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ANTI-TORTURE STANDARDS IN COMMON LAW AFRICA: Good Practices and Way Forward

2022

REDRESS

Ending torture, seeking justice for survivors

WHO WE ARE

The Convention against Torture Initiative (CTI) is an inter-governmental, cross-regional initiative launched in 2014 and spearheaded by six governments (namely Chile, Denmark, Fiji, Ghana, Indonesia and Morocco) supporting States to strengthen institutions, policies and practices and reduce the risks of torture and ill-treatment. CTI offers confidential and constructive State-to-State dialogue and exchanges, technical assistance and capacity building to support States to ratify and implement the UN Convention against Torture, with the goal of achieving universal ratification and improved implementation by 2024.

REDRESS is an international human rights organisation that delivers justice and reparation for survivors of torture, challenges impunity for perpetrators and advocates for legal and policy reforms to combat torture and provide effective reparations. As part of its Reparations programme, REDRESS develops anti-torture standards as measures of non-repetition – a critical form of reparation.

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LIST OF ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ATA	Nigeria, Anti-Torture Act, 2017
CAT	UN Committee against Torture
CIDTP	Cruel, inhuman or degrading treatment or punishment
CPTA	ACHPR's Committee for the Prevention of Torture in Africa
ECOWAS	Economic Community of West African States
FGM	Female genital mutilation
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
NCAT	Nigeria, National Committee on Torture
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institutions
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
PCTPA	South Africa, Prevention of Combating and Torture of Persons Act, 2013
PTA	Kenya, Prevention of Torture Act, 2017
PPTA	Uganda, Prevention and Prohibition of Torture Act, 2012
RIG	Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)
SPT	Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
SRT	UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
TRRC	The Gambia, Truth, Reconciliation and Reparations Commission
UN	United Nations
UNCAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNHCR	UN High Commissioner for Refugees
UPR	Universal Periodical Review

EXECUTIVE SUMMARY

The effective incorporation of anti-torture standards within States' domestic legal frameworks and their effective implementation in practice is crucial to prevent torture and other ill-treatment, ensure that perpetrators are held accountable, and to provide redress for victims. Putting in place effective laws, regulations and policies aimed at preventing and responding to torture and other ill-treatment can strengthen the functioning of the criminal justice system and broader State institutions by, among others, encouraging good practices and humane, coercion-free forms of criminal investigations and the humane treatment of suspects, witnesses and victims. Implementing anti-torture strategies and policies can also reduce corruption, strengthen the rule of law and the fair administration of justice, and ultimately build public confidence in State institutions.

At the date of publication of this report, 52 African States have demonstrated their commitment against torture and other ill-treatment through the ratification of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[1] There are also good examples of domestic legal protection against torture in the region. On the other hand, there are areas for improvement and common challenges ranging from a lack of legislative provisions to significant gaps between law and practice. Research conducted for this publication on **The Gambia**, **Ghana**, **Kenya**, **Nigeria**, **South Africa**, **Sudan**, **Uganda** and **Zimbabwe** provides a detailed overview of the anti-torture framework in these jurisdictions, particularly in relation to the following seven thematic areas:

- **Definition of torture**. Torture and other ill-treatment are prohibited in all reviewed States, but not always in an absolute manner. Moreover, while half of these States have incorporated a definition of torture mostly aligned with UNCAT and have criminalised it as a separate offence with adequate penalties, other States are yet to introduce or amend existing legislation in these areas.

- **Safeguards against torture**. Most reviewed States have adopted important legal and procedural safeguards against torture and other ill-treatment for persons deprived of liberty. Yet, amendments to national laws are needed to further improve compliance wwith international and regional anti-torture standards and ensure their effective implementation.

- **Exclusionary rule**. National laws in the majority of the States reviewed provide for the non-admission (exclusion) of evidence obtained by torture and other ill-treatment from proceedings, and there are good examples of judicial enforcement of such rule. However, reports also reveal instances where courts in some of the reviewed States have admitted torture-tainted evidence in criminal proceedings.

1 Refer to Annex 1.

- **The prohibition of *refoulement*.** Half of the States reviewed have incorporated the prohibition of *refoulement* into their legal systems in compliance with UNCAT, whilst the prohibition in the other States is limited in scope and excludes certain groups that may face risks of deportation and, consequently, of being subjected to torture or other ill-treatment upon return.

- **Complaints and investigations.** All domestic systems studied have, in some way, a procedure in place for receiving complaints of human rights violations committed by public officials, and some have strong legal or institutional frameworks providing for investigative mechanisms. Yet, complaints mechanisms may not always be independent and/or accessible, and further efforts to implement effective internal and external oversight mechanisms could increase a State's capability to respond to allegations of torture and other ill-treatment and build public confidence in their accountability mechanisms.

- **Accountability**. This is an area where domestic legal frameworks and practice can be significantly improved across the studied jurisdictions. This could be achieved by establishing all forms of jurisdiction over the offence of torture in compliance with UNCAT, increasing prosecutorial efforts and ensuring perpetrators are held accountable, establishing specialised investigative bodies to investigate allegations of torture or other ill-treatment, as well as by banning any procedural barriers to accountability such as amnesties, immunities and statutes of limitation.

- **Redress**. The extent to which the right to redress is provided for in domestic laws varies across the reviewed States. Nonetheless, legislative amendments to fully and adequately include all forms of reparation, as well as to make the right to redress accessible and enforceable, would be important to address the significant barriers that victims face to obtain reparation for torture and other ill-treatment.

A review of these thematic areas provides an opportunity to identify legislative and regulatory reforms to advance legal protection against torture and other ill-treatment, and improve a State's capacity to prevent and respond to such acts in practice. Key recommendations for States include:

- Ratify UNCAT and thoroughly review and amend domestic legal frameworks to incorporate the full range of obligations therein, introducing a comprehensive and strong anti-torture legal framework.

- Ratify the Optional Protocol to UNCAT (OPCAT) and establish independent national preventive mechanisms (NPMs) to adequately monitor and inspect all places of detention as a key measure to prevent torture and other ill-treatment and to identify systemic issues needing to be addressed.

- Guarantee arrested and detained persons the effective exercise of their rights, including to: be informed of the reasons for their detention in a language they understand; have prompt access to a lawyer; have access to an independent medical examination; be brought before a judge or court promptly after their arrest to review the legality of the detention; and have their arrest and detention properly documented in custody registers.

- Ensure the independence of investigative bodies (such as national human rights institutions), prosecutors and members of the judiciary and allocate sufficient resources to enable them to discharge their functions effectively, ensuring the fairness of the proceedings.

- Establish effective complaints and investigation mechanisms aimed at increasing accountability for torture and other ill-treatment, ensuring victims' rights to lodge complaints, to have their complaints investigated promptly, effectively and impartially and to obtain redress.

- Design and deliver professional training on a periodic/regular basis of relevant State authorities and other stakeholders on the prohibition of torture and other ill-treatment.

- Implement a transparent system of sanctions for relevant authorities (such as law enforcement officers, prosecutors and judges), including those of both a criminal and disciplinary nature for failure to comply with their legal duties and/or procedures.

INTRODUCTION

Torture is a gross human rights violation and an affront to human dignity. States in the African region widely acknowledge this and reject the practice, notably reflected through near regional universality of UNCAT and the widespread ratification of the African Charter on Human and Peoples' Rights (African Charter) and other human rights treaties which include an equivalent prohibition against torture.[2] Treaty ratification is a significant step, to be followed by concrete reforms towards effective implementation. Being party to UNCAT gives States the opportunity to continuously assess their domestic legal framework against international benchmarks and best practice and, where necessary, amend laws and procedures, criminalise torture as a separate offence, and introduce mechanisms of prevention, investigation, accountability, and redress, in compliance with their obligations under UNCAT and other relevant human rights and torture prevention instruments.

This report examines the anti-torture legislative and regulatory framework of eight States in common law Africa, namely, **The Gambia, Ghana**, **Kenya**, **Nigeria**, **South Africa**, **Sudan**, **Uganda** and **Zimbabwe**. The purpose of the report is to identify existing good practices and legislative provisions and opportunities for anti-torture legislative and regulatory reforms to inspire action towards strengthening the domestic implementation of UNCAT across the region. It outlines measures and proposals that can be considered by States and their institutions to secure legal protection against torture and other ill-treatment and positively impact torture prevention and response in practice.

To better facilitate cross-State and comparative learning of legal frameworks within comparable legal traditions, and given that it was beyond the scope of this project to study all States in the region, the research undertaken is intentionally restricted to common law jurisdictions. The findings of this report are based largely on comprehensive desk research, following a detailed questionnaire prepared by CTI and REDRESS, to examine all relevant aspects of each State's legislative and regulatory framework, as well as the implementation of such framework in practice. This was complemented by input from interviews with torture prevention experts and practitioners, in light of their work with torture victims and broader advocacy on torture prevention at the national levels. Members of the Advisory Board also provided crucial input.

We hope this report will serve as a tool for key stakeholders in the region, including officials in the executive branch and other governmental departments or services (such as police and prisons), as well as Parliamentarians, National Human Rights Institutions, NPMs, Ombudspersons and other criminal justice system actors, including judges, prosecutors and lawyers. Though the report focuses on particular States, it attempts more broadly to highlight some shared challenges that seem most prevalent considering the eight countries covered as a whole. While every State in the region faces contextually varying challenges, we trust the findings and recommendations contained in the report can be used to strengthen the anti-torture protection framework in other countries in Africa beyond those reviewed in this report.

2 Refer to Annex I .

1. DEFINITION OF TORTURE AND OTHER ILL-TREATMENT UNDER THE DOMESTIC LEGAL FRAMEWORK

1.1 THE ABSOLUTE PROHIBITION OF TORTURE AND OTHER ILL-TREATMENT

The prohibition of torture is a jus cogens norm of customary international law, a peremptory norm of general international law which cannot be derogated from.[3] The absolute nature of the prohibition of torture and other ill-treatment is expressly recognised in numerous international and regional human rights treaties, including UNCAT and the African Charter.[4] The prohibition also enjoys a non-derogable nature and cannot be justified under any exceptional circumstance, including war, threat of war, internal political instability or any other public emergency.[5] Orders by superior officers cannot be invoked as a justification of torture.[6]

The constitutional entrenchment of the prohibition of torture and other ill-treatment is common across all reviewed jurisdictions, although not all studied States expressly provide for its non-derogable nature:

3 The Committee Against Torture (**CAT**) has provided that the absolute nature of the prohibition of torture extends to 'other ill-treatment' (see General Comment No. 2, 24 January 2008, UN Doc. CAT/C/GC/2, paras. 3 and 6). The Special Rapporteur on Torture (**SRT**), Juan E. Mendez, further acknowledged the peremptory status of 'cruel, inhuman or degrading treatment' in 2014 (see UN Human Rights Council (**UNHRC**), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez – Mission to Ghana* (**Report of the SRT on Mission to Ghana**), 5 March 2014, UN Doc. A/HRC/25/60/Add.1, para. 40). This status has been recognised by the Inter-American Court of Human Rights (see *Lori Berenson-Mejía v. Peru*, Case No. 119, 25 November 2004, para. 100) and in commentary on the Court's jurisprudence (see Association for the Prevention of Torture (**APT**) and Center for Justice and International Law (**CEJIL**), *Torture in International Law: A guide to jurisprudence*, 2008, p. 113).

4 Other relevant instruments on the prohibition and prevention of torture include the Optional Protocol to UNCAT (**OPCAT**); Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (**The Robben Island Guidelines – RIG**), which, although not a treaty, were adopted by the African Commission on Human and Peoples' Rights (**ACHPR**) and must be noted as an important tool for torture prevention in Africa; the International Covenant on Civil and Political Rights (**ICCPR**), the Convention for the Protection of All Persons from Enforced Disappearances (**ICPPED**), the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), the Convention on the Rights of the Child (**CRC**), the Convention on the Rights of Persons with Disabilities (**CRPD**) and the four Geneva Conventions of 1949. The Statute of the International Criminal Court (**Rome Statute**) and the Protocol to the African Court on Human and Peoples' Rights (**African Court**) also provide legal avenues for accountability and redress.

5 UNCAT, Art. 2.2; CAT, General Comment No. 2, 24 January 2008, UN Doc. CAT/C/GC/2, para. 3; RIG, paras 9 and 11. See also Human Rights Committee (**HRC**), *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (**General Comment No. 20**), 10 March 1992, para. 3.

6 UNCAT, Art. 2.3.

State	Constitutional prohibition	Specific anti-torture legislation	Express provision on non-derogability
The Gambia	Article 21	No – the Prevention Against Torture Bill is set for approval	No
Ghana	Article 15(2)(a) and Article 28	No[7]	No
Kenya	Article 29	Yes	Yes – Constitution Article 25; PTA, Article 6
Nigeria	Article 34(1)	Yes	Yes – ATA, Section 3(1)
South Africa	Article 12	Yes	Yes – Constitution, Article 37(5); PCTPA, Article 4(4)
Sudan	Article 50	No	Yes (related to torture only, not CIDTP) – Constitutional Charter, Article 40
Uganda	Article 24	Yes	Yes – Constitution, Article 44; PPTA, Article 3
Zimbabwe	Article 53	No	Yes – Constitution, Articles 86(3)(c) and 87(4)(b)

As indicated in the figure above, only **The Gambia**'s and **Ghana**'s legal frameworks do not contain an express provision on the non-derogable nature of the prohibition of torture and other ill-treatment. That notwithstanding, the **Gambian** government has recognised before the African Commission on Human and Peoples' Rights (ACHPR), that such prohibition under domestic law is absolute, "in that even in situations of public emergency [freedom from torture] is non-derogable".[8] Whether this will be incorporated into **The Gambia**'s Prevention Against Torture bill currently pending approval [9] is yet to be seen.

In a similar approach, as part of its initial report to the CAT in 2010, **Ghana** indicated it has not explicitly provided for the non-derogable nature of the prohibition but noted that, although UNCAT had not been domesticated, its principles were "entrenched provisions in the Constitution" and "accordingly, the State cannot derogate from the principles established under [UN]CAT".[10] It is noteworthy however that the

7 Although Ghana has previously expressed its commitment to enact a "comprehensive legislation to prohibit and punish torture in order to fill any perceived gaps in existing laws on torture in Ghana", no legislation has been adopted as of yet. See HRC, *List of issues in relation to the initial report of the Ghana – Addendum: Replies of Ghana to the list of issues,* 13 June 2016, UN Doc. CCPR/C/GHA/Q/1/Add.1, para. 34.

8 African Commission on Human and Peoples' Rights (**ACHPR**), *The Republic of The Gambia: 2nd Periodic Report, 1994-2018* (**The Gambia: 2nd Periodic Report**), 3 September 2018, p. 31.

9 In his speech on the opening of the legal year 2020-2021, President Adama Barrow assured that the Prevention Against Torture Bill would be approved soon, but it is unclear why the process has not yet been concluded. AllAfrica, *Gambia: 'Prevention Against Torture Bill Set for Approval',* 1 February 2021.

10 CAT, *Consideration of reports submitted by States parties under article 19 of the Convention, Initial reports of States parties due in 2001, Ghana* (**Ghana Initial Report**), 7 July 2010, UN Doc. CAT/C/GHA/1 7 July 2010.

Constitution of **Ghana** provides that measures understood as "reasonably justifiable" during a state of emergency shall not be held to be inconsistent with, or in contravention of the fundamental rights recognised therein, which include the right to freedom from torture.[11]

Contrariwise, the recognition in law of the non-derogable nature of the prohibition of torture even in a state of emergency does not translate into compliance and States are encouraged to be extra diligent in these circumstances.

CASE STUDIES

KENYA	***EG & 7 others v Attorney General.*** In 2019, the High Court at Nairobi upheld the absolute nature of the prohibition of torture and that of cruel or degrading treatment or punishment, recognising it as a fundamental right that no law can seek to limit.[12]
UGANDA	***Issa Wazembe v Attorney General.*** In 2019, the High Court held that freedom from torture and CIDTP is a non-derogable right, stating that torture absolutely "cannot be tolerated",[13] a principle which was then effectively incorporated into future case law.[14]
SOUTH AFRICA	***S v Mthembu.*** In 2008, the Supreme Court of Appeal drew on the absolute nature of the prohibition of torture under UNCAT for its holding: "no derogation from it is permissible, even in the event of a public emergency (…). Our Constitution follows suit and extends the non-derogation principle to include cruel, inhuman and degrading treatment".[15]

11 Constitution of the Republic of Ghana 1992 with Amendments through 1996 (**Constitution of Ghana**), s 31(10) .

12 High Court of Kenya at Nairobi, EG & 7 Others v Attorney General; DKM & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae) (**EG & 7 Others v. Attorney General**), 24 May 2019, para. 319 (Kenya).

13 See CAT, *Second Periodic Report submitted by Uganda under article 19 of the Convention pursuant to the simplified reporting procedure, due in 2008* (**Uganda: Second Periodic Report**), 1 February 2021, UN Doc. CAT/C/UGA/2 ; See also High Court of Uganda (Civil Division), *Issa Wazembe v. Attorney General* (Civil Suit No. 154 of 2016), 19 August 2019 (Uganda).

14 See, e.g., High Court of Uganda (Civil Division), *Agaba v. Attorney General & 3 Others* (Civil Suit-2016/247) (**Agaba v. Attorney General**), 20 December 2019 (Uganda).

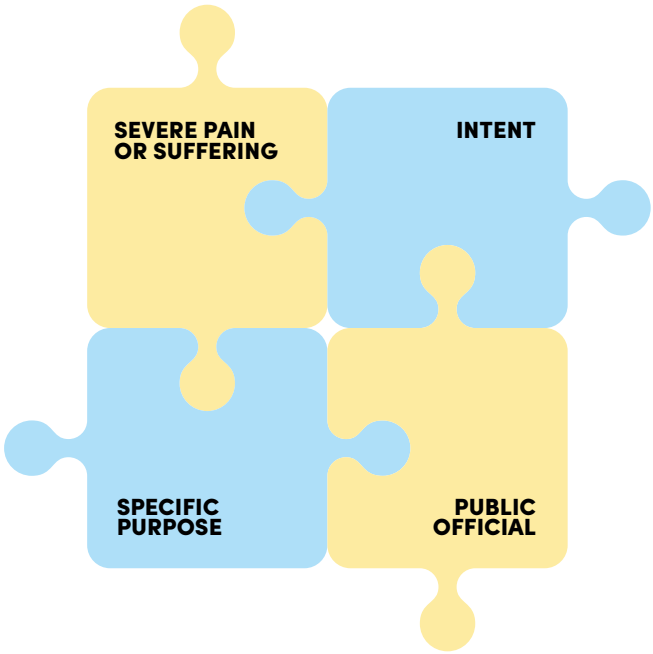
15 South African Supreme Court of Appeal, *S v. Mthembu*, 10 April 2008, para. 31 (South Africa).

PROPOSALS FOR STATES

- Ratify, without reservations, UNCAT and OPCAT, as well as other relevant international and regional human rights treaties containing the prohibition against torture and other ill-treatment (refer to Annex 1 for an overview of the status of treaty ratification).
- Review domestic laws and assess against international and regional treaty obligations, especially where relevant legislation such as Criminal Codes date back to a time prior to ratification of UNCAT.
- On the basis of the legislative review, consult and decide on the best approach to align national laws with international and regional standards, for example, by adopting a stand-alone anti-torture law or amending existing relevant legislation accordingly, and the process for undertaking these reforms.
- Amend relevant domestic laws or adopt new legislation to ensure they provide for the absolute and non-derogable nature of the prohibition of torture and other ill-treatment, in accordance with Art. 2.2 and 2.3 of UNCAT.

1.2 ELEMENTS OF THE DEFINITION OF TORTURE

As provided for in Article 1.1 of UNCAT, four elements are needed for an act to amount to 'torture' under the Convention:



Severe pain or suffering, whether physical or mental

Element of intent (pure negligence does not amount to torture)

Specific purpose (for example, obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind, or any other purpose)

Infliction by or at the instigation of or with the consent or acquiescence of a **public official or other person acting in an official capacity**

The definition of torture under UNCAT is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application (Article 1.2. UNCAT). States may decide to incorporate the UNCAT definition by amending existing legislation, such as their Criminal Code or other relevant criminal laws, or by adopting a stand-alone anti-torture law. In any case, a thorough review of the domestic legal framework after ratification of UNCAT is necessary to achieve treaty compliance. As noted by CAT, "serious discrepancies between UNCAT's definition and that incorporated into domestic law create actual or potential loopholes for impunity".[16]

Half of the eight States reviewed have defined torture as part of their legal framework, mostly in line with Article 1.1 of UNCAT, as part of their legal framework. These include: **Kenya**,[17] **Nigeria,**[18] **South Africa**,[19] and **Uganda**,[20] with all four having done so through stand-alone anti-torture laws.

Severe physical or mental pain or suffering

With regards to the level of severity of the pain or suffering inflicted, **Kenya**, **South Africa** and **Uganda** have adopted a definition that characterises torture as an act by which "severe pain or suffering, whether physical or mental, is intentionally inflicted on a person".[21] While the definition of torture in **Nigeria** contains this element, it does not specify that the pain or suffering must be "severe".

At a regional level, the ECOWAS Court has stated that: "A party alleging torture must prove a high minimum of severity to fall within the meaning of 'torture' under Article 5 of the African Charter. On the other hand, physical assault falls within other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture".[22] thus covering the first element required under UNCAT (severity of pain or suffering).

The anti-torture laws of **Kenya**, **Uganda** and **Nigeria** include a non-exhaustive list of acts that may constitute physical or mental torture, with **Uganda** also including a list of acts of "pharmacological torture".[23] These lists can be helpful for prosecutors, judges and decision-makers and provide legal clarity on specific acts or omissions (sometimes based on past case law) which have already been established as constituting torture or other ill-treatment. They are also useful for training manuals and other practical guides to help advise public officials in their actions. That said, and even though such lists can be non-exhaustive, they may, if not properly applied or understood, discourage relevant stakeholders (such as judges, prosecutors, lawyers and

16 CAT, General Comment No. 2 , para. 9.

17 Prevention of Torture Act (**PTA**), s 4 (Kenya),

18 Anti-Torture Act, 2017 (**ATA**), s 2 (Nigeria).

19 Prevention of Combating and Torture of Persons Act (**PCTPA**), s 3 (South Africa).

20 Prevention and Prohibition of Torture Act, 2012 (**PPTA**), s 2 (Uganda).

21 UNCAT, Art. 1.

22 *Okomba v. Republic of Benin*, Judgement No: ECW/CCJ/JUD/05/17, 10 October 2017, p.10.

23 According to the PPTA, Schedule 2, s 3, "pharmacological torture" includes "(a) administration of drugs to induce confession or reduce mental competence; (b) the use of drugs to induce extreme pain or certain symptoms of diseases; and (c) other forms of deliberate and aggravated cruel, inhuman or degrading pharmacological treatment or punishment."

others) from assessing whether other acts not included therein amount to torture in line with Article 1 of UNCAT.[24] Such lists should never eliminate the requirement to assess cases individually, with consideration of such factors that may affect the level of severity of pain or suffering inflicted, such as age, sex or vulnerability of the victim, the duration of the treatment, and the context in which the acts were committed.[25]

CASE STUDY

SUDAN

In *Abdel Hadi Radi v. Sudan*, the ACHPR found that beatings with whips, sticks, water hoses, rabbit jump (*Arannabb Nut*), death threats and other forms of ill-treatment, which caused serious injuries and psychological trauma, amounted to torture. It stated: "this treatment and *the surrounding circumstances* were of such a serious and cruel nature that it attained the threshold of severity as to amount to torture," highlighting specifically that these acts were carried out by security forces acting in their official capacity to force confessions and punish the victims, who were living in a refugee camp, for the killings of police men in the camp.[27]

In the States discussed in this report, there is recognition that both physical and mental, psychological, emotional suffering may constitute torture and be assessable in respect of severity. In **Uganda**, for example, the High Court has clarified that "torture does not presuppose violence" and can be practiced through subtle techniques not leading to physical pain but instead to "the disintegration of an individual's personality, the shattering of his mental and psychological equilibrium and the crushing of his will".[27] In relation to the level of severity necessary to amount to torture, **Kenya**'s High Court ruled that torture is physical or mental cruelty so severe that it endangers life or health.[28]

Intention

For an act to constitute 'torture' the pain or suffering must be inflicted *intentionally* (Art. 1 of UNCAT). According to CAT, the "elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances".[29]

24 See APT and CEJIL, *Torture in International Law: A guide to jurisprudence*, p. 3, [stating that "a strict definition listing every prohibited act would simply test the apparently endless ingenuity of torturers rather than providing effective protection to their victims"].

25 See HRC, *General Comment No. 20*, para. 4, [noting that "The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied"]; UN General Assembly (**UNGA**), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/72/178, 20 July 2017, para. 28; CAT, *General Comment No. 2,* paras. 20-24.

26 *Abdel Hadi v. Sudan*, Communication 368/09, 4 June 2014, para. 73.

27 High Court of Uganda (Civil Division), *Paulo Baguma Murama v. Uganda Revenue Authority*, 26 March 2020 (Uganda).

28 High Court of Kenya at Mombassa, *Bernard Muhilana Shimanyula v. Attorney General & 7 others*, 5 August 2020 (Kenya).

29 CAT, General Comment No. 2, para. 9.

National laws in **Kenya**, **Nigeria**, and **South Africa** expressly refer to the requirement of intent in their definition of torture, as required by UNCAT.

Specific purpose

In relation to the *purposive* element of the definition of torture, only **South Africa** and **Kenya** have included all purposes listed as examples by UNCAT. However, **Kenya** has limited the list of purposes to those only, while **South Africa** has made the list non-exhaustive, by using the words "such as". Indeed, the legislative history of UNCAT "indicates that the list of purposes is meant to be 'indicative' rather than 'all-inclusive'".[30] **Uganda** has similarly made its list non-exhaustive but has not specifically listed the discriminatory purpose, a crucial aspect of the definition to prevent forms of torture based on discrimination of any kind. **Nigeria** has seemingly conflated the purpose of "intimidation or coercion" with that of discrimination of any kind and has not indicated that the list is non-exhaustive, thus limiting the circumstances in which torture may be prosecuted.

Regional standard on discriminatory torture.

According to the ACHPR, torture "is a tool for discriminatory treatment of persons or groups of persons who are subjected to the torture by the State or non-state actors at the time of exercising control over such person or persons. The purpose of torture is to control populations by destroying individuals, their leaders and frightening entire communities."[31]

Public official requirement

Kenya, **Nigeria**, **South Africa** and **Uganda** all provide for the infliction of pain or suffering amounting to torture 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 line with Article 1 of UNCAT. CAT has encouraged States not to interpret the requirement of "public official" too narrowly.[32] According to CAT's jurisprudence, in a total absence of State authority, non-State actors which exercise quasi-governmental authority could fall under the definition of Article 1 of UNCAT.[33]

30 See Manfred Nowak, Moritz Birk, Giuliana Monina, *The United Nations Convention Against Torture and its Optional Protocol (2nd Edition): A Commentary* (**Commentary to UNCAT and OPCAT**), 19 December 2019, p. 23, paras. 30-32.

31 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, *Communication 279/03-296/05,* 27 May 2009, para. 156.

32 CAT has interpreted the expression "acting in an official capacity" to include *de facto* authorities such as rebel and insurgent groups which "exercise certain prerogatives that are comparable to those normally exercised by legitimate governments". See CAT, *Report of the Committee against Torture, 51st and 52nd sessions (2013-2014)* (**2013-2014 Report**), 2014, UN Doc. A/69/44, pp. 38, 113, 114 and 121; CAT, *Elmi v. Australia*, 25 May 1999, UN Doc.CAT/C/22/D/120/1998, para. 6.5; CAT, *General Comment No. 2*, para.18.

33 See CAT, *Elmi v. Australia*.

Additionally, a State can be held responsible for acts committed by private actors or non-State officials if the State fails to exercise due diligence to prevent, investigate, prosecute and punish them.[34] In these circumstances, State officials are considered as "authors, complicit or otherwise responsible under UNCAT for consenting to or acquiescing in such impermissible acts", as noted in CAT's General Comment No. 2, which further adds:

> Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.[35]

Indeed, this is particularly relevant in the context of gender-based violence as it will be further noted in this report, and RIG calls upon States to "pay particular attention to the prohibition and prevention of gender-related forms of torture and ill-treatment".[36]

Assessing the reviewed States' approach to criminalising torture committed by, at the instigation of or with the consent and acquiescence of public officials or others acting in an official capacity, **Uganda** has adopted a more extensive definition of torture so as to encompass any person acting in a private capacity to enable the prosecution for acts of violence committed by rebel groups,[37] while **South Africa** reported to CAT in April 2019, that "acts of torture carried out by non-state actors can be prosecuted in terms of the Anti-Torture Act, other applicable laws and even the common law".[38]

CASE STUDY

KENYA

Coalition on Violence Against Women & 11 others v Attorney general of the Republic of Kenya & 5 others. In the aftermath of Kenya's general election held in December 2007, several women, men and children were subjected to forms of sexual and gender-based violence including rape, gang rape, sodomy and other acts perpetrated by both State and non-State actors. The victims reported that the State failed to adequately investigate the facts and to prevent the foreseeable violence, due to a lack of training

34 See, for example, CAT, *Dzemajl and Others v. Yugoslavia*, Communication No. 161/2000, 21 November 2002, UN Doc. CAT/C/29/D/161/2000.

35 CAT, General Comment No. 2, para. 18.

36 RIG, Guideline 5.

37 REDRESS, *Legal Frameworks to Prevent Torture in Africa: Best Practices, Shortcomings and Options Going Forward* (**Legal Frameworks to Prevent Torture in Africa**), March 2016.

38 CAT, *List of issues in relation to the second periodic report of South Africa, Addendum: Replies of South Africa to the list of issues* (**South Africa second periodic report: Replies to list of issues**), 18 April 2019, UN Doc. CAT/C/ZAF/Q/2/Add.2, para. 92.

KENYA	of the police, a failure to plan and prepare policing operations during post-election violence, and failing to intervene where violence did occur. Whereas the Prevention of Torture Act, 2017 (PTA) had not been enacted at the time, the High Court relied on the Constitution and international standards to find that "the State does indeed have an obligation to prevent violations by State actors and non-State actors". Finding that some of the acts perpetrated by both State officials and non-State actors amounted to torture, the Court held that the State's failure to prevent, investigate and prosecute those acts was a basis for holding the State itself accountable for torture.[39]

PROPOSALS FOR STATES

- Introduce or amend national legislation to incorporate a definition of torture that, at a minimum, includes all four elements contained in Article 1 of UNCAT.
- Ensure State responsibility for acts of torture committed by non-State actors and private actors when the State fails to exercise due diligence to prevent, investigate, prosecute and punish them for the commission of such acts, and consider the issue of whether or how to incorporate the acts of non-State actors and private actors in the domestic definition of torture.

1.3 LAWFUL SANCTIONS AND THE PROHIBITION OF CORPORAL PUNISHMENT

The definition of torture under UNCAT intentionally excludes suffering which arises from or is inherent in or incidental to lawful sanctions.[40] Lawful sanctions are generally understood as those which are lawful under both national and international law, and a restrictive interpretation is recommended to reduce the risk of torture faced by persons (e.g. detainees) who may be "subjected to punishments as legitimate exercises of State authority".[41] Sanctions considered lawful in national laws may still amount to torture or other ill-treatment prohibited under international law, provided the necessary requirements of UNCAT's definition are met.[42] Therefore, States cannot use the lawful sanctions clause in Article 1 of UNCAT to justify the application of corporal punishment.

39 High Court of Kenya at Nairobi (Milimani Law Courts), *Coalition on Violence Against Women & 11 others v. Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights &3 others (Amicus Curiae)*, 10 December 2020 (Kenya).

40 UNCAT, Art. 1.

41 APT, *The Definition of Torture – Proceedings of an Expert Seminar*, 10-11 November 2001, pp. 20, 97; CTI and APT, *Guide on anti-torture legislation*, 2016, p. 14.

42 REDRESS, *Legal Frameworks to Prevent Torture in Africa*, p. 15.

a. Death penalty

CAT has increasingly expressed concern about the imposition of the death penalty, particularly in relation to the procedures and methods of execution, though it has never explicitly stated that the death penalty itself amounts to torture or other ill-treatment in violation of UNCAT. CAT frequently asks States to carefully review execution methods to ensure they inflict the minimum possible suffering, as well as to ensure inmates on death row awaiting execution are not kept in conditions of detention that may amount to cruel, inhuman or degrading treatment under Article 16 of UNCAT, including due to an excessively lengthy detention period. Similarly, the ACHPR has held that "the carrying out of a death sentence using a particular method of execution may amount to [CIDTP] if the suffering caused in execution of the sentence is excessive and goes beyond that [sic] is strictly necessary".[43] It has, for instance, found execution by hanging to be a violation of Article 5 of the African Charter.[44]

Most States reviewed provide for the death penalty in law as a sentence for serious criminal offences such as murder,[45] aggravated murder[46] or rape.[47] However, implementation of the death penalty is varied: **The Gambia** observes a moratorium on executions declared by President Adama Barrow in 2017,[48] as does **Nigeria**,[49] **Ghana** has not carried out executions since 1993,[50] and **Kenya** has a *de facto* moratorium on the death penalty and has not applied it since 1987.[51] Where they are in place, official moratoria are preferred. In 2015, the UN Special Rapporteur on Torture (SRT) recommended that **The Gambia** opt for an official rather than conditional moratorium, in part to avoid uncertainty for detainees which could precipitate the "death row phenomenon", which can produce "severe mental trauma and physical suffering among prisoners awaiting the implementation of their death sentences that constitutes ill-treatment".[52] CAT has raised similar concerns regarding **Nigeria**.[53]

43 *Spilg and Mack & DITSHWANELO v. Botswana*, Communication No. 277/2003, 12 October 2013.

44 *Interights & DITSHWANELO v. Botswana*, Communication 319/06, 28 June 2016.

45 Criminal Code, Act No. 25 of 1993, s 188 (The Gambia); Criminal Offences Act 29, 1960, s 46 (Ghana); Penal Code, s 204 (Kenya); Penal Code, s 210 (Malawi); Penal Code, s 221 (Nigeria); Criminal Code, 1991, s 28(3) (Sudan); Penal Code Act, s 188 (Uganda).

46 Constitution of Zimbabwe of 2013, Art. 48(2) (Zimbabwe).

47 Penal Code, ss 133 (Malawi); Penal Code Act, s 123 (Uganda).

48 The Gambia National Human Rights Commission (GMNHRC), *State of Human Rights 2020*, p. 16.

49 CAT, *Consideration of reports submitted by States parties under article 19 of the Convention – Consideration of the situation in Nigeria in the absence of a report (continued)* (**Consideration of Nigeria**), 22 November 2021, CAT/C/SR.1855, para. 14.

50 Amnesty International (AI), *Ghana – Death penalty status*, 2021; AI, *Report on the human rights situation covering 2019 – Ghana*, 8 April 2020

51 CAT, *Concluding observations of the Committee against Torture: Kenya* (**Concluding observations: Kenya**), 19 January 2009, UN Doc. CAT/C/KEN/CO/1.

52 UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez – Mission to The Gambia* (**Report of the SRT on Mission to The Gambia**), 16 March 2015, UN Doc. A/HRC/28/68/Add.4, paras. 33, 78 and 113(a); See also UNHRC, *Report of the SRT on Mission to Ghana*, paras. 62, 86, 101.

53 CAT, *Consideration of Nigeria*, para. 14; CAT, *Consideration of reports submitted by States parties under article 19 of the Convention – Consideration of the situation in Nigeria in the absence of a report*, 19 November 2021, para. 22.

CASE STUDY

SOUTH AFRICA

The Constitutional Court has held the death penalty to be unconstitutional, finding that "death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it '...involves, by its very nature, a denial of the executed person's humanity', and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state."[54]

b. Corporal punishment in criminal justice systems

As international law developed, several forms of corporal punishment were outlawed, including "excessive chastisement" imposed as a criminal sanction or educative or disciplinary measure.[55] Rule 43 of the Nelson Mandela Rules prohibits all disciplinary sanctions amounting to torture or other CIDTP, including corporal punishment.[56] The SRT has noted that corporal punishment should "without exception be considered to amount to cruel, inhuman or degrading punishment or torture in violation of international treaty and customary law",[57] and in *Osbourne v. Jamaica*, the Human Rights Committee (HRC) ruled that a sentence of whipping violated the International Covenant on Civil and Political Rights (ICCPR), as "corporal punishment constitutes [CIDTP]".[58] The ACHPR's Committee for the Prevention of Torture in Africa (CPTA) has noted the same and added that corporal punishments are "clearly a punishment of the past", calling upon States to repeal any statutes that apply judicial corporal punishment.[59] Although corporal punishment can also take place in educational settings and in the home against children, this section focuses exclusively on corporal punishment in criminal justice systems.[60]

54 Constitutional Court, *S v. Makwanyane and Others*, 6 June 1995 (South Africa), para 26.

55 HRC, *General Comment No. 20*, para. 5. The SRT and previous mandate holders also established that certain practices, including corporal punishment cannot be considered lawful sanctions. See, for example: HRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer* (**Report of SRT Nils Melzer**), 22 January 2021, UN Doc A/HRC/46/26, para 13.

56 UN Standard Minimum Rules for the Treatment of Prisoners (**the Nelson Mandela Rules**), 8 January 2016, UN Doc. A/RES/70/175, Rule 43.

57 UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak* (**Report of SRT Manfred Nowak**), 9 February 2010, UN Doc. A/HRC/13/39, para. 63.

58 *George Osbourne v. Jamaica*, Communication No. 758/1997, 13 April 2000, UN Doc. CCPR/C/68/D/759/1997.

59 Committee for the Prevention of Torture in Africa (**CPTA**), *Inter-Session Activity Report (May 2015 to November 2015) and Annual Situation of Torture and Ill-treatment in Africa Report*, November 2015, para. 28. Similarly, the SRT has established that all forms of corporal punishment must be considered torture and ill-treatment and therefore violate international treaties – See HRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention* (**Report of SRT Manfred Nowak, Addendum**), 5 February 2010, UN Doc. A/HRC/13/39/Add.5, para 209.

60 See CTI, *UNCAT Implementation Tool* 10/UNCAT/2021 - *Positive discipline and alternatives to corporal punishment of children*, 2021.

CASE STUDY

SUDAN

Curtis Francis Doebbler v Sudan. On June 1999, students of the Nubia Association at Ahlia University were arrested for having allegedly violated the public order during a picnic, because "they were not properly dressed or acting in a manner considered being immoral" – which consisted of "girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys". These students were sentenced by the court to between 25 to 40 lashes, punishments which were carried out in public with the supervision of the court. A complaint was brought before the ACHPR, which ruled that the corporal punishment amounted to a violation of the right to freedom from torture (Article 5 of the African Charter), stating that, "there is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the [African] Charter and contrary to the very nature of this human rights treaty."[61]

There has been progress in the ban on corporal punishment across the States covered in this report. **Ghana**, **South Africa**, **Kenya** and **Uganda** all repealed the practice as a criminal sanction in law or through caselaw, with the latter going further to prohibit corporal punishment as a disciplinary measure against prisoners.[62]

On the other hand, the practice of judicial corporal punishment is still authorised in other States reviewed[63] and has been raised as a concern by the SRT, who noted that the practice in **Nigeria** – which includes flogging frequently inflicted on teenagers[64] and amputation[65] – is "contrary to the prohibition of torture and other [CIDTP]," and not considered a lawful sanction under international law.[66] Both flogging and amputation are also used in **Sudan**, though flogging has been repealed as a sanction for most offences by Sudanese law,[67] and the ACHPR has noted its concern that lashes as punishment for an offence in **Sudan** were "tantamount to sanctioning State sponsored torture".[68]

61 ACHPR, *Curtis Francis Doebbler v. Sudan, Communication 236/00*, 4 May 2003, para. 42.

62 Criminal Procedure Code, 1960 (Act 30), s 294 (Ghana); Supreme Court of Uganda, *Kyamanywa Simon v. Uganda*, Constitutional Reference No.10 of 2000, 14 December 2001 (Uganda); Constitutional Court, *S v. Williams and Others*, CCT20/94, 9 June 1995 (South Africa); Abolition of Corporal Punishment Act (South Africa); Criminal Law (Amendment) Act 2003 (Kenya).

63 Criminal Code Act Nigeria (1916), s 17 (Nigeria); Criminal Procedure Act of Nigeria, s 387 (Nigeria); REDRESS and The People's Legal Aid Centre (PLACE), *Submission for the Universal Periodic Review of Sudan – Sudan: Human Rights two years after Al-Bashir's removal* (**Submission for the UPR of Sudan**), 2021; Criminal Code of The Gambia 25 (1933), s 30 (The Gambia); Criminal Procedure and Evidence Act (2016), s 353 (Zimbabwe).

64 End Corporal Punishment, *Corporal punishment of children in Nigeria*, last updated June 2021, p.4.

65 Centre for Islamic Legal Studies, *Draft Harmonised Sharia Penal Code Annotated*, s 93 (Nigeria) (note this does not reflect the actual law of any one State; rather it represents a summary of the Sharia Penal Codes of ten of the Northern states, with annotations explaining the differences among the States).

66 UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak – Mission to Nigeria (4 to 10 march 2007)* (**Report of the SRT on Mission to Nigeria**), 22 November 2007, UN Doc. A/HRC/7/3/Add.4, para. 60.

67 SOAS and REDRESS, *Legal and Institutional Reforms in Sudan: Policy Briefing* (**Sudan Policy Briefing**), March 2021; REDRESS and PLACE, *Submission for the UPR of Sudan*, 2021.

68 ACHPR, *Curtis Francis Doebbler v. Sudan*, Communication 236/00, para. 42.

Several of the States reviewed also allow corporal punishment to be used as a disciplinary measure in prisons, sometimes with specific limitations in place.[69] **Kenya** allows such disciplinary measure despite its Constitution prohibiting corporal punishment of "all persons".[70] **Uganda** expressly prohibits the use of corporal punishment and torture against prisoners, with the Commissioner of Prisoners confirming that any officers found to be engaged in this behaviour will be held personally liable.[71] In **South Africa**, corporal punishment is not explicitly prohibited in detention settings, though it is not listed as a potential means of punishment for disciplinary purposes.[72]

PROPOSALS FOR STATES

- Review and repeal legal provisions which authorise the use of judicial or administrative corporal punishment in places of deprivation of liberty and other detention facilities, as they amount to CIDTP under Article 16 of UNCAT and may amount to torture under Article 1 of UNCAT.

- Reinforce existing legal provisions by adopting policies (e.g. procedures, guidelines, codes of conduct) on zero tolerance for judicial and administrative corporal punishment and set procedures and penalties enabling accountability for misconduct.

1.4 CRIMINALISATION OF TORTURE AND OTHER ILL-TREATMENT

Under Article 4 of UNCAT, every State party has the obligation to criminalise torture by ensuring "that all acts of torture are offences under its criminal law". According to CAT, States parties are to enact a separate offence of torture in its criminal law that contains, at a minimum, the elements of the definition of torture under Article 1 of UNCAT.[73] This will alert perpetrators, victims and the public to the gravity of the crime of torture, emphasise the need for appropriate punishment, strengthen the deterrent effect of the prohibition, enhance the ability of officials to track the specific crime of torture, enable torture victims' access to justice and redress, aid the consequential non-application of statutes of limitation, amnesties and immunities, and enable

69 For example, in Ghana, corporal punishment in prison may consist of "not more than fifteen strokes with a light cane" for only male inmates "over the apparent age of eighteen years" for offences including mutiny, incitement to mutiny, or gross personal violence towards another prisoner or a member of the service, and is subject to certification of a medical officer about the inmate's fitness to undergo the punishment. See Prisons Service Act, s 44 (Ghana). In Kenya, only inmates found guilty of an "aggravated prison offence," after due inquiry, can be subject to "corporal punishment with a cane" limited to a prescribed amount. See Prisons Act (1963), s 51 (3)(a) (Kenya).

70 Constitution of Kenya, Art. 29(e) (Kenya).

71 Prisons Act, 2006, s 81(2) (Uganda).

72 Correctional Services Amendment Act, 2008 (South Africa).

73 CAT emphasised that torture must be made a distinct crime as this will "directly advance the Convention's overarching aim": See CAT, General Comment No. 2, para.11; and RIG, Guideline 4.

and empower the public to monitor and challenge State action or inaction that may violate UNCAT.[74] In addressing the concerning worldwide scenario of lack of accountability for torture and other ill-treatment, the SRT observed that impunity "is often shaped by formal obstacles to individual accountability enshrined in national laws, including, most notably, the absence of legal provisions specifically criminalizing torture and ill-treatment".[75] As UNCAT does not prescribe the best way in which States are to enact the offence of torture in national law, States are free to decide whether to do so by amending existing criminal laws or adopting new legislation such as a stand-alone anti-torture law.

Half of the reviewed States, namely **Kenya**, **Nigeria**, **South Africa** and **Uganda**, have made torture a separate offence in their jurisdictions mostly in line with the definition of torture under UNCAT. The other States have either criminalised torture in limited contexts (e.g. **Sudan**, where torture is criminalised only in the context of influencing the course of justice, and **Ghana**, where criminalisation is limited to acts by prison officers), or rely on other ordinary offences such as (grievous) bodily harm, assault or rape to prosecute acts of torture involving physical pain or suffering (**The Gambia** and **Zimbabwe**).

a. Offence of torture

Kenya, Nigeria, South Africa and **Uganda** have legislation in place that criminalises torture as a separate offence.[76] This means that acts amounting to torture, as respectively defined in these States' laws, can be directly prosecuted as torture.

Definition of torture in South Africa.

Prevention of Combating and Torture of Persons Act, 2013 (PCTPA).

Art. 3. For the purposes of this Act, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(a) For such purposes as to

(i) obtain information or a confession from him or her or any other person;

(ii) punish him or her for an act he or she or any other person committed, is suspected of having committed or is planning to commit; or

(iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or

74 CAT, General Comment No. 2, para.11; CAT, *General Comment N°3: Implementation of Article 14 by States Parties* (**General Comment No. 3**), 13 December 2012, UN Doc. CAT/C/GC/3, para. 19; See also See REDRESS, *Legal Frameworks to Prevent Torture in Africa*, p. 10

75 UNGA, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer* (**Interim report of SRT Nils Melzer**), 16 July 2021, UN Doc A/76/168 para. 26.

76 PTA (Kenya); ATA (Nigeria); PCTPA (South Africa); PPTA (Uganda). For an analysis of the national definitions of torture, see Section 1.2. above.

(b) 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, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Offence of torture in South Africa.

Art. 4. (1) 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 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.

(3) Despite any other law to the contrary, including customary international law, the fact that an accused person –

(a) is or was a head of state or government, a member of a government or parliament, an elected representative or a government official; or

(b) was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither a defence to a charge of committing an offence referred to in this section, nor a ground for any possible reduction of sentence, once that person has been convicted of such offence.

(4) No exceptional circumstances whatsoever, including but not limited to, a state of war, threat of war, internal political instability, national security or any state of emergency may be invoked as a justification for torture.

(5) no one shall be punished for disobeying an order to commit torture.

Ghana and **Sudan** are yet to criminalise torture as required under Articles 1 and 4 of UNCAT. The offences which refer to torture in these two States are limited in scope, exclusively referring to acts of physical violence and leaving aside mental pain or suffering (e.g. psychological torture). In **Ghana**, torture is criminalised under the offence of "Oppression by prison officer" in the Prisons Service Act, [77] and it is limited to prison settings. Ghana's Prison Services Act regulates the prohibition on subjecting persons within the prison service to "(i) torture or inhuman or degrading punishment, or (ii) any other condition that detracts or is likely to detract from human dignity or worth, (…)".[78] As a result, acts of torture can only be prosecuted as torture when committed by prison officers against prisoners, in which case they can be held personally liable. It is unclear whether this provision, which also refers to subjecting prisoners "to cruelty", extends to mental pain or suffering. Additionally, 'torture or other cruel, inhuman or degrading treatment or punishment' is mentioned as part of a broad range of acts of physical abuse criminalised in the context of domestic violence in **Ghana**.[79]

77 Prison Services Act (1972), s 25 (Ghana).

78 Prisons Service Act 1972, s 1(3)(a) (Ghana).

79 Domestic Violence Act 732 (2007), s 1 (Ghana).

In **Sudan**, the Criminal Act includes the offence of "Influencing the course of justice", under which it is a crime for "any person with public authority" to "engage[s] in physical or mental torture against a witness or accused or an opponent to make evidence or for a person or others to refrain from providing any information in any law case or incites" or to help another person to do so. [80] Accordingly, an act of torture is limited to physical or mental torture inflicted with the aim of obtaining evidence or preventing the production thereof. A July 2020 amendment to the Criminal Procedure Act further prohibited "torture or assault [of] the accused in any way" but does not provide a definition nor a penalty for the act of torture.[81]

Where torture is criminalised as a separate offence, implementation is equally crucial to effectively investigate allegations of torture and identify, prosecute and punish the perpetrators. In this regard, the States' willingness to implement their criminal laws is of fundamental importance.[82] Research has shown that even where countries have committed themselves to the criminalisation of torture, and at times have enacted important legislative changes, challenges remain at the practical level to create *de facto* change.[83] In this context, the SRT has emphasised "the duty of judges and courts to enforce the law by examining cases involving torture and ill-treatment and, if allegations are confirmed, prosecuting and punishing perpetrators irrespective of their status or level of authority".[84] Furthermore, it is important to disseminate the existence and correct enforcement of offences of torture through the adoption of practical guidelines and trainings tailored to law enforcement institutions, the judiciary, prosecutors and lawyers, as well as the roll out of awareness campaigns to the population in general.

80 Criminal Law Act 1991, s 115(2) (Sudan) as amended by the Miscellaneous Amendments Law of 2020. See also The Republic of Sudan, Ministry of Justice, Department of the Official Gazette, *Issue no. 1904 on 13-07-2020 [UNOFFICIAL TRANSLATION]*, 13 July 2020, para. 19.

81 REDRESS, *Sudan Legal Amendments – Explanatory Table*, 30 July 2020. For further analysis, see: REDRESS, *Further Historic Changes Made to Sudanese Laws*, 16 July 2020; REDRESS and African Centre for Justice and Peace Studies (ACJPS), *A way forward? Anti-torture Reforms in Sudan in the post-Bashir era* (**A way forward?**), December 2019.

82 Research by REDRESS, including interviews with stakeholders in the region. See also UNGA, Interim report of SRT Nils Melzer, UN Doc A/76/168, para. 31.

83 See, for instance, Parliament of Uganda, *Report of the Committee on Human Rights on the Alleged Torture in Ungazetted Detention Centres in the Country* (**Alleged Torture in Ungazetted Detention Centres Report**), November 2019; African Centre for Treatment and Rehabilitation of Torture Victims (ACTV), *Annual Report 2019*, 2019, p. 43; HRC, *Concluding observations on the fourth periodic report of Kenya* (**Fourth report of Kenya: Concluding observations**), 11 May 2021, UN Doc. CCPR/C/KEN/CO/4, paras. 28, 29; CAT, Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013), 19 June 2013, UN Doc CAT/C/KEN/CO/2; IMLU, *Submission to the Universal Periodic Review 3rd Cycle (Kenya),*16 July 2019; IMLU, Center for Civil and Political Rights, *Shadow Report in Response to the fourth periodic report on the ICCPR (2013-2020)*; Kenya National Commission on Human Rights (KNCHR), *NHRI information to the 128th session of the Human Rights Committee,* 2020; Etannibi Alemika, *Police and Human Rights in Africa*, in ACHPR, *Newsletter No 14: Policing and Human Rights in Africa: Human rights compliance in extraordinary policing environments,* October 2020; Clare Ballard, Head of the Penal Reform Programme at Lawyers for Human Rights, as cited in The Citizen, *Leeuwkop prisoners v Correctional Services could be precedent-setting*, 12 November 2019; CAT, *Concluding observations on the second periodic report of South Africa* (**Second report of South Africa: Concluding observations**), 7 June 2019, UN Doc CAT/C/ZAF/CO/2; Centre for The Study of Violence and Reconciliation (CSVR) and International Rehabilitation Council for Torture Victims (IRCT), *Submission to the United Nations Committee Against Torture for the 66th Session*, June 2018; Amnesty International, *Nigeria: Time to End Impunity – Torture and Other Violations by Special Anti-Robbery Squad (SARS)* (**Time to End Impunity**), 26 June 2020; Prisoners Rehabilitation and Welfare Action (PRAWA) and IRCT, *UPR Briefing Note: Nigeria – Torture and detention in Nigeria* (**UPR Briefing Note: Nigeria**), 2018. This was also confirmed by stakeholders interviewed for this report.

84 UNGA, *Interim report of SRT Nils Melzer,* UN Doc A/76/168, para. 28.

b. Prosecution of torture as other crimes

In jurisdictions that do not have a specific torture offence, acts amounting to torture are prosecuted through a variety of ordinary offences that criminalise bodily injury, rape and sexual assaults among others. This is, for example, the case in **The Gambia** and **Zimbabwe**, where the current legislative frameworks do not envisage an offence of torture, as well as **Ghana** and **Sudan**, where torture is criminalised in limited contexts involving prison officers (and not public officials more broadly), and with the aim of influencing the course of justice (and not other purposes), respectively. Notably, these four States criminalise acts that cause bodily harm and death, as well as sexual offences such as rape and female genital mutilation (FGM), although the circumstances in which such acts are considered crimes and the penalties imposed for similar offences vary between those jurisdictions and at times do not reflect the gravity of the crime of torture.[85]

It is positive to note nonetheless that these reviewed States that do not provide for a separate offence of torture have made commitments to punish such acts in other ways. In reporting to international and regional human rights bodies, **The Gambia** has assured that torture does not go unaddressed: "Although the Constitutional prohibition of torture is not yet supported by the creation of a specific offence of torture under the country's criminal law, the offences in the Criminal Code such as threatening violence, common assault, assault causing actual bodily harm, assault causing grievous bodily harm and laws and regulations such as the Judges Rules and the Evidence Act 1994 have also been put in place to give effect to and prohibit the practice of torture."[86] It has been similarly observed in relation to **Ghana** that the Criminal Code, "has some provisions which take care of situations involving torture, cruel or inhuman treatment or punishment. An agent or official of State who uses his position to engage in such act could find himself liable for offences ranging from assault, causing harm, use of offensive weapons, manslaughter or in the extreme case, murder."[87]

The prosecution of acts amounting to torture as other crimes is particularly relevant in the context of sexual and gender-based violence (SGBV). Forms of SGBV, such as rape, domestic violence, and harmful practices (including FGM) may amount to torture when the four cumulative elements under Article 1 of UNCAT are present, or otherwise amount to CIDTP under Article 16 of UNCAT.[88] Such violence against women and girls can take different forms, can be perpetrated by State institutions and by State actors, as well as within family and community contexts. As stressed earlier in this report, when such acts are committed by non-

85 For instance, with regards to rape, laws in Ghana and Zimbabwe expressly require the victim to be a woman, impeding prosecutions of rape committed against male victims. In terms of the penalties, whilst all four States prescribe the death penalty either as the only penalty available or as the maximum punishment for an offence of murder, penalties for FGM vary from a range of 3 to 10 years of imprisonment or a fine. Laws in Sudan and in The Gambia provide for up to three years of imprisonment for FGM, and in Ghana and Zimbabwe the penalty is 10 years of imprisonment. The Gambia and Zimbabwe, nonetheless, provide for an alternative punishment of a fine. As to offences causing bodily harm, the prescribed penalties across the four States include a fine, imprisonment ranging from 6 months to 10 years and retribution (*qisas*).

86 UNHRC, *List of issues in the absence of the second periodic report of the Gambia – Addendum: Replies of the Gambia to the list of issues,* 12 June 2018, UN Doc. CCPR/C/GMB/Q/2/Add.1; See also ACHPR, *The Gambia: 2nd Periodic Report*, 3 September 2018.

87 CAT, *Ghana Initial Report,* 7 July 2010, UN Doc CAT/C/GHA/1.

88 CEDAW, *General Comment No. 35*, 26 July 2017, UN Doc. CEDAW/C/GC/35, para 16.

State-actors, such as non-State armed actors or private actors, they can amount to torture if the State fails to adequately prevent and respond to them.[89]

Recognition that some forms of SGBV may amount to torture is necessary to acknowledge the gravity of these acts, to expose the prevalence of such violations, and to ensure victims' rights. As noted by the SRT, integrating a gender perspective on torture and other ill-treatment "is critical to ensuring that violations rooted in discriminatory social norms around gender and sexuality are fully recognized, addressed and remedied."[90]

It must be noted that some of the reviewed States have taken efforts to overcome specific forms of SGBV through the introduction of legislation against domestic violence[91] and criminalisation of FGM. However, in many jurisdictions, some SGBV offences disproportionately perpetrated against women carry lower penalties in comparison to acts punishable as torture, or even to acts of physical or mental pain or suffering that can amount to torture but are prosecuted through other ordinary offences.

While the possibility of investigating and prosecuting cases of torture under other ordinary criminal offences may serve to avoid total impunity for acts of torture, this may be an insufficient strategy to reflect the gravity of the crime of torture and ensure adequate penalties. In this sense, international bodies such as CAT, the HRC and the SRT have recommended, including to **The Gambia** and **Ghana**, a review of their national legislation to ensure torture is included as an offence in line with the definition of torture provided for in Article 1 of UNCAT and that torture is made punishable with appropriate penalties commensurate the gravity of the crime.[92]

c. Criminalisation of ill-treatment

Under Article 16 of UNCAT, States are required to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1". However, UNCAT is silent as to whether the obligation to provide for a separate offence of torture under Article 4 of UNCAT also applies to other ill-treatment. CAT, in its General Comment No. 2,

89 UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, 15 January 2008, UN Doc. A/HRC/7/3, para. 53; UNHRC, *Report of SRT Manfred Nowak*, UN Doc A/HRC/13/39, para. 62; UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (**SRT Report of 2016**) 5 January 2016, UN Doc. A/HRC/31/57, paras. 51-52, 55; UNGA, *Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence*, 12 July 2019, UN Doc. A/74/148, para.12; CAT, *General Comment No. 2*, para. 18. See also: ACHPR, *Guidelines on Combating Sexual Violence and its Consequences in Africa (2017),* Part 1. Regional and International Legal Framework, 3. Definitions, 3.1. Sexual violence, para. E.

90 *Ibid*, UNHRC, SRT Report of 2016, UN Doc. A/HRC/31/57, para 6.

91 Domestic Violence Act 2007 (Act 732) (Ghana); Domestic Violence Act [Chapter 5:16], Act 14/2006 (Zimbabwe); Domestic Violence Act, 2013 (The Gambia).

92 UNGA, *Interim report of SRT Nils Melzer*, Nils Melzer, UN Doc. A/76/168, para. 64; HRC, *Concluding observations on the Gambia in the absence of its second periodic report* (**The Gambia: Concluding observations**), 30 August 2018, UN Doc. CCPR/C/GMB/CO/2, para. 34; CAT, *Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture – Ghana* (**Ghana: Concluding observations**), 15 June 2011, UN Doc. CAT/C/GHA/CO/1, para. 9; CAT, *Ghana Initial report (continued)*, 26 May 2011, UN Doc. CAT/C/SR.995 (26 May 2011), para. 35; UNHRC, *Compilation on the Gambia - Report of the Office of the United Nations High Commissioner for Human Rights*, 23 August 2019, UN Doc A/HRC/WG.6/34/GMB/2, paras. 31, 48.

has expressed that: "(…) articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment" and in some Concluding Observations, it has recommended States to punish acts of ill-treatment through provisions in national criminal law, albeit only in few instances.[93] Despite this, academic literature is of the view that the obligation to criminalise torture does not extend to other ill-treatment, as also echoed in UNCAT's travaux préparatoires and the fact that UNCAT's preventive obligations are those referred to in Articles 10 to 13.[94] Furthermore, there are specific challenges to establishing and prosecuting acts of CIDTP, in particular the lack of legal clarity on the offence as there is no international definition of CIDTP and the case law is vast.

Should States decide to criminalise other ill-treatment, it is recommended to provide for a clear definition, notably since there is no internationally agreed definition, and to keep the notion separate from that of torture.[95] According to the SRT, what distinguishes torture from other ill-treatment "is not the intensity of the suffering inflicted, but rather the purpose of the conduct, the intention of the perpetrator and the powerlessness of the victim"; thus, CIDTP "means the infliction of pain or suffering without purpose or intention and outside a situation where a person is under the *de facto* control of another."[96]

Amongst the eight reviewed States, **Kenya**, **Uganda** and **Ghana** criminalise ill-treatment in specific contexts, with different approaches, and **Nigeria** considers it as a form of physical torture. **Kenya** positively stands out for arguably providing the most far-reaching criminalisation of "cruel, inhuman or degrading treatment". It criminalises it as a specific criminal offence under six different Acts,[97] and defines it as "a deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a person in authority or the agent of the person in authority against a person under his custody, causing suffering, gross humiliation or debasement of the person".[98]

Also, Courts in **Kenya** have recognised inhuman treatment as "an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity." [99] **Uganda**, in its turn, criminalises ill-treatment under the Prevention and Prohibition of Torture Act, 2012 (PPTA), but does not define acts that constitute such crime, leaving it to the discretion of the courts, which "shall have regards to the definition of torture as set out in section 2 and the circumstances of the case".[100]

93 CAT, General Comment No. 2, para. 6; Manfred Nowak *et al.*, *Commentary to UNCAT and OPCAT*, p. 180, para. 16.

94 *Ibid,* Manfred Nowak *et al.*, *Commentary to UNCAT and OPCAT*, p. 180, para. 16.

95 APT-CTI, *Guide on anti-torture legislation*, 2016, p. 19; CAT, *Consideration of reports submitted by States parties under article 19 of the Convention – Concluding observations of the CAT (Germany)*, 12 December 2011, UN Doc. CAT/C/DEU/CO/5, para. 9. The lack of definition of ill-treatment may pose certain challenges with respect to legal certainty and associated defense fair trial rights. See REDRESS, *Legal Frameworks to Prevent Torture in Africa*, p. 20.

96 UNHRC, *Report of SRT Manfred Nowak*, UN Doc. A/HRC/13/39, para. 60.

97 PTA, s 7 (Kenya); Persons Deprived of Liberty Act, No. 3 of 2014, s 5 (Kenya); Children Act, ss 18, 20 (Kenya); The Basic Education Act of 2013, s 36 (Kenya); National Intelligence Services Act, 2012, s 51 (Kenya); National Police Service Act, ss 2, 95 (Kenya).

98 National Intelligence Services Act, s 51(4) and National Police Service Act, s 2(1) (Kenya).

99 High Court at Nairobi, *Republic v. Minister For Home Affairs and Others ex parte Sitamze*, 18 April 2008 (Kenya).

100 PPTA, s 7(2) (Uganda).

In **Ghana**, the offence of "Oppression by prison officer" [101] criminalises acts of "cruelty" and torture, while the offence of "domestic violence"[102] criminalises physical abuse that includes, among other acts, subjecting the person to torture or other CIDTP. Thus, it presents the same challenge as the criminalisation of torture, namely the limited scope and lack of definition of both terms. Finally, **Nigeria's** Anti-Torture Act (ATA), 2017 considers "cruel, inhuman or degrading treatment" as a form of physical torture instead of dealing it with it separately to the notion of torture: "physical torture, which refers to such cruel, inhuman or degrading treatment which causes pain, exhaustion, disability or disfunction of one or more parts of the body".[103]

CASE STUDY

KENYA	***MAO & another v Attorney General & 4 others.*** This case concerns the practice of detaining women in medical facilities after the delivery of their babies due to the non-payment of their medical bills. The petitioners were deprived of their liberty and kept in a medical ward under poor conditions that were relative to those of a prison, and subjected to ill-treatment and humiliation. The High Court of **Kenya** ruled that although "the treatment the petitioners were subjected to did not reach the level of torture", it amounted to "cruel, inhuman, or degrading treatment."[104]

In **Sudan**, **Zimbabwe**, **The Gambia**, and **South Africa**, where CIDTP is not criminalised as a separate offence, acts amounting to ill-treatment may only be prosecuted under other common law or statutory crimes. In the meantime, judicial interpretation may be considered an important avenue to advance the scope of the definition and criminalisation of ill-treatment.

CASE STUDY

In a case where Civil Liberties Organisation, a Nigerian human rights NGO, complained about several forms of harassment and persecutions from the Nigerian Government, including arbitrary arrest, incommunicado detention and torture and other forms of ill-treatment, the ACHPR noted that "the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental".[105]

101 Prisons Service Act, 1972 (NRCD 46), s 25 (Ghana).
102 Domestic Violence Act, 2007, s 1 (Ghana).
103 ATA, s 2(2) (Nigeria).
104 High Court at Nairobi, *M A O & another v. Attorney General & 4 others*, 17 September 2015 (Kenya).
105 ACHPR, *Huri Laws v. Nigeria*, Communication No. 225/98, 6 November 2000, para. 40.

d. Modes of liability

CAT's interpretation of Articles 1 and 4 of UNCAT requires the criminalisation of torture under the following modes of liability: direct commission (infliction), attempt to commit torture, instigation, incitement, consent or acquiescence, complicity and other forms of participation.[106] It is crucial that torture be criminalised beyond direct commission, to enable the prosecution of high-level perpetrators who order or support torture in different ways.[107] In line with such rationale, CAT has stated that "any person committing such an act, whether perpetrator or accomplice, shall be personally held responsible before the law".[108]

Among the four States that criminalise torture as a separate offence, **Kenya** and **South Africa** provide for the widest range of accountability and include all modes of liability mentioned above.[109] In **Uganda**, several modes of liability are foreseen, including those required under UNCAT, except for attempt to commit torture which has been left out.[110] **Nigeria's** ATA, in turn, refers to *actual participation* in the infliction of torture or *being present during its commission*. It also holds liable, as accessory to the crime of torture, commanding officers of the unit of the security or law enforcement agency for any act or *omission* or *negligence* on his part that may have led to the commission of torture by his subordinates.[111]

The other four States reviewed do not have provisions in their national legislation which stipulate specific modes of liability for torture, not least because torture is not criminalised as a separate offence in those jurisdictions. Instead, they may only apply the modes of liability which relate to other ordinary criminal offences under which acts amounting to torture could be subsumed and prosecuted.

e. Penalties

Article 4(2) of UNCAT provides for acts of torture to be made punishable by appropriate penalties taking into account their grave nature. CAT recommends that sentences of imprisonment for torture range between 6 and 20 years.[112] Penalties for the crime of ill-treatment should usually bear a lighter sentence than that of the offence of torture in accordance with the distinct definitions and grades of severity they relate to.

106 CAT, *General Comment No. 2*, para. 17; CAT, *Concluding observations on the initial report of Gabon,* 17 January 2013, UN Doc. CAT/C/GAB/CO/1, para. 8; CAT, *Consideration of reports submitted by States parties under article 19 of the Convention – Concluding observations of the Committee against Torture: Morocco,* 21 December 2011, UN Doc. CAT/C/MAR/CO/4, para. 5.

107 UNGA, *Interim report of SRT Nils Melzer,* UN Doc A/76/168, para. 27.

108 CAT, *Concluding observations on Guinea in the absence of its initial report*, 20 June 2014, UN Doc. CAT/C/GIN/CO/1, para. 7.

109 PCTPA, s 4 (South Africa); PTA, ss 4 and 8 (Kenya).

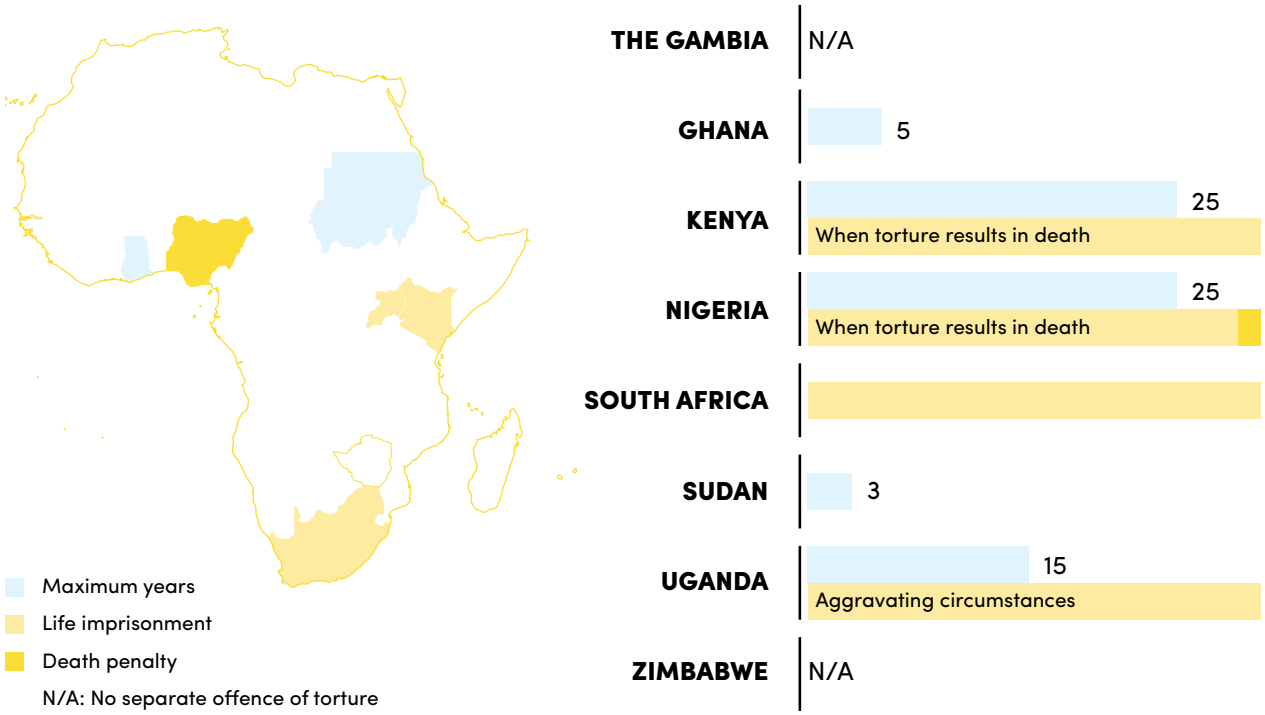
110 PPTA, s 8 (Uganda).

111 ATA, ss 7(1), 8(2) and 8(4) (Nigeria).

112 CAT, *Summary record of the 93rd Meeting of the Committee, held at the Palais des Nations, Geneva, on Thursday, 14 November 1991: CAT, 7th session,* 19 November 1991, UN Doc. CAT/C/SR.93. See also Chris Inglese, *The UN Committee against Torture: An Assessment*, The Hague/ London/ Boston: Kluwer Law International, 2001, p. 342.

In countries where torture and other ill-treatment are not criminalised as separate offences, acts amounting to torture or other ill-treatment will carry different penalties depending on the common law offence under which such acts are being prosecuted. This can be an issue in terms of legal certainty and adequate acknowledgment of the particular gravity of acts of torture. As provided for above, some of the sentences provided in the reviewed States for the offence of torture or other relevant offences causing bodily harm are lower than CAT's recommended ranges for the offence of torture.

The figure below showcases the penalty provided for the offence of torture in each reviewed State.



PROPOSALS FOR STATES

- Introduce or amend national legislation to criminalise torture, as defined in Article 1 of UNCAT, as a separate offence subject to punishment commensurate with the gravity of the crime (CAT recommends a minimum penalty of 6 years of imprisonment).

- Review criminal modes of liability to ensure that criminalisation of torture encompasses not only direct perpetration of torture, but also attempt, complicity, instigation, incitement, consent or acquiescence and other forms of participation, expressly prohibiting the invocation of superior orders as a justification to torture.

- Consider, consult broadly upon and strategise on gender sensitive approaches to the criminalisation of torture, and take steps to address sexual and gender-based violence that may amount to torture or other ill-treatment, such as rape, FGM or domestic violence.

- Consider the issue of whether or how to incorporate the acts of non-State actors/private actors into domestic criminal offences.

- Consider criminalising ill-treatment as a separate offence, with a distinct definition from torture and lower penalties.

2. SAFEGUARDS AND MONITORING MECHANISMS

2.1 PROCEDURAL AND LEGAL SAFEGUARDS

Articles 2(1) and 16 of UNCAT require States to take "effective legislative, administrative, judicial or other measures" to prevent torture and other ill-treatment in any territory under their jurisdiction. Among the many measures that States can take, a number of legal and procedural safeguards are not only legal requirements for the administration of justice, but also vital to effectively prevent torture and other ill-treatment when duly implemented in practice. The UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) recognises that procedural safeguards for persons deprived of their liberty at all phases of detention, "from initial apprehension to final release from custody", are central to preventing torture.[113] A recent study confirmed that "detention practice has by far the strongest impact on the incidence of torture" and that "safeguards in the first hours and days after arrest contribute crucially to lessening the risks of torture".[114]

Although the practice of torture is not limited to custodial settings, this section focuses on specific safeguards for those deprived of their liberty, particularly in the first hours of police detention, namely: a) registration of detention and custody records; b) information about rights and notification of third parties upon arrest; c) access to a lawyer; d) access to an independent medical examination; and e) prompt appearance before a judge. These and other safeguards are enshrined in several international human rights treaties, the RIG, the Luanda Guidelines, and other international and regional *soft law* instruments.[115] Most reviewed States have incorporated such safeguards in national law, although legislative amendments would be welcome to fully meet international and regional standards. This research also revealed that there is often a gap between the safeguards enshrined in legal and regulatory provisions and the protection afforded in practice.

113 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**), *The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the OPCAT, 12th session, Geneva, 15-19 November 2010* (**The approach of the SPT to prevention of torture**), 30 December 2010, UN Doc. CAT/OP/12/6.

114 Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, Liverpool University Press, 2016, p. 2.

115 See Art. 9 of ICCPR, which contains a number of safeguards as part of the right to liberty and security of the person; ICCPED; RIG, ACHPR/Res.61(XXXII)02 and the ACHPR's Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (**the Luanda Guidelines**); the Nelson Mandela Rules; and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 9 December 1988, UN Doc. A/RES/43/173.

a. Registration of detention and custody records

International standards require comprehensive detention records to be kept and regularly updated, recording every step of the arrest and custody, including transfers and other accompanying details.[116] The registration of arrest and detention and the maintenance of custody records are important to ensure that detainees can be identified, serving as important safeguards against torture and other ill-treatment and enforced disappearances;[117] and to some extent they facilitate the implementation of other safeguards, such as judicial oversight of detention. International human rights bodies recommend that States ensure prompt registration of persons deprived of their liberty, as well as periodic inspection of such custody records at police and prison facilities to guarantee their conformity with legal procedures.[118]

Most States studied require a register be kept to document arrests and admissions into police custody or detention facilities.[119] For instance, in **Nigeria**, police officers shall, within 48 hours of arrest, keep a record of the alleged offence, date and circumstances of arrest, full name, occupation and residential address of the arrestee, as well as their height, photograph, fingerprints or other means of identification.[120] In **Kenya**, the register must be maintained with more extensive information such as personal details including name, age and address, physical condition and medical history, reasons for arrest and detention, date and time of appearance before court, identity of arresting officers, date and time of interrogations and identity of interrogators.[121]

The practice in Uganda.

According to Uganda's Human Rights Commission, "the majority of the 962 places of detention the Commission inspected in 2018 had registers which were regularly used and updated, save for a few isolated cases mainly at police posts, where the registers were not updated. The existence of updated registers demonstrated that the majority of detainees the Commission assessed had an admission trail, an inventory of their property and information regarding their judicial processes. However, poor storage of records was noted in instances where the registers got filled up."[122]

116 ICPPED, Art. 17(3).

117 International human rights bodies, including HRC, CAT and the Committee on Enforced Disappearances (**CED**), recommend that States keep a register of all persons deprived of liberty. See, for example, HRC, General Comment No. 20, para 11; ICPPED, Art. 10(3); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 6; and Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principle 12.

118 See e.g., CAT, *Ghana: Concluding observations*, para. 10; CED, *Concluding observations on the report submitted by Senegal under article 29 (1) of the Convention*, 18 April 2017, UN Doc. CED/C/SEN/CO/1, para. 34.

119 Draft Prisons and Correctional Service Act 2016, ss 31 and 171 (Zimbabwe); Criminal Procedure Act 1991, ss 75 and 82 (Sudan); Correctional Services Act No. 111 1998, s 6 (South Africa); Standing Order (G) 362 on Custody Register, para. 3 (South Africa); Child Justice Act 2008, s 28(3) (South Africa); Administration of Criminal Justice Act 2015, s 15(1) (Nigeria); Nigeria Police Act 2020, ss 44 and 68 (Nigeria); National Police Service Act No. 11A of 2011, s 50 and Fifth Schedule [Section 59(2)] (Kenya); Persons Deprived of Liberty Act No. 23 of 2014, s 3(3) (Kenya); Prisons Act 2006, s 61 (Uganda).

120 Administration of Criminal Justice Act 2015, s 15(1) (Nigeria); Nigeria Police Act 2020, ss 44 and 68 (Nigeria).

121 National Police Service Act No. 11A of 2011, s 50 and Fifth Schedule [Section 59(2)] (Kenya); Persons Deprived of Liberty Act No. 23 of 2014, s 3(3) (Kenya).

122 Uganda Human Rights Commission (UHRC), *The 21st Annual Report on the State of Human Rights and Freedoms in Uganda in 2018* (**2018 Human Rights Report**), 2018, p. 216.

The Gambia has no domestic legal provision requiring official registration of detained persons and the SRT noted in 2015 that often suspects of high interest were not officially registered so they could be detained beyond the 72 hour time limit.[123] **Ghana** is also yet to introduce regulations concerning registers, books and prison records.[124] In practice, the public does not seem to have access to any records kept by the police, making it difficult to track whether registration is undertaken in **Ghana**.[125] The absence of registration requirements increases the risk of judicial delays and fair trial violations.

In addition to the international standards cited above, the Luanda Guidelines provide that all registers should be updated "at the earliest possible time following arrest or detention".[126] **South Africa** and **Nigeria** provide guidance as to when the arrest must be recorded; respectively, as soon as reasonably possible after arrest and within a reasonable amount of time but not more than 48 hours after arrest.[127]

Additionally, **Uganda**, **Nigeria**, and **Kenya** all require that arrested and detained people be kept in places of detention authorised by law.[128] Despite the legal provisions in place in most jurisdictions, there remains a significant gap between the law and practice. For instance, reports by the Parliament of **Uganda**[129] and the **Kenya** National Commission on Human Rights [130] both note that persons are detained in unauthorised facilities in these countries, and that torture allegedly occurs in such facilities. This has also been identified as an issue in **The Gambia**[131] and **Sudan**.[132] The adequate organisation, maintenance and centralised storage of registers is also lacking in both **Uganda** and **Nigeria**, thus significantly limiting the efficacy of the legal requirement.[133]

123 UNHRC, *Report of the SRT on Mission to The Gambia*, para. 108(a).

124 Prisons Service Act 1972 N.R.C.D. 46, s 51 (Ghana).

125 Research by REDRESS, including interviews with stakeholders in the region.

126 *Luanda Guidelines*, Guideline 15(a).

127 Standing Order (G) 361: Handling of persons in the custody of the Service from arrival at the police station (**Standing Order (G) 361**), para. 3 (South Africa); Administration of Criminal Justice Act 2015, s 15(1) (Nigeria).

128 Constitution of the Republic of Uganda (**Constitution of Uganda**), 1995, Art. 23 (Uganda); ATA, s 3(2) (Nigeria); National Police Service Act No. 11A of 2011, Fifth Schedule [Section 59(2)], s 10 (Kenya).

129 Parliament of Uganda, *Alleged Torture in Ungazetted Detention Centres Report*, November 2019.

130 KNCHR *The Mountain of Terror: A Report on the Investigations of torture by the Military at Mt. Elgon,* May 2008.

131 HRC, *The Gambia: Concluding observations,* para. 32.

132 HRC, *Concluding observations on the fifth periodic report of the Sudan* (**5th report of Sudan: Concluding Observations**) 19 November 2018, UN Doc. CCPR/C/SDN/CO/5, paras. 41 and 43.

133 See, e.g., UHRC, *2018 Human Rights Report*, 2018, p.216 [noting poor maintenance and storage of registers in Uganda] and PRAWA and IRCT, *UPR Briefing Note: Nigeria,* 2018, p. 4 [noting a lack of a central database or register of all places of detention, their location, and number of detainees in Nigeria].

PROPOSALS FOR STATES

- Amend legislation, regulations and policies to provide for the prompt registration of all persons upon apprehension, in a prescribed form and comprehensive manner to ensure consistency, identifiability of the individual arrested or detained, and the law enforcement officials concerned.[134]

- Custody records at police and prison facilities are to be contemporaneously updated, safely stored and periodically inspected – preferably by independent monitoring bodies – as well as made accessible to lawyers and family members on request and with detainees' consent.

- Custody records shall provide the basis for regular judicial review on arrested and detained individuals, which should be conducted with the aim of minimising the period of pre-trial detention.

- Amend legislation to ban unauthorised places of detention, and strengthen efforts to ensure that arrested and detained persons are taken to authorised facilities and promptly registered, by monitoring the activities of law enforcement institutions.

b. Information about rights

According to international and regional human rights standards, detained individuals shall be informed of their rights and of the reasons for their detention at the time of their arrest, in a language and manner that they can understand.[135] This important safeguard ensures that individuals are aware of their rights in detention, enabling them to effectively exercise them, including the right to challenge the lawfulness of their detention and to seek release if unfounded or unlawful. The Luanda Guidelines have developed Model Letters of Rights, to be adapted by each State in conformity with national legislation, regulations and policies. The Letters – one for Arrested Persons and another for People in Pre-Trial Detention – are included in the Luanda Guidelines Implementation Toolkit,[136] and include a broad range of rights, including (but not limited to) the right to remain silent, the right to legal representation, the right to interpretation and translation, the right to information, and the right to medical care. Both letters also include the right to be treated in a humane manner and the right to complain if subjected to inhumane treatment, as well as information about the complaint procedure.

134 The SRT recommended custody records shall include "recording of the time and place of arrest, the identity of the personnel, the actual place of detention, the state of health upon arrival of the person at the detention centre, the time at which the family and a lawyer were contacted and visited the detainee, and information on compulsory medical examinations upon being brought to a detention centre and upon transfer." See HRC, *Report of the SRT on Mission to Nigeria*, para. 75(j). See also UNHRC, *Resolution adopted on 24 March 2016 – 31/31*, 21 April 2016, UN Doc. A/HRC/RES/31/31, para. 9.

135 See for instance ICCPR, Art. 9(2); UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 10, 13 and 14; RIG, Guidelines 20(d), 25 and 26; Luanda Guidelines, ss 4 and s 5; *Nelson Mandela Rules*, Rule 54; SPT, *Report on the visit of the SPT to Honduras*, 10 February 2010, UN Doc. CAT/OP/HND/1, para.149.

136 ACHPR, *Luanda Guidelines – Toolkit*, 2017, pp. 49-60.

All reviewed jurisdictions enshrine an individual's right to be informed of the reason for arrest or detention,[137] and four States further require that the individual be informed of their right to remain silent.[138] The right to be informed of the right to consult a lawyer, in turn, is widely recognised, being included in the legislation of seven out of the eight researched States.[139] Conversely, most jurisdictions do not explicitly require individuals to be informed of their right to access a doctor or medical examination and treatment. Finally, only **Zimbabwe** requires individuals be informed of the right to notify family members or third parties promptly.[140]

All of the above are mostly in line with international standards, which require detainees to be notified of their rights at the moment of arrest, at commencement of detention or promptly thereafter.[149] The

137 Constitution of Zimbabwe Amendment (No. 20) Act 2013, Art. 50(1) and (5); Constitution of Uganda 1995, Art. 23(3); Constitution of the Second Republic of Gambia 1996 (**Constitution of The Gambia**), Art. 19(2); Constitutional Charter for the Transitional Period of 2019, Art. 51(2) (Sudan); Constitution of the Republic of South Africa 1996 (**Constitution of South Africa**), Art. 35(2)(a); Administration of Criminal Justice Act 2015, s 6(1) (Nigeria); Criminal Procedure Code 2010, s 38 (Nigeria); Constitution of Kenya, Art. 49(1); Persons Deprived of Liberty Act No. 23 of 2014, s 7 (Kenya); Constitution of Ghana, Art. 14(2).

138 Constitution of Zimbabwe, Art. 50(4)(b); Constitution of South Africa, Art. 35(1); Constitution of Kenya, Art. 49(1); Administration of Criminal Justice Act 2015, s 6(2) (Nigeria).

139 Constitution of Uganda, Art. 23(3); Constitution of The Gambia, Art. 19(2); Constitution of South Africa, Art. 35(2)(b); Constitution of Ghana, Art. 14(2); Administration of Criminal Justice Act 2015, s 6(2) (Nigeria); Constitution of Zimbabwe, Arts. 50 (1)(b)(ii) and 70 (1)(f) . In Kenya, this right is implicit through the combined reading of two provisions: Persons Deprived of Liberty Act No. 23 of 2014, s 7(d) and Constitution of Kenya, Art. 49(c).

140 Constitution of Zimbabwe, Art. 50(1).

141 *Ibid*, Arts. 50(1), (4)-(5) (Zimbabwe).

142 Constitution of Uganda, Art. 23(3).

143 Constitution of Ghana, Art. 14(2).

144 Constitution of The Gambia, Art. 19(2).

145 Constitutional Charter for the Transitional Period of 2019, Art. 51(2) (Sudan).

146 Constitution of South Africa, Arts. 35(1)(b) and (2)(a)-(b).

147 Constitution of Kenya, Art. 49(1).

148 Administration of Criminal Justice Act 2015, s 6(1) (Nigeria) and Constitution of Nigeria, Art. 35(3).

149 UN, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 13; Nelson Mandela Rules, Rule 54.

stipulation of a capped time limit, such as **The Gambia**'s, is not a requirement but nonetheless provides additional certainty as to the time limit, a useful element provided such limit falls under "promptly". In practice, case law shows that in some States, individuals are either not informed immediately after their arrest and/or detention, or at all.[150]

Legislation in the reviewed States also varies with regards to the means to convey relevant information to detained persons. Laws in **Sudan**, **Zimbabwe** and **Kenya** seem to not specify if this must be done orally or in written form. In **Nigeria**, the Constitution requires that an arrested person be provided with a written statement containing the facts and grounds of arrest, but information about rights is not included.[151] In **The Gambia**, **Ghana** and **Uganda**, such written statement with the reasons for arrest must only be supplied if the person was detained under emergency powers.[152] In **South Africa** research revealed express provisions requiring that a person in custody be informed of the reasons for detention and their rights both orally and in writing.[153] It is further mandated that the "Notice of Constitutional Rights" containing all this information must be handed to the person in custody who may take such notice with them into the detention facility.[154]

With the exception of **Sudan**, every jurisdiction examined requires that an individual be informed of their rights in a language they understand.[155] If an individual is informed but in a language which they cannot understand, this is not sufficient and does not ensure detainees can adequately exercise their rights. Particular attention should also be paid to ensure illiterate detainees or detainees with disabilities can exercise their rights effectively.[156] Research demonstrates that, despite the protective legislative provisions concerning this safeguard, authorities have not always followed these in practice.[157] The High Court of **Uganda** iterated that it is essential to inform individuals in order to help them understand the seriousness of the situation, make informed decisions about their rights and engage a lawyer. The Court also seemed to qualify the immediacy of the codified obligation by stating that the police are under an obligation to disclose the reason as soon as it is reasonably practicable.[158]

150 High Court of Uganda, *Ochwa v. Attorney General* (Civil Suit-2012/41), 27 February 2020 ; High Court of Uganda, *Agaba v. Attorney General*, 20 December 2019; Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, Liverpool University Press, 2016, p.349 (South Africa); High Court at Nairobi, *Titus Barasa Makhanu v. Police Constable Simon Kinuthia Gitau No. 83653 & 3 others* (**Titus Barasa v. Police Constable**), 29 February 2016 (Kenya).

151 Constitution of Nigeria, Art. 35(3).

152 Constitution of The Gambia, Art. 36; Constitution of Ghana, Art. 32; Constitution of Uganda, Art 47(a).

153 Standing Order (G) 361, paras. 6, 7(3) and 7(9); Standing Order (G) 341: Arrest and treatment of an arrested person until such person is handed over to the Community Service Centre Commander (**Standing Order (G) 341**), para. 4(c) (South Africa).

154 Standing Order (G) 361, para. 7(9) (South Africa).

155 Constitution of Uganda, Art. 23(3); Constitution of The Gambia, Art. 19(2); Constitution of Kenya, Art. 49(1); Persons Deprived of Liberty Act No. 23 of 2014, s 7 (Kenya); Constitution of Ghana, Art. 14(2); Standing Order (G) 341, para. 7(4) (South Africa); Constitution of of Nigeria, Art. 35(3); Criminal Procedure and Evidence Act, s 41A (1) (a) and Constitution of Zimbabwe, Art. 70 (2)(a).

156 APT, *2017 Symposium on Procedural Safeguards in the first hours of police custody – Outcome report*, p. 26.

157 See, e.g, High Court at Nairobi, *Titus Barasa v. Police Constable*, 29 February 2016 (Kenya); ACHPR, *The Gambia: 2nd Periodic Report*, 3 September 2018, p. 35; UNHRC, *Follow up report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his follow-up visit to the Republic of Ghana* (**Follow up report of the SRT on visit to Ghana**), 25 February 2015, UN Doc A/HRC/31/57/Add.2, para. 19.

158 High Court of Uganda, *Ochwa v. Attorney General*, 27 February 2020.

PROPOSALS FOR STATES

- Amend existing legislation and regulatory frameworks and codes to provide for the notification of rights at the moment of arrest, in a manner and language that the person detained understands, orally and in writing, and in an accessible format.

- Places of detention are encouraged to have staff representing the main ethnic and language groups. Where this is not feasible, finding ways to ensure detainees have access to an officer fluent in their language or dialect prevalent in the region that the detention facility is located in. Pictorial representations of rules and regulations throughout the prison or detention facility are also helpful, especially for illiterate detainees. Detention facilities could also provide such information in the form of handouts or booklets, provided upon induction into the prison or other detention facility.

- Law enforcement officials are to be trained and follow procedures to confirm that individuals have fully understood their rights and how to exercise them.

c. Access to a lawyer

A fundamental safeguard against torture and other ill-treatment is the right of prompt access to a lawyer at all stages of the investigation process and particularly from the moment of arrest.[159] The right to access a lawyer is regulated in several international and regional human rights instruments and guidelines, including in the African Charter and the RIG.[160] Individuals should be able to consult an independent lawyer of their choice in private. Free choice, independence and confidentiality are key elements to ensure that no intimidation influences client-counsel consultations, and that access is protected to enable the individual to report allegations of torture without fear of reprisals.

All the States examined provide for the right of individuals to consult with a lawyer.[161] However, there are discrepancies as to when access to a lawyer should be afforded. For instance, in **Zimbabwe** it is "without delay" from the moment of arrest and in **The Gambia** it is upon arrest;[162] whilst, in **Sudan**, access to a lawyer is not required at the interrogation stage which may render individuals increasingly susceptible to violence

159 UNHRC, *Report of the SRT on Mission to Ghana*, , paras. 26-29.

160 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11; African Charter, Art. 7(c); ICCPR, Art. 14(3)(b) and (d); ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; RIG, Guideline 20(c); Nelson Mandela Rules, Rule 61.

161 Constitution of Zimbabwe Amendment, Art. 50(1) and (5); Constitution of Uganda, Arts. 23(5)(b) and 48(2); Constitution of The Gambia, Art.19(2); Criminal Procedure Act 1991, s 83(3) (Sudan); Constitution of South Africa, Art. 35(2)(b); Constitution of Nigeria, Art. 35(2); Constitution of Kenya, Art. 49(1); Persons Deprived of Liberty Act 2014, ss 6 and 7 (Kenya); Constitution of Ghana, Art. 32; Prisons Service Act 1972 N.R.C.D. 46, s 38(4) (Ghana).

162 Constitution of Zimbabwe, Art. 50(1); Constitution of The Gambia, Art.19(2).

and intimidation to force confessions.[163] In **Nigeria**, the law provides for persons accused of a crime to consult with their lawyer before "making, endorsing, or writing any statement or answering any question" after being arrested.[164] Additionally, the right to choose and consult in private are both provided for in **Zimbabwe**, whilst **South Africa** and **Nigeria** provide the right to choose and **Kenya** provides the right to privacy.[165]

Despite the existence of this legal safeguard in national laws, reports have noted that the right to access to a lawyer is sometimes hindered in practice, including due to instances of discrimination and corruption.[166] Further, legal and financial obstacles related to legal aid may prevent individuals without means from exercising their right to a lawyer in practice, particularly where detained persons need to acquire legal assistance at their own cost. Vague terms such as 'reasonable access' and 'reasonable opportunities' can limit the scope of access to legal aid lawyers.[167] In **Ghana,** a State funded lawyer is only provided to those charged with capital offences;[168] in **South Africa** and **Sudan** legal representation is only provided at the State's expense, respectively, where "substantial injustice would otherwise result" or the individual is charged with a crime of extreme gravity.[169]

This can be problematic as in all reviewed States a significant number of detainees cannot afford a lawyer and are therefore effectively barred from such protection.[170] While some States, such as **Uganda** and **The Gambia**, have introduced laws mandating the establishment of legal aid, these measures have not yet been fully implemented.[171] A lack of sufficient legal aid lawyers has also proven to be a challenge in many jurisdictions.[172] In **South Africa**, a means test is used to balance access to justice with the costs of providing legal advice; however, access is determined by a court and so often individuals do not have legal representation at the time of arrest and at the time of questioning.[173]

163 REDRESS and ACJPS, *A way forward?*, p.37; REDRESS, *National and International Remedies for Torture: A Handbook for Sudanese Lawyers* (**National and International Remedies for Torture**), March 2005; REDRESS and PLACE, *Submission for the UPR of Sudan*.

164 Administration of Criminal Justice Act, s 6(2) (Nigeria).

165 Constitution of Zimbabwe, Art. 50(1) and (5); Constitution of South Africa, Art. 35(2)(b); Constitution of Nigeria, Art. 35(2); Administration of Criminal Justice Act 2015, s 6(2) (Nigeria); Persons Deprived of Liberty Act No 23 of 2014, s 7 (Kenya).

166 For instance, in Uganda 19 individuals were arrested from a LGBTQI+ shelter allegedly due to COVID-19 restrictions. They were subsequently denied lawyers until the High Court ordered for reasonable access to be granted. See, for example, Human Rights Awareness and Promotion Forum (HRAPF), Sexual Minorities Uganda (SMUG), Robert F. Kennedy Human Rights, *Petition to UN Working Group on Arbitrary Detention In the Matter of [REDACTED] v. Government of the Republic of Uganda*, 15 May 2020. See also CAT, Second report of South Africa: Concluding observations, para. 12.

167 Constitution of Uganda, Art. 23(5)(b); Prisons Service Act 1972 N.R.C.D. 46, s 38(4) (Ghana).

168 Legal Aid Scheme of 1997 (Act 542) (Ghana)

169 Constitution of South Africa, Art. 35(2)(c); Constitutional Declaration 2019, Art. 51(6) (Sudan).

170 UNHRC, *Report of the SRT on Mission to The Gambia*, para. 41. This was also suggested by research by REDRESS, including interviews with stakeholders in the region.

171 Legal Aid Service Providers Network (LASPNET), *The 10th Parliament Flashes Green Light on the National Legal Aid Bill 2020 as it Winds Up its Business*, 24 May 2021; IHRDA, *Legal Aid in The Gambia: an introduction to law and practice* (**Legal Aid in The Gambia**), 2012, pp. 17-18.

172 See, e.g. UHRC, *2018 Human Rights Report*, 2018, p.216 which notes lack of commitment and excessive workload of free lawyers in Uganda; Research by REDRESS, including interviews with stakeholders in the region [noting that free lawyers often advise individuals to plead guilty due to lack of proper time and experience to represent the individual] (South Africa); See also ACHPR, *The Gambia: 2nd Periodic Report*, 3 September 2018, p. 39; UNHRC, *Report of the SRT on Mission to Ghana*, paras. 26-29 [noting there are five lawyers to 160 cases in The Gambia and only 15 public defenders in Ghana].

173 Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, 2016, p. 348.

PROPOSALS FOR STATES

- Amend existing legislation so it comprehensively provides for the right of arrested and detained individuals to access legal representation in private from the first hours of detention, during questioning and during subsequent stages of criminal proceedings.

- Ensure individuals are able to effectively exercise such right by enabling private and confidential communication with legal counsel, in person at police stations and detention facilities, for example by setting up interview rooms, or, in the exceptional circumstance of in person consultation not being possible, via telephone.

- Establish, implement or extend the scope of State systems of free legal aid, and provide sufficient financial resources for such schemes/programmes. Collaboration between detention facilities and legal aid providers, such as paralegal committees or civil society organisations can also be helpful to increase access.

d. Access to an independent medical examination

Access to independent medical examinations, both physical and psychological, for persons deprived of their liberty is an important safeguard to deter, prevent and document torture.[174] Several international and regional instruments enshrine the right to an independent medical examination of persons as soon as possible after arrest and immediately upon their admission at a place of detention.[175] The SRT has pointed to the need for "routine medical screenings at entry, periodically during incarceration, at exit, at all transfers and upon request" in order to detect and document torture and other ill-treatment in places of detention. This includes through subsequent referral to a forensic expert in order to conduct a specialised forensic medical examination in line with the Istanbul Protocol, evaluating the consistency of findings and symptoms with allegations of torture and other ill-treatment.[176] In order to be most effective, medical examinations are to be conducted by medical practitioners who are independent of the detention facility, and held in private (out of sight and hearing of police officers). [177] Adequate medical care is also to be provided throughout the period of detention and detained persons should be properly informed of such rights.[178]

174 CTI, *UNCAT Implementation Tool 10/2021 on the Initial medical assessment of detainees upon admission*, 2021. See Office of the High Commissioner for Human Rights (OHCHR), *Istanbul Protocol – Manual on the Effective Investigation and Documentation of Torture and Other Cruel, inhuman or Degrading Treatment or Punishment* (**Istanbul Protocol**), UN Doc. HR/P/PT/8/Rev.1 paras. 168-169.

175 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,* Principle 24; *The Nelson Mandela Rules*, Rules 30-31; RIG, Article 20(b).

176 UNGA, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 23 September 2014, UN Doc A/69/387, para. 39.

177 CTI, *UNCAT Implementation Tool 2/2017 – Safeguards in the First Hours of Police Detention* (**UNCAT Implementation Tool 2/2017**), 2017; See also OHCHR, *Istanbul Protocol*, UN Doc. HR/P/PT/8/Rev.1, para. 83.

178 CTI, *UNCAT Implementation Tool 2/2017*, 2017, pp. 3, 5. See also OHCHR, *Istanbul Protocol*, para. 104.

All jurisdictions examined, except for **The Gambia**, [179] provide - either in their Constitutions or through legislation- persons deprived of liberty with the right to access a doctor.[180] While some jurisdictions provide for access generally, others specify the circumstances in which arrested and/or detained persons can request medical assistance. In practice, the lack of clear requirements for access to medical examinations, including during the most critical times (before and after questioning, and immediately upon arrest), can later result in the dismissal of allegations of torture or other ill-treatment due to lack of evidence.[181]

In **Zimbabwe**, arrested individuals have the right to consult with a doctor of their choice, in private and without delay, whilst detained individuals have the right to communicate and be visited by a doctor, though no specific purpose is identified.[182] In **Nigeria**, individuals arrested, detained or under custodial investigation have the right to demand a physical and mental examination by an independent and competent doctor of their choice, after questioning, which shall be conducted without the influence of the police or security forces.[183] While in **Ghana**, whether a prisoner can access external medical care is to the discretion of the Director of Prisons.[184]

The law in South Africa and Uganda.

These States provide for access to medical examinations, expanding on when this right can be exercised. In **South Africa**, it is a requirement for every individual to have a health status examination as soon as possible after admission, as well as before and after making a confession.[185] In **Uganda**, the Prisons Rules require that prisoners be examined on admission to prison, prior to undergoing strenuous labour or corporal punishment or other punishment that may cause injury, prior to discharge and prior to transfer.[186]

Medical examinations shall be *independent* to promote transparency and adequate documentation of instances of torture and other ill-treatment. Although it is not required that detained persons choose their doctor, they should be able to choose their gender whenever possible.[187] **Nigeria** requires that the doctor be independent and of the individual's choice,[188] and in **Zimbabwe** and **South Africa** individuals

179 The SRT noted particular concern for the absence of such safeguard in The Gambia at the police investigation stage. See UNHRC, *Report of the SRT on Mission to The Gambia*, para. 64.

180 Constitution of Zimbabwe, Arts. 50(1) and (5); Constitution of Uganda, Art. 23; Criminal Procedure Act 1991, ss 49 and 83(1) (Sudan); Constitution of South Africa, Art. 35(2)(f); Correctional Services Act 1998, ss 6 and 12 (South Africa); ATA, s 7 (Nigeria); National Police Service Act 2011, s 59(2) and Fifth Schedule (Nigeria).

181 IHRDA, *Legal Aid in The Gambia*, 2012, pp. 17-18; UNHRC, *Report of the SRT on Mission to Nigeria*, p.43; UNHRC, *Report of the SRT on Mission to The Gambia*, para. 66.

182 Constitution of Zimbabwe, Arts. 50(1) and (5).

183 ATA, s 7 (Nigeria).

184 Prisons Service Act, 1972, s 32(6) (Ghana).

185 Correctional Services Act 1998, ss 6 and 12; National Instruction 6 of 2014, The Prevention and Combating of Torture of Persons (**National Instruction 6 of 2014**), para. 5(3) (South Africa).

186 The Prisons Act, Statutory Instrument 304-4, The Prisons Rules, s 26(1) (Uganda).

187 OHCHR, *Istanbul Protocol*, para. 173.

188 ATA, s 7 (Nigeria).

are also permitted to choose their doctor.[189] **Uganda** provides in its Constitution for access to "private medical treatment" at the request and cost of a person who is "restricted or detained".[190] In **Nigeria**, the legislation also provides that the examination "shall be conducted outside the influence of the police or security forces".[191] In contrast, **Ghana** requires medical examinations be conducted under the control of government medical officers and in the presence of a police officer, thus lacking independence.[192] Without independence there is a risk of bias, influenced or simply dishonest medical reporting, thus reducing the effectiveness of the safeguard.[193]

Ideally, access to medical care and medical examinations should be unrestricted and provided to all persons deprived of liberty, regardless of income. Some of the legislative provisions studied could be amended in this respect. In **Sudan**, individuals have the right to 'appropriate medical care' but there is no guidance as to what constitutes appropriate care.[194] In **Uganda** the right only pertains to 'reasonable access', a construct potentially open to abuse.[195] In **Ghana** treatment is only provided at the discretion of the Director of Prisons,[196] and only to ascertain the commission of an offence by the examined suspect in **Sudan**.[197] In relation to costs, consulting and being examined by a doctor is at the individual's own expense in **Zimbabwe** and **Uganda**, so many individuals cannot afford to exercise the right.[198] Further, even where care is provided by the State, resources may be lacking to provide adequate care – this is of particular concern with regards to psychiatric evaluations of the impact of torture.[199]

The Nelson Mandela Rules require every prison to have in place a health-care service to protect and promote physical and mental health of prisoners, and have a process in place to transfer more severe cases to external medical institutions.[200] Some of the countries studied seemed to comply with this. In **Kenya**, for example, a 2018 report found that 89.04% of the prison population surveyed had access to a health facility,[201] while **Uganda** reported to CAT that detainees have access to health facilities, including through prison and police units or by referral.[202] **Uganda's** Prisons Service has in place a programme which works to sensitize staff on health matters including on integrated health and prevention of communicable diseases.[203]

189 Constitution of Zimbabwe, Arts. 50(1) and (5); Correctional Services Act 1998, ss 12 and 13 (South Africa).

190 Constitution of Uganda, Art. 23(5)(c).

191 ATA, s 7 (Nigeria).

192 UNHRC, *Report of the SRT on Mission to Ghana*, para. 36.

193 For example, in Kenya, there was a case of detained persons who were not brought to court because of a court-ordered medical report stating they were suffering from diarrhea. The suspects had in fact been severely tortured and could not be taken to court due to their injuries, and the prison uniformed health officer had apparently falsified the report. Information obtained from research by REDRESS, including interviews with stakeholders in the region.

194 REDRESS and ACJPS, *A way forward?*, p. 39.

195 Constitution of Uganda, Art. 23.

196 Prisons Service Act 1972, s 32(6) (Ghana).

197 Criminal Procedure Act 1991, s 49 (Sudan).

198 Constitution of Zimbabwe, Art. 50(1); Constitution of Uganda, Art. 23.5(c); Correctional Services Act 1998, s 12 (South Africa).

199 Research by REDRESS, including interviews with stakeholders in the region.

200 The Nelson Mandela Rules, Rules 25 and 27.

201 KNCHR, *State of Healthcare for Prisoners in Kenya - A Survey Report*, 2019.

202 See CAT, *Uganda: Second Periodic Report*, 1 February 2021, UN Doc. CAT/C/UGA/2.

203 See Uganda Prisons Service, *Medical Services*.

PROPOSALS FOR STATES

- Amend legislation and prison procedures to provide independent medical examinations as soon as possible after arrest and upon admission into the detention facility, and regularly during the period of detention and upon request.
- Take steps to ensure medical examinations are conducted by medical practitioners independent of the authorities and in private.
- Ensure medical examinations are properly recorded by medical staff, with comprehensive information clearly identifying the individual, time and date of examination, any identified injuries as well as allegations made. In this sense, medical staff, prosecutors and judges shall be adequately trained on the use of the Istanbul Protocol.
- Ensure training for qualified medical and forensic experts on how to conduct forensic medical evaluations in line with the Istanbul Protocol to document medical findings consistent with allegations of torture and ill-treatment.
- Judges and prosecutors are encouraged to request an independent medical examination of persons deprived of their liberty regardless of allegations of torture and other ill-treatment being made.

e. Notification of family or third party upon arrest

International and regional human rights standards provide for the notification of a family member or a third party as soon as possible after the arrest.[204] The SPT has recommended that notification be made no later than 3 hours after arrest.[205] This safeguard helps protect individuals from risks of incommunicado detention, torture and other ill-treatment, and enforced disappearances.[206] By informing an external party of the arrest, the lawfulness of the arrest or detention and its conditions can be more easily monitored and challenged.

In **Uganda**, the arrested or detained person has the right to request their next-of-kin to be informed "as soon as practicable" of the deprivation of liberty.[207] **Ugandan** legislation further requires that a relative be

204 See for instance UN, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 16.1; The Nelson Mandela Rules, Rule 68; RIG, Guidelines 20(a) and 24; The Luanda Guidelines, Guideline 4(f).

205 SPT, *Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden*, 10 September 2008, UN Doc. CAT/OP/SWE/1, para. 50.

206 Being held incommunicado has been recognised as a form of torture by the UNHRC pursuant to Article 7 of the ICCPR as well as by the ACHPR. See High Court of Uganda, *Agaba v. Attorney General*, 20 December 2019 (Uganda) and the citations therein.

207 Constitution of Uganda, 1995, Art. 23(5).

informed of the detention and allowed access to the person within 72 hours if under a state of emergency.[208] The law in **Kenya** recognises the right of the detainee to inform family members of the arrest and detention and place of detention and guarantees not only the right to communicate with a third party upon the first instance of detention, but also upon any transfer from one detention facility to another.[209] In **Nigeria**, **Ghana** and **The Gambia** notification is the responsibility of the police.[210]

Although all jurisdictions examined have adopted provisions related to this safeguard, these are at times subjected to limiting circumstances that may contravene international and regional standards.[211] In **The Gambia**, **Ghana** and **South Africa,** relatives must only be informed of the arrest if the person was detained under emergency powers, with the exception of arrests of a juvenile in **Ghana**, in which case parents, guardians or close relatives must always be informed regardless of emergency powers. [212] In **Sudan** an arrested person's right to inform a third party is subject to the approval of the Prosecution Attorney or court,[213] and the requirement of permission constitutes a barrier to the effective implementation of this important safeguard.

The law in Kenya, Nigeria and Zimbabwe.

In prisons and other places of detention, it is not always easy to communicate with the outside world, not least due to the potential financial costs involved. In order to ensure that the safeguard of notification of third parties is respected, the law in **Kenya** commands that any communication pursuant to this right must be facilitated by authorities free of charge.[214] **Nigeria** and **Zimbabwe** similarly stipulate that notification of the relatives is to be done at no cost of the suspect.[215]

In practice, compliance with this safeguard has been challenging in some of the reviewed States, as there have been complaints by prisoners that they have not been allowed to communicate with family or embassies,[216] at times as a form of punishment.[217] Consequently, unaware of the detention, families are unable to challenge the detention or treatment of the individual, thus increasing the individual's vulnerability to incommunicado detention, torture, other ill-treatment and other human rights violations.[218]

208 Ibid, Art. 47(b).

209 Persons Deprived of Liberty Act No. 23 of 2014, s 8 (Kenya) and National Police Service Act No. 11A of 2011, Fifth Schedule [Section 59(2)] (Kenya)

210 Administration of Criminal Justice Act 2015, s 6 and Nigeria Police Act (2020), s 35(3) (Nigeria); Constitution of Ghana, Art. 32.

211 Constitution of Zimbabwe, Arts. 50(1) and (5); Constitution of Uganda, Art. 23(5); Constitution of South Africa, Arts. 35(2)(f) and 37(6); National Police Service Act 2011, s 59(2) (Kenya); Persons Deprived of Liberty Act 2014, s 7 (Kenya).

212 Constitution of The Gambia, Art. 36; Constitution of South Africa 1996, Art. 37(6); Juvenile Justice Act, 2003 (Act 653), s 11 (Ghana).

213 Criminal Procedure Act 1991, s 83(5) (Sudan).

214 Persons Deprived of Liberty Act No. 23 of 2014, s 8 (Kenya) and National Police Service Act No. 11A of 2011, Fifth Schedule [Section 59(2)] (Kenya).

215 Administration of Criminal Justice Act 2015, s 6 (Nigeria); Nigeria Police Act 2020, s 35(3) (Nigeria); Constitution of Zimbabwe, Art. 50 (1) (b) (i); Criminal Procedure and Evidence Act [Chapter 9:07], 1927, s 41A (1) (d) (Zimbabwe).

216 ACHPR, *Report of the Human Rights Promotion Mission to the Republic of The Gambia, 19-24 April 2017*, 2017.

217 Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, 2016, p. 349-50 (South Africa).

218 REDRESS and ACJPS, *A way forward?*, p.38; REDRESS and PLACE, *Submission for the UPR of Sudan*.

CASE STUDY

UGANDA

The High Court has taken a strong stance in protecting the right to notify a family member or third party upon arrest, having ruled that "holding an individual without permitting him or her to have contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned".[219]

PROPOSALS FOR STATES

- Amend legislation and regulatory rules to provide for the right to notify family members or a third party as soon as possible after arrest and within a specific timeframe.
- Ensure police stations and detention facilities are provided with appropriate means for arrested and detained individuals to communicate with family members or a third party in confidence, via telephone or in person.
- Notification of arrest or detention made by someone other than the concerned individual – such as the police or prison officers – should only be done on request of the arrestee/detainee and they should then be informed that such notification was made to the indicated family member or third party and what additional information was provided.
- Any restriction to the exercise of the right to notification should be strictly justified and limited in time, and subject to supervisory oversight and judicial review.

f. Judicial oversight

According to international standards, an individual whose liberty is deprived must be brought promptly before a competent judicial authority.[220] Judges review the lawfulness of detention and order the release of the detained person if unlawful or arbitrary, as well as can hear allegations of torture or other ill-treatment and consider whether there are any visible signs of torture or other ill-treatment, and any allegations that may be brought by the detainee, including to order an independent forensic medical evaluation.[221] The HRC interprets the term "promptly" as within

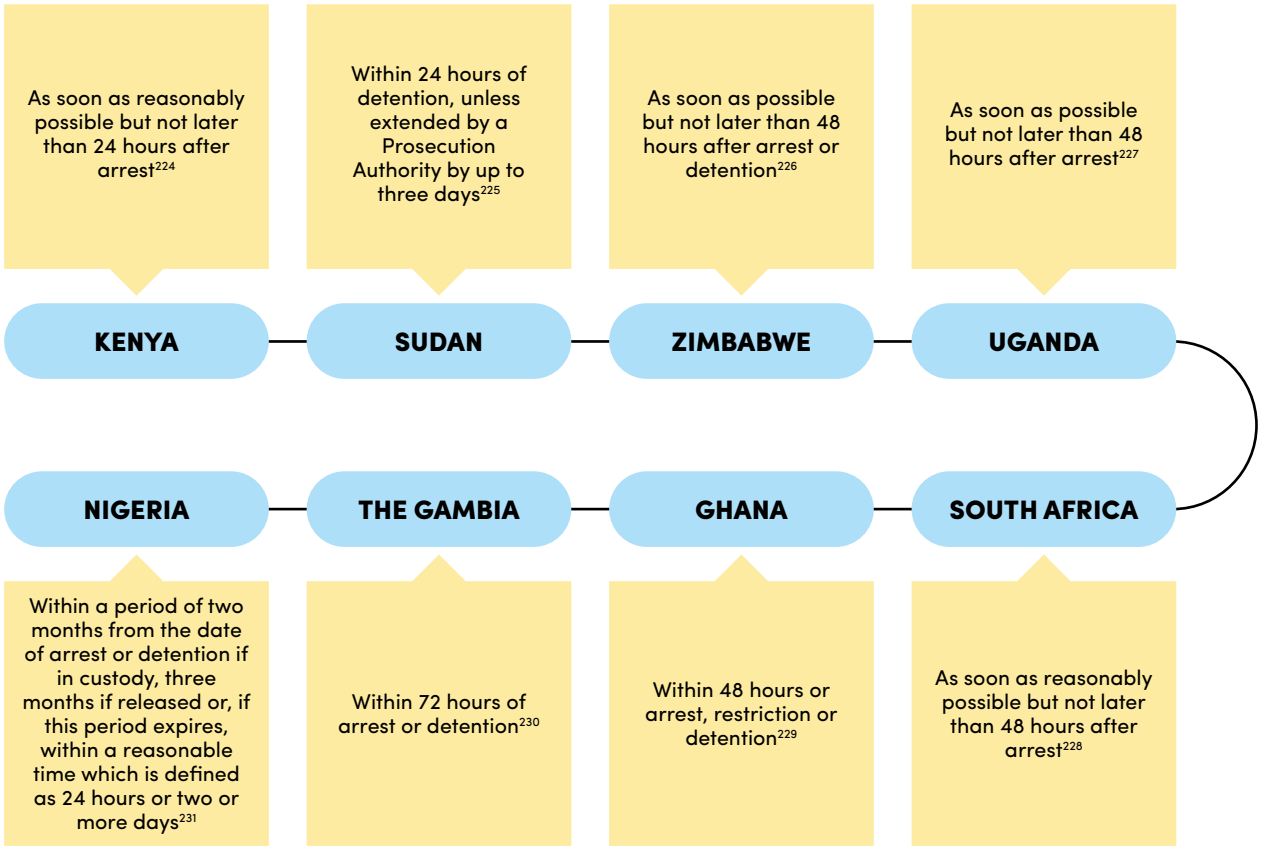
219 See High Court of Uganda, *Agaba v. Attorney General* [citing ACHPR's Communications 48/90, 50/91, 52/91 and 89/93], 20 December 2019 (Uganda).

220 See for example ICCPR, Art. 9.3 and RIG, Art. 27.

221 CTI, *UNCAT Implementation Tool 2/2017*, 2017, p. 8.

48 hours, having noted that any delay "must remain absolutely exceptional and be justified". This is because detention longer than 48 hours without judicial oversight unnecessarily increases the risk of ill-treatment and torture,[222] which is known to be higher during the first hours after arrest and during the initial period of detention.

Laws in all jurisdictions examined require that detainees or arrestees are brought before the court within varying time limits:[223]



222 HRC, *General Comment No. 35 on Article 9 of the ICCPR (Liberty and security of person)* **(General Comment No. 35)**, 16 December 2014, UN Doc. CCPR/C/GC/35.

223 Constitution of Zimbabwe, Art. 50(2); Constitution of Uganda, Art. 23; Police Act 1994, s 25(1) (Uganda); Constitution of The Gambia, Art. 19(3); Criminal Procedure Act 1991, s 79 (Sudan); Constitution of South Africa, Art. 35; Constitution of Nigeria, Art. 35(4); Constitution of Kenya, Art. 49(1)(f); Constitution of Ghana, Art. 14(3).

224 Constitution of Kenya, Art. 49(1)(f).

225 Criminal Procedure Act 1991, s 79 (Sudan).

226 Constitution of Zimbabwe, Art. 50(2).

227 Constitution of Uganda, Art. 23; Police Act 1994, s 25(1) (Uganda).

228 Constitution of South Africa 1996, Art. 35.

229 Constitution of Ghana 1992, Art. 14(3).

230 Constitution of The Gambia, Art. 19(3).

231 Constitution of Nigeria, Art. 35(4).

Provisions which exceed the 48-hour limit are not in full compliance with international standards and amendment would strengthen prevention of torture and other ill-treatment.[232] Moreover, legal provisions do not always translate into practice. For instance, in **South Africa**, there have been allegations of officers abusing the 48 hour rule through arbitrary arrests, or even completely preventing judicial oversight, including at instances where the practice of torture or other ill-treatment was identified. [233] The **Uganda** Human Rights Commission registered 323 complaints relating to detention beyond 48 hours,[234] but notably this seems to have been often the result of (i) inadequate human and financial resources; (ii) individuals being arrested before investigations have been undertaken; (iii) lack of sufficient evidence; and (iv) lack of judicial officers, rather than unwillingness to comply.[235]

PROPOSALS FOR STATES

- Amend legislation and regulatory rules to require individuals be brought before a judge promptly after arrest, and at most within 48 hours thereafter.
- Sensitise judges and prosecutors to torture prevention, particularly on its incidence during the initial period of detention, including to encourage them to regularly enquiry how detainees have been treated when they are brought before the court and to investigate when allegations of torture are made.

2.2 INVESTIGATIVE INTERVIEWING

Article 11 of UNCAT requires States to ensure that rules, practices, instructions and methods governing questioning and interview procedures are systematically reviewed with a view to preventing cases of torture. This is particularly relevant given the increased risk of torture and other ill-treatment being inflicted during police questioning.[236] Hence, certain rights and rules must be observed when interviewing suspects, witnesses and victims. For instance, when conducting interviews, officers must not resort to any type of physical force nor undue direct or indirect psychological pressure to induce confessions or obtain information about the case under investigation. In this sense, the presence of lawyers during questioning represents a key safeguard against coercive or otherwise abusive interrogation techniques in addition to an individual's right to remain silent. States are also encouraged to keep records of the time and place of questioning,

232 REDRESS and ACJPS, *A way forward?*, p.36.

233 Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, 2016, p. 349.

234 UHRC, *2018 Human Rights Report*, 2018.

235 *Ibid*.

236 UNGA, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (**Interim report of the SRT**), 5 August 2016, UN Doc. A/71/298, paras. 9, 10, 17, and 19.

along with the names of those present, provide for the audio and video recording of interviews,[237] establish clear procedural rules that envisage time limits, rest and physiological breaks, as well as inform the person being interviewed of their rights. Legal provisions can be supplemented by State procedures, regulations and guidelines, and training of law enforcement officials to foster adherence to international human rights standards and a safe environment during interviewing.

The Principles on Effective Interviewing for Investigations and Information Gathering (the Méndez Principles) were drafted in response to former SRT Juan E. Méndez's interim report to the UNGA in 2016, which advocated for the development of a universal protocol identifying a set of standards on non-coercive interviewing methods and procedural safeguards to be applied at a minimum to all interviews by law enforcement officials, military and intelligence personnel and other bodies with investigative mandates.[238] The Méndez Principles provide concrete guidance to the authorities on how to conduct rapport-based, non-coercive investigative interviewing and the additional safeguards that need to be in place in order to guarantee the fairness of criminal investigations and prevent torture or other ill-treatment. Together with the implementation of the above-referred key legal and procedural safeguards before, during and after the interview process, they aim at increasing the effectiveness of investigations and the reliability and evidentiary value of the information obtained, while respecting the rights of interviewed persons and preventing torture and other ill-treatment.[239] When correctly applied, such investigative interviewing techniques can increase the prospects of obtaining relevant and credible evidence from the suspect, thus improving the quality and fairness of investigations and judicial proceedings.

In line with some of these standards, **Nigerian** legislation requires that any confessional statement be video-recorded, if possible, or recorded in writing, and that a statement is "taken in the presence of a legal practitioner of his [the interviewee's] choice, or where he has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a Civil Society Organization or a Justice of the Peace or any other person of his choice".[240]

Case study: Nigeria.

In 2021, the UN Office on Drugs and Crime (UNODC) started the development of a training course based on the Méndez Principles, with Nigeria agreeing to be the first country where this course will be piloted. [241] The course will be a customised training tool on investigative interviewing and the prevention of torture and other ill-treatment.

237 RIG, Guideline 28; Luanda Guidelines, Guideline 9(g).

238 UNGA, *Interim report of the SRT*, 5 August 2016, UN Doc. A/71/298, paras. 9, 10, 17, and 19.

239 See Principles on Effective Interviewing for Investigations and Information Gathering (Mendez Protocol), 2017.

240 See Administration of Criminal Justice Act, 2015, ss 15(4) and 17(1) (Nigeria); Police Act, 2020, ss 60(2) and (3) (Nigeria).

241 United Nations Office on Drugs and Crime (UNODC), *Supporting the Victims of Torture*, 26 June 2021.

Similarly, **Ugandan** police officers have been introduced to investigative interviewing using the PEACE method.[242] **Uganda** is also taking steps to move to the audio and video recording of interviews of victims of violence and trauma.[243] In **Kenya**, witness statements must be recorded in writing and signed by interviewees after they have been read out to them in a language they understand, with the option to make any correction they wish.[244] Where an accused person wishes to make a confession, they can choose their preferred language of communication, receive free interpretation if needed and be informed of their right to have legal representation of their own choice.[245] The Evidence Rules on Out of Court Confessions provide that the recording officer *may* record the confession on electronic media, albeit not mandatory, and must certify that the accused person has not been subjected to any form of coercion, duress, threat, torture or any other form of ill-treatment.[246] Additionally, **Kenya**'s and **Uganda**'s anti-torture Acts consider that "prolonged interrogation of a victim so as to deny the victim normal length of sleep or rest" amounts to mental or psychological torture.[247]

In **South Africa**, detailed instructions for interviewing persons in custody are included in a National Instruction. For example, suspects are entitled to at least eight hours of complete uninterrupted rest during every period of 24 hours while in custody, ten minutes breaks every two hours of interview and a reasonable opportunity to enjoy meals without being interviewed. Suspects who wish to confess must be once again informed of their right to consult a legal practitioner and must be medically examined before and after making the confession. It is further specified that if a system of electronic recording of interviews is available, the system must be used.[248]

PROPOSALS FOR STATES

- Consider introducing national legislation and policies to incorporate the Méndez Principles.
- Strengthen efforts to make the audio and video recording of all interviews a standard procedure, and provide for these to be adequately secured for use in judicial proceedings. If audio and video recording technology is not available, using other recording device such as a dictaphone could be considered as an alternative.

242 Penal Reform International (PRI), *Working with police, magistrates, and lawyers to promote fairer criminal investigations and trials in Uganda*, 19 February 2020.

243 Through a pilot project designed by International Justice Mission (IJM) on trauma-informed police interviewing, a Kampala prison created a dedicated interview space designed to help women and children survivors of violence feel more comfortable. The project includes use of technology such as mobile audio-video equipment capable of producing tamper-proof recordings which are simultaneously recorded on multiple CDs. IJM has committed to training law enforcement personnel in using this equipment and will expand their use throughout Uganda should the pilot prove successful.

244 National Police Service Act No. 11A of 2011, s 52 (Kenya).

245 Evidence (Out of Court Confessions) Rules, 2009, s 4 (Kenya).

246 Evidence (Out of Court Confessions) Rules, 2009, ss 6(1), 4(1)(c) and 14 (Kenya).

247 PTA, Schedule (Kenya); PPTA, Second Schedule (Uganda).

248 National Instruction 6 of 2014, ss 5(3), 5(5), and 8 (South Africa).

- Take steps to secure sufficient financial resources for technology to support innovative investigative techniques (e.g. electronical recording), as well as other measures that safeguard persons deprived of liberty which were addressed herein, capable of reducing the risk of torture and ill-treatment.

- Provide adequate and regular training to law enforcement officials on effective investigative and interviewing techniques and, more broadly to law enforcement officials, prosecutors and judges on procedural and legal safeguards for persons deprived of liberty in line with international and regional human rights standards. An evaluation of such training programmes is advisable to measure their impact and the progress made.

- Encourage stakeholders acting in the criminal justice system to move away from accusatory, coercive and confession-oriented proceedings towards rapport-based interviewing. This can be done, for example, through the enactment of legislation, regulations or guidelines to eliminate convictions based solely on confessions as the primary source of evidence, as well as through the aforementioned training initiatives.

- Implement internal and external independent monitoring mechanisms to systematically assess compliance by public officials with legal and procedural safeguards against torture and other ill-treatment and impose sanctions to officials who fail to comply with them.

2.3 INDEPENDENT EXTERNAL MONITORING MECHANISMS

Systematic and regular monitoring of all places of detention is a crucial safeguard to protect the rights of persons deprived of their liberty due to the inherent vulnerability and power imbalance associated with places of detention, including their right to be free from torture and other ill-treatment.[249] Through collaboration between various bodies, independent monitoring provides for the adoption and maintenance of relevant standards, encourages compliance with these, and increases accountability by promoting transparency and providing "mutually reinforcing means of prevention".[250] Monitoring of places of detention is required to assess compliance with legal and procedural safeguards and to examine material conditions of detention, regime and activities and access to services and facilities, as well as the treatment of persons deprived of their liberty, with special attention to vulnerable groups.[251]

249 OPCAT, Art. 4.

250 SPT, *The approach of the SPT to prevention of torture*, 30 December 2010, CAT/OP/12/6, para. 5(h).

251 Ibid., paras. 5(c), (d), (h), (j). See also OPCAT, Art. 19(a); APT, *Monitoring places of detention – A practical guide*, 2004.

Under OPCAT, States shall establish a system of independent monitoring and inspection of all places of detention through National Preventive Mechanisms (NPMs), in the form of national visiting bodies, which play a fundamental role in preventing torture and other ill-treatment.[252] In compliance with OPCAT, such mechanisms should: (1) be fully independent; (2) receive adequate resources for effective functioning; (3) have the ability to regularly examine all places in which persons are detained and make recommendations to improve their treatment where necessary; (4) have access to all information regarding detained persons, their treatment and conditions of detention, and access to all places of detention as well as the opportunity to have private interviews with them without witnesses; and (5) make annual reports of their operations available to the public.[253]

Of the reviewed States, **Ghana**, **Nigeria** and **South Africa** have ratified OPCAT, while **Uganda** seems to have initiated the process for ratification, as recently reported in advance to its UPR.[254] The Commission on Human Rights and Administrative Justice in **Ghana** conducts monitoring visits to prisons as part of its mandate to promote human rights and it has been recommended that it be specifically designated as an independent monitoring mechanism and provided with sufficient resources to carry out this mandate.[255]

Nigeria and **South Africa** have well-established independent monitoring mechanisms. In **Nigeria**, the National Committee on Torture (NCAT), established in 2009 as its NPM, is mandated to examine and investigate allegations of torture from individuals, civil society organisations and government institutions and visit places of detention, as well as to systematically review rules and practice on questioning and treatment of suspects including developing a National Anti-Torture Policy.[256] Through visits, it has noted reductions in the number of allegations of torture and appealed for more funds to support prisons and the Committee's oversight activities.[257] It has also organised public tribunals (allowing victims to state their case in an open forum) on police abuse and workshops that raise awareness of the absolute prohibition of torture, particularly amongst lawyers and law enforcement officers.[258] Reports have noted challenges with the functioning of NCAT, including a lack of independence, resources, and inadequate recording of visits.[259] The government of **Nigeria** has acknowledged a need for reform, and recently committed to restructure NCAT to "make it more independent and responsive".[260] NGOs have also noted that "access to most detention facilities in Nigeria is still a big challenge, making monitoring of their activities practically impossible."[261]

252 OPCAT, Art. 3.

253 OPCAT, PART IV.

254 UNHRC, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – Uganda* (**UPR: National report of Uganda**), 9 November 2021, A/HRC/WG.6/40/UGA/1, para. 18.

255 UNHRC, *Report of the SRT on Mission to Ghana*, paras. 37, 38.

256 Federal Ministry of Justice (Nigeria), *Mandate of the National Committee on Torture*, 2 March 2010, p.1.

257 National Committee Against Torture (Nigeria), *4th Quarterly Report of the National Committee Against Torture (NCAT) for the period ending 31st December, 2014 to the UN Subcommittee Against Torture in Geneva, Switzerland*, 2014, p. 16.

258 REDRESS, UNODC, Legal Resources Consortium, *Technical Commentary on the Anti-Torture Framework in Nigeria*, February 2017.

259 PRAWA and IRCT, *UPR Briefing Note: Nigeria*, 2018, p. 2; AI, *Time to End Impunity*, June 2020, p. 6.

260 OHCHR, *In Initial Dialogue with Nigeria, Experts of CAT Ask about the Fight against Terrorism, and Conditions of Detention*, 17 November 2021.

261 PRAWA and IRCT, *UPR Briefing Note: Nigeria*, p.3.

South Africa has opted for a multi-stakeholder body as its designated NPM, coordinated by the South African Human Rights Commission.[262] The Judicial Inspectorate for Correctional Services (JICS) is responsible for inspecting prisons to report on the treatment of prisoners and on conditions of detention. As part of JICS, Independent Correctional Centre Visitors (ICCVs) regularly visit prisons (including conducting unannounced visits) and interview prisoners in private. They are also given access to all parts of a prison and to all relevant documents, and attempt to resolve complaints directly with the Head of Correctional Centre (HCC).[263] Other bodies include the Independent Police Investigative Directorate (IPID), the Military and Health Ombuds, and other health-related boards.[264] CAT has commended these efforts and further recommended that these bodies be adequately resourced, independent and, importantly, carry out visits to places of detention other than prisons.[265]

The Luanda Guidelines require States to allow access to detainees and places of detention to independent monitoring bodies, neutral independent humanitarian organisations authorised to visit, lawyers and legal service providers, and others such as judicial authorities and National Human Rights Institutions. Detained persons should also be permitted to communicate with visitors freely and in full confidentiality.[266] The reviewed States that have not ratified OPCAT have, nonetheless, put in place independent mechanisms, some with monitoring functions and often through the form of National Human Rights Commissions:

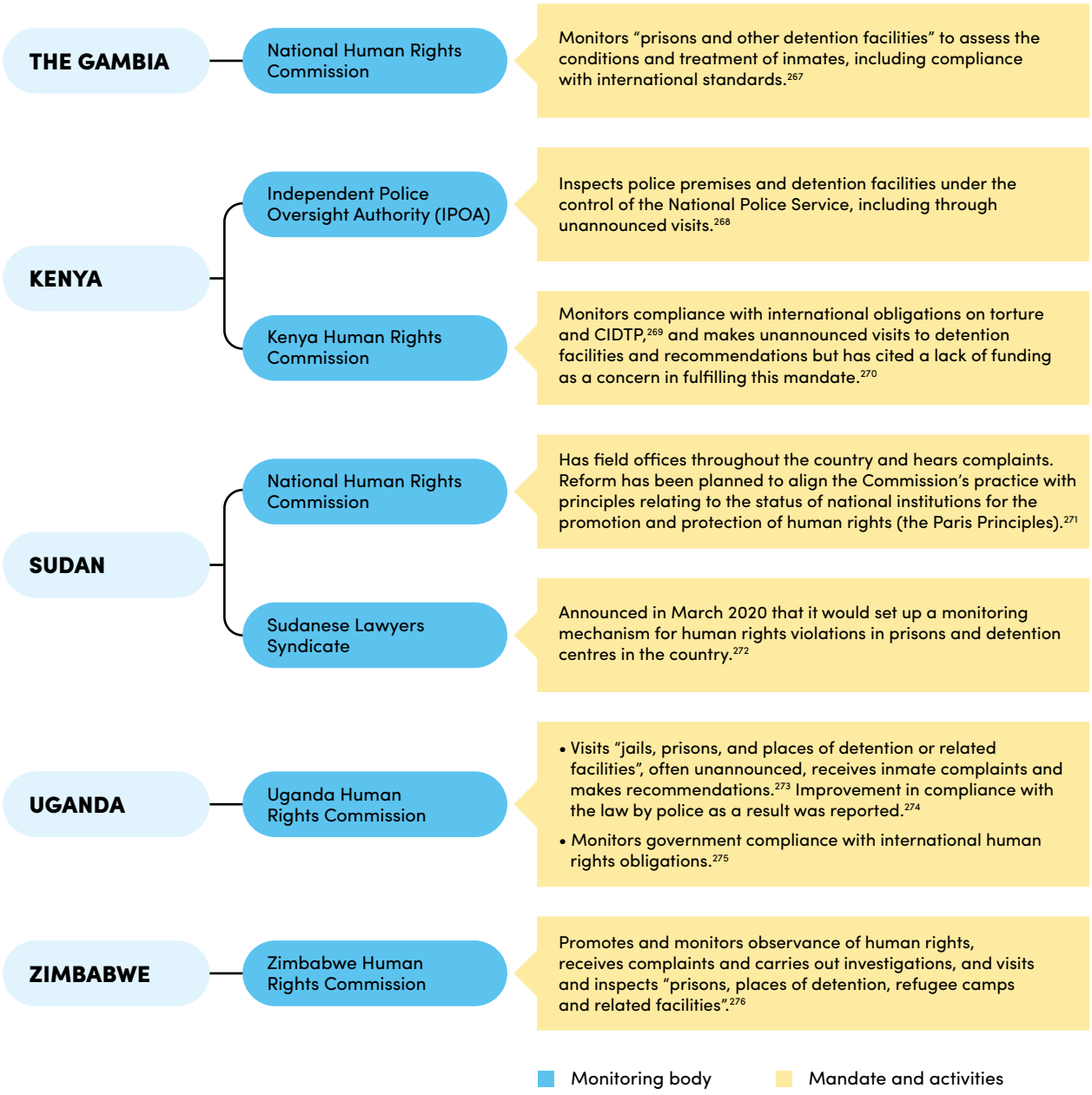
262 South African Permanent Mission Geneva, *Correspondence to OHCHR-SPT*, Ref. 131/2020, 25 August 2020.

263 REDRESS, *Legal Frameworks to Prevent Torture in Africa*; See Correctional Services Act No. 111 of 1998, ss 85 and 93 (South Africa).

264 South African Permanent Mission Geneva, *Correspondence to OHCHR-SPT*.

265 CAT, *Second report of South Africa: Concluding observations*.

266 *Luanda Guidelines*, Art. 42.



267 GMNHRC.

268 National Police Service Act (Kenya); Independent Police Oversight Authority Act, s 11(Kenya).

269 PTA, Art. 12(1)(d) (Kenya).

270 CAT, *Third periodic report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017*, 26 December 2018, UN Doc CAT/C/KEN/3; KNCHR, *Report to the Committee Against Torture on the Review of Kenya's Third Periodic Report on the Implementation of the Provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and/or Punishment*, February 2020.

271 UNHRC, *Report of the Independent Expert on the situation of human rights in the Sudan*, 30 July 2020, UN Doc A/HRC/45/53, para. 43; UNHRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan* **(Report of the OHCHR on Sudan)**, 27 July 2021, UN Doc A/HRC/48/46, para. 22.

272 Dabanga, *Sudan Lawyers to Monitor Human Rights Violations in Prisons*, 9 March 2020.

273 Constitution of Uganda, Art. 52.1(b). This was also suggested by research by REDRESS, including interviews with stakeholders in the region. See also UNHRC, *UPR: National report of Uganda*, 9 November 2021, A/HRC/WG.6/40/UGA/1, para. 74.

274 Parliament of Uganda, *Report on the Alleged Torture in Ungazetted Detention Centres in the Country*, November 2019.

275 Constitution of Uganda, Art. 52.1(h).

276 Constitution of Zimbabwe, Art. 243, s 243; *Zimbabwe Human Rights Commission* (**ZHRC**).

Additionally, monitoring by NGOs can be a useful way of increasing transparency and accountability.[277] In **Ghana,** some national NGOs have a limited monitoring and reporting role, subject to resources.[278] In **Uganda**, the African Centre for Treatment and Rehabilitation of Torture Victims has previously been permitted to conduct prison visits,[279] though visits were restricted during the COVID-19 pandemic.[280] Independent NGOs have also been permitted to monitor prisons in **South Africa**, including the International Committee of the Red Cross.[281] **The Gambia** granted unlimited access to prisons and detention centres to the ACHPR for the first time in 2017, and has also granted such access to UN bodies.[282] Where State-sanctioned independent bodies do not exist or are ineffective, this work by NGOs and other actors is crucial to improving public access to information about places of detention, though more frequent unrestricted access is necessary to allow for this to be done effectively.

PROPOSALS FOR STATES

- Ratify OPCAT and establish a National Preventive Mechanism (NPM) in accordance with the provisions therein.
- Strengthen efforts to allow designated independent monitoring bodies, such as NPMs, National Human Rights Institutions (NHRIs) and Ombudsperson institutions unlimited access to all places of detention (including police cells, prisons, psychiatric institutions, juvenile and immigration detention centres and any other detention facilities places where persons may be deprived of their liberty), through unannounced visits and allow monitors to meet in private with persons deprived of their liberty.
- Ensure that NPMs or other independent monitoring bodies such as Ombudspersons or national human rights institutions are adequately funded, allowing them to operate effectively and independently.
- Undertake efforts to strengthen cooperation with and support to non-governmental organisations that undertake monitoring activities.
- Ensure that all reports on places of detention, produced by independent monitoring mechanisms including NPMs, be made available and easily accessible to the public in accordance with OPCAT, and that their recommendations are implemented by all actors concerned.

277 See APT and Organization for Security and Co-operation in Europe (Office for Democratic Institutions and Human Rights), *Monitoring places of detention: a practical guide for NGOs*, December 2002.

278 UNHRC, *Report of the SRT on Mission to Ghana*, paras. 37, 38.

279 ACTV, *Annual Report 2019*, pp. 9, 15.

280 NilePost, *Uganda Prisons suspends visits to inmates over coronavirus*, 21 March 2020.

281 U.S. Department of State, *2020 Human Rights Report – South Africa*, 2020.

282 ACHPR, *The Gambia: 2nd Periodic Report*, 3 September 2018, p. 32.

3. EXCLUSIONARY RULE

The non-admission of torture-tainted evidence (known as the "exclusionary rule") requires that confessions and other evidence obtained by torture be inadmissible in legal proceedings, except against a person accused of such treatment as evidence that the statement was made under torture (Article 15 of UNCAT). The ACHPR's Principles and Guidelines on the Right to a Fair Trial also call on prosecutors to reject any evidence they know or believe to have been obtained through unlawful means, including torture or other ill-treatment.[283] The burden of proof should shift to the prosecution, while "the applicant is only required to demonstrate that his or her allegations are well founded, thus that there are plausible reasons to believe that there is a real risk of torture or ill-treatment."[284]

The exclusionary rule also applies to derivative evidence.[285] Under the doctrine of the 'fruit of the poisonous tree', if the first evidence ('tree') is tainted, so will be the derivative evidence ('fruit'). As such, if a confession or statement obtained through torture or other ill-treatment leads, directly or indirectly, to other (derivative) evidence, including for example the identification of other witnesses or the location of physical evidence, these should all be excluded.

The exclusion of evidence obtained by torture and other ill-treatment serves as an important safeguard against torture, including by disincentivising what is identified by former SRT as one of the most frequent purposes of such violation: to extract a confession.[286] The inadmissibility of such evidence may thus further discourage this practice. It also safeguards rights relating to due process and guarantees the fairness of judicial proceedings, contributing to the effectiveness, integrity and public reliability of criminal justice systems by ensuring court proceedings are based on reliable evidence, preventing miscarriages of justice and strengthening the rule of law-based institutions.[287]

283 ACHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principles F(l), N(6)(d)(i), N(6)(g).

284 See e.g., UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 10 April 2014, UN Doc. A/HRC/25/60, para. 33.

285 ACHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principles F(l), N(6)(d)(i), N(6)(g); CAT, *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 19 of the Convention*, 18 July 2005, UN Doc. CAT/C/4/Rev.3, para. 24; Inter-American Court of Human Rights, *Teodoro Cabrera García and Rodolfo Montiel Flores v. Mexico*, Case No. 12, 449, 26 November 2010, para. 167; UNGA, *Resolution adopted by the General Assembly on 19 December 2017: 72/163. Torture and other cruel, inhuman or degrading treatment or punishment*, 19 January 2018, UN Doc. A/Res/72/163, para. 6; UN, *Guidelines on the Role of Prosecutors*, 1990, para. 16.

286 UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 25th Session* (**Report of the SRT Juan E. Méndez**), 10 April 2014, UN Doc. A/HRC/25/60, para. 17; UNHRC, *Report of SRT Manfred Nowak*, UN Doc. A/HRC/13/39.

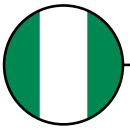
287 UNHRC, *Report of the SRT Juan E. Méndez*, UN Doc. A/HRC/25/60, para. 21

Almost all the States reviewed in this report have clear constitutional and/or statutory provisions making evidence obtained under inducement, threats or torture, inadmissible in judicial proceedings.[288] There is also evidence of judicial enforcement of such provisions in some jurisdictions studied, although, as demonstrated below, instances of non-compliance have been reported in a smaller number of States.[289] Particularly in relation to exclusion of derivative evidence, this research did not confirm that this approach is largely adopted by States (neither in law nor case law), with the exception of some cases in **South Africa**.[290]

SOUTH AFRICA

The inadmissibility of evidence obtained by torture is enshrined in the Constitution and has been explicitly upheld by the Supreme Court: "any evidence which is obtained as a result of torture must be excluded in any proceedings".[291]

NIGERIA



The Evidence Act provides for the inadmissibility of evidence that was or may have been obtained by oppression, which includes torture, inhuman or degrading treatment, as well as the use or threat of violence whether or not amounting to torture.[292]

UGANDA

The exclusionary rule is provided for in its anti-torture Act.[293]

KENYA

The exclusionary rule is provided for in its anti-torture Act, and the Constitution goes further to determine the exclusion of evidence obtained in violation of "any right or fundamental freedom in the Bill of Rights (...) if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice".[294]

GHANA

The Evidence Act 1975 regulates the admissibility of confessions and provides for its inadmissibility "against the accused unless the statement was made voluntarily".[295]

SUDAN

The Evidence Act 1994 stipulates that a confession is not valid if it "was the result of coercion or inducement".[296]

288 Only The Gambia does not include such a provision.

289 See, for example, in relation to Ghana: UNHRC, *Follow up report of the SRT on visit to Ghana*, 25 February 2015, UN Doc. A/HRC/31/57/Add.2, and UNHRC, *Report of the SRT on Mission to Ghana*. And in relation to Sudan: REDRESS, *Legal Framework to Prevent Torture in Africa*.

290 South African Supreme Court of Appeal, *S v. Mthembu*, 10 April 2008, para. 34-36 (South Africa).

291 Ibid, para. 1 (South Africa).

292 Evidence Act, 2011, s 29(2) and (5)(Nigeria).

293 PPTA, ss 14 and 15 (Uganda).

294 PTAA, s 9 (Kenya); Constitution of Kenya, Art. 50(4). See also High Court of Kenya at Nairobi, *EG & 7 Others v. Attorney General*, 24 May 2019.

295 The Evidence Act 1975 (N.R.C.D. 323), s 120 (Ghana).

296 Evidence Act 1994, s 20(2) (Sudan).

CASE STUDIES

NIGERIA	***Philip v State (2019).*** In this case, the Court ruled that oppression as provided for by the Evidence Act includes, "torture, inhuman or degrading treatment and the use or threat of violence, whether or not amounting to torture". Also, in terms of the procedure followed to assess the legality of confessions, the Court registered that "where it is alleged that the confessional statement of an accused person was obtained as a result of torture, intimidation or any of the circumstances enumerated in section 29(2), (a) of the Evidence Act, the court must conduct a trial-within-trial (or mini-trial) to determine the voluntariness of the statement."[293]
KENYA	***Republic v Elly Waga Omondi.*** This case concerns the exclusion as evidence of a confession made by the accused person under threat and torture. The High Court ruled the confession inadmissible, having noted that "all that the accused needs to do is to raise doubts in the court's mind about the voluntariness of such a statement", thus placing the burden of proof related to the voluntariness of a retracted statement fully on the prosecution.[294]

In practice, these provisions are not always observed, and there are reports of confessions obtained by torture having been admitted in criminal proceedings in some of the researched States.[299] In **Sudan**, the law allows for this where such confessions are corroborated by other evidence, a concern voiced by the HRC.[300] Judges' reluctance to consider allegations of torture is also a concern,[301] highlighting the need for additional training of judicial actors.

297 *Philip v. The State* [2019] 13 NWLR 509 (Pt 1690), p.535 (Nigeria). See also Supreme Court of Nigeria, *Iregu Ejima Hassan v. The State* [2016] LPELR-42554(SC), 16 December 2016, paras. 29-31 (Nigeria).

298 High Court of Kenya at Nairobi, *Republic v. Elly Waga Omondi,* 11 May 2015.

299 For example in Sudan, Ghana and Nigeria: REDRESS and ACJPS, *A way forward?*, p. 40; REDRESS, *National and International Remedies for Torture*, March 2005; UNHRC, *Follow up report of the SRT on visit to Ghana*, para 28; AI, *'You have Signed your Death Warrant': Torture and Other Ill Treatment by Nigeria's Special Anti-Robbery Squad (SARS)*, 2016, p. 6.

300 HRC, *5th report of Sudan: Concluding Observations*.

301 See REDRESS and ACJPS, *A way forward?,* p. 40; Constitutional Court, *Nasif BE Ahmed, Torture in Sudan 1989-2016 (New Horizons Research Centre 2017) 127; Paul John Kaw and others v. (1) Ministry of Justice; (2) Next of kin of Elreashhed Mudawee*, Case No MD/ QD/51/2008, Judgment of 13 October 2009 (Sudan); UNHRC, *Follow up report of the SRT on visit to Ghana*, para. 28; CAT, *Second report of South Africa: Concluding observations*, para. 24.

PROPOSALS FOR STATES

- Review existing laws and reform judges' rules to introduce relevant legislative provisions requiring the exclusion or non-admission of evidence obtained by torture or other forms of ill-treatment, including derivative evidence obtained as a result.
- Provide adequate training to judges, prosecutors and investigators on the exclusionary rule and fair trial rights.
- Review and amend legislation to shift the burden of proof to the prosecution when there is a plausible reason that evidence may have been obtained by torture or other ill-treatment.
- Ensure judges are fully independent from the executive and legislative branches of Government and are able to exercise their functions with impartiality, including to rule on the inadmissibility of torture-tainted evidence.
- Judges and prosecutors should be encouraged to consider allegations of torture and ill-treatment at any stage of the proceedings and are required to launch *ex officio* investigations in line with Article 12 of UNCAT where there are reasonable grounds to suspect torture or other ill-treatment has occurred.

4. PROHIBITION OF *REFOULEMENT*

Article 3 of UNCAT prohibits States from deporting, extraditing, expelling or otherwise transferring persons to countries where there is a real risk that they may be exposed to torture. The prohibition of refoulement in UNCAT is absolute and not subject to exception.[302] Pursuant to CAT's General Comment No. 4, the initial burden of proof rests on the individual making a complaint to "submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real."[303] Nevertheless, the burden of proof is reversed "when complainants are in a situation where they cannot elaborate on their case, such as when they have demonstrated that they have no possibility of obtaining documentation relating to their allegation of torture or have been deprived of their liberty".[304] In such instances, CAT has clarified that "the State party concerned must investigate the allegations and verify the information on which the communication is based".[305] Diplomatic assurances are often used in this regard, as a formal commitment by the receiving State that the person will be treated in accordance with international human rights standards, but they should not be used as a loophole to undermine the principle of non-refoulment and should be subject to risk assessments in line with such principle.[306]

Of the States covered in this report, **South Africa**,[307] **Kenya**,[308] **Uganda**,[309] and **Zimbabwe**[310] have incorporated the prohibition of *refoulement* into their legal systems in compliance with UNCAT.

302 See for instance, European Court of Human Rights (ECtHR), *Chahal v. United Kingdom*, Judgment, Application. No. 22414/93, 15 November 1996. See also, RIG, Guideline 15, which provide that "[S]tates should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture".

303 CAT, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* (**General Comment No. 4**), 4 September 2018, UN Doc CAT/C/GC/4, para. 38.

304 *Ibid*. See also CAT, *A.S. v. Sweden*, 15 February 2001, UN Doc. CAT/C/25/D/149/1999, para. 8.6,

305 CAT, *General Comment No. 4,* para. 38.

306 *Ibid,*paras. 19 and 20.

307 CAT, *Second periodic report submitted by South Africa under article 19 of the Convention, due in 2009*, 2 November 2017, UN Doc. CAT/C/ZAF/2, paras. 114 and 115.

308 PTA, s 21 (Kenya).

309 PPTA, s 22 (Uganda).

310 Extradition Act, Chapter 9:08, s 14(2) (Zimbabwe).

CASE STUDY

SOUTH AFRICA

Abdi and Another v Minister of Home Affairs and Others. The appellants of this case were a recognised refugee and a registered asylum seeker who had fled their home country due to life endangering threat of violence and persecution, respectively. In deciding whether they should be prevented from deportation, the Supreme Court of Appeal found that they would face a real risk of suffering physical harm if they were forced to return to Somalia and that "it was obvious that no effective guarantee could be given to them against persecution or subjection to some form of torture, or cruel, inhuman and degrading treatment if they were to be compelled to re-enter Somalia."[311] After remarking that the concerned authorities in South Africa "had little regard to their fears for their safety should they be compelled to return to Somalia", the Court ruled that one appellant was entitled to remain in South Africa in accordance with his status as a refugee and so was the other appellant until a final decision had been made on his application for asylum.

Article 5 of the ECOWAS Convention on Extradition of 1994, to which **The Gambia**, **Ghana** and **Nigeria** are parties, also prohibits the extradition if the person whose extradition is requested "has been, or would be subjected to, torture or [CIDTP] in the requesting State or if that person has not received or would not receive the minimum guarantees in criminal proceedings".[312]

The prohibition of *refoulement* under UNCAT is absolute and applies to all persons.[313] However, **The Gambia**,[314] **Nigeria**[315] and **Sudan**,[316] have incorporated the prohibition of *refoulement* as contained in the 1951 Convention relating to the Status of Refugees (Refugee Convention),[317] thus limited to refugees. Similarly, **Ghana**'s prohibition of *refoulement* is limited to refugees and does not refer to torture, but rather to threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion.[318] The incorporation of the principle of *non-refoulement* as provided in the Refugee Convention can be problematic because, unlike in UNCAT, the prohibition therein is not absolute and may not be claimed "by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[319] A similar exception has been

311 Supreme Court of Appeal of South Africa, *Abdi v. Minister of Home Affairs*, 15 February 2011, para. 26 (South Africa).

312 ECOWAS, Convention A/P.1/8/94 on Extradition, Art. 5.

313 See RIG, Guideline 15, which provides that "[S]tates should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture"; See also OHCHR, *The principle of non-refoulement under international human rights law*.

314 Refugee Act No. 15 of 2008, s 27 (The Gambia).

315 National Commission for Refugees, Etc. Decree 1989(No. 52 of 1989) (Nigeria).

316 Asylum Regulation Act 2014, ss 13, 21, 22 and 28 (Sudan).

317 UN Convention relating to the Status of Refugees, 1951.

318 Refugee Law, 1992 (PNDCL 305D) (Ghana).

319 UN Convention Relating to the Status of Refugees, 1951, Art. 33(2).

incorporated in **Nigeria** and **Ghana**, whose domestic laws provide an exception to the principle of *non-refoulement* of individuals who may represent "a danger to the security" of the State or convicted of a "serious crime".[320] It must be acknowledged that refugees and migrants often face a higher risk of torture and other ill-treatment because of their insecure status.[321]

Other examples of non-compliance with the principle of non-refoulement suggest that the amendment of legislation and training on these standards with relevant stakeholders are needed. For example, a Turkish national accused of terrorism was allegedly deported from **Kenya** despite a court order prohibiting his deportation.[322] CAT had previously expressed concern over practices of returns of individuals on grounds of national security and terrorism in **Kenya**, although this was addressed by the introduction of its anti-torture Act and a provision therein on the absolute prohibition of *refoulement*.[323] Despite this, in 2021 the HRC expressed concern about reports of refoulement and other violations perpetrated by Kenyan officials in the context of counter-terrorism operations.[324]

In **Sudan**, in 2014, Eritrean nationals were among asylum seekers and refugees forced to return to their home countries. According to the UN High Commissioner for Refugees, they were given no access to standard asylum procedures to have their claims reviewed, and effectively amounted to refoulement in violation of both international and domestic standards.[325]

PROPOSALS FOR STATES

- Incorporate the prohibition of *refoulement* in national legislation (including extradition laws as well as treaties with other States), as provided for under Article 3 of UNCAT, with no exceptions, even in case of individuals who may pose a national security threat or have committed serious crimes.
- Take effective measures to ensure relevant stakeholders, such as government officials dealing with immigration procedures and members of the judiciary, are trained and duly implement the principle of non-*refoulement*.

320 National Commission for Refugees, Etc. Decree 1989 (No. 52 of 1989), s 1(2) (Nigeria); Refugee Law, 1992 (PNDCL 305D), s 1(2) (Ghana).

321 See Human Rights Centre, University of Minnesota, *Submission for the list of issues: Kenya, Rights of LGBTQI+ Citizens and Non-Citizens in Kenya*, 13 January 2020; SOAS and IRRI, *Sudan's compliance with its obligations under the International Covenant on Civil and Political Rights: Anti human trafficking initiatives, the rights of refugees and the human rights of migrants, 122nd session of the Human Rights Committee (2018)*, January 2018.

322 Human Rights Watch (HRW), *Kenya: Investigate Deportation of Turkish National*, 1 July 2021.

323 CAT, *Concluding observations: Kenya*, para. 17.

324 HRC, *Fourth report of Kenya: Concluding observations*.

325 United Nations High Commissioner for Refugees (UNHCR), *UNHCR Concerned Over Forced Returns of Refugee and Asylum-Seekers from Sudan*, 4 July 2014.

- Require relevant authorities to conduct a thorough and individualised assessment of the risk of being tortured or subjected to other forms of ill-treatment in the country of origin before making a decision regarding the deportation of individuals.

- Authorities shall refrain from the use of and reliance on diplomatic assurances. In case such assurances are received, authorities shall still carry out individualised risk assessments, and set up monitoring mechanisms to ensure compliance with the prohibition of *refoulment*.

- Ensure legislation allows for appeal to courts to challenge deportation or extradition decisions that may violate the principle of non-refoulement and make sure individuals are informed of their right to appeal.

5. COMPLAINTS AND INVESTIGATION MECHANISMS

The right to complain, followed by prompt and impartial investigations of human rights violations, including torture and CIDTP, are crucial steps towards accountability, redress and deterring future violations. Article 13 of UNCAT provides for the right of individuals alleging to have been subjected to torture to complain and requires States to promptly and impartially examine such complaints, while Article 12 commands that State 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". Both provisions are also meant to apply to acts of CIDTP under Article 16 of UNCAT. Independent complaints and investigation mechanisms play a vital role in enabling States to effectively fulfil these obligations. As RIG notes, States should "[e]nsure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment" and such complaints should be investigated promptly, impartially, and effectively. Such obligation to investigate has also been considered by the ACHPR to form part of States' procedural obligations to prevent torture and provide redress to the victims.[326]

Legal provisions providing for the right to complain should include information on how complaints should be registered by the receiver of the complaint, the exact mechanism for filing complaints, the duty to report, and the means of responding to complaints, including the requirement to notify the complainant of any outcome.[327] Investigations should seek to determine the nature and circumstances of any acts of torture or other ill-treatment with a view to holding perpetrators accountable and, importantly, they shall be undertaken by independent and qualified individuals, as expressed by the SRT.[328]

All the States reviewed in this report have, to some extent, procedures in place to receive and investigate complaints against public officials, (such as police officers, prison officials, and other security officers in

326 RIG, Guideline 17; ACHPR, *General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* (**General Comment No. 4**), March 2017, para. 25; See also ACHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan,* Comunication. No. 379/09 (2014), 10 March 2015.

327 See, e.g. Persons Deprived of Liberty Act No. 23 of 2014, s 27 (Kenya) and Correctional Services Act No. 111 of 1998, s 2 (South Africa).

328 UNHRC, *Report of SRT Nils Melzer*, UN Doc. A/HRC/46/26, para. 12.

detention facilities).[329] In addition, some of those reviewed have established special oversight mechanisms (such as NHRIs) which are mandated to receive and investigate allegations of human rights abuses including torture. How these mechanisms operate in practice, however, is not always clear, and improved implementation of international standards would further enhance the ability of States to respond to human rights violations, as demonstrated below.

In **Ghana**, for instance, numerous measures entitle prisoners and the public to make complaints against police officers for misconduct[330] and corresponding investigation units have been set up to deal with them accordingly.[331] Legislation in **Ghana** also mandates that prompt and impartial investigations be undertaken upon the reporting of human rights violations.[332] In **Kenya**[333] and in **South Africa**[334] several independent investigative bodies exist, including national human rights institutions. Importantly, **Kenya's** PTA provides for prompt investigations and requires the officer-in-charge of the police station to "immediately forward the complaint to the Directorate of Criminal Investigations".[335] This prevents complaints from being referred back to internal police mechanisms, which can affect independence.

In **Uganda**, the Uganda Human Rights Commission is responsible for receiving and investigating complaints and it operates independently.[336] In 2020, the body registered 308 complaints of torture by security officials and private individuals, which represented 49% of all human rights violations complaints it received that year.[337] Additionally, Human Rights Committees have been established as one of the primary monitoring, complaints and grievance procedures to strengthen transparency and accountability in prisons and places of custody, though "a number of [them] were not functional" in 2018.[338] Where they are operating, these committees receive training from the Uganda Human Rights Commission, and in turn train prisoners to increase awareness of their rights so that they can report violations.[339]

329 See, for example, Rules of Procedure on Complaints Handling (made pursuant to section 25 of the National Human Rights Commission Act 2017), Rule 4(1) (The Gambia); Prisons Service Act, 1972 N.R.C.D. 46, s 22 (Ghana); Police Service Act, 1970 (Act 350), s 23 (Ghana); Criminal Procedure Code, 1960 (Act 30), s 61 (Ghana); Security and Intelligence Agencies Act, 1996 (Act 526), s 21 (Ghana); PTA, s 13 (Kenya); Constitution of Kenya, Art. 59; Persons Deprived of Liberty Act No. 23 of 2014, s 27 (Kenya); Independent Policing Oversight Authority Act No. 35 of 2011, s 24 (Kenya); Kenya National Commission on Human Rights Act No. 14 of 2011, s 32 ; Prisons Act, Chapter 90, s 72 (Kenya); ATA, s 5 (Nigeria); National Instruction 6 of 2014, para. 4(5) (South Africa); Correctional Services Act No. 111 of 1998, s 21 (South Africa); Criminal Procedure Act 1991, s 34 (Sudan); PPTA, s 11(1) (Uganda); Zimbabwe Human Rights Commission Act [Chapter 10:20] Act No. 2/2012, s 9(2).

330 Prisons Service Act, 1972 N.R.C.D. 46, s 22 (Ghana); Police Service Act, 1970 (Act 350), s 23 (Ghana).

331 Security and Intelligence Agencies Act, 1996 (Act 526), ss 21-22 (Ghana).

332 Commission on Human Rights and Administrative Justice Act, 1993 (Act 456) (Ghana).

333 For instance, the Kenya's National Commission on Human Rights, Independent Policing Oversight Authority, and the Commission on Administrative Justice-Office of the Ombudsman.

334 These include the Independent Police Investigative Directorate (IPID), the South African Human Rights Commission (SAHRC) and the Office of the Military Ombudsman.

335 PTA, ss 13(2) and (3) (Kenya).

336 Constitution of Uganda, Art. 54.

337 UHRC and ACTV, *Press Statement on UN Day in Support of Victims of Torture with Specific Attention to Torture Survivors* (**Press Statement**), 22 June 2021, p. 2.

338 UHRC, *2018 Human Rights Report*, p. 227.

339 Research by REDRESS, including interviews with stakeholders in the region.

In an important step towards promoting human rights in the country, and in acceptance of recommendations received during their UPR in 2010,[340] **The Gambia** set up a National Human Rights Commission, with a broad mandate, including the investigation of human rights complaints, provided these occurred after the coming into force of the National Human Rights Commission Act or have continued beyond 24 January 2018.[341] For violations before this date, the Truth, Reconciliation and Reparations Commission has the power to investigate based on an ongoing review of priorities, including specific allegations of torture.[342]

Similarly, as part of **Sudan's** transitional government's commitment to ensuring accountability for past human rights violations, the Public Prosecution has established investigative committees on an *ad hoc* basis. The Committee on Extrajudicial Killings, for instance, has a mandate to investigate abuses, including torture, which occurred between 30 June 1989 (when al-Bashir assumed power) and 11 April 2019 (the date of al-Bashir's removal from office). It can receive complaints directly from victims or through referrals from the Public Prosecution.[343] Domestic investigations have also been initiated against security forces in relation to the killing of individuals at the anti-regime protests in December 2018.[344] However, the status of these *ad hoc* Committees and **Sudan's** commitment is unclear since the unrest in Sudan in October 2021.

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SUDAN

Accountability efforts for excessive use of force. In June 2019, peaceful protesters who attended a sit-in were attacked by security forces, mainly the paramilitary Rapid Support Forces (RSF). More than one hundred civilians were killed and protesters were beaten, raped, intimidated and detained. Later, eight hospitals were forced to close due to the harassment of medics.[346] As a result, the National Independent Investigation Committee was established to achieve justice and accountability for the violations committed in what is now known as the 3 June Massacre. The Committee indicates that they have documented audio-visual evidence with at least 3,200 testimonials, including from victims, family members and military officials. Delays, challenges in the criminal justice legal framework and absence of the principle of criminal liability on the grounds of command or superior responsibility are impeding the progress made by the Committee's work.[347]

340 UNCT-The Gambia, *Contribution to the Second Cycle of the Universal Periodic Review of the UNHRC*, p. 1.

341 As noted earlier in this report, this includes complaints only of those human rights violations committed after the coming in force of the National Human Rights Commission Act or those proven to be continuing after 24 January 2018.

342 The Truth, Reconciliation and Reparations Commission of The Gambia (TRRC), *Truth, Reconciliation and Reparations Commission Interim Report 2018-2019*.

343 The material jurisdiction of the committee includes acts of torture, rape, and unlawful detention as well as systematic violence against students. REDRESS, *Domestic Accountability Efforts in Sudan – Policy Briefing* (**Sudan Policy Briefing II**), May 2021, paras. 3, 13, and 16; See also Dabanga, *Sudan: Victims of human rights abuse can file complaints now*, 14 January 2020.

344 REDRESS, *Sudan Policy Briefing II*, May 2021, para. 17.

345 Statement by several Special Rapporteurs on the first anniversary of the 3 June events, 3 June 2020; REDRESS and ACJPS, *A way forward?*; PHR, *Chaos and Fire: An Analysis of Sudan's June 3, 2019 Khartoum Massacre*, 5 March 2020.

346 *Report of OHCHR on Sudan*, 27 July 2021, UN Doc A/HRC/48/46.

While the legal framework and existing institutions highlighted above represent important steps towards accountability, States also face common challenges related to their investigative efforts. These vary from obstacles to making complaints (including the fear of reprisals), to inadequate investigations, in part due to lack of independence and training.

Fear of reprisals when making complaints was a common issue identified among the States studied. In **Ghana**, the Government indicated that it believes that most cases of torture continue to be unreported in prisons, and that many prisoners "[suffer abuses] in silence" due to a fear of repercussions.[347] In 2014, the SRT also noted that the number of complaints received seemed "surprisingly low".[348] In **Nigeria**, complainants have reported feeling intimidated and deterred from lodging complaints against the police through internal mechanisms.[349] In relation to **South Africa**, CAT has expressed concern that no adequate safeguards exist to protect victims against potential reprisals.[350] CAT also noted that politicians have at times used "unambiguous and openly hostile language" with regards to acts of torture and rape by police officials, potentially deterring complainants from reporting. [351] Fear of reprisals among victims in **Uganda** has also been noted, though the passing of a Witness Protection Law has been discussed.[352]

The independence of investigative mechanisms is not always clear. For example, the HRC pointed that investigative mechanisms in **Ghana** are not fully independent, as complaints against police officers are investigated by fellow officers.[353] Outcomes of investigations carried out by the Police Intelligence and Professional Standards Bureau (PIPS) – an internal mechanism within the police – are not made public, and PIPS' work was described by civil society as "completely opaque", according to the SRT.[354] The HRC similarly reported concerns about the independence of **Sudan**'s National Human Rights Commission,[355] in part because its members are appointed by the President of the Republic.[356] When asked whether the body allowed for immunity of intelligence and police officers, **Sudan** replied that investigations are carried out in line with its mandate, including through "[communication] with relevant authorities," sometimes requesting an immediate cessation of human rights violations.[357] However, statutory immunities continue to limit investigative capacity.[358]

347 UNHRC, *Follow up report of the SRT on visit to Ghana*, para. 14.

348 Despite the State counting almost 15,000 prisoners, the Government notes that no complaints about the treatment of prisoners by prison staff had been received at the highest level as of March 2014. Only three complaints were received by the Acting Director-General, all involving prisoner-on-prisoner violence. UNHRC, *Report of the SRT on Mission to Ghana*, paras. 32-33.

349 AI, *Time to End Impunity*, 2020, p. 21.

350 CAT, *Second report of South Africa: Concluding observations*, para. 24.

351 CAT, *Second report of South Africa: Concluding observations*, para. 32(d).

352 UHRC and ACTV, *Press Statement*, 22 June 2021, p. 2. See also UNHRC, *Summary of Stakeholders' submissions on Uganda, Working Group on the UPR, 40th session*, 9 November 2021, para. 3.

353 HRC, *Concluding observations on the initial reports of Ghana*, 9 August 2016, UN Doc CCPR/C/GHA/CO/1.

354 UNHRC, *Follow up report of the SRT on visit to Ghana*, para. 13.

355 The Sudan National Human Rights Commission (SNHR) is mandated to receive and investigate complaints on human rights violations. HRC, *5th report of Sudan: Concluding Observations*, para. 8. It should be noted that a draft law was allegedly in development to establish a new Human Rights Commission, in accordance with the Constitutional Declaration of 2019. See UNHRC, *Report of OHCHR on Sudan*, 27 July 2021, UN Doc. A/HR/48/46.

356 Constitutional Charter for the Transitional Period of 2019, s 142(1) (Sudan).

357 See HRC, *Human Rights Committee reviews the situation of civil and political rights in Sudan*, 10 October 2018.

358 In the transitional period, there has been no response to requests by the Public Prosecution to waive legal immunities, making investigation and prosecution of any cases of torture, ill-treatment and other human rights violations "functionally impossible". REDRESS and PLACE, *Submission for the UPR of Sudan*.

Other issues identified include lack of proper training and sensitisation to issues of torture, and lack of funding. In **Uganda**, inadequate measures to investigate by the police, leading to a climate of impunity, have been reported.[359] In **Kenya**, bodies like the IPOA face significant delays in their investigations, sometimes prompted by police refusal to collaborate or the mishandling of crime scenes.[360] It has also been noted that **South Africa** lacks relevant investigatory training to document torture (for instance on the application of the Istanbul Protocol).[361] In **Zimbabwe**, the Zimbabwe Human Rights Commission[362] has noted slow progress on complaints of torture, often because redress had not yet been obtained "due to the prevailing economic situation in the country".[363] Whereas **Zimbabwe** accepted recommendations under the UPR mechanism to "harmonize all laws with the 2013 Constitution [...] the government has yet to establish an independent complaints mechanism for the public regarding conduct of the security forces."[364]

Finally, in **Nigeria** there are temporary judicial panels to investigate complaints of police brutality and extrajudicial killings, as well as torture, by members of the dissolved Special Anti-Robbery Squads. Yet, as noted by civil society, areas for improvement of these panels include raising awareness of their existence among the population, quicker and less rigorous admissibility processes and cooperation on the part of the police and military in appearing before the panel.[365]

PROPOSALS FOR STATES

- Establish specific independent and impartial bodies (such as Ombudspersons, NHRIs, or Committees) with a mandate to receive complaints, undertake investigations of allegations of torture and other ill-treatment and refer them to the competent authorities, and ensure they are adequately funded in order to effectively and independently carry out such a mandate.

- Ensure complaint mechanisms are effective and easily accessible to all persons, including by providing various options to submit complaints and through various locations throughout the State, and by taking steps to ensure that the public is well-informed about their existence and encourage individuals to make use of their right to complain.

- Enact legislation to ensure that victims, witnesses and any individuals making a complaint against a public official are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

359 ACTV and IRCT, *UPR Briefing Note – Torture in Uganda*, 2016, pp. 1, 2.

360 Independent Policing Oversight Authority, *End-Term Board Report 2012-2018*, p.93.

361 See REDRESS, *Legal Frameworks to Prevent Torture in Africa*.

362 The Zimbabwe Human Rights Commission receives complaints and has constitutional power to investigate persons' conduct where human rights and freedoms have been violated. Constitution of Zimbabwe, Art. 234(1)(f).

363 ZHRC, *Annual Report – 2019*, 2019, p. 33.

364 HRW, *UPR Submission Zimbabwe 2021*, 15 July 2021.

365 See CLEEN Foundation, NOPRIN Foundation, *Report on judicial panels of inquiry into police brutality and extra judicial killings by the police and other agencies in Nigeria*, December 2020, p. 8.

- Ensure that investigations are carried out promptly, effectively, independently, and in accordance with the Istanbul Protocol.
- Enact legislation and regulatory procedures for judicial review of decisions not to investigate allegations of torture.
- Conduct trainings for all officials involved in the investigatory process, including forensic experts, on the documentation of torture and other ill-treatment in accordance with the Istanbul Protocol, training of judicial officers on interpreting these assessments, and training of law enforcement personnel in cooperating and refraining from intervening in the investigations.
- Develop and implement procedures and mechanisms to collect clear and reliable statistical data on the number of complaints made, investigations launched, as well as the number of subsequent convictions and penalties imposed by the judicial authorities on the perpetrators of torture and other ill-treatment. Such data should be made available and easily accessible to the public to ensure transparency.

6. JURISDICTION, PROSECUTION AND PROCEDURAL BARRIERS TO ACCOUNTABILITY

6.1 JURISDICTION

Establishing criminal jurisdiction over the offence of torture is a fundamental measure to ensure States can prosecute such acts. Article 5 of UNCAT requires States to establish different types of jurisdiction over torture, incorporating the principles of territoriality and flag, nationality (active/passive) and universal jurisdiction. The establishment of universal jurisdiction in particular serves to avoid the existence of "safe havens" for perpetrators and is applicable to torture given the recognition by the international community of its heinous nature and, as such, its status as an "international crime".[366] In the same line, the RIG require States to confer jurisdiction to their national courts to hear cases of torture "in accordance with Article 5(2) of [UNCAT]", which itself obliges States to take necessary measures to exercise universal jurisdiction over acts of torture.[367]

Uganda, **Kenya** and **South Africa** have enacted provisions, through their respective anti-torture Acts, establishing the three different types of jurisdiction as per the UNCAT. However, in **Uganda** the exercise of jurisdiction over non-citizens for the purpose of establishing prosecutions requires the consent of the Director of Public Prosecutions.[368] Similarly, in **South Africa** the exercise of jurisdiction in cases where the offence was committed outside of its territory is subject to the written authority of the National Director of Public Prosecutions.[369]

CASE STUDY

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The landmark case of *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre Trust* (Torture Docket case),[370] concerned allegations of widespread torture amounting to crimes against humanity committed in Zimbabwe. The South African Constitutional Court ruled that "the duty to combat torture travels beyond the borders of Zimbabwe" and that the South African Police Service and the National Prosecution Authority had an obligation under international law to investigate and prosecute torture committed against Zimbabwean nationals in Zimbabwe. The Court held that the principle of universal

366 Chris Inglese, *The UN Committee against Torture—An Assessment*, Kluwer Law International, 2001, p. 342; J Herman Burgers & Hans Danelius, *The United Nations Convention against Torture—A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* Martinus Nijhoff Publishers, 1988, pp. 1, 131.

367 RIG, Art. 6; UNCAT, Art. 5(2).

368 PPTA, s 19 (Uganda).

369 PCTPA, s. 6(2) (South Africa).

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jurisdiction was applicable to the case if two conditions were satisfied, namely that the country where the alleged crimes occurred is unable or unwilling to prosecute such crimes and that the presence of the alleged offender in South Africa is anticipated. The Court stressed, however, that the actual presence of the suspect in South African territory was not a necessary precondition for the conduction of investigations.[371]

Where jurisdiction is not clearly established in accordance with UNCAT, States can only rely on their general provisions of jurisdiction, which usually do not envisage every type of jurisdiction desired, especially universal jurisdiction. Consequently, these States may find themselves unprepared to assume competence for prosecuting cases of torture, being restrained by their jurisdictional circumstances.

PROPOSALS FOR STATES

- Enact legislation to expressly provide for all heads of jurisdiction over the offence of torture as required under Article 5 of UNCAT and to establish universal jurisdiction over the offence of torture.
- Ensure that relevant stakeholders, including law enforcement agents, public investigators and judicial authorities are aware and trained on the State's exercise of jurisdiction over cases of torture.
- Express in a public and official manner that the State's territory shall not serve as a 'safe haven' to perpetrators of torture. In this regard, consider adopting a policy to encourage the exercise of universal jurisdiction over cases of torture.

6.2 PROSECUTIONS

In the spirit of combating torture and fighting impunity, Article 7 of UNCAT also requires States to either prosecute any alleged offenders of torture or extradite them for prosecution abroad.[372] In this regard, the CAT has clarified that States are expected to prosecute and may only choose between prosecuting and extraditing an alleged perpetrator if and when an extradition request was put forward.[373] It should be noted that, in any case, extradition must necessarily respect the principle of non-refoulement.

370 Constitutional Court, *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another*, 30 October 2014.

371 Despite the Court's ruling, not a single perpetrator has been brought to account in South Africa in connection with the Torture Docket Case, leaving the impact of this important decision unfelt in practice. See Human Rights Pulse, *Turning A Blind Eye: South Africa Fails To Investigate Allegations Of Torture In Zimbabwe*, 22 September 2020. See also Mail & Guardian, *Zimbabwe: What is the current status of the Torture Docket case?*, 23 May 2020.

372 UNCAT, Art. 7; RIG, Guideline 7.

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

Amongst the researched States, **Kenya**,[374] **Uganda**[375] and **South Africa**[376] have legal provisions referring to the possibility of extradition for acts of torture specifically. **Kenya**'s legislation gives effect to Article 7 of UNCAT by categorically affirming that "where a person is not extradited (…) the person shall be prosecuted in Kenya."[377]

In most of the States reviewed, the respective national prosecution authorities are responsible for instituting criminal proceedings and retain discretion when deciding whether to pursue a prosecution. Although internal and independent bodies, such as police directorates and NHRIs, may conduct investigations and recommend prosecutions to the concerned prosecutorial authority,[378] the latter is ultimately responsible for the final decision which in most States studied is not subject to judicial review.[379] Hence, as other actors working in the criminal justice system (judges, police, lawyers), prosecutors "shall be properly and in sufficient number selected, educated and paid".[380] States are also encouraged to take "effective measures for combating corruption in the administration of justice".[381] These are relevant measures to ensure prosecutors' ability to adequately respond to instances of torture via criminal proceedings. Of note, some jurisdictions such as **Kenya**, **South Africa** and **Uganda** do envisage the possibility of private prosecutions, but these are often prohibitively expensive and rare in practice.[382]

One of the challenges observed in practice across all reviewed States is a in low level of accountability for torture. Where a separate offence of torture has been provided through stand-alone anti-torture Acts, research has not revealed any criminal proceedings established thereunder. This may be a result of different factors researched for and analysed in this report, such as a lack of independence in investigative and prosecutorial mechanisms.[383]

In addition, the absence of comprehensive, public and accessible data concerning the number of recommendations for prosecution under the offence of torture, actual prosecutions, and their outcome is an obstacle when seeking to assess a State's progress in fighting impunity. Often, where there is some documentation of human rights abuses, the lack of standards for and information on the categorization made by governmental bodies can prevent a clear assessment of the prosecution for torture as cases categorised as police brutality or other offences can also qualify as torture.[384]

374 PTA, ss 21(1) and (4) (Kenya).

375 PPTA, s 22(1) (Uganda).

376 PCTPA, s 6(c) (South Africa).

377 PTA, ss 21(1) and (4) (Kenya).

378 Constitution of Zimbabwe, Art. 243 (1) (g); Independent Police Investigative Directorate Act No. 1 of 2011, s 7 (South Africa); National Human Rights Commission Act 2010, s 5(p) (Nigeria); National Human Rights Commission Act, 2017, s 15(1)(h)(i) (The Gambia); Independent Policing Oversight Authority Act No. 35 of 2011, s 29 (Kenya); Kenya National Commission on Human Rights Act No. 14 of 2011, s 41; National Coroners Service Act No. 18 of 2017, s 27 (Kenya).

379 Constitution of Zimbabwe, Art. 258; Criminal Procedure and Evidence Act [Chapter 9:07], 1927, s 10 (Zimbabwe); Constitution of Kenya, Art. 157 (10); PCTPA, s 7(4) (South Africa); Criminal Procedure Act 1991, ss 33 and 35 (Sudan); Criminal Procedure Code, 1960 (Act 30), s 58 (Ghana); Constitution of The Gambia, Art. 85.

380 UNHRC, *Report of SRT Manfred Nowak, Addendum,* 5 February 2010, UN Doc A/HRC/13/39/Add.5, para 259 (c).

381 *Ibid*.

382 REDRESS, *Legal Frameworks to Prevent Torture in Africa*.

383 See a discussion of these aspects in Section 5: Complaints and Investigations, above.

384 Research by REDRESS, including interviews with stakeholders in the region.

Given the lack of prosecutions for torture, it is not unusual for civil proceedings to be established instead.[385] While those represent an important venue for victims to obtain redress and hold governments accountable, they fall short of attributing individual criminal responsibility to perpetrators, thus contributing to impunity for torture, which remains a significant issue across the reviewed States.[386]

PROPOSALS FOR STATES

- Enact or amend legislation and policies to provide for the prosecution or extradition of alleged perpetrators of torture, as required under UNCAT.
- Adopt a "zero tolerance" policy in relation to torture and other ill-treatment by, inter alia, issuing public statements and adopting internal regulations condemning practices of torture that clearly state that anyone committing such acts or otherwise participating or assisting in their commission will be criminally prosecuted and shall receive the appropriate penalties upon conviction.
- Consider making the prosecution of perpetrators of torture a priority within the strategic plan of the Public Prosecutions' Office.
- Consider creating separate investigative units within the Public Prosecutions' Office and/or the judiciary with a specific mandate to investigate torture.
- Provide training on the relevant international human rights standards related to the investigation of torture to stakeholders involved in accountability mechanisms, such as judges and prosecutors.

385 For example, in 2013, a group of eight survivors of sexual and gender-based violence that took place in the post-election period in 2007-2008 in Kenya filed a constitutional petition at the High Court in Kenya, with the assistance of IMLU, ICJ Kenya, COVAW and PHR. REDRESS intervened in the case as *amicus curiae*. In a landmark decision, the High Court found the Kenyan government responsible for failure to protect, investigate and prosecute the violence against 4 of the survivors (High Court at Naiorbi, *COVAW, IMLU et al v. Attorney-General of Kenya et al,* 10 December 2020*.)*.

386 See for instance, HRW, *UPR submission Zimbabwe 2021*, 15 July 2021; AI, *Time to End Impunity,* June 2020; UNHRC, *Report of the SRT on Mission to Nigeria*; GMNHRC, *State of Human Rights in The Gambia – 2020 Report*, 2020; The Human Rights Foundation Centre for Law and Democracy, *Universal Periodic Review Submission for The Gambia: NGO Submission*, 28 March 2019; UNHRC, *Follow up report of the SRT on visit to Ghana*, 25 February 2015, UN Doc. A/HRC/31/57/Add.2.; ACJPS, World Organization Against Torture (OMCT), *(Post)-Covid19 era in Sudan: The urgency to unravel the torture and inhuman treatments system one year after the Transition,* July 2020; Strategic Initiative for Women in the Horn of Africa (SIHA), *Human Rights Conditions of Female Detainees and Prisoners in Sudan*, 13 March 2020; REDRESS and ACJPS, *A way forward?*; HRC, *Fourth report of Kenya: Concluding observations*; KNCHR, *Report to CAT*, February 2020; The Legal Resources Centre & Omega Research Foundation, *Handbook: Reporting Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2020; CAT, *Second report of South Africa: Concluding observations*.

6.3 PROCEDURAL BARRIERS TO ACCOUNTABILITY

a. Amnesties

Although there is no explicit provision in UNCAT prohibiting amnesties, these constitute a barrier to accountability for torture and, as such, are considered incompatible with the spirit and obligations of UNCAT.[387] The UN Updated Principles on Combating Impunity further highlight that amnesties, "shall be without effect with respect to the victims' right to reparation […] and shall not prejudice the right to know".[388]

Amnesties are referred to in the domestic laws of half of the reviewed States, particularly in **Sudan,**[389] **The Gambia,**[390] **South Africa**[391] and **Uganda**.[392] However, the degree and scope of application differs across such States. In **The Gambia**, for instance, amnesty may only be applied in the context of abuses under the presidency of Yahya Jammeh (from July 1994 to January 2017), "in consultation with victims of the applicant's crimes and cannot be applied to grave violations of human rights such as torture, forced disappearance or sexual violence"[393]. This clear exception concerning torture is essential to avoid conflict with the obligations of UNCAT. On the other hand, in **South Africa**, since the amnesty concerns the apartheid era and the application of its anti-torture Act, enacted in 2013, it is not retroactive and there is a concerning absence of prosecution of apartheid-era cases and other "gross human rights violations".[394] The same lack of retrospective application of the law is also present in **Sudan**,[395] alongside the fact that international crimes were only incorporated into Sudan's criminal code in 2009.

Kenya and **Uganda** are the only jurisdictions to expressly prohibit the granting of amnesties to persons accused of torture.[396] However, the extent to which this prohibition is fully applicable in **Uganda** is unclear

387 See CAT, *General Comment No. 2*, para. 5 and CAT, *General Comment No. 3*, 13 December 2012, UN Doc. CAT/C/GC/3, para. 38.

388 UN, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1, Principle 24(c).

389 On 12 November 2020, the chair of Sudan's Sovereign Council, Lt. Gen. Burhan, announced a general amnesty for those who previously carried weapons or participated in military operations in Sudan. See also Art. 37(1)(f) of the Criminal Procedure Act 1991. For an analysis of its content and consequences, see REDRESS, *A General Amnesty in Sudan, International Law Analysis,* January 2021.

390 Truth, Reconciliation and Reparations Commission Act 2017, s 19 (The Gambia).

391 The Promotion of National Unity and Reconciliation Act No. 34 of 1995, s 20 (South Africa) provides that the granting of an amnesty is conditional to the crime being politically motivated and the perpetrator disclosing the full truth before the Truth and Reconciliation Committee.

392 The Uganda Amnesty Act was passed in 2000 mainly to grant amnesty to former soldiers engaged in acts of war or acts of related purpose on behalf of the Lord's Resistance Army.

393 TRRC, *Mandate* (The Gambia).

394 CAT, *Second report of South Africa: Concluding observations*.

395 Sudan's attorney general has stated that the principle of non-retroactivity is enshrined in the Criminal Procedure Act 1991. See REDRESS and SOAS, *Sudan Policy Briefing II*, May 2021.

396 PPTA, s 23 (Uganda); PTA, s 10 (Kenya).

given its pre-existing Amnesty Act[397] is silent about exceptions related to torture and relevant caselaw on this topic is ambiguous.[398]

b. Immunities

While immunities are not specifically prohibited under UNCAT, they are contrary to the principle of non-derogability, the obligation to prosecute cases of torture and the right of victims to redress.[399] Consequently, States must ensure that their domestic legislations do not provide for immunities capable of shielding perpetrators of torture from judicial proceedings.

Three of the eight researched States have provisions in their legislation preventing the invocation and application of immunities in relation to torture, namely **Kenya**, **South Africa** and **Uganda**.[400] As to the remaining five countries, immunities are still envisaged in their respective domestic laws, although with varying degrees of reach (e.g. head of State, government officials or law enforcement agents).[401]

In **Ghana** and **Zimbabwe**, immunity from civil and criminal proceedings is afforded to the President for acts done in their official capacity during their time in office.[402] **Nigeria** also provides immunity for the President and further extends it to the Vice-President, Governor and Deputy-Governor.[403] Officials serving in the armed forces in **Nigeria** benefit from immunities for actions in aid to civil authority and military duty.[404]

In **The Gambia**, in addition to presidential immunity, national legislation exonerates all public officials from civil or criminal liability for the exercise of their duties with respect to unlawful assemblies, riotous situations or public emergencies.[405] This far-reaching immunity represents a concerning obstacle to justice and redress and has had serious repercussions for prosecutions.[406]

397 Although the Amnesty Act 2000 (Uganda) was set to expire in 2015 following various extensions and amendments, is not clear whether it is still in effect.

398 See ACHPR, *Thomas Kwoyelo v. Uganda*, Communication 431/12, 17 October 2018 and Sharon Nakandha in International Justice Monitor, *Supreme Court of Uganda Rules on the Application of the Amnesty Act*, 16 April 2015. Despite the seemingly broad sweep of the Act, the Supreme Court of Uganda clarified its scope in the case of Thomas Kwoyelo, a former commander of the Lord's Resistance Army, assuring that amnesty is not appropriate for "grave crimes as recognized under international law". However, the African Commission then found that "by interpreting and applying the provisions of the Amnesty Act differently without any reasonable justification or explanation, [Uganda] violated the right to equal protection of the law afforded to [Thomas Kwoyelo] as provided under Article 3(2) of the Charter". See also REDRESS, Emerging Solutions Africa, Uganda Victims' Foundation, *Not Without Us: Strengthening Victim Participation in Transitional Justice Processes in Uganda,* July 2020.

399 See CAT, *Third periodic report of the United Kingdom of Great Britain and Norther Ireland and dependent territories*, 18 November 1998, UN Doc. CAT/C/SR.354, para. 39; CAT, *General General Comment No. 2*, para. 5; CAT, *General Comment No. 3*, para. 42; RIG, Guideline 16(b).

400 PCTPA, s 4(3)(a) (South Africa); Human Rights (Enforcement) Act of 2019, s 14 (Uganda); PTA, s 10 (Kenya).

401 Constitution of Zimbabwe, Art. 98; Constitution of The Gambia, Art. 105; Indemnity Act as amened in 2001, ss 2(a) and (b) (The Gambia); Truth, Reconciliation and Reparations Commission Act, 2017, s 25 (The Gambia); Constitution of Ghana, Art. 57; Constitution of Nigeria, Art. 308; Armed Forces Act, s 239 (Nigeria); Armed Forces Act 2007, s 42 (Sudan); Police Act 2008, s 45(1) (Sudan); Constitutional Charter for the Transitional Period of 2019, s 22 (Sudan).

402 Constitution of Zimbabwe, Art. 98; Constitution of Ghana, Art. 57.

403 Constitution of Nigeria, Art. 308.

404 Armed Forces Act, s 239 (Nigeria).

405 Indemnity Act as amened in 2001, ss 2(a) and (b) (The Gambia).

406 Research by REDRESS, including interviews with stakeholders in the region.

In **Sudan**, immunity from prosecution "remains [as] one of the biggest obstacles to justice"[407] with legislation not only granting immunities to government officials[408] and law enforcement actors in respect of all acts "related to official business",[409] but also affording higher-level officials with the discretionary power to decide whether such immunities shall be waived or not, without judicial review. Although in 2020 the transitional Government abolished some of the immunities enjoyed by members of the National Intelligence and Security Services (now known as the General Intelligence Service),[410] immunity is still provided for in legislation for the police and armed forces.[411] Recent accountability efforts have been unsuccessful as authorities fail to enforce the 2020 amendments, other existing immunities remain in force and the respective heads of forces refuse to lift immunities when requested by the Public Prosecution.[412] Despite a promising decision by the Supreme Court in 1993 in which the conviction of three police officers for torturing a woman in order to extract a confession was upheld under the rationale that prior permission to prosecute was not required to proceed in cases involving the use of torture,[413] recent cases pursued by the Attorney General have not followed such precedent.[414] Generally, members of the armed forces and police officers will most likely not be investigated or prosecuted due to their immunities.[415]

CASE STUDY

KENYA

Attorney General & 2 others v Kenya Section of International Commission of Jurists.[416] In addressing whether Sudan's then President Al-Bashir, as a sitting Head of State was immune to Kenya's judicial processes or not, the Court of Appeal held the following concerning immunities in the context of *jus cogens* norms:

> When a State engages in acts which are contrary to *jus cogens* norms, then by implication it waives any rights to immunity for stepping out of the sphere of sovereignty. (…) A State which carries out or permits torture, war crimes, crimes against humanity, the crime of genocide, and the crime of aggression is

407 REDRESS and SOAS, *Sudan Policy Briefing II*, May 2021, p. 9.

408 The Constitutional Charter for the Transitional Period of 2019 (Sudan) contains immunity provisions which stipulate that criminal proceedings may not be instituted against any member of the Sovereign Council, Council of Ministers, Transitional Legislative Council, or governors of Sudan's states without a waiver of immunity from the Legislative Council—or the Constitutional Court, in the absence of a Legislative Council.

409 National Security Act [Unofficial Translation], s 52(3).

410 See the Miscellaneous Amendments Law of July 2020 (Sudan) and the now- removed Section 52 of the National Security Act 2010 (Sudan).

411 Armed Forces Act 2007, s 42 (Sudan); Police Act 2008, s 45(1) (Sudan).

412 UNGA, *Interim report of SRT Nils Melzer*, UN Doc. A/76/168. See also REDRESS and PLACE, *Submission for the UPR of Sudan*; REDRESS and SOAS, *Sudan Policy Briefing II*, May 2021.

413 Supreme Court of Sudan, Case No. 875/1993, 28 November 1993 (Sudan). Taken from REDRESS, *National and International Remedies for Torture*, March 2005, p. 27.

414 REDRESS and PLACE, *Submission for the UPR of Sudan*.

415 *Ibid*.

416 Court of Appeal at Nairobi, *Attorney General & 2 others v. Kenya Section of International Commission of Jurists*, 16 February 2018 (Kenya).

> in violation of customary international law. (…) an exception to immunity exists in cases where the individual is responsible for crimes against humanity. In the result the State official, including a Head of State, is personally responsible for his crimes because customary international law is based on the appreciation that certain acts amounting to international crimes of individuals cannot be considered as legitimate performance of official functions of the State.

c. Statutes of limitation

Statutes of limitation represent a barrier to accountability and victims' rights and contribute to *de facto* impunity, all of which contravenes the States' obligation to prevent and prosecute torture in all circumstances. In consideration of the repressive and threatening context under which torture is commonly inflicted, the imposition of statutes of limitation is all the more harmful since victims may take a long time to feel safe enough to come forward to report such crime. Moreover, the extreme gravity of torture and its status as an international crime should repeal any prescription period.[417]

Legislation regarding statutes of limitation varies significantly in the eight researched States. While only **Uganda** has a legislative provision banning the application of statutes of limitation in relation to torture,[418] **Kenya** is the only State which has explicitly established a time limit of 6 years to bring legal action for the offence of torture.[419]

As to the other States, in absence of specific legislation, the general domestic provisions on statutes of limitation are applicable to torture. In **Sudan**, there is a 2-year limitation period to commence judicial proceedings attached to the offence of torture as defined in Article 115 of the Criminal Act 1991.[420] In **Nigeria**, a 3-month limitation period is envisaged for claims against individuals falling within the term 'public officer' for "any act done in pursuance execution or intended execution of any Act or Law or of any public duty or authority", or in respect to alleged neglect or default in the execution of those.[421] However, following the Supreme Court's finding that such act must be "done in pursuance or execution or intended execution of a law or public duty or authority",[422] one could argue that the prescribed limitation is not applicable to acts amounting to torture as they are by nature illegal and not compatible with any law or public duty mandate.

417 See CAT, *General Comment No. 3*, para. 38; See also CAT, *2013-2014 Report* 2014, UN Doc. A/69/44, pp. 27, 39, 46, 102, 114, 121 and 130.

418 The Human Rights (Enforcement) Act 2019, s 19(1) (Uganda) states "Save for rights and freedoms guaranteed under article 44 of the Constitution [*which includes the right to "freedom from torture, cruel, inhuman or degrading treatment or punishment"],* actions for enforcement of human rights and freedoms shall be instituted within ten years of the occurrence of the human rights violation."

419 PTA, s 30 (Kenya).

420 Criminal Procedure Act 1991, s 38 (Sudan).

421 Public Officers Protection Act No. 39 of 1916, s 2(a) (Nigeria).

422 Supreme Court, *Hassan v. Aliyu & Ors,* 16 July 2010, p. 84, paras. B-D (Nigeria).

In **Ghana**, accountability for wrongful acts causing death is barred after 3 years from the death.[423] The same time limitation applies to legal actions claiming damages for injuries resulting from negligence, nuisance or breach of duty.[424] In **Zimbabwe**, the right of prosecution for murder is not barred by any lapse of time, but for any offence other than murder, whether at the public instance or at the instance of a private party, a standard time limit of 20 years is imposed for prosecution from when the offence was committed. [425] However, any civil proceedings instituted against the State or its employees must be commenced within 8 months after the cause of action has arisen. After this period, the affected persons cannot claim from the State any violation on the part of the police officers,[426] which substantially reduces the possibility for victims to obtain redress.

Some States also provide for statutes of limitation concerning the activity of their NHRIs, preventing them from investigating complaints that are not made within a pre-determined time limit. In **Ghana**, for instance, this period is 12 months,[427] while in **Zimbabwe** it is 3 years.[428]

In relation to **South Africa**, Article 18(1)(j) of the Criminal Procedure Act establishes a general 20-year prescription time for the right to institute prosecutions, from the time the offence was committed, against any offence other than those listed therein. This list includes offences such as murder, rape, kidnapping and crimes against humanity, but torture is not included. Nevertheless, the South African government has guaranteed that "the right to institute prosecutions for the offence of torture never lapses", affirming further that such article "specifically provides [so]". [429]

CASE STUDY

KENYA

Musa Mbwagwa Mwanasi & 9 others v Chief of the Kenya Defence Forces & another:[430] The petitioners in this case were arrested and subjected to torture and incommunicado detention on suspicion of plotting and/or participating in the failed coup of 1 August 1982. Several years later, in 2015, they submitted a constitutional petition seeking a declaration that the abuses they had suffered constituted violations of their fundamental rights and freedoms to human dignity and cruel, inhuman and degrading treatment. They also requested an award of consequential damages. The High Court had to address the question of whether there was a limitation of time for filing constitutional petitions and, in doing so, held that "though there is no limitation

423 Civil Liability Act No. 176 of 1963, s 16 (Ghana).

424 Limitation Act 1972 N.R.C.D. 54, s 3 (Ghana). Under the Criminal Offences Act No. 29 of 1960 (Ghana), s 79(4), "A person who wrongfully imprisons another person is under a duty to supply him with the necessaries of health and life."

425 Criminal Procedure and Evidence Act [Chapter 9:07], 1927, s 23 (Zimbabwe).

426 Police Act [Chapter 11:10] No.2 of 1995 (Zimbabwe).

427 Commission on Human Rights and Administrative Justice Act, 1993 (Act 456), s 13 (Ghana).

428 Zimbabwe Human Rights Commission Act [Chapter 10:20] Act No. 2/2012, s 9(4)(b).

429 CAT, *South Africa second periodic report: Replies to list of issues* 18 April 2019, UN Doc. CAT/C/ZAF/Q/2/Add.2.

430 High Court of Kenya at Nairobi, *Musa Mbwagwa Mwanasi & 9 others v. Chief of the Kenya Defence Forces & another*, 25 February 2021 (Kenya).

KENYA	period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant reliefs sought in a constitutional petition for enforcement of fundamental rights and freedoms, is entitled to consider whether there has been inordinate delay in filing a petition and consider further whether there is plausible explanation for delay and whether justice will be served by proceeding on with the matter". In its 2021 decision, the Court found that the petitioners delay in coming to court was justified by factors such as a genuine fear of the regime then in power (Moi Regime), a lack of confidence in "an emasculated judiciary during the Moi Regime" and a lack of means to meet legal fees and costs for filling a petition; it finally granted the relief sought by the petitioners.

PROPOSALS FOR STATES

- Amend existing legislation to repeal any obstacles to accountability for torture, particularly amnesties, immunities and statutes of limitation, including immunity provisions related to the Head of State or President.
- Eliminate any other obstacles that impede accountability for torture and other ill-treatment, both formally and in practice.
- Undertake public campaigns devoted to raising awareness of torture victims' rights and encouraging them to report such crimes.

7. REDRESS

International and regional legal instruments and guidelines require States to establish legal and institutional frameworks that enable victims of torture and other ill-treatment to access and obtain redress. In order to be effective, the right to redress must be accessible and decisions must be enforceable.[431] Article 14 of UNCAT applies to both victims of torture and other ill-treatment and requires States to ensure victims obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In this regard, CAT has highlighted that the obligation to provide redress requires States to satisfy both procedural and substantive obligations, which relate, respectively, to: (i) enacting legislation and establishing effective and accessible complaint mechanisms, investigation bodies and institutions with the competence to determine the right to and award redress for victims of torture and ill-treatment and (ii) ensuring such victims obtain full and effective redress, which includes five forms of reparation, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[432]

Although the extent to which the right to redress for acts of torture and other prohibited ill-treatment is reflected in the domestic legislative frameworks of the countries examined varies, the research suggests that none of the countries have fully or adequately enshrined the right. Despite all of the States providing for the right to redress in some form – be that through their constitutional framework or legislation expressly enacted to provide rights to victims of torture (or a combination of the two) – significant barriers to victims achieving redress appear to exist in all of them.

These barriers, which are present even in States whose domestic legislative framework providing for redress is well-developed, include the unavailability of legal aid, difficulties with the enforcement of judgments and a lack of measures aimed at rehabilitation and guarantees of non-repetition.

431 The right to redress for victims of torture and other prohibited ill-treatment is enshrined in a number of international and regional human rights instruments, including UNCAT, OPCAT, the African Charter and ICPPED. The right to redress is also reflected in various international standard-setting texts, such as RIG and the UN Basic Principles on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines), and ACHPR, *General Comment No. 4* para. 9.

432 CAT, *General Comment No. 3*, paras 5-7.

7.1 PROCEDURAL ASPECT: ACCESS TO AN EFFECTIVE REMEDY

In order to ensure access to effective redress, States must ensure that victims of torture have access to effective remedies, including through adequate "judicial, quasi-judicial, administrative, traditional and other processes".[433] In many of the States examined, the right to redress is enshrined in the relevant Constitution. The Constitutions of **Zimbabwe**, **Uganda**, **South Africa**, **Nigeria**, **Kenya** and **Ghana** all allow for a person whose fundamental rights have been breached to petition the court for redress.[434] In all of these countries except Ghana, the relevant Constitution is clear that the persons other than the victim may bring a claim on behalf of another individual or group or in the public interest. In **Nigeria** specifically, the Fundamental Rights (Enforcement Procedure) Rules, 2009 specify that no human rights case should be dismissed because of lack of *locus standi*, and that human rights groups, non-governmental organisations, or anyone acting on behalf of another person or in the interest of a group of persons can institute actions on behalf of an applicant.[435] Through its National Human Rights Commission, **Nigeria** also assists victims of human rights violations and seeks redress on their behalf, formulating policies for the promotion and protection of human rights, publishing reports on the state of human rights in the country and organizing awareness workshops.[436]

In **Kenya**, the Constitution lays out the range of available remedies for victims of human rights abuses, including a declaration of rights, declaration of invalidity of laws, an injunction and a conservatory order.[437] This partly corresponds with the elements of reparation enshrined in the UN Basic Principles and Guidelines. In addition, the High Court is afforded jurisdiction by the Constitution "*for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*"[438]

Kenya has also enacted specific legislation to provide victims of torture with the enforceable right to adequate redress, including compensation and rehabilitation; the Victims Protection Act 2014, the PTA and the Public Finance Management (Reparations for Historical Injustices Fund) Regulations 2017 (which operationalised the Restorative Justice Fund) all explicitly provide for the right to redress and oblige the State to put programmes in place that support victims. These acts represent a positive move towards an accessible and victim-led approach. However, the HRC noted in May 2021 that limited progress had been made in practice towards providing full redress to victims of human rights violations (including some dating back to over 50 years ago).[439]

433 ACHPR, *General Comment No. 4*, para. 9.

434 Constitution of Zimbabwe, Art. 85; Constitution of Uganda, Art. 50; Constitution of South Africa, Art. 38; Constitution of Nigeria, Art. 46; Constitution of Kenya, Arts. 23 and 59; Constitution of Ghana, Art. 33.

435 Fundamental Rights (Enforcement Procedure) Rules, 2009, s 3(e) (Nigeria).

436 National Human Rights Commission Act 2010, s 5 (Nigeria).

437 Fundamental Rights (Enforcement Procedure) Rules, 2009, s 22(3) (Nigeria).

438 Constitution of Kenya, Art. 165(3)(b).

439 HRC, *Fourth report of Kenya: Concluding observations*, para. 8.

In **The Gambia** and **Sudan**, there is no express constitutional right to redress, but the right is indirectly incorporated in **The Gambia**, through the incorporation of the common law into its Constitution, which allows for victims whose fundamental rights have been breached to bring actions in tort,[440] and in **Sudan** through the incorporation of the various international and regional human rights instruments it has ratified[441] (including UNCAT, African Charter and ICCPR) which themselves provide for the right to redress.

South Africa, despite having enacted the Prevention of Combatting and Torture of Persons Act (PCTPA) in order to address the offence of torture, has not included any provisions on the right to redress for victims of torture. Although this does not affect the rights of victims under the PCTPA to seek compensation through the civil[442] and criminal proceedings[443] or the constitutional right to seek redress for a breach of fundamental rights, this does not reflect a victim-led approach to addressing torture. The HRC has recommended that the PCTPA is amended to include provisions relating to the right of civil redress and remedy for victims of torture.[444]

Although **Sudan** currently lacks any specific right to redress for victims of torture in its domestic legislative framework, the draft Transitional Justice Bill in **Sudan** will, if enacted, expressly recognise the right to redress. Aspects of the draft bill are highly promising – such as the rejection of impunity for perpetrators, the centring of the need for accountability and plans to consult and negotiate with civilians when preparing **Sudan's** transitional justice strategy.[445] Nonetheless, aspects of the draft legislation require clearer direction and definition if it is to provide for effective redress – in particular, the meaning of "victims" should be clarified, along with the role and remit of bodies created by the legislation and the enforcement process for the right to reparations.[446]

In all States, regardless of how the right to redress is enshrined in the domestic legal system, there are barriers in terms of accessibility. Failure to provide redress promptly is a *de facto* denial of the right under the African Charter.[447]

Often, barriers to redress are financial – for example, in **The Gambia**, free legal aid is not available except to those charged with a capital offence. This led to a finding by the ACHPR that **The Gambia** was in breach of the African Charter on the basis that forms of redress are not realistically available to those without means.[448] Similarly in **Kenya**, court fees for filing claims and hearing cases effectively bar many individuals from access to justice.[449]

440 Constitution of The Gambia. Art. 7(d).

441 Constitutional Charter for the Transitional Period of 2019, Art. 41(2) (Sudan).

442 PCTPA, s 7 (South Africa) provides for civil liability of persons convicted of torture.

443 The Criminal Procedure Act 51 of 1977 (South Africa) provides that awards of compensation may be granted to victims of a crime.

444 HRC, *Concluding observations on the initial report of South Africa*, 27 April 2016, UN Doc. CCPR/C/ZAF/CO/1.

445 REDRESS, SOAS, *Transitional Justice Processes in Sudan: Policy Briefing*.

446 *Ibid*.

447 ACHPR, *General Comment No. 4*, para. 26.

448 ACHPR, *Purohit and Moore v. The Gambia*, Communication No. 241/01, 29 May 2003, para. 37. Note that case was in relation to individuals unlawfully detained under the Lunatics Detention Act rather than victims of torture.

449 AllAfrica, *Kenya: High Court Fees Threatens Access to Justice, Warns Lawyer*, 5 December 2021.

For victims who do have the means to launch proceedings, they are often lengthy, costly and highly sophisticated and, even where successful, can lead to re-traumatisation.[450] Claimants can also face difficulties producing the evidence required to the civil standard of proof[451] - as demonstrated by the **Kenyan** case of *Daniel Kibet Mutai & 9 others v Attorney General*, in which the damages awarded to claimants were reduced on the basis that they could not produce evidence showing the full extent of their injuries.[452] There have also been reports of evasive tactics used by police forces in **South Africa** in order to discourage victims from continuing with claims. [453]

Procedural barriers may also originate from the granting of immunities. In **Sudan**, the immunity enjoyed by armed and police forces is incompatible with the right to effective redress, as it effectively bars victims of torture from bringing claims against perpetrators and provides no guarantee that previous offences will not be repeated.[454] This can be contrasted with the approach in **Kenya**, where the National Police Service Act expressly provides for redress and compensation for victims of rights violations committed by police officers,[455] and in **South Africa**, where the Johannesburg High Court has ruled that the Minister of Safety and Security was vicariously liable in damages for breaches of the Kenyan Constitution committed by the police, emphasising the need for the public to be able to place reasonable trust in members of the police force.[456]

In order to be effective, the right to redress should be available to all victims of torture and other ill-treatment and remedies should follow a victim-led approach.[457] The **Zimbabwe** Constitution provides that a person will not be prevented from approaching the court for relief by the fact that they themselves have contravened a law[458] – which allows for those who have been tortured while detained or imprisoned to seek redress. Additionally, the National Peace and Reconciliation Commission, which was set up under **Zimbabwe's** Constitution, is tasked with establishing a Gender Unit to assess the specific needs of victims of gender-based violence and make recommendations as to the appropriate redress measures.[459]

450 CAT, *Second report of South Africa: Concluding observations*, para. 6(b) ; AI, *Time to End Impunity,* June 2020.
451 REDRESS and ACJPS, *A way forward?*.
452 Court of Appeal at Eldoret, *Daniel Kibet Mutai & 9 others v. Attorney General*, 28 November 2019 (Kenya).
453 Research by REDRESS, including interviews with stakeholders in the region.
454 REDRESS and SOAS, *Sudan Policy Briefing II*, May 2021.
455 National Police Service Act No. 11A of 2011, s 10 (Kenya).
456 Constitutional Court of South Africa, *K v. Minister of Safety and Security*,13 June 2005 (South Africa).
457 ACHPR, *General Comment No. 4*, paras. 18-19.
458 Constitution of Zimbabwe, Art. 85(2).
459 National Peace and Reconciliation Commission Act [Chapter10:32] No. 11/2017, s 9(k) (Zimbabwe).

PROPOSALS FOR STATES

- Review legislation to provide for all types of redress, including compensation, rehabilitation, satisfaction and guarantees of non-repetition, as all are important ways of providing redress to victims of torture.

- Review legislation and implement policies to repeal any procedural or practical barriers to redress and ensure proceedings on cases of torture and ill-treatment are conducted based on a victim-centred approach.

7.2 REPARATION

a. Compensation

The most common form of redress expressly provided for in the domestic legislative frameworks of the States examined is compensation, which can be awarded in civil or criminal proceedings or both. While this is an important form of reparation, "monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment"[460] and its provision alone does not adequately fulfil States' obligations under Article 14 of UNCAT.

As stated above, the majority of the States examined include the right to redress in their Constitutions. Of these States, all except **South Africa** specifically refer to compensation as one of the available forms of redress.[461] The specific right to compensation for victims of torture (as opposed to a more general constitutional right to redress in the event of infringement of a fundamental right) exists in **Kenya** in the Victim Protection Act 2014[462] and the National Police Service Act.[463] The PPTA in **Uganda** also expressly provides for compensation to be paid to victims of torture or their families or dependents – although it has been noted that high profile political cases are often prioritised, and those victims are more likely to be successful in compensation claims than "ordinary" victims.[464]

It is worth noting that even where torture is not criminalised as a separate offence, it may still serve as a basis for compensation. In **Zimbabwe**, for instance, the lack of domestic criminalisation of torture did not prevent the High Court of Zimbabwe from considering the torture suffered by the victim for the award of compensation.

460 CAT, *General Comment No. 3*, para 9.

461 The Constitution of South Africa refers only to "appropriate relief, including a declaration of rights". See Art. 38.

462 Victim Protection Act No. 17 of 2014, s 23 (Kenya).

463 National Police Service Act No. 11A of 2011, s 10 (Kenya).

464 PPTA, s 6 (Uganda). Research by REDRESS, including interviews with stakeholders in the region.

CASE STUDY

ZIMBABWE

In the 2018 high profile case of Jestina Mukoko,[465] a pro-democracy campaigner, the Zimbabwean State was ordered to pay compensation to the victim for the abduction, incommunicado detention and torture she suffered at the hands of state security agents in 2008 who tried to make her confess to plotting against Robert Mugabe's administration.[466]

In some of the States examined, specific funds have been established to provide reparations to victims of torture. In **The Gambia**, the fund established by the Truth, Reconciliation and Reparations Commission received approximately USD 1 million in 2019 to be distributed as reparations to victims of torture, which was obtained from the sale of assets of former President Jammeh – under whose regime the victims were subjected to torture. However, implementation of the scheme has been limited due to financial constraints.[467] Concerns were also raised as to "political willingness" to fully implement the TRRC.[468] In **Kenya**, both the Restorative Justice Fund and the Victim Protection Fund have been slow to provide reparations to victims due to the parliamentary processes involved in making the funds operational.[469]

A major difficulty faced by victims of torture and prohibited ill-treatment is the enforcement of compensation awards, with victims frequently obtaining nothing at all or having to wait years to receive partial compensation.[470] This can be due to complex and inefficient enforcement processes, or due to the financial constraints of the State in question. In its second periodic report to the HRC, Uganda acknowledged its limits in this regard, stating that the State had tried "within the limits of its resources" to pay financial awards given as compensation to victims of violations.[471] To streamline the payment process, **Uganda** has also established a system of individual financial responsibility of Ministries, Departments and Agencies (MDAs), according to which any awards arising out of actions of MDAs will be paid out of their budgets.[472] The Ministry of Defence now also has a Compensation Committee and the Uganda Prisons Force has a dedicated desk to ensure timely payments.[473]

465 In *S v. J. Mukoko* the Court reiterated that no person should be subjected to physical or psychological torture, or to cruel, inhumane or degrading treatment or punishment. See High Court, *S v. J. Mukoko*, 27 September 2018 (Zimbabwe).

466 International Federation for Human Rights, *Zimbabwe: State ordered to pay 150,000USD reparation to Jestina Mukoko,* 12 October 2018; Front Line Defenders, *Jestina Mukoko Finally Gets Justice*, 5 October 2018.

467 UNHRC, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Visit to the Gambia* (**Report of the SRT on Visit to the Gambia**), 9 July 2020, UN Doc. A/HRC/45/45/Add.3.

468 Research by REDRESS, including interviews with stakeholders in the region.

469 The HRC noted that the regulations that will operationalise the Restorative Justice Fund are still at a consultative stage, limiting the progress that can be made towards redress. Similarly, the regulations that will govern the Victim Protection Fund await parliamentary approval, which is necessary before victims can access reparations. See HRC, *Fourth report of Kenya: Concluding observations*, para. 8.

470 REDRESS, *Legal Frameworks to Prevent Torture in Africa*, p. 54.

471 HRC, *Second periodic report submitted by Uganda under article 40 of the Covenant, due in 2008*, 19 November 2020, UN Doc. CCPR/C/UGA/2.

472 UNHRC, *UPR: National report of Uganda*, 9 November 2021, A/HRC/WG.6/40/UGA/1, para. 70.

473 UNHRC, *UPR: National report of Uganda*, 9 November 2021, A/HRC/WG.6/40/UGA/1, para. 75.

In **Sudan**, research revealed that, as of 2019, Sudan was yet to provide any compensation to victims of torture where reparations had been recommended by the ACHPR under the African Charter.[474]

PROPOSALS FOR STATES

- Enact or amend existing legislation to provide victims of torture with the right to compensation for moral harm and economically quantifiable damage, in an amount appropriate and proportional to the gravity of the crime and with regards to the circumstances of each case.

- Enact legislation to provide for the setting up of a Victims Compensation Fund, to be used for the proper compensation to victims (and their families) for grave human rights violations, including torture, and ensure proper implementation of such legislation, including by eliminating administrative barriers to setting up such funds.

b. Rehabilitation

Under international law, the right to redress for victims of torture and CIDTP includes "the means for as full rehabilitation as possible",[475] which States are to provide with the aim of restoring and repairing the harm suffered by victims whose life situations, including dignity, health and self-sufficiency may never be fully recovered as a result of the torture suffered.[476] CAT indicates that States must adopt a holistic approach to ensure the availability, appropriateness and accessibility of specialist services for victims such as "medical, physical and psychological rehabilitative services; re-integrative and social services; community and family-oriented assistance and services; vocational training; education etc".[477] The guide to practical implementation of the RIG refers to the provision of "medical, psychological or psychiatric care" as steps that States should take to rehabilitate victims, noting that the goal of redress is to erase, insofar as possible, all of the consequences of the torture or prohibited ill-treatment that a victim has suffered.[478] The ACHPR has also called on States to provide medical and social rehabilitation to victims.[479]

Of the States examined, **Zimbabwe, Uganda, Kenya** and **The Gambia** refer to the rehabilitative element of redress in their domestic legal frameworks. The **Zimbabwe** Constitution states that one of the functions of the National Peace and Reconciliation Commission is to develop programmes that ensure rehabilitative

474 REDRESS and ACJPS, *A way forward?*.

475 UNCAT, Art. 14; CAT, *General Comment No. 3*, para. 12.

476 CAT, *General Comment No. 3*, paras 11-15; See also CTI and OSCE, *UNCAT Implementation Tool 5/2018: Providing rehabilitation to victims of torture and other ill-treatment*, 2018.

477 *Ibid*, CAT, *General Comment No. 3*, para 13.

478 ACHPR, OHCHR and APT, *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: Practical Guide for Implementation* (**RIG – Practical Guide**), April 2008, p. 68

479 ACHPR, *Resolution on the Right to Rehabilitation for Victims of Torture*, 7 May 2015, ACHPR/Res.303 (LVI) 2015.

treatment and support.[480] Similarly, in **The Gambia**, the Truth, Reconciliation and Reparations Committee has a medical board that can provide for rehabilitation of victims[481] (although given its financial constraints, the extent to which these services are provided is unclear). In **Uganda**, the PPTA provides for the possibility of rehabilitation including medical and psychological care or legal and psycho-social services to victims of trauma – but victims can only access this form of redress if it is awarded through a judicial process.

Kenya's legislation is well developed in terms of rehabilitation; the PTA obliges the State to put in place programmes to provide specialised care for victims of torture which include psychological support, appropriate medical assistance and legal assistance or legal information on relevant judicial and administrative procedures (and specifies that the medical and professional costs involved are to be incurred by the State).[482] The Victims Protection Act also set up a Protection Board tasked (among other things) with the rehabilitation of victims, which can include the provision of education, shelter and psychological support – although these are to be funded through the Victim Protection Fund, which, as previously noted, is not currently operational. In **Nigeria**, the Prisoners Rehabilitation and Welfare Action have reiterated the need for the ATA to be amended to provide for rehabilitative measures for torture victims.[483]

In **Ghana, Nigeria, Sudan** and **South Africa**, the right to redress does not expressly encompass the right to rehabilitative measures, although medical and psychological treatment may be provided by public health institutions. Regardless of the domestic legal framework providing for rehabilitation, in all of the States examined, a significant amount of rehabilitation services for victims of torture and other forms of ill-treatment is falling on NGOs, international organisations and civil society rather than on the States.[484]

PROPOSALS FOR STATES AND CIVIL STAKEHOLDERS

- Enact legislation or amend existing legislation to provide victims of torture with the right to as full rehabilitation as possible, encompassing psychosocial (including trauma therapy), medical, psychiatric and legal support.

- Implement programmes to provide full-scope support for victims to ensure their rehabilitation and full reintegration. Consider designing these in collaboration with the judicial system, civil society organisations, and health care providers.

480 Constitution of Zimbabwe, Art. 252(e).

481 UNHRC, *Report of the SRT on Visit to the Gambia*.

482 PTA, ss 17 and 19 (Kenya).

483 PRNigeria, *PRAWA Urges FG to Amend Anti-Torture Act to Accommodate Rehabilitation of Victims*, 25 June 2020.

484 Research by REDRESS, including interviews with stakeholders in the region; CSVR, *Civil Society Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in South Africa*, 22 March 2019; HRC, *Fourth report of Kenya: Concluding observations*; ACTV, *Annual Report 2019*, 2019; PRAWA and IRCT, *UPR Briefing Note: Nigeria*, 2018.

c. Guarantees of non-repetition

As part of an effective right to redress, States should provide victims of torture and other ill-treatment with assurances and guarantees that the acts will not be repeated or renewed.[485] In order to guarantee non-repetition of torture and other ill-treatment, CAT has highlighted the importance of undertaking measures to combat impunity for violations of UNCAT, including through establishing effective clear instructions to public officials on UNCAT's provisions, particularly the absolute prohibition of torture, and measures such as ensuring that judicial proceedings abide by international standards of due process, fairness and impartiality and strengthening the independence of the judiciary.[486] Other measures to guarantee non-repetition should include prosecuting perpetrators and implementing preventative measures against torture or other ill-treatment, such as the safeguards and monitoring mechanisms addressed in this report, as well as to provide adequate training to relevant stakeholders such as law enforcement officials, military and security forces.[487]

Some independent monitoring bodies also fulfil their role of promoting human rights by organising training for security forces, going beyond prevention and guaranteeing compliance but also encouraging better practices in general that contribute to ensuring non-repetition. The UHRC, for instance, has trained thousands of police officers in human rights throughout Uganda.[488]

The practice in Uganda

The UN Uganda, in collaboration with the Uganda Human Rights Commission, developed a pocketbook for police, detailing basic human rights requirements in a handy and concise format for police officers. The handbook equips officers with knowledge regarding the right to be free from torture and cruel, inhuman and degrading treatment or punishment. The pocketbook also includes "common unacceptable excuses for torture" and presents information as to why torture has no benefits. Additionally, it provides in-depth explanation of the law and expectations for conduct of police officers.[489]

The Gambia has also focused on a method of training. The Institute for Human Rights and Development in Africa (IHRDA) has worked with the police to develop a Human Rights module for curriculum to be used at time of recruitment, which has not existed for over 50 years after independence[490].

485 ACHPR, OHCHR and APT, *RIG - Practical Guide*, p. 69.
486 CAT, *General Comment No. 3*, para. 18.
487 ACHPR, *General Comment No. 4*, paras. 46-47.
488 See UHRC and United Nations in Uganda, *A Pocketbook for Police on Basic Human Rights Standards*, 2012.
489 *Ibid*.
490 Research by REDRESS, including interviews with stakeholders in the region.

Of the countries examined, only **Uganda** expressly provides for the possibility of a guarantee of non-repetition as a form of redress. Nevertheless, the law does not specify which measures may be ordered as guarantees of non-repetition, thus leaving it to the discretion of the judiciary.[491]

PROPOSALS FOR STATES AND THEIR INSTITUTIONS

- Introduce legislation that allows for and envisages the possibility of ordering and implementing guarantees of non-repetition in cases of torture and other ill-treatment.
- Take steps to ensure full compliance with decisions issued in cases of torture by national, regional and international courts and bodies, where non-repetition measures are ordered to prevent torture and other ill-treatment in the future.
- Implement and ensure that guarantees of non-repetition are effective. States may wish to introduce the following:
- Measures that strengthen the independence of the judiciary, including avoiding access to judicial positions through executive appointment.
- Measures to ensure adequate legal and procedural safeguards are in place for persons in detention.
- Measures to protect legal, medical and media professionals, as well as human rights defenders.
- Review and reform laws and policies (and gaps therein) which directly or indirectly allow torture or other ill-treatment to occur.
- Accessible and comprehensive education to the public as well as mandatory trainings to relevant stakeholders, including law enforcement officials, prosecutors and judges, on human rights standards, existing domestic legislation and procedural and legal safeguards for persons deprived of liberty. States are encouraged to carry out an evaluation of the impact of such training programmes.
- Effective measures aimed at mitigating and eliminating the legal, structural and socioeconomic conditions which contribute to the systemic victimisation of and violence towards marginalised individuals, including by means of torture and ill-treatment. Consider taking measures to ensure these conditions are considered in the course of investigations into allegations of torture and ill-treatment, with a view to identifying patterns and remedying the factors contributing to these.

491 The Human Rights (Enforcement) Act, 2019 (Uganda).

- Awareness-raising and educational campaigns on violence against women and girls, and adopt measures to address such violence, including those able of tackling root causes of violence.

- Systemic changes covering regulatory frameworks and practices aimed at eliminating abuses committed by public officials and implementing safeguards against such abuses.

- A programme of reparations in consultation with survivors of torture or other ill-treatment and their representatives. Consider implementing such a programme in a manner that is sensitive to the gender, race, ethnic, religious or indigenous backgrounds, as well as social or migration status, sexuality, age, or disability of victims.

8.CONCLUSION

This report reviewed the anti-torture legal and regulatory framework in **The Gambia, Ghana**, **Kenya**, **Nigeria**, **South Africa**, **Sudan**, **Uganda** and **Zimbabwe**, and provided an analysis of standards in place to prevent, prohibit and respond to torture and other ill-treatment in these States. The extent of domestic legal and regulatory protection against torture and other ill-treatment and the level of compliance with international and regional standards varies between the States reviewed and within the areas researched in this report.

As showcased in the report, there are positive examples of domestic legal protection against torture and other ill-treatment in the region, including through legislative provisions, regulations, policies, institutions, mechanisms and practices, which can inspire action towards strengthening the domestic implementation of UNCAT across common law Africa.

This report also identified shared challenges experienced by States to prevent and respond to torture and other ill-treatment, which range from a lack of legislative and regulatory provisions to significant gaps between law and practice. In this regard, the report outlined measures and proposals that can be considered by States and their institutions at the legal and policy level. Recommendations are based on international and regional standards, as well as inspired by existing measures adopted by States in the region. Proposals include, among others, ratification of UNCAT and of other relevant human rights treaties, specific anti-torture legislative and regulatory reform, measures and policies. Implementing the proposed recommendations can allow States to strengthen mechanisms and institutions to combat torture and other ill-treatment, as well as to put in place practical measure such as the provision of training on different thematic areas relating to the prohibition of torture and other ill-treatment.

The report is hoped to serve as a useful basis for Governments and other relevant stakeholders to exchange experiences, good practices and challenges, and to discuss the way forward to enhance torture prevention and response strategies across common law Africa, including by implementing the recommendations outlined herein. The report can also assist States in identifying priority areas on anti-torture legislative reform and measures that can be undertaken ahead of and/or after UNCAT ratification.

CTI and REDRESS remain committed to supporting States, their institutions, and civil society, in the advancement of prevention of torture and other ill-treatment as well as response strategies, and are available to continue providing technical assistance as requested.

ANNEX 1

TABLE 1 - RATIFICATION OF HUMAN RIGHTS INSTRUMENTS

	UNCAT	OPCAT	ICCPR	ICPPED	CEDAW	CRC	CRPD	Geneva Conventions	Rome Statute	African Charter	Protocol to the African Court
The Gambia	✔	✖	✔	✔	✔	✔	✔	✔	✔	✔	✔
Ghana	✔	✔	✔	✔	✔	✔	✔	✔	✔	✔	✔
Kenya	✔	✖	✔	✔	✔	✔	✔	✔	✔	✔	✔
Nigeria	✔	✔	✔	✔	✔	✔	✔	✔	✔	✔	✔
South Africa	✔	✔	✔	✖	✔	✔	✔	✔	✔	✔	✔
Sudan	✔	✖	✔	✔	✖[492]	✔	✔	✔	✖[493]	✔	✔
Uganda	✔	✖	✔	✔	✔	✔	✔	✔	✔	✔	✔
Zimbabwe	✖	✖	✔	✖	✔	✔	✔	✔	✖	✔	✔

✔ Signed and ratified/acceded ✖ Not ratified or acceded ✔ Signed but not ratified

UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT); International Covenant on Civil and Political Rights (ICCPR); International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC); Convention on the Rights of Persons with Disabilities (CRPD); Geneva Conventions of 1949; Rome Statute of the International Criminal Court; African Charter on Human and Peoples' Rights; Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

492 The Council of Ministers had endorsed recommendation to accede to CEDAW on 27 April 2021, including reservations to Arts. 2, 16, and 29(1). There is uncertainty as to the status of this today.

493 The Council of Ministers had unanimously approved the ratification of the Rome Statute. There is uncertainty as to the status of this today.

TABLE 2 - STATUS AND APPLICABILITY OF RATIFIED HUMAN RIGHTS INSTRUMENTS IN THE DOMESTIC LEGAL SYSTEM

	Direct enforceability of international treaties and agreements	Direct enforceability of customary international law (as long as consistent with Constitution and Acts of Parliament)	Dualist system/ requires introduction of implementing legislation	Additional information/Exceptions
The Gambia	No*	Yes**	Yes*	Provisions that are in line with the Constitution can and have been invoked before the courts.
Ghana	No*	No	Yes*	The Supreme Court has held that international treaties and agreements don't need additional legislation in order to bind the State.
Kenya	Yes	Yes	No	The Constitution is silent as to hierarchy of international law and domestic law.
Nigeria	No	No	Yes	
South Africa	No*	Yes	Yes*	Some agreements and self-executing provisions are directly enforceable, unless inconsistent with the Constitution or an Act of Parliament.
Sudan	Yes	Yes	No	
Uganda	No	Yes**	Unclear, but yes in practice	
Zimbabwe	No	Yes	Yes*	Some treaties or agreements, or modifications thereto, can become law through Parliamentary resolutions, except where requiring withdrawal or appropriation of funds from the Consolidated Revenue Fund or a modification of domestic law.

*See exceptions
** This is pursuant to a court's interpretation of the Constitution rather than the Constitution itself

ANNEX 2

FURTHER READING MATERIALS

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12. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 9 December 1988, UN Doc. A/RES/43/173.*
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16. *UN,* Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, 8 February 2005, UN Doc. E/CN.4/2005/102/Add.1*

Tools and other reports

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