



NOT ONLY THE STATE:

**TORTURE BY
NON-STATE ACTORS**

**TOWARDS ENHANCED PROTECTION,
ACCOUNTABILITY AND EFFECTIVE REMEDIES**

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THE REDRESS TRUST

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'Shadows on a mound of soil (Kabul)'

FOREWORD

The Report by REDRESS "**Not only the State: Torture by Non-State Actors**" is very timely. *De facto* regimes and armed groups continue to commit acts amounting to torture, causing untold suffering. However, this practice has received comparatively little attention if contrasted to torture committed by state agents.

The international community is making some progress towards enhanced accountability for international crimes. Yet, as this Report rightly points out, more should be done to respond to torture by non-state actors, and I hope that it will trigger a fresh debate on the subject.

The Report proposes several important areas for standard setting and practical implementation, in order to make new inroads to combat torture by non-state actors, and these proposals merit careful consideration. I applaud REDRESS for this initiative, which should serve as an invaluable reference and tool for all those who are committed to tackling this particular practice of torture more effectively.

Professor Manfred Nowak
UN Special Rapporteur on Torture

INTRODUCTION

by Robert Francis B. Garcia,
Secretary General, PATH (Peace Advocates for Truth, Healing and Justice)

There is one simple but inescapable conclusion illumined by this study: the laws we have right now, and their implementing mechanisms, need to catch up.

*Having been tortured by so-called “non-State actors” myself, I have more than a passing interest in the subject of this study. Even before I started writing *To Suffer thy Comrades*¹ a few years back, I have contemplated the various ways by which the abomination I experienced, along with thousands of my comrades, will be remedied.*

Reading this paper, I realize how laborious that route would be.

I used to be a “non-State actor” as well, having been a member of the Communist Party of the Philippines-New People's Army during the 1980s, at the prime of my youth. I joined the guerrillas in the countryside and waged war against the State. Suffering torture, and perhaps a gruesome death, from government soldiers was something I dreaded, but for which I somehow prepared. I never expected that the blows would come from my own comrades.

It was in 1988 when the anti-infiltration campaign called “Oplan Missing Link” (OPML) happened. OPML would turn out to be just one of the numerous bloody campaigns undertaken by the CPP-NPA to ferret out suspected “deep-penetration agents” (DPAs) within its ranks.

The pattern in all these anti-DPA campaigns was frighteningly similar: suspicion, arrest, interrogation, forced confession, detention, execution; a bloody domino effect that had bodies writhing, rolling, and dying en masse. It was November 1988, when they arrested and tortured me and thrown along with 56 other chained guerrillas in the Sierra Madre mountain ranges. At that time, 66 suspects were already executed.

One of the worst punishments we endured was the denial of food. The torturers also experimented with various combinations of physical and psychological terror tactics. A female detainee was beaten up, hung on a tree and forced to watch how they beat up other victims. Then she was made to listen to the recorded voices of her children. Some were left dangling in trees for days. They slit the captives' skin with a knife or shaved off their eyebrows for fun. Captives' legs were forced apart and their thighs were sat upon. Their skin was seared with a lamp.

In its wake, I suffered a broken jaw, concussions on my head, wounds where the chains rubbed on the skin, and a battered psyche that proved much harder to heal. The sheer brutality of the experience itself may have been one of the reasons why most of us refused to talk about it for a very long time. It was

¹ Garcia, Robert Francis. *To Suffer thy Comrades*. Manila: Anvil Publishing, 2001.

much easier to talk about military atrocities than the cruelty of one's own comrades. Thus the truth was buried for a very long time.

Talking about the experience was difficult enough as it were, finding legal redress was not even imagined. At least not until recently.

In August 2003, we brought together a group of people who were directly or indirectly victimized by the CPP-NPA's anti-infiltration campaigns – former comrades who survived the torture, families who lost a member or two, and compatriots who believe that the thousands of comrades who fell in the wake of these anti-infiltration campaigns must find their due. We formed the Peace Advocates for Truth, Healing and Justice (PATH).

All of our members are involved in various other advocacies and campaigns, but find this particular one far harder and fraught with obstacles. Many of us are human rights workers who never tire of hollering against the State's abuses – work that is by no means easy, but pretty much cut and dried. It enjoys the luxury of certitude and “political correctness.” Furthermore, legal remedies addressing State-perpetrated violations of human rights and international humanitarian law are very much in place. The issue of non-State-perpetrated violations however, such as the Philippine communist purges, is much more complex and uncertain. For one, we are hard-put to carry this issue to a government audience, knowing full well that the latter has to equally answer for much. This makes it even harder to invoke state accountability on grounds of “positive obligation,” for even victims of human rights violations by the state can hardly take them to task. As this study puts it: “...states have frequently employed counter-insurgency strategies and outright war to combat these groups instead of resorting to judicial processes. These strategies are themselves often characterised by serious violations of human rights and humanitarian law.”

What adds to the complexity of this issue is that the war is still waging. The end to the violent conflict between the government and the CPP-NPA is nowhere in sight, as such addressing the issue of past violations inevitably gets mired in political manoeuvrings. The government uses it as an effective propaganda ammunition against the rebels, while dispensing with counter-insurgency measures that fall way below human rights and IHL standards. Like at present, left-wing activists are being summarily executed on an almost daily basis, while the government in effect is mouthing: “They had it coming,” or, “Just like in the past, they are killing their own comrades.” In such a situation, the truth suffers, along with justice and accountability.

In addition to this, bringing up the issue remains a dangerous undertaking, simply because the CPP-NPA is still armed and active. They have also categorically dismissed any possibility of reopening the issue, claiming that it is already a closed book. The perpetrators, they say, have either fled the Party or have been rightfully punished. The scores of victims' families who do not know what really happened, and the thousands of dead-and-disappeared, point to the contrary. The Party, in its long history, have not shown any capacity for undertaking due process and credible investigations that pass accepted international norms. What they have shown thus far is the capacity for dispensing summary executions, a number of which they publicly proclaim, such as the assassination of former Party leaders Romulo Kintanar and Arturo Tabara.

Thus, understandably, most of their victims refuse to raise the issue or bring it to the proper body for fear of courting further harm.

We at PATH have explored various legal options, one is the filing of individual criminal cases against identified lead perpetrators, such as those involved in the OPML in the province of Laguna. As expected, the wheels of justice grind to an almost standstill. Gathering evidence of a crime that happened more than a decade back poses a terrible challenge, including the lack of witnesses willing to testify and the blurring of memory through time. The absence of an anti-torture law in the Philippines also poses a limitation, thus the charges filed are limited to serious physical injuries and serious illegal detention.

The case of Jesse Marlow Libre is a particular case in point. In November 2005, we at PATH, with the help of forensic scientists and volunteer experts were able to exhume the remains of his parents, revolutionary couple Jesse and Nida Libre. They were falsely suspected as spies and killed by the CPP-NPA in Cebu on September 1985. The truth behind the disappearance of the young orphan Libre's parents was withheld from him by the movement (they claimed the military killed them). It was only in 2005 when he learned the disconcerting reality upon seeing his parents' skeletons buried together in a mountain gravesite, bearing tell-tale signs of severe torture and violent death. Thus with the exhumation of truth comes the cry for justice.

What are the legal options available to him? We can barely find witnesses willing to testify. Who are responsible? A whole Party organization was involved. What are the levels of accountability? It was a complex hierarchical setup: there were onlookers, guards, interrogators, torturers, executioners, decision-makers, and Party directives. Truth and justice are simply lost in the labyrinth.

Another quasi-legal option is our call for the creation of a Truth and Justice Commission, being aware of the extreme difficulty of filing individual court cases. But Commissions of this sort were successfully done in post-conflict situations, i.e. in countries in transition. We find no precedent of a Truth Commission set up in any country with ongoing conflict, though we are open to setting such a precedent back home.

As we grope around for tenable legal recourse, we welcome any political developments that could offer some promise or possibility of an official, widely recognized probe. Thus when the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (or CARHRHIL, the **first** out of four stages in the substantive agreement within the ongoing peace talks between the Philippine government and CPP-NPA-NDF²), we asked: "Could this be the avenue we are looking for?"

Sadly, CARHRHIL gives little indication in that direction. The negotiating parties have set up the **Joint Monitoring Committee (JMC)** on April 14, 2004 purportedly to monitor each other's compliance with the stated agreements on human rights and international humanitarian law. But it covers only cases that happened "on or after August 7, 1998," the official date of the pact. That effectively leaves out the bloodiest and most far-reaching crimes that resulted from the anti-infiltration purges because they happened more than a decade back. It is not retroactive.

Besides, what powers does the JMC actually wield? The most disconcerting feature of the agreement is "the failure of the CARHRHIL to vest the JMC with executory power."³ Indeed, all the JMC can do is deliberate on a filed complaint, try to reach a consensus, and then throw it to the "Party concerned" for further investigation. Nothing in the agreement indicates that either Party can be compelled to investigate. Much less are they compelled to provide reparation for the aggrieved.

² Primer on the CARHRHIL and the JMC. Manila: Office of the Presidential Adviser on the Peace Process, 2004.

³ De la Cruz, Rosselynn Jaye and Rachel Anne Sibugan. *Breaking Ground on Bloody Ground. A Legal Inquiry into the CARHRHIL between the GRP and the NDF.* 2005.

Indeed, till this day not one of the cases filed with the JMC, whether against government or the CPP-NPA-NDF, has moved an inch beyond their respective filing cabinets.

In short, we have an official “agreement” to respect HR and IHL, with a body to “monitor” compliance, but no teeth to enforce it. All we have is their word, which, going by experience, does not amount to much. All it has accomplished so far is bolster the CPP-NPA's claims to belligerency. As this paper pointedly observes: “While such developments (i.e. bilateral agreements or unilateral declarations of observance) have the potential to result in greater protection, doubts remain concerning their effectiveness: there is often little external monitoring of agreements or commitments and it is unclear what steps, if any, have been taken with a view to preventing torture. In the absence of such verification, it is difficult to assess whether the purported steps are genuine attempts to stop torture by members of the group concerned. Claims about steps taken may equally serve as mere gestures to gain enhanced legitimacy by appeasing those who raise human rights concerns without changing the actual practice. Continued reports about torture and other serious violations by non-state actors often appear to point to the latter.”

This paper however does not close the door on pursuing creative “engagements” with armed groups towards convincing them to abide by HR and IHL standards. This suggestion has some merit, and in an ideal setting it would be wise to negotiate with them on these grounds. Armed groups generally operate on the basis of political expediency, thus productively engaging them might entail setting mechanisms that would make it “politically costly” for them not to follow the standards. These mechanisms, however, have yet to be realized.

Human rights violators from the State have to face the entire UNDHR and all international humanitarian laws, while the best recourse for victims of non-State violations remains the common Article 3 of the Geneva Conventions, with hardly any enabling mechanisms.

Sol Santos writes: “...human rights creates obligations on or can be applied to non-state actors like rebel groups, and not just states or governments. The basis for this is the more dynamic view that human rights are meant not just to regulate the state but, more fundamentally, to assert the inherent rights of individuals against all forces, whether state or non-state, which would violate them.”⁴ Poring through this comprehensive study, we at PATH realize that many people in the world find themselves stuck in the same boat. The victims of the former Yugoslavian conflict, the RUF in Sierra Leone, Shining Path of Peru, and so on continue to suffer from a very constricted legal terrain at either national or international levels. Correcting this is an imperative, if we are to be true to the notion of human rights universality.

Thus in the final analysis, we continue to grope, even as crimes against humanity continue to pile up and bury the old ones. Torture and other inhuman acts continue to be committed all over the world, both by governments and armed groups. War and injustice prove to be fertile grounds for these atrocities to breed and multiply. We cannot emphasize enough the urgency of creating new laws and mechanisms that could deter them, or deal with them in a manner that would restore our humanity.

⁴ Santos, Soliman. *The Human Rights Implications of the Left Purge*. Anne Frank Lecture Series, Royal Netherlands Embassy, Manila: 2003.

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INDEX

I. INTRODUCTION	10
II. PRACTICE OF TORTURE BY NON-STATE ACTORS.....	13
1. Non-state actors and Torture: Clarifying terminology	14
1.1. Who are non-state actors?	14
1.2. Can non-state actors commit torture as a matter of international law?	16
Summary	20
2. Prevalence and purpose of torture committed by <i>de facto</i> regimes and armed groups	20
3. Methods of torture used by non-state actors	25
4. Victims of torture by non-state actors.....	30
5. Impact on victims.....	31
Summary	33
III. ENSURING RESPECT FOR THE PROHIBITION OF TORTURE IN RELATION TO NON-STATE ACTORS	34
1. Gaps in the legal framework applying to non-state actors.....	34
1.1. National law and practice.....	34
1.2. International legal framework and mechanisms applying directly to non-state actors.....	35
Summary	42
1.3. Limited reach of state responsibility for violations by non-state actors	42
Summary	48
2. The prohibition of torture applied to non-state actors.....	49
2.1. State Responses.....	49
Summary	60
2.2. Responses by non-state actors	61
Summary	66
2.2. International Responses	67
Summary	71
2.3. International justice through third countries: Universal jurisdiction.....	72
Summary	77
IV. STANDARDS AND MECHANISMS REVISITED: TAKING EFFECTIVE STEPS TO ENSURE PROTECTION, ACCOUNTABILITY AND REPARATION FOR TORTURE BY NON-STATE ACTORS	79
1. Clarifying and developing relevant international standards.....	79
2. Developing and strengthening international mechanisms.....	81
3. Strengthening domestic enforcement of the prohibition for torture by non-state actors.....	84
4. Furthering compliance with relevant international standards by <i>de facto</i> regimes, armed groups and other non-state actors.....	85
5. Strategies for survivors and NGOs acting on their behalf: Seeking protection, accountability and reparation for torture by non-state actors	87
V. TABLE OF AUTHORITIES	90

I. INTRODUCTION

Over the last decades, steps to combat torture have focused almost entirely on states- for good reason. Torture, which continues to be prevalent worldwide, constitutes the negation of one of the core functions of the state to guarantee the rights of those coming within its jurisdiction, and to ensure their security and well-being. The responsibility of the state is reflected in the international system for the protection of human rights. This system is not only largely made by states but also addressed to states as duty-holders and does not traditionally contemplate the responsibility of actors other than states. Yet non-state actors are increasingly engaged in conduct that violates human rights, including torture as one of the integral coercive means used to gain or exercise power.

The category of 'non-state actors' ranges from private individuals and companies to armed groups and *de facto* regimes. All of these actors can and have been responsible for serious crimes. It is mainly armed groups, both those opposed to, or having some kind of support or acquiescence from governments, and *de facto* regimes that have reportedly used torture, including rape, mutilations and corporal punishments, on a large-scale as a key element of their arsenal of violence. Colombian paramilitaries and rebels, armed groups in the former Yugoslavia, rebel forces in Sierra Leone, members of armed groups under investigation by the International Criminal Court (ICC) in the Democratic Republic of Congo (DRC), Uganda and Sudan, Iraqi insurgents, Afghan warlords and Maoists in Nepal, are just some prominent cases.

Armed groups and *de facto* regimes commonly exercise control over territory or people or both. In many instances, they effectively replace the state. For the people subject to their control, it makes little difference whether the crimes are committed by a recognised state or by other entities exercising 'state-like' powers. Victims have a right to and a need for protection against (further) torture as well as a desire for justice and reparation for the violations inflicted.

However, serious shortcomings and challenges exist, both in law and practice that limit effective protection, justice and reparation for torture carried out by non-state actors. International law has perceived non-state actors through the prism of sovereignty only, portraying their acts as ordinary crimes subject only to domestic law. In practice this is usually insufficient, not least because the criminalisation of torture is inadequate in national law. Though domestic enforcement of international law is important, it is clearly insufficient in situations of failed states or where armed groups control territory and are effectively out of reach of a state's justice system. Traditionally, non-state actors do not incur direct obligations under international law. One significant exception are the minimum standards of international humanitarian law binding on armed groups, in particular Article 3 common to the four Geneva Conventions of 1949 that also prohibits torture. However, this body of law applies solely to armed conflicts whose very existence is often contested, and there are few if any mechanisms for enforcement.

International criminal law provides a tool that can be, and is increasingly, used to respond to violations by non-state actors. Yet, international criminal law is confined to individual responsibility and its reach is limited. International and internationalised tribunals (also called mixed or hybrid tribunals, i.e. mechanisms that combine domestic and international elements of criminal justice) can be suitable fora for holding non-state actors accountable. However, their jurisdiction is not yet fully universal, they often have no jurisdiction to try individual cases of torture and they commonly only try those bearing the greatest responsibility. Accountability at the domestic level, be it in the country concerned or in third states, is of obvious importance but the track records of states in this regard is haphazard and weak. Domestic criminal laws often do not fully capture the nature and magnitude of torture. Moreover, national practice is inconsistent and criminal prosecutions of non-state actors responsible for international crimes such as torture face numerous obstacles.

International human rights law sets comprehensive standards that could be utilised to ensure responsibility of non-state actors as an entity. However, states, human rights bodies and others remain reluctant to bring such actors fully into the human rights framework traditionally governing the relationship between the state and those subject to its jurisdiction. This state-centred system, with few exceptions, recognises violations by non-state actors only within the framework of state responsibility where they can be linked to the state, such as a state exercising control over paramilitary forces or failing in its positive obligation to prevent and to respond to such violations.

An effective response to torture by non-state actors needs to be pursued on two interrelated levels, (i) the applicable substantive legal framework and (ii) the mechanisms for its enforcement. The question whether and if so how, human rights should apply directly to non-state actors is significant in responding to violations such as torture. From the victims' perspectives, it is important to acknowledge conceptually that individual and collective rights have been violated. However, it is even more critical that mechanisms will be put in place at all levels that offer genuine protection, combat impunity and provide effective remedies for violations. This challenge calls for a rethink about existing legal frameworks with a view to clarifying applicable standards and establishing effective mechanisms. It also necessitates a fresh look at the specifics of how non-state actors operate and how they can be engaged so as to secure greater protection and accountability. The prevalence of torture by non-state actors, the large number of victims and the prospect of continuing and future violations make it imperative and add urgency to the search for effective responses that counter lawlessness and the lack of accountability and justice. This applies not only to the non-state actors themselves but also to states using such actors to evade their responsibilities.

There is a growing recognition that the international legal framework for dealing with non-state actors is inadequate, in particular in respect of failed states or armed groups exercising state-like powers. Several United Nations organs have taken steps in response to violations by non-state actors, both general and country-specific. Responses consist in: (i) standard setting (such as prohibiting the recruitment of child soldiers); (ii) protection mechanisms (in particular for civilians in armed conflict); (iii) individual and collective sanctions (for acts of terrorism but also for violations of humanitarian law and human rights); and (iv) accountability mechanisms (through establishing criminal tribunals or referring situations to the International Criminal Court (ICC)). Many states have established and accepted the jurisdiction of the ICC. This constitutes an important mechanism to hold non-state actors accountable for international crimes and to provide reparation to victims. The courts of some states have also held non-state actors responsible for violations committed in third countries. UN agencies, NGOs and bodies such as the International Committee of the Red Cross (ICRC) are taking steps to engage with non-state actors in order to secure greater respect for applicable international standards.

These initiatives reflect a greater awareness of the need for enhanced protection and accountability in respect of violations committed by non-state actors. Significant progress has been made in engaging non-state actors on specific issues, such as the ban of landmines. The increased use of sanctions and of criminal tribunals in response to international crimes also signals that the UN and states are in principle willing to take effective steps to hold non-state actors accountable. However, the current approach is largely piecemeal, with a heavy emphasis on criminal accountability that is not accompanied by the strengthening of other mechanisms. Many responses focus on specific violations and are carried out on an ad-hoc basis. Broader initiatives, such as attempts by NGOs and states within the UN system to develop fundamental standards of humanity, have effectively come to a halt. States are still reluctant to apply relevant international human rights standards to non-state actors as this is often seen as conferring a degree of legitimacy to groups that they would not have otherwise.

There has been no specific focus or coherent approach to the problem of torture by non-state actors to date, even though available evidence points to a pervasive practice. UN bodies, such as the Special Rapporteur on Torture, and international and national human rights organisations have monitored,

reported and condemned such torture in some instances. International and national courts have also held individual perpetrators accountable in a few cases. Several national Truth and Reconciliation Commissions have examined, identified, and reported on torture by non-state actors, particularly in the course of conflict. Yet, concerted efforts to document such torture fully, to examine its prevalence and to address this specific violation in a coherent fashion are lacking. This is due to a combination of factors, in particular an enhanced focus on responses to international crimes generally, rather than on torture specifically. It is also due to the very nature of torture by non-state actors. The absence of monitoring and information, the difficulty for victims to take effective legal action and the inaccessibility of many *de facto* regimes, armed groups and others all contribute to a lack of visibility and momentum to identify torture by non-state actors as an area of concern that requires immediate action.

This Report seeks to trigger a fresh debate on the practice of torture by non-state actors, focusing on armed groups and *de facto* regimes as the groups that most commonly make widespread or systematic use of torture. It aims to give new impetus to the campaign against torture by such actors through raising awareness and examining responses and practical solutions: how to respond to this practice more effectively and how to strengthen remedies for the victims of such violations. The Report is also intended as a tool for victims of such torture and those working on their behalf to assist them to identify and advocate for reforms and make better use of existing remedies.

The Report was prompted by requests from those working on behalf of victims of torture committed by armed groups, who were questioning how best to approach questions of justice and reparation. These victims have been struggling to find recognition and justice. The combination of a focus on states' violations, the lack of existing remedies and practical difficulties mean that there are a large number of unresolved cases and very little accountability. While national and international actors have arguably neglected the pressing need for enhanced protection and justice, there is a growing awareness that a more coherent and effective response is needed. This Report seeks to demonstrate that the effective campaign against torture by non-state actors must be an integral part of such a response.

The Report:

- provides an overview and analysis of the nature and prevalence of the practice of torture by non-state actors;
- maps the applicable national and international framework;
- identifies and examines the main issues and challenges in regard to prevention, accountability and reparation at the national and international level;
- explores the creation and/or use of mechanisms and remedies to counter the practice more effectively.

The Report is aimed at international human rights bodies, states and others concerned with torture and/or non-state actors, but also and in particular at those working on behalf of victims of torture and engaging with non-state actors. It is also aimed at non-state actors themselves, by means of outlining existing obligations and responsibilities and indicating how best to meet these obligations with regard to the prohibition of torture.

II. PRACTICE OF TORTURE BY NON-STATE ACTORS

[Extract of article posted on 27 December 2003 Inquirer News Service, as part of Juan Sarmiento's five-part series "CPP Victims Seek Justice, Closure" (PDI, 26-20 December 2003) (INS's EDITOR'S NOTE: Following is a first-person account of Gil Navarro, a survivor of "Operation Missing Link." He has since left the underground movement.)]

IT BEGAN with an invitation to a labor conference in a guerrilla zone. Our group of five reached a New People's Army camp in Laguna on July 1, 1988. I was then 26 and the secretary of the Communist Party of the Philippines' section organizing committee in Calamba, Laguna.

Three of us were blindfolded and chained and ordered not to talk. The next morning, I noted that there were about 10 cells with prisoners, about 10 meters apart, covered with plastic sheets. After a week, I was presented to Dex, Gerry and Igor, and told to sit at the table. "Starting today, we are dropping you from the rolls of the party because you're a DPA (deep-penetration agent)," Dex said. "That's not true," I protested. "Only the Central Committee can drop me from the rolls." "Someone has already squealed on you," Gerry said...

Three days passed before I was interrogated again... "Are you going to confess now?" Dex said. "What will I confess?" I said. I could still smile then. They presented someone, a youth organizer from Biñan, who had supposedly identified me as a spy. He was sobbing. Then he was led away. "You son of a bitch. So you're a nut hard to crack!" Dex said. A yellow pad was rolled and used to hit my face. Vlady pointed an M-16 at me and pulled the trigger. The rifle had no bullet. I was then made to sit before a pit three feet deep. "Are you going to confess now?" they asked, a gun pointed at me. "What will I confess?" I said. They put bullets between my fingers and squeezed. Someone shoved a fist against my chest bone. I cried in pain. I was also made to squat, and my shin was hit with something hard.

After that day, I was interrogated daily. I was roused from sleep at night. I was slapped repeatedly. The routine lasted a month. Two women took notes of my interrogation. On those nights, I could hear someone's cries and the whirring of a power saw. Sometimes, they deprived me of food. There were moments when I entertained the thought of committing suicide by slashing my wrists with the sharp edge of a tin can, but I couldn't find any.

The anti-DPA campaign was called Operation Missing Link because no one knew how they disappeared. I decided to make up a story after an incident in the second week of August. Someone asked me [after having killed another detainee in front of my eyes]: "Will you be the next? What's your message to your family?" That's when I said yes. Yes, I was recruited by Tatang's son. Yes, I'm a DPA. They asked about my salary, my network, how I was recruited. I found it difficult to make up something. I merely confirmed what they had told me. I thought that what I was doing was not right, but it was a matter of survival. I told them about Red Sox ("Oplan Red Shank"), a military plan to infiltrate the party, which I had earlier read about in a torn page of the Inquirer that I found at the camp. Two days later, Igor and Lea made me list down the supposed military spies I knew. They took a picture of me holding a plate with my name on it. Then the series of killings began. Many more were arrested.

I received severe torture at the second camp. With my hands bound, I was made to sit by a big tree. They raised my feet as if I were being made to do a split. Igor pulled at one of my legs and a woman pounded my knee with a coconut shell. "Confess some more!" said Igor, Ken and Dex. Then, before all the people in the camp, Dex took off my underwear. Using a razor, he slit the skin just above my penis four times. The torture lasted for half a day. "Just kill me because I just made up the story. You won't get anything from me. Call Ken and tell him to kill me," I screamed. Days later, they asked me about some names in Manila. If they were unsatisfied with my answer, Igor would force me to eat a piece of paper. We stayed at the camp for two weeks... At night I could hear screams. I saw people being marched off, with someone carrying a spade and a crowbar.

I was set free on Dec. 8. The then head of the Southern Luzon Commission summoned me and said: "I can no longer shed tears to ask for your forgiveness. Come, let's go to our comrades." Unchained, I went to a group that included those who had also been released, as well as some members of the Central Committee. They sang a song welcoming me back to the party. I cried.

The prevalence of torture committed by non-state actors worldwide is difficult to assess. The conduct of such actors is not subject to the same degree of scrutiny as that of states. This is not least because areas under their control are often virtually inaccessible, both for geographical and political reasons. In particular, parties will deny that an armed conflict necessitating external monitoring exists, and the international system has not developed coherent mechanisms for monitoring their conduct. The available information is therefore necessarily incomplete and often anecdotal. The lack of information about this practice is in itself a major deficiency in the current system of dealing with torture by non-state actors. Nevertheless, human rights organisations, rehabilitation centres and others have collected a considerable amount of raw data about such violations, mainly from victims and witnesses who were able to leave the areas under control. Accounts before Truth and Reconciliation Commissions, various UN reports and the jurisprudence of international and national tribunals are further sources that provide insight into the prevalence, nature and pattern of such torture. The following general overview is not meant to provide a comprehensive mapping of this practice. Instead, it draws out common features and patterns illustrated by a range of concrete examples with a view to gaining a better understanding of the reality of torture practised by non-state actors.

I. Non-state actors and Torture: Clarifying terminology

I.1. Who are non-state actors?

There is no authoritative definition of the term ‘non-state actors’ under international law. The broadest possible definition encompasses all private actors distinct from the state, including private individuals, civil society organisations, private companies, armed groups, *de facto* regimes etc. The present examination of the practice of torture by non-state actors focuses on the conduct of collective actors that have the capacity to exercise power over territories or people or both, namely, *de facto* regimes and armed groups, both those opposed to governments and having close links with them. As armed groups have established *de facto* regimes, at least temporarily, there is a certain degree of overlap between these categories. These groups of non-state actors not only frequently exercise power in state-like fashion but have in practice also been responsible for the bulk of reported torture cases. Entities, such as private security companies, multinational corporations, military components of missions operated by intergovernmental organisations and others, are a further category of non-state actors that have reportedly also been responsible for serious violations. Some principles, such as state responsibility for violations by private actors, apply as a general rule to most non-state actors. However, it is beyond the scope of this report to address all types of non-state actors as the applicable legal framework and grounds for responsibility differ considerably for the various actors and entities just mentioned.⁵

De facto regimes arguably come closest to resembling states. Such entities have been defined as exercising “all the functions of a sovereign government in maintaining law and order ... courts of justice, adopting or imposing laws, regulating the relations of the inhabitants of the territory to one another and to the government.”⁶ Examples of *de facto* regimes abound, such as Afghanistan and the authorities in the Kurdish areas in Northern Iraq throughout much of the 1990s and the early 2000s, the Republika Srpska in Bosnia-Herzegovina until the Dayton Peace Agreement, Somalia, the Turkish Republic of Northern Cyprus, Abkhazia and South Ossetia in Georgia, and the Palestinian National Authority. The nature of *de facto* regimes and the circumstances under which they operate, such as during conflict or in times of peace, differ widely with regard to their degree of permanence, the extent to which they have received international recognition, internal coherence and organisation, foreign influence and effective control

⁵ See on this point for example Clapham, *Human Rights Obligations of Non-State Actors*, pp. 299 et seq.; Alston, *The ‘Not-A-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors*, pp.3 et seq., at p.9 with further references and Rosemann, *The Privatization of Human Rights Violations-Business’ Impunity or Corporate Responsibility?*, pp. 77 et seq.

⁶ Lord Atkin, *Arantzazu Mendi case*, House of Lords, at 65 et seq.

over a certain territory. What these entities have in common is that they do not qualify as states under international law because they lack at least one of the essential prerequisites of statehood.⁷

Armed groups have been defined as an “armed actor with a basic structure of command operating outside state control that uses force to achieve its political or allegedly political objectives”⁸ or as “challengers to the state’s monopoly of legitimate coercive force.”⁹ This category encompasses rebel groups and liberation movements hostile to the government in the territory concerned. This does not necessarily mean that they are free from any state influence, as such groups may and frequently do receive support from foreign governments, such as, for example, the *União Nacional para a Independência Total de Angola* (UNITA) from the US and South Africa, Hezbollah from Iran, the National Patriotic Front of Liberia led by Charles Taylor from Libya,¹⁰ and various armed groups engaged in the armed conflict in the Democratic Republic of Congo, in particular from Rwanda and Uganda.¹¹

In the context of armed conflict, international humanitarian law recognises several types of armed groups. These include belligerents, insurgents and national liberation movements whose status confers certain rights and obligations under the applicable humanitarian law treaties and customary international law.¹² In a conflict that reaches the threshold of an armed conflict, all parties, whether states or non-state actors, are bound by the minimum standards of international humanitarian law, including the prohibition of torture.¹³ However, armed groups may operate outside of the context of an armed conflict, for example during prolonged ceasefires such as in Sri Lanka since 2002. The umbrella term “armed groups” is therefore broader than the categories recognised under international humanitarian law. It also includes those groups that persist to use violence, or threaten its use, during peacetime.

Groups using acts of violence that constitute forms of “terrorism”, in particular targeting the civilian population to instil terror as a means to political ends, constitute a separate category that can, if a broad definition were adopted, be seen as a specific subcategory of armed groups.¹⁴ In practice, the nature of groups whose main *modus operandi* consist in using acts of “terrorism” to further political ends on an international scale, such as *al-Qaeda*, differ considerably from traditional types of armed groups which commonly confine themselves to seeking political changes within, or relating to, a given territory. However, the distinction between armed groups and “terrorist organisations” is not necessarily a neat one, as armed groups, such as the Kurdistan Workers’ Party (PKK) in Turkey, have resorted to acts of

⁷ The generally recognised criteria for statehood under international law are a permanent population, a defined territory, an effective government and the capacity to enter into relations with the other state. See Brownlie, *Public International Law*, pp.70 et seq. The lack of recognition may be an indication that the entity concerned has not attained full statehood. See *ibid.*, pp.85 et seq.

⁸ This is the definition used by the NGO Geneva Call, see *Armed Non-State Actors and Landmines*, p.10.

⁹ See for a discussion of the term Pablo Policzer, *Neither Terrorists nor Freedom Fighters*, pp.7 et seq. See also the definition used by OCHA in *Humanitarian Negotiations with Armed Groups*, p.87: “Groups that have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structures of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate.”

¹⁰ See Human Rights Watch, *Angola Unravels*, the decisions of the U.S. courts in a series of cases against Iran relating to hostage takings by Hezbollah in the 1980s, *infra*, at Ill. 2.3. (iii) and the indictment of the Sierra Leone Special Court against Charles Taylor, the former President of Liberia, SCSC-03-01-I-001, 7 March 2003. Taylor provided in turn support to the RUF in Sierra Leone, see *ibid.*, paras.20 et seq.

¹¹ See in particular judgment of the ICJ, *DRC v. Uganda*.

¹² In particular under the 1977 Protocol II to the Geneva Conventions and the 1977 Protocol I for National Liberation Movements (see Article I (4)). See for an analysis Clapham, *Human Rights Obligations of Non-State Actors*, pp.271 et seq.

¹³ See ICRC, *Customary International Humanitarian Law*, Volume I, pp.315 et seq.; Institute of International Law, *The Application of International Humanitarian Law and Fundamental Human Rights*, Article 2, and Article 3 (2) of the Turku Declaration of Minimum Humanitarian Standards, 2 December 1990.

¹⁴ See Policzer, *Neither Terrorists nor Freedom Fighters*, p.11. There is a continuing discussion of whether international humanitarian law should apply to these groups. The answer is affirmative as far as the prohibition of torture is concerned, as all parties are bound to respect certain minimum standards of international humanitarian law, such as those contained in common article 3 of the Geneva Conventions.

terrorism in the course of their operations.¹⁵ For the purpose of this Report, “terrorist organisations” are treated as armed groups with regard to any practice of torture used by its members.

Groups with close links to the state, such as paramilitaries, militias and other groups and forces are a further category of entities using armed force. They are characterised by their dual nature, i.e. being at once distinct from official state structures and having close links with the government of the country concerned. These links range from collaboration and joint operations to financial aid and other forms of assistance by governments and various degrees of acquiescence. There are numerous examples of paramilitary groups and militia that have been and are particularly common in Latin American and Africa, for example the Janjaweed in Sudan, Youth Militias in Zimbabwe, the United Self-Defence Forces in Colombia (AUC), the Civilian Self-Defence Patrols in Guatemala and Civil Defence Units in El Salvador. The main difference between such entities lies in the degree of independence from governments, as they are either created and closely controlled by governments or maintain looser links, in particular where pursuing own objectives that might diverge from those of the government in question. In practice, governments provide various kinds of support to paramilitaries, militias and other groups and use them as proxy armies, counter-insurgency forces or as forces for political repression.¹⁶

I. 2. Can non-state actors commit torture as a matter of international law?

Torture is generally understood as a violation committed by or with the involvement of state officials, i.e. a “state crime”. Non-state actors are characterised by their very lack of official status under international law. Determining whether, and if so, which definition of torture applies to their acts not only goes to the core of understanding the meaning of torture when applied to such actors but also plays an important role in framing legal responses.

According to article 1 of the UN Convention against Torture, “the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him 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*” (emphasis added). Under this definition, acts by which severe pain or suffering is intentionally inflicted for any of the purposes specified seemingly do not qualify as torture if committed by non-state actors unless there is some degree of official involvement.

Does this mean that, legally speaking, non-state actors cannot inflict torture? If so, do acts which, if committed by officials or with their acquiescence would amount to torture, need to be qualified as something else than torture? International law provides no simple answer to this question, as it depends on the area of law considered, namely international human rights law, international humanitarian law and international criminal law. These three bodies of law differ in so far as they apply in different contexts and govern different forms of responsibility. They are, however, not entirely separate: international human rights law continues to be applicable in armed conflict, though international humanitarian law may constitute *lex specialis* (i.e. applicable as the more specific law) and serious violations of both international human rights and/or international humanitarian law commonly constitute international crimes, such as torture.

¹⁵ The EU has banned the PKK as a “terrorist organisation.” See e.g. Council Decision 2005/221/CFSP of 14 March 2005.

¹⁶ See for a more detailed discussion *infra* at II 2.

International human rights law

International human rights law principally governs the responsibility of states for violations, be they committed by state officials or others, and does not explicitly provide for responsibility of non-state actors themselves for acts of torture.

There was some debate during the drafting of the UN Convention against Torture as to whether the definition of torture should apply equally to non-state actors. Ultimately the view that torture is characterised by its official nature and direct link with the state and state responsibility prevailed.¹⁷ This has found expression in Article 1 of the Convention against Torture, which is more specific than other human rights treaties, which commonly simply prohibit torture in general terms, e.g. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Human rights bodies generally recognise that acts by non-state actors may qualify as torture where there is a degree of state involvement. Beyond this, they have applied the definition of torture directly to non-state actors in the context of states’ obligation not to send persons to third countries where they are at risk of torture (principle of non-refoulement). The UN Committee against Torture has recognised that the definition of torture may apply to *de facto* regimes in certain circumstances, such as in Somalia during the mid-1990s where “those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments.”¹⁸ Conversely, it found that the definition of torture does not apply to other entities that do not meet this threshold, for example, in a case concerning fear of torture at the hands of the Shining Path in Peru even though the group was in control of parts of the country for much of the 1990s.¹⁹ The European Court of Human Rights (ECHR) has equally held that non-state actors can commit torture in the context of states’ obligation of non-refoulement.²⁰

In their jurisprudence, international human rights bodies have not explicitly addressed the question whether states’ obligation to prosecute acts of torture committed in third countries (or to extradite the alleged perpetrator to stand trial (*aut dedere aut judicare*))²¹ also applies to torture committed by non-state actors. The duty of states to extradite or prosecute suspected perpetrators of torture extends at least to *de facto* officials as the Committee against Torture has found that torture committed by such

¹⁷ The delegations of Spain and Panama advocated for a broad definition of torture that includes acts by non-state actors. They argued amongst other things that the applicability of international human rights to non-state actors was recognised in such instruments as the Convention against Racial Discrimination. The definition of torture should not be limited if the purpose was to eradicate any violations of physical and psychological integrity of the individual. Germany’s delegation argued that the term “public official” should be understood to apply to person who exercise authority over others and whose authority is comparable to government authority, an interpretation apparently followed by the Committee against Torture in its recent practice. The U.S. delegation was adamantly opposed to extending the applicability of the definition of torture to any acts other than official government conduct as it viewed the official nature of torture as its defining feature, Boulesbaa, *The UN Convention and the Prospects for Enforcement*, pp.23 et seq.

¹⁸ The Committee against Torture held that de-facto regimes can qualify as official entities within the meaning of Article 1 of the Convention: “The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase ‘public officials or other persons acting in an official capacity’ contained in article 1.” *Elmi v. Australia*.

¹⁹ The Committee against Torture found that “the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.” *G.R.B. v. Sweden*, para.6.5. In a subsequent decision that concerned deportation to Somalia, the Committee against Torture emphasised that it is only “in the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1...”, finding that the establishment of the Transitional National Government in Somalia meant that fear of torture at the hands of Somalia factions not belonging to the Government does not fall within the scope of Article 3 of the Convention. *H.M.H.I. v. Australia*, para.6.4.

²⁰ See ECHR, *Ahmed v Austria* and *HLR v France*.

²¹ See in particular Articles 5-8 UN Convention against Torture.

officials falls within the meaning of Article I of the UN Convention against Torture.²² In a recent judgment in line with this interpretation, the UK Central Criminal Court held in *R v. Zardad* that the definition of torture (as defined in UK criminal law, largely incorporating the definition of Article I of the Convention against Torture) applies to members of *de facto* regimes acting in a quasi-official capacity, here *Zardad* who belonged to the *Hezb-I-Islami* faction controlling parts of Afghanistan from 1992 to 1996.²³

While persons “acting in an official capacity” need not be state officials, the Committee against Torture has defined this category rather narrowly in its jurisprudence on refoulement. The conduct of many armed groups is therefore bound to fall outside of the scope of Article I as currently understood, with the possible exception of those that have established a high degree of *de facto* control. However, where non-state actors are held to fall outside of the scope of the obligation to extradite or prosecute, there are no rules of international law that prohibit states from enacting legislation and exercising jurisdiction that allows the extradition or prosecution of such perpetrators of “torture” for other international crimes, in particular war crimes and crimes against humanity, and/or ordinary crimes such as assault or murder.²⁴

International humanitarian law and international criminal law

International humanitarian law governs the conduct of the parties in armed conflict, a category of persons not defined by their official status but by their nature and participation in armed conflict.²⁵ International criminal law concerns the individual criminal responsibility for international crimes, including genocide, crimes against humanity and war crimes.

Article 3 common to the four Geneva Conventions enshrines the prohibition of torture during armed conflicts:²⁶

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To the end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ... (c) outrages upon personal dignity, in particular, humiliating and degrading treatment.”

²² *Elmi v. Australia*, supra.

²³ See *R v. Zardad* (Judgment of 18 July 2005).

²⁴ ICTY, *The Prosecutor v. Furundzija*, paras.155 and 156.

²⁵ See on the definition of an armed conflict, ICTY, *Prosecutor v. Tadic*, para.70: “... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”

²⁶ Acts of torture committed in an international armed conflict constitute grave breaches that states parties are obliged to penalise and prosecute, see Articles 50, 51, 130 and 147 of the four Geneva Conventions respectively.

Article 3, which is recognised as a rule of customary international law, applies to and directly binds state and those non-state actors that are parties to a conflict, in particular armed groups. Article 75 (2) (a) (ii) of Additional Protocol I to the Geneva Conventions and Article 4 (2) (a) of Additional Protocol II to the Geneva Conventions also expressly prohibit torture and apply to the parties to international and non-international armed conflicts respectively, including non-state actors as specified in the respective protocols.

International criminal tribunals have recently clarified the definition of torture that applies in armed conflicts when determining criminal responsibility for torture as a war crime or crime against humanity. Common article 3 applying to parties to a conflict contains no explicit requirement for an act of torture to be inflicted by or with the acquiescence of an official. The International Criminal Tribunal for the former Yugoslavia (ICTY) initially read this requirement into the definition of torture under international humanitarian law, using the definition of article 1 of the UN Convention against Torture as a yardstick.²⁷ In the *Furundžija* case, the ICTY found Furundžija, who belonged to the armed forces of the Croatian Community of Herceg-Bosna, responsible for torture committed in 1993 in the form of beatings and sexual violence, including rape, and guilty of crimes against humanity and war crimes. In so doing, the Court held that “at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a state or any other authority-wielding entity.”²⁸

The ICTY changed its jurisprudence in the case of *Prosecutor v. Kunarac et al.* Kunarac, Kovac and Vukovic belonged to the Bosnian Serb army that ran camps in the Foca region and conducted a campaign against the local civilian Bosnian Muslim population. The Court found all three responsible for acts of torture, enslavement and rape, and guilty of crimes against humanity and war crimes. In its reasoning, the Court distinguished between the definition of torture applied in the context of international humanitarian law and international human rights law, holding 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.”²⁹ 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.”³⁰ The Appeals Chamber affirmed this reasoning and noted that “the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”³¹ The jurisprudence of the International Criminal Tribunal for Rwanda (ICTR)³² and the provisions of the Rome Statute of the ICC³³ largely reflect the jurisprudence of the ICTY. This development has provided a clarification by distinguishing violations amounting to torture under international humanitarian law and international criminal law from those under international human rights law.³⁴

A question that is in practice often closely related to the one of official status is whether acts of severe violence committed by non-state actors need to have a particular purpose in order to qualify as torture. International tribunals have found that the purposive element is integral to the definition of torture

²⁷ *The Prosecutor v. Delalic*, para.459.

²⁸ *The Prosecutor v. Furundzija*, para.162.

²⁹ *The Prosecutor v. Kunarac et al.*, para.495.

³⁰ *Ibid.*, at para. 496.

³¹ *The Prosecutor v. Kunarac et al.*, Appeals Judgment, para.148, affirmed in *Prosecutor v. Limaj et al.*, para.240 “the issue is now settled by the Appeals Chamber.”

³² *The Prosecutor v. Laurent Semanza*, paras.342-343, changing its earlier jurisprudence in the *Akayesu* case where it had defined torture in line with Article 1 UNCAT.

³³ See Articles 7 (1) (f) (Crimes against Humanity) and 8 (2) (c) (i) and (ii) (War Crime) of the ICC Rome Statute.

³⁴ See on the jurisprudence of the ICTY and the ICTR, Lord, *Liability of Non-state Actors for Torture*, pp.112 et seq.

under international humanitarian law.³⁵ For torture to constitute a war crime, severe pain or suffering needs to be inflicted for a purpose (where the purposive element is absent, acts of severe violence, such as mutilations or rape, may constitute separate violations of international humanitarian law (in particular common Article 3) and war crimes). Moreover, in a significant development, the definition of torture as a crime against humanity under the ICC Rome Statute does away with the purposive requirement, thus broadening the scope of its applicability where the other elements of the crime are present.³⁶

Summary

- The prohibition of torture can and does apply to *de facto* regimes and armed groups under international humanitarian law where these groups are parties to the conflict, irrespective of their relationship to any government. The definition of torture applicable to the parties bound by international humanitarian law differs from Article 1 of the Convention against Torture. In particular, there is no need for any official involvement for an act to qualify as torture. While severe pain or suffering needs to be inflicted for a particular purpose in order to constitute torture under international humanitarian law and a war crime, the purpose element is absent from the definition of torture as a crime against humanity in the ICC Rome Statute.
- The definition of torture under international human rights law is recognised to apply to those acting in an official capacity, particularly *de facto* regimes, in particular in respect of states' obligation:
 - (i) not to send persons back to countries where they are at risk of torture (non-refoulement) and
 - (ii) to criminalise and prosecute acts of torture irrespective of the nationality of the perpetrator and the victim and the place where the torture was committed (or to extradite the alleged perpetrator where the torture has occurred in a third country).

Human rights bodies have commonly not applied the definition of torture to acts committed by armed groups although regional human rights courts have considered applicability in non-refoulement cases.

- Relevant sources and jurisprudence recognise that non-state actors can commit torture as defined in international law. However, this does not apply to all kinds of non-state actors. It is only fully recognised in respect of: (1) *actors having a special status*, i.e. those acting: (i) in an “official capacity” in international human rights law, and/or (ii) as parties to an armed conflict in the course of the latter in international humanitarian law, and (2) *acts requiring an organisational policy*, such as torture committed as part of a “widespread or systematic attack against any civilian population” in order to constitute a crime against humanity under international criminal law.

2. Prevalence and purpose of torture committed by *de facto* regimes and armed groups

Available sources point to a practice of torture by non-state actors that is often widespread if not systematic. The practice varies considerably depending on the type of non-state actor concerned and the particulars of the conflict and/or the circumstances in which torture is used.

³⁵ ICRC, *Customary International Humanitarian Law*, Volume I, pp.317, 318.

³⁶ Article 7 (2) (e) of the ICC Rome Statute.

De facto regimes

Many *de facto* regimes use torture, often systematically in camps and detention centres. Torture is also used as a means of war and in pursuance of a policy of “ethnic cleansing”, such as by the Serb militia groups in the Republika Srpska during the war in Bosnia and Herzegovina. In the case of *Mehinovic et al. v. Vukovic*,³⁷ the U.S. District Court found that the defendant, Vukovic, a member of the Bosnian Serb forces, had committed various acts of torture (the following are excerpts from the judgment):

“24. That evening, defendant Vukovic entered the interrogation room. Mehinovic was lying on the floor as a result of the previous beatings. Vukovic kicked him on the left side of his face, disfiguring Mehinovic's face and causing him to be unable to eat for 10 days. Vukovic also kicked him in the genitals and other parts of his body. As he carried out these beatings, Vukovic used a derogatory term about Muslims and made remarks that Muslims were an “invented nation” and that they “don't need to exist.” At one point, Vukovic forced Mehinovic to lick his own blood from the walls while Vukovic and others stood laughing. That night Mehinovic was in constant fear that he Vukovic would kill him. 25. Mehinovic was kept in the police interrogation room for several days. Vukovic came to the interrogation room daily and specifically sought out Mehinovic for beatings. Particularly painful were beatings that Vukovic inflicted on areas of Mehinovic's body that were already injured from previous beatings. 26. During another interrogation session, Vukovic watched while police chief Todorovic tortured Mehinovic by dislocating Mehinovic's finger. Todorovic forced Mehinovic to place his hand on a table, palm up, and then hit Mehinovic's hand with the butt of a rifle, dislocating his finger. Mehinovic nearly lost consciousness from the pain. Vukovic stood laughing in the room with other guards while this was happening. Mehinovic's hand was swollen for two to three months following the incident. 47. On one evening, Vukovic along with a group of 10-15 soldiers came to the school and beat many of the detainees and forcibly extracted their teeth with pliers. Bicic was among the many victims of this incident. The soldiers dragged Bicic into a locker room in the gymnasium, forced him to the ground with his hands behind his back, stuck wooden instruments or objects into his mouth to keep his jaw open, and extracted several teeth with pliers. 48. Bicic suffered eight broken ribs during his detention, a broken nose and finger, and numerous scars on the head and elsewhere. He suffered internal injuries as well and urinated blood for over a month at one point. Each of these beatings caused Bicic to suffer immense pain that lasted for days. While detained, Bicic lost well over half of his body weight.”

Such regimes also use torture to impose an ideological regime and exercise political control, such as was done by several warlords and the Taliban regime in Afghanistan in the 1990s. The systematic use of torture by these factions has been well documented and was the subject of criminal prosecutions in the UK in the case of *R. v. Zardad*, who was convicted of a series of acts of torture committed under his command.³⁸ The Afghanistan Independent Human Rights Commission is currently compiling testimonies and information in order to establish a comprehensive account of torture committed throughout the conflict.³⁹

De facto regimes, such as Transdniestra in Moldova with support of the Russian Federation, have also been responsible for politically motivated torture, including savage beatings, mock executions and food

³⁷ *Kemal Mehinovic, et al. v. Nikola Vukovic, aka/la Nikola Nikolac.*

³⁸ See in particular Human Rights Watch, *Blood-Stained Hands, Past Atrocities in Kabul and Afghanistan's Legacy of Impunity*, Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes Against Humanity: 1978-2001*, and *R. v. Zardad* (18 July 2005).

³⁹ See for the website of the AIHRC, <http://www.aihrc.org.af>.

TORTURE BY NON-STATE ACTORS

deprivation, targeting individuals accused of “anti-Soviet activities and illegally combating the legitimate government of the State of Transdniestria.”⁴⁰

In other *de facto* regimes, such as the Palestinian National Authority, the security agencies are largely responsible for torture used in the course of security operations and as a means to extract confessions.⁴¹ The Palestinian Independent Commission for Citizens’ Rights (PICCR) “received 116 complaints in 2004, from citizens who reported that they were subjected to ill treatment during their detention by the Palestinian security agents.” The PICCR’s annual report details several cases of torture in the form of severe beatings but the PICCR concluded that “it does not believe that there is a systematic policy by the Palestinian security agencies” to use torture.⁴²

Armed groups

K is a 34-year-old Sri Lankan Tamil who worked as an assistant to a local Liberation Tiger of Tamil Eelam (LTTE) leader in the north of the country. In 1999, LTTE soldiers arrested K and accused him of secretly working for the Sri Lankan Government. He was taken to a building used by the LTTE as a prison. K was kept in a very small, dark cell where he was unable to stretch out or to lie down. He was held on his own and naked in this cell for nine months, and received poor food once a day.

K was regularly taken out of his cell by his guards and taken to another room in the prison where he was interrogated about his alleged crime of being a government informant. During interrogations, he was frequently subjected to *falaqa* (beating on the soles) and electrocution on various parts of his body. On several occasions his abusers put a plastic bag over his head so that he could not breathe, and on other occasions he was submerged, head first, in cold water, where he was held for periods unable to breathe. He was also burned with cigarettes, and heard the screams of other prisoners being abused and executed.

He was finally able to escape from the prison when he managed to befriend one of his guards. He has apparently not sought any legal action and has since left the country.

Armed groups have committed numerous acts of torture mainly in the course of what are commonly internal armed conflicts (though foreign governments often provide various forms of support to such groups). Internal armed conflicts, in which state forces fight rebel forces and/or where non-state actors fight each other, make up 95% of all conflicts worldwide.⁴³ The torture practices of armed groups vary considerably depending on their objectives, structure and *modus operandi*. Groups with clearly defined political objectives, a clear command structure and internal cohesion, and at times even controlling parts of the territory of a country, commonly commit torture as part of a general policy (though isolated acts of torture may also occur). This includes the operation of camps or other special detention facilities (see e.g. the case from Sri Lanka above). Examples of armed groups falling within this broad category include the *Rassemblement congolais pour la démocratie* (RCD-Goma) and the *Rassemblement congolais pour la démocratie - Mouvement de libération* (RCD-ML) in the DRC, the Mojahedin e Khalq in Iran, the Maoists in Nepal (Communist Party in Nepal-CPN(M)), the Shining Path in Peru, the Communist Party of the

⁴⁰ See ECHR, *Ilascu and Others v Moldova and Russia*, paras.188 et seq.

⁴¹ See Palestinian Independent Commission for Citizens’ Rights, *Annual Report*, 2004, pp.127 et seq., available at www.piccr.org.

⁴² *Ibid.*, p. 129.

⁴³ See Human Security Centre, *Human Security Report*, p.23.

Philippines-New People's Army (CPP-NPA), the LTTE in Sri Lanka, and the Kurdish Workers' Party (PKK) in Turkey.⁴⁴

Such groups use torture mainly as a political weapon to maintain and enforce control both over the members of the group and the local population. To this end, torture is used as a means to coerce information about government operations, rival groups, informants, suspected defectors, rival groups and critics. Torture is also employed as a form of punishment, in particular against (alleged) informants and dissidents.⁴⁵ Several groups use torture as an instrument to intimidate the local population into submission, usually where the local population in the areas dominated by the armed group is potentially hostile to it. The Revolutionary United Front (RUF) in Sierra Leone, for example, cut off limbs of their victims as punishment and deterrence for taking part in elections or for opposing the RUF.⁴⁶ The Shining Path in Peru also used highly visible and particularly cruel forms of torture, such as mutilations, slashing, crucifixion and forcing the civilian population to witness the torture and public executions of others.⁴⁷ Groups such as the FIS in Algeria and those forming part of the insurgency in Iraq have used torture, be it as part of massacres or of those abducted and killed, as an integral element of their campaigns of using "terror" for political ends.⁴⁸

In the operation of a number of armed groups, many of which have no clear command structure or visible internal cohesion, political and criminal objectives become increasingly blurred.⁴⁹ Examples are the RUF in Sierra Leone, various armed groups in the DRC, Afghan warlords and, to a varying degree, the Colombian warring factions.⁵⁰ These groups often employ various torture practices as a means to maintain control over the people in an area and to sustain the war effort and concomitant 'way of life' of the group members. The practice of such groups is often dominated by violence as a means of punishment, coercion, sexual violence and the singling out of specific groups, particularly where conflicts have an ethnic dimension. Criminal acts of violence committed by members of these groups may not constitute torture, as defined in international human rights and humanitarian law, where they lack the requisite purpose element. However, such acts can and commonly do constitute prohibited ill-treatment, ordinary crimes as well as possibly war crimes and/or crimes against humanity.

⁴⁴ Amnesty International has documented violations by armed groups in the DRC, see *Democratic Republic of Congo: Torture: a weapon of war against unarmed civilians*. There have been repeated reports about torture by the Maoists, see for example Human Rights Watch, *Nepal: Maoist Rebel Abuses Continue*, and Report of the Special Rapporteur on Torture, *Mission to Nepal*, 2006, para.19. The Peruvian Truth and Reconciliation Commission found that the Shining Path had pursued a policy of torture, Final Report, General Conclusions, 14. PATH, a Philippines human rights group, has documented a series of torture cases at the hands of the CPP-NPA during the anti-infiltration campaign from 1987-1989, for a range of materials see <http://path.intercreate.net/>. The LTTE reportedly uses torture systematically in torture cells located in the Vanni Region in the Northern Province and in the Trincomalee, Batticaloa and Amparai districts in the eastern province, areas under the control of the LTTE that are not subject to independent monitoring. See *Tamil dissidents held incommunicado in LTTE torture cells*, Asian Tribune, 9 September 2005. See for reports about torture by the PKK in Turkey, e.g. Amnesty International, *Annual Report 1996*, p.303 and Turkey, *No Security without Human Rights*, Chapter 3.

⁴⁵ Groups such as the CPP-NPA in the Philippines, the LTTE in Sri Lanka and the Maoists in Nepal have reportedly used torture as a weapon against suspected 'spies' and 'informants' (see previous footnote), as has the ANC in South Africa, see *Truth and Reconciliation Commission of South Africa, Report*, released on 21 March 2003, Volume Six, Section Five, Chapter 3, the RCD-Goma and RCD-ML in the Democratic Republic of Congo, see Amnesty International, *Democratic Republic of Congo: Torture: a weapon of war against unarmed civilians*, pp.25 et seq., as well as in Burundi by the Forces for the Defence of Democracy (FDD), in particular in the 1990s, see Human Rights Watch, *Proxy Targets, Civilians in the War in Burundi*, p.89 and UNCHR, *Second Report of the Special Rapporteur on the situation of human rights in Burundi*, 1997, para.11, and the FNL (National Liberation Forces), FACT, *La Torture au Burundi*, p.5.

⁴⁶ See *Witness to Truth*, Report of the Sierra Leone Truth & Reconciliation Commission, Volume 2, paras.150, 151.

⁴⁷ See *Final Report of the Peruvian Commission for Truth and Reconciliation*, pp.198, 199.

⁴⁸ See Human Rights Watch, *A Face and a Name, Civilian Victims of Insurgent Groups in Iraq*.

⁴⁹ See on this nexus Münkler, *The wars of the 21st century*, pp.7 et seq.

⁵⁰ See in particular *Witness to Truth*, Report of the Sierra Leone Truth & Reconciliation Commission, Volume 2; on violations by armed groups in the DRC the investigation by the ICC and the judgment of the ICJ, *DRC v. Uganda*; Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes Against Humanity: 1978-2001*, and Report of the High Commissioner for Human Rights on the situation of human rights in Colombia, 2005, in particular paras.104 et seq.

Groups with links to the state: Paramilitary groups, militias, vigilantes etc.

Wilson Duarte, a peasant farmer, was abducted on 28 March 2003 by paramilitaries operating in the municipality of Viotá in the department of Cundinamarca, Colombia. Viotá is known as a region where the guerrilla movement began and maintained a high level of presence until the beginning of 2003. The paramilitary group “Bloque Centauros” from Casanare began to infiltrate the town in mid 2003.

Duarte and his friends were taking a break in a small store located near the Formation Center of the Agricultural Federation Trade Union, of which Duarte was a member, when 30 heavily armed men who identified themselves as members of the paramilitary group of Casanare abducted him and five other farmers. Whereas the others were later released, Duarte was kept in custody of the paramilitaries. The paramilitaries appear to have targeted Duarte for belonging to the Agricultural Trade Union, wrongly accusing him of being a member of the guerrilla groups.

According to the account given by one of the peasants who had been abducted with Duarte, the paramilitaries hacked off one of Duarte’s arms. When Duarte did not provide the paramilitaries with information about the location of the guerrillas, the paramilitaries cut off his other arm and thereafter his legs. They finally beheaded him, cut open his stomach and put his head in it as deterrence. The findings of the subsequent autopsy of Duarte’s corpse were in line with this eyewitness account.

Community leaders of the region who had heard about the abduction informed Colonel González, commander of the Colombia Battalion in the region about the location of the paramilitary groups and its victims. They told him that the peasants were being kept in a farm called “Florencia” (8 km from Viotá). The Colonel informed them that he had sent his men to search for the group. However, the military apparently never arrived at the farm according to accounts by local people.

The general criminal authorities are investigating the case. The investigation is still in its preliminary stages and no persons have been arrested in early 2006.

Paramilitary groups and militias, such as the Janjaweed in Sudan, the United Self-Defence Forces in Colombia (AUC), the Civilian Self-Defence Patrols in Guatemala and Civil Defence Units in El Salvador during the 1980s have all used torture as a means of combating rebels, opponents and others hostile to existing power relations, in particular through terrorising local populations.⁵¹ Militias and vigilante groups, either exercising policing or security functions or operating as politicised forces for political parties outside of formal government structures, have also committed numerous acts of torture. An example is the Youth Militias, known as the Green Bombers, that originated from the National Youth Service set up by the Government of Zimbabwe in 2000 and has reportedly been responsible for a series of acts of torture, rape and murder of political opponents and others.⁵²

The main difference between various paramilitary groups lies in their relationship to the state and degree of independence from governments. Governments use paramilitary and other groups either as proxy armies or local forces in the course of conflict, as part of counter-insurgency campaigns, to repress political opponents and to combat crime. This is mainly in order to enhance flexibility in operations by bypassing formal channels, to evade accountability and to instil terror:

“It was about vandalism. We used to do the things the State does not want to do themselves [sic]. Then they can just say it was just the youth, not us...We

⁵¹ See on the civil defence units in El Salvador and Guatemala the respective reports of the Truth and Reconciliation Commissions of El Salvador, *From Madness to Hope*, 1993, and Guatemala, *Memoria del Silencio*, Volume 3, 1999 and on Colombia the reports by the UN High Commissioner for Human Rights, 2004, p.19, para.55 and p.49, para.23 and 2005, paras.112 et seq.

⁵² See The Solidarity Peace Trust, *An overview of youth militia training and activities in Zimbabwe*, at http://www.zim-movement.org/docs/SPT_hm_0903.htm.

are Zanu-PF's [the ruling party] 'B' team. The army is the 'A' team and we do the things the government does not want the 'A' team to do"- -

comment by a member of Zimbabwe's youth militia about their activities.⁵³

Governmental support to paramilitary and other groups takes a variety of forms, ranging from financial and logistical support and arming, to more direct means, such as specific training, instructions and joint operations. Colombia, for example, created paramilitary groups in the 1970s and, even though it later declared them illegal, continues to provide support to such groups according to the findings of the Inter-American Court of Human Rights and others.⁵⁴ In Guatemala, the Court found with regard to torture and other violations committed by a Guatemalan civil patrol in 1985, that "at the time the events in this case occurred, the civil patrols enjoyed an institutional relationship with the Army, performed activities in support of the armed forces' functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision."⁵⁵ Sudan supported and armed the Janjaweed (literally devils on horses) tribal militia in 2003 in response to an uprising by the Sudan Liberation Army in Darfur, and has since not only conducted joint operations but also apparently incorporated the Janjaweed into its regular forces.⁵⁶

Armed groups and paramilitary groups may receive support from their own governments and also from foreign ones- not only financial support but also training, often provided as part of political support. This may also form part of counter-insurgency strategies and include instruction in interrogation and torture techniques, along with the provision of manuals on operational methods to be used in armed conflict, for example for the Contras in Nicaragua,⁵⁷ which may result in the responsibility of the state concerned.

3. Methods of torture used by non-state actors

Available evidence⁵⁸ shows that *de facto* regimes, armed groups and paramilitary groups and others use a wide range of torture methods, at times apparently copying methods of torture that its members have suffered at the hands of state authorities. Methods of torture used are often particularly crude and have in several cases resulted in serious injuries and/or the death of victims. Beatings all over the body, commonly with sticks, bars or other weapons are the most common form of torture. Some of the other often reported forms of torture include:

- Crucifixion
- Amputations
- Mutilations
- Electroshocks
- Stabbings
- Slashing

⁵³ Ibid.

⁵⁴ *Case 19 Merchants v. Colombia*, paras.84 et seq.

⁵⁵ *Blake Case*, paras.76 and 78.

⁵⁶ See Letter dated 30 January 2006 from the Chairman of the Security Council Committee established pursuant to Resolution 1591 (2005) concerning the Sudan, paras.102 and 103.

⁵⁷ Such as the manual on "Psychological Operations" prepared by the CIA, which, while not expressly calling for the use of torture, contains a section on "Implicit and Explicit Terror" as a strategy to fight the Nicaraguan government, including directions to kidnap officials of the Sandinista government and "to neutralise carefully selected and planned targets, such as court judges, *mesta* judges, police and State Security officials, CDS chiefs etc." See ICJ judgment, *Military and Paramilitary Activities*, para.118.

⁵⁸ The torture methods mentioned in this section are based on the case studies and other sources referred to in this Report.

TORTURE BY NON-STATE ACTORS

- Flogging
- Pulling teeth out with pliers
- Cutting the skin and exposure to substances such as chilli powder
- Burns with cigarettes
- Scalding
- Contortions
- Palestinian hanging (victim is pulled up with his/her hands tied behind the back and is hanging from his/her arms causing severe pain and dislocation of arms)
- Submerging in water
- Asphyxiation
- Rape
- Sexual violence to genitals
- Sleep deprivation
- Food deprivation
- Prolonged exposure to sun
- Mock executions
- Forcing persons to witness the torture of others
- Forced to torture or kill others
- Prolonged solitary confinement.

Forms of torture in Specific Contexts

Rape and sexual violence

M is a young woman from northern Uganda. In 2002, when she was 16-years old, the Lords Resistance Army (LRA) that has been fighting an internal war against the Government of Uganda since 1986, ambushed a minibus M was travelling in. The men who were on the bus with her were lead into the bush by a group of armed rebels. She did not see them again. M, together with two other women from the minibus, was abducted and taken back to the rebels' camp, where she was held for nearly two years before escaping.

While she was in the camp she was forced to work for the armed group: collecting firewood, water, and doing the cooking and cleaning. M, along with the other women and girls held in the camp, was regularly beaten. During the night groups of soldiers came to the hut which she shared with other women and girls and raped her and others. She was subjected to anal rape and forced to perform oral sex on soldiers. Those who were held by the rebels were often forced to fight or to punish others, and M was made to whip people when the rebels told her to. One day she was threatened with death if she did not kill another young woman, and so she stabbed the girl to death. While she was held by the LRA, M was also forced to dispose of the bodies of those who had died or been killed in the camp.

She was finally able to escape one day when she was in the forest collecting wood with another group of women. She has since left the country, not having taken any legal action, and was receiving medical treatment at the time of writing.

Large-scale sexual violence is a recurring feature of many conflicts, committed by all sides. Rape and other forms of sexual violence, which may amount to torture and constitute violations of international humanitarian law as well as international crimes, in particular war crimes and crimes against humanity, are often used as a weapon of war. Groups operating in Bosnia-Herzegovina during the war, armed groups in Burundi and Eastern DRC and the Janjaweed in Darfur, Sudan, for example, have all employed rape as a strategic weapon to instil terror and to change the ethnic composition in the areas concerned. According to the International Commission of Inquiry Report on Darfur:

“Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called ‘slaves’ or ‘Tora Bora.’”⁵⁹

In several countries, armed groups hold women as virtual sex slaves, such as during the conflict in the former Yugoslavia,⁶⁰ the Janjaweed in Sudan,⁶¹ the LRA in Uganda and warlords in Afghanistan during the 1990s.⁶² It is often difficult to distinguish whether groups use sexual violence as torture, that is, as a means of punishment or coercion and intimidation or for reasons of discrimination, or purely for sexual gratification (which, while it may not amount to torture because of the lack of the requisite purpose element, constitutes a violation of international humanitarian law and may qualify nonetheless as a war crime and/or crime against humanity). This is especially the case where conflicts lead to lawlessness and members of armed groups and individuals use the situation to target women. Such appears, for example, to be the case in Afghanistan, Burundi, and the DRC.⁶³

⁵⁹ See *Report of the International Commission of Inquiry on Darfur*, 2005, para.333.

⁶⁰ See *The Prosecutor v. Kunarac*.

⁶¹ *Report of the International Commission of Inquiry on Darfur*, 2005, para.334 “...women and girls were abducted, held in confinement for several days and repeatedly raped during that time.”

⁶² See reports by Human Rights Watch, *Blood-Stained Hands, Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity*, Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes Against Humanity: 1978-2001* and the UK case of *R. v. Zardad* (18 July 2005).

⁶³ See *Report on the human rights situation in Burundi submitted by the Special Rapporteur*, 2004, paras.38 et seq. and *Report submitted by the independent expert on the situation of human rights in the Democratic Republic of the Congo*, 2005, paras.64 et seq.

Torture involving child soldiers

D is a 19-year-old from the DRC and a member of the Banyamulenge tribe. He lived with his family in South Kivu, close to the Congo/Rwanda/Burundi border.

In the summer of 2003, when he was 17-years-old, four members of the Mai Mai militia came to his village to try to recruit young men to fight for them. D tried to resist, but the men were armed and, together with other young men from the village, forcibly took him away from his home to a camp. While he was at the camp militia members tried to make him undergo military training. When he initially refused, he was beaten, kicked and stamped on. One soldier stabbed him in his left leg with the bayonet of his rifle, while another stabbed him in his left arm with a knife. His stab wounds were treated by a traditional healer.

After spending a week at the camp, during which time D had agreed to fight for the militia, he and the rest of the young men from the village were sent home to their families with a sum of money for their parents. The money was by way of compensation for the future absence of their sons. They were told that they would be collected by the militia again in a weeks time, and D took the opportunity then to escape.

D has scars from the stabbings and beatings he suffered. He has since left the country.

Many armed groups recruit child soldiers contrary to international standards.⁶⁴ This is not only to bolster their numerical strength but also because armed groups often see children as more compliant and use them for a number of purposes, particularly combat in the case of boys and sexual gratification in the case of girls.⁶⁵ Child recruitment itself is now considered an international crime.⁶⁶ In addition, recruited children are frequently subjected to several forms of violence and forced to commit acts of violence, many of which constitute torture or ill-treatment. Both the RUF in Sierra Leone and the LRA in Uganda, for example, have coerced children to harm or to kill others, either members of the group who have fallen foul of the leadership or civilians during attacks.⁶⁷ Commonly, the groups threaten the coerced children that they will be harmed or killed themselves if they disobey.

Torture in the context of kidnappings and extortions

A number of armed groups resort to extortions to fund their operations and enrich themselves, either through “gun-point” methods or kidnappings, both of which have entailed torture. Kidnappings, which in themselves constitute violations of international law,⁶⁸ are a common feature in several conflicts, notably

⁶⁴ The recruitment of children is prohibited under Article 38 of the Convention on the Rights of the Child; Article 77(2) of Additional Protocol I of 1977 to the four Geneva Conventions of 1949; Article 4(3)(c) of Additional Protocol II of 1977 to the four Geneva Conventions; Article 22(2) of the African Charter on the Rights and Welfare of the Child, 1990, and The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000. The latter two define children as persons under the age of 18 whereas the former set the minimum age at 15.

⁶⁵ *Report of the Secretary-General on children and armed conflict*, 2003, para.32: “The incidence of the abduction of boys and girls has significantly increased in recent years. Parties to conflict have used this practice in systematic campaigns of violence against civilian populations in such countries as Angola [UNITA], Nepal [CPN-Maoist], Sierra Leone [RUF and AFRC], the Sudan [muraheleen militia, SPLM/A; SPDF] and Uganda [LRA].”

⁶⁶ Article 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the ICC Rome Statute makes it a war crime to conscript or enlist children under the age of fifteen years into national armed forces or armed groups, or using them to participate actively in hostilities. Almost all of the arrest warrants issued by the ICC to date include the war crime of conscription and enlistment of children under the age of fifteen years.

⁶⁷ See on the RUF, *Witness to Truth*, Report of the Sierra Leone TRC, Volume 3 B, Chapter 4: Children and the Armed Conflict, and case history on Uganda, *supra*.

⁶⁸ Where “organized groups or private individuals act on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government”, kidnappings may violate the prohibition of involuntary or enforced disappearances, which may in itself amount to torture. In

in Colombia, Kashmir, Lebanon, Nepal, and lately Iraq.⁶⁹ They are frequently used to extort money. In Afghanistan, for example, warlords ran checkpoints where they stopped civilians and routinely extorted money, detaining and torturing them when the individuals or their family members failed to pay directly.⁷⁰ Armed groups also kidnap individuals and groups of persons to send a political message, including threatening to kill or murder human rights defenders, journalists, alleged collaborators, “spies” or “foreigners.”⁷¹ Kidnapped persons are often held in inhuman conditions and subjected to various forms of torture. Several U.S. courts, for example, have held that kidnappings committed in Lebanon in the 1980s, including conditions of detention and the treatment of the kidnapped persons, constituted torture.⁷² In the case of *Cicippio*, all three captives suffered various forms of torture at the hands of Hizbollah:

“Frank Reed was abducted in Beirut while on his way to meet his wife for lunch on September 9, 1986. He was held at gunpoint, then thrown into the back of a car and taken to a hideout where he was beaten for several days as a suspected C.I.A. agent. Reed, too, was subjected daily to torture and threats of death. He was kept in solitary confinement for two years, blindfolded and chained to the wall or floor. He contracted persistent eye infections from the blindfold, and scars remain on his wrist to this day from the manacles. For part of his captivity, Reed was held in a six foot-by-six foot room with only rodents for company. During the entire 44 months of his captivity, Reed says, he was never permitted to stand erect; he was constantly shackled in a stooped position.

Because Reed attempted to escape on two occasions, his captors considered him a hard case and punished him accordingly. They tightened his chains to deter future escape attempts. After one escape attempt, electric shocks were administered to his hands and he was forced to kneel on spikes. His captors battered his feet with iron bars. To this day, Reed says, he has no sensation in his feet. He can stand or walk only for short periods. Following his second escape attempt, his guards struck him in the kidneys with a rifle, and for days afterwards his urine was bloody. One guard struck him multiple times on each side of his head with a hand grenade, permanently damaging his hearing. His captors broke Reed’s jaw and nose, turned him upside down and beat the soles of his feet with a belt. On another occasion he was kicked in the ribs so forcefully that the bones pierced his skin. One of Reed’s captors placed boiling tea kettles on his shoulders, the scars of which remain today.”⁷³

Cruel, inhuman or degrading forms of punishment

Several *de facto* regimes and armed groups have inflicted forms of cruel, inhuman or degrading punishment amounting to torture in violation of international human rights and humanitarian law

international humanitarian law, common Article 3 (1) (b) of the four Geneva Conventions of 1949, Article 75 (2) (c) of Additional Protocol I and Article 4 (2) (c) of Additional Protocol II prohibit the taking of hostages. Enforced disappearances constitute crimes against humanity pursuant to Article 7 (1) (i) of the ICC Rome Statute, and the taking of hostages a war crime pursuant to Article 8 (2) (a) (viii) and (2) (c) (iii).

⁶⁹ See on Colombia, in particular kidnappings by Farc (Revolutionary Armed Forces of Colombia), Report of the High Commissioner for Human Rights on the situation of human rights in Colombia, 2005, paras.104 et seq.; on Kashmir, Human Rights Watch, *Behind the Kashmir Conflict*; Amnesty International, Nepal, *Escalating “disappearances” amid a culture of impunity*, and Iraq, *In Cold Blood: Abuses by armed gangs*. See on Lebanon the cases relating to hostage taking by Hezbollah decided by US courts, *infra* at III. 2.3. (iii).

⁷⁰ See *R. v. Zardad* (unreported, 18 July 2005).

⁷¹ In particular in Iraq, see Amnesty International, *Iraq, In Cold Blood: Abuses by armed gangs*, pp.91 et seq.

⁷² See *infra* at III. 2.3. (iii).

⁷³ *Cicippio, et al., v. Islamic Republic of Iran*.

standards.⁷⁴ This encompasses mutilations used both to punish and intimidate the local population. Examples are the chopping off of limbs that was widely practised by the RUF in Sierra Leone,⁷⁵ used by the UNITA in Angola⁷⁶ and is alleged to have been used by the Maoists in Nepal.⁷⁷ It also includes corporal punishments and executions, at times using particularly cruel methods, such as stoning and amputations, as well as floggings as cruel, inhuman or degrading forms of punishment. These punishments are often administered after summary trials and in the presence of the local population, at times forced to attend. *De facto* regimes, such as the Taliban in Afghanistan, have inflicted such cruel, inhuman and degrading punishments on those violating their legal system, as have armed groups like the Shining Path in Peru on their “enemies”.⁷⁸

4. Victims of torture by non-state actors

Victims of torture by non-state actors do not belong to a unique group. Persons belonging to minorities or tribes or living in rural areas have borne the brunt of the torture, though other groups have also been victimised. In many cases, the very people for whom the armed group claims to fight, or which a *de facto* regime claims to represent, become the main target.

The profile of victims varies depending on the nature of the *de facto* regime and the type of conflict. Where armed groups seek support of local populations, victims are usually those directly opposed to or critical of the group. These include ideological/ethnic and internal rivals and/or state authorities. Where war becomes self-serving or based on oppression of local populations/certain ethnic groups, it is the latter that are the main targets of violations amounting to torture. Such a situation is also often characterised by widespread sexual violence and violence against children, including torture. As noted by the UN Secretary-General, the “*changing nature of conflict has a profound impact on respect for civilian status and the safety and well-being of civilian populations...*” as “*armed groups... tend to avoid major military engagement and instead target and spread fear among civilians...*”⁷⁹

Victims of torture by non-state actors frequently belong to the following categories (that may overlap to some degree):

- ‘The local population’ = In conflicts where the local population is hostile or seen to be hostile to their operations, armed groups use torture as a form of punishment. It also serves as a means of intimidation and coercion to suppress resistance or to procure goods and services. These are mainly conflicts where armed groups establish control over certain areas that are often but not necessarily defined by ethnicity. In these situations, members of the local population are exploited and tortured by armed groups to sustain the war effort or to impose their ideology. Examples are the practice of the Shining Path in Peru, the RUF in Sierra Leone, the LRA in Uganda, the Forces for the Defence of Democracy (FDD) in Burundi and warlords in Afghanistan.⁸⁰

⁷⁴ See in particular UN Human Rights Committee, *General Comment 20*, para.5.

⁷⁵ See *Witness to Truth*, Report of the Sierra Leone Truth & Reconciliation Commission, Volume 2, paras.150, 151.

⁷⁶ See Human Rights Watch, *Angola Unravels*.

⁷⁷ Report of the Special Rapporteur on Torture, *Mission to Nepal*, 2006, para.19.

⁷⁸ *Report on the situation of human rights in Afghanistan submitted by Mr. Kamal Hossain*, 2001, paras.36 et seq. and Final Report of Peru’s Truth and Reconciliation Commission, 2004, pp.198, 199.

⁷⁹ See Report of the Secretary General on the protection of civilians in armed conflict, 2005, para.3.

⁸⁰ See on the Shining Path and the RUF the reports by the Peruvian and Sierra Leone Truth and Reconciliation Commission respectively, on the LRA the warrant of arrest for Joseph Kony, 2005; on Burundi, UNCHR, *Second Report of the Special Rapporteur on the situation of human rights in Burundi*, 1997 and on Afghanistan, Afghanistan Justice Project, *Casting Shadows: War Crimes and Crimes Against Humanity: 1978-2001*.

- Ethnic groups = In conflicts fought along ethnic lines, members of ethnic groups have been frequently targeted by armed groups and subjected to torture as one of the forms of violence. Victims of such policies include various groups during the war in the former Yugoslavia, in particular Bosnian Muslims and Kosovar Albanians;⁸¹ members of ‘African’ tribes at the hands of the Janjaweed in Darfur, Sudan; both Hutus and Tutsis in the conflicts in Burundi and Rwanda; Lendu, Hema and others in the DRC; Shia’s and others at the hands of insurgents in Iraq;⁸² and Hindus by militants in Kashmir.⁸³
- ‘Enemies’ = ‘Enemies’ are all those who either oppose or are seen, by the *de facto* regime, paramilitaries or the armed group concerned, to undermine their position or policy. This category includes soldiers and law enforcement officials belonging to the *de jure* government, former members who have left and/or turned against the regime/group, rival groups within the ethnic community concerned, community leaders and human rights defenders, especially those that expose violations and are critical of the groups concerned.⁸⁴ Alleged collaborators of other conflict parties, in particular suspected informants, have also been tortured frequently by armed groups, for example by the Shining Path in Peru, Mohajedin e Khalq in Iran, the Maoists in Nepal and the CPP-NPA in the Philippines.⁸⁵ United Nations and humanitarian personnel have also been “attacked, taken hostage and killed”.⁸⁶ In Colombia, state officials, such as prosecutors and judges who inquired into the conduct of armed groups, have been targeted by armed paramilitaries.⁸⁷
- Women = Women have been specifically targeted by non-state actors, mainly during armed conflicts. Gender-specific violations take the form of rape, sexual slavery and other forms of sexual harassment (see above at II. 3).⁸⁸
- Children = Children have been frequently subjected to torture by non-state actors, in particular armed groups, often in the course of forced recruitments and in the form of sexual violence (see above at II. 3).⁸⁹

5. Impact on victims

Torture, whether committed by or with the acquiescence of state authorities or by non-state actors, often results in severe long-term physical and/or mental suffering.⁹⁰ Torture by *de facto* regimes, armed

⁸¹ See, for example on Kosovo, UNHCR/OSCE *Preliminary assessment of the situation of ethnic minorities in Kosovo* and the ICTY judgment in the case of *Prosecutor v. Limaj et al.*, Case IT-03-66.

⁸² See Amnesty International, *Iraq, In Cold Blood: Abuses by armed gangs*, on the targeting of Shia.

⁸³ Human Rights Watch, *Behind the Kashmir Conflict*.

⁸⁴ See for example Amnesty International, *Democratic Republic of Congo: Torture: a weapon of war against unarmed civilians*, pp.25; Report of the High Commissioner for Human Rights on the situation of human rights in Colombia, 2005, paras.104 et seq.

⁸⁵ See the Final Report of the Peruvian Truth and Reconciliation Commission, pp.193 et seq.; Human Rights Watch, *No Exit: Human Rights Abuses Inside the Mojahedin Khalq Camps*; Report of the Special Rapporteur on Torture, *Mission to Nepal*, 2006, para.19. and various documents available from the website of PATH, <http://path.intercreate.net/>.

⁸⁶ See *Report of the Secretary-General on the protection of civilians in armed conflict*, 2005, para.32.

⁸⁷ See Special Rapporteur on Human Rights Defenders, *Mission to Colombia*, 2002, paras.188 et seq.

⁸⁸ See UN Doc.S/2005/740, para.5.

⁸⁹ *Children and armed conflict*, Report of the Secretary-General, 2003, paras.24 et seq. UN Committee on the Right of the Child, Concluding observations, *Uganda*, 2005, paras.67 and 68 and DRC, 2001, paras.64 and 65.

TORTURE BY NON-STATE ACTORS

groups, paramilitaries and others frequently takes place in situations, such as armed conflicts or in failed states, where it is coupled with insecurity and other violations that are prone to aggravate the consequences for victims. Certain policies pursued by a number of such actors, such as rape as a weapon of war or visible punishment for alleged informants or dissidents produce a collective climate of terror and fear.⁹¹ They can also lead to the stigmatisation of those that are targeted by the groups in question. This applies in particular to victims of rape and child victims of torture, especially child soldiers who are often both perpetrators and victims of torture.⁹²

Survivors of torture in armed conflict or in failed states or *de facto* regimes usually have no or only very limited access to medical, psychological or social rehabilitation services. Instead, the conflict and the lack of facilities often aggravate the health condition of victims of torture, such as the spread of HIV/AIDS following mass rapes.⁹³ Torture survivors also often suffer additional war-related trauma, resulting from the loss of relatives, destruction of livelihood and internal displacement.⁹⁴

The prevailing lawlessness, and the fact that the perpetrators are still wielding power, frequently means that the survivor and his/her family live in fear of further violations that can continue with impunity. Even when they leave the conflict area, victims often become refugees or internally displaced persons in places where there is little understanding or support for the trauma experienced,⁹⁵ or yet further insecurity. In post-conflict societies, the need for reconstruction and pressures by society “to move on” and “to forgive and forget” can result in a feeling of abandonment and despair where the suffering is not acknowledged or is even resented as an unwelcome reminder of the past.

In conflict and post-conflict situations, there are commonly large numbers of victims of a series of violations and a need to resolve the immediate consequences of conflict, such as displacement and destruction of livelihood and infrastructure. While torture survivors share this collective need, they also have both individualised needs and collective goals of a different nature. The individual needs depend on the type of violation and physical and/or mental injury suffered, for example rape, mutilations and prolonged solitary confinement or torture in detention camps. These violations often require different forms of physical rehabilitation and psychological intervention. Collective goals also vary and are often specific to the conflict. Torture survivors as individuals and as a group within a community, commonly seek public acknowledgment of what happened, including the truth about the nature, extent and responsibility for violations, as well as accountability and reparation.⁹⁶ One illustration is the initiative of the Peace Advocates for Truth, Healing and Justice (PATH). PATH is a non-governmental organisation of torture survivors and families of those who were killed during the CPP-NPA purges in the Philippines in the 1980s. It is advocating for the establishment of a truth and justice commission to address these violations and for accountability of those responsible.⁹⁷

⁹⁰ Allden, *The psychological consequences of torture*, pp.117 et seq. and Skylv, *Physical sequela of torture*, pp.38 et seq.

⁹¹ See Weisaeth, *Psychiatric Problems in War*, pp.25 et seq.

⁹² See UN Doc. A/58, S/2003/1053, para.64.

⁹³ For example in Burundi, *Report on the human rights situation in Burundi submitted by the Special Rapporteur*, 2004, para.61, and in the DRC, *Report submitted by the independent expert on the situation of human rights in the Democratic Republic of the Congo*, 2005, para.70.

⁹⁴ See Tata Arcel et al., *Ethnic Cleansing and Post-Traumatic Coping-War Violence*, pp.45 et seq.

⁹⁵ Gorman, *Refugee survivors of torture: Trauma and treatment*, pp. 443 et seq.

⁹⁶ See REDRESS, *Torture Survivors' Perceptions*, though the focus of the preliminary inquiry was on state torture, the findings should apply in similar measures to those who have survived torture at the hands of non-state actors, as evidenced by recent surveys in this regard. See International Centre for Transitional Justice, *Uganda, Forgotten Voices*.

⁹⁷ See for further information the website of PATH at <http://path.intercreate.net/>.

Summary

- Prevalence: Torture is used by a considerable number of *de facto* regimes and armed groups, both those opposed to and working in collaboration with the state. While the torture practices differ considerably, there are numerous examples of entities that use torture as a method of political control and coercion, both to extract information and to punish, and, in particular in the case of *de facto* regimes, as a means of “law enforcement”. In several instances, members of armed groups have committed not only torture but also acts of severe violence for criminal ends.
- Methods: Both *de facto* regimes and armed groups use a wide range of torture methods, often resulting in the death of the victim. Rape and corporal punishment are specific forms of torture that are widely used, in particular by armed groups. Torture is often an integral part of the recruitment of child soldiers as well as extortions and kidnappings. Some *de facto* regimes and armed groups also inflict corporal punishments amounting to torture.
- Victims: Many people from various walks of life become victims of torture at the hand of non-state actors. They are often civilians in the case of armed conflict and are in several instances the very people on whose behalf armed groups claim to fight. The local population, ethnic groups, ‘enemies’, women and children are particularly vulnerable to torture by *de facto* regimes, armed groups, paramilitaries and others.
- Impact: Survivors of torture committed by armed groups and others often share many characteristics with other victims of war. However, it is important to recognise that those who suffered such torture not only experience particular and individual sufferings but also have specific goals and needs.

III. ENSURING RESPECT FOR THE PROHIBITION OF TORTURE IN RELATION TO NON-STATE ACTORS

I. Gaps in the legal framework applying to non-state actors

I.1. National law and practice

States have traditionally conceived of torture and other abuses committed by non-state actors as crimes to be dealt with through criminal sanctions. National laws often do not criminalise torture in line with international standards and consequently, in such cases perpetrators can only be prosecuted for ordinary crimes. In practice, however, states rarely hold non-state actors accountable for torture being either unwilling or unable to do so. There is often a lack of political will to do so where those responsible have close links with the state concerned, in particular individuals or armed groups, such as paramilitaries in Colombia.⁹⁸

In armed conflicts it is frequently difficult if not impossible for states to investigate torture by armed groups hostile to the government. Dysfunctional local institutions, lack of access as well as displacement and/or reluctance of victims to collaborate with state authorities, as for example in Afghanistan, contribute to these difficulties.⁹⁹

Where armed rebel groups or entities use acts of violence qualified as terrorism to challenge their authority, states frequently employ counter-insurgency strategies and outright war to combat these groups, instead of resorting to judicial processes. These strategies are themselves often characterised by serious violations of human rights and humanitarian law, for example in Peru, Sri Lanka and Turkey.¹⁰⁰

Only a few states institute criminal proceedings following the end of conflict. Even where a country is principally willing to hold non-state actors accountable for torture and other violations after the end of conflict, there are frequently a number of legal and practical obstacles.¹⁰¹

Victims of torture committed by non-state actors commonly have no effective remedies and obtain little if any reparation during conflicts. They have a greater prospect of obtaining some reparation after the end of conflict. While it is difficult to obtain favourable court rulings, several states have established truth and reconciliation commissions and/or reparation schemes. The remit of these bodies often includes non-state actors and several commissions have made important findings on the violations committed by such actors and recommended that victims be afforded reparation, for example in Peru, Sierra Leone and South Africa.¹⁰² However, mainly due to the lack of political will in what are often fragile circumstances, many states fail to set up mechanisms tasked with establishing the truth of past crimes by armed groups and others and providing reparation for victims.

De facto regimes and armed groups themselves also commonly fail to hold perpetrators of torture accountable and/or to provide reparation to victims.

⁹⁸ See in particular the cases of 19 Merchants and the Mapirian massacre before the Inter-American Court and International Crisis Group, *Colombia: Towards Peace and Justice?*

⁹⁹ See for a more detailed examination of national responses, *infra* at III. 2.1.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

The brief overview shows that traditional national responses are often inadequate. While there is a growing momentum of states in post-conflict situations advocating for steps to be taken with the aim of establishing the truth, accountability and providing forms of reparation, this momentum is far from uniform and initiatives are often inadequately implemented. Nevertheless, these mechanisms, usually put into place with international support, hold some promise for an improved state practice of dealing with the challenge of torture by non-state actors.

1.2. International legal framework and mechanisms applying directly to non-state actors

(i) International Human Rights Law

As a general rule, non-state actors are neither party to international human rights treaties nor do such treaties (or customary international law for that matter) stipulate obligations for them.¹⁰³ Individuals can only bring complaints of state violations before regional or international human rights bodies. At first sight, international human rights law offers neither direct protection against nor accountability of *de facto* regimes, armed groups and other similar entities.

The main reason for this lacuna is that international human rights law chiefly addresses the relationship between states and individuals subject to their jurisdiction and operates largely on the basis of state responsibility, unlike international humanitarian and international criminal law.¹⁰⁴ States are the main subjects of international law. They incur a primary “negative” duty to refrain from violating human rights, a “positive” duty to ensure respect for human rights, and, in case of breach, an obligation to provide reparation.¹⁰⁵ Non-state actors, in contrast, do not incur responsibility as an entity as a matter of general international law, with one exception: where they succeed in becoming a government or a new state.¹⁰⁶ This has in practice only happened in relatively few instances, for example the People’s Front for Democracy and Justice (PFDJ), the successor of the Eritrean People’s Liberation Front in Eritrea, the South West Africa People’s Organisation (SWAPO) in Namibia and the African National Congress (ANC) in South Africa. This form of responsibility is, in any case, based on factors extraneous to the nature of the violations committed.¹⁰⁷

Several human rights instruments emphasise the duty and responsibility of individuals and groups, and not only the state, to respect human rights.¹⁰⁸ However, this has not given rise to concrete obligations

¹⁰³ One notable exception is Article 4 (1) of the Optional Protocol to the Convention on the Right of the Child on the involvement of children in armed conflict, of 25 May 2000: “Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”

¹⁰⁴ See for two contrasting approaches Rodley, *Can Armed Opposition Groups Violate Human Rights?*, pp.299 et seq. according to whom human rights law can be applied to *de facto* regimes only and Clapham, *Human Rights Obligations of Non-State Actors*, pp.25 et seq. who argues that non-state actors should and can be bound by international human rights law.

¹⁰⁵ See the ILC Draft Articles on State Responsibility and Principles 1-3 of the 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.

¹⁰⁶ Article 10 of the ILC Draft Articles on State Responsibility: “(1) The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law. (2) The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law...”

¹⁰⁷ See for relevant jurisprudence and practice, Commentary to Article 10 of the ILC Draft Articles on State Responsibility.

¹⁰⁸ Reference is commonly made to the Preamble of the Universal Declaration of Human Rights, the ICCPR and ICESCR and, with regard to transnational corporations to the Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 2003. See for example, Reinisch, *Changing International Legal Framework*, pp.69 et seq. See also Article 10 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and

and human rights monitoring mechanisms traditionally only inquire into the actions of states. Attempts to bring non-state actors closer into the fold of international human rights law have met with little progress.

The attempts to broaden the definition of specific violations to include non-state actors, such as the definition of forced disappearances¹⁰⁹ has failed, as have moves to establish minimum “fundamental standards of humanity” binding state and non-state actors alike under all circumstances.¹¹⁰ Many states see the potential application of human rights law to non-state actors as diluting the focus from the distinct nature of human rights violations as acts involving state officials and engaging state responsibility, torture being a prime example.¹¹¹ States also object to including obligations for non-state actors in human rights instruments on the grounds that international supervisory mechanisms geared towards states could not and should not be utilised for violations by non-state actors.¹¹²

The reluctance of states to recognise the applicability of human rights law to non-state actors is traditionally attributed to the concern that such a step might confer legitimacy to collective entities otherwise not or only partially recognised as subjects of international law, and bolster their claims to statehood.¹¹³ There are countervailing developments, for example the jurisprudence of human rights bodies on state obligations in relation to *de facto* regimes, the practice of the Security Council to invoke the human rights obligations of armed groups in armed conflict and, more controversially, of the UN and individual states to condemn terrorist acts as human rights violations.¹¹⁴ However, this has not yet translated into the creation of a human rights framework and machinery applicable to non-state actors, not least because of the factors referred to above.

In a significant practical development, states have in several instances entered into agreements with relevant actors, in particular armed groups, in which both sides commit themselves to uphold human rights and/or humanitarian law standards. There is no reason why these *sui generis* agreements (unique examples of this kind), and unilateral declarations by non-state actors for that matter, should not have binding force, creating obligations for its parties to adhere to relevant international human rights standards.¹¹⁵ However, these agreements often have no or largely ineffective monitoring or enforcement mechanisms designed to ensure adherence in practice.

Fundamental Freedoms, 1999, Art.10: “ No one shall participate, by act or failure to act where required, in violating human rights and fundamental freedoms.”

¹⁰⁹ UN Doc. E/CN.4/2005/66, 10 March 2005, paras.29 et seq.

¹¹⁰ See the Turku Declaration of Minimum Humanitarian Standards of 1991 and the work of the Commission on Human Rights on Fundamental Standards of Humanity, CHR resolution 2000/69, CHR decision 2002/112 and the report of the UN Secretary-General on fundamental standards of humanity, 2004.

¹¹¹ See for a discussion of state practice Rodley, *Can Armed Opposition Groups Violate Human Rights?*, pp.299 et seq. and Provost, *International Human Rights and Humanitarian Law*, pp. 62 et seq., in particular p.74.

¹¹² See e.g. UN Doc. E/CN.4/2005/66, 10 March 2005, para.31.

¹¹³ This is reflected in the provisos, contained in numerous declarations and in Article 4 (3) of the Optional Protocol to the Convention on the Right of the Child concerning the obligations of armed groups not to recruit child soldiers, that, as stated for example in the Resolution of the Institute of International Law, *The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties*: “The application of such principles and rules [to respect international humanitarian law as well as fundamental human rights] does not affect the legal status of the parties to the conflict ...”.

¹¹⁴ See Clapham, *Human rights obligations of non-state actors*, in particular pp.35 et seq.

¹¹⁵ Schoiswohl, *Human Rights Obligations of Non-Recognised Entities*, pp.221, with reference to state practice.

(ii) International Humanitarian Law

The minimum standards contained in common Article 3 of the 1949 Geneva Conventions prohibit the use of torture. They serve as the main yardstick for the conduct of non-state actors in armed conflicts.¹¹⁶ However, the applicability of international humanitarian law is limited to parties to armed conflicts, thereby excluding many *de facto* regimes and armed groups not party to an armed conflict, in particular during times of peace. It is also often unclear whether a conflict has reached the requisite threshold and the various sides of a conflict may deny that international humanitarian law obligations apply.

The importance of the prohibition of torture as a common minimum standard binding on parties to a conflict both as a matter of treaty and customary international law, is not matched by any supervisory or complaints system under international law. Individual responsibility for serious violations of international humanitarian law is well established and there are by now various avenues to hold perpetrators accountable. However, no permanent mechanism exists that allows victims to bring complaints against state or non-state actors alleging a violation of international humanitarian law by parties to an armed conflict.¹¹⁷ Even instruments that recognise, at least implicitly, the responsibility of non-state actors to provide reparation, such as the Basic Principles and Guidelines on the Right to Reparation,¹¹⁸ do not refer to any mechanism that victims of such violations could use to claim reparation. This is a reflection of the insufficiently developed system of monitoring under international humanitarian law. It is possibly also a manifestation of the continuing debate about whether individuals have a right to reparation under international humanitarian law.¹¹⁹

Regional human rights courts as well as the International Court of Justice (ICJ) have applied human rights law to situations of armed conflict.¹²⁰ This development can potentially result in greater accountability of non-state actors for what are effectively violations of both international humanitarian law and international human rights law. However, this only applies where a link to state responsibility can be made and will only have limited impact so long as victims have no opportunity to complain directly against non-state actors under any individual human rights complaints procedure.

(iii) International Criminal Law

International criminal law governs the criminal responsibility of individuals for acts that constitute international crimes.¹²¹ The mandate of international tribunals and mixed courts as well as the relevant state practice demonstrate clearly that non-state actors can incur individual responsibility for any international crime, whether committed individually or jointly, either as actual perpetrators or on the ground of command responsibility.¹²²

¹¹⁶ *Supra*, at II. 1.2.

¹¹⁷ ICRC, *Compliance with International Humanitarian Law*, 2003 and Kleffner, *Improving compliance with international humanitarian law through the establishment of an individual complaints procedure*, pp.237 et seq.

¹¹⁸ See Principle 15 of the 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.

¹¹⁹ See on such a right *ibid.* and the ICJ Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in particular paras.152 and 153. See for a comprehensive discussion of various approaches Schwager/Bank, *Is there an Individual Right to Compensation for Victims of Armed Conflicts?*

¹²⁰ See the decision of the Inter-American Commission on Human Rights and the judgment of the Inter-American Court of Human Rights in the *Tablada* case and the *Las Palmeras* Case, paras.32-34. See also the judgment of the ECHR in the case of *Isayeva, Yusupova and Bazayeva v. Russia*. See for ICJ jurisprudence in particular, *DRC v. Uganda*, paras.215 seq.

¹²¹ See Article 25 of the ICC Rome Statute.

¹²² See Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, pp.916 et seq.

TORTURE BY NON-STATE ACTORS

Torture is an international crime giving rise to an obligation to prosecute or extradite those accused of the crime irrespective of the nationality of the perpetrator or the victim, or indeed the location of the crime. Torture also comes within the listed elements of crimes within the ICC jurisdiction: genocide, crimes against humanity and war crimes.¹²³

ICTY jurisprudence has advanced the application of international criminal law to non-state actors by recognising that it is the nature of the act rather than the status of the person that defines torture for the purpose of international criminal responsibility.¹²⁴ In respect of war crimes, the Appeals Chamber in the *Tadic* case held that war crimes could be committed not only in international armed conflicts but also in non-international armed conflicts. This ruling broke new ground and is of particular importance for the accountability of non-state actors under international criminal law, as they frequently operate in the context of internal armed conflicts.¹²⁵

The individual criminal responsibility for war crimes of those acting in the course of an internal or international armed conflict is now generally accepted, as reflected in the jurisprudence of the ex Yugoslavia and Rwanda tribunals¹²⁶ and the statute of the ICC.¹²⁷ Criminal proceedings against RUF members and others for war crimes before the Sierra Leone Special Court and the arrest warrant against five Lords' Resistance Army commanders in the Uganda situation before the ICC are two striking examples that illustrate the practical impact of this development.

Torture committed in a widespread or systematic manner constitutes a crime against humanity if underpinned by an organisational policy,¹²⁸ whether committed in the course of an armed conflict or not.¹²⁹ The applicability of international criminal law to 'peace-time' systematic torture is particularly relevant to crimes committed by a rebel group within the areas under its control following a peace agreement or by *de facto* officials in a failed state.

These are important clarifications that have also found recognition in the ICC Statute. It is clear both from the text of the statute and from the first investigations opened, all of which concern (though not exclusively) members of armed groups and militias,¹³⁰ that such non-state actors can incur individual criminal responsibility for the crimes recognised in the statute. The statutes of mixed tribunals, such as those relating to Cambodia, East Timor and Sierra Leone, confirm this development. The jurisdiction of

¹²³ Article 5 of the ICC Rome Statute.

¹²⁴ *Supra*, at II. 1.2.

¹²⁵ *The Prosecutor v Dusko Tadic*, paras.562 and 568.

¹²⁶ See e.g. *The Prosecutor v. Kayishema*, paras.170-172; *The Prosecutor v. Akayesu*, para.608, *The Prosecutor v. Musema*, para.254. In *Akayesu*, the ICTR trial chamber set a high threshold as to whether civilians can commit war crimes and ruled this out in the particular circumstances of the case ("civilians must be legitimately mandated and expect, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts", para.6.5). The Appeals Chamber in the *Akayesu* case disagreed, holding at para. 444 of its judgment that "This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute. In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute."

¹²⁷ Article 8 (2) (c), (d), (e) and (f) of the ICC Rome Statute. See on state practice, ICRC, *Customary International Law*, pp.551 et seq.

¹²⁸ The organisational policy need not necessarily be state policy but can also be pursued by non-state actors, as recognised by the ICTR in *The Prosecutor v. Kayishema*, paras.125, 126. The ICC Elements of Crime specify that "it is understood that 'policy to commit such attack' requires that the State or organization (emphasis added) actively promote or encourage such an attack against a civilian population." International Criminal Court, Elements of Crimes, Article 7, Introduction, 3.

¹²⁹ "[I]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all." *Tadic Jurisdiction Case*, para.141.

¹³⁰ In Sudan, it is understood that the list of suspects encompasses janjaweed militias, rebels and government officials.

such tribunals varies depending on the nature of the conflict and the crimes committed. However, all statutes allow for the prosecution of crimes against humanity, which may include systematic or widespread torture, and, in the case of Cambodia and East Timor, of torture as a singular crime, which is irrespective of whether committed by state officials or non-state actors.¹³¹

Criminal law has become an important if not the main vehicle for ensuring accountability of non-state actors. Examples are the prosecution of members of various factions accused of crimes committed in the conflict in the former Yugoslavia before the ICTY and of RUF members before the Sierra Leone Special Court. Further examples are investigations by the ICC into the conduct of the LRA in Uganda, various groups in the DRC and the Janjaweed and others in Sudan, as well as the conviction of an Afghan warlord for torture in the UK. Yet, insufficient political will and the perceived need for compromise solutions, in particular amnesties, hamper moves towards greater accountability of the perpetrators at the domestic level. The lack of capacity of domestic systems to bring to justice all of the alleged perpetrators and the limited reach of international and mixed tribunals as well as the courts of third states proceeding on the basis of universal jurisdiction are further factors that contribute to a lack of accountability. Moreover, responsibility under international criminal law does not capture the responsibility of *de facto* regimes or armed groups as entities.

(iv) International responses to the challenges posed by non-state actors

Several human rights bodies have addressed violations, including torture, by non-state actors notwithstanding the absence of any apparent direct obligations under international human rights law to do so and the lack of a clear mandate for victims of non-state actors to resort to the complaints mechanisms. The Inter-American Commission on Human Rights has probably gone furthest in passing resolutions on human rights abuses by non-state actors and highlighting such abuses in its country reports, such as the ones on Colombia.¹³² However, the Commission does not enter into a dialogue with non-state actors and has no enforcement mechanism.¹³³ Moreover, its examination of human rights violations by such actors takes place within the framework of state responsibility. It expressly warned that if the concept of human rights is used “too sweeping, the Inter-American Commission on Human Rights could become involved in any act of violence perpetrated by an armed group. There is no doubt that this would have an adverse effect on the American system for protecting human rights and would do nothing to enhance its operation.”¹³⁴

The UN Special Rapporteur on Torture has addressed violations amounting to torture in his reports on country visits, for example following his visits to Georgia and Nepal.¹³⁵ The Rapporteur has also in exceptional cases transmitted urgent appeals to non-state actors, in particular *de facto* regimes where there is a clear channel of communication.¹³⁶ While being grounded in a comprehensive understanding of

¹³¹ See Section 7 UNTAET Regulation 2000/15 (East Timor) and Article 3 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 2001. See Swart, *Internationalized Courts and Substantive Criminal Law*, pp.291 et seq.

¹³² See in particular the second and third Report on the Human Rights Situation in Colombia, 1993 and 1999 respectively.

¹³³ “... if the Commission, in violation of its mandate, were to agree to process a denunciation involving some alleged act of terrorism, in so doing it would implicitly place terrorist organizations on an equal footing with government, as the Commission would have to transmit the denunciation to the subversive organization which allegedly is responsible for the act and request that it make such observations as it deems appropriate. Undoubtedly, such organizations would be very pleased to be dealt with as if they were government. But, what government in the hemisphere could tolerate an implicit recognition of quasi-governmental status for an organization of this kind?”, in OEA/Ser.L/V/II.53, doc. 22, 30 June 1981, *Report on the situation of human rights in Colombia*, para.5: Human Rights, Subversion and Terrorism.

¹³⁴ *Annual Report of the Inter-American Commission on Human Rights, 1990-1991*, II, 4.

¹³⁵ Report of the Special Rapporteur on Torture, *Mission to Georgia*, 2005, paras.52 et seq. and *Mission to Nepal*, 2006, para.19.

¹³⁶ See the *Report of the UN Special Rapporteur on Torture*, UN Doc. E/CN.4/2004/56/Add.1, para.1977, containing urgent appeals addressed to the Palestinian Authorities.

TORTURE BY NON-STATE ACTORS

human rights, this practice is largely based on humanitarian considerations to assist victims of violations and highlight abuses. It is also of limited effect, as the entities concerned often fail to respond to urgent appeals or recommendations made in reports following country visits.

UN rapporteurs with a specific country mandate and UN missions all over the world have equally highlighted violations and engaged with non-state actors. This practice appears to be resting largely on pragmatic considerations of preventing further violations rather than being a reflection of the applicability of human rights standards to non-state actors.

States, UN organs and bodies have taken a series of further measures with a view to binding non-state actors to international standards and preventing violations, such as:

- Making treaties binding on non-state actors, especially concerning the rights of children;¹³⁷
- The UN Security Council has developed a practice of calling upon non-state entities to abide by international human rights and humanitarian law standards.¹³⁸ It has also affirmed that states have a responsibility to protect their own populations from international crimes, with the support of the UN, and its willingness to respond to “systematic, flagrant or widespread violations of international humanitarian and human rights law in situations of armed conflict”;¹³⁹
- Both the UN General Assembly and the UN Commission on Human Rights have called on parties to a conflict to abide by international standards, referring either to international humanitarian law and/or international human rights law;¹⁴⁰
- Various UN organs have been involved in the development of codes of conduct for humanitarian assistance that included an affirmation of responsibility and accountability of *de facto* regimes and armed groups under international law;¹⁴¹
- The UN Security Council and the High Commissioner for Human Rights have appointed rapporteurs and set up monitoring mechanisms dealing with children and civilians in armed conflict¹⁴² and sexual violence in war;¹⁴³
- Several UN bodies have engaged in conflict resolution and monitoring of agreements to uphold international humanitarian law and/or peace agreements;¹⁴⁴

¹³⁷ See Article 3 (4) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and Article 4 (3) of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts.

¹³⁸ See for an overview of relevant resolutions of the UN Security Council, ICRC, *Customary International Law*, Vol. II, 2005, p.3672, paras.289 et seq. See in particular UN S/RES 1265 (1999) Protection of Civilians in Armed Conflict and UN S/RES 1193 (1998), para.14: “urging the Afghan factions to put an end to the discrimination against girls and women and to other violations of human rights ... and to adhere to the internationally accepted norms and standards in this sphere.” See also UN S/RES 1212 (1998), para.7, calling on UNITA in Angola to respect international human rights law and UN S/RES 1493 (2004) on the DRC.

¹³⁹ UN S/RES 1674 (2006).

¹⁴⁰ See e.g. UN GA/RES/58/196, para.4 on the DRC and the Commission on Human Rights on Colombia, 2003, paras.26 and 28.

¹⁴¹ See S/RES 1502 (2003) concerning protection of humanitarian personnel and the UN and its associated personnel in conflict zones, in particular para.3 and for specific examples, Ground Rules for Somalia, Inter-Agency Standing Committee, *Growing the Sheltering Tree*, pp.82, 83, and UN Doc. E/CN.4/2001/91, 12 January 2001, 45: “The Code of Conduct for Humanitarian Assistance in Sierra Leone contains certain guiding principles for States and non-State entities. The principles state that while the primary responsibility for the protection and well-being of the civilian population and respect for their human rights rests with the Government of the State or authorities in control of the territory, “insurgent groups and militia should be held to the same standard of responsibility as Governments” (Page 88).

¹⁴² See S/RES 1265 (1999) and S/RES 1612 (2005).

¹⁴³ See S/RES 1325 (2000). See *Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Report of the United Nations High Commissioner for Human Rights, 2005.

¹⁴⁴ For example, the San José Agreement of 1990 stipulated that ONUSAL were to produce reports on violations, expressly including the prohibition of torture, committed by the Government of El Salvador and the Farabundo Martí para la Liberación Nacional (FMLN) and to make recommendations to the FMLN on the basis of its observations.

- The UN Security Council has in several instances imposed sanctions against non-state actors, such as the Serb armed groups in what is now Bosnia and Herzegovina, UNITA in Angola, the RUF in Sierra Leone and the Taliban in Afghanistan.¹⁴⁵ In its recent practice, the Security Council has imposed sanctions against individuals, including non-state actors in Cote d'Ivoire and Sudan, for human rights and humanitarian law violations.¹⁴⁶

UN action also encompasses initiatives to ensure accountability, justice and reparation for violations, including those for which *de facto* regimes and armed groups are responsible, through:

- Establishing international commissions of inquiry¹⁴⁷
- Setting up international tribunals¹⁴⁸
- Referral to the ICC¹⁴⁹
- Supporting mixed tribunals¹⁵⁰ and, in exceptional cases,
- Recommending or establishing compensation mechanisms.¹⁵¹

Most of these measures and mechanisms have a bearing on torture by non-state actors. However, UN bodies have not taken any action to date that focuses specifically on torture by *de facto* regimes, armed groups or other such actors. Moreover, the initiatives and responses of human rights treaty bodies and UN organs are largely piecemeal. The international practice is mainly ad-hoc as there is no coherent and concerted UN policy to address relevant actors directly within the existing human rights system. This is evidenced by the lack of any UN procedure specifically mandated to examine human rights violations by non-state actors.¹⁵²

In contrast stands the UN response to acts of terrorism; here the UN Security Council has taken prompt and decisive action. This illustrates what steps can be taken if the political will is present. The Council has created a series of obligations for states that range from criminalising acts of terrorism to various forms of international cooperation to combat terrorism. It has also established a strong sub-commission and imposed sanctions against those held responsible for acts of terrorism.¹⁵³

These developments largely explain the current focus on international criminal law as the main instrument for responding to violations by non-state actors. This approach appears as the international parallel to traditional national approaches of dealing with violations by non-state actors within national criminal law. While important, it remains one-dimensional as its emphasis on individual responsibility fails

¹⁴⁵ See e.g. UN S/RES 942 (1994) (Bosnian Serbs); S/RES 864 (1993) and 1127 (1997) (UNITA/Angola); S/RES 1171 (1998) and 1306 (2000) (RUF/Sierra Leone); S/RES 1267 (1999) and S/RES 1333 (2000) (Taliban/Afghanistan). The UN Security Council has also imposed several arms embargos to stop fighting, see e.g. on the Democratic Republic of Congo, UN S/RES 1493 (2003).

¹⁴⁶ See on Cote d'Ivoire, UN S/RES 1572 (2004). UN S/RES 1591 (2005) stipulated that those individuals "who impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities" shall be subject such measures as travel bans and the freezing of assets. Subsequently, the Security Council imposed such sanctions on four individuals, including three non-state actors, one associated with the Janjaweed and two belonging to the "rebel" movements, i.e. the Sudanese Liberation Army and the Movement for Reform and Development, see UN S/RES 1672 (2006).

¹⁴⁷ Impunity, Report of the Secretary-General, 2006, paras.8 et seq.

¹⁴⁸ See on the ICTY S/RES 827 (1993) and ICTR S/RES 955 (1994).

¹⁴⁹ In relation to crimes committed in Darfur, Sudan, S/RES 1593 (2005).

¹⁵⁰ See e.g. S/RES 1315 (2000) leading to an agreement between the Government of Sierra Leone and the United Nations on the Establishment of the Sierra Leone Special Court.

¹⁵¹ See the United Nations Compensation Commission for Iraq, <http://www2.unog.ch/uncc/> and the recommended compensation commission for Sudan, see Report of the International Commission of Inquiry on Darfur, 2005, para.649.

¹⁵² The only exception is the Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises.

¹⁵³ See S/RES/1373 (2001) and subsequent resolutions. See UN Action against Terrorism, at <http://www.un.org/terrorism/>.

to recognise the organised and often state-like fashion in which non-state actors frequently operate. It is also insufficient in so far as it fails to strengthen the position, and remedies of victims against non-state actors as a group. Such responsibility would have the benefit of entailing public acknowledgment, including a possible responsibility of the state or foreign states, the potential to seize assets belonging to the group and/or any of its members, and giving more emphasis on measures to be taken to prevent recurrence.

Summary

- Currently, international law only provides for limited responsibility of non-state actors. This applies in particular to international human rights law where states are still reluctant, with few exceptions, to recognise obligations of non-state actors. Agreements between states and armed groups containing commitments to uphold human rights, as well as unilateral declarations by *de facto* regimes recognising international human rights standards, are significant developments signalling how such actors can incur human rights obligations in practice.
- Common minimum standards under international humanitarian law provide an important yardstick, prohibiting torture by parties to a conflict and applying to both state and non-state actors. However, these standards do not apply to non-state actors operating outside the context of armed conflict and are not accompanied by international enforcement mechanisms. There are also no international remedies for victims against non-state actors bound by international humanitarian law.
- Individual non-state actors can incur criminal responsibility for torture as an international crime, both in its own right and as war crime or crime against humanity. A series of difficulties exist in the actual practice of seeking and ensuring accountability of non-state actors for torture, both at the domestic and international level.
- Human rights bodies and UN organs and mechanisms have responded to violations by non-state actors, in particular armed groups in the course of conflict, by taking a multitude of preventive and punitive measures. While there is an increasing focus and concern about such violations, there is still a lack of a coherent approach. Responses are often ad-hoc, politicised and of limited effect. In particular, there are no torture specific policies or mechanisms in respect of non-state actors. International responses have largely focused on criminal responsibility, which, though important, fails to provide full justice and reparation to victims by emphasising individual wrongdoing only, and not collective responsibility.

1.3. Limited reach of state responsibility for violations by non-state actors

Even where non-state actors are the actual perpetrators of torture, states can and are often involved in a number of ways. State organs may: participate in joint operations; give direct orders to non state actors to commit torture; provide various forms of support, be it in their own country or abroad, or fail to prevent or respond to such torture. The degree of state liability in these cases is determined by the rules on state responsibility. The responsibility of the state for torture by non-state actors is important and more far-reaching than what is apparent at first sight. However, it is confined by the limits of state power vis-à-vis such actors.

(i) State Responsibility for non-state actors “acting under their control”

A state incurs responsibility for any breach of an international obligation, such as the prohibition of torture under international human rights and international humanitarian law, which can be attributed to

it.¹⁵⁴ State responsibility entails a duty to cease the offensive act, to offer assurances of non-repetition and to make full reparation for the injury caused.¹⁵⁵ The injured state, and any other state in cases where the obligation breached is owed to the international community as a whole, such as the prohibition of torture, may invoke responsibility of a state.¹⁵⁶

As a general rule, states are responsible for the wrongful conduct of their organs¹⁵⁷ “or of others who have acted under the direction, instigation or control of those organs, i.e. agents of the state.”¹⁵⁸ This rule encompasses, amongst others, private actors who are not state organs but nevertheless act under the instructions of the government concerned. The main factor is that the state authorises certain conduct, in which case “it does not matter that the person or persons involved are private individuals nor whether their conduct involves ‘governmental activity’... Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as ‘auxiliaries’ while remaining outside the official structure of the State.”¹⁵⁹

States clearly incur responsibility where they act jointly with non-state actors. This applies in particular to armed groups, such as paramilitaries, that collaborate closely with state forces. The Inter-American Court of Human Rights, for example, found that Colombia was responsible, *inter alia*, for torture committed in the course of a massacre carried out jointly by the military and paramilitaries.¹⁶⁰

It equally applies to a close institutional relationship amounting to consent and/or acquiescence to acts of torture by paramilitaries, militias and the like. In the case of *Blake v. Guatemala*, the Inter-American Court of Human Rights held the state responsible for several violations committed by a Guatemalan civil patrol in 1985. It found that

“at the time the events in this case occurred, the civil patrols enjoyed an institutional relationship with the Army, performed activities in support of the armed forces' functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision. A number of human rights violations, including summary and extrajudicial executions and forced disappearances of persons, have been attributed to those patrols...As a consequence, the Court declares that the acquiescence of the State of Guatemala in the perpetration of such activities by the civil patrols indicates that those patrols should be deemed to be agents of the State and that the actions they perpetrated should therefore be imputable to the State.”¹⁶¹

¹⁵⁴ See Articles 1 and 2 of the ILC Draft Articles on State Responsibility.

¹⁵⁵ See Articles 30 and 31 *ibid.*

¹⁵⁶ See Articles 42-48 *ibid.*

¹⁵⁷ See Articles 4-7 *ibid.* Articles 9 and 11 provide for state responsibility for acts by private actors in exceptional cases, namely for (i) conduct carried out in the absence or the default of official authorities and (ii) conduct acknowledged and adopted by a State as its own respectively.

¹⁵⁸ See Article 8 *ibid.* and Commentary on the ILC Draft Articles on State Responsibility, p.80.

¹⁵⁹ *Ibid.*, p.104.

¹⁶⁰ Inter-American Court of Human Rights, *Case Rio Frio Massacre (Columbia)*, paras.42, 50, and 59 *et seq.*; *Case 19 Merchants v. Colombia* and the *Case Mapiripán Massacre v. Colombia*.

¹⁶¹ *Blake Case*, paras.76 and 78.

In a similar case, the Inter-American Commission on Human Rights held Peru liable for extrajudicial killings and enforced disappearances carried out by civil defence patrols engaged in anti-insurgency operations that “acted in the name of state security forces or with their consent.”¹⁶²

Beyond such direct links, international jurisprudence is not clear on the requisite nature and degree of state “control” that triggers responsibility for the conduct of armed groups. Relevant cases commonly concerned various degrees of support for armed groups acting in third countries or in *de facto* regimes established, maintained or supported by the state in question. The International Court of Justice set a high threshold in the *Military and Paramilitary* case, holding that the conduct of the USA in “financing, organizing, training, supplying and equipping” the Contras, a paramilitary force in Nicaragua accused of serious human rights abuses, including torture, was not sufficient to amount to the requisite “effective control.”¹⁶³

The ECHR has on the other hand found states responsible for violations where they exercised control over *de facto* regimes established on foreign territory and falling within the jurisdiction of the court (the extent of which has yet to be fully clarified in the jurisprudence of the court, in particular with regard to the territory of a non-member state). The Court found that a sufficient degree of control was present in cases of direct military involvement or a close institutional relationship between state forces and non-state actors. Its jurisprudence developed in particular in cases relating to human rights violations, including torture, attributed to the Turkish Republic of Northern Cyprus (TRNC) authorities in Northern Cyprus, i.e. a *de facto* regime that has close links to Turkey.¹⁶⁴ The Court rejected Turkey’s contention that it does not incur state responsibility, holding that:

*“It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises effective control over the policies and actions of the authorities of the ‘TRNC’. It is obvious from the large number of troop engaged in active duties in northern Cyprus ... that her army exercises effective overall control over the part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the ‘TRNC’.”*¹⁶⁵

In the case of *Ilascu*, the Court held that the Russian Federation was responsible for the torture of the applicants who had been arrested and detained in 1992 and ill-treated by officials belonging to the non-recognised republic of Transdniestria. This entity had been established on the territory of Moldova following the break-up of the Soviet Union with the support of the Russian Federation. The Court found that the Russian Federation incurred state responsibility for the torture because: (a) it had provided military, political and economic support in the setting up and survival of the separatist regime of Transdniestria; (b) “the applicants were arrested ... with the participation of soldiers of the Fourteenth Army ... [and] detained on Fourteenth Army premises and guarded by Fourteenth Army troops. During their detention, these three applicants ... were subjected to treatment ... contrary to Article 3 of the Convention”; (c) the Army troops transferred the applicants to the Transdniestrian police and regime being “fully aware that they were handing them over to an illegal and unconstitutional regime.”¹⁶⁶ The Court held that the Russian Federation incurred continuous responsibility for subsequent violations on the grounds that it did not act to prevent violations brought about by its agents.¹⁶⁷

¹⁶² Inter-American Commission on Human Rights, Report No. 101/01, Case 10.247 et al., paras.189 et seq.

¹⁶³ *Military and Paramilitary Activities in and against Nicaragua*, paras.109 and 115.

¹⁶⁴ ECHR, *Cyprus v. Turkey*.

¹⁶⁵ *Ibid.*, para.56.

¹⁶⁶ *Ilascu and Others v Moldova and Russia*, para.384.

¹⁶⁷ *Ibid.*, para.393.

The *Ilascu* decision further specifies the scope of responsibility of states that support non-recognised entities on the territory of third states falling within the jurisdiction of the Court. Cases concerning the responsibility of both the Russian Federation and Georgia for torture allegedly inflicted by authorities of the *de facto* regime in Abkhazia, Georgia, pending at the time of writing,¹⁶⁸ are set to further develop jurisprudence on the scope of state responsibility for violations committed by armed groups and *de facto* regimes that enjoy their support.

(ii) State responsibility arising out of positive obligations: “due diligence”

Individuals, criminal gangs and armed groups all commit acts that would amount to torture under international human rights law if the state were involved. Even though there may be no such involvement whatsoever, international human rights law has long recognised that the obligation of a state is not confined to respecting human rights and refraining from violations. States also have to “ensure” the enjoyment of human rights “within their jurisdiction”.¹⁶⁹ This entails “positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory.”¹⁷⁰ States are, as recognised by the Inter-American Court of Human Rights in the seminal case of *Velasquez Rodriguez*, obliged to exercise “due diligence” in securing the enjoyment of human rights against violations by non-state actors:

“An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”¹⁷¹

The due diligence principle is by now well recognised in the practice and jurisprudence of international and regional human rights bodies.¹⁷² UN treaty bodies have formulated specific positive obligations of states in relation to the rights of particular groups of persons, namely minorities, women and children.¹⁷³ Positive obligations also extend to occupying powers in the context of armed conflict. The ICJ held Uganda responsible for its failure to prevent violations of international humanitarian law, including torture, by rebel groups during its occupation of parts of the Democratic Republic of Congo.¹⁷⁴

¹⁶⁸ *Mamasakhlisi vs. Georgia and the Russian Federation and Nanava vs. Georgia and Russian Federation*.

¹⁶⁹ See Article 2 (1) of the ICCPR (see in this respect also General Comment No. 31, *The Nature of the General Legal Obligation imposed on States Parties to the Covenant*.) and Article 1 of the European Convention on Human Rights, the American Convention on Human Rights and the African Convention on Human and Peoples' Rights respectively.

¹⁷⁰ *Ilascu and Others v Moldova and Russia*, para.313.

¹⁷¹ *Velasquez Rodriguez v Honduras*, para.172.

¹⁷² See *Case of the “Panel Blanca” v. Guatemala*; *Costello-Roberts v United Kingdom*, European Court of Human Rights, 1993, para.27 and African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre v Nigeria*.

¹⁷³ Human Rights Committee, *General Comment 23*, para.6.1: “... a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party;” UN Committee on the Elimination of Violence against Women, *General Recommendation 19*, para.9 and Committee on the Right of the Child, *General Comment 5*, paras.42 et seq.

¹⁷⁴ *DRC v. Uganda, Case Concerning Armed Activities on the Territory of the Congo*, para.179: “The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account” and para.211.

TORTURE BY NON-STATE ACTORS

The “due diligence” principle requires states to “prevent, punish, investigate or redress the harm caused by such acts [violations] by private persons or entities.”¹⁷⁵ In the case of torture, it entails a duty for states “to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7 [of the ICCPR], whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”¹⁷⁶ Such measures include the adoption of legislation affording effective protection in practice and ensuring criminal and civil accountability of non-state actors responsible for torture.¹⁷⁷

As held by the ECHR, an obligation to afford concrete protection exists where “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to ... an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”¹⁷⁸ This is even more evident in cases of ongoing violations such as in the case of *Harziji Djemali v. Yugoslavia*, where a violent mob destroyed a Roma settlement in Montenegro in the presence of a passive police force. Here, the UN Committee against Torture found the state responsible for a violation even though the public officials themselves had not committed the acts that amounted to cruel, inhuman and degrading treatment.¹⁷⁹

In responding to violations, states are obliged to investigate allegations of torture promptly, impartially and thoroughly, irrespective of whether the perpetrators are state officials or non-state actors.¹⁸⁰ Where sufficient evidence is found, states are duty-bound to prosecute those responsible and, where found guilty, impose a punishment commensurate with the gravity of the crime.¹⁸¹ Victims of torture have a right to complain and to have complaints of torture fully investigated, as well as to be protected against harassment.¹⁸² The obligation to investigate, prosecute and punish is subject to the ability of state authorities to conduct prompt and effective investigations that may be limited where the perpetrators belong to a *de facto* regime or armed groups operating outside of state control.¹⁸³ However, state authorities are obliged to take up investigations and prosecutions where and when possible, such as in the course of political transition following a conflict.

States also have to provide effective remedies for victims of torture by non-state actors.¹⁸⁴

¹⁷⁵ Human Rights Committee, *General Comment 31*, para.8: “The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. ... It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power...”

¹⁷⁶ UN Human Rights Committee, *General Comment No.20*.

¹⁷⁷ *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights, para.175.

¹⁷⁸ *Case of Osman v. the United Kingdom*, para.117.

¹⁷⁹ *Hajrizi Dzemajl et al. v. Yugoslavia*, para.9.2.

¹⁸⁰ See for an overview of relevant jurisprudence, REDRESS, *Taking complaints of torture seriously*, pp. 7 et seq.

¹⁸¹ See in particular Articles 4-8 and 12-13 of the UN Convention against Torture.

¹⁸² See in particular Article 13 of the UN Convention against Torture.

¹⁸³ *Ilascu and Others v Moldova and Russia*, para.347.

¹⁸⁴ Human Rights Comment, *General Comment 31*, para.8.

The obligation of a state to exercise “due diligence” within its jurisdiction is limited in circumstances “where a State is prevented from exercising its authority in part of its territory.” As held by the ECHR, this “may be the result of military occupation by the armed forces of another State which effectively controls the territory concerned, acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.”¹⁸⁵ However, even in such a situation, a state is not fully discharged from fulfilling its obligations as illustrated by the judgment of the ECHR in the *Ilascu* case.

Ilascu brought a case for a violation of his Convention rights, including Article 3 (prohibition of torture), not only against the Russian Federation (see above) but also against Moldova, even though the latter did not exercise control over Transdniestria. The Court held that the factual situation reduced the scope of Moldova’s jurisdiction but that “it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or another State.”¹⁸⁶ In developing the scope of positive obligations, the Court held that the State in question, i.e. Moldova, “must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms guaranteed by the Convention.” It considered whether “the measures actually taken were appropriate and sufficient in the present case”, finding that the steps taken by Moldova were not, in particular its failure of “trying to reach an agreement guaranteeing respect for their [the applicants] Convention rights.”¹⁸⁷

The judgment sets an important precedent, even though judges were far from unanimous on the extent of a state’s positive obligations under the given circumstances. It clearly establishes that a state cannot absolve itself entirely from any responsibility for the conduct of armed groups or *de facto* regimes on its territory but has to take steps to secure the freedom of individuals from (further) torture. The exact nature of the measures to be taken depends on the circumstances in a given case.

While this is an important development, the effectiveness of the due diligence standard for victims of torture by non-state actors remains limited. This is particularly so with *de facto* regimes or hostile armed groups where the state authorities are not in a position either to provide adequate protection or to undertake investigations to secure criminal accountability.

(iii) State responsibility for violating the prohibition of refoulement in cases of risk of torture by non-state actors

States may incur responsibility for sending persons to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture at the hands of non-state actors. The relevant jurisprudence of human rights bodies recognises the applicability of the prohibition of refoulement where the threat emanates from actors that exercise *de facto* authority in a country. This applies in particular to those entities that qualify as “failed states”, such as Afghanistan and Somalia during much of the 1990s. The UN Committee against Torture, and other bodies, have held that such entities can commit torture as defined in Article 1 of the UN Convention against Torture. States are obliged not to send individuals to any areas where they are at risk of torture by *de facto* authorities.¹⁸⁸

¹⁸⁵ *Ilascu and Others v Moldova and Russia*, para.312.

¹⁸⁶ *Ibid.*, at para.333.

¹⁸⁷ *Ibid.*, at para.348.

¹⁸⁸ See the *Elmi Case* and the jurisprudence of the ECHR in particular the cases of *Ahmed v. Austria* and *H.L.R. v. France*, para.40: “Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply

There is no uniform approach with regard to other non-state actors. The jurisprudence and practice is far from clear on whether the prohibition of refoulement applies where the risk of torture stems from individuals or groups that are not *de facto* authorities and where the state concerned, though willing, is not able to provide protection. The Committee against Torture has ruled out the applicability of Article 3 of the Convention against Torture in this context, holding that such groups as the Shining Path in Peru and clans in Somalia cannot commit torture within the meaning of the Convention.¹⁸⁹ The ECHR has taken a different approach. It recognises that the prohibition of refoulement is in principle applicable where the State is unable to provide effective protection against torture, as for example argued in relation to drug cartels in Colombia.¹⁹⁰ The ECHR's approach, which is broadly in line with the one adopted by the United Nations High Commissioner for Refugees (UNHCR), of focusing on effective protection, reflects better the rationale of the prohibition of refoulement. This is to prevent torture where an individual sent back to a particular country is at risk of violence amounting to torture, irrespective of the status of the perpetrators (as reflected in the due diligence principle).¹⁹¹

Summary

- A state incurs responsibility for torture committed by non-state actors where it (i) directly participates in torture; (ii) has a close institutional or operational relationship amounting to consent or acquiescence; (iii) exercises effective control over non-state actors, be it on its own territory or abroad, and (iv) fails to prevent or respond to torture by non-state actors though it had the obligation and opportunity to do so.
- The test of “effective control” depends on the particular circumstances of the case. It commonly encompasses direct military interventions and close institutional relationships between state forces and non-state actors. It includes situations where the state exercises considerable influence, such as through the provision of military, political and economic support, in particular in the setting up and survival of a *de facto* regime. It is not clear under which circumstances financing, organizing, training, supplying and equipping of non-state actors that use torture amounts to effective control triggering state responsibility.
- A state incurs responsibility for its failure to comply with its positive obligation to take appropriate steps to ensure enjoyment and respect for human rights and freedoms within its territory. This general obligation entails that a state takes measures to prevent and respond to torture committed by any private actor on its territory. The obligation is limited in circumstances where a State cannot exercise its authority in part of its territory. However, even in such a situation, the state still has responsibility to take all steps appropriate under the circumstances to prevent (further) torture and, where possible, to respond to violations. This includes investigating and prosecuting those responsible where present on those parts of its territory that are under state control.
- An occupying force has a positive obligation as a matter of international humanitarian law to take appropriate steps to prevent torture by non-state actors in the area of occupation.

where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”

¹⁸⁹ *Supra*, at II. 1.2.

¹⁹⁰ The ECHR ultimately found that there was not sufficient evidence of a credible threat emanating from the non-state actors, see *HLR v. France*, para.44.

¹⁹¹ Moore, *From nation state to failed state*, pp.81 et seq.

- International jurisprudence and national practice differs on the scope of states' obligations in respect of the prohibition of refoulement. The protection approach, which focuses on the actual risk of torture irrespective of the nature of its source, better reflects the rationale of the rule (i.e. preventing that someone is transferred to a place where he is exposed to the risk of torture) than an approach focusing on the status of the perpetrator (which recognises the risk only if it emanates from *de facto* regimes but not from others).

2. The prohibition of torture applied to non-state actors

The prohibition of torture has been developed mainly in the field of international human rights law, specifying states' obligations not only to prevent torture but also to ensure accountability and to provide reparation for its victims. This body of law intersects with and is complemented by more limited rules specific to armed conflicts or to individuals, namely minimum standards of international humanitarian law and international criminal law. The latter standards oblige non-state actors directly to refrain from torture and stipulate that they incur criminal responsibility in case of breach. The international human rights law prohibition of torture does not expressly bind non-state actors. However, in the light of human rights commitments undertaken by various non-state actors and initiatives to strengthen protection of human rights in relation to violations by them, it is essential to examine how such actors can use relevant standards to combat torture. The following sections seek to analyse how states, international organisations and non-state actors themselves can and in certain cases have, utilised, or failed to utilise, international standards on prevention, accountability and reparation in relation to torture.

2.1. State Responses

(i) States' obligations: Prevention, accountability and reparation

The prohibition of torture requires states to take effective measures to prevent torture. While this general duty relates to torture involving state agents, states also have a positive obligation to prevent torture through both legislation, institutional and practical measures as specified above.

States are obliged to criminalise torture, investigate allegations of torture promptly, impartially and thoroughly, and to prosecute and punish those responsible, irrespective of whether the perpetrators are state officials or non-state actors. While it may be difficult or impossible to carry out prompt and effective investigations of acts of torture by *de facto* regimes or armed groups, state authorities have to take all possible steps under the circumstances, including full investigations and prosecutions once possible, in particular following the end of conflict.¹⁹² The state may neither grant amnesties for torture nor decide that allegations of torture by certain groups are not to be investigated for reasons of political expediency.¹⁹³

A state's breach of an international obligation entails the duty to afford reparation.¹⁹⁴ A state which incurs responsibility for gross violations of international human rights or serious violations of international humanitarian law such as torture committed by non-state actors, be it because the non-

¹⁹² *Supra*, III. 1.3. (ii) and REDRESS, *Taking Complaints of Torture Seriously*, pp.10 et seq.

¹⁹³ See on the incompatibility of amnesty laws with states' duty to investigate and prosecute torture, REDRESS, *Bringing the International Prohibition of Torture Home*, pp.71 et seq.

¹⁹⁴ *Ibid.*, at pp.79 et seq. and *supra*, III. 1.3. (ii).

state actors were acting under its control or because the state failed to meet the due diligence standard, is obliged to:

- “Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice... irrespective of who may ultimately be the bearer of responsibility for the violation; and
- Provide effective remedies to victims, including reparation [comprising restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as appropriate].”¹⁹⁵

(ii) Prevention of Torture

Providing Protection against torture by non-state actors

States that exercise control over entities, such as paramilitaries, are required to take a series of steps to prevent torture by such actors, either exercising effective control and supervising conduct or ceasing support. Although legislation that outlaws the activities of such groups is important, for example what is in place in Colombia, it is in itself often insufficient.¹⁹⁶ This applies in particular where it is not accompanied by other measures, such as ceasing to act jointly in operations and/or to support any groups that are known to engage in torture, be it at home or abroad, as well as taking effective steps towards the dissolution of such groups where possible.¹⁹⁷

Though the scope of measures to be taken by state authorities regarding *de facto* regimes and armed groups hostile to the government is more limited, the failure to take any preventive measures will not absolve states from their responsibility to prevent violations. Legislation aimed at deterring torture needs to provide for criminal and civil accountability of non-state actors responsible for torture. Many states have failed to implement legislation that criminalises torture as required by international standards. This includes not only the recognition of the crime of torture in line with the definition of torture in Article I of the UN Convention against Torture (which arguably covers *de facto* officials, see above) but also in fulfilling their positive obligations, establishing criminal responsibility of non-state actors for acts amounting to torture and providing for adequate punishments. Existing legislation is often ineffective. For example, in the case of rape (which may amount to torture), the legislation of certain countries impedes prosecutions, e.g., reading in to the definition a requirement of violence (Bulgaria), or requiring extra substantiation of the evidence (the requirement of four witnesses in Sudanese law).¹⁹⁸

States also have to provide protection through institutional and practical measures. What measures are appropriate to provide protection depends on the circumstances in a given case. Victims and witness protection laws and programmes are key instruments¹⁹⁹ but need to be effective in practice in order to ensure protection. A further important way in which a state can provide protection during armed conflict within its sphere of influence is the enhanced presence of its own forces with a mandate to

¹⁹⁵ See Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation.

¹⁹⁶ See Inter-American Court of Human Rights, *Rio Frio Massacre (Colombia)*.

¹⁹⁷ See on the responsibility of Colombia for the conduct of paramilitaries, Inter American Court Human Rights, *19 Merchants Case*. See for the Commission’s assessment of recent protection measures by the Colombian Government, *IACHR Annual Report, 2004*, Chapter IV, Colombia.

¹⁹⁸ See for example on the requirements for legislation criminalising rape, *MC v. Bulgaria*, and on Sudan, where rape victims themselves can also face capital charges for the crime of adultery if they are pregnant and fail to prove rape, *Access to Justice for Victims of Sexual Violence*, Report of the United Nations High Commissioner for Human Rights, 2005, para.35.

¹⁹⁹ For examples of domestic witness protection laws, see Japan, Law concerning Measures Accompanying Criminal Proceedings to Protect Crime Victims, May 2000; the Philippines, the Witness Protection, Security and Benefit Act, Republic Act No.698 and South Africa, Witness Protection Act, 1998. See for a comparative analysis of practice, including on various shortcomings, REDRESS, *Taking Complaints of Torture Seriously*, pp.34 et seq.

protect individuals and groups at risk that are staying in particular areas, settlements and camps. But even where individuals are in the hands of non-state actors, the state is expected to take measures that “were appropriate and sufficient in the present case” to secure their rights.²⁰⁰ This can in particular consist in reaching an agreement with the actors concerned that the individuals at risk are treated in accordance with international standards, to be monitored by an independent observer.²⁰¹

In practice, states frequently fail to provide protection. At times this is because of a lack of will, but often it relates to a lack of capacity. Effective victim and witness protection laws and programmes,²⁰² are rare and often there is a lack of (adequate) response in cases of ongoing violations.²⁰³ Frequently, state forces have failed to prevent violations by armed groups against internally displaced persons²⁰⁴ and to protect nationals at risk of torture by *de facto* regimes operating on their territory.²⁰⁵

Non Refoulement

State practice differs considerably in applying the principle of non-refoulement to individuals at risk of torture from non-state actors. Some countries, such as the United Kingdom²⁰⁶ and the United States,²⁰⁷ have recognised that the prohibition of refoulement can apply where the threat of torture emanates from non-state actors, i.e. applying the protection approach. Other countries, such as Germany,²⁰⁸ have based their decisions mainly on the status of the perpetrator, which means that individuals may be sent back to countries where they are at risk of torture at the hands of non-state actors, at least those that are not *de facto* regimes (also on the grounds that an internal flight alternative exists). The latter practice, contributes to a lack of protection against torture by non-state actors even where no functioning state is in place or the state concerned is unable to provide protection.

(iii) Accountability of non-state actors for torture

Investigation and prosecution of non-state actors over which the government has control or where there are close links

States have taken few if any steps to hold accountable non-state actors that have close links with the government. Here, violations are often committed as part of a state policy or enjoy at least some degree of government support. One example is the Janjaweed, a tribal militia in Darfur accused of having committed serious violations, including torture and widespread rape. The Government of Sudan apparently not only armed and financed the militias at the beginning of the conflict but also incorporated many of them into the regular forces instead of disbanding them and undertaking full investigations. It

²⁰⁰ *Ilascu and Others v Moldova and Russia*, para.334.

²⁰¹ See on the obligations that the ECHR identified in this case, *ibid.*, paras.336 et seq., in particular para.350.

²⁰² The Special Rapporteur on Human Rights Defenders, Report submitted by Ms. Nina Jilani, *Mission to Colombia 2002*, para.188, found, for example, that the witness programme that had been established in Colombia was not effective.

²⁰³ See Committee against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia*.

²⁰⁴ See *Report of the Secretary General on the protection of civilians in armed conflict, 2005*, para.21, which also refers to the Guiding Principles on Internal Displacement. In practice, armed forces meant to provide protection have themselves reportedly committed violations against IDPs, for example in Uganda, see HRW, *Uganda: Army and Rebels Commit Atrocities in the North*. See for the duty of occupying powers to prevent violations the ICJ Judgment in the case of *DRC v. Uganda*.

²⁰⁵ *Ilascu and Others v Moldova and Russia*.

²⁰⁶ *The Queen on the Application of (1)Ruslanas Bagdanavicius, (2)Renata Bagdanaviciene and Secretary of State for the Home Department*.

²⁰⁷ Moore, *From nation state to failed state*, pp.110 et seq.

²⁰⁸ *Ibid.*, pp. 106 et seq. 106 and in particular the decision of the Constitutional Court of 1989.

TORTURE BY NON-STATE ACTORS

has, in response to ICC investigations, set up Special Courts that have tried some perpetrators but has largely failed to stop violations and ensure veritable accountability.²⁰⁹ The government of Colombia has also taken insufficient steps to hold paramilitary forces accountable, which continue to enjoy de facto impunity.²¹⁰ Of note, the proposed law on demobilisation of paramilitary groups in Colombia significantly reduces prison sentences for demobilised combatants.²¹¹

Impunity also stems from the fact that many states have no or inadequate legislation, and do not maintain a system of investigations that meets international standards of promptness, impartiality and effectiveness.²¹² This applies both to torture committed by officials or private actors with the acquiescence of officials. This is particularly the case where legislation, such as amnesty laws, limits or prevents criminal accountability, as in El Salvador.²¹³ The reluctance of victims and those working on their behalf to pursue their cases out of fear of retaliation by the perpetrators has also hampered investigations of torture by non-state actors. Paramilitaries and others have not only targeted victims and witnesses but also state officials, such as in Colombia, in response to investigations and prosecutions relating to their conduct.²¹⁴ An additional factor that has complicated investigations in certain circumstances, particularly during armed conflict, is the difficulty of identifying those responsible. Unlike the situation of torture by officials, custody records or other means of identifying the perpetrators (e.g. officers of a particular police station as potential suspects) are often not available due to the nature of operations.

While impunity of paramilitary groups and others is part of state policy where the state uses and supports such groups, a state can find it difficult to investigate and prosecute members of such groups even where the general political will exists to do so. Paramilitary groups often have powerful connections and the ability to expose governmental wrongdoing that may act as a shield against state prosecutions.

Specific accountability mechanisms can also fail to accomplish their objectives where not backed up by sufficient political will or capacity. Indonesia, for example, set up a special court to try government officials and pro-government militias for crimes, including torture, in relation to atrocities committed in East Timor in 1999. However, a UN appointed panel of experts concluded in 2005 that “the prosecutions before the Ad Hoc Court were manifestly inadequate, primarily owing to a lack of commitment on the part of the prosecution, as well as to the lack of expertise, experience and training in the subject-matter, deficient investigations and inadequate presentation of inculpatory material at trial.”²¹⁵

²⁰⁹ See *Report of the Special Rapporteur on the human rights situation in the Sudan*, 2006, paras.47,48.

²¹⁰ The paramilitaries have been responsible for 63% of torture committed between 1997 and 2000. See *Third Periodic Report of State Parties due in 1997, Colombia*, 2002, para.27. However, there have only been a handful of investigations of torture cases by the Attorney General. See Fiscalía General de la Nación, *Boletín Estadístico No. 13*, p. 44 in <http://www.fiscalia.gov.co/pag/general/estadis.html>. The Committee against Torture recently expressed its concern at “The allegations of tolerance, support or acquiescence by the State party’s agents concerning the activities of the paramilitary groups known as “self-defence groups”, which are responsible for a great deal of torture or ill-treatment.” See conclusions and recommendations of the Committee against Torture, 2004, para.9 (b).

²¹¹ Amnesty International, *Colombia: Justice and Peace Law will guarantee impunity for human rights abusers*.

²¹² See REDRESS, *Taking Complaints of Torture Seriously*, pp. 20 et seq.

²¹³ Decree 486, the “General Amnesty Law for the Consolidation of the Peace”, 1993. See Inter-American Commission on Human Rights, *Report on the Human Rights Situation in El Salvador*, 1994.

²¹⁴ The Special Rapporteur on Human Rights Defenders, *Mission to Colombia*, 2002, paras.47 et seq., found that it is in particular the paramilitaries who are responsible for killings of and other violations perpetrated against human rights defenders.

²¹⁵ See *Letter dated 24 June 2005 from the Secretary-General addressed to the President of the Security Council*, Annex I, para.17.

Investigation and prosecution of non-state actors hostile to the government

During armed conflict

A.A.S. was 22 years old and lived in Nyala, Darfur, Sudan, operating as a private commercial truck trader between Nyala and Labado. The Sudan Liberation Army (SLA), a rebel group that had taken up arms in 2002 against the Government of Sudan, was in control of the area of Labado. In March 2004, rebel soldiers wearing Sudan Liberation Army (SLA) uniforms arrested A.A.S. in Labado and took him to a SLA military camp. The SLA suspected him of working for the Sudanese armed forces because the colour of his vehicle was the same as of those used by the Sudanese army.

The SLA flogged his back severely every day during his detention. The flogging was used both as a punishment for A.A.S.'s alleged collaboration with the Government of Sudan and as a way to pressure him into joining the SLA forces. The SLA told A.A.S. that he would not be released unless he joined them. After one month of detention, A.A.S. managed to escape SLA detention.

In the meantime, the Sudanese armed forces captured A.A.S.'s truck that had been used by the SLA in military operations. In April 2004, A.A.S. reported to the police in Nyala, complaining about the torture he had suffered at the hands of the SLA and the confiscation of his truck. The police responded by filing a case against him for waging war against the state on the basis that his truck had been used in military operations against Government forces. They accused A.A.S. of lying and arrested and detained him on the spot. He spent one month in Nyala prison awaiting his trial at which he was acquitted for lack of evidence.

The police did not open an investigation concerning A.A.S.'s torture allegations against the rebels because they accused him of lying. Following his acquittal, A.A.S., who does not know any of the individual perpetrators, wanted to have the rebels prosecuted for the torture suffered but did not know how to proceed.

During armed conflicts, it is frequently difficult if not impossible for states to investigate torture by members of armed groups hostile to the government: local institutions do not function effectively and state investigators have no access to the scene of the crime if it is in the territory controlled by armed groups, and the suspected perpetrators, who are often difficult to identify in the first place, may not leave the areas under their control. Many victims are often either internally displaced or have gone into exile, and in many instances disinclined to collaborate with state authorities. This is because the state is seen as hostile (in particular in conflicts with an ethnic dimension where the victim comes from a minority group, for example in Sri Lanka, Sudan and Guatemala), or out of fear of adverse responses from the non-state actors themselves or the larger community. One example of the possible consequences facing victims is the case of the truck driver in Sudan [see case history, above] who faced criminal prosecution for alleged collaboration with the rebels when complaining, instead of having his allegations of rebel torture investigated. A further illustration is a case of torture from Sri Lanka known to REDRESS where one of the conditions of release set by the LTTE was not to complain to anyone about the torture or to face serious consequences (death threats).

Where state authorities actually investigate and prosecute members of armed groups, such prosecutions are often highly politicised and commonly for "rebellion", "acts of terrorism" or "treason" instead of serious human rights violations such as torture. Investigations and trials of purported members of armed rebel groups under emergency and/or anti-terrorism legislation have raised a number of concerns about their compatibility with international human rights standards. This includes in particular shortcomings

with regard to safeguards against arbitrary detention and torture, due process and fair trials.²¹⁶ Prominent examples are the cases against the Shining Path leader Guzman in Peru and the PKK leader Öcalan in Turkey.²¹⁷

Victims and human rights groups can also be reluctant to call on state authorities to prosecute armed groups in situations of armed conflicts where the state itself is considered to be responsible for serious violations and has failed to ensure accountability of its own forces and officials. In Northern Uganda, for example, some NGOs see the focus on prosecuting non-state actors as distracting from the real issue: the responsibility of the state for its failure to protect civilians, in particular internally displaced people against LRA rebels, and to ensure that the conduct of its own forces are in line with international standards.²¹⁸

As prosecutions and trials for rape by armed groups in the DRC demonstrate, however limited, the setting of precedents can embolden victims to come forward and can serve as an important reference point to call on authorities to undertake further investigations and prosecutions, and develop a principled policy to this end.²¹⁹

After conflict

State practice on the investigation and prosecution of torture following the end of armed conflict varies considerably. There are few examples where states have taken steps to hold non-state actors responsible for torture and other violations, including prosecutions and trials at the national level complementing those undertaken by the ICTR and the ICTY.²²⁰

National prosecutions and trials will generally only occur when there is a strong national commitment to accountability and when the interest groups shielding the perpetrators have little power. Often, there will also be strong international support.

In the case of Sierra Leone, the trial of RUF leaders and others would not have occurred without strong political and financial support and expertise from the outside, and the creation of the Special Court for Sierra Leone. However, the moves in early 2006 to have Charles Taylor, Liberia's warlord turned President, stand trial in The Hague rather than before the Special Court in Sierra Leone out of concerns that a trial before the latter would ignite unrest and destabilise the region is an illustration of the difficulties inherent in prosecuting actors with powerful national and regional links.²²¹

²¹⁶ Some notorious examples are proceedings under anti-terrorism legislation in Sri Lanka, Concluding observations of the Committee against Torture: Sri Lanka, 1998, para.253 and decision by the Human Rights Committee in the case of *Nallaratnam Singarasa v. Sri Lanka*; as well as before "faceless courts" in Peru, Concluding observations of the Human Rights Committee: Peru, 1996, para.11.

²¹⁷ Guzman was sentenced under anti-terrorism legislation by military judges in 1992. He was being retried at the time of writing after the Peruvian Constitutional Court found the anti-terrorism laws unconstitutional. Öcalan was sentenced to death in 1999 for acts of terrorism, a sentence which was later converted into life imprisonment. The ECHR, in a judgment of 12 March 2003 (*Öcalan v. Turkey*), found that there had been several violations of due process rights and the right to a fair trial in his case.

²¹⁸ According to interviews conducted by REDRESS in Uganda in early 2006. See also *Concluding observations of the Committee against Torture, Uganda, 2005*, particularly paras.6 (f) and 10 (n) and (o).

²¹⁹ See Human Rights Watch, *Seeking Justice, Prosecution of Sexual Violence in the Congo War*.

²²⁰ For example, in Haiti, Emmanuel Constant, the former Secretary General of the organisation FRAPH (Armed Revolutionary Forces for the Progress of Haiti) that was part of the military dictatorship/de facto regime lasting from October 1991 to October 1994, was charged, *inter alia*, with torture for his role in the Raboteu massacre in 1994. A Haitian court tried him in absentia (as he was present in the U.S. and has not been extradited) and convicted and sentenced him to life imprisonment on 16 November 2000. See Trial Watch *Profile of Emmanuel Constant* at <http://www.trial-ch.org/trialwatch/profiles/en/facts/p334.html>.

²²¹ See the website of the Special Court for Sierra Leone for updates, www.sc-sl.org.

Even when a country is principally willing to hold non-state actors accountable for torture after the end of conflict, there are commonly a number of legal and practical obstacles. These hurdles apply by and large to investigations and prosecutions of both state and non-state actors, and include:

- **Inadequate legislation**, in particular criminal laws not providing for adequate definition of the elements of the crime and punishments that reflect the seriousness of the crime of torture;
- **No retroactivity**, where no adequate criminal laws are in place at the time when the acts were committed (often despite the prior ratification of conventions or treaties outlawing torture), it is frequently difficult if not impossible to apply subsequent criminal legislation retroactively (though the prohibition of retroactive application does not apply to international crimes under international human rights law, see Article 15 (2) of the ICCPR);
- **Statute of limitations**, in particular where a conflict has lasted for a considerable time;
- **Capacity**, in particular where there has been a large number of perpetrators;
- **Evidence**, especially where the alleged torture was committed a considerable time ago and where there is no adequate documentation, particularly medical evidence;
- **Victim and witness protection**, in particular where the perpetrators of torture still wield considerable influence.²²²

Most states do not hold non-state actors accountable following the end of conflict. Besides the difficulties just outlined, the lack of political will to undertake investigations and prosecutions is a major factor for the prevailing impunity. This is often due to either the continuing influence of perpetrators or the difficulties that investigations and prosecutions would entail where there is limited capacity, or both. A further factor is that state agents themselves are often equally responsible for serious violations such as torture, often committed in the course of the very conflict with non-state actors. A government commonly has little incentive to raise the issue of accountability of other actors where this will inevitably draw attention to its own record of torture.

In countries such as Afghanistan the alleged perpetrators still wield considerable power after the end of conflict, even holding governmental positions and thus pre-empting or making it extremely difficult to seek accountability for their crimes. This is also due to the lack of judicial capacity and the weakness of alternative constituencies to apply sufficient pressure to this end.²²³ Several states, such as Algeria, El Salvador, Sierra Leone, South Africa, Uganda and Zimbabwe have passed amnesties covering violations committed during armed conflict (commonly by all sides), including torture.²²⁴ The Charter for Peace and National Reconciliation in Algeria excludes certain categories of crimes from the scope of the amnesty but not torture.²²⁵

Amnesties are often motivated by the wish to bring an end to conflict and to secure peace through reintegrating, or at least not antagonising, potentially violent groups.²²⁶ In some instances, the granting of an amnesty has been conditional, i.e. it is only granted where the crimes are politically motivated and the perpetrator discloses the full truth in a truth commission, such as in South Africa.²²⁷ Truth and reconciliation commissions can be an important means to realise victims' right to truth where providing

²²² See REDRESS, *Reparation for Torture*, pp.45 et seq.

²²³ Walsh, *Warlords and women take seats in Afghan parliament*, Guardian, and Human Rights Watch, *Afghanistan: Bring War Criminals to Justice*.

²²⁴ Algeria, Charter for Peace and Reconciliation, 2005 Decree 486, the "General Amnesty Law for the Consolidation of the Peace", 1993; Article IX (3) of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United front of Sierra Leone, 18 May 1999; South Africa, the Promotion of National Unity and Reconciliation Act 1995; Uganda, The Amnesty Act, 2000; REDRESS/Amani Trust, *Torture in Zimbabwe*, pp.8 et seq.

²²⁵ See Human Rights Watch, *Impunity in the Name of Reconciliation*.

²²⁶ See e.g. the Peace Agreement between the Government of Sierra Leone and the Revolutionary United front of Sierra Leone, 18 May 1999.

²²⁷ See section 20 of the Promotion of National Unity and Reconciliation Act 1995.

full disclosure about the nature and facts of violations and the fate of victims.²²⁸ Several commissions, such as in Chile, El Salvador and South Africa, have established valuable records of violations, including torture, committed by non-state actors. In so doing, they have also used international humanitarian law and human rights standards as a yardstick.²²⁹

However, truth commissions cannot be a substitute for full investigations and accountability of the perpetrators. Granting amnesties for serious human rights violations, irrespective of whether the perpetrators are state officials or non-state actors, violates the positive obligations of states to investigate fully, and prosecute and punish the perpetrators of serious violations, including torture.²³⁰ The state equally violates its obligations if it grants amnesties in respect of violations amounting to international crimes committed in the course of armed conflicts. The granting of amnesties after the end of conflicts envisaged in Article 6 (5) of the 2nd Additional Protocol to the Geneva Conventions does not apply to serious violations such as torture, as erroneously held by the South African Constitutional Court.²³¹ Moreover, such amnesties do not bind foreign or international jurisdictions, and the UN has expressly refused to recognise such amnesties, such as the one contained in the Lome Peace Agreement in Sierra Leone. Amnesty laws covering non-state actors should therefore exclude international crimes. Recent examples of legislation that largely take this principle into account are the DRC Amnesty Law of 2005 and the Truth and Reconciliation Act of Liberia 2005, both of which exempt international crimes from the scope of amnesties.²³²

(iv) Reparation for torture by non-state actors

Reparation through the courts or government reparation programmes

During conflict

Victims of torture have received little reparation during conflicts. There are commonly a number of obstacles for such victims seeking reparation before courts, and there is often little difference in practice for victims of torture committed by the state or by non-state actors.

Where reparation is sought from the state on the grounds that the perpetrators had links or acted under the control of the state, victims need to demonstrate that the state incurred responsibility. This might be possible where there is a clear relationship, such as in the case of a contractual relationship between the state and the responsible non-state actors, but it is difficult if not impossible to prove where the relationship is less clear and the state denies any such responsibility. The nexus between state forces and paramilitaries is often a highly sensitive matter - such paramilitaries are often used by the state in the first place to evade political and legal responsibility. Publicly making such arguments carries obvious security risks and the judiciary, even where it is independent, is likely to be reluctant to entertain it unless there is clear-cut evidence.

²²⁸ See on the right to truth and the role of Truth and Reconciliation Commissions in particular Report of the independent expert to update the Set of principles to combat impunity, Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*.

²²⁹ See Campbell, *Peace and the laws of war*, pp. 627 et seq. including further references.

²³⁰ *Supra*, III. 2.1. (i).

²³¹ *Azanian Peoples Organisation (AZAPO) & Ors v President of the Republic of South Africa & Ors*.

²³² The DRC Amnesty Law of 29 November 2005 does not, however, expressly mention torture as a crime to which the amnesty does not apply.

Taking legal action against the non-state actors as a group is often impossible, especially where the latter does not operate as such or is not recognised as a legal entity. In many instances, victims only have recourse against individual perpetrators, a process which itself can be fraught with legal problems. A common difficulty is identifying the individual perpetrators, and even establishing to which group they belong. Moreover, in many legal systems a claim for reparation depends on a prior conviction of the alleged perpetrator even though successful prosecutions might be virtually impossible because of the prevailing security situation.²³³ The legal hurdles are compounded by practical obstacles, including:

- the court system has either broken down or is inaccessible for those living in conflict zones;
- bringing cases, even civil ones, against members of rebel groups can entail considerable security risks for the plaintiff, his/her family and potential witnesses;
- sufficient evidence is difficult or impossible to obtain because of a lack of effective investigations;
- finally, even where a favourable ruling is obtained, it will often not be enforceable against non-state actors that are outside of the reach of state authorities unless their assets are available and can be used for that purpose.

National human rights institutions or commissions are an alternative avenue. Such commissions have in some instances monitored and reported on violations by non-state actors, for example in Colombia and Nepal.²³⁴ However, many commissions do not investigate torture by non-state actors nor do they recommend that they provide reparation, mainly because their work focuses on violations by state authorities. Equally, practical considerations, including security concerns, may prevent them from doing so. Civil society groups may also be reluctant to bring cases against non-state actors before national human rights commissions, lest this takes resources and focus away from dealing with state violations. Even where commissions have a mandate that encompasses violations by non-state actors, the recommendations will have little leverage where such actors fail to comply.

Victims of torture may obtain some form of reparation if there is a compensation scheme for victims of crime that covers crimes committed by non-state actors. Few countries have established such schemes, and those that have are usually not those countries ravaged by armed conflict, that is, where there is the greatest need with regard to crimes committed by non-state actors.²³⁵ But even where such schemes do exist, they are commonly limited to compensation only and provide lump sum payments that are standardised and by their nature not proportional to the seriousness of the violations.²³⁶ In addition, or alternatively, victims may benefit from state rehabilitation programmes for victims of torture or other crimes, but such programmes operate in relatively few countries.²³⁷

After conflict

Judicial remedies

The prospect for victims to obtain reparation after the end of a conflict depends on the situation prevailing in the country concerned. There are commonly two major avenues; either through the courts and/or through administrative schemes providing for reparations. Taking legal action before courts is

²³³ See REDRESS, *Reparation for Torture*, p.48.

²³⁴ See e.g. *Maoists to make commitment to human rights: NHRC*, Kathmandu Post Report, 21 April 2003.

²³⁵ See Office for Victims of Crime, *Directory of International Crime Victim Compensation Programs, 2004-2005*.

²³⁶ See e.g. the Criminal Injuries Compensation Scheme in the UK, 2001, www.cica.gov.uk.

²³⁷ See the US Torture Victims Relief Act of 1998, Act 30 October 1998, P.L. 105-320, 112 Stat. 3016 (Effective 1 October 2003) and the Swiss Federal Assistance to Victims of Offences Act, Adopted on 4 October 1991 (LAVI; RS 312.5).

often not an effective remedy. In addition to the obstacles outlined in the previous section, the judicial system is frequently dysfunctional after a period of prolonged conflict.²³⁸ There is often the need for long-term capacity building of the judiciary with international support, for example, as in Afghanistan and the DRC. Specialised courts that have been set up with international involvement are mainly mandated to address criminal accountability only, for example in Sierra Leone and East Timor.

Even where the judicial system is functional, amnesty laws, statutes of limitations and evidential problems resulting from prevailing impunity and/or the length of time since the violation often prove insurmountable hurdles for victims. The biggest difficulty commonly stems from the large number of victims who, if all were to take legal action before the courts, would overburden the court system. It also means that victims will be unable to obtain full reparation where the assets of the perpetrators are limited or not traceable as will frequently be the case with non-state actors.²³⁹

The Human Rights Chamber for Bosnia and Herzegovina is a notable exception of a judicial mechanism that has provided limited subsequent oversight for violations by non-state actors. The Chamber, set up pursuant to the 1995 Dayton Peace Agreement, held the Republika Srpska responsible for some of the violations, including acts amounting to torture, such as enforced disappearances, committed during the war in the former Yugoslavia, in particular in the *Srebrenica* case.²⁴⁰ However, the mandate of the Chamber only covered violations committed after the signing of the Dayton Peace Agreement in 1995. Most violations took place before that date, unless they qualified as continuing violations, such as enforced disappearances.²⁴¹

Truth and Reconciliation Commissions and Reparation Schemes

It is mainly in light of the difficulties associated with large number of claims before domestic courts following conflict that several states have established commissions mandated to determine the truth of violations and recommend reparations, or set up reparation programmes intended to benefit a large number of victims. The mandate of several truth and reconciliation commissions (TRCs), such as in Chile, Guatemala, El Salvador, Peru, Sierra Leone and South Africa, has encompassed violations by non-state actors, including both paramilitary groups and groups hostile to the government concerned. In South Africa, for example, the TRC not only detailed the nature of the Apartheid regime but also chronicled violations committed by the ANC and the Pan Africanist Congress.²⁴² TRCs in Guatemala, El Salvador, Peru and Sierra Leone also identified those responsible for serious violations, including paramilitaries and armed groups hostile to the government, and established a factual record of violations and suffering.²⁴³ However, the impact of TRCs is limited where alleged perpetrators refuse to participate and disclose information, as for example was the case with Inkatha in South Africa.²⁴⁴

Several TRCs have recommended reparations for acts of torture by non-state actors. In South Africa, the TRC recommended comprehensive reparations for the victims of Apartheid and conflict, basing the Government's obligation both on international law and South Africa's Constitution. The reparation encompassed all victims of "political violence", including those who had, for example, suffered torture at

²³⁸ See *Report of the independent expert on the situation of human rights in Afghanistan, 2005* as well as *Report by the independent expert on the situation of human rights in the Democratic Republic of the Congo, 2005*, para.77.

²³⁹ See Roht-Arriaza, *Reparations Decisions and Dilemmas*, pp. 157 et seq.

²⁴⁰ *Selimovic and 48 Others v. RS*.

²⁴¹ See Annex 6 to the general framework agreement for peace in Bosnia and Herzegovina, Chapter Two, Part C.

²⁴² See Truth and Reconciliation Commission of South Africa, *Report, 2003*, Volume Six, Section Five, Chapter 3 for ANC and Chapter 5 for Pan Africanist Congress.

²⁴³ See overview in Hayner, *Unspeakable Truths*, pp.305 et seq.

²⁴⁴ But the TRC nevertheless found violations, see its *2003 Report*, Volume Six, Section Five, Chapter Four, I.

the hands of the ANC.²⁴⁵ In Sierra Leone, the TRC recommended the establishment of a Special Fund for War Victims, based on Article XXIX of the Lome Peace Agreement. The Fund is to benefit victims of torture by armed groups such as the RUF, address the specific needs of victims in the areas of health, pensions, education, skills training and micro credit, and provide community reparations as well as symbolic reparation.²⁴⁶ In Peru, the TRC developed a “comprehensive plan for reparations in which individual and collective, symbolic and material forms of compensation are combined.”²⁴⁷ It found that the Government of Peru was responsible to provide reparation, including for violations by non-state actors on the basis of the due diligence principle.²⁴⁸

In all three instances, the TRCs based their recommendations that the state provide reparations not only for state violations but also those committed by armed groups and others, both on the legal and perhaps more importantly political responsibility of the governments concerned to afford justice to the victims of “political violence” and armed conflict. Notably, none of the TRC’s recommended expressly that reparation be provided or financed by the non-state actors responsible. However, as recommendations have not yet been implemented in either Peru or Sierra Leone, the possibility remains that the responsible government bodies will draw on funds from perpetrators, where available, to contribute to the fund for reparations.

Lack of reparation for past violations

In a number of instances, states have not established any or adequate TRC or reparation mechanisms following the end of conflict.²⁴⁹ Commonly, their absence is due to a lack of political will that often goes unopposed where there are no or weak domestic constituencies that can and do advocate successfully for the establishment of such mechanisms. In times where a state is emerging from a period of political instability as “a failed state”, the various factions often share an interest in not having a public examination of their past wrongdoings, such as in Afghanistan and Somalia, and there is little official incentive to establish a reparation scheme in light of scarcity of resources.²⁵⁰ The lack of will frequently exists on the part of both state authorities and non-state actors. It is often particularly acute in the immediate aftermath of conflict, such as at present in Sri Lanka and, in the past, in Zimbabwe,²⁵¹ as well as in Algeria²⁵² and to some degree in Northern Ireland where only half-hearted measures have been taken to date.²⁵³ In countries characterised by strong ethnic divides the various groups are often reluctant to admit to, and provide reparation for violations, in particular where other groups are not equally willing to do so, as has been largely the case in Bosnia-Herzegovina.²⁵⁴ National liberation movements that have come to power have also been unwilling to acknowledge the truth of violations and provide reparation to the victims of their acts, the ANC being a rare exception.

²⁴⁵ TRC, *Final Report*, Volume 5, Chapter 5, October 1998.

²⁴⁶ *Witness to Truth*, Sierra Leone Truth & Reconciliation Commission, Volume 2, Chapter Four, paras.100 et seq.

²⁴⁷ Report of the Peruvian Truth and Reconciliation Commission, *General Conclusions*, para.167.

²⁴⁸ *Ibid.*

²⁴⁹ See for an overview of Truth Commissions to date, including case studies where no such commission has been established, e.g. Mozambique, Hayner, *Unspeakable Truths*.

²⁵⁰ See on Transitional Justice Initiatives in Afghanistan the work of the Afghanistan Independent Human Rights Commission, www.aihrc.org and on Somalia, Amnesty International, *Somalia: Urgent need for effective human rights protection under the new transitional government*.

²⁵¹ See on the legacy of impunity in Zimbabwe, REDRESS, *Torture in Zimbabwe*.

²⁵² See on Algeria, *Human Rights Watch Report*, 2005.

²⁵³ See on the measures taken in the course of the ‘transitional justice’ process in Northern Ireland where to date there have been neither a concerted efforts to bring perpetrators of torture and other serious crimes to justice nor to establish a truth commission (instead, several inquiries into particular incidents have been carried out), Bell, *Dealing with the Past in Northern Ireland*, pp. 1095 et seq.

²⁵⁴ The Republika Srpska did, however, in line with an order by the Human Rights Chamber for Bosnia and Herzegovina, establish a truth commission to investigate the violations committed in Srebrenica. See Orentlicher, *Independent Study on Best Practices*, 2004, para.21.

One telling example is Namibia, where SWAPO, apparently responsible for serious violations, including torture, during its resistance to the Apartheid regime, became the government after independence in 1990.²⁵⁵ Even though it incurs responsibility under international law for past violations by SWAPO, Namibia has to date steadfastly refused to establish a TRC and/or to provide reparation for victims. While critics contend that the Government is unwilling to do so because it might undermine its legitimacy,²⁵⁶ the Government argues that the setting up of a TRC “would open the gates for claims for restitutions by all members of society.” This would be “a costly exercise to administer, whether a public hearing or otherwise, you will never satisfy all of those that are hurt, and we cannot place monetary value on our pain and suffering.”²⁵⁷ Finally, where violations including torture largely concern the members of a political organisation, such as the CPP-NPA in the Philippines, which has a history of a long conflict accompanied by violations on both sides, the lack of interest on the part of successive governments has militated against the establishment of an official Truth and Reconciliation Commission and/or reparation scheme.²⁵⁸

Though the situation may change over time and general circumstances may be more favourable for the establishment of relevant mechanisms, it will often be more difficult to mobilise society to this end. Where a TRC or a reparation mechanism is set up after a considerable passage of time, its beneficial impact for victims is bound to be diminished.

Summary

- Even though states are obliged to take appropriate measures with a view to preventing torture, in practice, they often fail to adopt adequate legislation and to take effective measures ensuring protection.
- States have largely failed to fulfil their obligation to investigate and prosecute perpetrators of torture. With regard to armed groups with close ties to the state, this is due to a combination of lack of political will and security concerns on the part of victims and others involved.
- During conflict, states commonly have limited means to investigate torture by armed groups hostile to them because of limited access and lack of victim cooperation (out of security concerns or reluctance to engage with state authorities). Where investigations and prosecutions of non-state actors take place, there are often concerns about the observance of custodial safeguards and fair trial standards.
- After conflict, there is often no functional justice system to try a large number of perpetrators amidst ongoing security concerns. The parties concerned often share an interest not to open criminal investigations and prosecutions where there is a shared history of violations. The granting of amnesties has been a common response, often accompanied by truth and reconciliation commissions as an alternative to full investigations and prosecutions. The latter are important for the victims’ right to truth and public acknowledgment. However, they are no substitute for criminal accountability of perpetrators of torture. Torture, be it committed by a *de facto* regime or by armed groups in the course of conflict, is a serious human rights violation and international crime that cannot be the subject of an amnesty recognised under international law.

²⁵⁵ Conway, *Truth and Reconciliation: The Road not Taken in Namibia*.

²⁵⁶ *Ibid.*

²⁵⁷ See *Namibia rules out mass grave truth commission*, 30 November 2005, www.iol.co.za.

²⁵⁸ See for ongoing efforts to establish a truth commission, the website of the NGO PATH at <http://path.intercreate.net/>.

- The obstacles faced by victims of torture suffered at the hands of non-state actors are often similar to the ones experiences by those who were tortured by state agents.
- Survivors of torture committed by armed groups encounter numerous difficulties when seeking reparation during conflict. This is largely due to a culture of impunity and security concerns in case of paramilitaries close to the state and the limited possibilities of taking legal action against armed groups hostile to the state. National human rights institutions, crime compensation boards and rehabilitation schemes are alternative mechanisms and sources that can provide some form of reparation but there is little discernible practice to this end.
- There is a greater prospect of obtaining reparation after conflict. While there are few examples of reparations awarded by the judiciary, which is often dysfunctional and not in a position to process mass claims, victims of non-state actors have obtained forms of reparation through truth and reconciliation commissions and similar mechanisms. The latter have in particular provided a forum for truth and public acknowledgment of wrongdoing. Several commissions have recommended individual compensation and collective forms of reparation, including for torture by non-state actors, but implementation is often slow and unsatisfactory. In a number of countries, no such commissions are in place, largely due the lack of sufficient political will, and victims of torture by non-state actors have received no or very limited reparation from other sources.

2.2. Responses by non-state actors

(i) *Obligations of non-state actors: Prevention, accountability and reparation*

De facto regimes, armed groups, paramilitaries and others have an obligation not to use torture, both as a matter of international human rights and humanitarian law where applicable. However, neither of these bodies of law imposes obligations on such actors to take preventive measures. However, international standards applicable to states can be used, in particular in relation to *de facto* regimes that operate some form of criminal justice system, especially where such entities have declared their commitment to uphold relevant international standards. There are also prevention measures, such as training, which all such actors can utilise for their members.

International law does not impose an obligation on armed groups and other such actors to investigate, prosecute and punish torture committed by their members or within the areas under their control. Again, international standards applicable to investigations, prosecutions and punishments by states can be used as yardstick when examining the record of non-state actors in this respect.

There are no express rules of international human rights law that provide for responsibility of non-state actors to afford reparation for torture.²⁵⁹ Where international humanitarian law binds non-state actors, a breach of common article 3 of the Geneva Conventions arguably entails a duty to provide reparation to the victims of such violations in accordance with international standards.²⁶⁰ Beyond the limited responsibility to make available effective remedies and reparation for any prior violations where they subsequently become a new government or a new state,²⁶¹ non-state actors are only subject to individual

²⁵⁹ *Supra*, III. 1.2.

²⁶⁰ See on the right to reparation under international humanitarian law, Bank/Schwager, *Is there an Individual Right to Compensation for Victims of Armed Conflicts against a State?*

²⁶¹ See Article 10 of the ILC Draft Articles on State Responsibility.

responsibility. This is either under general international law,²⁶² in specific provisions such as Article 75 of the Rome Statute, or national law, be it of the country where the torture took place or in third countries. Where the liable non-state actors are unable or unwilling to provide reparations, the Basic Principles and Guidelines call on states to “endeavour to establish national programmes for reparation and other assistance to victims”.²⁶³

(ii) Prevention of Torture

Safeguards and monitoring

De facto regimes

The existence of a legal system in which fundamental safeguards can be put in place greatly facilitates the application of most of the internationally recognised measures aimed at the prevention of torture. Such a system exists only in few *de facto* regimes that have a degree of permanency and have developed legal institutions.²⁶⁴ For a number of reasons most *de facto* regimes are either unwilling or unable to take preventive measures. The willingness of a *de facto* regime to subscribe to the gamut of preventive measures depends to a large degree on its ideology and positioning vis-à-vis the international community. Where a *de facto* regime does not recognise international human rights standards and is not seeking international legitimacy, it is commonly less inclined to put into place preventive measures, such as has been the case with the Taliban in Afghanistan.²⁶⁵

However, even for a *de facto* regime willing to take preventive measures, there is often inadequate capacity in the administration of justice, especially criminal justice. Shortcomings include in particular a lack of effective institutions and safeguards. Fragile political structures and a lack of resources have also contributed to weak preventive action.²⁶⁶ An example is the Palestinian National Authority where serious violations such as torture and forced disappearances reportedly continue unabated.²⁶⁷ This is in spite of the recognition of international human rights standards, including the prohibition of torture, in its Basic Law and the existence of an active national human rights institution, namely the Palestinian Independent Commission for Citizens’ Rights.

The limited capacity is often at least partly due to the reluctance of external actors, such as states or international organisations, to contribute to building the capacity of justice systems of *de facto* regimes

²⁶² As implicitly recognised in the 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. See Principle 16 “States should endeavour to establish national programmes for reparation... in the event that *the party liable for the harm suffered* is unable or unwilling to meet *their obligations*.” [emphasis added].

²⁶³ Principle 16 of the Basic Principles.

²⁶⁴ For example Taiwan, see Cooney, *Effects of Rule of Law Principles in Taiwan*, pp.417 et seq. In practice, however, there have been concerns about torture and the use of evidence extracted under torture in trials in Taiwan’, see Amnesty International, *Annual Report*, 2002, p.238.

²⁶⁵ Situation of Human Rights in Afghanistan, Note by the Secretary-General, 1999, para.16, according to which the UN Special Rapporteur delivered an aide-mémoire to a Taliban representative in May 1999, requesting specific actions “to be taken in order to prevent further violations and to protect and reassure the civilian population affected”, such as instructions to local Taliban commanders to refrain from violations, to release arbitrarily detained civilians, to investigate violations committed by all parties to the conflict and prosecute those guilty of violations and to facilitate access for UN personnel to assess the human rights situation.”. The request met with an inadequate response only (para. 17: “In the only response received, reference was made to a special decree of Mullah Omar in which he had appealed to people to avoid actions by way of revenge following the recapture of Bamyan, it being suggested in the letter that such burning of houses as had taken place was done by people seeking revenge.”). See para.36 *ibid.* on the “basic framework for the respect of human rights” under the Taliban. *Report on the situation of human rights in Afghanistan submitted by Mr. Kamal Hossain*, 2001, paras.40 et seq.

²⁶⁶ See e.g. PICCR, *Special Report, Status of the Security Chaos and the Weakness of Sovereignty of Law*.

²⁶⁷ See PICCR, *Annual Report*, 2004, pp.126, 127; PICCR, *Special Report Concerning Disappearances*, and Palestinian Centre for Human Rights, *Annual Report 2004*, pp.44 et seq.

whose existence is contested, such as Abkhazia in Georgia, so as not to lend, indirectly, support to a *de facto* regime by strengthening its institutions.²⁶⁸ Assistance provided by the UN, OSCE, ICRC and others consists mainly in awareness raising, training and advice on relevant international human rights and humanitarian law standards.²⁶⁹

De facto regimes have agreed to visits by international and regional monitoring bodies, be it the Special Rapporteur on Torture in the case of Abkhazia or the European Committee for the Prevention of Torture (CPT) in the case of Transdniestra. However, *de facto* regimes are commonly not subject to the same degree of international monitoring as states, particularly by treaty-based bodies, such as the UN Committee against Torture and the CPT (as mentioned, the CPT has visited Transdniestra, but attempts to gain access to the Turkish Northern Republic of Cyprus have failed). *De facto* regimes therefore commonly do not benefit from a dialogue with international treaty bodies. They are for this reason arguably less prompted and prone to engage and to bring their system and practice in line with international standards.

Armed groups

Armed groups often do not even have a basic administration in place, especially where they lack secure territorial control. A common characteristic of these groups is the absence of any safeguards, including outside monitoring, as they often exercise summary justice without due process, such as the Shining Path in Peru, and/or operate clandestinely.²⁷⁰ Many groups such as the LRA in Uganda have not taken any steps to provide safeguards or to engage effectively with outside monitors with a view to preventing human rights violations by their members.

On the other hand, several groups have committed themselves to respecting international human rights and/or international humanitarian law standards, in agreements with the government concerned or in unilateral statements.²⁷¹ Examples are national liberation movements,²⁷² the CPP-NPA in the Philippines,²⁷³ the Sudanese People's Liberation Movement/Army (SPLM/SPLA) in Sudan,²⁷⁴ the Guatemalan National Revolutionary Union (URNG) in Guatemala and the Farabundo Marti National Liberation Front (FMLN) in El Salvador.²⁷⁵ Several peace and ceasefire agreements, such as in El Salvador,²⁷⁶ Sri Lanka²⁷⁷ and Sudan²⁷⁸ include declarations to abide by international human rights and/or

²⁶⁸ See for general considerations International Council on Human Rights Policy, *Ends and Means*, pp.49, 50 and for a concrete example the programme of the OSCE in Abkhazia, which focuses on conflict resolution and rehabilitation. The programme has a "human dimension", including some human rights capacity building elements, but does not address institutional capacity building. See OSCE Mission to Georgia, at <http://www.osce.org/georgia/16289.html>.

²⁶⁹ International Council on Human Rights Policy, *Ends and Means*, p.50.

²⁷⁰ See *Final Report by the Peruvian Truth and Reconciliation Commission*, in particular pp.204, 205.

²⁷¹ See for an overview *Statements by Non-State Actors under International Humanitarian Law* [with a focus on historical precedents and ban of landmines].

²⁷² These include for example the ANC in South Africa (1980), SWAPO in Namibia (1981) and the PLO (1989).

²⁷³ See *Comprehensive Agreement on Human Rights and International Humanitarian law entered into between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, including the Communist Party of the Philippines and the New People's Army*, 16 March 1998. The CPP has also declared itself bound by Protocol II of the Geneva Convention in 1991 and, in 1996, made a unilateral undertaking to apply the Geneva Conventions and Protocol I.

²⁷⁴ *Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affected Civilian Populations between the Government of Sudan, the Sudan People's Liberation Movement (SPLM) and the United Nations Operation Lifeline Sudan (OLS)*, 15 December 1999.

²⁷⁵ See for the agreements in Guatemala and El Salvador, adopted in 1994 and 1990 respectively, Schoiswohl, *Human Rights Obligations of Non-Recognised Entities*, pp.228 et seq.

²⁷⁶ *San Jose Agreement of 1990*.

²⁷⁷ *Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam*, 2002.

humanitarian law standards²⁷⁹ although practice is far from uniform²⁸⁰ and armed groups sometimes apply and interpret these standards selectively to suit their own ends.

Armed groups have also appointed or approved of individuals or bodies with a mandate to protecting human rights, such as the North East Secretariat on Human Rights in Sri Lanka.²⁸¹ They have also engaged with external bodies, including civil society, for example undergoing training on international standards. While such developments have the potential to result in greater protection, doubts remain concerning their effectiveness: there is often little external monitoring of agreements or commitments and it is unclear what steps, if any, have been taken with a view to preventing torture.²⁸² In the absence of such verification, it is difficult to assess whether the purported steps are genuine attempts to stop torture by members of the group concerned, or mere empty gestures to enhance legitimacy by appeasing those who raise human rights concerns. Continued reports about torture and other serious violations by non-state actors often appear to point to the latter.²⁸³

(iii) Accountability for torture

Investigations by non-state actors

The 'legal systems' and the capacity of *de facto* regimes to carry out investigations and prosecutions of crimes, including torture, vary greatly. They range from entities with a well-developed legal system, such as Taiwan (whose statehood is contested), to regimes that have no effective separation of powers and apply forms of summary justice only, such as Afghanistan under the warlords and the Taliban.²⁸⁴

Due to the lack of sufficient outside monitoring, it can be difficult to establish what steps, if any, *de facto* regimes have taken in response to torture. *De facto* regimes that have used torture systematically, such as in Afghanistan, have by definition not demonstrated any will to investigate and prosecute torture committed by its members.²⁸⁵ Many *de facto* regimes such as Somaliland, the authorities in the Kurdish areas in Northern Iraq and the Palestinian National Authority (PNA) have made public commitments to human rights and have at times even passed relevant legislation. These are not only of symbolic value but can serve as an important yardstick to promote greater compliance with international human rights standards. However, these developments have apparently had limited impact in ensuring accountability of

²⁷⁸ *Sudan Comprehensive Peace Agreement*, 9 January 2005.

²⁷⁹ See ICHRP, *Negotiating Justice?*, on peace agreements and human rights in general and for specific case studies (Cambodia, El Salvador, Mozambique, Bosnia and Herzegovina, Guatemala, Northern Ireland, Sierra Leone and Burundi).

²⁸⁰ The *Memorandum of Understanding between the Government of Indonesia and the Free Aceh Movement*, 2005, for example, does not contain an express obligation for non-state actors to uphold relevant standards.

²⁸¹ See www.nesohr.org.

²⁸² There have been monitoring mechanisms in several agreements, such under the San Jose Agreement in El Salvador under which ONUSAL "produced reports detailing violations by the Government and violations by FMLN and addressed recommendations to the FMLN pursuant to its observations", see Sassoli, *Possible Legal Mechanisms to Improve Compliance by Armed Groups*, p.15. See for a critical review of the limited scope and weak implementation mechanism of the Joint Monitoring Committee to monitor the implementation of the 1998 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, established following the 2004 agreement between the Government of the Philippines and the National Democratic Front, Robert Francis Garcia, *Driving the CARHRIHL. Another Trip To Peace?* In other agreements, such as in Sri Lanka, responding to human rights violations by the parties is part of the broader mandate of the Sri Lanka Monitoring Mission to uphold the ceasefire. However, monitoring efforts have proved to be of limited effectiveness in preventing violations, see Amnesty International, *Sri Lanka: A Climate of Fear*.

²⁸³ *Ibid.*

²⁸⁴ *Report on the situation of human rights in Afghanistan submitted by Mr. Kamal Hossain*, 2001, paras.36 et seq.

²⁸⁵ *Ibid.*

regime officials and others working closely with the *de facto* authorities.²⁸⁶ *De facto* regimes frequently fail to develop and implement a strong policy of accountability, often due to a persisting authoritarian mindset nurtured in armed struggle.²⁸⁷ One example of this widespread phenomenon is the Palestinian authorities. The PNA has established the Palestinian Independent Commission for Citizens' Rights (PICCR) with the power to investigate complaints against Palestinian authorities, a notable step compared to other regimes and even states in the region. However, reports by the PICCR and human rights groups indicate that the Palestinian Attorney General has failed to follow up complaints and recommendations, namely, to investigate allegations of serious violations by members of the Palestinian Security Services and other PNA authorities and armed groups. This has resulted in a climate of impunity.²⁸⁸

Even where a *de facto* regime or factions within it are willing to take steps to ensure accountability, factors such as the lack of resources, limited capacity and fragile political structures commonly militate against the creation and maintenance of institutions capable of ensuring criminal accountability for torture broadly in line with international standards. This is often caused or compounded by international isolation and a lack of external support.

Where armed groups claim that they have taken disciplinary action against members responsible for torture and other violations,²⁸⁹ these claims are not only difficult to verify, such as claims by the CPP-NPA in relation to the internal purges committed in the 1980s, but there are also concerns about the validity of trials and the observance of fair trial standards.²⁹⁰

(iv) Reparation for torture

There is limited anecdotal evidence of incidents where non-state entities have paid some compensation to victims *ex gratia*.²⁹¹ However, this practice seems to be confined to isolated violations where the perpetrators exceeded their authority or where it was a case of mistaken identity. The payment of compensation in such cases commonly rests on the insistence and influence of the victim(s) on the one hand and the good will of the non-state actors on the other. This practice therefore fails to reflect internationally recognised principles that call for accountability and full, fair and non-discriminatory reparation.

Non-state actors have not set up truth commissions or other commissions of inquiry. The only apparent exception is the ANC in South Africa that established the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees during the time of political transition from

²⁸⁶ See Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law*, pp.296 and Amnesty International, *Somalia: Urgent need for effective human rights protection*, and *Annual Reports for Iraqi Kurdistan, 1986*, pp. 183, 184 and 2002, p. 132.

²⁸⁷ See e.g. Bell, *Peace Agreements and Human Rights*, p.204, on the PNA according to whom "the regime... has failed to make a transition 'from behaving like a liberation army of soldiers and commandos to one of bureaucrats and civil servants, who put the law above political expediency'" [footnote omitted].

²⁸⁸ See PICCR, *Special Report on Enforced Disappearances* and PICCR, *Annual Report, 2004*, pp.126 et seq. on torture ("The absence of accountability mechanisms and serious investigations into these complaints relating to the ill-treatment of detainees is the primary reason for the continuation of the degrading practices and cruel treatment in many Palestinian detention centres. PICCR believes that the best means to prevent these illegal transgressions against detainees is for the security agencies to pay heed to PICCR and citizens' complaints and to conduct serious investigations into these transgressions in order to hold perpetrators accountable and punish them accordingly"). See also *Annual Report of the Palestinian Centre for Human Rights, 2004*, pp.51, 52.

²⁸⁹ See <http://path.intercreate.net/> for various articles on CPP-NPA responses.

²⁹⁰ See also Zegveld, *Accountability of non-state actors in international law*, p.156, according to whom "international practice provides little support for the prosecutions by non-state groups of their own members. The general feeling is that it is difficult to conceive of humanitarian law giving non-state groups the authority to prosecute and try authors of violations."

²⁹¹ According to information obtained by REDRESS from Nepal.

Apartheid in South Africa in 1992, largely as a result of pressure by former prisoners and human rights groups, such as Amnesty International.²⁹² The Commission was tasked with carrying out a full and thorough investigation into complaints made by persons detained in ANC camps outside of South Africa. It found evidence of consistent torture of suspected “enemy agents” and “dissidents”.²⁹³ Notably, the Commission recommended that “all witnesses who suffered maltreatment while being detained in ANC camps should receive monetary compensation for their ordeal” and that “urgent and immediate attention be given to identifying and dealing with those responsible for the maltreatment of detainees.”²⁹⁴ Following the publication of the first Commission report, the then ANC leader Nelson Mandela recognised the collective responsibility of the ANC and a second commission of inquiry was set up in early 1993. The Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuses Against ANC Prisoners and Detainees by ANC Members published its report in August 1993 but no further action was taken. In spite of the particular historical context of their establishment and their shortcomings, the Commissions are significant not only for the important role they played in the context of South Africa’s response to dealing with its past; they also serve as an example how non-state actors can address violations committed by their own members. However, the objective commonly pursued by non-state actors when setting up such mechanisms, namely to enhance their legitimacy, usually by responding to national and/or international demands, can only be achieved if the relevant commissions are sufficiently credible in terms of composition, mandate, process, and transparency, as well as where findings and recommendations are accepted and implemented subsequently.

Summary

- Non-state actors often lack either the will or the capacity, or both, to take measures with a view to preventing torture. There are instances where *de facto* regimes have established human rights institutions and where armed groups have committed themselves to human rights standards and external monitoring. While potentially promising developments, these mechanisms have not been very effective in circumstances where legal standards are often of secondary importance and have had limited impact in preventing torture to date.
- *De facto* regimes rarely investigate acts of torture due to factors such as lack of will, limited resources and fragile political structures. The lack of external support and international isolation are further factors. International support in capacity building is vital to ensure that basic structures are in place that allow effective investigations and fair accountability mechanisms.
- Information about investigations and punishments of perpetrators of torture by armed groups themselves is largely anecdotal. Armed groups commonly lack the basic structures to conduct investigations and trials in line with international standards and there is little evidence of a genuine commitment to hold members accountable for torture unless it is seen as a manifestation of lacking discipline.
- *De facto* regimes and armed groups commonly have no effective remedies in place and provide compensation or other forms of reparation only in exceptional cases where the specific circumstances are favourable to the victim. Neither of these groups tends to establish truth commissions or similar mechanisms, the ANC in South Africa being the only exception. In spite of some shortcomings, the experience of the ANC inquiry provides valuable lessons for other groups, in particular those seeking legitimacy as part of the political process.

²⁹² Hayner, *Unspeakable Truths*, p.60.

²⁹³ See *Skweyiya Commission Report*, 1992, available at <http://www.anc.org.za/ancdocs/misc/skweyiya.html>.

²⁹⁴ *Ibid.*, at O.

2.2. International Responses

(i) Prevention of Torture

UN thematic rapporteurs, in particular the Special Rapporteur on Torture, country-specific rapporteurs, working groups, such as the one on enforced and involuntary disappearances, and UN country missions all monitor the conduct of non-state actors to some degree with a view to preventing torture and other human rights violations.²⁹⁵ However, independent bodies commonly have limited direct access to areas controlled by non-state actors, including their detention facilities.²⁹⁶ The effectiveness of monitoring is hampered by a series of factors, including the insufficient prioritising of existing resources to conduct the required monitoring on the ground, for example in the DRC.²⁹⁷ This makes it difficult if not impossible, to assess the real human rights situation and deprives potential and actual victims of a vital safeguard against torture. Its *ad hoc* nature and, where contact has been established, lack of cooperation on the part of non-state actors and insufficient follow-up are further factors limiting the impact of monitoring. In the course of armed conflict it is mainly and often solely the International Committee of the Red Cross (ICRC) that has access to non-state actors as parties to the conflict. The ICRC has both the established track record to do this work, and frequently updates strategies of how to raise concerns with non-state actors about illegal conduct including torture that comes to its attention, and by so doing can and does contribute effectively to prevention. However, its *modus operandi* limits the visibility of its impact.²⁹⁸

Engagement with *de facto* regimes and armed groups, by international bodies and NGOs, is an important means to seek protection and prevention of torture. It can be particularly effective where accompanied by monitoring mechanisms. The practice of engaging with armed groups and lesson learned are examined in more detail below at IV.4.

(ii) Accountability of non-state actors for torture

Prosecution practice of international and internationalised criminal tribunals

The ICTY and ICTR have found several non-state actors guilty of having committed acts of torture as elements of international crimes subject to their jurisdiction, in particular war crimes and crimes against humanity but also genocide, such as in the *Furundzija*, *Celebici*, *Kunarac*, *Vukovic*, *Kvočka* and *Limaj* cases before the ICTY²⁹⁹ and the *Serushago*, *Semanza*, *Niyitegeka* and *Musema* cases before the ICTR.³⁰⁰

Yet, significant limitations remain in ensuring accountability of the perpetrators. The ICTY and ICTR focus mainly on state actors, and a number of non-state actors have escaped accountability before the

²⁹⁵ *Supra*, III. 1.2. (iv).

²⁹⁶ For example, with regard to country visits, the country concerned has to grant permission to visit, and, once this is given, a visit to areas controlled by non-state actors may prove impossible because of objections by state officials, international bodies, the non-state actors themselves or due to logistical obstacles (such as during the visit of the Special Rapporteur on Torture to Nepal). Report of the Special Rapporteur on Torture *Mission to Nepal*, 2006, para.19.

²⁹⁷ *Report submitted by the independent expert on the situation of human rights in the Democratic Republic of the Congo*, 2005, para.80 (c)- (e).

²⁹⁸ The ICRC “has a framework of three main types of action: (1) responsive action (in the wake of an emerging or established pattern of abuse), 2) remedial action (rehabilitation, reparation, restitution and compensation required as a result of the patterns of abuse) and environment-building (permanently required action with a view to creating an environment conducive to the prevention of abuse, and appropriate responses to any pattern of abuses). See Santos, *The Human Rights Implications*, referring to ICRC, “Holding Armed Groups to International Standards: An ICRC Contribution to the Research Project of the International Council on Human Rights Policy” (manuscript n.d.), pp. 7-8. and Sassoli, *Possible Legal Mechanisms to Improve Compliance by Armed Groups*, pp. 16,17.

²⁹⁹ See e.g. *The Prosecutor v. Furundzija*, *The Prosecutor v. Mucic et al.*, *The Prosecutor v. Kunarac*, *The Prosecutor v. Kvočka* and *The Prosecutor v. Limaj*.

³⁰⁰ See e.g. *The Prosecutor v. Serushago*, *The Prosecutor v. Semanza*, *The Prosecutor v. Niyitegeka*, and *The Prosecutor v. Musema*.

tribunals.³⁰¹ International or internationalised criminal courts commonly only prosecute and try persons bearing the greatest responsibility. This is evidenced by the jurisprudence of the ICTY and ICTR to date and ongoing investigations, prosecutions and trials before the ICC and mixed tribunals, such as the Special Court for Sierra Leone. This means that these tribunals will have to be complemented by domestic criminal justice mechanisms to ensure accountability of the majority of perpetrators, which often does not occur. In Sierra Leone, perpetrators of international crimes, including torture, other than the thirteen indicted to stand trial before the Special Court, benefit from an amnesty law. The amnesty, though not recognised by the UN and declared inapplicable by the Special Court with regard to trials before it, continues to apply to other prosecutions and trials in domestic courts to “anything done by them [member of the RUF, ex-AFRC, ex-SLA or CDF] in pursuit of their objectives as members of those organisations since March 1991 up to the time of signing the present Agreement [7 July 1999].”³⁰²

Even where perpetrators are prosecuted by international tribunals, the effectiveness of such courts is frequently hampered by operational difficulties, in particular due to lack of resources. A further factor impacting adversely on international tribunals is the insufficient collaboration of states to bring perpetrators to justice. The continuing liberty enjoyed by Karadzic and Mladic at the time of writing stands out as the single biggest failure in this respect.³⁰³

The statute of the ICC, a treaty-based instrument adopted in 1998 that came into force in July 2002, has significantly extended the reach of international criminal law. This is not only due to the number of states subject to the ICC’s jurisdiction, but also because either states, as has happened in the DRC and Uganda, or the Security Council, in the case of Darfur/Sudan, may refer cases to the ICC.³⁰⁴ It is perhaps premature to assess the role of the ICC in ensuring accountability for international crimes. Clearly, although it has jurisdiction over a large number of states party to it or referred to it, the Court can with the exception of ongoing crimes not respond to violations that took place before July 2002³⁰⁵ and will realistically only deal with a limited number of cases involving large-scale violations. A series of difficulties have already become apparent, not only limited capacity but, particularly in relation to non-state actors, a series of obstacles and security concerns. This applies to both victims/witnesses and the investigators themselves when investigating crimes in the midst of an ongoing conflict. There is also the prospect that ICC investigations will aggravate or complicate existing conflicts or jeopardise peace processes, for example as has been suggested by some in relation to Uganda.³⁰⁶ The potential strength of the system, namely the principle of complementarity that provides an incentive for states to prosecute international crimes domestically, is yet to be fully tested. It is bound, as far as crimes by non-state actors are concerned, to be confronted with most of the problems relating to national investigations and prosecutions identified earlier in this Report.

(iii) Reparation for torture

Using international human rights bodies

Victims of torture by non-state actors have no single avenue that they can use to claim reparation. In states that have accepted individual complaints mechanisms, victims may bring cases before international

³⁰¹ Zegveld, *Accountability of non-state actors in international law*, pp.153 et seq., at p.155.

³⁰² See Article IX (3) of the *Lome Peace Agreement* of 3 June 1999.

³⁰³ See *Twelfth Annual Report of the ICTY*, 2005, p.3.

³⁰⁴ See for regular updates about cases before the ICC <http://www.icc-cpi.int/cases.html>.

³⁰⁵ See Article 24 of the Rome Statute of the ICC.

³⁰⁶ See e.g. Uganda, *ICC indictments to affect northern peace efforts, says mediator*, IRINNews, 10 October 2005.

or regional human rights bodies, arguing that the state concerned is responsible for the conduct of non-state actors. This applies in particular where the state concerned has acted jointly or exercised control over non-state actors, such as paramilitaries in Colombia, or over *de facto* regimes such as the Russian Federation in Moldova. It is also relevant in cases where the state failed to prevent torture and fulfil its positive obligations. There have been several cases to date in which victims of torture by non-state actors have received compensation: the *Harziji Djemali v. Yugoslavia* case before the Committee against Torture,³⁰⁷ the *19 Merchants and the Mapiripán massacre* cases in Colombia before the Inter-American Court,³⁰⁸ and several cases before the European Court of Human Rights, in particular the case of *Ilascu v. Moldova and the Russian Federation* described in some detail above.³⁰⁹ The African Commission on Human and Peoples' Rights has also recognised state responsibility to provide reparation for failing to prevent torture and other violations by unidentified perpetrators.³¹⁰

In all these cases victims have been awarded reparation against the state responsible. This included in most cases a finding of responsibility as well as the duty to investigate and to provide monetary compensation. The cases demonstrate that individual complaints procedures before regional and international human rights courts can provide an avenue for reparation from a state for torture committed by non-state actors.

Venues for claiming violations of international humanitarian law and seeking reparation

There is no international body mandated to consider individual claims relating to the violation of international humanitarian law. Reparation for violations of international humanitarian law may be claimed by states, such as in proceedings brought before the International Court of Justice, e.g. in relation to the war in the former Yugoslavia and in the DRC,³¹¹ or provided on the basis of reparation schemes. In the case of the *DRC v. Uganda*, the ICJ ruled that Uganda owes reparation to the DRC not only for violations committed by Ugandan forces but also for the failure of Ugandan forces to prevent violations of international humanitarian law, including torture, by armed groups on the territory of the DRC under its control.

The international reparation schemes set up to date, such as the United Nations Compensation Commission and the Ethiopia-Eritrean Claims Commission, do not provide for reparation for violations committed by non-state actors.³¹² Such international schemes are rare in any case and commonly the subject of either inter-state negotiations or largely political decisions made by UN bodies. In a recent development, the UN Commission of Inquiry proposed the setting up of a Compensation Commission for Darfur, Sudan.³¹³ Its mandate would also cover reparation for crimes committed by non-state actors, including the janjaweed and rebels. However, so far the proposed Commission has not been established and it appears more likely that reparation is to be provided in the course of ICC proceedings.

³⁰⁷ *Supra*, at III. 1.3. (ii).

³⁰⁸ See Inter-American Court of Human Rights, *Case 19 Merchants v. Colombia*, and case *Mapiripán Massacre v. Colombia*.

³⁰⁹ See on the jurisprudence of the ECHR, Mowbray, *Development of Positive Obligations*.

³¹⁰ *Malawi African Association and others v. Mauretania*, para.140, confirming Decision in *Communication 74/92 and Commission Nationale des Droits de l'Homme et des Libertés v Chad*, para.22.

³¹¹ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Application of 20 March 1993, pending at the time of writing and *DRC v. Uganda*.

³¹² See on the UNCC relating to violations committed by Iraq in the course of the invasion of Kuwait in 1990 and 1991, www.uncc.org; on the Eritrea-Ethiopia Claims Commission, Article 5 of the Agreement signed in Algiers on 12 December 2000 relating to claims arising out of the armed conflict of 1998-2000. A further mechanism, the Iran-U.S. Claims Tribunal was set up following the 1979 hostage crisis to settle mutual claims, see the Algiers Accords of 1981, 20 ILM 223-240 (January 1981).

³¹³ See *Report of the International Commission of Inquiry on Darfur*, 2005, para.649.

While it is conceivable that states or the UN set up reparation schemes covering violations by non-state actors, the difficulty of securing sufficient funding, and the existence of a reparation regime before the ICC, are factors that are bound to militate against such steps. In a rather exceptional development, the recent judgment of the ICJ in the case of *DRC v. Uganda* provides an opportunity for both states to agree on compensation for the violations for which Uganda incurred responsibility, including torture committed by armed groups in DRC. This includes devising a mechanism for the benefit of the victims of such acts although the judgment is silent on how the DRC should use any reparations it is entitled to receive from Uganda.

The reparation regime of the International Criminal Court and non-state actors

Victims of torture by non-state actors may also be able to seek reparation through the ICC, in relation to the criminal prosecutions proceeding before it. The Court can order reparation, which may take the form of restitution, compensation or rehabilitation. Reparation is to be provided either by the convicted person(s) himself/themselves or through the Victims' Trust Fund.³¹⁴ It may be granted to the individual victims but the ICC may also order collective reparations directly or through the Victim's Trust Fund.³¹⁵ The reparation regime under the ICC constitutes the first permanent mechanism under which individual victims of international crimes can seek compensation, and, notably, other forms of reparation in line with the standards developed in international law. It is an important mechanism for victims that has created many hopes and expectations. At the time of writing, the system is still in its early stages and has not been fully tested. Yet, some important limitations are obvious:

- Firstly, in relation to torture, the Rome Statute only applies to acts of torture that constitute an element of international crimes recognised in the Statute. It therefore introduces a threshold that will not be met in all cases of torture committed by non-state actors.
- Secondly, the Rome Statute in principle applies to state parties only. Several countries such as, for example, Iraq, Russia, Zimbabwe and South Asian countries with conflicts during which international crimes have been or may be committed by non-state actors currently fall outside the scope of the ICC. Although the UN Security Council can refer such situations to the ICC, as happened in the case of Darfur in Sudan, this is bound to remain the exception.
- Thirdly, the Rome Statute does not apply retroactively. A large number of victims of torture committed by non-state actors during armed conflict or before July 2002 will therefore not be able to obtain reparation through the ICC.
- Fourthly, the reparation regime of the ICC is only applicable to cases identified and pursued by the prosecutor that result in conviction. Whilst there is a limited possibility for the Victims' Trust Fund to provide collective support to the communities of victims of the broader situations before the Court, Court ordered reparations is restricted to victims that have suffered harm as a result of the actions of perpetrators convicted by the Court.
- Fifthly, individual non-state actors guilty of international crimes often do not have large assets, and, where they do, it is commonly difficult to seize them. The Victims' Trust Fund will for its part most likely not have sufficient funds at its disposal to repair large-scale violations fully, in particular where there are a large number of victims, such as in all three cases currently before the ICC. Nevertheless, depending on the approach taken, it can play an important role in

³¹⁴ See Articles 75 and 79 of the ICC-Rome Statute respectively.

³¹⁵ REDRESS/FRA, *ICC Trust Fund and Victims Rights Working Group, The Trust Fund for Victims: A Brief Introduction*.

providing symbolic and other forms of reparation that victims of non-state actors would otherwise not be able to obtain.

- Sixth, the Rome Statute provides for individual responsibility only, which means that the Court does not rule on state responsibility (including for acts committed by non-state actors). While the state concerned will have to cooperate in order to implement certain reparation measures ordered for which state participation is essential, such as collective reparation taking the form of public commemoration, erection of monuments or similar measures, it cannot be held responsible to provide reparation, in particular compensation, to the victims under the statute. A foreseeable consequence of the exclusion of state responsibility is that the funds available will in many instances be insufficient to provide adequate reparation.

Summary

- Regional and international bodies, in particular UN field missions, and the ICRC play an important role in monitoring the conduct of non-state actors. Engagement and effective monitoring can lead to better protection. In practice, however, there are a number of factors limiting the effectiveness of international bodies, with the possible exception of the ICRC whose role is at times underestimated because of the lack of visibility of its operations.
- International criminal law has significantly advanced in recent years to recognise criminal responsibility of non-state actors for torture as genocide, war crimes and crimes against humanity. While several investigations and prosecutions have been conducted or are pending before international tribunals, the ICC and mixed tribunals, the effectiveness of international criminal justice is still limited by political factors, in particular failure of state cooperation, and lack of adequate capacity.
- Victims of torture by non-state actors have no regional or international remedies against non-state actors themselves as a matter of international human rights law. However, regional and international human rights bodies have recognised the responsibility of states for violations, including torture, committed by non-state actors and awarded reparation to the victims. The reparation regime of the ICC is the first of its kind that allows victims of non-state actors to participate and to obtain reparation, either from the perpetrators themselves or through the Trust Fund. It is yet to be fully tested but will inherently face problems of capacity and exclusion (including victims coming from states that are not subject to the jurisdiction of the ICC). It therefore has to be complemented with efforts to strengthen remedies at the local level and, possibly, additional reparation mechanisms, such as compensation commissions, at the international level.

2.3. International justice through third countries: Universal jurisdiction

(i) States' obligations to ensure accountability and to provide remedies for torture committed in third countries

States' obligation to prosecute encompasses acts of torture (as defined in article 1 of the UN Convention against Torture) committed in third countries unless the alleged perpetrator is extradited to stand trial (*aut dedere aut judicare*).³¹⁶ This duty includes torture committed by non-state actors deemed to have acted "in an official capacity", especially *de facto* regimes. States also have a series of obligations under international criminal law, in particular the duty to cooperate, both under the Rome Statute and under relevant Security Council resolutions.³¹⁷ Finally, states have an independent duty under the Geneva Conventions to investigate and prosecute grave breaches of international humanitarian law, which include torture.³¹⁸

International treaty law is silent on whether states have an obligation to provide civil remedies for torture committed in third countries, whether by state or non-state actors.³¹⁹ The Committee against Torture appears to be recognising such an obligation, at least implicitly.³²⁰ Such interpretation finds support in the preamble of the UN Convention against Torture, which stresses notions of universality and effectiveness, and the principle of an evolving purposeful interpretation of international human rights treaties. It also ties in with judicial pronouncements by the ICTY in the *Furundzija* case. Irrespective of whether states parties have an obligation to provide civil remedies for torture committed abroad, they are certainly not barred from doing so, and the Committee against Torture has welcomed any steps taken towards this end.³²¹

(ii) Criminal Accountability

State practice

There is a growing momentum on the part of victims and those working on their behalf to turn to foreign jurisdictions in order to have perpetrators of torture prosecuted. The legal basis for such prosecutions is known as universal jurisdiction that allows and at times obliges states to prosecute alleged perpetrators for international crimes such as torture irrespective of the nationality of the victim or perpetrator and the place where the torture was committed. Several cases against alleged perpetrators of torture have been brought in foreign jurisdictions, mainly against state officials, but only some of them have resulted in prosecutions or even convictions. This has been the case where adequate legislation was in place, the perpetrator was present, the state authorities exercised any discretion they had under national law appropriately and the competent court found that there was sufficient evidence to warrant a conviction.³²²

³¹⁶ See in particular Articles 5-8 UN Convention against Torture.

³¹⁷ See Articles 86 et seq. of the ICC Rome Statute. Where a court, such as the ICTY or ICTR, is established on the basis of a Chapter VII resolution of the Security Council, UN member states are obliged to comply on the basis of Articles 25 and 48 of the UN Charter.

³¹⁸ See Articles 146 and 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August, 12, 1949.

³¹⁹ See e.g. Ingelse, *Committee against Torture*, pp. 362 and Byrnes, *Civil Remedies for Torture*, pp.537 et seq.

³²⁰ See Canada, UN Doc. CAT/C/CO/34/CAN, para.4 (g).

³²¹ Concluding Observations of the Committee against Torture, United States of America, para.178 (b).

³²² See for an overview on relevant law and practice, REDRESS, *Bringing the International Prohibition of Torture Home*, pp.88 et seq.

Several national courts have found non-state actors, mainly those operating in the war in former Yugoslavia, responsible for torture as an element of genocide and/or grave breaches of the Geneva Convention.³²³ The applicability of the Genocide Convention and the Geneva Conventions absolved the courts from determining the question of whether a particular status of the perpetrator is a requisite element for an act to constitute torture subject to universal jurisdiction, particularly where it is not committed in the course of war.

The UK Central Criminal Court squarely confronted this issue in the case of *R v. Zardad*. *Zardad*, a member of the *Hezb-I-Islami* faction in Afghanistan, was tried and convicted following a retrial for conspiracy to torture committed under his command from 1992 to 1996. The Court found that section 134 of the UK Criminal Justice Act, which incorporates elements of the definition of Article I of the UN Convention against Torture, also applies to persons acting in a public capacity.³²⁴

The ruling in the *Zardad* case can be seen as an affirmation of states' obligations to prosecute *de facto* officials for acts of torture unless they extradite them, and sets an important precedent for the scope of universal jurisdiction in relation to torture committed by non-state actors. It has a potentially wide application to any group exercising effective control over an area, whether this area is located in a collapsed state without central government or controlled by a group opposed to an existing government.

Although states are obliged to extradite or prosecute non-state actors who are alleged to have committed torture, either with at least the acquiescence of officials or as *de facto* officials, there have been few such prosecutions for torture or international crimes involving torture abroad. While the exercise of universal jurisdiction is generally fraught with difficulties, there are additional obstacles when it is applied to non-state actors.

- Firstly, existing legislation may not cover torture by non-state actors, in particular not covering acts of torture committed by persons other than state agents and/or by confining universal jurisdiction over war crimes to grave breaches applying to international armed conflicts only.
- Secondly, existing legislation providing for universal jurisdiction over torture does not specify whether it includes non-state actors, leaving it to the courts to interpret the relevant provisions accordingly. The UK *Zardad* case is an example where a court has apparently interpreted implementing legislation in line with international jurisprudence. However, it is conceivable that the authorities and courts in other cases could take a narrower position on the question of prosecution of non-state actors for torture, resulting in the inapplicability of relevant legislation.

³²³ There are several decisions by national courts that support this finding. In 1994, a Danish court found Refik Saric, guilty of grave breaches of the Geneva Convention, including the infliction of serious bodily harm, and sentenced him to eight years imprisonment. The judgment, though not dealing specifically with the crime of torture and relying on provisions applicable in international armed conflict, is an early example of the application of universal jurisdiction in relation to crimes committed in the course of the war in former Yugoslavia, dealing with acts of torture under the prism of crimes amounting to grave breaches of the Geneva Conventions as incorporated into Danish criminal law. In 2001, the German Federal High Court found Maksim Sokolovic, a Bosnian Serb, guilty of genocide. In considering the decision of a regional high court on appeal (which had found the accused guilty of genocide, murder and infliction of serious bodily harm), the Federal High Court, in interpreting the relevant section of German criminal law, examined in greater detail whether the serious bodily harm inflicted by Sokolovic constituted torture as defined in Article 147 of the Geneva Convention and concluded that it did. In its deliberation, the Court distinguished between torture and other forms of inhuman and degrading treatment with reference to Article I of the UN Convention against Torture, the jurisprudence of the European Court of Human Rights and the Rome Statute of the ICC without addressing the status of the perpetrator.

³²⁴ The 18 July 2005 judgment is unpublished. In a preliminary ruling of 2004, *R v. Zardad*, para.38, the judge construed section 134 of the Criminal Justice Act of 1988 to mean that a "person acting in a public capacity" [should include] people who are acting for an entity that has acquired *de facto* effective control over an area of a country and is exercising governmental or quasi governmental functions in that area...To adopt the construction contended for the Defence [that the mere fact that there is a central government in existence precludes there being a *de facto* authority of which a person might be a public official or in similar capacity] would be to leave a substantial loophole in the enforcement of an international obligation, and in the attempt to penalise the international crime of torture where it is committed by those who are in authority either under the force of the law, or who are in reality in authority as a result of a situation which has come about or which they have created."

- Thirdly, states are commonly reluctant to exercise criminal jurisdiction unless the alleged perpetrator is present, which is often a prerequisite according to domestic law, and there is sufficiently strong evidence to make out a prima facie case. This is a considerable hurdle for victims of non-state actors and those acting on their behalf, as it will often be even more difficult to collect sufficient evidence in time than it is in cases involving state agents. However, the *Zardad* trial in the UK, which was triggered by a journalistic investigation, demonstrates that a case can succeed where the competent authorities, in this case the Attorney General, take a strong lead in pursuing the prosecution and use methods that allow victims abroad to give evidence, such as via video-link.
- Fourthly, international efforts to bring perpetrators of torture to account under universal jurisdiction have largely focused on officials, whereas non-state actors have received comparatively little attention. The main exception is prosecutions against individuals allegedly responsible for international crimes in the former Yugoslavia.³²⁵ Victims and those working on their behalf can be expected to make increased use of courts in third countries in order to seek accountability of non-state actors. This is particularly so in light of the lack of domestic accountability of non-state actors, increased awareness and the presence of several alleged perpetrators, in Europe and states elsewhere that have the requisite legislation and practice to exercise universal jurisdiction.

(iii) Compensation and other forms of reparation, in particular in civil cases

State practice

Victims of torture and other violations increasingly have recourse to courts in third countries, in particular where there are no effective remedies in the domestic legal system in the country where the violation has taken place. These moves have initially focused mainly on seeking reparation from state officials and states but are increasingly used in relation to non-state actors, in particular transnational corporations. While suits against states have met with limited success mainly because of state immunity,³²⁶ there have been several successful cases against non-state actors that do not enjoy immunity under international law.

U.S. law and jurisprudence

The US courts have attracted the bulk of cases, as the Alien Tort Claims Act (ATCA) allows foreign nationals to sue for damages in relation to torts violating the law of nations.³²⁷ Claims have been brought both against states on the basis of their alleged responsibility for violations by non-state actors as well as directly against such actors.

- Legal action against states

Suits brought in the U.S. against states for torture have largely failed on the grounds of state immunity.³²⁸ States can only be sued where they fall within the scope of the amendment to the Foreign Sovereign Immunities Act. This amendment provides an exception to state immunity and allows U.S. nationals

³²⁶ See for an overview of state practice, REDRESS, *Immunity v. Accountability*, pp.21 et seq. See the following section for cases in the U.S. against designated state sponsors of terrorism.

³²⁷ Alien Tort Claims Act ATCA (28 US Code, Chapter 85, Sec. 1350), adopted in 1789.

³²⁸ See REDRESS, *Immunity v. Accountability*, pp.31, 32.

alleging to be victims of terrorism to bring civil suits against designated state sponsors of terrorism.³²⁹ Under the amendment, several U.S. nationals have obtained favourable judgments against Iran for kidnapping, torture and inhuman treatment. The cases relate to a spate of hostage-takings by *Hezbollah*, a non-state actor, during the 1980s civil war in Lebanon for which Iran was held responsible on the grounds that it had funded and actively supported the organisation.³³⁰ The U.S. courts awarded millions of dollars in compensation, including punitive damages.³³¹ However, the successful plaintiffs have met with difficulties in their attempts to enforce judgments, mainly because the U.S. administration objected to the attachment of diplomatic and consular property.³³² Moreover, in a recent case, the D.C. Circuit Court of Appeals held that relevant legislation does not provide a private right of action against the foreign government itself.³³³ In spite of the favourable judgments just mentioned, the exception to state immunity is limited. It confines the rights to U.S. citizens and applies to a selected number of states only. It is also based on political rather than human rights considerations. In addition, the stance taken by the U.S. administration has hampered enforcement.

- Legal action against non-state actors

In torture cases, the victims can sue both the individuals concerned and organised groups and institutions as legal persons where applicable.³³⁴ The case of *Kadic v. Karadzic*, in which two groups of Bosnian refugees sought damages under the ATCA for, *inter alia*, genocide, rape, torture, assault, sexual violence and summary executions, set an important precedent for the civil responsibility of non-state actors for international crimes.³³⁵ The Second District Court held on appeal that Karadzic, as head of the then non-recognised Republic of Srpska, was a non-state actor.³³⁶ In deliberating the question whether acts of non-state actors can violate the law of nations, the Court held that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” It found that genocide and war crimes committed by non-state actors are in violation of the law of nations whereas the third category, including torture and degrading treatment, is not: “However, torture and summary execution--when not perpetrated in the course of genocide or war crimes--are proscribed by international law only when committed by state officials or under colour of law.”³³⁷ This finding tied in with Judge Edwards’ views in the earlier case of *Tel-Oren v. Libya Arab Republic*, according to whom the ATCA could not be “read to cover torture by non-state actors, absent guidance from the

³²⁹ 28 U.S.C. § 1605 (a). U.S. citizens may also use the Torture Victims Protection Act of 1991, U.S. Code Collection, Title 28, Part IV, Chapter 85, § 1350 to sue individuals alleged to be responsible for torture, or civil remedies to sue alleged perpetrators of acts of international terrorism.

³³⁰ *Cicippio v. Islamic Republic of Iran*, [kidnapping, being held hostage and tortured]; *Higgins v. Islamic Republic of Iran*, [kidnapping and killing]; *Sutherland v. Islamic Republic of Iran*, [kidnapping and imprisoning in inhumane conditions for six and a half years]; *Jenco v. Islamic Republic of Iran*, [kidnapping and imprisonment in inhumane conditions for a year and a half]; *Polhill v. Islamic Republic of Iran*, [kidnapping and imprisoned in inhumane conditions for over three years]; *Stethem v. Islamic Republic of Iran*, [torture, inhumane detention and killing]; *Cronin v. Islamic Republic of Iran*, [kidnapping and torture for four days] and *Surette v. Islamic Republic of Iran*, [kidnapping and torture for 14 months].

³³¹ The courts awarded compensatory damages ranging from \$14.6 to \$65 million as well as punitive damages of commonly \$300 million each.

³³² See Elsea, *Lawsuits Against State Supporters of Terrorism: An Overview*.

³³³ *Cicippio-Puelo v. Islamic Republic of Iran*.

³³⁴ This applies both to cases where government officials are involved in the conduct of non-state actors, such as a political party “acting under the colour of law” - see decision of the US District Court New York, *Tachiona v. Mugabe*- and other cases where principles of liability of legal entities for tort apply.

³³⁵ *Kadic v. Karadžić*.

³³⁶ This was a questionable finding, given its recognition that the Republic of Srpska had all attributes of a state and was at least a de-facto regime. However, it did relieve the Court from applying the Foreign Sovereign Immunities Act, and, possibly, even granting immunity to Karadzic. See for an analysis Bello and Posner, *Kadic v. Karadžić*, pp.658 et seq.

³³⁷ *Kadic v. Karadžić*.

Supreme Court on the statute's usage."³³⁸ The *Kadic v. Karadzic* case resulted in a default judgment awarding \$4.5 billion US dollars to the plaintiffs, which has not been enforced to date.

A subsequent case, *Mehinovic et al. v. Vukovic*, decided in April 2002, included "an action for torture, cruel, inhuman or degrading treatment, arbitrary detention, war crimes, crimes against humanity, genocide, and municipal torts brought by four refugees from Bosnia-Herzegovina against Georgia resident Nikola Vukovic, a former Bosnian Serb soldier." The U.S. District Court, Northern District of Georgia, Atlanta Division, found Vukovic liable to pay damages.³³⁹ On the question of Vukovic's liability for torture, in particular with regard to his status, the Court held that "the beatings carried out by Vukovic and his accomplices [in 1992] were clearly perpetrated, instigated, and acquiesced in, by persons acting in an official capacity as part of the police or military forces of Republika Srpska."³⁴⁰ The Court also found Vukovic liable for violations of common article 3 of the Geneva Conventions, grave breaches and crimes against humanity, and awarded each plaintiff \$10 million US dollars compensatory damages and \$25 million US dollars punitive damages. The judgment is yet to be enforced as Vukovic fled the country during the proceedings. The judgment appears to signal a change in jurisprudence from the *Kadic v. Karadzic* ruling, implying that it is sufficient to be acting in an official capacity as part of law-enforcement agencies or the military of a *de facto* regime.

However, a subsequent decision of the U.S. District Court for the District of Columbia of 31 March 2003 in the case of *Doe v. Islamic Salvation Front and Anwar Haddam* casts doubt on such a conclusion. In the *Doe* case, plaintiffs sought damages for war crimes and crimes against humanity, including torture, allegedly committed by members of the Islamic Salvation Front in Algeria. The Court questioned, however, whether the ATCA confers a cause of action for these violations.³⁴¹

Although the ATCA constitutes an important remedy for victims of torture by non-state actors, there are significant limitations. Besides obstacles applying generally to the use of courts in third countries, in particular costs, statutes of limitations and evidential hurdles, the jurisprudence of U.S. courts has not been fully consistent to date and is far from settled. In particular, it leaves open the possibility that suits against non-state actors for torture will be dismissed for lacking a cause of action under the ATCA, for example where courts find that torture by armed groups does not violate the law of nations.

Moreover, lack of enforcement to date has turned the ATCA into a largely symbolic remedy, though there are hopes for increased enforcement in future. Defendants often have no assets in the country or they are difficult to locate in time before defendants manage to relocate them, as happened in the *Kadic v. Karadzic* and the *Mehinovic v. Vukovic* cases. The ATCA nevertheless serves an important function, giving victims a court forum and establishing a judicial record of violations as well as effectively deterring defendants from entering or living in the U.S. Litigation for torture and other violations under the ATCA, naming and potentially shaming defendants, also has adverse political and economic repercussions for non-state actors, such as armed groups or *de facto* regimes, seeking legitimacy.³⁴²

³³⁸ *Tel Oren v. Libya Arabic Republic*, at 795.

³³⁹ *Kemal Mehinovic, et al. v. Nikola Vukovic, aka Nikola Nikolac*.

³⁴⁰ "Vukovic himself was a soldier in a unit tied to and supported by the Bosnian Serb and Serbian governments. He often carried out beatings with other soldiers. The beatings inflicted by Vukovic all were committed in official or designated detention facilities, guarded by Bosnian Serb or Serbian police or soldiers. Without their permission or acquiescence, and that of those in the political and military hierarchy above him, Vukovic could not have perpetrated abuses against plaintiffs. Plaintiff Subasic described frequently hearing guards scheduling beatings in advance. The fact that the beatings carried out by Vukovic and others were routine, daily occurrences at these facilities also indicates that the beatings were, in fact, ordered, authorized, and perpetrated as part and parcel of official policy."

³⁴¹ See for the background to this case, in which the US District Court for the District of Columbia, in a judgment of 2 February 1998, had initially found that FIS was liable for a violation of common article 3 of the 1949 Geneva Conventions for acts of torture, http://www.ccr-ny.org/v2/legal/human_rights/rightsArticle.asp?ObjID=azjDoFknPA&Content=59

³⁴² Shelton, *Remedies in International Human Rights Law*, p.172.

Practice and challenges to using courts in civil law countries

Outside of the US, no express legislation exists that provides civil courts with jurisdiction to hear cases of torture alleged to have been committed in third countries. Victims in civil law but not common law countries may become a *partie civile* in criminal proceedings brought on the basis of universal jurisdiction. However, this only offers legal recourse for victims of torture by non-state actors if the legislation of the state in question: (i) provides for the exercise of universal jurisdiction over acts of torture, including where committed by non-state actors, and (ii) allows victims to seek reparation in the course of criminal proceedings.

Even where both conditions are met, for example in states such as in France, and victims can principally seek reparation through criminal proceedings, additional hurdles need to be overcome. These obstacles include the requirement of certain states (not expressly provided for under international law) of the presence of the perpetrator, and the ability to enforce the judgment. The former is illustrated in proceedings brought by four Bosnian nationals, refugees from detention centres ran by Bosnian Serbs, who applied to become *partie civile* in a case concerning torture, war crimes, crimes against humanity and genocide. The French Appeal Court, in reversing the decision of the examining magistrate, found that the magistrate had no jurisdiction to proceed, given the particularities and limitations of French law. This decision was based on the lack of presence of the alleged perpetrators of torture, and, in relation to the other international crimes alleged, on the lack of implementing legislation.³⁴³ While many non-state actors, especially during armed conflicts, will not leave the territory concerned, responsible representatives of armed groups and *de facto* regimes are often present or even based in third countries.

Practice and challenges to using courts in common law countries

Victims of torture by non-state actors have to date hardly used courts in common law countries outside of the US, to bring reparation cases. Without legislation that provides domestic courts with civil jurisdiction for torture or other violations committed abroad and/or the possibility to become *partie civile*, torture victims commonly face considerable legal hurdles. Where the plaintiff succeeds in serving process and the court finds that it is the appropriate forum to hear the case, such victims will have to show a cause of action, such as an action for tort.³⁴⁴ UK courts have entertained this possibility in the cases of *Al Adsani v. Saudi Arabia* and *Ron Jones vs. the Ministry of Interior of Saudi Arabia & Anor*, but case law is sparse and not settled.

The examination of existing avenues in third countries shows that it is generally difficult to take successful legal action against perpetrators of torture in third countries. This is due to a combination of lack of adequate legislation as well as procedural and practical hurdles. While this applies equally to state and non-state actors, most efforts and litigation to date has focused on state agents and the state. As case law in the US shows, such litigation can provide an important avenue for holding perpetrators accountable, and victims of torture by non-state actors and those working on their behalf have yet to explore fully and make use of existing remedies in third countries.

Summary

- While foreign jurisdictions are increasingly used to seek criminal accountability of officials for torture committed in their home country, invoking the principle of universal jurisdiction, there have been comparatively few cases against non-state actors. Several factors complicate the prospect of successful prosecutions of non-state actors abroad, such as lack of adequate

³⁴³ See FIDH, *France, Competence Universelle*.

³⁴⁴ Fiona Mc Kay, *Civil Reparation*, p.290.

legislation, procedural hurdles and the difficulty of providing evidence. However, the exercise of universal jurisdiction holds considerable potential as a means to hold non-state actors accountable and to deny safe havens. This is particularly true where legislation is in place that allows the exercise of universal jurisdiction and evidential hurdles and security concerns can be overcome, such as in the recent *Zardad* case in the UK.

- The U.S. is the only country that expressly allows foreign torture survivors to sue the perpetrators, and, in a limited number of cases, the state responsible for torture. The jurisprudence of U.S. courts on non-state actors is not fully settled but several courts have recognised claims under the ACTA, in particular against *de facto* regimes, and awarded reparation. Other jurisdictions are yet to be fully tested. In civil law systems, victims may be able to seek reparation from non-state actors as party to criminal proceedings based on universal jurisdiction. In common law countries outside of the US, victims may be able to utilise tort law in exceptional cases only, as this often does not allow a cause of action. In light of these hurdles, states should adopt legislation to enable victims of torture by non-state actors to seek reparation on the basis of universal jurisdiction. This should include the possibility to have recourse against foreign states that have incurred responsibility for torture committed by non-state actors.

IV. STANDARDS AND MECHANISMS REVISITED: TAKING EFFECTIVE STEPS TO ENSURE PROTECTION, ACCOUNTABILITY AND REPARATION FOR TORTURE BY NON-STATE ACTORS

There are a series of gaps and shortcomings in the existing international legal framework and in the implementation of the international prohibition of torture in respect of non-state actors at the national and international level. It is obvious that the response to the widespread practice of torture by non-state actors is neither coherent nor satisfactory. However, it is much more difficult to identify suitable steps to tackle the problem effectively. This difficulty stems from the considerable grey area surrounding the status of non-state actors and their conduct under international law. It is also because many states and non-state actors have failed to take a principled stance against torture and to adopt measures to ensure accountability for perpetrators and reparation for victims. The failure to bring non-state actors sufficiently into the fold of international law, instead of only treating them as ‘outlaws’ bearing criminal responsibility, is an important factor contributing to their lack of engagement and compliance.

The absence of effective remedies against non-state actors stands out as the single biggest deficiency of the present system. Efforts to prevent torture by non-state actors and to strengthen accountability and remedies for its victims needs to combine standard setting and the establishment of international mechanisms with the strengthening of national remedies in order to have greater practical impact. This needs to be complemented by effective engagement with non-state actors themselves.

I. Clarifying and developing relevant international standards

The development of relevant international standards is arguably lop-sided. It is by now well-established that non-state actors are bound by the prohibition of torture under common article 3 of the four Geneva Conventions in the course of armed conflict and incur individual criminal responsibility for international crimes. However, it is less clear whether and how the obligations of states under international human rights law apply to torture by non-state actors and whether non-state actors themselves are bound by international human rights standards. While it is recognised that states can incur responsibility for non-state actors in a number of ways, there remains a lack of clarity regarding the specifics of relevant obligations.

State responsibility and positive obligations regarding torture by non-state actors

Regional and international human rights bodies continue to develop and define the scope of state responsibility in their jurisprudence, in particular regarding positive obligations of states in relation to torture by non-state actors. While the responsibility of a state depends on the specifics of the case concerned, it would be beneficial if human rights bodies developed clearer standards on the obligations of states vis-à-vis paramilitaries, militias and other groups having close links with the government on the one hand, and hostile armed groups and *de facto* regimes on the other.

There is also a lack of clarity regarding the scope of states’ obligations not to send individuals to places where there are reasonable grounds to believe that non-state actors would torture them. The jurisprudence of the UN Committee against Torture focuses on the status of the perpetrator and thereby excludes torture by such actors as armed groups hostile to the government. It is considerably

TORTURE BY NON-STATE ACTORS

narrower than the jurisprudence of other bodies, such as the European Court of Human Rights that have adopted a protection approach.

International human rights bodies have not clearly indicated that states are obliged to establish universal jurisdiction over torture committed by non-state actors, with the possible exception of *de facto* regimes. This applies equally to the responsibility of states to provide effective remedies and reparation for torture committed by non-state actors, whether within their territory or in third countries, which has not been fully developed in treaty law and jurisprudence.

In light of these considerations, international and regional human rights bodies should:

- Develop a consistent practice of addressing the obligations of states in relation to the conduct of non-state actors, particularly concerning the prohibition of torture. To this end, they should develop general comments, guidelines or policies that specify states' obligations in this regard with a view to guiding states' conduct.
- Provide states with guidance on their negative and positive obligations in relation to (a) paramilitaries, militias, vigilante groups etc. enjoying the support of the state and (b) other armed groups and *de facto* regimes, both on their territory and in third states. This should in particular include the examination of the responsibility of states for "outsourcing" torture by using paramilitaries and other groups/individuals, and the development of criteria to minimise the risk of torture by such actors. It should also specify steps that states must take in order to comply with their positive obligations, such as adopting adequate legislation, providing protection, ensuring accountability and having effective remedies in place.
- Affirm that the prohibition of refoulement encompasses acts of torture by non-state actors, irrespective of their status, where the state is unwilling or unable to provide protection.
- Specify the obligations of, and encourage states to implement legislation and exercise universal jurisdiction (both criminal and civil) for acts of torture committed by non-state actors in third countries.

Applying international standards on the prohibition of torture to non-state actors

While clarifying the scope of state responsibility is important, it is critical to determine the extent to which non-state actors themselves are and should be bound by international human rights standards, in particular the prohibition against torture. This is because applicable obligations under international humanitarian law and international criminal law are of limited reach. International bodies, states and civil society would benefit from clearer standards that could be applied to the conduct of non-state actors and used as a yardstick to condemn violations. This applies in particular to specific measures that *de facto* regimes and armed groups should take to prevent torture and to provide accountability and reparation. In addition, various actors could use these standards to engage with and to promote greater compliance by non-state actors.

The extension of the present human rights system to such actors would meet considerable obstacles, not least in terms of limited prospects of enforcement. This is largely due to significant political and conceptual reservations by states and others to apply international human rights standards to non-state actors. There is, however, already support and a good case for extending it to *de facto* regimes, but not necessarily to other groups. In light of these obstacles, a nuanced approach might be needed, both within the UN and regional human rights systems, which should comprise the following elements:

- Firstly, following a consistent policy of calling both on non-state actors, in particular *de facto* regimes to adhere to international standards, and on states to fulfil their obligations, namely to refrain from supporting actors who engage in torture, and to take positive measures to prevent and respond to torture by such actors. The UN Security Council and other bodies, in developing general policies and responding to particular conflict situations, should take into consideration the fact that the latter obligation also extends to occupying powers.
- Secondly, developing, in consultation with civil society organisations and non-state actors, a set of guidelines on obligations of such actors, in particular *de facto* regimes and armed groups in relation to torture, including mechanisms for monitoring and enforcement. Such guidelines could be adopted in form of a resolution, for example by the Human Rights Council or by international or regional bodies, such as the EU, OAS, AU or OSCE. While this would be a non-binding ‘soft law’ document, e.g. in the form of a code of conduct or operating guidelines, it would set relevant principles that could harden into binding standards over time. The document should specify the obligation of the concerned non-state actors, to: (i) refrain from torture, (ii) take preventive measures and (iii) ensure accountability as well as reparation, taking into consideration existing international standards. As a first step, an independent expert or a panel of experts should be mandated to produce a draft on the pertinent issues, both in terms of substance and process.
- Thirdly, international bodies and states should encourage, recognise and lend support to unilateral declarations and agreements between non-state actors and states or other entities, in particular ceasefire/peace agreements, in which such actors pledge to abide by international humanitarian law and international human rights standards. This includes devising effective monitoring mechanisms to ensure that the non-state actors concerned apply human rights standards in practice.³⁴⁵ Conversely, international bodies and states should pursue a principled policy of supporting agreements involving non-state actors only on condition that the parties agree to abide by relevant international standards. This could be done by establishing a standing mechanism within the UN system, such as a panel of experts that monitors such agreements upon request unless a UN mission is specifically mandated to do so.
- Fourthly, international and regional bodies should consistently use both international humanitarian law and international human rights standards relating to the prohibition of torture as benchmarks in engaging with *de facto* regimes, armed groups and others, such as in UN field missions.

2. Developing and strengthening international mechanisms

Establishing human rights mechanisms to deal with torture by non-state actors

There is a distinct lack of international mechanisms applying directly to non-state actors. As part of the UN human rights machinery, states should consider appointing a Special Rapporteur or Working Group to focus specifically on serious violations of international human rights and humanitarian law by non-state actors. The objective of this mechanism would be to enhance monitoring and compliance. To this end, it should be tasked with collecting information about violations and engaging directly with such actors in seeking adherence to international standards. It should be mandated to publish reports about violations,

³⁴⁵ See proposal in UN Doc. S/2005/740 on protection of civilians in armed conflict, para.48, which does, however, not expressly mention commitment to human rights and humanitarian law (but “commitment to cease all attacks on civilians”).

either received through general channels or as a result of country visits, and to refer violations to appropriate bodies within the UN system for further action. This mechanism should work closely with existing mechanisms on specific violations, especially in the present context the UN Special Rapporteur on Torture and country-specific rapporteurs.

The UN Special Rapporteur on Torture should, irrespective of the existence of a thematic body dealing specifically with violations by non-state actors, develop a comprehensive policy and practice on torture by such actors. The UN Special Rapporteur on Torture could, for example, specify his position in this regard in his annual reports or the recommendations published periodically in his reports to the Human Rights Council and the General Assembly.

Alternately or additionally, states should consider adopting optional protocols to existing human rights treaties that recognise the applicability of the prohibition of torture to non-state actors (or at least specific types of such actors as *de facto* regimes), and provide for enforcement mechanisms. Such protocol(s) might possibly grant *de facto* regimes and armed groups a special status for the purpose of victim protection without conferring any further recognition. This approach may face obstacles in the short term given the reluctance of states to bring non-state actors into the fold of international human rights, and problems of definition and applicability. However, states should explore the adoption of additional protocols, such as has been done in relation to the prohibition of child soldiers, as a means to strengthen compliance and victims' rights vis-à-vis non-state actors in the future.

Establishing international humanitarian law mechanisms dealing with non-state actors

There are no individual complaints mechanisms for victims of violations of international humanitarian law. In a series of seminars convened by the ICRC, experts have proposed the establishment of bodies, such as an International Humanitarian Law Commission or an Office of the High Commissioner for International Humanitarian Law, which could be established as part of the Geneva Conventions machinery or separately.³⁴⁶ However, not least in the face of states' reluctance there is little progress towards the establishment of such an individual complaints mechanism.

The state parties to the Geneva Convention and/or designated UN organs (e.g. by mandate of the General Assembly) should explore further the feasibility of a mechanism ensuring greater compliance and effective remedies for victims. Options include the adoption of an Optional Protocol to the Geneva Conventions binding all parties to armed conflicts, including non-state actors in relation to common article 3 of the four Geneva Conventions; additional measures to be considered are reporting systems and fact-finding missions which could be carried out by the International Fact Finding Commission.³⁴⁷

The UN Security Council and UN Secretary-General should establish and further develop a monitoring mechanism on violations of international humanitarian law in armed conflict. An important development in this regard is the establishment of a mechanism to collect information, to be undertaken by the Office for the Coordination of Humanitarian Affairs for the Security Council, which will include data on the number of civilians killed, injured and tortured.³⁴⁸ This is in addition to the mechanism relating to the violation of the rights of children in armed conflict, which was about to be established at the time of writing.³⁴⁹

³⁴⁶ See on the current state of debate on such a body, ICRC, *Improving Compliance with International Humanitarian Law*.

³⁴⁷ Envisaged in Article 90 of Additional Protocol I to the Geneva Conventions. See on the current discussion of how to put this into practice, ICRC, *Improving Compliance with International Humanitarian Law*, p.11 and *Ways to bind non-state actors to international humanitarian law*, Panel Discussion, Bruges Colloquium, 2003, pp.173 et seq.

³⁴⁸ UN Doc. S/2005/740, para.52.

³⁴⁹ See UN S/RES 1612 (2005).

Strengthening international criminal law mechanisms applicable to non-state actors

The UN Security Council should further develop its practice of setting up commissions of inquiry mandated to investigate violations of international human rights and international humanitarian law, whether committed by state or non-state actors, with a view to establishing a factual account of violations and recommending appropriate accountability mechanisms.

Whereas the Security Council has established such a commission of inquiry to examine the situation in Darfur, Sudan, and has acted upon its recommendation to refer the case to the International Criminal Court, it had in early 2006 not acted upon a report submitted in December 2004 by an International Commission of Inquiry into allegations of serious violations of international human rights and humanitarian law committed in Cote d'Ivoire since 19 September 2002. It is important that the Security Council develops a coherent policy of responding to situations where international crimes appear to have been committed with a view to seeking accountability. This applies particularly where the violations are committed in a state not party to the ICC and where no other competent mechanism is in place. Other UN bodies should also follow a principled and coherent policy of seeking accountability of perpetrators of international crimes through identifying and implementing suitable mechanisms for crimes, including where committed by *de facto* regimes and armed groups.³⁵⁰ To this end, UN bodies should work with states to complement international justice initiatives with the strengthening of domestic accountability mechanisms in relation to torture committed by non-state actors. For their part, states that have not done so should ratify and implement the Rome Statute to strengthen the ICC mechanism.

Using sanctions as additional accountability mechanisms

Sanctions are a double-edged sword. While they can be a means to bring about compliance with international law, the use of sanctions is often highly politicised and the type of measures taken may raise concerns about their compatibility with human rights standards. Where sanctions are sufficiently targeted, as in the recent practice of the United Nations Security Council to impose measures against non-state actors for violations of international human rights and humanitarian law, they can act both as an effective accountability mechanism and a deterrent without unduly affecting third parties. To this end, the UN Security Council and the Working Group on General Issues on Sanctions as well as individual sanctions committees should further refine their practice of using sanctions against individuals and non-state entities. This entails in particular clarifying the circumstances in which targeted sanctions are to be imposed and imposing sanctions consistently in cases of serious violations of international human rights and humanitarian law, such as torture. It also includes mechanisms for the effective enforcement of sanctions, in particular with regard to the freezing of assets, and clear guidance on the conditions for the lifting of sanctions. In case of individual sanctions for violations of international human rights and humanitarian law, the Security Council should automatically consider what criminal mechanisms are available or needed to ensure accountability, and take the necessary steps towards this end.

Using international reparation mechanisms in response to torture by non-state actors

Victims of torture by non-state actors have not benefited from international reparation mechanisms. Such mechanisms could play a useful role where remedies are either unavailable or not effective. The UN Security Council or other bodies should contemplate setting up reparation schemes not only in cases of gross violations by states but also by non-state actors. The funding for such schemes could come in particular from personal assets of the perpetrators frozen as part of sanctions imposed by the UN Security Council in response to the violations, following a judicial determination of responsibility.³⁵¹

³⁵⁰ See UN Commission on Human Rights, Res.2002/79, 25 April 2002 and S/RES 1295 (2000), para.5.

³⁵¹ See *Report by the UN Secretary General on Africa, 1998*, para.50, which recommends holding non-state actors financially liable.

States that incur responsibility for violations by non-state actors should equally contribute funds, either voluntarily or through the threat of sanctions by the UN Security Council. Finally, states and other bodies should fully support the Trust Fund of Victims of the ICC that is expected to become an important source of reparation for victims of international crimes, committed both by state and non-state actors.

3. Strengthening domestic enforcement of the prohibition for torture by non-state actors

States can and should take a series of steps to strengthen enforcement of the prohibition of torture in relation to non-state actors. In order to comply with their obligations under international law states should not support and on the contrary should seek to effectively ban non-state actors that use torture, such as paramilitaries, whether operating on their own territory or elsewhere. Equally, states should adopt measures in response to torture by non-state actors in order to meet their positive obligations, in particular the following:

- Legislation:
 - Prohibiting torture committed by non-state actors, in particular by making it a crime carrying appropriate punishments;
 - Providing for the exercise of universal jurisdiction, both criminal and civil, over torture and other international crimes involving torture, where committed by non-state actors.
- Prevention:
 - Setting up national bodies and/or allowing national and international bodies, whether intergovernmental or non-governmental, to monitor the conduct of non-state actors and to engage with *de facto* regimes and armed groups and others with a view to preventing torture;
 - Refraining from sending individuals to countries where there is a credible risk that they will suffer torture at the hands of non-state actors.
- Accountability:
 - Pursuing a policy of having all allegations of torture, whether committed by state agents or by non-state actors, investigated promptly, impartially and effectively. Suspected perpetrators of torture should be prosecuted and punished where found guilty according to the gravity of the crime. This implies that acts of torture should not be subject to any amnesties;
 - Ensuring that any investigations and trials of non-state actors adhere to fair trial standards;
 - Providing victims with the right to participate in proceedings and to protection. The state should set up specific victim and witness programmes to ensure these rights;
- Reparation:
 - Ensuring that victims of torture by non-state actors have effective remedies that allow them to seek justice and reparation for their suffering;
 - Refraining from granting any amnesties and/or applying unduly short statutes of limitations that hinder the effective use of remedies;
 - Providing judicial and non-judicial remedies. The latter should include, particularly after the end of conflict, commissions with a mandate to provide reparation to the victims of torture by non-

state actors. Reparation should be provided either by the responsible actors themselves, or, where this is not possible or where the state incurs joint responsibility, by the state;

- Establishing rehabilitation programmes for survivors of torture, irrespective of whether torture has been committed by state agents or non-state actors.

4. Furthering compliance with relevant international standards by de facto regimes, armed groups and other non-state actors

Engagement with non-state actors with a view to upholding international standards

International bodies and organisations increasingly realise the necessity of ensuring protection of individuals and groups from torture and other violations inflicted by non-state actors. However, it is far from obvious how to accomplish this objective in the absence of international or domestic mechanisms specifically dealing with torture by such actors. A key approach taken by various organisations, be it the UN, ICRC, regional bodies or NGOs, is engagement.³⁵² Engagement, especially humanitarian negotiations in armed conflicts, commonly has a dual purpose of providing humanitarian assistance and protection of vulnerable groups.³⁵³ OCHA has defined the objective of humanitarian negotiations as securing “the cooperation of an armed group in reaching an agreed outcome or understanding that will facilitate or enhance humanitarian action.”³⁵⁴

With regard to the prohibition of torture, engagement may consist in securing a commitment to uphold international standards (e.g. international humanitarian law, international human rights law), which may take the form of a unilateral declaration, code of conduct or an agreement with other parties to a conflict, including governments. Where possible, such commitments might also include an undertaking to reveal the truth and to provide reparation to victims. The ICRC, for example, is pursuing a practice of seeking declarations and commitments to comply with international humanitarian law.

Such commitments have to be complemented by effective monitoring that benefits from adequate resources from the UN and others. This requires access by outsiders, be it NGOs, the UN or others tasked with visiting detention facilities. They should also have a mandate to interview both non-state actors and persons under their control to establish whether there are credible allegations of torture and if so, what steps the armed group or others concerned have taken in response to such allegations. A reporting mechanism should be agreed with non-state actors as a way to monitor compliance. Complementary measures consist in providing materials and training about relevant international standards to non-state actors.³⁵⁵

The strategy employed by the NGO Geneva Call in its campaign to end the use of landmines by non-state actors, i.e. the signing of a deed of commitment by armed groups which is deposited with the City of Geneva and whose observance is monitored by Geneva Call through a reporting mechanism and fact-finding missions, can serve as a useful model.³⁵⁶ However, given the secrecy of torture practices, the

³⁵² See in particular in relation to children in armed conflict and the recruitment of child soldiers, which has, however, only had limited success to date, see UN Docs. A/58/546; S/2003/1053, paras.45 et seq. and paras.73 et seq.

³⁵³ See OCHA, *Humanitarian Negotiations with Armed Groups*, p. 12.

³⁵⁴ *Ibid.*, p. I.

³⁵⁵ See also suggestions in Sassoli, *Possible Legal Mechanisms to Improve Compliance by Armed Groups*.

³⁵⁶ See Clapham, *Human Rights Obligations of Non-State Actors*, pp. 291 et seq. and Geneva Call, PSIO (Program for the Study of International Organization(s)), The Graduate Institute of International Studies and the Armed Group Projects, *An Inclusive Approach to Armed Non-State Actors and International Humanitarian Norms*.

sensitivity of torture accusations and a lack of apparent incentives if compared to the clearing of landmines, it is not clear how easily the model can be replicated in relation to torture by non-state actors. In addition, great care would need to be taken to ensure that the mechanism employed is effective so as not to undermine its credibility.

The degree of success of any engagement depends on a number of factors, and studies by NGOs and OCHA have identified several key issues. These include understanding the context of armed groups (in particular motivations, structure, principles of action, interests, constituency, needs, ethno-cultural dimensions, control of population and territory); determining the level of tolerance within an armed group or de facto regime; identifying reformers within armed groups; and taking into consideration the role of foreign governments.³⁵⁷ OCHA has also identified and detailed steps to be taken in the various phases of negotiation, namely preparation, seeking agreement and implementation.³⁵⁸

While progress has been made in understanding and conducting engagement, its success depends on the specific context, in particular on the nature of the conflict and group(s) concerned. Effective engagement operates on several levels: not only the UN, the ICRC and other regional and international bodies but also domestic civil society and community members often play a crucial role in fostering a general human rights awareness of non-state actors and their supporters. Consultation and coordination between international bodies and domestic groups is of key importance so as to avoid engagement, which marginalises local constituencies that may play a key role in monitoring the conduct of non-state actors. In addition to the work already undertaken by OCHA, both the UN Special Rapporteur on Torture and/or the Working Group whose establishment is suggested above should devise a policy and operational guidelines for engaging with non-state actors with a view to securing abidance with international standards on the prohibition of torture.

Adherence by non-state actors to relevant international standards

De facto regimes, armed groups and others should adhere not only to binding international humanitarian law standards but also to internationally recognised human rights standards, irrespective of the extent of their legal obligations under this body of law. These standards should be adhered to for the sake of the integrity of the individual. However, observing these standards also has practical advantages: it will not only protect individual members of the non-state actors concerned from facing sanctions and accountability for torture and other international crimes, but it is also bound to strengthen the legitimacy of any group, both at home and abroad.³⁵⁹ This applies to both the present and for the future, e.g. in the context of truth and reconciliation commissions established following the end of conflict.

To this end, non-state actors should endeavour to apply the same standards as states, as applicable. This entails the following steps with regard to:

- Prevention of torture:
 - Publicly pledging to uphold the prohibition against torture, either in unilateral statements or in agreements, such as ceasefire arrangements, and instructing members to abide by international standards;
 - Refraining from applying corporal punishments and resort to the death penalty, in particular cruel methods of execution that are incompatible with the prohibition of torture.³⁶⁰

³⁵⁷ International Council on Human Rights Policy, *Ends And Means*.

³⁵⁸ *Ibid.*, pp.45 et seq.

³⁵⁹ *Ibid.*, p.40.

³⁶⁰ *Interim Report of the Special Rapporteur on Torture*, 2005, paras.18 et seq.

- Training of members in relevant international standards of human rights and humanitarian law;
 - Where they run detention centres, providing custodial safeguards, in particular access to legal and medical assistance and to family members;
 - Giving detainees the right to complain of torture and ill-treatment to independent bodies or organs set up for that purpose;
 - Allowing and inviting external bodies to monitor compliance of detention conditions and treatment of prisoners with international standards;
 - Establishing institutions responsible for the protection of human rights, in particular the wellbeing of detainees, as a means to provide safeguards against torture. Such bodies should be in line with the Paris Principles on national human rights institutions, as applicable.
- Accountability:
 - Putting into place a complaints system, including prompt, impartial and effective investigations of violations;
 - Strictly adhering, in any investigation and prosecution of torture cases, to fair trial standards, and only imposing punishments in line with international standards.
 - Reparation:
 - Adequately compensating victims of torture as well as acknowledging torture and assisting in revealing the truth about violations;
 - Facilitating and not unduly hindering NGOs or other independent bodies willing to provide rehabilitation where the actors themselves are not in a position to provide rehabilitation for torture survivors.

5. Strategies for survivors and NGOs acting on their behalf: Seeking protection, accountability and reparation for torture by non-state actors

Prevention and protection: Individual and collective strategies

Victims of torture and those working on their behalf may seek protection from (further) torture from a variety of bodies, be they national or international. UN field missions and the ICRC can play a particularly effective role in preventing torture by non-state actors because they are often able to have better or any access than other bodies. Beyond access in the individual case, it is frequently the secrecy of torture practices and the fear of survivors and those close to them, including human rights defenders themselves that inhibits complaints about torture and indeed perpetuates torture. Broader strategies aimed at preventing torture by non-state actors will be more effective if they succeed in:

- Providing an accurate record of torture by non-state actors, particularly by thoroughly documenting cases and establishing databases of violations;
- Exposing the nature of torture by *de facto* regimes, armed groups and others through appropriate channels, including naming and shaming groups/members that are responsible for torture, both at home and abroad;
- Lobbying supporters, including states, of *de facto* regimes, armed groups and others to make their support conditional upon the verified adherence by the group concerned to international standards on the prohibition of torture, and exposing supporters who refuse to do so;
- Seeking to enhance protection of torture survivors and others through official institutions, programmes and practical support.

Remedies

- Timely documentation of torture for future legal proceedings

Remedies are frequently ineffective in countries during conflict or in *de facto* regimes and the possibility of seeking justice and reparation often arise only a considerable time after the violation. The timely documentation of torture, by using such internationally recognised standards as the Istanbul Protocol on the effective documentation and investigation of torture is critically important in cases of torture by non-state actors.

- Establishing state responsibility

Where the state is implicated in violations - in particular in cases of torture by paramilitaries - the remedies are essentially the same as those available in relation to state torture. Victims can take legal action in the state concerned, including to extant national human rights institutions; where this fails and the state in question has accepted individual complaints mechanisms, they can bring the case before a regional or an international human rights body. The main challenge will commonly be to establish state responsibility, demonstrating that the state exercised control or even carried out joint operations.

State responsibility can also be established regarding *de facto* regimes and armed groups hostile to the state where the state concerned has failed to meet the due diligence standards. However, this requires that the state had the opportunity to take effective action. Moreover, a finding in such cases is confined to the specific obligations of the state under the due diligence standards. It may result in a ruling that the state has to provide protection, to investigate allegations of torture by non-state actors and to prosecute the perpetrators, but it will not address the responsibility of the non-state actors themselves (even though there would be factual findings as to the acts committed and the perpetrators).

- Taking legal action against non-state actors

In the absence of recourse against the state (and to international human rights mechanisms), victims of torture by non-state actors have two main avenues, either before domestic courts/mechanisms or before courts in third countries on the basis of universal jurisdiction. Domestic remedies will often be ineffective, especially during conflict. However, it is important to test existing avenues and possibly change practice by bringing complaints and suits, where possible. Setting precedents and contributing to the development of jurisprudence are key elements in creating remedies or making existing ones more effective. Victims and NGOs seem to have made little use of such practice, in many cases for good reasons because of the nature of the conflict and security issues but also for a lack of trying, an obstacle that can be overcome.

Alternatively and where feasible in very limited cases, victims and NGOs may directly approach *de facto* regimes or armed groups to seek reparation. This can be a means of raising awareness and obtaining some degree of acknowledgment and even monetary compensation under favourable circumstances. However, the success of such an approach depends on the willingness of non-state actors to engage in the first place. Such willingness is often not present. Furthermore, measures taken will commonly not include criminal and disciplinary accountability of those responsible.

After the end of conflict, it is critical for victims and those working on their behalf to make their voices heard in any public debate about collective solutions dealing with violations by state and non-state actors. This includes addressing such questions as the need for accountability, truth, and individual and collective reparations through appropriate mechanisms. This entails making their views known with respect to the fulfilment of victims' right to reparation, such as amnesties and the adequacy and appropriateness of reparation or truth mechanisms where they exist. It also comprises advocating that

those who have been tortured by non-state actors receive the same recognition and treatment as victims of state agents. As this is commonly a highly political process, it is critical to generate the awareness that (former) non-state actors should be held equally responsible and that victims have a right to full reparation, irrespective of who they are. This will be a particular challenge for marginalised groups and where necessary and possible, survivors and NGOs should have recourse to domestic courts and human rights institutions to make their concerns known.

International or internationalised courts are important mechanisms to seek criminal accountability and/or reparation for torture by non-state actors. The jurisdiction of these courts covers only a few conflicts and international(ised) tribunals will most likely be unable to prosecute more than those perpetrators bearing the greatest responsibility and to award largely symbolic reparation. However, cases, such as those against individuals in Uganda and the DRC before the ICC at the time of writing, can serve as precedents on specifying victims' rights and providing models for future ones. This makes it all the more important to exercise and test the scope of victims' rights before existing tribunals, and to advocate further reforms for the benefit of victims where existing rights fail to ensure justice and reparation.

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