

Litigating Torture and Ill-treatment in the Middle East and North Africa

A Manual for Practitioners



November 2016

Photo on front and back cover:

Prison lock, © [Floris van Halm](#), 20 July 2011

Lock on a door in former prison Fort Ussher, Ussher Town, Accra, Ghana

REDRESS

Ending Torture. Seeking Justice for Survivors

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Ill-treatment in the
Middle East & North Africa**

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Introduction

Torture is an abhorrent crime that is absolutely prohibited under any circumstance. It has the special status of *jus cogens*, which is a ‘peremptory norm’ of general international law. Rules of *jus cogens* cannot be contradicted by treaty law or by other rules of international law.

Torture cannot be justified even if there is an emergency, terrorist or other threat facing a country. The absolute prohibition of torture operates irrespective of the particular circumstances at play or the attributes of the perpetrators or the victims. Members of the military, the security services, the police or any other public authority cannot torture a suspect under any circumstances; their role as public officials does not give them a license to abuse the rights of any person. Non-citizens, migrants, terror suspects, convicted criminals, persons suspected to have vital information about planned crimes, women’s rights activists, protesters and opposition leaders benefit like any other person or group of persons from the right not to be subjected to torture or other prohibited ill-treatment. Under international law, there are no recognised defences to torture, such as necessity or superior orders. An order from a superior officer or a public authority cannot be used as a justification for torture.

This prominent status notwithstanding, torture continues to be practised widely all over the world, including in the Middle East and North Africa (MENA) region, the focus region of this manual. Across the region, torture has been prevalent for many decades, serving as a method to obtain confessions and as a key tool for authoritarian regimes to repress dissent, instill fear and maintain their grip on power. It was one of the

precursors to the “Arab Spring” uprisings in Egypt and Libya. Several countries in the region have been used as part of the USA’s policy of outsourcing the interrogation of terror suspects, made infamous by the treatment of Maher Arar in Syria.¹ In addition, migrant workers from mainly Asian countries have faced ill-treatment in numerous Gulf countries, raising the spectre of State responsibility for the failure to exercise due diligence to protect under the UN Convention Against Torture.

The “Arab Spring” uprisings across the region have resulted in significant changes in the political landscape of the region and also challenges, many of which are still unfolding at the time of writing. The situation is therefore characterised by a high degree of volatility and uncertainty, with some regimes clamping down on calls for change, such as Bahrain or Saudi Arabia, some countries in the midst of conflict, such as Syria and Yemen, while others are undergoing uncertain and often fractious transition, such as Egypt, Iraq, Libya and Tunisia.

The use of torture in all these countries is frequently arbitrary. Anyone can become a victim of torture, with marginalised people and those who stand out from the status quo being particularly exposed. Torture can leave permanent scars on victims and most will struggle for the rest of their lives with the consequences of the harm inflicted

¹ See, UN Human Rights Council, *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/42, 26 January 2010, (UN Human Rights Council, Joint Global Study), para. 147.

upon them. Beyond inflicting irreparable harm on the individual victim, torture affects communities and society as a whole. It is the antithesis of the rule of law and where it is allowed to fester, a range of other associated human rights abuses also tend to be present.

This underscores why taking active steps to combat torture is so important. Today, most countries in the MENA region have ratified or acceded to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which requires States parties to prevent, investigate and prosecute, and afford victims with access to rehabilitation, compensation and other form of reparation.² Many States are also party to the International Covenant on Civil and Political Rights (ICCPR).³ Many have some domestic legislation in place prohibiting torture, and criminal laws exist providing some (relatively small) opportunities for the investigation and prosecution of the alleged perpetrators and related litigation at domestic levels.

Limited, but important avenues for litigation and advocacy also exist at regional and international levels. Tunisia, Algeria, Libya and Egypt recognise the competence of the African Commission on Human and Peoples' Rights (African Commission) to adjudicate alleged violations of the African

² Algeria, Bahrain, Egypt, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, State of Palestine, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, Yemen have ratified or acceded to the UNCAT.

³ Algeria, Bahrain, Egypt, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, State of Palestine, Syria, Tunisia and Yemen have ratified or acceded to the ICCPR. See, REDRESS and MIZAN, *Torture in the Middle East: The Law and Practice- Regional Conference Report*, 2013 (REDRESS and MIZAN 2013 Report) at <http://www.redress.org/downloads/publications/130821%20MENA%20report.pdf>.

Charter on Human and Peoples' Rights (African Charter), including torture. Algeria, Libya and Tunisia have also ratified the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (African Court). Algeria, Morocco and Tunisia recognise the competence of the United Nations Committee Against Torture to consider individual complaints regarding alleged violations of UNCAT. The International Criminal Court has taken some interest in crimes in the MENA region, with preliminary examinations ongoing in relation to crimes alleged to have taken place in respect of Palestine and Iraq, and with arrest warrants having been issued in relation to Libya and Sudan. Furthermore, there are a number of claims and successful prosecutions which have been brought under the principle of extraterritorial (including universal) jurisdiction in relation to torture and other crimes committed in the MENA region, which highlights this as an additional avenue for accountability and justice for victims.

The fight against torture requires a combination of measures of prevention, prohibition, prosecution, rehabilitation, compensation and other forms of reparation. Supporting victims with legal claims is an important aspect of these measures and vital to hold States to account and to uphold the rule of law, making clear that torture is never acceptable. Litigation can contribute to deterrence, a change of law and practice, while at the same time it can help ensure that victims obtain redress for the harm inflicted upon them.

This manual focuses on the MENA region. It uses four case studies: Bahrain, Egypt, Morocco and Tunisia, as examples of how torture and ill-treatment can and have been litigated across the region, and how barriers to justice have been

dealt with locally and internationally.⁴ The manual also draws out some additional relevant practice and jurisprudence relating to other countries in the region. While national systems differ, valuable lessons can be learnt from the experiences of lawyers and practitioners in those countries which may serve as useful guidance for practitioners from other countries in the region.

Part I of this manual provides an introduction to the methods to document torture and ill-treatment to support litigation efforts, with a specific emphasis on medical documentation.

Part II outlines domestic litigation avenues. The four case studies examined for this manual offer a range of possible avenues for victims of torture and ill-treatment to obtain redress and to hold perpetrators to account; though some of these avenues work more effectively than others. This Part also explores some of the limitations and challenges associated with certain litigation strategies and recommends how certain barriers may be overcome.

Part III reviews how the principle of universal jurisdiction has been applied to pursue accountability for suspected perpetrators and to increase avenues of justice for victims. Several cases which concern the MENA region will be explored as well as the practical and other challenges that have been encountered and how these have been addressed.

Part IV examines regional and international avenues for litigation and related advocacy. All too often, States fail to

give effect to victims' rights, and fail to hold those responsible to account in their own domestic legal system. Regional and international avenues therefore can provide a "port of last resort" for victims seeking to obtain justice.

This manual was researched and written by REDRESS. Valuable and extensive research assistance was provided by Scott Sandvik and Mohamed Osman, interns with REDRESS, and by students from the human rights clinic of the School of Oriental and African Studies, namely Ahmed Abdeltawwab, Clémence Aymon, Francesca Gage, Aku Okocha under the supervision of Professor Lynn Welchman.

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Part I: Investigation and documentation of torture

This Part provides an introduction to documentation. It sets out the key purposes for documenting torture and sets out the main international and regional standard-setting texts that have been developed to aid with documentation. It also explains some of the key challenges that may arise when carrying out documentation and how these may be addressed.

When an allegation of torture is made it is necessary to assemble evidence of the facts surrounding the allegation so that further action can be taken – usually involving a combination of measures linked to human rights advocacy, support to victims, and follow up of the legal case through the criminal justice process, civil courts, national human rights commission, and/or at the international level. This collection of evidence, or parts of it, may be done by the individual victim, the police, the individual’s lawyer, a prosecutor or judge, prison authorities, medical professionals, a non-governmental organisation, or a national investigatory body, such as a national human rights commission.

Documentation of a case involves recording the individual’s version of events and collating other forms of evidence which may support it. In reality, documentation of a case is often done by a number of persons, though it may be directed or collected by one – such as the individual’s lawyer, the police or an investigative body. Medical professionals may provide

documentation either through the medical records they produce for a patient they are treating, or through more formal medico-legal examination and documentation (such as through the use of a medico-legal form, or the production of an expert report). This documentation should then be taken into account in an investigation into the allegation and may be used in subsequent legal proceedings.

I.1 Why document torture?

There are three main reasons to document torture:

1. **To understand whether torture is happening, why it is happening and to have a clearer evidential basis to determine what additional steps should be taken to address the problem.** Concrete information about torture practices is crucial for national authorities with the responsibility to ensure that torture doesn't happen, to respond effectively. It is also crucial for human rights organisations as part of a wider strategy of human rights advocacy: having a clear understanding of torture practices and who might be responsible will greatly assist advocates to follow up with the competent local authorities, so that effective action can be taken to address the problem.

Documentation can help to provide an evidential basis to show patterns of torture. The types of patterns that might emerge might include a pattern of torture against particular marginalised or discriminated against groups such as minority ethnic or religious groups, human rights defenders or political activists and sexual minorities. Or, it may reveal a pattern about the practice of a particular

form of torture – such as rape in detention; use of electric shocks; psychological tactics; forms of sensory deprivation; humiliating and degrading treatment; mutilation of body parts during conflict. There might also be a pattern linked to where torture is most prevalent: torture may be linked to a particular police station or military contingent, or be practiced most frequently in a certain region of a country.

Documentation can also be used to assess whether the practice of torture is increasing or decreasing in a particular location. This will be important to determine whether prevention measures such as training or detention safeguards are working, or whether additional safeguards need to be put in place.

Evidence-based advocacy is important for law reform and reform of policies and institutions at the domestic level. It is also important at the regional and international levels, such as when reporting to the African Commission and to United Nations bodies including treaty bodies or special procedures. It is also important for media campaigns, to increase public awareness of the issue.

2. **To ensure that victims receive appropriate medical or psychological care or other needed services, and to prevent further violations against them.** Torture may cause physical injury such as broken bones and wounds that heal slowly and can leave physical scars. It may however not leave any physical trace and can be purely psychological, for instance through the use of death threats, mock executions, solitary confinement or incommunicado detention. Irrespective of the form used,

torture usually leads to severe psychological harm and survivors of torture frequently experience difficulties in getting to sleep, suffering from nightmares, difficulties with memory and concentration, persistent feelings of fear and anxiety, depression and/or an inability to enjoy any aspect of life. Sometimes these symptoms meet the diagnostic criteria for post-traumatic stress disorder (PTSD) and/or major depression. These are common responses to the trauma suffered.

Documentation of survivors' physical and psychological condition may help to signpost them to specialist service providers so they can obtain much needed support.

Documentation may also reveal whether there are any particular risks the victim faces of being exposed to further violence, so that protection measures can be put in place to minimise and ideally eliminate those risks or to have the individual moved from the place where torture or other ill-treatment is being carried out to a safer environment.

Documentation of torture may assist a victim with an asylum claim on the basis that evidence of past torture may impact on future risks of ill-treatment. It may also help to prevent other types of violations from occurring. For example, documenting torture may reveal that a victim signed a forced confession. It may be possible for a lawyer to seek to have that confession excluded from any legal proceedings.

3. **To ensure civil and criminal accountability.** International law requires States to investigate allegations of torture

and to punish those responsible. It also requires States to enable victims of acts of torture to pursue remedies that are accessible and effective and to afford full reparation for the harm suffered (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition). Documenting torture will help to put pressure on the competent authorities to open an official investigation capable of identifying the perpetrators. Sufficient evidence will be necessary for a criminal prosecution and conviction, which further underscores the importance of documentation. Torture evidence is also vital to pursue civil claims for damages, including compensation for the individual victim, at both the domestic and international or regional level.

An understanding of what documentation exists in a given case will also help lawyers to identify whether the evidence is sufficient to sustain a claim of torture (or whether further evidence should be sought).

I.2 International & regional framework for documentation

In 1999, a range of medical, legal and human rights experts drafted the ***‘Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (Istanbul Protocol)*** precisely with a view to support the investigation and documentation of torture and ill-treatment by national authorities, lawyers, psychologists, doctors and other

stakeholders.⁵ The Istanbul Protocol provides a comprehensive framework for the assessment of torture and ill-treatment and for investigating such allegations and reporting findings to the judiciary or other investigative bodies. Since its finalisation, the Istanbul Protocol has been endorsed by the United Nations as well as regional human rights mechanisms, including for instance the African Commission.⁶ It is a manual designed to ensure that a State's obligation to investigate, prosecute and afford reparation for torture is translated into reality by making effective the investigation and documentation of torture cases.

The Istanbul Protocol is complemented by a number of other instruments designed to render investigations more effective. The ***International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (Sexual Violence Documentation Protocol)*** for instance sets out best practice standards for documenting and investigating sexual violence in conflict zones. It is aimed at supporting accountability efforts by ensuring that the strongest possible evidence is collected and survivors receive proper support.⁷

⁵ Office of the UN High Commissioner for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2004, (Istanbul Protocol) at <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.

⁶ African Commission, *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman OR Degrading Treatment or Punishment in Africa (Robben Island Guidelines)*, The African Commission on Human and Peoples' Rights, meeting at its 32nd ordinary session, held in Banjul, The Gambia, from 17th to 23rd October 2002, para 19, at <http://www.achpr.org/instruments/robben-island-guidelines-2008/>.

⁷ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict- Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law*, First Edition, June 2014, at

The ***Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary And Summary Executions of 1991 (Minnesota Protocol)*** can also assist in the documentation of cases of torture and ill-treatment, including for instance where a victim has died as a result of the treatment inflicted.⁸

At the regional level, the African Commission adopted the ***Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa (Robben Island Guidelines)*** which provide that investigations “into all allegations of torture or ill-treatment shall be... “guided by the UN Manual on the Effective Investigation and Documentation of Torture and Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).”⁹ The African Commission has furthermore announced that it is in the process of adopting Guidelines on Combating Sexual Violence and Its Consequences. According to the Commission, these Guidelines will also address the need for accountability of perpetrators, and therefore once adopted, could serve as a useful tool for litigators seeking accountability of perpetrators and justice for victims.¹⁰

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf.

⁸ Office of the UN High Commissioner for Human Rights, *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, 1991, at

http://www.ohchr.org/Documents/Issues/Executions/UNManual2015/Annex1_The_UN_Manual.pdf.

⁹ Robben Island Guidelines, para. 19.

¹⁰ African Commission, *Press Release: The African Commission on Human and Peoples’ Rights (ACHPR) is developing Guidelines to combat the scourge of sexual violence in Africa*, 15 September 2016, at

<http://www.achpr.org/press/2016/09/d316>.

Amongst the key principles highlighted in these regional and international principles for investigations to be effective:

- States must establish and support **effective and accessible complaint mechanisms** which are independent from detention and enforcement authorities and which are empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment;
- Investigators must be **competent, impartial and independent** of suspected perpetrators and the national authority for which the investigators work;
- Methods used to carry out investigations should meet the **highest professional standards** and findings shall be made *public*;
- Investigators should be **obliged to obtain all information necessary to the inquiry** and should effectively question witnesses;
- Torture victims, their lawyer and other interested parties should have **access to hearings and any information** relevant to the investigation and must be **entitled to present evidence** and allowed to submit written questions;
- **Do no harm**: Engaging individuals, their families and communities in order to investigate and document incidents must be done in a way that maximises the access to justice for survivors, and minimises as much as

possible any negative impact the documentation process may have upon them;

- Victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families must be **protected from violence, threats of violence or any other form of intimidation or reprisal** that may arise pursuant to the report or investigation;
- Detainees should have the **right to obtain an alternate medical evaluation** by a qualified health professional and this alternate evaluation should be accepted as admissible evidence by national courts;
- States should **establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention** and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights. Equally, States should encourage and facilitate **visits by NGOs to places of detention**.

1.3 Key documentation challenges and how these can be addressed

The investigation of torture and cruel, inhuman or degrading treatment or punishment ('ill-treatment') can pose specific challenges to national authorities, in particular, where the

authorities in charge have not received any training on how to document the crime with a view to collect relevant evidence. In addition, in many instances, States are reluctant to initiate such investigations. This makes the role of lawyers and other stakeholders seeking to support victims in their quest for accountability and reparation ever more important. Lawyers can document what happened to their clients. Such documentation can trigger investigations, support ongoing investigations or be used to highlight authorities' failure to adequately investigate and support litigation efforts at national, regional and international levels.

Preliminary issues:

- **Getting informed consent: It is vital for any interviewer to obtain informed consent from the victim or witness.** All survivors and witnesses must understand the purpose of the data collection and how information collected may be used as well as any potential risks associated with same. They must give their informed consent to be interviewed and examined, to be photographed, to have their information recorded, to be referred to any support services, and to have their information and contact details shared with third parties: "Obtaining informed consent before documenting testimonial information ensures that the survivor/witness maintains full control and power over her/his own experiences, and that s/he is a knowledgeable and willing participant in the justice process. Not obtaining informed consent violates the rights of the survivor/witness, disrespecting her/him, and causing her/him harm. The results of an interview conducted without securing proper and informed consent may also not be accepted in certain legal

proceedings, on the grounds that the information was provided under some kind of duress or coercion, or based upon misleading assurances.”¹¹

Not every victim will want to pursue a legal case. To do so may be draining, time consuming or not in the victim’s personal interest. Some victims may fear for their safety or that of their families, or may simply wish to move on from the experience. This must be respected.

- **Ensure measures of confidentiality are in place:** Where will interviews take place? How will the data collected be stored? Are there risks that the data (whether stored physically and/or in electronic form) may be stolen? The precise measures to be taken to preserve confidentiality will depend on the local context and the perceived risks. It is common good practice for interviews to take place in private spaces outside of public view and for any data collected to be stored securely, and for names and other personal details to be stored separately from factual information.
- **Empathy:** Lawyers interviewed for the development of this manual emphasised that victims had suffered psychologically and needed to be listened to with empathy and patience.
- **Avoid leading questions:** Leading questions can lead to a skewed version of the events and can undermine later

¹¹ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict- Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law*, p. 45.

prosecutions, if it can be successfully argued that victims were coached.

I.4 Proving torture

Lawyers receiving a potential client who says that he or she has been subjected to violence by or with the acquiescence of State officials will need to know what type of documentation is needed so as to file a claim for torture or ill-treatment. When considering what type of evidence is required to prove torture, it is important to focus on finding proof which corresponds to the elements of the definition of torture.

The main elements to prove torture as defined by UNCAT, and generally followed by other human rights treaties such as the ICCPR and the African Charter are set out below, together with the typical evidence used to prove those elements. It must be stressed, however that it is not the responsibility of the victim to prove every element of their claim. Once a credible allegation has been made, it is the responsibility of the State to pursue investigations.

Severe pain or suffering, whether physical or mental

Severe pain or suffering, whether physical or mental, has been understood to require a certain threshold of intensity. However, the threshold need not be 'extreme'. The characterisation of the severity of harm is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The African Commission's *Abdel Hadi Radi* case against Sudan

concerned conduct “ranging from severe beating with whips and sticks, doing the *Arannabb Nut* (rabbit jump), heavy beating with water hoses on all parts of their bodies, death threats, forcing them to kneel with their feet facing backwards in order to be beaten on their feet and asked to jump up immediately after, as well as other forms of ill-treatment,”¹² which resulted in serious physical injuries and psychological trauma. The Commission found that “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.”¹³

Lawyers arguing that a specific act resulted in such severe pain and suffering that it amounted to torture should seek to inquire with the victim (and witnesses, where available) not only about the methods used to inflict pain and suffering, but also about the duration of the treatment and concretely, what the victim felt or experienced as a result. Medico-legal reports can be used to demonstrate the physical or mental effects on the victim. The latter may be complemented by demonstrating the effects linked to the sex, age and state of health of the victim.

The types of evidence that are usually used to prove the severity of pain or suffering include:

- A statement from the victim which explains, not only what transpired but any particular personal circumstances of the victim (age, religion, particular

¹² African Commission, *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Communication 368/09, 5 Nov. 2013, para. 71.

¹³ *Ibid*, para. 73.

vulnerabilities, past experiences) which might have increased the severity of the impact of the experience on the victims' physical or psychological well-being. The Istanbul Protocol provides important guidance on how to interview victims of torture and ill-treatment, as does the Sexual Violence Documentation Protocol.

- A medical and/or psychological report describing the victim's symptoms. Medical and psychological expert evidence can be crucial to support claims of torture and ill-treatment. These reports are important for proving the degree of harm, however they will not always be possible to obtain, because of lack of access to independent doctors, prohibitive costs for procuring a report or otherwise. The absence of a medical or psychological report does not prove that torture did not happen. Where independent medical evidence cannot be obtained, detailed statements and oral evidence by the victim and eye witnesses (if any) can also help to prove harm.
- Medical reports prepared by State authorities including post-mortem reports (where applicable) will also be useful and lawyers should be able to apply to a court to receive these if they are not immediately made available.
- Physical evidence (soiled clothes; weapons/instruments used to inflict the treatment).
- Photographs, Videos.
- Other expert evidence, such as evidence as to calculation of loss.

Intention

Article 1(1) UNCAT specifies that for an act to constitute torture, it must have been intentionally inflicted. As such, the

crime of torture cannot be met through negligence.¹⁴ Some courts have implied the intention requirement, holding that the deliberate infliction of severe pain and suffering was the only outcome consistent with the facts. In *Kunarac*, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that it is “important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.”¹⁵ Courts have also eased the burden of proving intentionality, holding that the State bears the primary responsibility of disproving torture, once a credible allegation is made. For example, where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under the prohibition.¹⁶

In proving intent, lawyers do not need to show that a perpetrator intended to cause serious pain or suffering: it is enough to show that the severe pain and suffering is the natural and most obvious consequence of the conduct.¹⁷

¹⁴ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*, UN Doc. A/HRC/13/39/Add.5, 5 February, para. 34.

¹⁵ International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeal Chamber, Judgment, 12 June 2002, para. 153.

¹⁶ European Court of Human Rights (ECtHR), *Selmouni v. France*, Application no. 00025803/94, Judgment (Grand Chamber), 28 July 1999, para. 87; see also, ECtHR, *Aksoy v Turkey*, Application no. 21987/93, Judgment, 18 December 1996, para. 61.

¹⁷ UN Committee Against Torture (CAT), *E.N. represented by Track Impunity Always (TRIAL) v Burundi*, Communication No.578/2013, 2 February 2016, para. 7.3.

The types of evidence that are usually used to prove the intention to produce severe pain or suffering and that the State is responsible include:

- Contextual or similar fact evidence to show that the treatment to which the victim was subjected is treatment which is well-recognised to result in severe pain or harm. This could be gleaned from medical or psychological research studies into the effects of certain types of treatments on other detainees; the use of experts who have studied the phenomenon of torture in other contexts and can apply their general knowledge to the facts of the case.
- Evidence of the physical and psychological health of the victim prior to the detention or alleged incident of torture. This could be in the form of medical reports from doctors who treated the individual prior to the events, or statements from trusted persons in the community who know the victim well and can attest to the victim's prior good health. This may be further substantiated by correspondence with official bodies requesting an official explanation as to what transpired while the victim was in detention, which is unanswered or insufficiently explained.

Specific purpose

There is a requirement for torture to be inflicted for a specific purpose. The nature of the purpose, as set out in the UNCAT definition, has been interpreted broadly and non-exhaustively and is understood to include punishment, self-incrimination, intimidation of the population, humiliation and

discrimination as among the relevant qualifying purposes. Sometimes the prohibited purpose has been implied. The suggestion that the rape by a person wielding power or authority took place for simple private gratification purposes has not been accepted; the involvement of a person of authority can be inherently coercive.¹⁸

The types of evidence that are usually used to demonstrate a specific purpose include:

- The victim's witness statement, which may refer to particular questions being asked, the forcible taking of a confession.
- The wider context of the crime, whether a situation of conflict, the repression of a community or particular groups within it. This can be demonstrated through news reports, broader human rights documentation of patterns of discrimination or violence towards particular groups in society, and evidence that the victim is, or is perceived to be, part of such a group (for instance by United Nations, regional institutions such as the African Commission, nongovernmental organisations).
- Statistical evidence, for example to demonstrate discriminatory practices.

Involvement of a public official

Under human rights law, torture must take place by or at the instigation of or consent or acquiescence of public officials. In certain circumstances this has been understood to extend to

¹⁸ ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 495.

persons holding de facto power as public officials, in the absence of any de jure government control. In *Elmi v. Australia*, the UN Committee Against Torture determined that, in the exceptional circumstance where State authority was wholly lacking (Somalia had no central government at the time), acts by groups exercising quasi-governmental authority could fall within the definition.¹⁹

In contrast, international humanitarian law does not limit the notion of torture to acts committed by state officials, or at their instigation, or with their consent or acquiescence. At the ICTY, the *Kunarac* Trial Chamber determined that the “characteristic trait of the offence ... is to be found in the nature of the act committed rather than in the status of the person who committed it.”²⁰ Consequently, “the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.”²¹ The Appeals Chamber affirmed this reasoning.²² The jurisprudence of the International Criminal Tribunal for Rwanda (ICTR)²³ and the provisions of the ICC Statute²⁴ largely reflect this ICTY jurisprudence.

¹⁹ CAT, *Elmi v Australia*, Communication No. 120/1998, 14 May 1999, para. 6.5.

²⁰ ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber, Judgment, 22 February 2001, para. 495.

²¹ *Ibid*, para. 496.

²² ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgment, 12 June 2002, para. 148.

²³ ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgment, 15 May 2003, paras. 342-343.

²⁴ Rome Statute, Articles 7(1)(f) (Crimes against Humanity) and 8(2)(c)(i) and (ii) (War Crimes).

The types of evidence that are usually used to demonstrate the involvement of a public official include:

- Detention records, which demonstrate that the victim was in an official place of detention at the time of the events.
- The victim's witness statement, in which the victim should be asked to note whether they saw any public officials, their police or military unit, official uniforms or vehicles, the location – a detention centre or military barracks, etc.
- Diagrams, maps, drawings of the scene of the alleged torture.
- Similar fact evidence or wider torture trends involving public officials, in which others who suffered similarly have been able to identify the presence of public officials.
- Official records, such as caution statements, custody records or personnel records.

State responsibility to exercise due diligence The obligation to prevent torture has been interpreted as a positive requirement that States must exercise due diligence and thereby protect persons within their jurisdiction from acts causing severe pain or suffering. In *Dzemajl et al. v. the Federal Republic of Yugoslavia*, the police, though present at the scene, failed to intervene to prevent the destruction of a Roma settlement by private individuals. The UN Committee Against Torture determined that this failure to act amounted to acquiescence in the acts, which were understood to

amount to cruel, inhuman or degrading treatment.²⁵ In the *El Masri* case, the ECtHR Grand Chamber determined that a State is obliged to take measures to ensure that individuals within its jurisdiction are not tortured, and must take measures to prevent a risk of ill treatment about which it knew or should have known.²⁶ The obligation on States to exercise due diligence is an obligation of means and not necessarily one of result. Thus, the evidence to support such a contention would focus on demonstrating that there were steps the State could have reasonably taken to prevent the torture from happening, but did not do so.

Lawful sanctions

Article 1(1) UNCAT stipulates that torture: “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” However, the fact that a sanction is considered lawful under national law does not necessarily engage the exception. Forms of corporal punishment,²⁷ such as lashes, whipping or flogging have been held to violate the prohibition.²⁸

For instance, the UN Committee Against Torture recently expressed its deep concern that **Saudi Arabia** “continues to sentence individuals to and to impose corporal punishment,

²⁵ CAT, *Hajrizi Dzemajli et al. v. Federal Republic of Yugoslavia*, Communication No. 161/2000, 21 Nov. 2002, para. 9.2.

²⁶ ECtHR, *El-Masri v. The Former Yugoslav Republic Of Macedonia* (Grand Chamber), Judgment, Application no. 39630/09, 13 December 2012, paras. 218-221.

²⁷ Human Rights Committee, *General Comment No. 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7)* (30 September 1992), para. 5.

²⁸ African Commission, *Curtis Francis Doebbler v. Republic of Sudan*, Communication 236/2000, 4 May 2003, para. 42.

including flogging/lashing and amputation of limbs — practices that are in breach of the Convention.”²⁹ The Committee further indicated that Saudi Arabia “should review the case of Ra’if Badawi as well as the cases of all individuals currently sentenced to lashing and any other form of corporal punishment with a view to, at a minimum, invalidating any aspect of their sentences involving corporal punishment. In addition, the State party should ensure that Mr. Badawi receives prompt medical care and redress, including rehabilitation, as required by article 14 of the Convention.”³⁰

I.5 The need for strong, credible and reliable evidence

The Istanbul Protocol provides particular guidance on the different types of evidence, including on taking statements from victims and witnesses, collecting and presenting medical and psychological evidence, and the collection of physical evidence. The Sexual Violence Documentation Protocol and Minnesota Protocol provide further guidance on documentation in particular circumstances.

A number of factors will affect the strength of documentation and its ability to be used by lawyers in legal proceedings. Documentation will be strongest if it is:

²⁹ CAT, *Concluding observations on Saudi Arabia*, CAT/C/SAU/CO/2, 8 June 2016, para. 10.

³⁰ *Ibid*, para. 13.

- **From a reliable and identifiable source:** if the source and circumstances of collection cannot be identified and proved, evidence is likely to be of no use in court.
- **Detailed:** generally, the more detailed the documentation is, the better.
- **Internally consistent:** human memories are not fool proof- particularly after a traumatic event, and so it is almost inevitable that there will be inconsistencies in an individual's account. However, the extent to which other evidence corroborates or contradicts the account in general will impact the chances of success in any legal proceedings.
- **Collected as soon as possible:** the earlier information is collected, the stronger it is likely to be- for example it is more likely that any physical injuries will still be identifiable. However, this should not dissuade collection of evidence much later if necessary; in such cases, medical and psychological evidence can be particularly useful.

Part II: Litigating torture at the domestic level

II.1 Introduction

This Part discusses the avenues for litigating torture and ill-treatment cases at the domestic level, and explains the challenges and advantages related to domestic litigation. Depending on the legal system, complaints about torture and ill-treatment may be pursued as criminal, civil and constitutional complaints before relevant courts. Other avenues may include filing a claim with a national human rights commission where one exists, and pursuing disciplinary proceedings.

The justice processes and context in which torture is committed in the countries of the MENA region differ, yet certain commonalities exist. Some countries' legal systems are based solely or mainly on Shari'a law (including Iran, Oman, Qatar, Saudi Arabia and Yemen). Other countries adhere to a mixed or hybrid legal system that is influenced by Egyptian, French, British as well as Shari'a law (such as Bahrain, Tunisia, Egypt, Morocco and Sudan).

Government responses to the Arab Spring uprisings have been characterised by excessive use of force by police, military and security forces, as well as armed thugs used by

law enforcement agents for instance in Egypt.³¹ Torture and ill-treatment are used as tools of repression and to prevent the exercise of freedoms of expression, assembly and association in several countries across the region.³² Under the pretext of countering terrorism, counter-terrorism and security laws have been introduced in Egypt,³³ Morocco,³⁴ Tunisia³⁵ and Bahrain,³⁶ giving authorities broad powers of arrest and detention and undermining safeguards against torture. Several countries in the region, including Morocco, Egypt, Iraq, Jordan and Syria, are known to have participated

³¹ The Guardian, *Egypt's army took part in torture and killings during revolution, report shows*, 10 April 2013, at <https://www.theguardian.com/world/2013/apr/10/egypt-army-torture-killings-revolution>. See also, REDRESS and MIZAN 2013 Report, pp. 6-13.

³² See for instance, Human Rights Watch, *The Blood of People Who Don't Cooperate: Continuing Torture and Mistreatment of Detainees In Bahrain*, 2015 (Human Rights Watch 2015 Bahrain Report); Amnesty International, *Annual Report, Egypt 2015/2016*, at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/egypt/report-egypt/>.

³³ See for instance, Cairo Institute for Human Rights Studies and Egyptian Initiative for Personal Rights, *The New Counterterrorism Law, Another Blow to the Constitution, Encourages Extra-Judicial Killing – Commentary on Law 94/2015 on Counterterrorism*, August 2015, at http://eipr.org/sites/default/files/reports/pdf/the_new_counterterrorism_law.pdf.

³⁴ The Terrorism Act No 03-03 of 28 May 2003 allows for detention in police custody for up to 96 hours, renewable twice upon the authorisation of the public prosecutor. See, International Commission of Jurists, *Submission to the Committee Against Torture on the Examination of the Fourth Periodic Report of the Kingdom of Morocco*, 47th Session 31 October -25 November 2011, at http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MAR/INT_CAT_NG_O_MAR_47_9554_E.pdf.

³⁵ Amnesty International, *Annual Report, Tunisia 2015/2016*, at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/tunisia/report-tunisia/>.

³⁶ Bahrain Centre for Human Rights, *The Terrorism Law in Bahrain- A Tool To Silence Dissidents*, 13 March 2014, at <http://www.bahrainrights.org/sites/default/files/Terrorism%20Laws%20in%20Bahra in%20-%20FINAL.pdf>.

in the High Value Detainee rendition programme of the United States, providing support to or directly facilitating the torture of detainees held under that programme.³⁷ Overall, UN reports, African Commission statements as well as reports from civil society suggest that torture and ill-treatment are practiced widely and with impunity across the region.³⁸

II.2 Criminal proceedings

Article 1 of UNCAT defines torture as:

any act by which **severe pain or suffering**, whether **physical or mental**, is **intentionally** inflicted on a person for **such purposes** as obtaining from him or a third person information or a

³⁷ UN Human Rights Council, *Join Global Study*, (n 1), paras. 131-158.

³⁸ See for instance, African Commission, *Inter-Session Activity Report (April 2014-April 2015) and Annual Situation of Torture and Ill-treatment in Africa Report, Presented to the 56th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21 April to 7 May 2015*, para. 13, at http://www.achpr.org/files/sessions/56th/inter-act-reps/228/56os_intersession_report_comm_mute_en.pdf; CAT, *Concluding Observations: Tunisia*, CAT/C/TUN/CO/3, 10 June 2016, paras. 15, 19; *Concluding Observations: Saudi Arabia*, CAT/C/SAU/CO/2, 8 June 2016, paras. 7-9; *Concluding Observations: Kuwait*, CAT/C/KWT/CO/3, 5 September 2016, para.13; *Concluding Observations: Jordan*, CAT/C/JOR/CO/3, 29 January 2016, paras. 23-24; *Concluding Observations: Iraq*, CAT/C/IRQ/CO/1, 7 September 2015, paras. 12, 15; *Concluding Observations: Qatar*, CAT/C/QAT/CO/2, 25 January 2013, paras. 14, 18; REDRESS and MIZAN 2013 Report; Amnesty International, *Egypt: Rampant Torture, Arbitrary Arrests and Detentions Signal Catastrophic Decline in Human Rights One Year after Ousting of Morsi*, 2014, at <https://www.amnesty.org/en/latest/news/2014/07/egypt-anniversary-morsi-ousting>; See also Al-Nadeem Centre, *'Oppression Harvest in 2015'*, 2016, at <https://drive.google.com/file/d/0B2-QqOchi4gFN004cXBxUjBQ5nc/view>; Human Rights Watch, *Egypt: Year of Abuses Under Al-Sisi*, 2015, at <https://www.hrw.org/news/2015/06/08/egypt-year-abuses-under-al-sisi>; Amnesty International, *Behind the Rhetoric: Human Rights Abuses in Bahrain Continue Unabated*, 2015, p. 22.

confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a **public official** or other person acting in an **official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Accordingly, lawyers arguing that a specific act constituted torture under international human rights law must prove the four constituting elements of the crime: 1) severe pain or suffering inflicted with 2) intent; 3) for a specific purpose; 4) by a public official. This is set out in the section on documentation, above.

At the domestic level, however, countries have used definitions which diverge from the UNCAT definition set out above, or have not specifically criminalised torture. Examples of the approaches taken in the four sample countries are set out below.

Egypt	Torture is criminalised in Egypt's Penal Code, ³⁹ which provides in Article 126 that “any personnel or public officer who tortured or ordered for any defendant to be tortured to coerce him/her to confess a crime or any information should be punished by hard labour imprisonment or imprisonment between three to ten years.” If the tortured victim dies the penalty as prescribed for deliberate murder shall be inflicted.” The Penal Code does not define torture and it is up to the competent court to derive the definition of torture from different circumstances and elements of the examined case. For instance, an Egyptian criminal court has held that “[T]orture is an assault against, or physical or moral harm
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³⁹ Article 126, Egyptian Penal Code of 1937.

	<p>inflicted upon, the defendant. Accordingly, torture is a form of violence or coercion. Physical violence includes beating, injuring, tying the limbs, detention, humiliation, deprivation of food or sleep, etc. For an act to be considered as physical torture, it does not require any particular degree of intensity or gravity. Moral torture, however, aims to humiliate a person to force a confession.”⁴⁰</p> <p>Article 126 further provides that torture is punishable by up to ten years imprisonment, or longer if the torture results in death. Article 126 only applies where torture is inflicted upon defendants. That means that acts committed by public officials against individuals who are not suspected of having committed a crime will not qualify as torture. This narrow scope of Article 126 is particularly problematic in regards to the alleged use of force by authorities against protestors. Furthermore, if an act of torture occurred after the victim was convicted or during the enforcement of the penalty, the act does not fall under Article 126.</p>
Bahrain	<p>Torture is a criminal offence in Bahrain, as provided for under Articles 208 and 232 of the Penal Code. Following Bahrain’s Universal Periodic Review, and several recommendations by States that Articles 208 and 232 be amended to give effect to the definition in UNCAT, both provisions were amended on 9 October 2012 by Law No. 52 of 2012. Accordingly, amended Article 208 provides that “[A] prison sentence shall be the penalty for every public official or any person charged for public service, who intentionally inflicts severe pain or suffering, physically or mentally, against any person detained or under his control, for the purpose of punishing that person for an act he/she or any other person had committed or is suspected to have committed, or to intimidate or coerce that person or any</p>

⁴⁰ Registered under no. 988 of 1986, Zagazig felonies, session of 17/03/1987. Mentioned in “Comments on the Penal Code”, Mustafa Magdy Herga, p. 1048.

	<p>other person, for any reason whatsoever, based on any form of discrimination.”⁴¹ Where the torture leads to death, a life sentence shall be imposed.</p> <p>Article 232 provides for the same definition in relation to acts carried out by private actors.</p> <p>The amendment also resulted in the statute of limitation of ten years being lifted; prosecutions of violations of Articles 208 and 232 are no longer subject to any prescription.⁴²</p>
Morocco	<p>Article 231 -1 of Morocco’s Criminal Code criminalises torture, defining torture as “any act, committed intentionally by a public official or someone acting at his behest or with his express or tacit consent, by which severe physical or mental pain is inflicted on a person in order to intimidate him or her, or to pressure that person, or someone else, to obtain information or indications, or confessions; to punish that person for an act that he or she, or a third person has committed or is suspected to have committed, or when such pain or suffering is inflicted for any other reason based on any type of discrimination. This term does not cover the pain or suffering relating only to legal sanctions or caused by such sanctions or that is inherent to such sanctions.” The UN Special Rapporteur on Torture found that while this definition includes all the elements of the definition found in Article 1 (1) UNCAT, it did not cover “complicity or explicit or tacit consent on the part of the law enforcement or security personnel or any other person acting in an official capacity.”⁴³ Articles 231-2</p>

⁴¹ Unofficial translation from the Arabic original; see further Kingdom of Bahrain: Universal Periodic Review – Interim Report, September 2014, pp.8-9, at http://lib.ohchr.org/HRBodies/UPR/Documents/session13/BH/Bahrain_UPR2_Mid_Term_English.pdf.

⁴² Ibid.

⁴³ UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Morocco*, A/HRC/22/53/Add.2, 28 February 2013, para.10, at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-53-Add-2_en.pdf; see further Penal Code as of 2011, at

	to 231-8 foresee sanctions for torture, including prison sentences of 5-30 years, depending on the gravity of the offence.
Tunisia	Tunisia's Criminal Code of 1999, as amended by Decree No. 106 in 2011, criminalises torture yet provides a definition that is limited to acts committed for the purposes of extracting a confession or information and for racial discrimination. It excludes other purposes and is overly narrow, with the UN Special Rapporteur on Torture urging Tunisia in June 2014 to ensure that "the national definition of torture [is] brought into accordance with the UN Convention against Torture." ⁴⁴ The Criminal Procedure Code in Article 101ter provides that a person convicted of torture faces prison terms ranging from eight years and a fine up to life imprisonment, the latter being applicable where the torture resulted in the death of the victim.

In the absence of a uniform approach with regard to criminal proceedings, this section will identify common lessons for those jurisdictions in which torture is a crime, and will look at possible other avenues where it is not.

II.2.1 Where torture and ill-treatment have not been criminalised

Under international human rights law, states are obliged to conduct prompt, impartial and effective investigations into allegations of torture and to prosecute those responsible, where there is sufficient evidence indicating that torture has

<http://www.ilo.ch/dyn/natlex/docs/SERIAL/69975/69182/F1186528577/MAR-69975.pdf>.

⁴⁴ See UN Office of the High Commissioner for Human Rights (OHCHR), *Tunisia: More than political will is needed to eradicate torture – UN rights expert*, 6 June 2014, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14671&LangID=E>.

been committed.⁴⁵ The obligations to investigate and prosecute torture cases remain even where the governments concerned have chosen not to incorporate a torture definition into the respective criminal codes.

In those MENA countries where torture and ill-treatment have not been criminalised as a separate offence, or where acts that would normally amount to torture are not covered by a narrow definition of torture, the acts which would amount to torture need to be investigated and prosecuted as an included offence. This can for instance include assault, assault causing bodily harm, offences against the physical integrity of the person and/or abuse of authority.

What will happen if a state was to introduce a crime of torture onto the statute books? Would it be possible to prosecute torture that happened before it was criminalised, or will it only be possible to prosecute future torture cases?

Normally it will not be possible to prosecute a person for a crime unless that crime is an official crime recognised in the statute books of the country, at the time the crime took place. This is the principle of legal certainty (***Nulla poena sine lege***) - one cannot be punished for doing something that is not prohibited by law. It is an important fair trial principle recognised in all legal systems. But, torture is a crime which exists as a matter of general international law and by

⁴⁵ See for example Articles 12 and 13 UNCAT, requiring States to ensure that any individual who alleges torture has the right to lodge a complaint to competent authorities, who are obliged to examine complaints of torture promptly and impartially; see also African Commission jurisprudence on Article 5 of the African Charter, including for instance its admissibility decision in *Hawa Abdallah (represented by the African Centre for Justice and Peace Studies) v Sudan*, Communication 401/11, 1 August 2015, para. 57.

applicable treaties. Its incorporation into domestic law would not result in the creation of a new criminal offense but in the establishment of national mechanisms to prosecute and punish acts that were already prohibited as a matter of general international law and/or treaty law.

Article 15 of the ICCPR, ratified by almost all MENA countries, allows the trial and punishment of just this sort of case. It provides:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, ***at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*** (emphasis added)

This same principle has been incorporated into Article 11 of the Universal Declaration of Human Rights (UDHR) (1948): “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

If acts which amount to torture are prosecuted as lessor or subsidiary offences what types of arguments can be made by lawyers representing victims? Lawyers for victims may be able to argue that a State has not complied with its human rights obligation to investigate and prosecute torture, which derives from its obligations under treaties and under general international law; it does not depend on whether the State has chosen to criminalise torture. Thus, it may be that the State is violating its international human rights obligations when it does not have a statute capable of prosecuting torture. Note however that these arguments can be made to encourage a State to reform its laws. These arguments will not result in an individual being prosecuted for torture in the absence of a statutory provision which criminalises torture; that would breach the defendant's right to a fair trial.

Under the same principle, a State may breach its human rights obligations:

- **if the competent authorities sentence the convicted person to a non-custodial sentence or a very short period of imprisonment which may correspond to the lessor included offence under domestic law but is inappropriate for the acts which took place, which would amount to torture if torture had been criminalised.** In this respect, it is important that a penalty is sufficient in view of the fundamental breach of human rights in torture cases. If a penalty is overly low, it could not be said to have a deterrent effect nor could it be perceived as fair by the victim. The sentence needs to be in proportion to the seriousness of the act; when this deterrent effect is not present, the criminal justice

system does not comply with its role as a vehicle to prevent torture.⁴⁶

- **if it decides not to investigate or prosecute the acts in question, because an overly short limitation period (applicable to the included offence) has expired.** Under international law, acts of torture should not be subjected to overly short statutes of limitation;⁴⁷ many bodies have recognised that there should be no limitation at all for torture.⁴⁸
- **if it decides to give an amnesty or to recognise an immunity for the suspect.** Under international law, amnesties and immunities do not apply to torture prosecutions as they contradict the obligation to investigate and prosecute, which is a fundamental obligation under UNCAT and other treaties outlawing torture. The Committee Against Torture for instance noted in regards to **Morocco** that it is “concerned by some of the existing legal provisions on torture, particularly those providing for the possibility of granting

⁴⁶ See, e.g. ECtHR, *Zontul v. Greece*, Application no. 12294/07, Judgment, 17 January 2012.

⁴⁷ UN General Assembly, *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*, UN G.A. Resolution 60/147, 16 December 2005, (UN Basic Principles and Guidelines), Articles 6, 7; Committee Against Torture, *General Comment No. 3 on the Implementation of article 14 by States parties*, CAT/C/GC/3, 19 December 2012 (CAT General Comment No. 3) paras. 38, 40.

⁴⁸ See, eg. CAT, *Concluding Observations: Denmark*, CAT/C/DNK/CO/5, 16 July 2007 at para. 11; *Concluding Observations: Jordan*, CAT/C/JOR/CO/2, 25 May 2010, para. 9; *Concluding Observations: Bulgaria*, CAT/C/BGR/CO/4-5, 14 December 2011, para. 8; *Concluding Observations: Armenia*, CAT/C/ARM/CO/3, 6 July 2012, para. 10.

an amnesty or pardon to perpetrators of acts of torture.”⁴⁹

Thus, even if the competent authorities may decide to prosecute for a lesser offence, this does not make the human rights framework relating to the prohibition of torture inapplicable; to the contrary, that framework applies to all acts which may properly amount to torture, regardless of how they are characterised in relation to a particular investigation or prosecution.

II.2.2 When the authorities decide not to charge torture

Sometimes, even where there is a definition of torture in domestic law, the competent authorities may nonetheless choose to prosecute the impugned acts as a lesser offence. The UN Committee Against Torture has consistently held that torture as defined in the Convention Against Torture should be a separate offence “distinct from common assault or other crimes”.⁵⁰ This obligation continues through to prosecution: the Committee has stressed that “it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present”.⁵¹ The Committee Against Torture has stressed that, by criminalising and prosecuting torture in this way States “will directly advance the Convention’s overarching aim of preventing torture and ill-treatment” including by “alerting everyone, including perpetrators, victims, and the public, to

⁴⁹ CAT, *Concluding observations: Morocco*, CAT/C/MARC/CO/4, 21 December 2011, para. 6.

⁵⁰ CAT, *General Comment No. 2: Implementation of article 2 by States parties*, CAT/C/GC/2, 24 January 2008, at para. 11.

⁵¹ *Ibid.*, para. 10.

the special gravity of the crime of torture”, emphasising “the need for appropriate punishment that takes into account the gravity of the offence”, enhancing “the ability of responsible officials to track the specific crime of torture” and “enabl[ing] and empower[ing] the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention”.⁵²

In Bahrain for instance, alleged perpetrators of torture have rarely been prosecuted under the felony (i.e. torture) charge, and have more commonly been charged with misdemeanour crimes such as assault.⁵³ Similarly, **in Morocco**, if police officers face any prosecution for acts of torture, these are classified as lesser crimes. The UN Committee Against Torture for instance noted with concern in relation to Morocco that “police officers are, at the most, prosecuted for assault or assault and battery, but not for torture, and that the information provided by the State party indicates that the administrative and disciplinary penalties imposed on officers for such acts do not seem to be commensurate with their seriousness.”⁵⁴ Similarly, **in Tunisia**, judges reportedly convict perpetrators for less serious offences which carry a lighter punishment, such as violence against the person, instead of torture.⁵⁵

⁵² Ibid, para. 11.

⁵³ REDRESS and MIZAN 2013 Report, pp. 40, 44.

⁵⁴ CAT, *Concluding observations: Morocco*, CAT/C/MARC/CO/4, 21 December 2011, para. 16.

⁵⁵ International Commission of Jurists, *Illusory Justice, Prevailing Impunity Lack of Effective Remedies and Reparation for Victims of Human Rights Violations in Tunisia*, May 2016, (ICJ 2016 Tunisia Report), p. 70, at <http://www.ici.org/wp-content/uploads/2016/05/Tunisia-Remedies-and-reparations-Publications-Thematic-report-2016-ENG.pdf>.

There can be several reasons why acts that amount to torture are not prosecuted as torture:

- the definition of torture is overly narrow, or only applies to a narrow category of persons. For instance, in **Egypt**, the crime of torture can only be committed against criminal suspects. In addition, some laws only recognise physical forms of severe pain or suffering as capable of amounting to torture (even though the UNCAT provides that suffering may be physical or mental or both). For this reason, the Committee Against Torture has consistently criticised States that criminalise and/or prosecute acts of torture and other ill-treatment without taking into account the cumulative effect of physical and mental pain and suffering.⁵⁶
- The definition of torture is perfectly adequate, but is interpreted narrowly by the prosecutors who are bringing the charges or by the judges who are interpreting the law. This may simply be a misinterpretation. In some cases, however, it may result from certain discriminations operating in society which may lead to certain acts not being understood to be as serious or harmful as others. In some countries, acts of rape, including rape with an object, may not be

⁵⁶ See, e.g., CAT, *Concluding Observation: Moldova*, CAT/C/MDA/CO/2, 29 March 2010, para. 19 (“amend the code of criminal procedure to ... clarify that the individual and cumulative physical and mental impact of treatment or punishment should be considered”). See also, CAT, *Concluding Observations: United States of America*, CAT/C/USA/CO/2, 25 July 2006, para. 13; CAT, *Concluding Observations: Japan*, CAT/C/JPN/CO/1, 3 August 2007 at para. 10; CAT, *Concluding Observations: Estonia*, CAT/C/EST/CO/4, 19 February 2008, para. 8; CAT, *Concluding Observations: Gabon*, CAT/C/GAB/CO/1, 17 January 2013, para. 7.

interpreted as torture because of these discriminatory reasons.

- The police, prosecutors and judges may simply not be familiar with the relevant provisions, particularly if they have only recently been adopted.
- There may be a lack of will to apply the offence, because of the stigma associated with torture, because there is a heavy penalty associated with torture cases or simply because the prosecutions are perceived as difficult or time-consuming to pursue. Or, legal system officials may lack sufficient independence to pursue such cases, or they may fear the repercussions of pursuing such cases. Following the uprising in February 2011 in **Bahrain** for instance, the Bahrain Independent Commission of Inquiry (BICI) found that torture was used systematically. However, instead of prosecuting perpetrators under Article 208 of the Penal Code providing for torture, charges of assault have been used, and the few officials who have been held responsible benefitted from lighter sentences.⁵⁷

II.2.3 Criminal complaints

International law clearly recognises the right of victims to complain about torture and to have the complaint investigated.⁵⁸ A range of international and regional

⁵⁷ See REDRESS and International Rehabilitation Council for Torture Victims, *Bahrain: Fundamental Reform or Torture Without End?* (REDRESS and IRCT 2013 Bahrain Report), April 2013, p. 44, at [http://www.redress.org/downloads/publications/fundamentaireform\(1\).pdf](http://www.redress.org/downloads/publications/fundamentaireform(1).pdf).

⁵⁸ See for instance Art. 13 UNCAT.

instruments exist that provide further guidance on measures States should take to guarantee the right to complain in law and in practice.⁵⁹ The UN Human Rights Committee, responsible for overseeing compliance with the ICCPR, has affirmed, “the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”⁶⁰ The right to complain and the corresponding duty to investigate complaints of torture is also standard jurisprudence of the African Commission in regards to alleged violations of Article 5 of the African Charter.⁶¹

In assessing whether domestic authorities comply with their obligations, lawyers and other seeking justice on behalf of victims may resort to international standards as to what constitutes a prompt, impartial and effective investigation. Where authorities fail to adhere to those standards, this may provide the basis for a judicial review of a decision to discontinue an investigation, or, where such a decision is final, for the submission of a complaint to regional or international human rights mechanisms. It is therefore important to bear these standards in mind throughout when devising a litigation strategy. If the lawyer is aware that local authorities have failed to carry out an adequate investigation it would furthermore be important for the lawyer to take steps to independently document the crime in line with the Istanbul Protocol. The evidence gathered could be used to

⁵⁹ See, *Robben Island Guidelines*, Section F, May 2003.

⁶⁰ UN Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 March 2004.

⁶¹ African Commission, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, para. 100.

strengthen any ongoing official investigations and prosecutions; it could also trigger investigations, or be used to substantiate complaints submitted to regional or international human rights mechanisms.

The obligation to investigate exists where authorities are aware of information that torture has been committed, even in the absence of a formal complaint from the victim. The Committee Against Torture for instance considered that “the authorities have the obligation to proceed to an investigation *ex officio*, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion.”⁶² According to the African Commission, “whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion.”⁶³ However, our research suggests that in the vast majority of cases authorities do not initiate *ex officio* investigations, notwithstanding the information they have at their disposal that torture may have taken place. As a result, a criminal investigation usually depends on victims (and/or their legal representatives) to submit a formal complaint to the competent authorities.

Complaints processes should have the following characteristics:

⁶² CAT, *Blanco Abad v Spain*, Communication No. 59/1996, 14 May 1998, para. 8.2.

⁶³ African Commission, *Article 19 v Eritrea*, Communication 275/03, 30 May 2007, para. 72.

- **Anyone with information about a crime should be able to complain, not only the victim.** There may be many reasons why a victim may not wish to file a complaint – they may be afraid of repercussions, they may fear further torture. A doctor or prison monitor should be able to file a complaint directly, if they see a detainee with symptoms consistent with torture, as should the victim’s family. Similarly, it should be possible (and indeed encouraged) for public officials to inform the competent authorities when they see other officials partaking in criminal behaviour such as torture.

- **Authorities need to ensure that victims and witnesses are protected against ill-treatment and intimidation.**⁶⁴ The obligation to protect victims and witnesses is an integral part of an effective investigation, as reflected in the Istanbul Protocol: “Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.”⁶⁵ The absence of effective protection systems in law and practice across the region has been highlighted as a “major problem impeding accountability.”⁶⁶ **In Bahrain** for instance, accountability efforts are undermined as

⁶⁴ See Article 13 UNCAT.

⁶⁵ Istanbul Protocol, para. 80.

⁶⁶ REDRESS and MIZAN 2013 Mena Report, p. 43.

human rights defenders who speak out against human rights violations committed by Bahraini authorities and seek accountability face threats and harassment from security forces,⁶⁷ and many have been jailed. Similarly, in **Tunisia**, authorities have reportedly intimidated victims of human rights violations through the use of blackmail and bribed victims to withdraw their complaints.⁶⁸ Human rights defenders working with and in support of victims of human rights violations committed by **Egyptian** authorities, including torture, have been arrested, detained, prosecuted and sentenced, for instance for participating and organising an un-authorised demonstration or participating in a demonstration.⁶⁹ Several organisations were closed down and/or had their assets frozen, effectively preventing them from supporting accountability processes and victims seeking justice.⁷⁰

- **The police or other body receiving the complaint should be able to process the complaint without it being on a specific form or following any kind of procedure.** A complaint should not have to be formal. Not all victims

⁶⁷ Ibid.

⁶⁸ See further, ICJ 2016 Tunisia Report, p. 21.

⁶⁹ See for instance, African Commission, *Press Release on the arrest and detention of Human Rights Defenders in Egypt*, 27 June 2014, at <http://www.achpr.org/press/2014/06/d212/>.

⁷⁰ See, Amnesty International, *Egypt: Asset freeze is a shameless ploy to silence human rights activism*, 17 September 2016, at <https://www.amnesty.org/en/press-releases/2016/09/egypt-asset-freeze-is-a-shameless-ploy-to-silence-human-rights-activism/>; Al Nadeem Centre for Rehabilitation of Victims of Violence, *Our Reply to the MOH allegations regarding closure of El Nadim*, 25 February 2016, at <http://www.alnadeem.org/en/content/our-reply-moh-allegations-regarding-closure-el-nadim>.

will be able to write a complaint on a particular form; they may not have access to the form. Sometimes, the requirement of forms invites corruption – victims may need to pay officials to receive a form. There should be no requirement for victims to append evidence – such as a medico-legal report – to a complaint. Victims should be able to submit evidence should they wish, and should they have access to such information. However this should not be a requirement. It should be the authorities’ responsibility to investigate all credible complaints; it is not the responsibility of the victim to pursue all evidential leads when the authorities will be better placed to collate the evidence.

- **It should be possible to file the complaint at any time.** As the crime of torture should not normally prescribe, there should not be a requirement that a complaint be filed within a short period of time (e.g., within 15, 30 or 60 days of the incident). There are many reasons why a victim cannot file a complaint straight away. The victim may be in detention, he or she may be far away from the location of the complaints body. He or she may also suffer psychological trauma or physical injuries which may prevent him or her from taking steps in relation to the case in a quick way. In some cases, victims may have fled the country because of their fear of further abuse, which may also complicate the filing of speedy complaints.
- **The complaints process should be prompt, accessible, available and appropriate.** There should not be barriers put in the way of victims to prevent them from filing complaints, such as fees to file a complaint, forcing

victims in remote areas to file a complaint in the capital city, or in a location far removed from where they live. Complaints processes must be safe and secure, and cater to victims' needs for privacy and dignity. In **Bahrain**, victims and lawyers criticised the process adopted when they made a complaint of torture or ill-treatment. One lawyer for instance said that the questioning of one of the complainants in his case lasted for many hours and the complainant was interrogated as if she were a defendant.⁷¹

- **Complaints processes – both the body that receives the complaint and how it is handled - should be sufficiently independent and impartial.** This means that the bodies that receive and follow up complaints should be independent in the chain of command from those who are accused of the acts amounting to torture or ill-treatment. For instance in **Egypt**, the Public Prosecution as a formally independent judicial body under the administration of the Ministry of Justice⁷² has powers to investigate complaints to determine whether or not there is evidence to pursue a criminal prosecution before the courts.⁷³ However, it has been reported that often prosecutors are unwilling to impartially investigate or to investigate at all.⁷⁴ District prosecutors reportedly feel obliged to consult their superiors and State Security Prosecution Services when considering whether to

⁷¹ REDRESS and IRCT 2013 Bahrain Report p. 46.

⁷² Article 125 of Law No. 46 of 1972 on the Judiciary.

⁷³ Articles 21-29 of the Code of Criminal Procedure.

⁷⁴ See Amnesty International, *Egypt: 'Officially, You Do Not Exist' – Disappeared and Tortured in the Name of Counter-Terrorism*, 2016, p. 51, at <http://www.amnesty.it/flex/FixedPages/pdf/MDE1243682016ENGLISH.PDF>.

dismiss a case of torture, rather than deciding solely on the existing evidence.⁷⁵ The lack of independence is reflected in the prosecution's failure to conduct serious investigations into reports of killings and torture at the hands of law enforcement officials, which stands in sharp contrast to the number of 'political dissidents' prosecuted.⁷⁶ In one case concerning allegations of torture resulting in death in custody, the Egyptian authorities' failure to carry out an independent and impartial investigation led the victim's family to take the case to the African Commission.⁷⁷ **In Bahrain**, the Office of the Ombudsman of the Ministry of Interior is mandated to receive and examine complaints alleging, amongst other matters, "physical injury or serious ill-treatment" by an employee of the Ministry of Interior. This includes for instance complaints against police and public security force personnel.⁷⁸ However, the Office of the Ombudsman remains embedded in the Ministry of Interior, and according to Decree no. 27 of 2012, the Minister of the Interior and the President of the Council of Ministers can recommend the appointment and removal of the Ombudsman from office. Furthermore, some of the Ombudsman's personnel are reportedly connected to those implicated in many of the human

⁷⁵ Ibid.

⁷⁶ Egyptian Initiative for Personal Rights, *Guarantees of Prosecution Independence Needed for a More Effective Justice System*, 9 August 2014, at <http://eipr.org/en/pressrelease/2014/08/09/2180>.

⁷⁷ See *Mohammed Atta (represented by REDRESS, El Nadim Center and Egyptian Initiative for Personal Rights) v The Arab Republic of Egypt*, Communication 597/16, The Complainant's Admissibility Brief, at <http://www.redress.org/downloads/160610mohammed-atta--admissibility.pdf>.

⁷⁸ Office of the Ombudsman, *New Police Ombudsman Commits to Accountability, Transparency and Justice for Victims of Police Misconduct*, 11 July 2013.

rights violations the Ombudsman is mandated to review.⁷⁹ Similar concerns exist regarding the independence of the **Special Investigations Unit** within the Public Prosecution Office in **Bahrain**. Established in February 2012 to “investigate unlawful or negligent acts that resulted in deaths, torture and mistreatment of civilians,” the unit is staffed with members of the same public prosecution office which was responsible for politically motivated prosecutions before, during and after the 2011 protests- many of which relied on evidence obtained by torture.⁸⁰ It is also the same office responsible for prosecutions of leading figures from opposition and human rights organisations on freedom of speech related charges during 2012. The Unit has also reportedly failed to allow independent medical examinations in cases of suspicious deaths and alleged torture or ill-treatment. Moreover the Unit reportedly has suffered from a lack of staff and resources, hampering its effectiveness.⁸¹

- **Investigations must be effective and thorough**, meaning that they must be capable of ascertaining the facts and establishing the identity of any alleged perpetrators.⁸²

⁷⁹ See for instance, Bahrain Institute for Rights & Democracy (BIRD) and Americans for Democracy and Human Rights in Bahrain, *Unaccountable – A shadow report on the Bahraini Ministry of the Interior’s Ombudsman and Bahrain National Institute for Human Rights*, July 2014, pp. 6, 9-10, at http://birdbh.org/wp-content/uploads/2014/10/ADHRB_Mechanism_Final-0814_Web.pdf.

⁸⁰ *Ibid*; see also REDRESS and IRCT 2013 Bahrain Report, p. 46.

⁸¹ Human Rights Watch, *Bahrain: Promises Unkept, Rights Still Violated*, 22 November 2012, at <https://www.hrw.org/news/2012/11/22/bahrain-promises-unkept-rights-still-violated>.

⁸² ECtHR, *Assenov et al v Bulgaria*, Application No.90/1997/874/1086, Judgment, 28 October 1998, para. 77.

According to the African Commission, effectiveness of the investigation is closely linked to its independence: “[T]his means not only a lack of hierarchical or institutional connection but also a practical independence.”⁸³ In assessing the effectiveness of an investigation, the Commission therefore examines, *inter alia*, the legal framework in place and its ability to ensure accountability of officials⁸⁴ and whether the investigation targets those responsible, including, where appropriate, high ranking officials.⁸⁵ Where violations continue being committed, the Commission has found that this demonstrates a “weakness in the judicial system and lack of effectiveness to guarantee effective investigations and suppression of the said violations.”⁸⁶ Premature closure of investigations because, for instance, victims could not identify their attackers, will also be taken into account when assessing the effectiveness of an investigation.⁸⁷ **In Bahrain**, the Public Prosecutor issued ‘Special Directives’ to the Special Investigative Unit, providing a ‘Code of Conduct’ to be used by members of the Unit when investigating and collecting evidence of torture and other ill-treatment. According to the authorities, the Directives comply with the Istanbul Protocol, and staff of the Unit has received training on the standards contained in the Istanbul Protocol. However, according to Amnesty International, “it appears that the actions undertaken by

⁸³ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications 279/03-296/05, 27 May 2009, (Sudan COHRE Case), para. 150.

⁸⁴ *Ibid.*, para. 153.

⁸⁵ *Ibid.*, para. 152.

⁸⁶ *Ibid.*, para. 153.

⁸⁷ *Ibid.*, para. 151.

the SIU [in relation to several cases of alleged torture reported to Amnesty International] failed to comply systematically and thoroughly with the Istanbul standards.”⁸⁸

- **As long as the complaint is not frivolous or vexatious, it should be fully investigated.** Allegations must be investigated promptly and fully. This is to ensure that vital evidence is not lost, and also to ensure that justice is swift. Serving public officials accused of torture or ill-treatment should be suspended pending the outcome of the investigation.

II.2.4 What if authorities do not adequately investigate or discontinue the investigation?

Victims have a fundamental right to know what happens with an investigation and if a decision is taken for any reason to close an investigation or to end a prosecution. According to the African Commission, where the authorities fail to inform about the closure of an investigation, this may render an investigation ineffective: “[T]he Commission considers that the failure to inform the victim about the investigation and the decision to dismiss her case prejudiced her because she was left in a state of limbo without knowing what further steps to take. This in effect renders any available remedies ineffective.”⁸⁹

⁸⁸ Amnesty International, *Behind the Rhetoric: Human Rights Abuses in Bahrain Continue Unabated*, 2015, p. 17.

⁸⁹ African Commission, *Safia Ishaq Mohammed (represented by REDRESS and the African Centre for Justice and Peace Studies) v Sudan*, Communication 443/2013, para. 58 (admissibility decision).

In Tunisia, if the Public Prosecutor decides to discontinue the proceedings, the civil party may require that the prosecutor opens a preliminary investigation or summon the accused directly before the First Instance Tribunal.⁹⁰ However, unless the accused is found guilty, the civil party shall incur the expenses of the proceedings.⁹¹ In addition, in cases where the investigating judge decides to discontinue a prosecution initiated by a civil party, the accused can request compensation from the civil party.⁹² Where the accused has appeared before the First Instance Tribunal, and is subsequently acquitted, the civil party may be fined.⁹³ As a result of those limitations and risks, these civil party rights are “rarely used if the Judicial Police or public prosecutor do not act on the complaint.”⁹⁴ In cases where civil parties do initiate proceedings, judges reportedly demonstrate prejudice in favour of the accused over the civil party, for instance refusing to hear witnesses requested by the civil party, without providing any reasons for the refusal.⁹⁵ In **Egypt**, “no person other than the Attorney General, State Attorney or head of the Public Prosecution may file a criminal lawsuit against a civil servant, public employer and/or law enforcement officer for crimes or misdemeanours perpetrated thereby during the course of or as a result of performance of the duty thereof.”⁹⁶ In cases where the suspect is a public official, a complainant therefore does not have standing to file a lawsuit directly against the suspect.

⁹⁰ Code of Criminal Procedure, Tunisia, Articles 36, 206.

⁹¹ *Ibid*, Article 39.

⁹² *Ibid*, Articles 45, 167(3).

⁹³ *Ibid*, Article 45.

⁹⁴ ICJ 2016 Tunisia Report, p. 20.

⁹⁵ *Ibid*, p. 39.

⁹⁶ Egyptian Code of Criminal Procedure, Article 63.

The only possible course of action is the submission of a complaint to the Public Prosecution service. Should the Public Prosecution dismiss a complaint or decide to discontinue an investigation, the only possibility for a complainant to re-open an investigation is to present “new evidence.”⁹⁷ The decision to re-open remains entirely within the discretion of the Prosecution, which will also assess any new evidence presented to it. According to the African Commission, this effectively exhausts domestic remedies in Egypt: in cases where the prosecution services decide to stop an investigation, “victims were left with no other remedy because the inquiry procedures have been stopped.”⁹⁸

II.2.5 The inadmissibility of torture evidence

As enshrined under Article 15 of UNCAT, confessions and other evidence obtained by torture are inadmissible in legal proceedings, except against a person accused of such treatment as evidence that the statement was made. The exclusion of evidence obtained by torture is an important aspect of States’ obligations to prevent torture. It counteracts one of the main enumerated purposes of torture – to elicit a confession. The rationale for the exclusionary rule stems from a combination of factors: i) the unreliability of evidence obtained as a result of torture (ii) the outrage to civilised values caused and represented by torture (iii) the public policy objective of removing any incentive to undertake torture anywhere in the world (iv) the need to

⁹⁷ Egyptian Code of Criminal Procedure, Article 197, providing that such evidence can include witness testimonies, reports and other documents.

⁹⁸ African Commission, *Egyptian Initiative for Personal Rights & Interights v Egypt*, Communication 323/06, 12 October 2013, para. 65.

ensure protection of the fundamental rights of the party against whose interest the evidence is tendered (and in particular those rights relating to due process and fairness) and (v) the need to preserve the integrity of the judicial process.

The exclusionary rule is also reflected in the African Commission’s Fair Trial Principles, which call on prosecutors to refuse any evidence they know or believe to have been obtained through unlawful means, including torture and ill-treatment. The burden of proof should be on the prosecution to “prove beyond reasonable doubt that a confession was not obtained under any kind of duress.”⁹⁹

All of the countries reviewed have legislation in place prohibiting the use of confessions or coerced statements, yet there are serious problems with implementation.¹⁰⁰ In **Morocco** for instance, Article 293 of the Criminal Procedure Code prohibits evidence obtained through “coercion” or “violence,” yet reportedly such evidence is frequently admitted in cases against terrorism suspects, and in cases against protestors.¹⁰¹ The UN Special Rapporteur on Torture noted in 2012 that “courts and prosecutors do not comply with their obligation to initiate an *ex officio* investigation whenever there are reasonable grounds to believe that a confession has been obtained through the use of torture and

⁹⁹ See for instance, UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, 2012, A/HRC/19/61, 1 March 2012, Add. 3, para. 89.

¹⁰⁰ See further, REDRESS and MIZAN 2013 Report, pp. 26-28.

¹⁰¹ Human Rights Watch, *Just Sign Here: Unfair trials based on confessions to the police in Morocco*, June 2013, at https://www.hrw.org/sites/default/files/reports/morocco0613webwcover_0.pdf.

ill-treatment, or to order an immediate and independent medical examination [...] if they suspect that the detainee has been subjected to ill-treatment.”¹⁰² The Special Rapporteur expressed further concerns regarding the fact that “judges are willing to admit confessions without attempting to corroborate the confession with other evidence, even if the person recants before the judge and claims to have been tortured.”¹⁰³

A 2014 judgment of the **Court of Appeal of Agadir** constitutes a rare case where an accused has been acquitted in Morocco on the basis that confession was obtained under torture. Because of its importance, the case is set out in detail.¹⁰⁴

The case concerned two defendants accused of selling and consuming drugs (cannabis). According to the police record,

¹⁰² Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, 28 February 2013, UN Doc A/HRC/22/53/Add.2, (Méndez Morocco Report 2013), para. 27; the UN Working Group on Arbitrary Detention repeated this concern following its mission to Morocco in December 2013, see *Report of the Working Group on Arbitrary Detention*, 4 August 2014, UN Doc A/HRC/27/48/Add.5 para. 32.

¹⁰³ Méndez Morocco Report 2013, para. 27.

¹⁰⁴ Court of Appeal of Agadir, Case No 6955, 14/260\$/1969, 25 July 2014. The judgment was not available at the time of writing; the decision was covered in media and NGO reports, including a commentary by Droit et Justice: *Commentaire de l'arrêt 6955*, at http://www.droitetjustice.org/wp-content/uploads/pdf/008_Cour%20d'Appel_Commentaire%206955_Ag.pdf; Medias24, *Une première au Maroc : Annulation d'un jugement en raison de la torture*, 28 June 2014, at <http://www.medias24.com/Les-plus-de-Medias-24/13963-Une-premiere-au-Maroc-Annulation-d-un-jugement-en-raison-de-la-torture.html>; Le 360, *Annulation d'un verdict pour cause de torture. Une première!*, 28 August 2014, at <http://www.le360.ma/fr/societe/annulation-dun-verdict-pour-cause-de-torture-une-premiere-20533>; FIDH, *La justice marocaine en chantier: des réformes essentielles mais non suffisantes pour la protection des droits humains*, 2014, p. 18, note 44, at <https://www.fidh.org/IMG/pdf/maroc645f2014.pdf>.

the police interviewed the first defendant, who confessed to knowing the second defendant and that the second defendant sold him drugs on a regular basis. The police record noted further that during his interview, the first defendant “behaved hysterically” and hit his head on the floor. When the first defendant was subsequently interviewed by the prosecutor, the prosecutor noted wounds on the first defendant, including marks on the left eye, the chest, the thigh as well as marks consistent with cigarette burns on the chest and neck. The prosecutor referred the case to a doctor, in order to identify the nature and the cause of the wounds. A medical report subsequently indicated that the first defendant’s wounds were consistent with a physical assault that would have occurred within the three previous days. Irrespectively, the prosecutor proceeded with the case and the first defendant was convicted at first instance on the basis of his confession. In appealing the first instance court’s decision, his lawyer argued that the police had used violence against his client and that the medical report confirmed that his client lost the use of one of his ears due to the injuries he sustained. As the confession was obtained under torture, the lawyer argued that the judgment of first instance should be reversed.

On 24 July 2014, the Court of Appeal ruled that according to all the documents submitted, it was clear that the police had tortured the first defendant in detention. The Court further held that the police record was not convincing, particularly as the police’s version contradicted the medical evidence. On the basis of Article 293 of the Code of Criminal Procedure the Court found that it could not accept the first defendant’s confession, and acquitted the first defendant.

The Court of Appeal also held that the illegality of torture had to be extended to the other investigative procedures, such as the search of the first defendant's home, the interception of a phone call to the first defendant's mobile phone as well as the confession of the second defendant (who had stated that he bought drugs from the first defendant). According to the Court of Appeal, since the officer responsible for the torture was also in charge of the investigative steps taken, the entire investigation was tainted and could not be trusted.

The Court of Appeal's finding that the use of torture also rendered other evidence derived from the torture (also referred to as the "fruits of the poisonous tree" or "derivative evidence") inadmissible is important and in line with the objective to deter the use of torture to obtain evidence in the first place. The Inter-American Court on Human Rights has also confirmed in a case against Mexico that "the absolute character of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action. Consequently, the Court considers that excluding evidence gathered or derived from information by coercion adequately guarantees the exclusionary rule."¹⁰⁵

¹⁰⁵ Inter-American Court of Human Rights (IACtHR), *Teodoro Cabrera Garcia and Rodolfo Montiel Flores v Mexico*, 26 November 2010 (Preliminary Objection, Merits, Reparations and Costs), para. 167.

The Ministry of Justice reportedly confirmed that those responsible for the first defendant's torture would be prosecuted.¹⁰⁶

In Egypt, pursuant to Article 55 of the Constitution, any defendant has the right to be silent during any interrogation or investigation, and any confession or statement obtained under physical or mental coercion or by threatening a detainee is inadmissible. However, Amnesty International's research in 2016 into the practice of the National Security Agency suggests that the Agency routinely tortures and ill-treats detainees, including children, "to force them to confess to crimes or implicate others." According to Amnesty International, such 'confessions' are frequently videotaped and shown to the public to convince society that detainees were engaged in "terrorism." Prosecutors subsequently use such videotaped 'confessions' in court to undermine detainee's attempts to retract them.¹⁰⁷ **In Tunisia**, Article 155 (2) of the Criminal Procedure Code, as amended in October 2011, excludes confessions and witness statements obtained under torture or duress. However, judges in Tunisia appear to be reluctant to apply this provision in practice, and to carry out an investigation to establish whether evidence has indeed been obtained through torture (or duress). Judges appear to take their decisions without investigating, and without, for instance, sending the defendant who alleges

¹⁰⁶ Medias24, *Une première au Maroc : Annulation d'un jugement en raison de la torture*, 28 June 2014, at <http://www.medias24.com/Les-plus-de-Medias-24/13963-Une-premiere-au-Maroc-Annulation-d-un-jugement-en-raison-de-la-torture.html>; no information about the investigation against the police officer(s) responsible was available at the time of writing.

¹⁰⁷ Amnesty International, *Egypt: 'Officially, You Do Not Exist' – Disappeared and Tortured in the Name of Counter-Terrorism*, 2016, pp. 8, 44-46.

to have been tortured for a medical examination. No ‘practice direction’ or procedural guidance currently exists to help guide Tunisian judges as to what steps to take to implement amended Article 155 (2) when relevant allegations are raised in court.¹⁰⁸

II.3 Civil claims

Torture can cause significant harm to victims and it has been recognised that torture survivors have a cause of action against those that wronged them. Importantly, initiation of civil procedures should not depend on the existence and success of the criminal process.¹⁰⁹ In most countries in the region, there is no legislation in place explicitly providing for reparation from the State for torture. Rather, legislation establishes more general forms of reparation available to victims of any crime resulting in harm or damage.

In countries with a civil law tradition, such as for instance **Egypt**,¹¹⁰ **Tunisia**¹¹¹ and **Morocco**,¹¹² victims have a right to

¹⁰⁸ REDRESS, *Legal Frameworks to Prevent Torture in Africa: Best Practices, Shortcomings and Options for Going Forward*, March 2016, p. 35, at <http://www.redress.org/downloads/publications/1603anti-torture-legislative-frameworks-in-africa.pdf>.

¹⁰⁹ CAT, General Comment No. 3, para. 26.

¹¹⁰ Article 220 of the Code of Criminal Procedure of Egypt provides that “[A] civil action, no matter the resulting amount, to compensate for the damage caused by the crime, may be filed before criminal courts to be heard in conjunction with the criminal lawsuit.”

¹¹¹ Article 1 of the Code of Criminal Procedure of Tunisia provides that any offence gives rise to a civil action if harm was caused.

¹¹² Article 7 and 9 of the Code of Criminal Procedure of Morocco and Article 77 of the Code des Obligations et des Contrats: “*Tout fait quelconque de l’homme qui, sans l’autorité de la loi, cause sciemment et volontairement à autrui un dommage*

seek compensation for damages as civil parties in the context of criminal proceedings. While this provides a clear procedure for victims to obtain civil remedies, such ‘civil adhesion’ claims usually only proceed at the end of a successful criminal trial, and are therefore contingent on the criminal trial, which, if the only avenue to compensation, can limit victims’ access to civil remedies. The advantages of bringing a civil claim as part of the criminal proceedings, are that the judge hearing the criminal matter will also be called upon to decide reparations,¹¹³ and will be well acquainted with the facts of the case. Furthermore, the burden of proof of the act of torture rests on the prosecution in criminal cases, and the civil party must only prove the damages suffered as a result of the torture, and specify the compensation claimed. In **Tunisia**, civil parties can pursue a civil claim against the accused, yet the Code of Criminal Procedure does not specify whether a civil party can also pursue such a claim against the State for criminal acts of public officials. The jurisprudence in this respect is inconsistent: in some cases, the State has been joined as a respondent in criminal proceedings, and courts have ordered the State to pay compensation to victims, while in others, such claims needed to be pursued in separate civil or administrative claims.¹¹⁴

Victims also have a right to pursue a civil claim for compensation separately from criminal proceedings before

materiel ou moral, oblige son auteur à réparer ledit dommage, lorsqu’il est établi que ce fait en est la cause directe. Toute stipulation contraire est sans effet.”

¹¹³ See for instance, Article 167 of the Code of Criminal Procedure of Tunisia.

¹¹⁴ See further ICJ 2016 Tunisia Report, p. 109.

civil courts. In **Egypt**,¹¹⁵ **Tunisia**¹¹⁶ and **Morocco**,¹¹⁷ civil claims for torture can be pursued against the perpetrator and the State who is liable for acts or omissions committed by public officials in the exercise of their duty. While the outcome of the civil case is independent of the outcome of any related criminal proceedings, the civil court must wait for the decision in the criminal case before it decides on the civil claim, which can result in significant delays.¹¹⁸

In countries which do not provide for a civil party system in criminal trials, the only route to bring a claim is to bring a separate civil claim before the courts. In **Bahrain**, Article 158 of Decree Law No. 19/2001 provides torture survivors with a legal basis for a civil claim for compensation for acts of torture. A victim can file a civil claim for compensation regardless of whether a criminal case has been brought against the alleged perpetrator. However, lawyers in Bahrain indicated that civil claims for torture “are destined to fail” because the courts require a very high standard of proof

¹¹⁵ Court of Cassation (Civil Chamber), Case 3535/64, 13 February 2006, at <http://www.f-law.net/law/threads/16262-%D8%A7%D8%AD%D9%83%D8%A7%D9%85-%D9%86%D9%82%D8%B6-%D8%AD%D8%AF%D9%8A%D8%AB%D8%A9-%D9%81%D9%89-%D8%A7%D9%84%D8%AA%D8%B9%D9%88%D9%8A%D8%B6> (in Arabic).

¹¹⁶ See further Articles 82 and 83 of the Code of Obligations and Contracts of Tunisia, and Article 84 on State liability.

¹¹⁷ Article 79 of the Code of Obligations and Contracts of Morocco provides: “L’Etat et les municipalités sont responsables des dommages causés directement par le fonctionnement de leurs administrations et par les fautes de service de leurs agents.” Article 80 provides that “les agents de l’Etat et des municipalités sont personnellement responsables des dommages causés par leur dol ou par des fautes lourdes dans l’exercice de leurs fonctions. L’Etat et les municipalités ne peuvent être poursuivis à raison de ces dommages qu’en cas d’insolvabilité des fonctionnaires responsables.”

¹¹⁸ See ICJ 2016 Tunisia Report, p. 112; see Article 265 of the Code of Criminal Procedure of Egypt.

(essentially requiring a criminal conviction), and there was the very real potential for evidence to be manipulated by the State defendant.¹¹⁹

Recent legislative reforms in **Bahrain** resulted in the statute of limitations for torture to be lifted in the Penal Code, yet it is unclear whether this extends to civil claims filed under Article 158 of Decree Law No.19/2001, which in Article 180 (a), provides that a claim must be brought within three years either “from the date on which the victim knows of the damage and the person liable for it, or fifteen years from the date on which the unlawful act has occurred, whichever comes first.”¹²⁰ In **Tunisia**, the limitation period for civil lawsuits runs parallel to the corresponding criminal lawsuit.¹²¹ The 2014 Constitution lifted statutes of limitation in regards to torture, providing explicitly that “crimes of torture are not subject to any statute of limitations.”¹²² In **Egypt**, Article 99 of the 2014 Constitution provides that “any assault on the personal freedoms or sanctity of the life of citizens...is a crime with no statute of limitations for both civil and criminal proceedings.”

The harm suffered will be decisive in determining the amount of compensation to be awarded. According to the **Egyptian Court of Cassation** (Civil Chamber) compensation should be fair, take into account the specific circumstances of the case, including “the health and social conditions of the

¹¹⁹ REDRESS and IRCT 2013 Bahrain Report, pp. 49-50.

¹²⁰ See further, REDRESS and MIZAN 2013 Report, p. 47.

¹²¹ Code of Criminal Procedure of Tunisia, Article 8.

¹²² See Article 23 of Tunisia’s Constitution of 2014, at https://www.constituteproject.org/constitution/Tunisia_2014.pdf.

victim” and be proportional to the damage caused. The court have also referred to Article 222 of the Civil Code, which indicates that compensation should be provided for material and moral damages.¹²³ In **Tunisia**, compensation will also cover material and moral harm,¹²⁴ with material harm including actual loss, expenses to repair the consequences of the act as well as gains the plaintiff has been deprived of as a consequence of the act.¹²⁵ No guidance or practice direction exists in Tunisia for courts to assess what criteria to apply in assessing moral harm. As a result, the jurisprudence is inconsistent in the few cases where compensation for torture was awarded. The First Instance Tribunal of the Permanent Military Court of Kef found for instance that moral harm “is the type of harm that is inflicted on the victims’ emotions and feelings and the pain the victims endure.”¹²⁶ Another Military Court in Tunis considered that compensation for moral harm is “commensurate with the reality of the suffering they endured and within the framework of achieving justice and equity.”¹²⁷

II.4 Constitutional claims

Constitutional prohibitions of torture and ill-treatment exist in several countries throughout the MENA region, including in Iraq, Syria, State of Palestine and Yemen. The Constitutions

¹²³ Court of Cassation (Civil Chamber), Case 3535/64, 13 February 2006 (n. 119).

¹²⁴ See Article 83 of the Code of Obligations and Contracts of Tunisia.

¹²⁵ *Ibid*, Article 107.

¹²⁶ Case No. 95646, Judgment p. 736, quoted in ICJ 2016 Tunisia report, p. 106.

¹²⁷ Case No.71191, Judgment, p. 943, quoted in ICJ 2016 Tunisia report, p. 107.

of the countries also include a prohibition of torture and/or ill-treatment.

Tunisia	Article 23 of Tunisia’s 2014 Constitution provides that “[T]he State protects human dignity and physical integrity, and prohibits mental and physical torture. Crimes of torture are not subject to any statute of limitations.”
Morocco	Article 22 of Morocco’s Constitution of 2011 provides that “[T]he physical or moral integrity of anyone may not be infringed, in whatever circumstance that may be, and by any party that may be, public or private. No one may inflict on others, under whatever pretext there may be, cruel, inhuman, [or] degrading treatments or infringements of human dignity. The practice of torture, under any of its forms and by anyone, is a crime punishable by the law.”
Bahrain	Article 19 (d) of Bahrain’s 2002 Constitution provides that “[N]o person shall be subjected to physical or mental torture, or inducement, or undignified treatment, and the penalty for so doing shall be specific by law. Any statement or confession proved to have been made under torture, inducement, or such treatment, or the threat thereof, shall be null and void.”
Egypt	Article 52 of the 2014 Constitution of Egypt provides that “[T]orture in all forms and types is a crime that is not subject to prescription.”

The Constitutions in the majority of MENA countries do not provide for a separate right to a remedy or a right to reparation by way of constitutional petition to relevant courts. In **Bahrain**, **Tunisia** and **Morocco** for instance, the Constitutional Court only has jurisdiction over the conformity of different pieces of legislation with the Constitution. This can result in relevant legislation being overturned, yet there is no right for a separate court action to enforce fundamental rights enshrined in the Constitution.

In **Egypt**, Article 99 of the Constitution provides that “[T]he State shall guarantee fair compensation for the victims of such violations [of personal freedoms, the sanctity of the private life of citizens, or any other public rights and freedoms guaranteed by the Constitution and the Law].” Victims of such violations can assert their right to compensation through the ‘National Council for Human Rights’, which, according to Article 99, may file a complaint with the Public Prosecution and may intervene in the civil lawsuit in favour of the affected party at its request. There is no possibility, however, for victims to file a fundamental rights case claiming reparation for a violation of Article 52 of Egypt’s Constitution.

II.5 Human Rights Commissions

Human rights commissions are governmental institutions that have the mandate to investigate allegations concerning human rights violations and to issue recommendations and/or orders to rectify the situation of the violation. In some countries surveyed, national human rights commissions also have a mandate to inspect prisons and other detention facilities and consider allegations concerning torture and ill-treatment.

Egypt	<p>The National Council of Human Rights (NCHR) is governed by Article 214 of the Constitution and Law No. 94 of 2003.¹²⁸ Pursuant to Article 3 of this law, the mandate of the NCHR is to raise people’s awareness of human rights, receive complaints about human rights violations, provide different authorities with proposals to enhance and improve the human rights situation, monitor the Egyptian Government’s commitment to its international human rights obligations, and provide State bodies with suggestions to guarantee the application of these obligations enshrined in international treaties and publish reports about the human rights situation in Egypt.¹²⁹ The NCHR cannot take decisions on the complaints it receives, but it can refer complaints to any competent body at its discretion, advise and follow up on complaints and assist the relevant institution. The NCHR can also intervene as <i>Partie Civile</i> in favour of victims of such violations, as well submit complaints to the General Prosecution’s Office regarding these infringements.</p>
Morocco	<p>The National Council for Human Rights (<i>Conseil National des Droits de l’Homme</i>, CNDH) is Morocco’s official human rights commission. It has a mandate that includes monitoring, receiving and handling complaints, mediation and early intervention, investigation and enquiries, reporting and treaty practice.¹³⁰ Following its investigation of a complaint, the CNDH may advise the victim concerned on the next steps, including taking judicial action. The CNDH itself is not entitled to take decisions, nor to accompany the victim through the legal proceedings when seeking justice.¹³¹ In some cases, the CNDH may issue a report on the violation.¹³²</p>

¹²⁸ Law 94/2003 the Egyptian Gazette 19/6/2003 concerning the establishment of the National Human Rights Council.

¹²⁹ Ibid.

¹³⁰ CNDH, *CNDH’S mandate in the area of human rights protection*, <http://www.cndh.org.ma/an/presentation/cndhs-mandate-area-human-rights-protection>.

¹³¹ Interview with Mourad Errarhib, Director of cooperation and international relations, CNDH, Rabat, London, 20 November 2015.

¹³² Ibid.

	Some civil society organisations have expressed concern about the CNDH's lack of independence and have recommended that the CNDH, subject to further reform, should be downgraded to 'B Status', given to national human rights institutions considered as not fully in compliance with the Paris Principles. ¹³³
Bahrain	In 2009, the National Institution for Human Rights (NIHR) was established, and following an amendment introduced in 2014, its mandate now includes not only human rights education and awareness-raising, but also reviewing draft and existing legislation to ensure its compliance with international human rights laws and standards, investigating complaints of abuse and making recommendations. ¹³⁴ Concerns exist regarding its independence and effectiveness, and it has not been accredited under the Paris Principles. ¹³⁵
Tunisia	Article 128 of Tunisia's 2014 Constitution created the national human rights commission, which is mandated to, amongst other things, promote human rights, make proposals to develop the human rights system and conduct investigations into violations of human rights with a view to resolving them or referring them to the competent authorities. By September 2016, a bill on the functioning of the Human Rights Commission was pending adoption by the Parliament. ¹³⁶

¹³³ Alkarama, *Morocco: National Human Rights Council to Keep A Status Despite Lack of Independence from the Executive*, 3 February 2016, at <http://en.alkarama.org/morocco/2032-morocco-national-human-rights-council-to-keep-a-status-despite-lack-of-independence-from-the-executive>.

¹³⁴ Amnesty International, *Behind the Rhetoric: Human Rights Abuses in Bahrain Continue Unabated*, 2015, p. 16.

¹³⁵ Americans for Democracy and Human Rights in Bahrain and Bahrain Institute for Rights and Democracy, *Subservient and Unaccountable: A Shadow Report on the Bahraini Ministry of the Interior's Ombudsman and Bahrain National Institute for Human Rights*, 2014, p. 21.

¹³⁶ UN Committee on Economic, Social and Cultural Rights reviews third report of Tunisia, 23 September 2016, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20574&LangID=E>.

II.6 Disciplinary and oversight mechanisms

The domestic legislative framework should ensure that officials suspected of torture and ill-treatment, in addition to criminal sanctions, are subject to disciplinary proceedings and, where appropriate, sanctions. While emphasising that disciplinary sanctions cannot replace criminal sanctions, the UN Committee Against Torture has found a violation of Articles 2(1) and 4(2) UNCAT in a case where the officials who had been found to have tortured the complainant were not subject to disciplinary proceedings while the criminal proceedings were in progress.¹³⁷ In the countries reviewed, disciplinary measures such as suspensions, wage deductions or dismissals are possible.¹³⁸ The possibility for suspensions while the criminal proceedings are ongoing is important particularly where a suspect might interfere with the investigation, tamper with evidence or threaten the victim. Suspensions are also crucial to ensure that the torture ends, both for the victim who may remain vulnerable to further torture if he or she remains in detention, and also for other potential victims.

In none of the countries reviewed are torture and other ill-treatment specifically listed as criminal offences that can lead to disciplinary sanctions. **In Tunisia**, officers of the 'Internal Security Forces' can be disciplined for misconduct committed during the exercise of their duties as per Article 45 of Law 82-70, yet this does not explicitly include torture. In any event,

¹³⁷ CAT, *Urra Guridi v Spain*, Communication No. 212/2002, 17 May 2005, paras. 6.6. - 6.7.

¹³⁸ See for instance Egypt, Police Law Number 109 of 1971, Article 48; Article 66 of the Law on Public Function, Morocco.

these provisions are reportedly not used in practice.¹³⁹ Similarly, **in Morocco**, the relevant law regulating disciplinary sanctions does not include torture or ill-treatment. However, article 73(1) provides that a public official who is responsible for serious misconduct (*faute grave*) - by failing to carry out their official duty - shall be immediately suspended.¹⁴⁰

Some countries have put in place special mechanisms to monitor the conduct of specific State institutions. For instance **in Bahrain**, following the recommendations of the BICI inquiry, the Office of the Inspector General and an Office of Professional Standards inside the National Security Agency (NSA) was created by Decree No. 28 of 28 February 2012. The NSA Inspector General has a mandate to receive and examine complaints of human rights violations allegedly perpetrated by members of the NSA. It has yet to release a public report on its complaint programme and information on the status of investigations undertaken since its establishment. The Ombudsman also has a mandate to consider in human rights cases whether a disciplinary investigation is required in addition to criminal action.¹⁴¹ In **Morocco**, the *Direction Générale de la Sureté Nationale* (DGSN) can carry out inquiries into the conduct of police officers, in particular, following complaints of unlawful conduct or abuse of authority. In addition, in relation to criminal investigations against police officers, the pre-trial chamber which supervises the criminal investigation, may decide that the officer should be suspended from exercising

¹³⁹ ICJ 2016 Tunisia Report, p. 49.

¹⁴⁰ Morocco, Law on Public Function, Article 73(5).

¹⁴¹ Human Rights Watch 2015 Bahrain Report, p. 80.

his police functions until the case has been decided.¹⁴² These provisions notwithstanding, the UN Committee Against Torture in 2011 expressed its concern regarding Morocco's "failure to impose genuine disciplinary measures..."¹⁴³

II.7 Specific mechanisms applicable to the Military

Human rights mechanisms such as the UN Human Rights Committee, African Commission, Inter-American Court and European Court of Human Rights have criticised the use of military justice systems to try civilians and to try military personnel for human rights abuses committed against civilians, as lacking fair trial guarantees, in particular regarding military courts' independence and impartiality.¹⁴⁴ The Inter-American Court for instance considered that "the jurisdiction of military criminal courts must be restrictive and exceptional, and they must only judge military men for the

¹⁴² See Article 247, Code of Criminal Procedure.

¹⁴³ CAT, Concluding Observations: Morocco, 2011, UN Doc CAT/C/MAR/CO/4, 21 December 2011, para. 16.

¹⁴⁴ See for instance IACtHR, *La Cantuta v Peru*, Judgment of 29 November 2006 (Merits, Reparations and Costs); ECtHR, *Incal v Turkey*, Application No.22678/93, Judgment, 9 June 1998, paras. 65-73; UN Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/CGC/32, 23 August 2007, noting in para. 22 that "the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14 [ICCPR]." See also, African Commission, Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa, 2003, Principle A (5); African Commission, *Law Office of Ghazi Suleiman v Sudan*, Communication Nos. 222/98 and 229/99, para. 64.

commission of crimes or offences that due to their nature may affect any interest of military nature.”¹⁴⁵

The concerns notwithstanding, military courts are used across the region in several countries, often with a broad jurisdiction to pursue cases against civilians suspected of opposing the relevant government. Military courts are also used to try human rights abuses committed by military and security personnel, frequently leading to impunity of relevant officials allegedly responsible. **In Egypt**, Article 198 of the Constitution provides the military judiciary with exclusive jurisdiction over crimes related to the armed forces, its officers, personnel and their equals. Specifically in regards to human rights abuses committed by members of the military and the security forces, the military judiciary has been criticised for failing to ensure that perpetrators are held accountable.¹⁴⁶ For example, in a case involving forced virginity tests of protestors in March 2011, the military prosecutor failed to investigate and prosecute all those responsible. He only charged a military doctor with the lesser crime of ‘public indecency’ rather than for instance sexual assault, and did not seek to obtain any evidence in support.

¹⁴⁵ IACTHR, *La Cantuta v Peru*, *ibid*, para. 142.

¹⁴⁶ See, International Commission of Jurists, *Personal Jurisdiction of Military Courts in the MENA Region, Intervention by Said Benarbia, Director, ICJ MENA Programme* (ICJ Intervention on Military Courts). Mr Benarbia refers to the killings of more than 1,200 people during the dispersal of the Rabaa Al-Adawya and Annahdha Pro Morsi sit-ins on 14 August 2013. According to Mr Benarbia, even though most of the killings appear to be unlawful, Egyptian authorities have yet to conduct a thorough, effective, independent and impartial investigation into these killings, at https://www.google.fr/url?sa=t&rct=i&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiz5onk55bQAhXCfhoKHW_6C_sQFggdMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2Fissues%2FAdministrationJustice%2FConsultation2014%2FSaidBenarbia.docx&usq=AFQjCNEHrbJzLpV0IHV9Rxq8aGNerhXS2A.

The victims' lawyers' request to summon witnesses was ignored. As a result, the military court acquitted the only accused in a later trial. The lawyers representing the victims in the case, together with civil society organisations, then filed a **case against Egypt before the African Commission**, arguing, *inter alia*, that the forced virginity tests constituted torture contrary to Article 5 of the African Charter, and that the investigation, prosecution and trial by the military judiciary did not adhere to standards enshrined in Articles 5 and Article 26 (independence of the judiciary) of the Charter.¹⁴⁷

Furthermore, a decree issued by Egyptian President Abdel Fattah al-Sisi on 27 October 2014, Law No. 136, extended military jurisdiction over any crime committed in "public and vital facilities." The broad extension of jurisdiction meant in practice that civilians who engage in protests face a risk of prosecution and subsequent trial before military judges. By April 2016, more than 7,400 civilians had been tried before military courts. Some defendants have been convicted and sentenced after the courts reportedly relied on confessions extracted under torture.¹⁴⁸ Similarly, in **Bahrain**, Royal Decree No. 18 of 15 March 2011 - introduced to crackdown on the uprising in February 2011 - saw the establishment of special military courts, so-called National Safety Courts (NSC). The NSCs tried civilians for crimes that "brought the state of national safety," for crimes such as "defying procedures" of

¹⁴⁷ See Egyptian Initiative for Personal Rights, Interights and REDRESS in *Samira Ibrahim and Rasha Abdel-Rahman v Egypt*, at <http://www.redress.org/case-docket/samira-ibrahim-and-rasha-abdel-rahman-v-egypt->

¹⁴⁸ Human Rights Watch, *Egypt: 7,400 Civilians Tried in Military Courts- Torture, Disappearances Used to Elicit Confessions*, 13 April 2016, at <https://www.hrw.org/news/2016/04/13/egypt-7400-civilians-tried-military-courts>.

the decree and any other crimes that the commander in chief of the Bahraini Defence Force might refer to them. Between April and October 2011, the NSCs tried hundreds of civilians in what was said to have been proceedings that repeatedly failed to respect and protect basic due process rights. In addition, NSCs reportedly ignored signs of torture and ill-treatment on defendants who appeared before them, and used forced confessions to convict defendants.¹⁴⁹ Similarly, **Moroccan** military courts in April 2013 in a trial of 25 Sahrawis reportedly ignored that their ‘confessions’ were extracted under torture and other forms of coercion. All of the 25 men were civilians and included human rights defenders and advocates for independence for Western Sahara.¹⁵⁰ In January 2015, Morocco introduced a new law on military justice prohibiting military trials of civilians.¹⁵¹

In **Tunisia**, following the removal of President Ben Ali from office, the Code of Military Justice was amended with a view to expanding the scope of jurisdiction of military tribunals. The expanded jurisdiction of military tribunals meant that the majority of cases involving human rights violations committed by security and military personnel in Tunisia before and during the uprising were dealt with by military tribunals. This contributed to impunity as military courts have shielded personnel from accountability.¹⁵² Law-Decree No.

¹⁴⁹ See further, Human Rights Watch 2015 Bahrain Report, pp. 13-14.

¹⁵⁰ Human Rights Watch, Morocco: Tainted Trial of Sahrawi Civilians, 1 April 2013, at <https://www.hrw.org/news/2013/04/01/morocco-tainted-trial-sahrawi-civilians>.

¹⁵¹ Human Rights Watch, Morocco: 2 Civilians Still face Military Courts, Despite Reforms, 17 March 2015, at <https://www.hrw.org/news/2015/03/17/morocco-2-civilians-still-face-military-courts-despite-reforms>.

¹⁵² See for instance the case of Barraket Essahel, highlighted in ICJ Intervention on Military Courts (n. 150).

2011-69 grants victims the opportunity to file civil claims for compensation in criminal cases before military tribunals. However, the Decree does not apply retroactively, and consequently many victims of the human rights abuses that took place before this date are excluded from this opportunity.

Part III: Universal Jurisdiction Procedures

III.1 Introduction

The courts of the State where torture and ill-treatment took place (territorial State) would seem to be the most obvious avenue for victims to obtain justice and accountability. This is where most of the evidence is located and where prosecutions will have the most impact on victims and society more broadly. In reality, as also illustrated above, such courts may be inaccessible for a variety of legal and/or practical reasons, including absence of protection mechanisms, lack of independent complaint and investigative mechanisms, the existence of domestic immunities or amnesties and *de facto* impunity for State officials involved in torture. Where conflicts are ongoing, like in **Syria**, or following protracted periods of conflict, like in **Libya**, it can be virtually impossible to bring persons accused of torture and other international crimes to trial in the State where the crimes were committed because the entire State infrastructure may have been disrupted or even destroyed in the course of the conflict. Political divisions may furthermore mean that fair trials are not feasible.

Where the territorial judicial system is not an option, victims and advocates representing them might be able to pursue claims that rely on the principle of universal jurisdiction to seek justice abroad in the courts of another country. Under the principle of universal jurisdiction, States are allowed, and at times obliged, to investigate and prosecute international

crimes such as torture, war crimes, crimes against humanity, genocide, enforced disappearances and extrajudicial killings regardless of where they were committed, regardless of the nationality of the author or the victim and irrespective of any connection to the prosecuting State.

The principle of universal jurisdiction is enshrined in international human rights law and international criminal law.¹⁵³ The UN Convention Against Torture has incorporated an extradite or prosecute obligation; Article 5(2) obliges each State party to establish its jurisdiction over torture in cases “where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.” According to the former UN Special Rapporteur on Torture, in practice, “the obligation to exercise universal jurisdiction means that if there are reasonable grounds for suspecting that a person on a State’s territory has committed an act of torture, the State is obliged to take the person into custody or otherwise ensure his or her presence and conduct a preliminary investigation.”¹⁵⁴

In addition to the obligation to prosecute on the basis of **universal jurisdiction**, Article 14 UNCAT requires States parties to ensure that victims of torture and ill-treatment are

¹⁵³ See further, REDRESS and FIDH, *Extraterritorial Jurisdiction in the European Union – A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010, (REDRESS and FIDH 2010 Extraterritorial Jurisdiction Report), pp. 5-12, at

http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf.

¹⁵⁴ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/13/39/Add.5*, 5 February 2010, para. 153.

able to access a remedy and obtain redress.¹⁵⁵ The UN Committee Against Torture considers that this obligation is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. It emphasised that the ability of victims to claim civil remedies on the basis of **universal civil jurisdiction** outside their territory is important in particular “when a victim is unable to exercise the rights guaranteed under Article 14 in the territory where the violations took place.”¹⁵⁶

III.2 Universal Jurisdiction & the MENA Region

Universal jurisdiction is a possible option for accountability for international crimes committed in the MENA region, though the number of cases that have been successfully concluded remains limited. For instance, in September 2010, a **French** Court convicted Mr Khaled Ben Saïd, a Tunisian official, for ordering the torture of a detainee in **Tunisia** in 1996.¹⁵⁷ A complaint filed by **Algerian victims of torture with Swiss authorities** led to the arrest of Khaled Nezzar, former Algerian Minister of Defence, in Switzerland in October 2011.¹⁵⁸ Several cases are currently ongoing in European

¹⁵⁵ CAT, General Comment No. 3, para. 22.

¹⁵⁶ Ibid.

¹⁵⁷ International Federation for Human Rights (FIDH), *The Conviction of Khaled Ben Saïd – A victory against impunity in Tunisia*, November 2010, at <https://fidh.org/IMG/pdf/Bensaid550ang2010.pdf>.

¹⁵⁸ On 20 October 2011, Mr Nezzar was interviewed by Swiss authorities. He was released the following day subject to his participation in subsequent proceedings. He left Switzerland and his current whereabouts are not known, see further TRIAL International, *Khaled Nezzar*, at <https://trialinternational.org/latest-post/khaled-nezzar-2/>.

countries for crimes committed in **Syria** and **Iraq**.¹⁵⁹ Victims and their legal representatives filed a complaint in 2012 with authorities in the **United Kingdom** against Prince Nasser bin Hamad Al-Khalifa, the son of the King of **Bahrain**, requesting the Prince's arrest and prosecution for torture.¹⁶⁰ In September 2015, **Swiss** authorities opened a case against **Bahrain's** Attorney General Ali Bin Fadhul Al-Buainain on allegations of torture filed against by a victim with the support of several human rights organisations.¹⁶¹ Several attempts have been made to arrest high-ranking **Israeli** officials in the context of their visits to the **United Kingdom**.¹⁶²

The above cases, several of which are still ongoing, have not all resulted in the prosecution, conviction and sentencing of the alleged perpetrators. However, the cases are important in several ways:

- **Potential for accountability and reparation:** impunity in the State where the crime has been committed is one of

¹⁵⁹ See for instance Human Rights Watch, *Q&A, First Cracks to Impunity in Syria, Iraq-Refugee Crisis and Universal Jurisdiction Cases in Europe*, 20 October 2016, at <https://www.hrw.org/news/2016/10/20/qa-first-cracks-impunity-syria-iraq>.

¹⁶⁰ See for further information, European Centre for Constitutional and Human Rights, *British court confirms end of Bahraini prince's immunity*, October 2014, at https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/bahrain/prince-nasser.html.

¹⁶¹ See REDRESS, European Centre for Constitutional and Human Rights, Bahrain Institute for Rights & Democracy, TRIAL International, *Torture allegations: Criminal complaint filed in Switzerland against Bahraini Attorney General*, 15 September 2015, at <http://www.redress.org/downloads/prswitzerlandbahrainecchrbirdtrialredress150915.pdf>.

¹⁶² See for instance, REDRESS and FIDH 2010 Extraterritorial Jurisdiction Report (n. 157), pp. 264-265.

the main reasons why cases are initiated on the basis of universal, rather than territorial or active personality, jurisdiction. Where victims cannot obtain justice at home, as in the examples highlighted above, they may have no choice but to look for justice elsewhere. Universal jurisdiction prosecutions can counteract the lack of accountability and reparation in the territorial State. Indeed in instances such as the ongoing conflict in Syria which has already resulted in human rights violations on a devastating scale, it may be the only option available for some time. For instance, the European Network of Contact Points for investigation and prosecution of genocide, crimes against humanity and war crimes has emphasised “the importance of ad hoc meetings on specific situations, such as those relating to the ongoing conflicts in Syria, facilitating a proactive approach to combating impunity that must be ensured also in future.”¹⁶³

- Filing universal jurisdiction complaints also helps **shed light on systemic failures** of the authorities in the territorial State to investigate torture and other human rights violations. These complaints can help put States’ human rights violations on record and as such potentially contribute to a change of approach in the territorial State. The filing of complaints against former US Secretary for Defense, Donald Rumsfeld and other high-ranking US officials with authorities in France and Germany, for instance stimulated a debate within the US about the need to initiate investigations domestically.

¹⁶³ Conclusions of the 21st Meeting of the Network for investigation and prosecution of genocide, crimes against humanity and war crimes
The Hague, 12-13 October 2016, para. 19.

- A comprehensive universal jurisdiction complaint can also help **document violations** for future accountability efforts.
- Lastly, viable complaints help **make the world a smaller place for those who are accused of torture and other international crimes**. In several cases, the filing of such complaints has resulted in the (possibility) of the issuance of arrest warrants, as for instance in the case of **Israeli General Doron Almog, Donald Rumsfeld, George Bush** and others who subsequently cancelled or changed their travel plans.

III.3 Universal Jurisdiction complaints

There is no formula on how to progress a case using universal jurisdiction as each case will differ depending on the facts, countries involved, legislative frameworks and political climate at the time a complaint is filed. However past cases have highlighted a number of challenges practitioners supporting victims of torture on basis of universal jurisdiction need to take into consideration, in addition to those highlighted above in regards to litigation in their own national system.

- ***Legal basis in the country where a universal jurisdiction is to be filed*** (forum State): prior to the filing of any complaint with the relevant authorities it is important to verify the legal framework in the forum State to assess whether it does provide for universal jurisdiction over torture (or related offences), and if so, whether there are any conditions attached to when or how such jurisdiction can be exercised.

- What are the ***conditions for the exercise of universal jurisdiction***? Most countries subject the exercise of universal jurisdiction to conditions, which need to be carefully assessed at the outset of a case. A complaint filed with authorities will need to show that it meets these conditions. These will differ from country to country, yet frequently include:

- ***Requirement of the suspect's presence on the territory of the forum State.*** Most countries require that the suspect is present in the forum State when initiating an investigation on the basis of universal jurisdiction. In some countries, like France and The Netherlands, the suspect must be on the territory at the time the investigation is initiated. In others, like in Germany, and the United Kingdom, the suspect's anticipated presence on the territory is sufficient for an investigation to go ahead. Irrespectively, it will, in most cases, be helpful to identify the current whereabouts of the suspect, and monitor the travel schedule so as to meet the (anticipated) presence requirement. The Palestinian Centre for Human Rights for instance knew of **Israeli** General Doron Almog's travel plans to the United Kingdom, and in collaboration with a law firm in London, filed a complaint and a request for a warrant for his arrest in advance of his arrival in London. The magistrate examined the evidence submitted and, in light of General Almog's anticipated presence and short stay in the UK, issued a warrant for his arrest. He only eventually escaped arrest by Scotland Yard, which was waiting at the airport, as he was warned by the Israeli embassy not to get off the plane. He subsequently returned to Israel without ever getting off the plane.

- **Immunities:** immunities may apply to prevent individuals or entities from being held liable for a violation of the law, and it may cover criminal prosecution or civil liability or both. Immunities are generally not available to prevent the criminal prosecution of individuals (other than serving Heads of State, Ministers of Foreign Affairs, diplomats or a limited category of other officials who benefit from personal immunity by virtue of their particular role in representing the State abroad)¹⁶⁴ for certain categories for international crimes, including genocide, war crimes and crimes against humanity and torture.¹⁶⁵ Most State officials will only benefit from functional immunity which applies to acts performed in an official capacity. This immunity continues to apply even once the official has left office, but does not apply to crimes such as torture.¹⁶⁶ However, a different approach has been taken in respect of international criminal tribunals. The statutes of the range of international criminal tribunals specifically refer to the inapplicability of immunities in all circumstances, and this has been confirmed by the jurisprudence of such bodies,

¹⁶⁴ International Court of Justice, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), Judgment Merits, 41 ILM 536 (2002), paras. 51-54.

¹⁶⁵ Cassese, Antonio, *When May Senior State Officials Be Tried For International Crimes? Some comments on the Congo v Belgium Case*, European Journal of International Law, 2002, pp.864-865; see also ECtHR, *Al Adsani v the United Kingdom*, Judgment (Grand Chamber) of 21 November 2001, application no.35763/97, para.61; see also the judgments of Lord Millett and Lord Philips of Worth Matravers in the Pinochet case: *R v Bow Street Metropolitan Stipendiary Magistrate & Others*, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No.3) [1992] ALL ER 97 at pp.171-9 (Lord Millett) and pp.186-90 (Lord Philips of Worth Matravers).

¹⁶⁶ See, *Ex parte Pinochet R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147

even in respect of acting heads of state.¹⁶⁷ With respect to civil claims, the majority of cases that have considered extraterritorial civil claims for torture (which have been pursued directly, separately from a criminal prosecution) have not been allowed to proceed on the basis of applicable immunities. Many of these cases have included claims of torture from the MENA region.¹⁶⁸

Authorities have in the past invoked immunity of suspects to dismiss complaints filed on the basis of universal jurisdiction. For example, UK authorities refused to arrest **Bahraini Prince Nasser bin Hamad Al-Khalifa** arguing that he benefitted from immunity. Following a judicial review of this decision, the Director of Public Prosecutions in the UK conceded that the Prince does not have immunity from prosecution in the UK, leaving the path open for a UK investigation and prosecution of the Prince for torture committed in Bahrain.¹⁶⁹ Another type of immunities invoked by authorities in the past are so-called **special mission**

¹⁶⁷ Article 27 of the Rome Statute; Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda. The International Criminal Tribunal for the Former Yugoslavia, interpreting Article 7(2), dismissed the contention that it did not have jurisdiction over Slobodan Milosevic as a result of his status as the former president of the Federal Republic of Yugoslavia, *Prosecutor v. Milosevic*, Decision on the Preliminary Motions, “Kosovo”, IT-02-54 (8 November 2001) at paras. 26 – 34.

¹⁶⁸ See, e.g., *Al-Adsani v. Government of Kuwait and Others*, CA 12 March 1996; 107 ILR 536; *Al-Adsani v The United Kingdom*, Appl no. 35763/97, 2001 (ECtHR); *Bouzari v. Iran (Islamic Republic)* Ont. C.A. (2004); *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya (The Kingdom of Saudi)* and another *Mitchell and others v. Al-Dali and others* [2004] All ER (D) 418 (Oct.)

¹⁶⁹ See for further information, European Centre for Constitutional and Human Rights, *British court confirms end of Bahraini prince’s immunity*, October 2014, at https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/bahrain/prince-nasser.html.

immunity which secures, for the duration of a special mission visit, personal immunity from criminal jurisdiction for the members of the special mission. The UK authorities invoked special mission immunity in the framework of an official visit by **Egyptian General Mahmoud Hegazy** to the UK in September 2015. General Hegazy is alleged to be responsible for torture and other atrocities in Egypt, including the Rabaa Square massacre of 2013. When a complaint was filed, the Metropolitan Police responded saying that they had been advised by the Foreign Office and the Crown Prosecution Service that General Hegazy had special mission immunity, and therefore could not be arrested and prosecuted. Upon review of that decision, the High Court confirmed that General Hegazy benefitted from special mission immunity during his visit to the UK and that customary international law therefore required authorities to refrain from exercising criminal jurisdiction.¹⁷⁰

- ***How will evidence be collected?*** In universal jurisdiction cases, the crimes have been committed abroad, relatively far away from the forum State. Investigators and prosecutors in the forum State may not know about the crimes or be familiar with the context in which crimes have been committed. They may lack specific expertise in investigating and prosecuting international crimes cases, which are

¹⁷⁰ *The Queen on the application of Freedom and Justice Party and others v Secretary of State for Foreign and Commonwealth Affairs and others* (Amnesty International and REDRESS intervening), High Court of Justice Divisional Court, Case No: CO/6384/2015, 5 August 2016; for further information in this case, see REDRESS and Amnesty International intervention, at <http://www.redress.org/case-docket/aspecial-mission-immunity-the-queen-on-the-application-of-f-v-secretary-of-state-for-fco-and-other>.

different from ‘ordinary’ domestic crimes such as murder or assault and require different skills and knowledge. It is therefore important for lawyers supporting victims of torture in universal jurisdiction cases to put together a detailed complaint that includes evidence as set out above (see section I.4).

Past cases suggest that complaints should ideally be put together in the language of the authorities in the forum State, include the identification, whereabouts and anticipated travel plans of the suspect, their official position (and an explanation why this does not prevent prosecution, if necessary), contextual information and evidence that proves the commission of torture and that links the suspect to the torture committed. It will help if complaints are submitted in collaboration with domestic lawyers in the forum State and/or civil society organisations working on universal jurisdiction cases.¹⁷¹ Where possible, a complaint should also include details of potential victims and witnesses who managed to escape the territorial State. This is particularly important as in many cases, investigators of the forum State may not initially be in a position to travel to the territorial State, in particular where conflict is ongoing, as in Syria, or where government authorities are unlikely to collaborate in the investigation of a government sponsored crime such as torture.

¹⁷¹ Lawyers and others interested in universal jurisdiction developments and opportunities can subscribe to the “UJ – Listserv” coordinated by REDRESS at UJ-Info-subscribe@yahoogroups.com which provides subscribers with updates and allows for exchange of information.

Part IV: Procedures and functioning of regional and international human rights systems

IV.1 Introduction

There are a number of regional and international human rights mechanisms that can be used to access justice for victims of torture and ill-treatment in the MENA region. Each of these mechanisms has its strengths and weaknesses and is explained below.

IV.2 Regional human rights system

Two regional human rights systems exist in the MENA Region: (1) the African Human Rights system with the African Charter on Human and Peoples' Rights (African Charter) as Africa's key human rights treaty, and two complaints mechanisms; and (2) the Arab Human Rights system and the Arab Charter on Human Rights.¹⁷² The latter is not yet a fully developed regional human rights system, and it does not yet include a complaint mechanism providing for litigation of

¹⁷² See League of Arab States, Arab Charter on Human Rights, 22 May 2004, entered into force 15 March 2008, reprinted in 12 Int'l Human Rights Reports 893 (2005), at <http://hrlibrary.umn.edu/instreet/loas2005.html>.

torture and ill-treatment.¹⁷³ For the purposes of this Manual on litigation, this section will focus on the African Human Rights system and opportunities for victims and their advocates in those MENA countries that have ratified the African Charter.

IV.2.1 The African Commission on Human and Peoples' Rights

The African Charter is the regional human rights treaty for Africa. **Tunisia, Algeria, Libya** and **Egypt** have ratified the African Charter. The Charter established the African Commission on Human and Peoples' Rights (African Commission). The African Commission is the main and most accessible human rights mechanism in Africa. It is a quasi-judicial body that is charged with monitoring the implementation of the African Charter. It is entrusted to protect human and peoples' rights in accordance with the Charter as well as promote human and peoples' rights. It also has the task of interpreting the Charter on Human and Peoples' Rights.

Article 5 of the African Charter provides for the right to dignity and prohibits "all forms of exploitation and

¹⁷³ In September 2014, the Arab League approved a statute of the future Arab Court for Human Rights; criticism of the statute included that it does not include a possibility for individuals and NGOs to submit complaints to the Court. Egyptian international law expert M. Cherif Bassiouni said the Court is "likely to be little more than a 'Potemkin tribunal' (a fake institution only designed to impress people), see International Bar Association, *Bassiouni: New Arab Court for Human Rights is fake 'Potemkin tribunal'*, 1 October 2014, at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c64f9646-15a5-4624-8c07-bae9d9ac42df>.

degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.”

Jurisdiction

As part of its protective mandate, the African Commission has a quasi-judicial function to examine ‘Communications’ (i.e. complaints) from victims and/or their representative(s) alleging violations of the African Charter by a State party to the Charter. Its protective mandate allows the Commission “to make findings on violations or otherwise, with a view to safeguarding the enjoyment of human and peoples’ rights and fundamental freedoms and providing redress for breaches thereof.”¹⁷⁴

Anyone alleging a violation of the African Charter by one of the State parties to the Charter can file a complaint with the Commission. The Commission takes a wide approach as to who can file a complaint before it. The Commission has emphasised that complainants do not themselves need to be victims or members of a victim’s family to raise an allegation of a human rights violation. In particular, the Commission has explained that in cases where victims themselves are unable to file a complaint: “[I]t has adopted an *actio popularis* approach where the author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the

¹⁷⁴ African Commission, Resolution 97: *Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples’ Rights by States Parties*, 29 November 2006.

continent to receive assistance from NGOs and individuals far removed from their locality.”¹⁷⁵

Procedure for filing a complaint

Complaints can be addressed to the Chairperson of the Commission through the Secretary by any natural or legal person.¹⁷⁶ The complaint must comply with Rule 93 (2) of the Commission’s Rules of Procedure and contain, amongst other things: an account of the act or situation complained of, specifying the place, date, and nature of the alleged violations; the name of the victim, if he or she is not the complainant; the State(s) alleged to be responsible for the violation of the African Charter and any steps taken to exhaust domestic remedies. Furthermore, in order for a Communication to be taken up by the Commission, the Communication must be signed, it must be against a State party to the African Charter, and it must reveal, at least on a preliminary basis, a violation of one of the rights guaranteed in the Charter.

Any complaint that does not include all of the above information will be rejected, and the Commission will usually request the complainant to provide further detail on the missing information. While it is not necessary for the initial complaint to argue in detail the admissibility and merits or to provide an exhaustive account of the evidence in support, it is important that the complaint makes out a ‘*prima facie*’

¹⁷⁵ African Commission, *Article 19 v Eritrea*, Communication 275/03, 30 May 2007, para. 65; *The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96, 13-27 October 2001, para. 49.

¹⁷⁶ African Commission, Rule 93 (1) Rules of Procedure.

violation of the Charter. According to the Commission, the term *prima facie* means “on the face of it”; “so far as can be judged from the first disclosure”; “a fact presumed to be true unless disproved by some evidence to the contrary”. So, *prima facie* is a decision or conclusion that could be reached from preliminary observation of an issue or a case without deeply scrutinizing or investigating into its validity or soundness.¹⁷⁷

Once the Commission decides to take up the matter (**to be seized**), the author of the Communication will be informed. At this stage, the Commission will then also inform the State concerned.

If there are concerns as to the safety of the victim(s) of the alleged violations, the complainant can request the Commission to keep the **victim’s identity anonymous** in all public documentation of the case.¹⁷⁸

The procedure before the Commission can take a long time and delays in the consideration of complaints are not uncommon. These can be the result of the parties’ failure to respond to the Commission as well as the Commission’s

¹⁷⁷ African Commission, *Samuel T. Muzerengwa & 110 Others v Zimbabwe*, Communication 306/05, 1 March 2011, para. 55.

¹⁷⁸ See for instance complaint filed with the African Commission by REDRESS and Synergie pour l’assistance judiciaire aux victimes de violation des droits humains au Nord Kivu (SAJ) in *S.A. v DRC*, requesting the Commission in light of the sensitive nature of the alleged violation, that “the Applicant wishes her identity to be withheld from the public by referring to her as S.A. and through the redaction of her name, address and any other information which might identify her from any publicly available document, including the present communication,” para. 2, at <http://www.redress.org/downloads/engcommunication-sa-v-drc20-nov-2014.pdf>.

limited resources to examine communications in a more speedy manner. It is important for complainants to ensure that the Commission has up to date contact details so as to receive relevant correspondence. Where the Commission has sought unsuccessfully to contact complainants, it has struck out communications for lack of diligent prosecution. As the secretariat of the Commission often does not have the capacity to inform complainants about their respective complaints, complainants should follow up with the secretariat in writing after each Extra-Ordinary and Ordinary Session to inquire whether any steps have been taken in their case. These follow-up letters can be sent to the Executive Secretary of the Commission at au-banjul@africa-union.org and africancommission@yahoo.com.

Provisional Measures

If there is a chance that there will be irreparable harm to the victim, the Commission can at any time once the case is seized, adopt provisional measures, before taking a full decision in the case. It can do so on its own initiative or on the initiative of a party to the case. Complainants seeking provisional measures will need to demonstrate to the Commission the urgency of the measure required and how the harm risked to be suffered will be irreparable. In *Egyptian Initiative for Personal Rights & Interights v Egypt*, the Complainants requested provisional measures in order to put on hold a scheduled execution of a death sentence until the case before the Commission was considered.¹⁷⁹ A death sentence is an example of risk of irreparable harm. Other

¹⁷⁹ African Commission, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06, 1 March 2011, para. 30.

examples include cases of serious or massive violations; cases where the complainant was forcibly removed from his country of origin and wanted to return pending the outcome of the communication; cases where the complainants were prevented from voting in a national general election.

Admissibility

The Commission will then consider whether the communication is **admissible**. In accordance with Article 56 of the African Charter, a case will only be admissible if:

- the names of the author of the communication are provided;
- the communication relates to a specific violation of an article in the Charter;
- there is jurisdiction over the respondent State – the respondent State has ratified the African Charter (in the MENA Region **Tunisia, Algeria, Libya, Egypt**) and the allegations relate to incidents which took place after ratification (or which are violations which ‘continued’ to be perpetrated after the entry into force of the Charter);
- The Communication cannot be written “in disparaging or insulting language directed against the State concerned and its institutions or to the AU;”
- The Communication cannot be “based exclusively on news disseminated through the mass media”. Additional types of evidence should be used such as witness statements, medical reports, reports of intergovernmental bodies, etc.;

- The Communication must demonstrate that local remedies were exhausted before approaching the Commission, UNLESS, it is obvious that the remedies were unduly prolonged, or that they were not truly available (accessible without impediment), effective (with a reasonable prospect of success) and sufficient (capable of redressing the violation);
- The Communication must be submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter. Usually the Commission interprets this as meaning that the Communication must be made within six months, unless there are compelling reasons for a delay;
- The Commission must not have been settled by another international claims mechanism with a similar mandate.

The Commission will ask the author of the communication to present arguments about why the case is admissible, and the State will be given the opportunity to respond. The author will then have a short time to comment on the State's response. The Commission can hold a hearing on the matter, on request of the parties or on its own initiative.¹⁸⁰ The Commission can also decide to call in independent experts or witnesses.¹⁸¹

¹⁸⁰ Article 99 (1) Ibid.

¹⁸¹ Article 100 (1) Ibid.

Merits

Once a Communication is deemed admissible, the Commission sets a period of sixty days in which the complainant can file observations on the **merits** of the case.¹⁸² The Respondent State then has two months to respond to the complainant's submission. The complainant will have one month to reply to the State's submission. Also, the Commission can, either on its own initiative or at the request of one of the parties, try to help reach an **amicable settlement** between the parties.¹⁸³

Usually the Commission will consider the merits on the basis of filings made, but it is open to the Commission to hold a hearing and/or to carry out fact-finding. In 2004 upon invitation from the Government of Sudan, the Commission carried out a fact-finding mission in the context of allegations concerning the serious and massive human rights violations committed in Darfur. The fact-finding mission was not carried out specifically in the context of a communication pending before the Commission. However, the Commission did refer to the findings of its mission in the case of *Sudan human rights organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, specifically to interviews it had conducted during the mission with women internally displaced persons who alleged, *inter alia*, that they were raped and that their complaints were not investigated.¹⁸⁴ The Commission, based

¹⁸² Ibid, Rule 108 (1).

¹⁸³ Ibid, Rule 109 (1); see, e.g. African Commission, *Association pour la défense des droits de l'Homme et des libertés v. Djibouti*, Communication 133/94, 11 May 2000.

¹⁸⁴ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications 279/03 and 296/05, para. 151.

on a range of documents submitted by the complainants in support of such allegations, then found a violation of Article 5 as the State had not diligently protected its civilian population in Darfur and as it failed to provide remedies to the victims. The Commission may have come to the same conclusion without having carried out the fact-finding mission. However, by being in Darfur and speaking to authorities, NGOs and victims involved, the Commission was able to form its own impression of the situation, and, importantly, of the situation and needs of some of the victims. This may have contributed to the Commission's relatively far-reaching recommendations on reparation.¹⁸⁵

Once it has received the parties' submissions and/or carried out a fact finding mission, it will adopt a decision on the merits of the Communication.¹⁸⁶ Where the Respondent State fails to respond in time, the Commission usually grants an extension to submit observations. Should the Respondent State not make any observations, the Commission will take a decision on the merits of the case on the basis of the information before it.

The procedure before the Commission can take a long time and delays in the consideration of complaints are not uncommon. These can be the result of the parties' failure to respond to the Commission as much as the Commission's limited resources to examine communications in a more speedy manner. It is important for complainants to ensure that the Commission has up-to-date contact details so as to

¹⁸⁵ Ibid.

¹⁸⁶ African Commission, Rule 110 (1), Rules of Procedure.

receive relevant correspondence. As the secretariat of the Commission often does not have the capacity to inform complainants about their respective complaints, complainants should follow up with the secretariat in writing after each Extra-Ordinary and Ordinary Session to inquire whether any steps have been taken in their case. These follow-up letters can be sent to the Executive Secretary of the Commission at au-banjul@africa-union.org and africancommission@yahoo.com.

Jurisprudence on torture and ill-treatment

The African Commission has dealt with numerous cases involving allegations of torture and ill-treatment, including several cases against **Egypt**. In one case against Egypt, the Commission has for instance recognised that “when a person is injured in detention or while under the control of security forces, there is a strong presumption that the person was subjected to torture or ill-treatment”.¹⁸⁷ When such circumstances occur, it is up to the Respondent State to prove that the allegations of torture are unfounded.¹⁸⁸

In *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Sara-Wiwa Jnr.) v. Nigeria*,¹⁸⁹ the victim had been severely beaten during his detention and was furthermore denied access to a lawyer or medical care. He was sentenced to death

¹⁸⁷ African Commission, *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Communication No. 334/06, 1 March 2011, para. 168.

¹⁸⁸ *Ibid*, para 169.

¹⁸⁹ African Commission, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Sara-Wiwa Jnr.) v Nigeria*, Communications 137-94- 139/94- 154/96-167/97, 31 October 1998.

alongside other people and later executed. In deciding that there had been a violation of Article 5 of the Charter, the Commission determined that “[A]rticle 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience”.¹⁹⁰ In a later case, the Commission underscored can be “a tool for discriminatory treatment of persons or groups” ... and can have a purpose “to control populations by destroying individuals, their leaders and frightening entire communities.”¹⁹¹

Complaints to the African Commission should set out in detail how the acts complained of constitute torture and/or ill-treatment under Article 5 of the African Charter. As violations of Article 5 are rarely committed in isolation, violations of other Charter Articles could be similarly alleged (such as Article 6 if the torture or ill-treatment occurred during detention; Article 7 if evidence obtained under torture was used in a subsequent trial; Articles 9, 10 and 11 if the treatment was inflicted in response to an exercise of an individual’s right to freedom of expression, association or assembly). It is important to know the jurisprudence of the African Commission (and African Court) in this respect. The Institute for Human Rights and Democracy in Africa maintains the ‘Caselaw Analyser’, a database of African human rights mechanisms which can be a very helpful tool to

¹⁹⁰ Ibid, para. 79.

¹⁹¹ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, 279/03- 296/05, 27 May 2008, para. 156.

research jurisprudence when drafting a complaint. The Caselaw analyser is available at <http://caselaw.ihrda.org/>. In addition to the jurisprudence of African human rights mechanisms, complainants should also be aware of the Commission's many declaratory instruments which help set out the Commission's understanding and interpretation of specific State obligations under the Charter. The Commission's Robben Island Guidelines, Fair Trial and Legal Assistance Guidelines and Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) and Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa are particularly important in the context of alleged violations of Article 5.¹⁹² The Commission will also take into consideration other sources of human rights law, including UN treaties (such as UNCAT) and declaratory instruments (such as the Istanbul Protocol, General Comments of UN mechanisms etc).¹⁹³

Remedies

While its Rules of Procedure do not expressly provide the African Commission with a mandate to award reparation where it finds a violation of the Charter, the African Commission for instance has made clear that:

“[I]ts role consists precisely in pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that

¹⁹² For an overview of relevant instruments see, <http://www.achpr.org/instruments/>.

¹⁹³ See Articles 60 and 61 of the African Charter.

instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries.....cannot shield that country from fulfilling its international obligations under the Charter.”¹⁹⁴

If the Commission finds a violation, it usually recommends that the State party afford reparations to the victim, which might include compensation, restitution of rights or other types of measures.

It is important for litigants to actively consider reparations in their claims before the Commission in order that they can demonstrate how the author has suffered and put forward arguments as to why reparations should be recommended and in what form.¹⁹⁵

Implementation

Article 112 specifies the follow-up of the recommendations of the Commission. The Commission usually asks the State Party concerned to submit information on any measure it has taken on the matter within 180 days from the date it received the decision¹⁹⁶ and the Rapporteur for the Communication will monitor the measures taken.¹⁹⁷ If it

¹⁹⁴ African Commission, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para. 83.

¹⁹⁵ REDRESS, *Reaching for Justice: The Right to Reparation in the African Human Rights System*, October 2013, available at:

<http://www.redress.org/downloads/publications/1310reaching-for-justicefinal.pdf>

¹⁹⁶ African Commission, Rule 112 (3) Rules of Procedure.

¹⁹⁷ *Ibid*, Rule 112 (5).

finds that a State has not complied with its recommendations, the Commission may decide to convene a hearing on implementation, request the State concerned to develop an implementation plan¹⁹⁸ or refer the case to the African Court for non-implementation, provided that the State concerned has ratified the Protocol establishing the African Court.

Implementation of decisions is one of the biggest challenges litigants face before the African Commission. It is important to consider implementation at the outset of a case, and to bear in mind and explain to the client(s) that African Commission decisions are not *stricto sensu* binding, which will impact on the capacity of the Commission to press for implementation. Litigants may wish to file 'follow-up' submissions to the Commission specifically on implementation, request implementation hearings and engage the State domestically on implementation, including through national human rights institutions.¹⁹⁹

IV.2.2 The African Court on Human and Peoples' Rights

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human

¹⁹⁸ See for instance African Commission, Resolution 257 Calling on the Republic of Kenya to Implement the Endorois Decision, adopted at its 54th Ordinary Session, held in Banjul, The Gambia, from 22 October to 5 November 2013, at <http://www.achpr.org/sessions/54th/resolutions/257/>.

¹⁹⁹ The Network of African National Human Rights Institutions is developing guidelines for monitoring the implementation of decisions of the African Commission by National Human Rights Institutions, see Network of African National Human Rights Institutions (NANHRI), Annual Report 2015, p. 12, at http://www.nanhri.org/wp-content/uploads/2016/07/Annual-Report_2015-1.pdf.

and Peoples' Rights entered into force on 25 January 2004, establishing the African Court on Human and Peoples' Rights (African Court). The African Court officially started to operate in November 2006. The African Court's judgments are final and binding on the parties. **Tunisia, Algeria and Libya** have ratified the Protocol and therefore accept the Court's jurisdiction. **Egypt** has signed, but not yet ratified the Protocol.

Jurisdiction

The jurisdiction of the African Court covers all cases and disputes that are submitted to it concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instrument ratified by the concerned States. This is expressed into two types of jurisdiction: contentious and advisory. In accordance with Article 5 of the Protocol and Rule 33 of the Rules of Procedure, the African Commission, a State party to the Protocol and African intergovernmental organisations can bring a matter to the attention of the Court. Where a country has made a Declaration under Article 34(6) of the Protocol, the Court is also competent to receive cases from non-governmental organisations with Observer Status before the African Commission and from individuals.

Tunisia, Algeria and Libya have not made such a declaration. As a result, a complaint filed by an individual or NGO against any of those countries will be inadmissible.²⁰⁰

²⁰⁰ See for example, African Court on Human and Peoples' Rights, *Soufiane Ababou v Algeria*, Communication 002/11, 16 June 2011, at <http://caselaw.ihrda.org/fr/doc/002.11/view/fr/>.

Procedure

The only way to engage the African Court in regards to Algeria, Libya and Tunisia is through the African Commission. According to Rule 118 of the Commission's Rules, the Commission will bring cases to the Court if:

- the African Commission has taken a decision with respect to a communication and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the time limit;
- it has made a request for provisional measures against a State party, and considers that the State has not complied with the provisional measures requested;
- a situation constituting one of serious or massive violations of human rights has come to its attention; or
- it deems it necessary to do so at any stage of a communication.

Admissibility

In order for an application to be admissible before the Court, Rule 40 of the Rules of Court specifies criteria that are by and large the same as the criteria used by the African Commission to determine whether its communications are admissible.

The Application must:

- disclose the identity of the Applicant;

- comply with the Constitutive Act of the Union and the Charter;
- not contain any disparaging or insulting language;
- not be based exclusively on news disseminated through the mass media;
- be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
- not raise any matter or issues previously settled by the parties in another international forum.

In a matter concerning the killing of an investigative journalist and his colleagues in Burkina Faso and the failure to carry out diligent investigations into the deaths (*Zongo case*),²⁰¹ on the issue of the exhaustion of domestic remedies, the applicants had not used all possible remedies in Burkina Faso; while they did pursue legal remedies they did not appeal the final ruling to the cassation court as they believed it would not be effective or timeous to do so.²⁰² The

²⁰¹ African Court, *Late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabé Human and Peoples' Rights Movement v. Burkina Faso*, Application no 013/2011, 28 March 2014.

²⁰² *Ibid*, paras. 56, 62.

African Court determined that an appeal to the *Cour de Cassation* is not a waste of time and can in certain circumstances lead to a change or change the substance of a decision; it is therefore an effective remedy which should have been exhausted.²⁰³ However, in finding the case admissible it determined that the procedure was unduly prolonged and would have been further prolonged if the matter had been brought to the *Cour de Cassation*.²⁰⁴

On 3 June 2016, the Court handed down its judgment in a case submitted by the African Commission against **Libya**. The case was lodged in April 2012 before the Commission by Saif al-Islam Gaddafi, the son of former Libyan leader Muammar Gaddafi. He alleged violations of his right to liberty and to a fair trial in violation of Articles 6 and 7 of the African Charter respectively. In January 2013, the African Commission submitted an application to the Court requesting provisional measures pursuant to Article 5 (1) of the African Court Protocol and Rule 29 (3) of the Rules. In response, the Court requested Libya to refrain from proceedings that would impinge on Gaddafi's rights.²⁰⁵ Libya ignored the Order, and subsequently failed to respond to the Court and engage in the process, leading to a default judgment in June 2016. The Court found that Libya was responsible for a violation of Gaddafi's rights under Articles 6 and 7 of the Charter, and ordered Libya to, *inter alia*: "protect all the rights of Mr

²⁰³ Ibid, para. 70.

²⁰⁴ Ibid, para. 106.

²⁰⁵ African Court, *African Commission on Human and Peoples' Rights v Libya*, Application No. 002/2013, Order for Provisional Measures, at http://en.african-court.org/images/Cases/Orders/ORDER%20OF%20PROVISIONAL%20MEASURES_002-2013_English_African Commission on Human and Peoples Rights v. Libya.pdf

Kadhafi as defined by the Charter by terminating the illegal criminal procedure instituted before the domestic courts.” Despite the Court’s order to report on measures taken in response to its judgment, Libya has yet to respond.²⁰⁶

Provisional Measures

Similar to the African Commission, it is possible for the Court to adopt provisional measures in accordance with Rule 51 of the Rules of the Court. The Court has done so in a case referred to the Court by the Commission concerning **Libya**, requesting Libya to “immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party.”²⁰⁷

Merits

The African Court has yet to decide on a case involving an alleged violation of Article 5 of the African Charter. It has, however, rendered a number of judgments regarding other violations that complainants to the African Court should take into account when drafting their submissions.²⁰⁸ The Court can receive written and oral evidence, and may decide to hold an enquiry to obtain further evidence.²⁰⁹

²⁰⁶ African Court, *African Commission on Human and Peoples' Rights v Libya*, Application No. 002/2013, Judgment of 13 June 2016, at <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl%20%20002-2013%20African%20Commission%20v%20Libya-%20Engl%20.pdf>.

²⁰⁷ African Court, *African Commission on Human and Peoples' Rights v. Great Socialist Peoples' Libyan Arab Jamahiriya* (Provisional Measures), 004/11, 25 March 2011.

²⁰⁸ The Court’s jurisprudence can be found at <http://caselaw.ihrda.org/>.

²⁰⁹ See Article 26, African Court Protocol.

Amicus curiae interventions

The Court's Rules provide that it may accept amicus curiae interventions from "any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task."²¹⁰

Amicus curiae interventions can be of great value as they provide the Court with an opportunity to hear additional arguments on points of law that are of wider importance than the concerns of the parties in the particular case. This is particularly true in human rights cases which raise issues that are of major public importance.

Remedies

The Court issues binding judgments and has an express mandate to award reparation, with Article 27 (1) of the Protocol providing that:

If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

The Court has confirmed in its jurisprudence that where a violation of an international obligation results in harm, there is an obligation to provide adequate reparation. In the *Zongo* case, the Court found in favour of the claimants. It held separate hearings on reparation following which it ordered the Respondent State to *inter alia*, pay a determined amount

²¹⁰ Rules of Court, Rule 45 (1); see for example *Lohe Issa Konaté v Burkina Faso*, Application No.004/2013; *African Commission on Human and Peoples' Rights v The Great Socialist Libyan Peoples' Arab Jamahiriya*, Application No. 004/11.

of compensation to the families, publish a summary of the judgment in French in the Official Gazette of Burkina Faso and in a widely read newspaper and to keep the summary on the website of the Respondent State for one year. It also ordered Burkina Faso to reopen investigations into the murders with a view to apprehend, prosecute and bring to justice the perpetrators.²¹¹ In another Burkina Faso case which concerned a journalist who had been convicted of defamation for having published an article about counterfeit bank notes, and was sentenced to a prison term, the Court found that his rights had been violated, and ordered *inter alia*, the Respondent State to: expunge from the Applicant's judicial records, all the criminal convictions pronounced against him; to compensate the Applicant for loss of income and for moral damages. It also ordered Burkina Faso to publish a summary of the judgment in French in the Official Gazette of Burkina Faso and in a widely read newspaper and to keep the summary on the website of the Respondent State for one year.²¹²

The Court's practice to date suggests that it will award different types of reparation going beyond compensation, depending on the circumstances of the case. Where it finds a violation, complainants can make a submission on reparation, which should set out in detail the reparation

²¹¹ African Court, *Late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabé Human and Peoples' Rights Movement v. Burkina Faso*, Application no 013/2011, (Judgment on Reparations) 5 June 2015.

²¹² African Court, *Lohe Issa Konate v. Burkina Faso*, Application No. 004/2013, (Judgment on Reparations) 3 June 2016.

sought and provide evidence on how it is linked to redress the harm suffered as a result of the violation.²¹³

Implementation

Article 29 (2) of the Court’s Protocol provides that the Council of Ministers of the African Union (AU) shall be notified of the judgment and shall monitor its execution on behalf of the Assembly of the AU. Article 30 provides further that “[T]he States parties to the present protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.”

IV.3 International human rights system

There are a range of mechanisms that are available at the international level to draw attention to torture practices in a particular country and/or to assess a particular case of torture or ill-treatment.

IV.3.1 Individual Complaints Procedures

Individual complaints may be brought to a number of treaty bodies, if the State in question has accepted the possibility for individual complaints to be brought against it. For example, **Algeria, Morocco and Tunisia** have accepted the jurisdiction of the **UN Committee Against Torture** to receive individual complaints. **Algeria, Tunisia and Libya** have furthermore recognised the competence of the **UN Human**

²¹³ See further African Court, Rules of Court, Rule 34 (5).

Rights Committee and Tunisia and Libya the Committee for the Elimination of All Forms of Discrimination against Women (CEDAW Committee) to receive individual complaints. **Morocco, Saudi Arabia, Syria, Tunisia and Yemen** have recognised the competence of the UN Committee on the Rights of Persons with Disabilities. **Algeria and Morocco** have also recognised the competence of the UN Committee on the Elimination of all forms of Racial Discrimination.

In order for an individual complaint to be admissible, very similar criteria are used to those in place before the African Commission and African Court: a complaint can only be submitted against State parties recognising the competence of the mechanism, the complainant must have exhausted domestic remedies, the complaint must be brought within a reasonable time, and it must not have been considered by another international (or regional) settlement procedure.

Individual complaints have addressed a variety of torture contexts. For instance, the **UN Committee Against Torture** has determined that Morocco violated the rights of 34 sub-Saharan migrants when it failed to assess the risks of them being subjected to torture before expelling them to Algeria,²¹⁴ and breached the Convention when it convicted an individual on the basis of evidence procured through torture.²¹⁵ The Committee has determined that Algeria

²¹⁴ CAT, *The complainants v. Morocco*, Communication No. 321/2007, UN Doc. CAT/C/53/D/321/2007, 13 January 2015.

²¹⁵ CAT, *Ali Aarrass v. Morocco*, Communication No. 477/2011, UN Doc. CAT/C/52/D/477/2011, 19 May 2014.

violated UNCAT for acts of violence and intimidation against an investigating judge,²¹⁶ for carrying out torture, secret detention, and subjecting an applicant to humiliation and inhumane conditions of detention that accompanied the acts of torture, as well as failing to prevent, investigate, punish and afford redress for torture.²¹⁷ The Human Rights Committee has determined that Libya violated the prohibition of torture when it subjected applicants to incommunicado detention and enforced disappearance.²¹⁸

Even though **Tunisia** and **Libya** have recognised the competence of the CEDAW Committee to receive individual complaints, the Committee has yet to decide on a complaint from those countries. The CEDAW Committee is an important avenue for complainants alleging gender-based violence. It has rendered a number of significant decisions, ranging from domestic violence cases²¹⁹ to States' failure to respond adequately to sexual violence.²²⁰

In order for an individual complaint to be **admissible** before UN treaty mechanisms, very similar criteria are used to those in place before the African Commission and African Court: a complainant must exhaust domestic remedies, the complaint

²¹⁶ CAT, *L.A. v. Algeria*, Communication No. 531/2012, UN Doc. CAT/C/57/D/531/2012, 12 May 2016.

²¹⁷ CAT, *Nouar Abdelmalek v. Algeria*, Communication No. 402/2009, UN Doc. CAT/C/52/D/402/2009, 23 May 2014.

²¹⁸ HRC, *Youcif Almegaryaf and Hisham Matar v. Libya*, Communication No. 2006/2010, UN Doc. CCPR/C/110/D/2006/2010, 21 March 2014.

²¹⁹ See for example, CEDAW Committee, *A.T. v Hungary*, Communication No.2/2003, 26 January 2005; *Goekce v Austria*, Communication No.5/2005, 6 August 2007.

²²⁰ See for example, CEDAW Committee, *Vertido v The Philippines*, Communication No.18/2008, 1 September 2010.

must be brought within a reasonable time, and it must not have been considered by another international (or regional) settlement procedure. Specifically in the context of complaints submitted to CEDAW, it is important for admissibility purposes that complaints submitted at the domestic level explicitly highlighted grounds of discrimination.²²¹

The **United Nations Working Group on Arbitrary Detention (UNWGAD)** has issued a number of findings relating to persons arbitrarily detained in the MENA region, including in countries such as **Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Libya, Morocco, Oman, Palestinian Authority, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates** and **Yemen**. A person from any country can bring a matter to the attention of the Working Group, and the UNWGAD's competence to consider complaints does not depend on acceptance by States. It can respond urgently in cases of persons who remain in detention and require urgent attention and has a detailed individual complaints procedure which can assess an individual case in great detail. The Working Group has dealt with issues such as access to medical care, access to a lawyer, and has often called for individuals to be released from detention and to receive compensation.

Similarly, cases of enforced disappearances can be submitted to the **UN Working Group on Enforced or Involuntary Disappearances (UNWGEID)** irrespective of whether a State has recognised the UNWGEID's competence to consider

²²¹ See e.g. CEDAW, *Kayhan v Turkey*, Communication No.8/2005, 27 January 2006.

cases. The UNWGEID considers urgent appeals and general allegations which it transmits to the government concerned, requesting the government to carry out investigations and to inform UNWGEID about the results. As with UNWGAD, it is not necessary to exhaust domestic remedies before submitting a case to the group. The UNWGEID has developed a brief guide on “How to use the WGEID” and a Form for submitting a communication on a victim of an enforced disappearance.²²² In its 2016 Annual Report, the UNWGEID noted in respect of the countries reviewed that 311 cases of alleged enforced disappearance were outstanding in regards to Egypt, 330 in regards to Morocco and 19 regarding Tunisia. The Working Group noted specifically in respect of **Egypt** its “extreme concern” regarding an increasing pattern of disappearances, notably short-term disappearances.²²³

The UNWGAD and UNWGEID cannot issue binding decisions, yet they are important mechanisms to raise urgent cases, in particular in situations where domestic avenues have failed or do not offer a prospect of prompt relief. As neither mechanism requires exhaustion of domestic remedies and does not depend on acceptance by States, they are easily accessible. These cases are important as they draw attention to the plight of individuals in detention or forcibly

²²² See UNWGEID, Form to submit a communication on an alleged enforced or involuntary disappearance, at http://www.ohchr.org/Documents/Issues/Disappearances/Communication_form_E.doc.

²²³ UN Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances, 28 July 2016, A/HRC/33/51, para. 89.

disappeared which can help to remove or reduce the torture risk.

III.4.2 The work of Special Rapporteurs

When the human rights situation in a particular country is particularly problematic, the UN Human Rights Council may appoint a country-specific rapporteur to enquire into the situation. Rapporteurs with thematic mandates may also inquire into particular problem areas.

III.4.3 State reporting procedures

States are required to report periodically to treaty bodies about the extent to which they have complied with the treaties they ratified. Civil society and others will have an opportunity to present information to the treaty body to provide their own understanding of how the State has complied with its obligations. The Committee then uses the information it has received from the State and others, as well as any further information it has at its disposal, to discuss the matter with the State concerned and to issue concluding observations. While this dialogue does not have a binding consequence for the State in relation to any particular torture case, it acts as a form of suasion for governments, helps to document human rights concerns and is an important complement to other approaches.

All States that are part of the UN system participate in the **Universal Periodic Review** process, in which a State's human rights record is scrutinised by other States. As with the State reporting procedure to treaty bodies, this can also contribute to law reform. For instance in Bahrain, the relevant provisions on torture in the Penal Code were reformed following the conclusion of Bahrain's Universal Periodic

Review. The State reporting mechanism can be an important complement to litigation at domestic, regional and international levels. It affords complainants and/or their representatives and non-governmental organisations supporting them the possibility to raise specific issues of concern pertaining to e.g. a particular case, the absence of relevant legislation or general lack of accountability and reparation for torture and ill-treatment in the country concerned.

III.4.4 Commissions of Inquiry and other special procedures

When a human rights situation in a particular country is particularly grave, the UN Human Rights Council may adopt a special resolution, as it has done for instance regarding the situation in Syria, leading to the establishment of the Independent International Commission of Inquiry on the Syrian Arab Republic.²²⁴

²²⁴ See, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/HRBodies/HRC/IICT/Syria/Pages/IndependentInternationalCommission.aspx>.

Annex: Excerpts of submission on admissibility in *Safia Ishaq Mohammed Issa v Sudan*²²⁵

1. Introduction

1. Safia Ishaq Mohammed Issa ('the Applicant'), represented by the Redress Trust (REDRESS) and the African Centre for Justice and Peace Studies (ACJPS) (together 'the Authors'), submitted a complaint against the Government of Sudan to the African Commission on Human and Peoples' Rights ('African Commission' or 'the Commission') on 18 February 2013 ('the Complaint').²²⁶ Upon enquiry from REDRESS on 19 March 2013 about the status of the Complaint, the secretariat of the Commission on 20 March 2013 informed REDRESS that it had not received the Complaint sent on 18 February 2013.²²⁷ On 21 March 2013, the secretariat clarified that "*[W]e have checked our records and our email retrieval system and there is no record of the email ever being received. You may want to know that the Outlook system through which the Secretariat receives*

²²⁵ See further, REDRESS and African Centre for Justice and Peace Studies, Introduction of Communication: Safia Ishaq Mohammed Issa v Sudan, 18 February 2013, at <http://www.redress.org/downloads/complaintsafia-ishaq-mohammed-issa-v-sudan18february2013nosig.pdf>. The Commission declared the case admissible in May 2014.

²²⁶ See Annex B1, E-mail sent to au-banjul@africa-union.org (and all Commissioners as well as Executive Secretary) on 18 February 2013 at 18:43 (attachments of the original email not included in Annex B1).

²²⁷ See Annex B2, Letter sent by the secretariat of the Commission by e-mail on 20 March 2013, Ref. Number ACHPR 327/13.

its official correspondence was malfunctioning during the period in question."²²⁸ Following the re-submission of the Complaint, including all supporting documents,²²⁹ by e-mail on 25 March 2013, the secretariat of the Commission formally acknowledged receipt of the Complaint on 2 April 2013.

2. On 17 May 2013, the secretariat of the Commission informed REDRESS that it was seized of *Communication 443/2013: Safia Ishaq Mohammed Issa (represented by The REDRESS Trust) v Sudan* ('the Communication')²³⁰ at its 53rd Ordinary Session, communicated it to the Government of Sudan ('the Respondent State'), and asked the Applicant to make a submission on the admissibility of the Communication within two months from the date of notification.
3. The Applicant herewith makes her submission on admissibility in accordance with Rule 105 (1) of the Rules of Procedure of the African Commission ('Submission').
4. The Applicant herewith also refers to her request for a hearing to complement this Submission on admissibility at the 54th Ordinary Session (22 October 2013 to 5 November 2013). The Applicant submits her request separately in accordance with Rule 99 (4) of the Commission's Rules of Procedure.

²²⁸ See Annex B3, Letter sent by the secretariat of the Commission by e-mail on 22 March 2013, Ref. Number ACHPR 337/13.

²²⁹ The Complaint, Annexes A1- A5.

²³⁰ The letter of seizure sent by the Secretariat of the African Commission on Human and Peoples' Rights to REDRESS on 17 May 2013 mistakenly only referred to REDRESS as representing the Applicant in this Communication. As detailed in the Complaint, however, the Applicant is jointly represented by REDRESS and ACJPS.

2. Submission on Admissibility

5. The Communication satisfies the admissibility criteria stipulated in Article 56 of the African Charter. The Communication identifies the organisations representing the Applicant as the Authors of the Communication in accordance with Article 56 (1).
6. The Communication is compatible with the African Charter as stipulated by Article 56 (2) as it is submitted against Sudan, which ratified the Charter on 18 February 1986, and alleges serious violations of rights enshrined in the Charter²³¹ committed on and after 13 February 2011. It is written in a respectful language (Article 56 (3)) and it is not based exclusively on mass media reports, but on eyewitness testimony, medical and psychological reports, official documents issued by the Respondent State's authorities, as well as reports of non-governmental organisations in line with Article 56 (4). The Applicant has not submitted the Communication to any other procedure of investigation or settlement as per Article 56 (7).

2.1. Exhaustion of domestic remedies –Article 56 (5) of the African Charter

7. This Submission supplements the arguments on the exhaustion of domestic remedies initially set out in the Complaint,²³² namely that the Respondent State failed to provide a remedy despite ample notice and time to do so. The Applicant submits and sets out in further detail below, that she attempted to

²³¹ The Applicant submits in the Communication that the Respondent State engaged in conduct violating articles 1, 2, 3, 5, 6, 7, 9, 10, 11, 12, 16 and 18 of the African Charter.

²³² See the Complaint, paras. 28-38.

exhaust domestic remedies in the Respondent State, and continued to do so from her forced exile outside Sudan as she wanted her complaint to be investigated and the perpetrators prosecuted in Sudan.

8. The responses from the Sudanese authorities to the Applicant's complaints demonstrate that any theoretically existing remedies in the Respondent State are (i) unavailable as they cannot be pursued without impediment, (ii) ineffective, as there is no realistic prospect of success, and (iii) insufficient, as they are incapable of redressing the complainant.²³³

2.1.2. There are no effective and sufficient remedies available in the Respondent State to the Applicant for the alleged violations

(i) The Respondent State failed to remedy the violation despite ample notice and time to do so

9. The requirement to exhaust domestic remedies prior to filing a complaint with the Commission reflects the primary duty of the State to remedy an alleged violation and provides the State with an opportunity to do so. Accordingly, where the authorities are aware of an alleged violation yet do not initiate steps to remedy the violation, they fail to comply with their duty. Under these circumstances, victims of alleged violations have no alternative but to seek justice outside the State where the alleged violation took place. According to the Commission, bringing cases against State parties to the African Charter is therefore "a means of protecting human and peoples' rights".²³⁴

²³³ *Sir Dawada K. Jawara v The Gambia*, Communications 147/95-149/96, para. 32.

²³⁴ *Centre on Housing Rights and Evictions v The Sudan*, Communication 296/05, para. 91.

10. It is the Commission’s established jurisprudence that the exhaustion of domestic remedies is not required in cases where it can be shown that the state failed to remedy a situation despite “ample notice and time to do so”.²³⁵ According to the Commission, the fact that a State has not taken any action means that domestic remedies are either not available or, if they are, not effective or sufficient to redress the violations alleged.²³⁶
11. In the present case, the Applicant herself brought the violations to the attention of the authorities. On 16 February 2011, the Applicant obtained a “Form 8 A” (a basic medical report needed for filing a complaint) from Bahri hospital which noted injuries (see on the medical evidence further below at para.13). Thereafter, she filed a criminal complaint with the Attorney General at Khartoum Bahri, together with her lawyer. On the same day, and following the Attorney General’s request, the Applicant gave a formal statement to police officers at the East Bahri Police Station where she then filed a formal complaint.²³⁷
12. In addition to filing the complaints directly with the authorities, and in light of their failure to respond, the Applicant decided to issue a detailed public statement about what happened to her, thereby again putting the Respondent State on notice about the allegations. On 23 February 2011,

²³⁵ *Article 19 v Eritrea*, Communication 275/03, para. 77; *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, les Témoins de Jevoah v DRC*, Communications 25/89, 47/90, 56/91, 100/93, para. 36; *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Communication 155/96, para. 38;

²³⁶ *Article 19 v Eritrea*, Communication 275/03, para. 77.

²³⁷ See the Complaint, Annex A3; see also para. 29 of the Complaint; see also Annex B4, Statement by the Applicant’s lawyer, Nagla Ahmed, dated 10 July 2013.

the Applicant put her videotaped testimony on the internet.²³⁸ Video tapes of the Applicant's testimony on the internet were widely watched.²³⁹ Her testimony was reported on widely by national and international non-governmental organisations (NGOs), as well as national and international media, again alerting the authorities to the allegations of what had happened to the Applicant.²⁴⁰ In response, the director of the police of Khartoum state, Mohamed Al Hafiz Attia, declared in a press statement of 8 March 2011 that the medical test carried out on the Applicant did not prove the act of rape,²⁴¹ thereby at least acknowledging publicly that he was aware of the allegations. In the same press statement, he also declared that the Applicant's complaint of 16 February 2013 had been referred to the Attorney General and that the investigation into the complaint was still on-going. Neither the Applicant, nor her lawyer had, however, been informed about an investigation, nor, at any stage, about a dismissal of the Applicant's complaint. Accordingly, the Applicant and her lawyer in September 2011 decided that the failure to investigate her complaint should be brought to the attention of the Respondent State's Minister of Justice.²⁴²

13. While being aware of the allegations, there is no indication that the Respondent State has responded by taking any

²³⁸ See the Applicant's testimony entitled 'Safia Ishag's Rape' on Youtube at <http://www.youtube.com/watch?v=4qMQ22lLoCY> (in Arabic, with English subtitles), uploaded on 24 February 2011 and 'Sudanese Police Rape Girl' on Youtube at <http://www.youtube.com/watch?v=zU9rLAOQQOic> (in Arabic, with English subtitles), uploaded on 23 February 2011.

²³⁹ At the time of this Submission, Youtube had registered over 21, 000 'views' of the two youtube videos uploaded on 23 and 24 February 2011 respectively.

²⁴⁰ See for instance Girifna, 'So things get better', 13 February 2012 reporting in detail about the Applicant's case; Amnesty International, 'Sudan: Further Information: Many Still Detained Following Sudan Protests', 28 February 2011.

²⁴¹ See (in Arabic) <http://www.alsahafa.sd/details.php?Articleid=23554#23554>.

²⁴² See the Complaint, para. 34; see further below, para. 28.

measures capable of providing the Applicant with a remedy. Contrary to the statement made by the director of the police of Khartoum state, there is no indication that the authorities opened an investigation into the complaints filed by the Applicant. The authorities did not undertake any efforts to hold the alleged perpetrators to account, despite the existence of prima facie evidence²⁴³ of the Applicant's rape.²⁴⁴ While the medical examination at the Bahri hospital as recorded in the Form 8A (see above para.11) was insufficient and inadequate (the Form "does not document the full extent of the injuries that would assist in the prosecution of rape" and has been identified as a systemic shortcoming of investigations in cases of sexual violence in Sudan),²⁴⁵ it provided further evidence to substantiate the case and trigger the Respondent State's obligation to investigate the allegations.²⁴⁶

14. Furthermore, there is no indication that the authorities in charge of an investigation requested the Director of the National Intelligence and Security (NISS) to lift the immunity of NISS officials allegedly responsible, a requirement under the 2010 National Security Act, which the Commission repeatedly found to be contrary to Sudan's obligations under the African Charter.²⁴⁷

²⁴³ See on the standard of prima facie evidence, *Samuel T. Muzerengwa & 110 Others v. Zimbabwe (306/05)*, para. 65.

²⁴⁴ See for instance on the obligation to investigate as part and parcel of the notion of 'effective remedy', UN Human Rights Committee, 'General Comment No.31[80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13, para. 15.

²⁴⁵ Report of the UN High Commissioner for Human Rights, 29 July 2005, 'Access to Justice for Victims of Sexual Violence in Darfur', 2008, p. 2.

²⁴⁶ *Supra*, n.19.

²⁴⁷ Article 52 (3) of the National Security Act provides NISS officials with immunity from civil and criminal procedures; see for instance the Commission in *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, a case involving three human rights defenders alleging torture by NISS officials, and

15. Instead, the official response to the complaints lodged by the Applicant consisted of denial (the head of police dismissed the Applicant's testimony as implausible, and stated that the security forces would not commit such acts); dissuasion (both the Attorney General and the head of police, East Bahri station, implored the Applicant to refrain from pursuing her complaint; subsequently, family members were bribed to persuade the Applicant to this effect) and a series of threats and other measures aimed at discouraging anyone from raising the case or pursuing the complaint.²⁴⁸

16. The authorities, rather than investigating the allegations covered by the media, began intimidating the journalists reporting on the case and commenced criminal proceedings against them for defamation and publication of false news. In its Annual Report of 2012, Amnesty International refers to the cases of ten journalists:
 - Ten journalists faced charges for reporting on the case of Safia Ishaq Mohamed, a woman who was sexually assaulted by NISS officers in January. On 5 July [2011], Fatima Ghazali was sentenced to one month's detention and her editor, Saad-al Din Ibrahim, to a fine. On 25 July [2011], Amal Habani was sentenced to one month's imprisonment.²⁴⁹

where the Commission held in regards to the immunity provisions under the National Security Act that *"it would be making mockery of justice to expect that the victims would get justice from such a discretionary remedy."* *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, Admissibility Decision, August 2012, para. 67, see also African Commission, 'Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan', para. 31.

²⁴⁸ See the Complaint, para. 30; see further below, para. 26-32.

²⁴⁹ Amnesty International, 'Annual Report 2012-The state of the world's human rights', Sudan, at <http://www.amnesty.org/en/region/sudan/report-2012>; see also Human Rights Watch and ACJPS, 'Sudan: New Law Allows Military Trials of Civilians', 9 July 2013, which refers to the case of journalist Faisal Mohamed Salih, who had called for an independent investigation into the alleged torture and rape of the Applicant, and was thereafter arrested and charged with publication of 'false news'

17. The UN Secretary General’s Special Representative on Sexual Violence in Conflict expressed her serious concern about the prison sentence of Fatima Ghazali and fine of Saad-al Din Ibrahim. According to the Special Representative, the sentences:

do not only infringe on the freedom of speech and of the media, but also stifle sexual violence survivors and those who support them from speaking publicly about these crimes. Rapist- not reporters- must face criminal charges in Sudan.²⁵⁰

18. The Applicant therefore submits that there cannot be any doubt in the present case about the Respondent State’s notice of the allegations against NISS officials. Furthermore the Respondent State had ample opportunity to investigate the allegations, yet failed to “take the appropriate steps to remedy the violations alleged.”²⁵¹ Remedies in the Respondent State have therefore proved to be ineffective and insufficient to redress the violations alleged in the present case.²⁵²

(ii) Threats and harassment by the authorities forced the Applicant to leave the Respondent State

19. In addition to failing to remedy the violations, the authorities of the Respondent State started to threaten and harass the Applicant after she had decided to pursue her complaint in Sudan, eventually forcing the Applicant to leave Sudan on 18 February 2011.

and defamation, at <http://www.hrw.org/news/2013/07/09/sudan-new-law-allows-military-trials-civilians>.

²⁵⁰ UN News Centre, ‘Rapists, not reporters, must face criminal charges in Sudan says UN envoy’, 3 August 2011, at

<http://www.un.org/apps/news/story.asp?NewsID=39221&Cr=sexual&Cr1=violence#.UGNFe66g5lc>.

²⁵¹ *Article 19 v Eritrea*, Communication 275/03, para. 77.

²⁵² *Ibid.*

20. It is the Commission’s established jurisprudence that there is no need to exhaust domestic remedies where the applicant can demonstrate that exhausting domestic remedies would present a fear for his or her life.²⁵³ According to the Commission, “[t]he existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness.²⁵⁴ Therefore, if the applicant cannot turn to the judiciary of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.”²⁵⁵
21. In the present case, the Applicant, her family and others assisting her in the pursuit of domestic remedies were subjected to a number of threats and to harassment from the authorities.²⁵⁶ The men who raped the Applicant threatened her immediately after the rape that if she was “found again, the issue would escalate”.²⁵⁷ When the Applicant tried to file a complaint irrespective of this threat, the Attorney General at Khartoum Bahri sought to discourage her from filing a complaint and the head of East Bahri Police Station warned her not to file the complaint “as it would besmirch her family name”. The police officer taking her statement accused the Applicant of lying and threatened her, telling her not to speak about the case as continuing to insist on an investigation

²⁵³ *Gabriel Shumba v Zimbabwe*, Communication 288/2004, paras. 63, 74; *Rights International v Nigeria*, Communication 215/98, para. 24; *Alhassan Abubakar v Ghana*, Communication 103/1993, para. 6; *John D. Ouko v Kenya*, Communication 232/99, para. 19.

²⁵⁴ *Sir Dawda K Jawara v The Gambia*, Communications 147/95-149/96, para. 35; European Court of Human Rights, *Kudla v Poland*, Application No 30210/96, para. 159.

²⁵⁵ *Sir Dawda K Jawara v The Gambia*, Communications 147/95-149/96, para. 35.

²⁵⁶ See the Complaint, paras. 10; 30.

²⁵⁷ See the Complaint, para. 6.

would have very serious consequences. After the Applicant had filed the complaint, her family was bribed to persuade the Applicant to stop pursuing her complaint. Her family also received anonymous phone calls of a threatening nature. Once the Applicant had filed the complaint, the situation had become so precarious for herself and her family that the Applicant was no longer able to return to her family home safely as it was under NISS surveillance.²⁵⁸

22. The authorities' responses to the publication of the Applicant's testimony on the internet and to national and international media coverage of the Applicant's case as outlined above is emblematic for the threats and harassment victims are exposed to when they dare to speak out against sexual violence committed by authorities in the Respondent State. The arrests of journalists reporting on the Applicant's case,²⁵⁹ and the subsequent harassment of and threats against anyone willing to assist the Applicant in pursuing her complaint against the NISS officials,²⁶⁰ furthermore underline that it would not have been safe for the Applicant to stay in the Respondent State. This was also confirmed by French authorities who granted the Applicant refugee status on the basis of a "well-grounded fear of persecution".²⁶¹

²⁵⁸ See the Complaint, paras. 7-9.

²⁵⁹ Amnesty International, 'Annual Report 2012-The state of the world's human rights', Sudan, at <http://www.amnesty.org/en/region/sudan/report-2012>; UN News Centre, 'Rapists, not reporters, must face criminal charges in Sudan says UN envoy', 3 August 2011, at <http://www.un.org/apps/news/story.asp?NewsID=39221&Cr=sexual&Cr1=violence#.UGNFe66g5lc>.

²⁶⁰ See the Complaint, paras. 8-109; see further below, paras. 26-32.

²⁶¹ See decision by the 'Office Français de Protection des Réfugiés et Apatrides', No. 2011-12-04450-AM-DGT, 30 March 2012 (in French), Annex B5; see the Complaint, paras. 12-27.

23. The risk the Applicant took in filing the complaint with the authorities of the Respondent State – and the responses of these authorities - must be seen in the broader context of the position of women in the Respondent State, as well as the prevalence of rape and sexual violence in the Respondent State.²⁶² The Commission confirmed in its Concluding Observations on Sudan’s 4th & 5th Periodic Report that “[v]iolence against women, including the practice of FGM and rape are still prevalent.”²⁶³ The absence of a legal framework and of “other measures that address rape in Sudan”,²⁶⁴ as well as the stigma attached to the crime, and threats of further violence also against family members, most often deter victims from speaking out about sexual violence in custody. The almost complete absence of cases involving sexual violence being reported to the authorities, and the even lower number of cases that have resulted in compensation or other forms of reparation awarded to victims of rape, is testimony to these obstacles.²⁶⁵ It also underlines the courage of the Applicant in insisting on pursuing her case domestically.

²⁶² Ibid, paras. 12-27; see also *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, Admissibility Decision, August 2012, para. 53, where the Commission took into consideration the ‘general background’ in the Respondent State to assess the specific situation of the applicants in the case.

²⁶³ African Commission, ‘Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan’, adopted at the 12th Extra-Ordinary Session of the African Commission on Human and Peoples’ Rights held from 29 July to 4 August 2012, Algiers, Algeria (‘African Commission, ‘Concluding Observations’’), para. 36.

²⁶⁴ Ibid, para. 74.

²⁶⁵ See the Complaint, paras. 12-27; Liv Tønnessen, ‘From impunity to prosecution? Sexual Violence in Sudan beyond Darfur’, Norwegian Peacebuilding Resource Centre (NOREF), 2012; UN Human Rights Committee, Concluding Observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para. 14; African Commission, ‘Concluding Observations’, criticising the Respondent State for not providing ‘gender disaggregated data’ in its 4 & 4 combined Periodic Report, paras. 35, 77.

24. The Commission's established jurisprudence that a victim does not need to pursue local remedies if she or he fears for her or his life, is also reflected in the jurisprudence of other human rights treaty bodies and courts. The European Court of Human Rights,²⁶⁶ the Inter- American Commission on Human Rights²⁶⁷ and the Inter-American Court of Human Rights²⁶⁸ all provide for such an exception to the requirement of exhaustion of domestic remedies.
25. The Applicant therefore submits that sufficient evidence exists to show that her and her relatives' life and safety were threatened by the Respondent State, forcing her to flee the country.²⁶⁹ The Applicant submits that she therefore met the 'standard for constructive exhaustion of local remedies'²⁷⁰ and that any remedies in the Respondent State are not available to the Applicant without impediment.

(iii) Intimidation and harassment of the Applicant's lawyers prevented the Applicant from accessing an effective remedy from outside Sudan

26. Following the Applicant's forced exile from the Respondent State on 18 February 2011, the authorities continued to threaten and harass those who sought to assist her in pursuing her complaint from outside Sudan, including her lawyers.

²⁶⁶ European Court of Human Rights, *Akdivar v Turkey*, Application No. 21893/93, 16 September 1996, paras. 74, 75.

²⁶⁷ Inter-American Commission on Human Rights, *Plan de Sanchez Massacre Guatemala*, Case 11.763, 11 March 1999, para. 27.

²⁶⁸ Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Judgment of 29 July 1988, para. 66.

²⁶⁹ *Gabriel Shumba v Zimbabwe*, Communication 288/04, para. 77.

²⁷⁰ *Ibid*; *Rights International v Nigeria*, Communication 215/1998, para. 24.

27. The Applicant wanted, and continued, to pursue her case from abroad. In March 2011, the Applicant instructed a lawyer in Khartoum to act on her behalf in pursuing the complaint, and provided the lawyer with an affidavit for that purpose.²⁷¹ The lawyer, together with other Khartoum based human rights lawyers, sought to progress her case throughout 2011 and 2012. However, the lawyer faced considerable difficulties. Neither the Applicant nor any members of her family were able or willing to testify and pursue the case personally inside Sudan due to concerns for their own safety.²⁷²
28. The lawyers became increasingly reluctant to pursue the case with the authorities in the latter half of 2011, fearing for their own safety especially following the prosecution of the journalists for reporting on the matter.²⁷³ However, when the lawyers met with the Applicant in Kampala in late 2011, it was agreed that further efforts should be undertaken to prompt the Sudanese authorities to act on the pending complaint. Subsequently, Mr. Osman Hummada, Executive Director of the ACJPS, personally raised the case with the Minister of Justice of Sudan, Mr Mohammed Bushara Dousa, in September 2011, during his participation at the 18th Regular Session of the UN Human Rights Council in Geneva, Switzerland.²⁷⁴ The case was also put to the Sudanese delegation on the occasion of the consideration of its state party report by the African Commission in April 2012, as it was highlighted in an

²⁷¹ See statement by the Applicant's lawyer, Mrs Nagla Ahmed, dated 10 July 2013, Annex B4.

²⁷² Ibid.

²⁷³ Supra, paras. 16-17.

²⁷⁴ Statement by Osman Hummeida can be provided to the African Commission upon request.

alternative report submitted by ACJPS, REDRESS and Sudan Democracy First.²⁷⁵

29. Instead of opening an investigation, however, the Sudanese authorities, namely the NISS, in April 2012 arrested, harassed and threatened the Applicant's lawyer, who was known for representing victims of torture and other human rights violations. The NISS searched the lawyer's office and confiscated case files, including files of the Applicant's case and the power of attorney signed by the Applicant, and interrogated the lawyer about her work representing torture victims, telling her that it is against the state.²⁷⁶ This had to be understood as an indirect threat to the effect that to continue her work of taking up cases of victims of torture would entail adverse consequences, possibly including withdrawal of licence if not arrest and prosecution.²⁷⁷

30. In response to the increasing threats by authorities, particularly the NISS, the lawyer left the Respondent State, a move which was initially considered to be of a temporary nature. However, in September 2012, following a series of

²⁷⁵ Sudan Democracy First Group, ACJPS and REDRESS, 'Comments to Sudan's 4th and 5th Periodic Report to the African Commission on Human and Peoples' Rights: Article 5 of the African Charter: Prohibition of torture, cruel, degrading or inhuman punishment and treatment', April 2012, para. 43.

²⁷⁶ See statement by Mrs Nagla Ahmed, dated 10 July 2013, Annex B4.

²⁷⁷ See for further information on harassment and intimidation of lawyers working on human rights issues: ACJPS, 'Update: Human Rights Defenders Arbitrarily Detained in the Wake of Mass Popular Protests in Sudan, 20 July 2012; International Federation for Human Rights, 'Sudan: Arbitrary arrest and detention of numerous defenders', 30 July 2012, at <http://www.fidh.org/Sudan-Arbitrary-arrest-and>; SUDO UK, 'Lawyers Arrested after Press Conference', 1 July 2012, at <http://www.sudouk.org/updates/updates/2012/lawyersarrested.html> and International Bar Association, 'Arrest of Darfur Bar Association members of concern to IBAHRI', 3 July 2012, at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=88f555b8-0daf-4461-8258-c02b42bd88e4>.

incidents suggesting that there was still a considerable personal risk if she were to return to Sudan, the lawyer decided to remain outside the country.²⁷⁸ The risk the lawyer would have been exposed to had she stayed in the Respondent State has also been recognised by the immigration authorities in the country where she was promptly granted asylum. The relevant immigration authorities found that there are serious grounds for believing that the Applicant’s lawyer was at risk of persecution.²⁷⁹

31. The threats and harassment of the Applicant’s lawyer made it increasingly difficult for the Applicant to be able to have legal representation, a pre- condition for the Applicant’s access to domestic remedies in the Respondent State. The Commission noted that “in order to exhaust the local remedies within the spirit of Article 56 (5) of the Charter, one need to have access to those remedies but if victims have no legal representation it would be difficult to access domestic remedies.”²⁸⁰ The Commission held further that in situations where legal representatives cannot resort to domestic remedies “because of a general fear of persecution”, exhaustion of domestic remedies would be “unreasonable and impracticable.”²⁸¹ Furthermore, the requirement to exhaust domestic remedies “must be applied concomitantly with article 7 [of the Charter],

²⁷⁸ Supra, n.51.

²⁷⁹ Annex B8, decision of the United Kingdom Border Agency (UKBA) granting Mrs Nagla Ahmed’s request for asylum and ‘leave to remain in the United Kingdom as a refugee’. The UKBA recognises asylum seekers as refugees if it can establish a “well founded fear of persecution” of the asylum seeker in her or his home country, see UKBA, ‘Who can claim asylum’? at

<http://www.ukba.homeoffice.gov.uk/asylum/claimingasylum/whocanclaim/>

²⁸⁰ *Curtis Francis Doebller v Sudan*, Communication 236/2000, para. 24.

²⁸¹ *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, Admissibility Decision, August 2012, para. 55.

which establishes and protects the right to a fair trial.”²⁸² In its Principles and Guidelines on the right to a fair trial and legal assistance in Africa, the Commission has further outlined various components of the right to an effective remedy, including in particular, an ‘access to justice’,²⁸³ which, in turn, requires legal representation. The right of victims to legal assistance as part of their right to a remedy is also an integral part of regional and international human rights law.²⁸⁴

32. The authorities’ concerted efforts aimed at preventing an investigation into the allegations and at hindering anyone trying to assist the Applicant culminated in forcing her and her lawyer into exile. With the forced exile of her lawyer, the Applicant realised that any further attempts of pursuing remedies in Sudan would not only be futile but would also expose anyone acting on the Applicant’s behalf to genuine personal risk. Under these circumstances, it would be “repugnant to expect anyone within Sudan who sympathizes with the cause of” the Applicant to continue pursuing her complaint inside Sudan.²⁸⁵ The Applicant therefore submits that the continuous harassment and threats of her lawyers by

²⁸² *Amnesty International and Others v. Sudan*, Communication 48/90, 50/91, 52/91, 89/93, para. 31; see also *Anuak Justice Council v. Ethiopia*, Communication 299/2005, at para. 49.

²⁸³ See the African Commission, ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, at <http://www.achpr.org/instruments/fair-trial/>.

²⁸⁴ See for instance, UN Committee against Torture, General Comment No. 3 on Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para.20; UN Basic Principles 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, adopted and proclaimed by General Assembly resolution 60/147, 16 December 2005, paras. 3 (c) and 12; Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, Article 15 (2).

²⁸⁵ *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, Admissibility Decision, August 2012, para. 56.

the authorities of the Respondent State prevented her from exhausting local remedies.

Conclusion

33. In conclusion, the Applicant submits that she complied with Rule 56 (5) as she made several attempts to exhaust local remedies and provided the Respondent State's authorities with ample opportunity to remedy the alleged violations.²⁸⁶ In addition the authorities' harassment and threats of the Applicant, her family and her lawyers, made any further attempt to exhaust domestic remedies futile. As a result, it has become apparent that it is impossible for the Applicant to obtain justice in the Respondent in respect of the alleged violations.

2.2. The Communication complies with the 'reasonable time period' requirement of Article 56 (6)

34. Article 56 (6) of the Charter stipulates that communications must be submitted within "a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter." The rationale for the reasonable time requirement is to prevent challenges to domestic decisions within a jurisdiction long after they have been delivered, in the interests of legal stability and certainty.

35. Since the Charter does not provide for what "constitutes a reasonable period of time", the Commission "treats each case on its own merits".²⁸⁷ Cases where remedies could and were exhausted are treated differently than cases where remedies

²⁸⁶ *Bakweri Land Claims Committee v Cameroon*, 260/02, para. 55.

²⁸⁷ *Darfur Relief and Documentation Centre v Sudan*, Communication 310/05, para. 75.

are found to be unavailable, ineffective or insufficient, as in the present case. In such cases, the Commission estimates the timeliness of a communication “from the date of the complainant’s notice thereof”,²⁸⁸ taking into account the circumstances of the case.²⁸⁹

36. As outlined above, the present communication was submitted after a series of unsuccessful attempts to exhaust domestic remedies in Sudan. The Applicant had sought to pursue all possible domestic avenues and she was determined to have her case investigated by Sudanese authorities. When the authorities’ responses to the Applicant’s complaints eventually resulted in her forced exile, she continued attempting to exhaust domestic remedies from outside, resulting in threats and harassment to her lawyers and others trying to assist her. By September 2012, when the threats and harassment by the NISS forced the Applicant’s lawyer, Mrs Nagla Ahmed, to remain outside Sudan,²⁹⁰ it was evident that any attempts to further pursue the case in the Respondent State would be futile and would carry a serious risk for any lawyer acting on behalf of the Applicant.
37. Following these developments and after several exchanges with her lawyer in exile, the Applicant decided in late October 2012 that filing her complaint with the African Commission was the only avenue to justice available in her case.

²⁸⁸ *Tsikata v Ghana*, Communication 322/2006, para. 37.

²⁸⁹ *Darfur Relief and Documentation Centre v Sudan*, Communication 310/2005, para.75; *Gabriel Shumba v Zimbabwe*, Communication 288/04, para.44; *Socio Economic Rights and Accountability Project v Nigeria*, Communication 300/05, para. 42.

²⁹⁰ Annex B8, decision of the United Kingdom Border Agency (UKBA) granting Mrs Nagla Ahmed’s request for asylum and ‘leave to remain in the United Kingdom as a refugee’.

38. In the meantime, the Applicant's situation had drastically changed, as she had to struggle to adapt to a life far away from family and friends in Sudan, in a new country with a culture and language different from her own. This is confirmed by the psychological examination that she underwent on 26 and 27 December 2012.²⁹¹

39. The Applicant then filed her Complaint with the Commission on 18 February 2013.²⁹² The Applicant submits that, in light of these circumstances, she submitted her Complaint within a reasonable period of time after realising that domestic remedies were no longer available to her.

III Conclusion

40. In light of the foregoing, the Applicant requests the Commission to find this Communication admissible.

²⁹¹ Annex A4 of the Complaint.

²⁹² See above, para. 1.

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