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Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Good practices in national criminalization, investigation,
prosecution and sentencing for offences of torture****Report of the Special Rapporteur on torture and other cruel,
inhuman or degrading treatment or punishment, Alice Jill
Edwards****Summary*

In the present report, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Alice Jill Edwards, examines the obligations of States to criminalize, investigate and prosecute acts of torture and other ill-treatment, identifies major challenges standing in the way of impartial, prompt, transparent and effective investigations and presents a range of State practices. The Special Rapporteur places a special emphasis on the participation and protection of victims and witnesses and presents a range of actionable recommendations. The report also presents an overview of the activities of the Special Rapporteur since taking up her mandate on 1 August 2022.

* The present report was submitted after the deadline in order to reflect the most recent developments.



I. Activities relating to the mandate

1. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Alice Jill Edwards, took up her functions on 1 August 2022. Since that time, she has undertaken a broad range of activities relating to the mandate, the most notable of which are described below.
2. On 23 and 24 August, the Special Rapporteur conducted a working visit to Geneva, during which she organized a first consultation with international non-governmental organizations, with the support of the Association for the Prevention of Torture. She also met with representatives of the Permanent Missions of States Members of the United Nations and United Nations agencies.
3. On 9 September, the Special Rapporteur gave the keynote speech at the Australian national symposium on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, organized by the Australian Human Rights Commission. In her speech, she emphasized the importance of independent oversight mechanisms for the country's full adherence to its obligations to prevent torture and other ill-treatment.
4. On 20 September, the Special Rapporteur participated in an international seminar on standards and practices on prevention against torture during arrest, hearing and custody organized by the National Human Rights Council of Morocco. In her intervention, she called on Moroccan leaders at all levels to help identify problems and to be part of the solution in preventing torture and encouraged community participation in decisions relating to public order.
5. On 14 October, the Special Rapporteur presented her first interim report to the seventy-seventh session of the General Assembly,¹ setting out her vision and approach to the mandate. She took the opportunity to meet with a range of stakeholders working on matters relating to the mandate, including the Chairs of the Committee against Torture and the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and held a press briefing. Over the following months, she announced her priorities and set out her approach to the mandate more publicly through the issuance of several short video clips, blogs and podcasts and made a number of radio and television appearances.
6. On 1 November, the Special Rapporteur addressed the annual session of the International Bar Association, held on the theme "Preventing coercive interrogations and forced confessions: the role of the legal profession", exploring global perspectives on the theme, with a focus on the Principles on Effective Interviewing for Investigations and Information Gathering (the Méndez Principles).
7. On 23 November and 9 December, the Special Rapporteur, with a view to enhancing coordination, engaged in the mutual sharing of priorities and areas of collaboration with the full membership of the Committee against Torture and with the Chair of the Subcommittee.
8. On 29 and 30 November, the Special Rapporteur, in preparation of her thematic report, organized an online consultation with leading experts and practitioners on the duty to investigate crimes of torture in national law and practice.
9. On 5 December, the Special Rapporteur participated in thematic discussions held under the auspices of the Commission on Crime Prevention and Criminal Justice on the implementation of the Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development, speaking on a panel on the theme "Safeguarding victims' rights and protecting witnesses and reporting persons: improving criminal investigation processes".
10. On 14 December, the Special Rapporteur participated in a one-day meeting of experts organized by the Geneva Academy of International Humanitarian Law and Human Rights on

¹ [A/77/502](#).

the theme “Open source information: strengthening accountability at the intersection of law, technology and humanitarian space”.

11. On 15 December, the Special Rapporteur participated in the annual forum of the Convention against Torture Initiative.

12. From January to December 2022, the Special Rapporteur transmitted 72 communications, both jointly with other mandate holders and individually on behalf of individuals exposed to torture and other ill-treatment. No country visits were conducted in 2022. An invitation to visit Ukraine was postponed from late 2022 to February 2023 owing to the prevailing security situation. The requests of the Special Rapporteur to visit Chile and South Africa have been accepted.

II. Duty to investigate crimes of torture in national law and practice

A. Introduction

13. The “duty to investigate” every act of torture and other cruel, inhuman or degrading treatment or punishment starts with foundational legislation establishing that all acts of torture are offences under national law, and continues through stages of complaint and investigation, and concludes with either the prosecution, final judgment and sentencing of alleged offenders or the dismissal of the case based on sound judicial reasoning; or extradition of the accused to be tried in another jurisdiction. Effective investigations and prosecutions acknowledge suffering and bring justice and peace to victims and communities. The duty is closely connected to the right of victims and survivors to a remedy and reparation.² Prompt, impartial and transparent investigations also have a deterrent and preventive character, helping to improve officer behaviour and build or restore confidence in public administration.³

14. Yet despite the advanced international legal framework, very few incidents of torture or other ill-treatment are officially reported and too many investigations and prosecutions collapse or are withdrawn before their satisfactory conclusion. Investigating crimes of torture is not comparable with investigations into ordinary common crimes. In particular, torture is first and foremost a crime committed or enabled by public officials or, at times, promoted either quietly or outwardly by government policy or direction, or through consent or acquiescence. In making a complaint, an accuser is raising an allegation against the same authorities as those charged with protecting the rights of all individuals under their jurisdiction. This power asymmetry places the victim in a situation of particular precarity. Victims may still be in the custody or under the control of the very authorities against whom they are making allegations. Authorities handling such complaints may lack impartiality or be under pressure to cover up allegations or to destroy evidence. The risk of retaliatory violence, including being disappeared, are real in many contexts. The stakes can be very high.

15. There has been an impressive growth in the type and range of international venues working for justice and remedies for victims and survivors of the crime of torture and holding perpetrators responsible for their crimes. That said, such courts and tribunals have inherent limitations, including jurisdictional limitations, such as prosecuting only those with higher levels of responsibility. It is the view of the Special Rapporteur that justice, accountability, healing and reconciliation will only become a meaningful reality when national actors operate as the primary investigators and prosecutors of acts of torture and other comparable ill-treatment.

² The present report does not tackle questions of reparations and rehabilitation in full; see Committee against Torture, general comment No. 3 (2012), para. 19; Human Rights Committee, general comment No. 20 (1992), para. 14; and Human Rights Council resolution 22/21.

³ Carver, R. and Handley, L., *Does Torture Prevention Work?* (Liverpool University Press, 2016), pp. 81–84.

16. There have been numerous worthwhile developments at the domestic level. Universal jurisdiction⁴ has been effectively exercised in respect of historic cases, mass atrocities and even in the prosecution of company executives for complicity in torture.⁵ Truth and reconciliation efforts have brought restorative justice to millions and have been important sources of evidence gathering for criminal trials. Hybrid or mixed tribunals have successfully helped instigate domestic legislative reforms, enhanced local capacity and, importantly, placed judicial outcomes in the hands of society.⁶

17. Developments in forensic science and technology are enabling more secure and reliable evidence collection and preservation.⁷ Expertise in torture documentation, both physical and psychological, is growing, thanks to the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), and, in cases when torture leads to murder, to the Minnesota Protocol on the Investigation of Potentially Unlawful Death. Humane and non-coercive interviewing techniques, such as those presented in the Principles on Effective Interviewing for Investigations and Information Gathering (the Méndez Principles), are also applicable to investigations of torture. The need for specialist expertise when handling complaints of sexual torture has been acknowledged and investigators are aided by a range of important guidance for persons with special vulnerabilities (see para. 54 below). Open source information is being used to considerable effect, alerting the general public and authorities of potential violations and raising the stakes on Governments to respond appropriately. The Berkeley Protocol on Digital Open Source Investigations, launched in 2020, sets out common global standards for using public digital information, including videos, photographs, satellite imagery and social media posts.

18. The report of the Special Rapporteur examines the duty of States to investigate acts of torture for the purposes of criminal prosecution at the domestic level, reminding States of their binding obligations, highlighting key challenges, obstacles and impediments and presenting good practices drawn from diverse contexts. The report aims to address the alarmingly low number of investigations into torture and other ill-treatment. This glaring gap between the promise and reality of the international prohibition against torture makes the duty to investigate a topic worthy of discussion at the Human Rights Council.

19. The Special Rapporteur is grateful for the submissions of 24 States⁸ and over 34 other stakeholders to the present report⁹ and expresses her deep appreciation to the 26 experts and practitioners drawn from all geographical regions who took part in her online consultation held on 29 and 30 November 2022.

B. Duties to criminalize, investigate and prosecute all acts of torture

20. Attached to the peremptory and absolute prohibition of torture are obligations to investigate all acts of torture or other cruel, inhuman or degrading treatment or punishment, to prosecute or extradite suspects, to punish those responsible and to provide remedies to victims. According to the International Court of Justice, the duty to investigate for the purposes of prosecution or extradition aligns with States' "common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity [...] regardless of the nationality of the offender or the victims, or of

⁴ See [A/HRC/4/33](#).

⁵ TRIAL International et al., *Universal Jurisdiction: Annual Review 2022*.

⁶ Such as those established in Cambodia, Kosovo [all references to Kosovo should be understood to be in compliance with Security Council resolution 1244 (1999)], Senegal, Sierra Leone and Timor-Leste; and also, as recently announced, in the Gambia.

⁷ See [A/69/387](#).

⁸ Armenia, Australia, Dominican Republic, Ecuador, El Salvador, Germany, Iraq, Ireland, Italy, Kuwait, Luxembourg, Mexico, Morocco, Namibia, North Macedonia, Poland, Portugal, Qatar, Saudi Arabia, Sweden, Türkiye, Ukraine, Uruguay and State of Palestine.

⁹ All submissions are available at: [OHCHR| Good practices in national criminalization, investigation, prosecution and sentencing for offences of torture](#).

the place where the alleged offences occurred".¹⁰ The obligation to investigate and prosecute acts of torture is made further explicit or implicit in the range of international and regional treaties prohibiting torture.¹¹ The rules are clear and far-reaching; no stone shall go unturned in fighting impunity for crimes of torture.

21. States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have explicit treaty duties to establish all acts of torture as offences under domestic law (art. 4), to exercise jurisdiction over said offences (art. 5), to receive complaints and examine them promptly and impartially (art. 13), and to investigate those allegations promptly and impartially (art. 12). Defendants cannot rely on orders of a superior or public authority, or states of emergency, to exonerate their actions (art. 2 (3) and 2.(2)), while any legal mechanisms which interfere with that obligation, such as statutes of limitations, immunities or amnesties, are considered contrary to the non-derogable nature of the prohibition.¹² Amnesties provided at domestic law do not remove criminal liability pursuant to international tribunals or universal jurisdiction.¹³ Prosecutors and courts have a duty to refuse evidence obtained, or suspected of having been obtained, through torture or other illicit means (art. 15).¹⁴ Victims are to be protected from reprisals or intimidation during said investigations (art. 13) and they have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible (art. 14). Although only acts committed after the entry into force of the Convention fall within the scope of its obligations,¹⁵ as a *jus cogens* norm, which both pre-exists and is external to any specific treaty obligations, States remain duty-bound to investigate and prosecute earlier occurring allegations of torture and other ill-treatment.

22. States are to establish jurisdiction over all acts of torture on territoriality, flag State, active nationality, passive nationality and universal jurisdiction principles (art. 5). The Convention against Torture further imposes duties to extradite alleged offenders when they are not prosecuted (arts. 5 (2) and 7 (1)). As expressed by the International Court of Justice, "the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State".¹⁶ This obligation requires a State "to make a preliminary inquiry [art. 6 (2)] immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities [under art. 7 (1)] may or may not result in the institution of proceedings, in the light of the evidence before them ...".¹⁷ Further, in respect of extradition, the Convention clarifies that torture shall be deemed an extraditable offence and that the Convention may be considered as the legal basis for extradition in the absence of an extradition treaty where extradition is conditional upon the existence of such a treaty (art. 8). Mutual legal assistance between States parties is expected (art. 9). The Human Rights Committee has identified similar obligations.¹⁸

23. Under international humanitarian law, similar investigative obligations exist. As a grave breach of each of the four Geneva Conventions of 1949, the High Contracting Parties are obliged: to enact legislation to provide penal sanctions for persons committing, or

¹⁰ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, *ICJ Reports 2012* (concerning the case against Hissane Habré), para. 68.

¹¹ See *A/77/502*, para. 40.

¹² Committee against Torture, general comment No. 2 (2008), para. 5.

¹³ *Prosecutor v. Kallon and Kamara*, Special Court of Sierra Leone, Case No. SCSL-2004-15-AR 72(E) and SCSL-2004-16-AR 72(E), 13 March 2004, paras. 67–71.

¹⁴ See Office of the United Nations High Commissioner for Human Rights (OHCHR), *Guidelines on the Role of Prosecutors* (1990), para. 16.

¹⁵ *Belgium v. Senegal*, para. 100. It should be noted that the Court ruled only on obligations under the Convention and did not rule on the question of obligations under customary international law, for which the Special Rapporteur deems to have no such temporal limitation. See also, Committee against Torture, *O.R., M.M. and M.S. v. Argentina*, communication Nos. 1/1988, No. 2/1988 and No. 3/1988, decision of 23 November 1989, para. 7.5.

¹⁶ *Belgium v. Senegal*, para. 95.

¹⁷ *Ibid.*, para. 94.

¹⁸ Human Rights Committee, general comment No. 20 (1992), paras. 8 and 13–14.

ordering to be committed, torture and inhuman treatment, including biological experiments; to search for such persons in order to bring them to justice;¹⁹ and to prosecute suspects of acts of torture as grave breaches under universal jurisdiction, which is considered obligatory.²⁰ States may discharge their obligation to investigate war crimes and prosecute the suspects by setting up international or mixed tribunals.²¹ The preamble to the Rome Statute of the International Criminal Court recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. The Statute disregards immunity for Heads of State or Government (art. 27), establishes responsibility of those in command (art. 28), excludes statutes of limitations (art. 29) and disregards the excuse of following superior orders (art. 33). The duty to investigate and prosecute torture as genocide, war crimes or crimes against humanity is also determined to be customary law, applicable for crimes committed in international and non-international armed conflict, which requires States to establish jurisdiction and investigate war crimes allegedly committed by its nationals or armed forces, or on their territory, and, if appropriate, to prosecute the suspects.²² Customary law has also established that soldiers have a duty to disobey orders of a superior for grave breaches and that there is no relief for following superior orders.²³ Also considered customary norms are the rules against amnesties and statutes of limitation.²⁴

24. Among the many restatements of this international obligation to investigate torture for purposes of criminal prosecution at the regional level, the Inter-American Court of Human Rights has confirmed that: “The State has a legal duty [...] to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.²⁵ The Court has clarified that prosecutions must be conducted within “a reasonable time” by a competent, independent and impartial tribunal.²⁶ In cases of enforced disappearances, the Court has held that the refusal to investigate or to know the truth is a form of cruel and inhuman suffering to family members.²⁷

25. The jurisprudence of the European Court of Human Rights has held that the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice if credible assertions of ill-treatment are not investigated. An “effective official investigation” should be capable of leading to the identification and punishment of alleged offenders.²⁸ What the European Court terms a “positive obligation” includes requirements to legislate,²⁹ for authorities to act of their own motion to investigate once the matter has come to their attention³⁰ and that investigative bodies must be hierarchically, institutionally and practically independent of the individuals or entities they are investigating.³¹ In some circumstances, the obligation may require investigators to seek or to afford assistance to the authorities of another State.³² In addition, the Court has held that the procedural obligation to investigate also extends to a requirement

¹⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 50; Convention relative to the Treatment of Prisoners of War, article 129; and Convention relative to the Protection of Civilian Persons in Time of War, article 146.

²⁰ See International Committee of the Red Cross (ICRC), International Humanitarian Law Databases and commentary (<https://ihl-databases.icrc.org/en/customary-ihl/v1>), rule 158.

²¹ Ibid.

²² Ibid., rules 157 and 158.

²³ Ibid., rules 151, 154 and 155.

²⁴ Ibid., rules 159 and 160.

²⁵ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, ser. C, No. 4 (1988), para. 174.

²⁶ Ibid., *Manuel García Franco v. Ecuador*, Case 10.258 (1997), para. 70.

²⁷ Ibid., *Blake v. Guatemala*, series C, No. 36, para. 114, and *Torres Millacura et al. v. Argentina*, 26 August 2011, para. 142.

²⁸ European Court of Human Rights, *Labita v. Italy*, Application No. 26772/95, 6 April 2000, para. 131.

²⁹ Ibid., *X and Others v. Bulgaria*, Application No. 22457/16, 2 February 2021, para. 179.

³⁰ Ibid., *Gldani Congregation of Jehovah’s Witnesses and Others v. Georgia*, Application No. 71156/01, 3 May 2007, para. 97.

³¹ Ibid., *Bouyid v. Belgium*, Application No. 23389/09, 28 September 2015, para. 118.

³² Ibid., *X and Others v. Bulgaria*, Application No. 22457/16, 2 February 2021, para. 191.

to investigate allegations of ill-treatment administered by private individuals when they are “arguable”.³³

26. The African Commission on Human and Peoples’ Rights has likewise held that “allegations of torture against public officials impose an immediate duty on the State to initiate a prompt, impartial and effective investigation [...]”.³⁴ The Commission has warned States that by failing to take measures to investigate allegations, in spite of being notified of them, they “forfeit its prerogative to deal with a case domestically [...]”.³⁵ The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines) call on States to criminalize torture in line with article 1 of the Convention against Torture, paying particular attention to gender-related forms of torture and ill-treatment, to ensure that those responsible for torture are subjected to a legal process and to establish readily accessible and fully independent mechanisms.

27. Many soft law instruments have been developed to reaffirm rights to complain and provide guidance on how to carry out torture investigations impartially and promptly.³⁶

C. Obstacles, impediments and challenges to effective torture investigations

28. The failure of States to carry out investigations into allegations of torture and to hold perpetrators accountable can be attributed to numerous factors, requiring a whole-of-government reckoning about why such obstacles to accountability persist. Such factors include denial, wilful obstruction, delay, scapegoating, deficient and/or underfunded procedures, barriers to victim participation and historical patterns of torture and impunity that shape present-day tolerance of such practices and evasion of accountability.³⁷ Additional impediments and further details have been reported to the Special Rapporteur for the present report.

29. Regulatory gaps, such as an absence of an explicit crime of torture or unclear definitions in national law pursuant to which perpetrators can be tried, continue to be first-tier legal blocks. Regulatory gaps also include the absence of legal provisions setting out the procedures for complaints, investigations and prosecutions. Certain domestic laws continue to permit torture or inhuman treatment or punishment in various forms, making such acts unprosecutable. Such laws persist in States that retain colonial-era prison acts or other criminal codes allowing the use of corporal punishment.³⁸ In some countries indefinite solitary confinement is still on the statute books³⁹ and in others courts permit confessions and/or evidence extracted using torture.⁴⁰ Such laws require immediate repeal.

30. Non-existent, unsafe or inaccessible complaints procedures without victim or witness protection against reprisals or intimidation are not uncommon. Many persons arrested or deprived of their liberty are not made aware of complaints procedures, or the procedures in place lack confidentiality and safety. Bureaucratic red tape and “invisible” obstructions are prevalent. In some cases, authorities refuse to register complaints or accusers are discouraged or pressured not to file complaints.

³³ Ibid., para. 184.

³⁴ African Commission on Human and Peoples’ Rights, *Abdel Hadi, Ali Radi v. Sudan*, communication No. 368/09, 2014, para. 45.

³⁵ Ibid., para. 31.

³⁶ Soft law instruments relevant to the duty to investigate torture are available at <https://www.ohchr.org/sites/default/files/documents/issues/torture/annex-relevant-soft-law-instruments.docx>.

³⁷ See *A/76/168*.

³⁸ See joint submission by Reprieve, the Centre for Human Rights Education, Advice and Assistance (Malawi) and Irish Rule of Law International; see also submission by Suara Rakyat Malaysia and the Anti-Death Penalty Asia Network.

³⁹ Submission by Prisoners Legal Service, Canada.

⁴⁰ Joint submission by Reprieve et al. and submission by Suara Rakyat Malaysia et al.

31. Deficient investigations in terms of quality, capacity and application of torture-specific medical and forensic documentation and investigation interfere with justice. The Istanbul Protocol, the standard guide for documentation and investigation of torture, is being used routinely by clinical experts in torture cases. It has been reported, however, that most States have not adopted or endorsed it officially, meaning that public authorities lack clear and authoritative direction on how to document and investigate torture. In many countries, State agencies hold a monopoly on the production of medical evidence in torture cases, while evidence produced by private medical practitioners or non-State experts is not widely considered by the prosecution and may not always be admitted into proceedings⁴¹ In addition, it has been reported that there is a lack of prosecutorial and judicial expertise in assessing the reliability of evidence of torture.⁴² When death results from torture, autopsies may be limited to the cause of death (for example, heart attack, dehydration or blunt force trauma) and may fail to document injuries caused by torture. How to establish, document and evaluate psychological torture remains one of the most complicated aspects of both the investigation and trial phases. It has been reported that records produced under the Istanbul Protocol have been dismissed by courts on immaterial (form) grounds.

32. Delays at all stages of proceedings have been widely reported, including delayed disclosure of an incident or in filing and investigating complaints, which complicates the collection of reliable evidence. Furthermore, inadequate or loose guidance as to time frames, such as “reasonable delays”, results in discretionary (lack of) action and inconsistent standards.

33. Biased investigations lacking the requisite arms’ length, independence and rigor to push investigations and prosecutions forward were cited as key challenges. Secret or closed investigations and prosecutions that fall short of transparency and accountability standards were also reported, along with many incidents of evidence tampering and witness intimidation.

34. Lack of special accommodation for vulnerable victims also hinders investigations. Regrettably, it was not possible to address the full scope of the experiences of such victims in the present report, although the Special Rapporteur has attempted to mention their particular circumstances at relevant points (see sect. E below).

35. Lack of independence in the wider administration of justice, including prosecutors and judges, corruption and coercion of witnesses and lack of rule of law, also permeate torture trials. Judicial retaliation, in which prosecutors and judges are complicit in sham trials against accusers and victims in order to dissuade them from pursuing their complaints, is among the most extreme and yet common forms of intimidation.

D. Criminalizing torture

36. Research undertaken by the Special Rapporteur into national criminal legislation for the present report points to a trajectory towards the adoption of torture as an autonomous crime in a majority of countries worldwide.⁴³ The research carried out by the Special Rapporteur shows that legislative practice in at least 31 States in Africa,⁴⁴ 11 Arab States,⁴⁵

⁴¹ Submission by the International Rehabilitation Council for Torture Victims.

⁴² Submission by The Rights Practice.

⁴³ All efforts have been made to ensure that legislation referred to in the report is up to date. Any errors or changes can be communicated to the Special Rapporteur.

⁴⁴ Algeria, Angola, Benin, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Kenya, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, South Africa, Tunisia, Togo and Uganda.

⁴⁵ Bahrain, Iraq, Jordan, Kuwait, Lebanon, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates, Yemen and State of Palestine.

11 States in the Asia-Pacific,⁴⁶ 36 States members of the Council of Europe,⁴⁷ the Russian Federation and 18 States in Latin America and the Caribbean⁴⁸ all recognize torture as an explicit crime. Not all of these autonomous crimes are fully in line with article 1 of the Convention against Torture and calls for further amendments.

37. In addition to criminalizing torture, the right to lodge a complaint against maltreatment must be established in domestic law.⁴⁹ Prison, military, intelligence, security, immigration and other legislation covering places where people are deprived of their liberty or where powers of arrest are exercised must enshrine a right to complain and must establish impartial procedures for receiving complaints and carrying out investigations.⁵⁰ State officials who raise alarm and report cases of torture must be given protection under whistleblower legislation against retaliatory prosecution or other measures. The powers, authority and procedures of investigative bodies must be regulated.

38. Establishing an indictable offence of torture in domestic criminal or penal codes is a primary obligation. Any delays in doing so interfere with the implementation of other obligations under the Convention against Torture.⁵¹ At a minimum, the offence of torture shall be aligned with the elements defined in article 1 of the Convention, the most widely accepted definition. State practice to criminalize torture in alignment with article 1 and as an autonomous crime points to an emerging customary norm.⁵²

39. Arguments put forward by a few States that article 4 of the Convention against Torture does not demand a separate “crime” of “torture” but only requires that “acts of torture” be captured and prosecuted under other forms of criminality is not supported by an ordinary reading of article 4, the *travaux préparatoires*⁵³ nor backed up by extensive State practice to the contrary. Investigating and prosecuting cases of torture under ordinary offences, such as assault or abuse of authority, may serve to avoid total impunity, however this strategy fails to reflect the cruelty inflicted by torture, the gravity of the offence, the responsibility of public officials and does not deliver adequate penalties. Further, these common crimes almost always lack one or more elements of the definition of torture in article 1 of the Convention, and otherwise downplay or, either purposefully or inadvertently, obscure or hide the reality of torture, and in doing so foster impunity. While the offence of abuse of authority may be tried simultaneously with the crime of torture, the former is commonly used as the basis for economic crimes of financial mismanagement, fraud or corruption or for neglect or deviance of duty, the penalty for which is often removal from office or a fine. Defences of reasonable justification are generally permitted in respect of offences of abuse of authority. Specifically for sexual offences, which are disproportionately perpetrated against women, ordinary crimes often carry lower penalties in comparison to acts punishable as torture. This suggests discriminatory treatment of female (and potentially other) victims of sexual torture. The Committee against Torture has noted: “Codifying this crime will also (a) emphasize the need for appropriate punishment that takes into account the gravity of the offense; (b) strengthen

⁴⁶ Australia, Cambodia, Lao People’s Democratic Republic, Maldives, Mongolia, Nauru, Nepal, New Zealand, Philippines, Thailand and Timor-Leste.

⁴⁷ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina [partly], Croatia, Cyprus, Czechia, Estonia, Finland, France, Georgia, Greece, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Norway, Portugal, Republic of Moldova, Romania, Serbia, Slovak Republic, Slovenia, Spain, Türkiye, Ukraine and United Kingdom of Great Britain and Northern Ireland. Information for San Marino was not available.

⁴⁸ Antigua and Barbuda, Argentina, Belize [limited to torture of prisoners], Bolivia (Plurinational State of), Brazil, Canada, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru and Venezuela (Bolivarian Republic of).

⁴⁹ Human Rights Committee, general comment No. 20 (1992), para. 14.

⁵⁰ United Nations Office on Drugs and Crime (UNODC), *Incorporating the Nelson Mandela Rules into National Prison Legislation: A Model Prison Act and Related Commentary* (2022), part two, in particular arts. 43–45.

⁵¹ *Belgium v. Senegal*, paras. 75–76.

⁵² See <https://ihl-databases.icrc.org/en/customary-ihl/v1>. Defence and military codes have not been reviewed for the present report.

⁵³ See M. Novak et al., *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd ed., Oxford University Press, 2019), on article 4.

the deterrent effect of the prohibition itself; (c) enhance the ability of responsible officials to track the specific crime of torture and (d) enable and empower the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention".⁵⁴ In addition, codification will enable and improve torture victims' access to justice and redress. Not recognizing a crime of torture can serve to hide the number of cases of officially perpetrated torture.

40. Apart from the lack of an explicit crime or variations on the article 1 definition, the most common shortcomings in national legal frameworks include: qualifying torture as a crime only where committed as part of a crime against humanity or a war crime and not providing for torture outside these contexts (Ethiopia, Guinea-Bissau, Lesotho and Uruguay); limiting the public actors who can be prosecuted for such crimes, such as prison officials (Ghana); or limiting the purposes of torture to particular contexts, such as interrogation (China, Kuwait and the Sudan). A few countries have excluded the purpose of "discrimination" from the crime of torture (Uganda). The granting immunity, full or partial amnesty or applying a statute of limitation, which are prevalent practices, serve to protect perpetrators from prosecution. Some systems continue to permit the defence of following superior orders, which cancels out individual criminal liability. Of those States that have not yet criminalized torture as an autonomous crime, several have added "torture" as an aggravating factor appended to other crimes and, as such, increased the applicable penalty for their commission (Côte d'Ivoire, Denmark and Mozambique).

41. A few States have decided to list the type of acts that constitute torture in appendices or interpretative provisions (Maldives and Uganda). While such lists can provide legal clarity on what constitutes torture, they can never be exhaustive. In the Americas, owing to the slightly varied definition of torture in the Inter-American Convention to Prevent and Punish Torture, seven countries have included "methods intended to obliterate the personality of the victim or diminishing his/her capacities even if they do not cause physical pain or mental anguish" in lists of prohibited acts.⁵⁵

42. The Human Rights Committee has stated that those who refuse to obey orders must not be punished or subjected to adverse treatment.⁵⁶ A growing number of States have removed the defence of following superior orders.⁵⁷ Non-reporting of torture has been criminalized as a separate offence in Armenia,⁵⁸ while failing to prevent torture has been criminalized explicitly in Ecuador.⁵⁹ Other positive trends include explicit reference to a broad list of categories of discrimination to be prohibited as a reason for torture, including political opinion, race, religion, sex, sexual orientation, gender identity, disability or other protected characteristics.⁶⁰ As a good practice, a number of States have made it clear that rape and sexual abuse are part of a category of acts amounting to torture,⁶¹ while other countries make the perpetration of rape or other sexual violence an aggravating circumstance to the offence of torture.⁶² Torture based on sexual orientation or gender identity is considered an aggravating factor in sentencing in Ecuador and Mexico.

43. It is well-established that omissions that are deliberately inflicted on a victim causing severe mental or physical suffering can also constitute torture.⁶³ In the view of the Special Rapporteur, such omissions (such as purposefully depriving a prisoner of medical treatment, food or sleep) is still prosecutable as an "act" for the purposes of the element of *actus reus* in ordinary criminal law. Threats shall also be prosecuted.

44. Wider definitions than that in article 1 of the Convention are favoured by an increasing number of States, especially in countries in Africa and Latin America, to reflect specific

⁵⁴ Committee against Torture, general comment No. 2 (2007), para. 11.

⁵⁵ Chile, Dominican Republic, Ecuador, Mexico, Panama, Peru and Venezuela (Bolivarian Republic of).

⁵⁶ Human Rights Committee, general comment No. 20 (1992), para. 13.

⁵⁷ Australia and Dominican Republic.

⁵⁸ Submission by Armenia.

⁵⁹ Submission by Ecuador.

⁶⁰ Brazil, Chile, Costa Rica, Ecuador, Mexico and Venezuela (Bolivarian Republic of).

⁶¹ Kenya, Nigeria and Uganda.

⁶² Morocco and South Africa.

⁶³ Committee against Torture, general comment No. 3 (2012), paras. 3 and 23.

challenges and contexts, including countries facing internal insurgencies, armed conflicts with non-State actors, terrorist activities or other emergency situations. For example, some States criminalize torture not only when inflicted by people acting in their official capacity, but also acting outside their official capacity or in a wholly private capacity.⁶⁴ Uganda has extended the article 1 definition to include criminal liability for “other persons acting in an official or private capacity”. Argentina and Mexico include torture committed by private actors, while Guatemala and the Plurinational State of Bolivia explicitly criminalize torture when committed by members of organized gangs. While the decision to incorporate torture committed by individuals who are not government officials within the definition of torture is at the discretion of States, the prosecution of such cases must not be used to take attention away from investigating torture committed by public officials or for the purposes of skewing statistics.

45. A number of States have chosen to make no distinction between torture and other cruel, inhuman or degrading treatment or punishment and to list them together as a contiguous crime, leaving any distinctions to the sentencing phase and including more severe penalties for more egregious acts (Angola, Kenya and the Maldives). Other countries have opted to criminalize “cruel, inhuman or degrading treatment or punishment” separately, with lesser penalties attached. Article 4 of the Convention against Torture requires that torture be criminalized, but it does not extend that obligation to other forms of ill-treatment.⁶⁵ That said, other forms of ill-treatment must continue to be investigated and prosecuted if they rise to the level of criminal behaviour, and if that behaviour falls short of criminal conduct, disciplinary procedures should be instituted.

46. Some States that prosecute torture under universal jurisdiction⁶⁶ do not simultaneously have a general crime of torture in their penal codes, which means that it is not possible to prosecute their own nationals who commit torture at home whereas foreign nationals present in their territory are liable to prosecution for acts committed elsewhere. The Special Rapporteur is encouraged to learn that those States are working to rectify this double standard.

E. Participation, protection and empowerment of victims

47. Every complainant is to be treated with compassion and dignity before, during and after legal proceedings. Their privacy and safety, both physical and psychological, must be safeguarded.⁶⁷ Further, States are required, under article 13 of the Convention, to protect “the complainant and witnesses [...] against all ill-treatment or intimidation as a consequence of his [or her] complaint or any evidence given”. Under article 14, States are obliged to provide as full rehabilitation as possible after a complaint of torture or other ill-treatment has been made or a victim is identified. Access to rehabilitation is not contingent on participation as victims or witnesses in legal proceedings.⁶⁸

48. Trauma caused by torture, if left untreated, can lead to serious consequences, including deteriorating mental stability, physiological illnesses, anxiety, depression, sleep deprivation and memory loss. It can also result in a reduced ability to cope with the pressures, expectations and unknown consequences of court proceedings. Early access to trauma counselling and other forms of rehabilitation would assist not only the mental health of complainants, it would also help them to become more reliable witnesses in court proceedings.

49. Victims recount genuine reasons for being hesitant about filing complaints. They may lack confidence in the criminal legal system to hear and treat their experiences impartially,

⁶⁴ Human Rights Committee, general comment No. 20 (1992), para. 2.

⁶⁵ M. Novak et al., *The United Nations Convention Against Torture and its Optional Protocol*, p. 176, para. 1.

⁶⁶ Germany, Sweden and Switzerland.

⁶⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 10 and 12 (b) and (c); see also Rome Statute of the International Criminal Court, art. 68.

⁶⁸ Committee against Torture, general comment No. 3 (2012), para. 15.

fairly and with empathy; they may be pressured or otherwise dissuaded from registering their complaint; or they may fear that they themselves or their families will not be protected from threats, reprisals or intimidation. They may also be worried about counter-complaints or defamation suits launched by the authorities.⁶⁹ The emotional and often financial toll of pursuing complaints against public authorities can be doubly devastating, exacerbating trauma, including post-traumatic stress disorder, or slowing rehabilitation and recovery. Worrying about one's own safety or that of a loved one, or where one will sleep for the night or get one's next meal are sure-fire ways to reduce the chances of successful investigation and prosecution.

50. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁷⁰ established a unified set of minimum standards to "access the mechanisms of justice and to prompt redress"⁷¹ and such proceedings are intended to be responsive to the needs of victims, including through:

- (a) Keeping victims informed of their role and the scope, timing and progress of proceedings;
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings;
- (c) Taking measures to minimize inconvenience to victims, protect their privacy and ensure their safety, as well as that of their families and witnesses, from intimidation and retaliation;
- (d) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.⁷²

51. The Declaration further states that victims should receive material, medical, psychological support and social assistance, as well as information about the services available to them.⁷³

52. Practical measures that have been adopted at national levels to minimize trauma and maximize participation and engagement with the criminal legal system include: obtaining the consent of the complainant on the use and sharing of information; anonymization; providing different types of medical assistance (including medical, psychological and dental); a 24/7 telephone helpline; allocation of a victim liaison officer; and providing secure participation and communication (for example, through closed sessions, video links, voice distortion and the editing of public records).

53. It is good practice to familiarize victims-witnesses with the courtroom setting by bringing them into the courtroom in advance of proceedings and informing them about how to behave, where to stand or sit and what to expect. Such a simple orientation can help alleviate apprehension. It is also advisable to inform and train victims-witnesses in steps for their own self-protection since torture cases frequently attract media attention. Individuals might not understand or be able to weigh the dangers they may face in making allegations in public and whether or not they should answer media questions. For example, in the first case against members of the Fuerza Alternativa Revolucionaria del Común (FARC), a judge of the Special Jurisdiction for Peace in Colombia was attuned to the personal risks faced by the victim-witnesses. The judge ruled that they would first be thoroughly briefed so that they could make an informed choice as to whether they wanted to hide their identities. The consequent introduction of a code system dramatically improved the safety of over 2,000 victims.

⁶⁹ Submission by the Association for the Prevention of Torture.

⁷⁰ General Assembly resolution 40/34, annex.

⁷¹ *Ibid.*, para. 4.

⁷² *Ibid.*, para. 6.

⁷³ *Ibid.*, paras. 14 and 15.

54. Vulnerable victim-witnesses, such as survivors of sexual- and gender-based violence, may need special measures for which there is now good guidance.⁷⁴ The Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence (Murad Code) reminds investigators that all survivors are unique and not to make assumptions about their experiences or how they should behave or react.⁷⁵ For child victims of torture, special responsibilities arise and require dedicated specialists who are trained to put the child's best interests at the centre of any decision-making, including the child's right to psychological recovery.⁷⁶

55. Some countries, including Canada and the United States of America, offer victims the opportunity to make their voices heard by providing so-called victim impact statements, which are read out at trial. From the victim's point of view, such statements are valuable in aiding their emotional recovery by providing them with an opportunity to confront an offender with the impact of the crime. In 2012, the European Union issued a comprehensive and legally binding victims' rights directive, establishing minimum standards on the rights, support and protection of victims of crime.⁷⁷ A number of countries have published similar victims of crime charters (Ireland, South Africa). The International Criminal Court appoints legal representatives for victims to ensure that their views and concerns on matters where their personal interests are affected are heard. The *Model Legislative Provisions to Support the Needs and Protect the Rights of Victims of Terrorism* issued by the United Nations Office on Drugs and Crime, while covering a broader array of crimes, provides a helpful list of protection measures that could be taken in court proceedings involving torture.

56. The Prevention of Torture Act of Kenya provides for court sanctioned rehabilitation to be provided to victims of torture, at any time, with the cost to be covered by the Victim Protection Trust Fund. In Uganda, a 2017 decision by the civil division of the High Court awarded compensation and medical treatment to 22 people who were tortured in the context of a criminal investigation, with monitoring to be undertaken by a non-governmental organization.⁷⁸ In Argentina, an alleged victim who takes part in a public prosecution as a complainant (*querellante*) may suggest investigative steps to the public prosecutor; if such suggestions are rejected the complainant may request a hearing before a judge. Similar provisions exist in Chile and Guatemala. Another form of victim participation, whereby the alleged victim plays the role of "civil party" within the criminal proceedings, is practised in countries following the French legal tradition, such as Algeria, Belgium, the Democratic Republic of the Congo and France. Subject to the provisions in national legislation, this may allow the victim to be represented by a lawyer, to pose questions to witnesses and the accused, to make initial and closing remarks and to have access to information contained in the case file.

F. Safe, accessible and confidential complaints procedures

57. Guiding principles to assess the effectiveness of complaints procedures are: availability, accessibility, confidentiality, safety and traceability (that is, the recording of

⁷⁴ See Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (revised, 2022), paras. 274–276; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, 19–21 March 2007; Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence (Murad Code), 13 April 2022; United Kingdom Foreign and Commonwealth Office, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, 2nd ed. (2017); Institute for International Criminal Investigations, "Guidelines for investigating conflict-related sexual and gender-based violence against men and boys", 2016.

⁷⁵ Murad Code, principles 1.1 and 1.2.

⁷⁶ Convention on the Rights of the Child, art. 3 in relation to art. 37 (a); Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council resolution 2005/20, annex, guidelines 10–14; Istanbul Protocol, paras. 284–293.

⁷⁷ Directive 2012/29/EU of the European Parliament and of the Council, 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime.

⁷⁸ High Court of Uganda, *Abdu-Rashid Mbaziira and 19 Others v. Attorney General*, HCT-00-CV-MC-0210-2017, 12 October 2017.

cases and the presentation of periodic statistical reports).⁷⁹ Given the recurring theme of power asymmetry between the accuser and the accused in torture cases, ordinary complaints procedures relating to general administration bodies are likely to need to be adjusted.

58. Informing all new arrivals to closed facilities about how and to whom they can make complaints and the standards of care they can expect while deprived of their liberty is an elementary good practice. The State must report regularly and publicly on the number and the outcome of complaints. A significant number of countries, including Maldives, Morocco, Nigeria, South Africa, Spain and Uganda, have established complaints channels to national human rights institutions or other similar bodies, with various responsibilities to pass on complaints to prosecutorial or other competent authorities.

59. Placing complaint boxes in prisons, for example, in easily accessible confidential locations not monitored by closed circuit television is a simple precaution against intimidation or retaliation. Such boxes should be opened by an independent complaints body⁸⁰ that is not part of the prison administration. Complaints procedures must be accessible to persons in situations of vulnerability or with special needs, such as juveniles, persons with disabilities and persons with language or other barriers to effective communication. Rule 25 (1) of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) states that women prisoners who report abuse shall be provided immediate protection, support and counselling.

60. Making information available on complaints procedures in multiple languages, pictorial images or through confidential phone lines or computer terminals promotes accessibility despite illiteracy and language barriers.⁸¹ Georgia's Juvenile Justice Ombudsman has produced a series of easy-to-understand posters on what to do and provides a toll-free number to report abuse or complaints.⁸² In Hungary, assistance is provided to the elderly in care homes and patients in psychiatric hospitals through a "patient advocacy" system of laypersons who are designated to meet with residents, inform them of their rights and explore their complaints and concerns.⁸³ The Independent Office for Police Conduct in England and Wales has adopted statutory guidance for handling and investigating complaints of police misconduct, addressing issues of accessibility for vulnerable or marginalized community members.

G. Prompt, impartial and effective investigations

61. States have a duty to act as soon as a complaint has been lodged or, in the absence of a complaint, to investigate ex officio "wherever there is reasonable ground to believe that an act of torture has been committed in any territory under their jurisdiction".⁸⁴ The duty to investigate continues to apply in difficult security conditions, such as generalized violence or armed conflict despite the obvious challenges presented in such situations.⁸⁵ The minimum standards applicable include that the investigation be independent, impartial and subject to

⁷⁹ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rules 54–57; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173), principle 33; United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113), rules 75–78; Bangkok Rules, rule 25.

⁸⁰ Submission by the Association for the Prevention of Torture.

⁸¹ Convention against Torture Initiative, UNCAT Implementation Tool 7/2019, "Procedures and mechanisms to handle complaints of and investigations into torture or other ill-treatment".

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Convention against Torture, art. 12. Committee against Torture, *Parot v. Spain*, communication No. 6/1990, para. 10.4. Nelson Mandela Rules, rule 71.

⁸⁵ European Court of Human Rights, *Case of Mocanu and Others v. Romania*, Application Nos. 10865/09, No. 45886/07 and No. 32431/08, 17 September 2014, para. 319.

public scrutiny, that the competent authorities act with diligence and expediency and that victims are involved (with regard to the latter, see sect. E above).⁸⁶

62. For impunity to end, all public officials should be formally required to notify the competent independent authorities immediately upon becoming aware of allegations or indications of torture or ill-treatment.⁸⁷ It is a gross contravention of medical ethics for medical personnel to participate or be complicit in acts of torture⁸⁸ and best practice imposes a mandatory legal duty to report any suspicions to the competent authorities, much like the obligation to report concerns of child abuse that exists in many countries. Prosecutors have duties to be objective, impartial and professional.⁸⁹ Judges have an obligation to call for an investigation if defendants appearing in court assert that they have been subjected to any form of abuse, allege coercion during interrogation or being forced to confess or in cases where indications of injury are visible. Alertness to the demeanour and composure of persons appearing in court ought to trigger questions by judges, who should exercise their good judgment as to whether to make further inquiries in confidence in their offices or by holding a separate confidential session away from the detaining authorities. The Human Rights Commission of Uganda “Human Rights Investigators’ Handbook” sets out standards for effective investigations, emphasizing soft skills when dealing with victims and witnesses, including patience, curiosity, objectivity, persistence and common sense.

63. There can be no effective torture prevention if the same authorities against whom allegations are being made are themselves investigating their peers, subordinates or superiors. If investigators are not hierarchically, administratively and financially independent of the authorities they are investigating⁹⁰ there is an irreconcilable conflict of interest. The principle of impartiality applies to all persons involved in investigating incidents or in taking decisions in reference to incidents, including the investigative body, forensic medical practitioners engaged to document the incident, prosecutors, lawyers, judges and special bodies. Case law of the European Court of Human Rights is illustrative of specific cases where investigations were considered to lack the requisite independence, for example where a military prosecutor was in a subordinate relationship within the military hierarchy,⁹¹ where the investigating authority delegated a major part of the investigation and then later relied on that information to argue to the contrary,⁹² or where, in the course of investigations, a spokesperson for the Government declared to the media that the allegations in question were untrue.⁹³

64. The rules on impartiality and independence apply to civilian as well as military investigations. The Independent Commission on Investigations of Jamaica is a civilian-staffed State agency established by Parliament with statutory authority to carry out investigations into the actions by members of the security forces and other State agents that result in death or injury or abuse the rights of persons. Complainants and alleged victims are to be kept informed of progress in their investigations every 60-days and reports are presented to Parliament every six months.

65. In cases of widespread allegations of torture, particular procedures or bodies may need to be established to process mass claims. In Chile, nearly 30,000 survivors of political imprisonment, enforced disappearance and torture under the brutal dictatorship of General

⁸⁶ Convention against Torture, art. 12; European Court of Human Rights, *M and others v. Italy and Bulgaria*, Application No. 40020/03, 31 July 2012, para. 100.

⁸⁷ Council of Europe, Fourteenth General Report on the activities of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT/Inf (2004) 28), para. 27.

⁸⁸ Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 37/194), principle 2.

⁸⁹ International Association of Prosecutors, Standards of Professional Accountability and Statement of the Essential Duties and Rights of Prosecutors (1999), art. 4.2 (a) and (b).

⁹⁰ European Court of Human Rights, *Bouyid v. Belgium*, Application No. 23380/09, 28 September 2015, para. 118.

⁹¹ *Ibid.*, *Mocanu and Others v. Romania*, App. Nos 10865/09, 45886/07 and 32431/08, 17 September 2014, para. 333.

⁹² *Ibid.*, *Najafli v. Azerbaijan*, Application No. 2594/07, 2 October 2012.

⁹³ *Ibid.*, *Emin Huseynov v. Azerbaijan*, Application No. 59135/09, 7 May 2015, para. 74.

Pinochet were identified through the work of the National Commission on Political Imprisonment and Torture (Valech Commission), which operated from 2003–2004, and had to be re-opened in 2010, adding approximately 30,000 additional survivors.⁹⁴ The Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police, established in 2004 following a series of allegations of police brutality and custodial deaths, received more than 900 submissions.⁹⁵ Australia established a specialized investigation unit in 1987 to pursue alleged Nazi war criminals who had immigrated to the country following World War II and established another in 2020 to investigate potential war crimes committed during the Australian engagement in Afghanistan from 2005–2016.⁹⁶

66. A level of public scrutiny and transparency is key to ensuring public confidence in the good administration of justice. This includes publishing reports on the number of complaints, investigations conducted, recommendations for prosecution, including time frames and outcomes, and information both on whether those accused were found guilty and the sentences applied, as well as on the remedies provided to the victim(s).⁹⁷ In the event of deaths alleged to be caused by torture, autopsies or post-mortem examinations should be recorded and investigations triggered *ex officio*.⁹⁸

67. Prompt investigations ensure timely evidence gathering, which protects the integrity of process and the broader administration of justice. Despite this fundamental element, there is a lack of agreed standards as to what constitutes a “reasonable delay” or “promptness”. The Istanbul Protocol indicates that investigations should be commenced “within hours, or, at the most, a few days after the suspicion of torture or ill-treatment has arisen, and to be conducted expeditiously throughout”.⁹⁹ It is the position of the Special Rapporteur that any complaints of torture and other ill-treatment should be reported to judicial or other independent authorities immediately (within hours) and no later than 24 to 48 hours after complaints or allegations of torture are made known. Any delays are to be explained and documented in writing and such decisions must be open to judicial challenge.

68. Finally, investigations must be pursued with rigor so as to be capable of leading to the truth and, where appropriate, the prosecution of suspects.¹⁰⁰ Authorities must make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigations.¹⁰¹ In some situations a presumption of unlawful conduct may arise, for example where an individual is in good health at the time of being taken into police custody but is found to be injured at time of release.¹⁰² Evidence preservation measures ought to stipulate that data from closed circuit television, body cameras and other electronic systems be collected and stored off-site, that is, outside the prison or police station and without the ability of anyone to tamper with such evidence. In an era marked by the proliferation of digital information, including both misinformation and disinformation, it is crucial that investigators are able to determine whether open source information is authentic and to establish or disprove its veracity with sufficient accuracy.¹⁰³

H. Sentencing perpetrators

69. Penalties are to be commensurate with the gravity of the offence of torture,¹⁰⁴ which should be assessed according to penalties established in national legislation for the most serious offences and sentencing laws and/or guidelines. When an act of torture is committed

⁹⁴ Convention against Torture Initiative, UNCAT Implementation Tool 7/2019.

⁹⁵ Submission by Suara Rakyat Malaysia and Anti-Death Penalty Asia Network.

⁹⁶ Submission by Australian Centre for International Justice.

⁹⁷ Submission by Redress.

⁹⁸ Submission by Association for the Prevention of Torture.

⁹⁹ Istanbul Protocol, para. 193.

¹⁰⁰ European Court of Human Rights, *Oğur v. Turkey*, Application No. 21594/93, 20 May 1999, para. 88.

¹⁰¹ *Ibid.*, *El Masri v. The former Yugoslav Republic of Macedonia*, Application No. 39630/09, 13 December 2012, para. 183.

¹⁰² *Ibid.*, *Tomasi v. France*, series A No. 241-A, 27 August 1992, paras. 108–111; *Selmouni v. France*, Application No. 25803/94, 28 July 1999, para. 87.

¹⁰³ Berkeley Protocol on Digital Open Source Investigations (2022), para. 55.

¹⁰⁴ Convention against Torture, art. 4.2.

by a public authority, the punishment should take into account the special responsibility that public authorities play in society. Higher penalties may be due for those exercising superior orders or command responsibility. Based on the concluding observations of the Committee against Torture, it is indicated that an appropriate custodial sentence for the crime of torture ranges from 6 to 20 years' imprisonment¹⁰⁵ and that one year is inadequate.¹⁰⁶ In the Special Rapporteur's research for the present report, she found a wide spectrum of sentences, with little global consistency. Some countries impose lower penalties that are not in alignment with the range recommended by the Committee against Torture, while many States have higher penalties.

70. At a minimum, no punishment shall be cruel, inhuman or degrading. Corporal punishment is prohibited.¹⁰⁷ Fines on their own are incompatible with article 4 (2) of the Convention; likewise, conditional sentences or probation are considered not to reflect the gravity of the offence at hand.¹⁰⁸ Sentencing of juveniles involve additional considerations.¹⁰⁹

71. As to State practice, States frequently provide heavier penalties for "aggravated circumstances", such as when torture has caused death or permanent disabilities, permanent loss of the function of organs or serious mutilation, involved rape or sexual violence or was inflicted on a pregnant woman or a minor (Djibouti, Dominican Republic, Maldives, Norway, Panama and Rwanda). The Dominican Republic imposes higher penalties when the crime is committed against people in specific public positions, including magistrates or public authorities.¹¹⁰ Should a victim commit suicide as a result of torture, higher penalties are handed down in São Tomé and Príncipe and a number of States impose life imprisonment (Côte d'Ivoire, Eritrea and Togo). Norway imposes the same penalties for any person who aids and abets torture. Some laws, rightly, impose bans on holding public office if convicted of torture (Equatorial Guinea).

72. It is the view of the Special Rapporteur that aggravating circumstances or the impact of the crime of torture on the victim should be taken into account in sentencing as it can reflect the severity of the crime itself. Where this is not the case it can lead to frustration and a sense that justice was not served, however all factors must be weighed. What is important is that all relevant considerations are applied consistently and within sentencing guidelines. Factors such as remorse, prospects of rehabilitation or reoffending and the need for deterrence and community protection, should all be taken into account. Courts imposing penalties must have adequate guidance in order to achieve reasonable consistency and the rights of the accused must be respected.

73. While amnesties and immunities are never to apply to the offence of torture, any pardons, early release or other measures that reduce sentencing for good behaviour or clemency or prepare perpetrators for release back into the community should apply to those convicted of torture as in any other crime. However, such measures must not be used to exonerate convicted persons after a fair trial, negate the commission of the crime or result in impunity. In other words, they must not act as *de facto* amnesties. In a decision against Spain, the Committee against Torture ruled that pardoning civil guards who had been found guilty of torture by an independent court violated victims' rights under article 4 (2) of the Convention.¹¹¹ In that case the pardon almost totally exonerated their sentences.

¹⁰⁵ Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International, 2001) p. 340 and following.

¹⁰⁶ CAT/C/AUT/CO/6, para. 10.

¹⁰⁷ Human Rights Committee, general comment No. 20 (1992), para. 5.

¹⁰⁸ A/65/273, para. 59.

¹⁰⁹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

¹¹⁰ Submission by the Dominican Republic.

¹¹¹ See Committee against Torture, communication No. 212/2002.

III. Recommendations

74. In the light of the information in the present report, the Special Rapporteur recommends the following actions to States:

(a) Prioritize legislative reform establishing a coherent framework for complaints and investigations into torture and other ill-treatment, starting by criminalizing torture in line with article 1 of the Convention against Torture; repeal all laws that constitute torture or other forms of cruel, inhuman or degrading treatment or punishment; amend laws that permit amnesties, immunities and statutes of limitations for the crime of torture; and review penalties and sentencing guidelines, bearing in mind the availability of the Special Rapporteur to provide technical advice on draft laws and procedures;

(b) Establish or designate investigation authorities with independent statutory authority and competence to investigate acts of torture or other ill-treatment, in line with minimum standards of: impartiality; promptness; effectiveness; and public scrutiny through periodic public reporting on complaints received, ongoing investigations and outcomes; and ensure the hierarchical, financial and administrative independence of investigative bodies and officials;

(c) Set clear limits on what constitutes a reasonable delay in opening investigations of torture or other ill-treatment, ensuring that investigations are opened or reported to the competent authorities within the first few hours and no later than 24 to 48 hours after receiving complaints or being alerted to allegations; any delays are to be explained and documented in writing and subject to judicial oversight;

(d) Review and/or design complaints procedures to allow all individuals to safely and conveniently file complaints against public officials or authorities without fear of intimidation or reprisal;

(e) Provide a clear legislative basis for ex officio investigations, as well as guidance and training for judges and prosecutors on how to handle and be attuned to potential torture or ill-treatment; have all appropriate measures in place to protect complainants; and ensure, in particular, if they must remain in custody, that they are transferred to an alternative place of detention under judicial or other independent supervision;

(f) Adopt guidelines and standards for investigators, prosecutors, lawyers, medical and forensic experts and judges on:

(i) Documentation and investigation of cases of torture or other ill-treatment, as set out in the Istanbul Protocol and, if death should occur as a result of torture, in line with the Minnesota Protocol on the Investigation of Potentially Unlawful Death;

(ii) Victim participation, protection and empowerment measures as outlined in the present report;

(iii) Interviewing techniques for victims, witnesses and suspects in alignment with the Méndez Principles;

(iv) The admissibility and treatment of open source information, taking into account the Berkeley Protocol;

(g) Permit the collection and admission of second medical opinions or other expert reports or testimony into court proceedings to counteract the State monopoly on evidence production;

(h) Renew investments in training and education, in line with article 10 of the Convention against Torture; such training must be extended to judges, prosecutors, lawyers, investigators and medical and forensic scientists and should be offered in faculties of law and medicine.

75. The Special Rapporteur encourages international and national organizations supporting the efforts of Governments in developing national accountability frameworks to make sure that torture is criminalized as a serious criminal offence in ordinary criminal law, alongside efforts to legislate torture as a war crime and as a crime against humanity.

76. For national authorities, torture trials are often wrongly perceived as a threat to the very heart and legitimacy of governmental power. This false perception leads to serious obstacles to the delivery of justice, including through obstruction, threats and intimidation, legal and procedural irregularities and corruption. On the contrary, what threatens governmental legitimacy is torturing people, refusing to investigate and try perpetrators and allowing torturers to go unpunished. Impunity is the antithesis of accountable government.

77. The scale and extent of crimes of torture being perpetrated by public officials in countries, places and contexts worldwide far outstrip the capacity of international courts and tribunals to respond, no matter the international commitment to those bodies. This numerical gap alone pleads for national authorities to step up and own processes of justice, accountability, reconciliation and nation-building. No State has a perfect scorecard, but every State has the capacity to make changes through leadership in action. The Special Rapporteur calls on all Governments to establish, empower and equip national investigative bodies to take action against torture in line with international standards and best practices.
