter on Human and Peoples’

V. Strategies for the way forward at national level

19. A thorough review and assessment of the domestic legal system's compliance with treaty obligations is necessary to identify legal gaps and legislation requiring reform and/ or amendment. Such review can also help in deciding whether to amend existing legislation or adopt a stand-alone law to ensure compliance with treaty obligations. Other factors to consider when introducing anti-torture frameworks include the context, circumstances and extent to which torture is committed in the relevant country, as well as the identity of the perpetrators and the victims. Such a review requires a good understanding of the required elements of anti-torture legislation, something which participants mentioned at the workshop and relevant materials provided throughout has helped to foster.
20. Consultation with a broad range of stakeholders is important when considering the development of an anti-torture framework. In considering who to include in consultations participants stressed the need for engagement with representatives from relevant ministries, religious groups, civil society, lawyers, medical and psychological experts as well as law enforcement, prison officials, prosecutors and judges. Such consultations will help drafters to clearly identify the need for legislation, thereby helping to convince relevant ministries and governmental departments that legislation is needed. They can also raise awareness of relevant concerns, needs and objectives of the legislation, and familiarise those in charge of enforcement of the legislation, with the texts at an early stage. Consultations should also consider the type of law reform required. In Uganda, following consultation with stakeholders, including judges, it was decided that an amendment of the existing legislation was insufficient in light of the significant number of amendments required.
21. The decision as to whether to amend existing or draft new legislation will need to take into account the relevant context (for example the extent of torture and ill-treatment committed in the relevant country), the content of the amendment, the scope of the amendment and the existing legal framework. Where extensive amendments would be required, it may be best to introduce stand-alone legislation, and to amend existing legislation to ensure compatibility with the new stand-alone legislation. In addition, stand-alone anti-torture legislation can send a powerful message of commitment to the fight against torture.
22. At the same time, it is clear that initiating, developing, drafting and passing an anti-torture law until its enactment can be a long process. In Uganda, it took almost ten years for the Anti-Torture Act to be developed and enter into force. Drafters – and specifically anti-torture advocates – might be able to identify on-going law reform processes (such as a revision of a country's penal code or amendments of the evidence act) which may provide opportunities to reform relevant pieces of legislation (for example by criminalising torture or by introducing an evidential exclusionary clause) so as to bring the country's legal framework more into compliance with relevant obligations.
23. Participants highlighted that consultations are crucial to convince the relevant ministry that reforms are required. However, it can be a challenge to locate the required resources to hold such consultation meetings, and particularly to ensure that relevant persons and interest groups from different parts of the country can participate.

24. Collaboration between legislative drafters from different countries to exchange experiences and good practices can help ensure that lessons learned are taken into account. Support from regional and international institutions such as the Commonwealth Secretariat, CTI and nongovernmental organizations like REDRESS can also help domestic efforts aimed at introducing an anti-torture legal framework.

VI. Requests for follow – up

25. Participants made specific commitments and requests for follow up:

- Participants will share a report of the workshop with their relevant departments and ministries and consider how to proceed with the development of an anti-torture framework.
- Where possible, CTI – also together with partners – should look into possibilities for funding consultations on anti-torture legislative frameworks at national level with relevant stakeholders, including regional and international experts, or otherwise providing technical advice to State initiatives.
- CTI can advocate and foster support for the development of anti-torture legislative frameworks by sending relevant letters to national Ministries of Justice.
- The ‘training faculty’ of this workshop should stand ready to support the development of national anti-torture legal frameworks.