Regional Seminar
Promoting the Implementation of the UN Convention against Torture and the Robben Island Guidelines: the Obligation to Criminalise Torture
Accra, Ghana
5-6 April 2016

Background

1. As part of its Strategy for Implementation and Ratification 2016-2017, the Convention against Torture Initiative (CTI) held a regional seminar for sub-Saharan African governments in order to share experiences on criminalising torture in national laws. The event was hosted by the Government of Ghana, and opened by the Minister for Justice and the Attorney-General, Ms. H. E. Marietta Brew Appiah-Opong, on 5-6 April 2016, in Accra. It was organised in partnership with the African Commission on Human and Peoples' Rights and the Association for the Prevention of Torture (APT).
2. Over 40 participants from civil and common law traditions in Anglophone, Francophone and Lusophone countries attended, drawn from departments of police, justice, human rights, the judiciary, national human rights institutions and law commissions, as well as civil society and non-governmental organisations. Fourteen Government representatives participated: Angola, Burkina Faso, Cabo Verde, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Ghana, Gabon, Liberia, Madagascar, Nigeria, Tanzania, Togo and Zambia, while a further four country experiences were reflected by representatives of national human rights institutions or civil society from Kenya, Namibia, South Africa (via a written contribution) and Uganda. The event was supported by a number of experts such as the Chair of the UN Committee against Torture (CAT), members of the Committee on the Prevention of Torture in Africa (CPTA), the UN Office of the High Commissioner for Human Rights (OHCHR), the International Law Development Organisation (IDLO) and the Commonwealth Secretariat.
3. The seminar was conducted under the Chatham House Rule to encourage and foster open and frank dialogue. Dialogue was informed by the APT-CTI Anti-Torture Legislation Guide, [1] published in March 2016 in English, French and Portuguese, as a practical tool to assist States in the adoption or revision of anti-torture legislation at the national level. The guide also promotes existing good practices with concrete examples drawn from different regions, and sets out the basic and recommended elements for effective anti-torture legislation. The

[1] The *APT-CTI Guide on Anti-Torture Legislation*, 2016, contains more detailed application of the requirements for quality anti-torture legislation. The Guide, in English, French and Portuguese, is available at: http://www.cti2024.org/en/news/apt-cti-guide-on-anti-torture-legislation/.

In partnership with:

event also benefited from a research report of REDRESS on best practices and challenges in relation to legal frameworks to prevent torture, carried out in seven African countries.[2]

4. A half-day informal meeting with non-States parties to the UNCAT was held on 7 April 2016, in which benefits and challenges around ratification of the UNCAT were discussed.

Objectives

5. The objectives of the event were to:
   - Encourage States to adopt comprehensive anti-torture legislation by promoting the obligation to criminalise torture and other related obligations found in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the African Charter on Human and Peoples' Rights (ACHPR or African Charter) and the Robben Island Guidelines (RIG)[3];
   - Discuss the elements that are needed to construct comprehensive anti-torture legislation; and
   - Promote dialogue and cooperation among States in sub-Saharan Africa in order to share experiences and good practices regarding anti-torture legislation amongst States.
6. The meeting heard many good practices in relation to anti-torture legislation, either in the form of amending existing laws (such as penal codes) or in adopting stand-alone anti-torture legislation. The meeting also raised a number of key challenges for States in relation to the drafting of laws, the content and scope of such laws, and the processes relating to developing and adopting anti-torture legislation or amending existing laws. Of countries represented, they were at different stages in the adoption of anti-torture legislation: some had already criminalised torture, others had bills pending before Parliament, while some had not yet started the process. While the seminar focused specifically on developing national legislative frameworks, participants emphasised that, even in the absence of legislation, there were many policy and practical ways in which torture could be prevented.[4]
7. This report captures some of the main aspects of the discussions.

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[2] REDRESS, *Legal Frameworks to Prevent Torture in Africa: Best Practices, Shortcomings, Options Going Forward*, March 2016, available in English at: http://www.redress.org/downloads/publications/1603Anti-Torture_Legislative_Frameworks_in_Africa.pdf and in French at: http://www.redress.org/downloads/publications/Anti-Torture_Legislative_Frameworks_in_Africa_March%202016_FRENCH.pdf
The countries included in the research were the Democratic Republic of Congo, Kenya, Namibia, Nigeria, South Africa, Tunisia and Uganda.

[3] African Commission on Human and Peoples' Rights, *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (Robben Island Guidelines, or RIG), adopted by the African Commission on 23 October 2002, Banjul, The Gambia, available at: http://www.apt.ch/en/resources/the-robben-island-guidelines-2003-2008/.

[4] Examples include putting in place safeguards in relation to police custody, such as video or audio recording of interviews, developing codes of conduct for law enforcement personnel, training, etc.

International and regional frameworks

8. The obligation to criminalise torture is found in article 4 of the UNCAT, and is also understood as part of the obligations under article 5 of the African Charter, as elaborated via the African Union's Robben Island Guidelines.
9. Apart from article 4 of the UNCAT, other guarantees in the Convention are also best protected via legislative enactment. Key provisions of the UNCAT calling for legislative provisions include the definition of torture (articles 1, 4), the prohibition against *refoulement* (article 3), the exclusionary rule prohibiting the use of evidence obtained by torture (article 15), the exclusion of amnesties, immunities and the defence of superior orders (e.g. articles 2(2), 2(3), 14), and the right to redress (article 14). On the other hand, it is recommended that States impose penalties for the crime of torture of a minimum of six years, and that they extend jurisdiction for crimes of torture where a State's national has been a victim (passive personality). Optional legislative provisions, which led to important discussions at the seminar, involve whether national legislation should include the acts of non-State perpetrators unconnected to the State (so-called private acts) (article 1(2)), or the criminalisation – as a separate crime - of cruel, inhuman or degrading treatment or punishment (article 16).
10. The African Charter in article 5 prohibits torture and CITDP, while the RIG were elaborated to help implement article 5. In particular, Part C of the RIG sets out the particular steps to be taken to criminalise torture. While the Guidelines may be regarded as soft law, the African Commission has stated that it considers the RIG to *form part of* the rights guaranteed under article 5 of the African Charter. Of note is that the RIG explicitly mention that particular attention in the criminalisation of torture should be given to gender-related forms of torture and ill-treatment[5] and the torture and ill-treatment of young persons.[6] The RIG also provide that the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to those ends, should be criminalised.[7]

Domestic legislation: amendments or new anti-torture laws?

11. Guided by the international and regional frameworks, two different approaches have been taken by African States in criminalising torture in national law: either States have amended existing laws (such as penal codes, criminal evidence acts, etc.), or they have opted to adopt a stand-alone anti-torture law (e.g. Kenya, Uganda). It was noted that even with a special anti-torture law, there is a need to ensure that any potential inconsistencies with other laws are removed or limited, and therefore a full legislative review process may be needed.
12. Whichever approach is taken, if the crime of torture is not included in domestic law as a distinct crime, it is nearly impossible for the State to understand the real extent of the problem or to be able to collect important statistics on the number of reported cases, and in

[5] See, also, articles 3(2), 4, 5, 11 and 20(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women.
[6] RIG, Part I.C, para. 5.
[7] RIG, Part I.C, para. 14.

turn the percentage of those cases investigated, prosecuted, resolved, or remedied. Criminal justice statistics are a valuable tool for the State to monitor the effectiveness of the law and how the criminal justice system is functioning. In other words, criminal justice statistics - be they manual or electronic systems - allow for transparency and accountability, two key concepts in the fight against torture.

13. Positively, almost all States present had general constitutional guarantees against torture and other forms of ill-treatment. Still, it was considered that enabling legislation was important to clarify specific legal obligations and the rights of persons within its jurisdiction, and to more fully guarantee protection from torture in practice. For some monist States, the UNCAT was noted to be directly applicable at national level.

Defining torture

14. Pursuant to the UN Committee against Torture's jurisprudence, the definition of torture in article 1 of the UNCAT contains the minimum basic elements for national laws on torture. The Committee has consistently held, in line with article 4 of the UNCAT, that it is to be included as a 'separate and specific crime'. Several participating States explained how they had opted to insert the UNCAT definition of torture into national law *verbatim*. Other States, in recognizing that article 1 of the UNCAT allows definitions of 'wider application' and in reflecting their national contexts and needs, have opted to incorporate expanded definitions.
15. Expanded definitions have included non-State or private perpetrators of torture (e.g. Togo, Uganda) where there may be no connection to the State or where it cannot be established that the State has failed in its duties of due diligence. Capturing such crimes was considered particularly relevant in some national and sub-regional contexts in sub-Saharan Africa, such as those experiencing situations of non-international armed conflict or in contexts of transitional justice (e.g. Uganda). Torture/violence against women was another area of concern in some African countries such that it compelled a preference for definitions that clearly articulated that such acts were prohibited (e.g. Uganda).
16. While it was generally agreed that definitions of wider application than article 1 were not incompatible with the Convention, and that it was open to States to adopt them, special attention to accountability was raised, as such approaches should not encourage States to prosecute only the acts of non-State perpetrators, or that they be used to relieve the State of their responsibility for their own direct acts or their responsibility for acts of torture. Broader definitions can skew statistics and thus accountability for State-perpetrated torture. The impact of having different definitions of torture between countries was also discussed, particularly in relation to extradition (see section on extradition below).
17. Some States shared their practice of differentiating between types of torture, with a perceived index of seriousness. For instance, at least one State has distinguished between torture and 'aggravated torture', whereas other States treat the 'aggravated circumstances of torture' (such as relating to the status of the victim, e.g. a child or a pregnant woman) as a relevant factor to consider in sentencing for the crime of torture, rather than in defining the crime itself. It was queried whether torture was not already an aggravated offence, given that it causes 'severe pain or suffering'. A clearer understanding of State practices in using 'aggravation' was requested.

18. It was noted that all modes of liability are to be reflected in national law. Several participants requested further advice on how to deal with issues of consent and acquiescence.

Lawful sanctions

19. A short discussion on lawful sanctions, as per article 1, noted that such sanctions need to be compatible with international law as well as domestic law. It was argued that the death penalty was the intended acceptable lawful sanction in respect of article 1 of the UNCAT, while physical punishments (such as whipping or physical labour) are generally considered incompatible with the Convention.

Penalties

20. The seminar highlighted the wide variation in penalties/sentences for torture under national criminal laws in Africa. Very little consistency could be observed. A few States' legislation only treated torture as a 'misdemeanour' or 'offence' and not a crime, carrying penalties of between 1-3 years. At the other end of the scale, high penalties (e.g. minimum of 30 years in the case of one State) were questioned as to their proportionality as well as the potential impact they may have on dissuading prosecution, or limiting prosecution to only the most egregious violations. Some countries also impose fines for acts of torture, distinct from or in combination with a term of imprisonment. Further research on penalties and support for the development of related sentencing guidelines were encouraged.

Defining cruel, inhuman or degrading treatment or punishment

21. As has been noted by the CAT in its jurisprudence, acts amounting to torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) may overlap but that the same obligations exist for States to prevent and protect persons from such acts, and to provide remedies.[8] That said, the Committee notes that it is optional for States to incorporate a specific crime(s) of CIDTP as national laws may already incorporate 'equivalent' crimes of assault and battery, false imprisonment, rape or sexual assault (when not amounting to torture) and other related crimes. Some States have defined acts which may amount to CIDTP, for example in Ghana CIDTP covers poor prison conditions.
22. In choosing to enact a specific crime of CIDTP, States would need to decide how or if to define it, balancing the principle of legal certainty while not unduly limiting the range of harm that may constitute CIDTP.

Exclusionary rule

23. As a key measure in combatting impunity and preventing torture (e.g. to limit the reliance on torture-induced confessions), several States present informed the meeting that the exclusionary rule (article 15, UNCAT) had been incorporated into national laws, even if other aspects of the UNCAT had not yet been legislated. Laws in Madagascar, Namibia and Uganda declare evidence obtained by torture inadmissible. In South Africa, the exclusionary rule is contained in the Constitution.

[8] See UN Committee against Torture, 'General Comment No.2: Implementation of article 2 by States parties', CAT/C/GC/2, 24 January 2008.

Extradite or prosecute

24. Article 5(2) of UNCAT underlines a State party's obligation to prosecute or extradite alleged perpetrators of torture.[9] If a State chooses not to extradite an accused person, there is an obligation on that State to prosecute. There are a number of reasons why a State might decline to extradite: it may not extradite its nationals, it may be considered that the person would not receive a fair trial in the requesting country, or it is assessed they would be at risk of torture or the death penalty. Regardless of the reason for non-extradition, the State who has custody of the individual has the obligation to investigate and prosecute. There can nonetheless be challenges to prosecuting in such circumstances: one example would be where there may be a lack of evidence relating to the offence because it occurred in another jurisdiction. Another challenge is that domestic laws do not always allow for extraterritorial prosecution. Equally, the crime to be prosecuted must be the same in both countries and this presents a challenge where the States have adopted different definitions of torture (see above on definitions of torture).
25. The meeting discussed how these gaps can be minimised through legislative safeguards. For example, Uganda's anti-torture law is relatively open-ended as it stipulates that jurisdiction may be exercised if torture is committed by "any person who is for the time being present in Uganda."

Immunities, amnesties and defence of superior orders

26. The existence of constitutional provisions that provide for general immunity for heads of State, or which allow for amnesties for perpetrators of acts committed during particular events,[10] were noted as problematic in some African countries. Some States noted that there was uncertainty as to how particular amnesty or immunity provisions would be understood and applied in their courts. Some good practices were shared, for example in Namibia and Madagascar there is no immunity. In noting that superior orders are no defence for acts of torture, as provided in article 2(3) of the UNCAT, Uganda's law was highlighted as it provides that junior security officers are not exempt from criminal liability for acts of torture when they have acted on the instruction of senior officers.

Statutes of limitations

27. Several States noted that the crime of torture in their domestic law is subject to a statute of limitation, which would not be in line with the Committee against Torture's view that, owing to the gravity of the offence, the crime of torture should be precluded from any statute of limitation. It was clarified that the principle of legal certainty refers to the preciseness and predictability of the law at the time of the commission of the offence, and did not extend to allow the alleged perpetrator of an egregious crime to know when he or she would be exempt from prosecution after the passage of time. Efficiency in the application of the law,

[9] See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* Judgment of 20 July 2012, ICJ Reports, p. 422 et seq.
[10] Angola has granted amnesty for acts committed after the uprising of 1992 in its Constitution.

however, is an important element in the rule of law, and also supports victims to ensure that justice is not delayed.

Non-refoulement

28. It was noted that in order to protect persons from being returned to a risk of torture, the principle of *non-refoulement* should be incorporated into domestic law. It was observed that new anti-torture laws generally contain such a provision, while in States without specific anti-torture laws, some persons at risk would be protected via constitutional guarantees or laws relating to the protection of refugees or asylum-seekers, especially pursuant to the African Union Convention Governing Specific Problems of Refugees in Africa. While there is overlap in many cases between refugees and asylum-seekers on the one hand and (other) victims of torture on the other, it was noted that this is not always the case, so all persons need to be legislatively and procedurally protected from *refoulement*. As provided in article 3 of the UNCAT, *non-refoulement* is absolute and non-derogable.

Redress and reparation

29. Access to redress for victims and survivors of torture was observed as a major challenge in sub-Saharan Africa.[11] Reparation must be adequate and effective and correspond to the crime and the harm caused. The CAT has noted that the term 'redress' entails 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention.'[12] Some States have taken these measures as alternatives, rather than cumulative measures, or offer some but not all of forms of redress. State practice in Africa is mixed regarding redress, with some national torture laws not containing a right to redress, while in others, victims rely on constitutional remedies (in relation to the latter see the legal frameworks in Kenya, Namibia and Uganda).
30. For victims, the procedure to apply for reparations may be cumbersome, difficult or alienating, while some States impose very short periods in which victims can lodge their claims. Short periods do not take into account the practical challenges facing victims, for example challenges relating to their ongoing detention (if this is the case), fears about further torture or reprisals, and trauma, all of which can impede victims from coming forward quickly.
31. Another difficulty relates to the forms of reparation afforded by States through their legislation or practice. Often, the only available form of reparation is compensation; while money may be important, it often does not satisfy victims' wider needs which may concern acknowledgment of responsibility and guarantees of non-recurrence. Furthermore, there is little consistency in identifying the quantum of compensation, with diverse State practices. An under-appreciation of the harm caused by psychological torture can also sometimes lead to insufficient redress. Another challenge is that victims may not be able to enforce their compensation awards. This occurs sometimes when a State is recognised as jointly and severally liable together with the individual perpetrator, but the State refuses to give effect

[11] See, REDRESS, Legal Frameworks to Prevent Torture in Africa, above n. 2.
[12] See UN Committee against Torture, 'General Comment No. 3', 13 December 2012, CAT/C/GC/3, para. 2.

to the award. Participants pointed out that this is a problem in States which suffer from widespread corruption.

32. In States with a civil law tradition, civil claims for damages tend to be joined to criminal proceedings. In such cases, the victim will only receive compensation if the perpetrator is convicted. Participants discussed the challenges this presents, given that there may be a range of reasons why a particular criminal prosecution may fail, or not be pursued. The CAT has held that a victim's right to redress should not suffer by the failure to pursue a prosecution. In common law States, compensation claims tend to be pursued through human rights commissions (with the problem that the commission may only have the authority to 'recommend' a remedy), or fundamental rights petitions before constitutional courts. The seminar heard about States that have special legislation on claiming damages for torture and other human rights violations, or have criminal injury compensation frameworks to provide small payments to all victims of crime, in which eligibility is not conditioned on the conviction of the perpetrator. Some States, like Kenya and Madagascar, have established funds for rehabilitation of victims of torture.
33. Outside of a legal process, there are sometimes administrative models to pursue remedies, such as in a transitional justice context, through reparations frameworks affiliated with truth commissions. It was noted that of the various remedies, rehabilitation was not widely available.
34. While most States have defined a victim to include those who have suffered from torture or CIDTP, the CAT notes that victims include immediate family and dependents. Nigeria's draft law defines a victim to include the immediate family of the sufferer and any dependents in line with the CAT's recommendations.
35. Participants spoke about the shortage and under-resourcing of victim and witness protection schemes in Africa, discouraging persons from filing complaints.
36. It was noted that the CPTA is in the process of elaborating a general comment on redress, for which inputs were invited from participants.

Legislative processes

37. Participants shared their rich experiences of drafting and passing national legislation, and in campaigning for new laws or changes in the law. It was emphasised that enacting anti-torture legislation is best achieved through a transparent, multi-stakeholder process, involving a variety of actors such as parliamentarians, civil society organisations and human rights commissions. Some of the obstacles related to the passage of national anti-torture legislation were identified as:
    - A lack of prioritization of the issue versus other national legislative priorities;
    - Delays in parliamentary processes, which sometimes can take several years;
    - Disagreements during the consultation phase over the scope of national anti-torture laws (in particular around definitions of and penalties for torture); or
    - Lack of resources and capacity.
38. At least one example was given where a draft law that had gone through all the relevant steps for adoption in a given term of Parliament, did not receive the final approval before the Parliament dissolved, with the result that the process had to start over on the establishment of a new Parliament. In a number of States, draft laws or legislative amendments are still pending in their various Parliaments several years after their

introduction. Participants emphasised that many African States had only few government officials with legal drafting skills and among them, few with expertise in the field of torture prevention and redress. It was noted that civil society has contributed helpfully to the drafting of anti-torture legislation in Burkina Faso, Kenya and Uganda.

39. Interesting discussions ensued regarding leadership for the legislative process. While governments are generally the primary actors in this regard, examples were given where national human rights commissions or civil society actors were at the forefront of advancing parliamentary consensus on the need to adopt national anti-torture legislation. While government leadership is key, past historical abuses can give rise to perceptions amongst opposition parties that such laws are being pursued only to hold past governments accountable for their past actions, can politicise the passage of such legislation. For this particular reason, a whole-of-parliament rather than government-led approach may be suited to a given national context. The introduction of 'private member's bills' was suggested as an effective way, in a given State's context, to overcome some of these perceived divisions. Likewise, cross-party parliamentary human rights panels or committees were considered useful. Consultation as well as briefings on torture prevention and UNCAT obligations for Members of Parliament can help smooth the passage of anti-torture legislation. The recommendations for legislative reform made by the CAT during its State party reviews were cited by a number of States as having spurred such processes at the domestic level.
40. Public sensitization and debates around torture-related issues, through print media (newspaper and journal articles) and electronic media (television talk shows, radio), were mentioned as important to garner support for the law.

Recommendations and Requests

41. Participants made specific requests for further support and/or research from CTI and other partners in the following areas:
    - Capacity-building and in-country seminars and visits, in particular in legal drafting skills;
    - Advice on draft national anti-torture laws;
    - Further research to aid in understanding 'aggravation' and penalties and sentencing;
    - Collecting and disseminating good practices on transparent and multi-stakeholder consultation processes, sample laws, and on redress and victim and witness protection schemes.
42. Participants were invited to join the CTI Group of Friends for further dialogue and experience sharing.

CTI Secretariat
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Geneva