



TAKING COMPLAINTS OF TORTURE SERIOUSLY

***Rights of Victims and Responsibilities of
Authorities***

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THE REDRESS TRUST

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I. INTRODUCTION

Torture is a crime, a serious human rights violation and a traumatic experience with physical and psychological consequences. For those who have suffered torture, and for their families, finding ways to move forward with their lives and past this traumatic rupture will be a life long challenge. Broken bones take time to heal but it is the shattered spirits that are often the most difficult to repair. The deliberate abuse of an individual's *physical* and *psychological* integrity, in a way that is designed specifically to undermine their dignity, when this act is perpetrated by or on behalf of someone with the very responsibility to protect rights, is devastating and disorienting to victims. Torture is not only intended to extract information or obtain a confession: its aim is the deliberate destruction of bodily and physical integrity in order to stifle dissent, intimidate opposition and strengthen the forces of tyranny.¹ Torture aims to disorientate people to such a degree that their personalities and identities are destroyed.²

The process of seeking justice and reparation is, for some survivors, an essential part of their recovery process and a critical means by which they regain their dignity and sense of control. It may contribute substantially to the reestablishment of the victims' equality of value, power, esteem (dignity); relieve the victims' stigmatisation and separation from society and restore confidence and legitimacy in the fairness of the justice system.³ Making perpetrators accountable recognises the seriousness of the offence of torture and serves to publicly acknowledge that a wrong has been committed and that such wrongs are not tolerated. The revelation of the practice of torture and the investigation and punishment of perpetrators will also have a deterrent effect against would-be perpetrators and the more institutionalised forms of torture. It also strengthens the rule of law.

The importance of justice and reparation is recognised as a *right* of victims.⁴ The multiple individual and societal purposes that reparation serves have also been recognised in the seminal *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*.⁵ These principles and guidelines recognise that reparation can take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. They are not limited to pecuniary damages but can also include measures with longer-term restorative aims: verification of the facts and full and public disclosure of the truth, apology, including public

¹ W. Gorman, *Refugee Survivors of Torture: Trauma and Treatment*, Professional psychology : Research and Practice, 32 (2001), pp. 443 – 451.

² S. Graessner, N. Gurriss, C. Pross, *At the Side of Torture Survivors. Treating a terrible Assault on Human Dignity*. Baltimore, The John Hopkins University Press, 2001.

³ Y. Danieli, (1992). *Preliminary reflections from a psychological perspective*, in T.C. van Boven, C. Flinterman, F. Grunfeld & I. Westendorp (Eds.), *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Netherlands Institute of Human Rights [Studie- en Informatiecentrum Mensenrechten], Special issue No. 12, 1992.

⁴ See, for example the Universal Declaration of Human Rights (Article 8); the International Covenant on Civil and Political Rights (Articles 2(3); 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention on the Rights of the Child (Article 39); the Convention against Torture (Article 14) and the Rome Statute for the International Criminal Court (Article 75). It also figures in regional instruments such as the European Convention on Human Rights (Article 5(5), 13 and 41); the American Convention of Human Rights (Articles 25, 63(1) and 68); the African Charter on Human and Peoples' Rights (Article 21(2)).

⁵ *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* (rev. 24 October 2003), UN Doc. E/CN.4/2004/57 10 November 2003, Appendix 1.

acknowledgement of the facts and acceptance of responsibility, and judicial and administrative sanctions against those responsible.⁶

Despite victims' *right* to justice and reparation, torture survivors are commonly confronted with institutional or legal barriers that make the realisation of this right difficult if not impossible. In its comparative research on the right to reparation for torture in the domestic laws of thirty countries published in 2003, REDRESS identified the lack of effective police complaints mechanisms as a key obstacle faced by torture survivors.⁷ While a range of law-enforcement agencies and security forces perpetrate torture, our research reveals that the practice of police torture and ill-treatment is most entrenched. This is usually carried out in the course of criminal investigations, especially shortly after arrest, and in pre-trial detention. The focus of this study therefore is on police complaints procedures, though its findings may apply equally to other public bodies.

This Report examines the international legal framework regarding the *right to complain* of torture and the *obligation to investigate*, and identifies, analyses and compares how diverse countries have given these norms practical effect. In addition to framing the comparative study, the examination of this international framework serves to expose any normative inconsistencies and to reveal those areas where further standards are required to enhance the effectiveness of complaints processes. The comparative analysis serves to identify major obstacles faced by torture survivors when lodging or pursuing complaints with police, whether these obstacles are a result of law or practice or both. The analysis also serves to identify problem areas and distil best practices. This comparative research draws on information provided to REDRESS by a wide range of individuals, organisations and institutions, including internal investigation departments of police services, national human rights institutions and police complaints authorities, intergovernmental as well as nongovernmental organisations, lawyers, academics and independent researchers. REDRESS has also made use of the findings of its survey of law and practice in thirty selected countries, and has examined State Party Reports to the Committee against Torture and the Human Rights Committee; reports by the European Committee for the Prevention of Torture as well as reports by national and international nongovernmental organisations.

The following three case studies are considered in substantial detail: (i) the complaints system in the Russian Federation, as an example of how a conventional system has failed to provide impartial and effective complaints procedures; (ii) the Indian National Human Rights Commission, as an example of the limitations faced by complaints bodies in respect of torture cases; and (iii) the Police Ombudsman for Northern Ireland, as an example of a functional, independent institution.

The Report concludes with a set of recommendations relating to the development of further standards and other potential steps that might be taken to address the specific problems identified. These recommendations are aimed at governments, police authorities, and other bodies dealing with complaints against law enforcement officials, as well as courts dealing with torture-related questions.

REDRESS wishes to acknowledge the contributions of all those who have collaborated in the research for this study, namely: Ms. Maggie Beirne, Committee for the

⁶ Ibid.

⁷ REDRESS, *Reparation for Torture, A Survey of Law and Practice in Thirty Selected Countries*, April 2003. See on this study also the observations by the Special Rapporteur on Torture in Report of the Special Rapporteur on the question of torture and other inhuman, cruel or degrading treatment or punishment, in accordance with Assembly resolution 57/2000 of 18 December 2002, UN Doc. A/58/120, 3 July 2003, in particular paras.29 et seq. <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/b95b171916cf4c10c1256d900044e4c9?Opendocument>.

Administration of Justice, Belfast; Mr. Ian Bynoe, Commissioner, Independent Police Complaints Commission, UK, formerly Police Complaints Authority, UK; Ms. Cordula Droege, International Commission of Jurists; Mr. Badar Farrukh, Superintendent of Police, NWFP Police Department, Pakistan; Mr. Justin Felice, Director of Investigations, Police Ombudsman for Northern Ireland; Ms. Narine Gasparyan, Lawyer, Armenia; Professor Andrew Goldsmith, School of Law, Flinders University; Mr. Michael Gunther, Internal Affairs Bureau, New York Police Department; Mr. Michael Kellet, Lancashire Police, Former police advisor to the CPT; Mr. Raj C. Kumar, School of Law, City University of Hong Kong; Professor Colleen Lewis, School of Political and Social Inquiries, Faculty of Arts, Monash University; Mr. Michael Lieneke, Complaints Unit, Police, Cologne, North Rhine-Westphalia; Dr. Lone Lindholt, Danish Institute for Human Rights; Ms. Ruth McConnell, Internal Investigations Branch, Police Service of Northern Ireland; Dr. Usha Ramanathan, Human Rights and Law Researcher, India; Ms. Mary O'Rawe, School of Law, University of Ulster; Dr. R.K. Raghavan, Former Director of Central Bureau of Investigations, India; Mr. Javier Sanjuan, International Lawyer, Spain, formerly MINUGUA, Guatemala; Mr. Farhad Sattarov, Lawyer, Azerbaijan; Ms. Paula Schwartzbauer, Committee for the Administration of Justice, Belfast; Ms. Olga Shepeleva, Nizhny Novgorod Committee against Torture; Mr. Philip Shepherd, Police Services of Northern Ireland; Mr. Kai Siegert, Programme Manager, Police and Human Rights - Beyond 2000, Directorate General of Human Rights, Council of Europe; Ms. Manuela Stefanescu, APADOR-CH (the Romanian Helsinki Committee); Dr. Anke Stock, Kurdish Human Rights Project, London; Ms. Maria O'Sullivan, School of Law, Monash University; Mr. Michael Utsaha, Human Rights Lawyer, Nigeria; Mr. Pavel Tchikov, Kazan Human Rights Centre; Professor Samuel Walker, Department of Criminal Justice, University of Nebraska at Omaha and Ms. Anna Wilkowska, International Lawyer, Poland.

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II. STATUS OF THE PROHIBITION OF TORTURE IN INTERNATIONAL LAW

The prohibition of torture is universally recognised and encompasses not only the obligation not to commit torture, but also the obligation to forestall and preempt any such acts.⁸ It is set out in all the major international instruments dealing with civil and political rights,⁹ and in national Constitutions and domestic legislation throughout the world. The prohibition is absolute. In *Aksoy v Turkey*,¹⁰ the European Court of Human Rights noted that: “even in the most difficult of circumstances, such as the fight against

⁸ *Prosecutor v. Furundzija* (10 December 1988, case no IT-95-17/1-T,(1999) 38 International Legal Materials 317), paras. 144 and 148.

⁹ E.g., Article 5 of the Universal Declaration of Human Rights 1948; Article 7 of the International Covenant on Civil and Political Rights 1966; the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 3 of the European Convention on Human Rights; Article 5 of the American Convention on Human Rights; Article 5 of the African Charter on Human and Peoples' Rights; and the Inter-American Convention to Prevent and Punish Torture.

¹⁰ *Aksoy v. Turkey* (1997) 23 E.H.R.R. 553 ECHR, para 62.

organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.” In *Furundzija*,¹¹ the International Criminal Tribunal for the Former Yugoslavia stated:

“...because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.... Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.”

III. IMPORTANCE OF COMPLAINTS TO THE PROHIBITION OF TORTURE

A ‘complaint’ about torture is an important right for victims in and of itself as it provides them with the chance to positively express dissatisfaction and disapproval of their treatment. This may contribute substantially to the reestablishment of their sense of control and dignity. It is also a means to an end, in that it gives notice to the competent authorities of the alleged commission of a crime. In this respect, the complaint is also a trigger for the competent authorities to begin an investigation into the alleged acts with a view to holding the perpetrators accountable as part of criminal or administrative proceedings. A complaint may also be a first step for the victim to obtain other forms of reparation; without the evidence generated by the official investigation of the complaint, it is often difficult for the victim to pursue non-criminal legal remedies such as restitution or compensation. Consequently, the availability of effective complaint mechanisms will have wide implications for the prevention and punishment of torture as well as for remedies and reparation.¹² As has been noted by the Inter-American Court of Human Rights, the failure to investigate “has led to a situation of grave impunity [i]t is injurious to the victims, their next of kin and society as a whole, and fosters chronic recidivism of the human rights violations involved.”¹³

In a broader sense, complaints about torture, when victims make use of them, may provide an indicator of the nature and extent of the practice in the country concerned. Analysis of patterns of complaints may assist authorities to identify necessary reforms or to counter systemic problems.

¹¹ *Furundzija*, *supra*, paras 153-4.

¹² See on complainants’ views of complaints procedures Tammy Landau, *Public Complaints against the Police: A View from Complainants*, Toronto, Centre of Criminology, 1994.

¹³ *Caracazo Case*, Judgment of August 29, 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 (2002) at para. 117.

j) Express and Implicit Recognition of a Right to Complain and Duty to Investigate

The right to complain about torture and have one's complaint investigated is recognised in international law, both in international treaties and customary international law. It derives from the absolute prohibition of torture and the right to an effective remedy and has been recognised and elaborated upon in a series of resolutions and declarations as well as in jurisprudence.

Only two of the international and regional treaties that prohibit torture contain an express right to complain. Article 13 of the Convention against Torture provides a right for every individual who alleges that he or she has been subjected to torture in the territory under the jurisdiction of the State party to a) bring a complaint to the competent authority and b) have the complaint investigated by the authorities promptly and impartially. Article 8 of the Inter-American Convention to Prevent and Punish Torture expressly requires states to guarantee individuals a channel through which they can submit their complaints of torture, and to have these complaints impartially examined through an immediate and proper investigation and criminal process. The right to complain about torture is also enshrined in the United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.¹⁴ The International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights, American Convention on Human Rights and African Charter on Human and Peoples' Rights do not contain such express guarantees; however, their respective treaty or convention monitoring bodies have found that such rights and obligations are implicit in the respective Convention provisions.

The Human Rights Committee has identified a right to complain and have one's complaint heard as part of the requirements of the ICCPR. According to the Committee, Article 7 of the ICCPR [prohibition of torture], should be read in connection with Article 2(3), which requires States to guarantee a means of redress to victims whose rights have been violated and an audience with competent authorities to have those cases heard. The Committee further stipulated the unequivocal obligation of States to recognise the right of individuals to complain under their domestic law and the obligation to investigate complaints promptly and impartially.¹⁵ It has also repeatedly directed States found in violation of the Convention to carry out investigations and provide effective remedies to victim(s).¹⁶

¹⁴ Adopted by General Assembly resolution 43/173 of 9 December 1988. Principle 33 (1): "A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers."

¹⁵ See General Comment 20 Concerning Prohibition of Torture And Cruel Treatment or Punishment (Art. 7) 10/3/1992 at para 14. See, also, Concluding Observations of HRC, Egypt, UN. Doc. CCPR/CO/76/EGY, 28 November 2002; Concluding Observations of HRC, Viet Nam, UN. Doc. CCPR/CO/75/VNM, 26 July 2002; Concluding Observations of HRC, Yemen, UN. Doc. CCPR/CO/75/YEM, 26 July 2002; Concluding Observations of HRC, Georgia, UN. Doc. CCPR/CO/74/GEO, 19 April 2002; Concluding Observations of HRC, Hungary, UN. Doc. CCPR/CO/74/HUN, 19 April 2002; Concluding Observations of HRC, Azerbaijan, UN. Doc. CCPR/CO/73/AZE, 12 November 2001; Concluding Observations of HRC, Uzbekistan, UN. Doc. CCPR/CO/71/UZB, 26 April 2001; Concluding Observations of HRC, Venezuela, UN. Doc. CCPR/CO/71/VEN, 26 April 2001; Concluding Observations of HRC, Syria, UN. Doc. CCPR/CO/71/SYR, 24 April 2001; Concluding Observations of HRC, Kyrgyzstan, UN. Doc. CCPR/CO/69/KGZ, 24 July 2000; Concluding Observations of HRC, Congo, UN. Doc. CCPR/C/79/Add.118, 27 March 2000.

¹⁶ *Jijón v. Ecuador* (Communication No. 277/1988), CCPR/C/44/D/277/1988 at para. 7; See also *Rodriguez v. Uruguay* (Communication No. 322/1988) CCPR/C/51/D/322/1988 para. 14; *Dermitt v. Uruguay* (Communication No. 84/1981) CCPR/C/17/D/84/1981 at para. 11; *Muteba v. Democratic Republic of the Congo*, (Communication No. 124/1982) CCPR/C/22/D/124/1982 at para. 13.

The European Court of Human Rights has similarly interpreted the prohibition of torture in Article 3 together with the general duty to guarantee Convention rights in Article 1 of the European Convention on Human Rights, as obliging states to investigate all cases of torture thoroughly and effectively. Together with Article 13, this includes the right of a victim to lodge a complaint to the competent authorities.¹⁷ However, the jurisprudence of the European Court of Human Rights has been far from clear on the question of whether the right to complain and the duty to investigate allegations of torture arises primarily as a procedural obligation relating to the prohibition of torture or in respect of the duty to provide an effective remedy. In *Assenov v. Bulgaria*, the Court located the procedural obligation to investigate as an implied element within the substantive prohibition against torture and ill-treatment.¹⁸ However, in the case of *Ilhan v. Turkey*, it situated the right and duty to investigate primarily in Article 13, the right to an effective remedy, stating that “(w)hether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case.”¹⁹ In subsequent cases, such as *Vezenaroglu v. Turkey*, the Court held that a procedural obligation derives from Article 3 ECHR where the applicant has an arguable claim that he/she was ill-treated by police officers.²⁰

In the Inter-American human rights system, the finding of a duty to investigate originated in the earliest contentious case before the Court, *Velasquez-Rodriguez v. Honduras*. The Inter-American Court held that investigations were central to “ensuring” the free and full exercise of the rights recognized by the Convention.²¹ In *Maritza Urrutia*, the Court stated that: “The fact that the State did not investigate the acts of torture effectively and allowed them to remain unpunished, means that it has omitted to take effective measures to avoid acts of this nature being repeated within its jurisdiction”²²

Under the African Charter, the African Commission in *Commission Nationale Des Droits De L’Homme et Des Libertes v Chad* observed that States are required to undertake measures to give effect to rights.²³ This, the Commission found, necessarily means that in cases of alleged violations, investigations have to be conducted.

¹⁷ For example, in *Aksoy v. Turkey* (1997), supra, the Court found that the authorities’ failure to conduct an investigation had the effect of precluding other effective remedies: “such an attitude from a State official under a duty to investigate criminal offences was tantamount to undermining the effectiveness of any other remedies that may have existed.” (para. 98); See also *Mentes v. Turkey* (1998) 26 E.H.R.R. 595 ECHR, para. 85.

¹⁸ *Assenov and Others v. Bulgaria* (1999) 28 E.H.R.R. 652 ECHR at para. 102. “The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires by implication that there should be an effective official investigation.” Endorsed in *Labita v. Italy*, Application no. 26772/95 (unreported judgment of 6 April 2000), para. 131, available at <http://hudoc.echr.coe.int/hudoc/default.asp?Language=en&Advanced=1> and *Vezenaroglu v. Turkey* (2001) 33 E.H.R.R. 59 ECHR, para. 32.

¹⁹ *Ilhan v. Turkey* (2002) 34 E.H.R.R. 36 ECHR, para.92.

²⁰ *Vezenaroglu v. Turkey*, supra, para. 35.

²¹ *Velasquez Rodríguez Case*. Judgment of July 29, 1988, Series C No. 4. I/A Court H.R., para. 166. See, also, *The “Street Children” Case. (Villagrán Morales et al.)*, Judgment of November 19, 1999, Series C No. 63. I/A Court H.R., para 225.

²² *Maritza Urrutia Case*, Judgment of November 27, 2003, Series C No. 103. I/A Court H. R., para 129-130.

²³ *Commission Nationale Des Droits De L’Homme et Des Libertes v Chad*, Communication 74/92, [1995] IHRL 64 (2 October 1995).

III.1. Elements of the Right to Complain

Who may complain?

The concept of 'victim' encompasses persons and collective groups of persons who suffer harm, including physical or mental injury, emotional suffering, economic loss, or impairment of their fundamental legal rights. Victims may also include *inter alia*, dependants and members of the immediate family or household of the direct victim, to the extent that they suffered physical, mental, or economic harm.²⁴

The *Standard Minimum Rules for the Treatment of Prisoners*,²⁵ provide that "every prisoner shall have the opportunity each week day to make requests or complaints to the director of the institution or the officer authorized to represent him." The *Body of Principles*, in broadening the scope set out in the *Standard Minimum Rules*, provides that counsel or family members or indeed any other person should have the right to report torture and other violations of the *Principles* to the appropriate authorities.²⁶

To whom?

The *Body of Principles* is perhaps the most specific in describing the persons or bodies competent to receive complaints. It lists detention authorities, higher authorities, or, where necessary, appropriate authorities vested with reviewing or remedial powers.²⁷ Rule 36 (1) - (3) of the *Standard Minimum Rules for the Treatment of Prisoners* refers to the director of the institution, the officer authorised to represent him [the prisoner], the central prison administration, judicial authorities or other proper authorities, all as authorities with whom a detainee may lodge a complaint.

Article 13 of the Convention against Torture refers to "*competent authorities*" as does Article 8 of the Inter-American Convention, though there is no clear explanation of what denotes 'competence'.²⁸ The Special Rapporteur on Torture has noted the important role to be played by 'judicial or other competent authorities' who "shall review the lawfulness of the detention as well as monitor that the detained individual is entitled to all of his/her rights, including the right not to be subjected to torture or other forms of ill-treatment. ..."²⁹ The European Committee for the Prevention of Torture has stressed "the role of judicial and prosecuting authorities as regards combating ill-treatment by the police."³⁰

Investigations must be carried out by authorities exhibiting impartiality and independence, which are vested with judicial capacity to enable the institution of criminal proceedings. Whether a given investigation is sufficiently independent and

²⁴ Basic principles and guidelines, *supra*, Appendix 1, at para. 8.

²⁵ Rule 36 (1), Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

²⁶ *Body of Principles*, *supra*, Principle 7 (3).

²⁷ Principle 33 (1); (4).

²⁸ *Encarnacion Blanco Abad v. Spain*, Communication No. 59/1996, CAT/C/20/D/59/1996 para 8.6.

²⁹ Report of the Special Rapporteur, UN Doc. E/CN.4/2004/56, 23 December 2003, paras. 39-40 citing his general recommendation E/CN.4/2003/68 para 26 (k). On 'judicial', see also Concluding observations of the Committee against Torture: Senegal, UN Doc. A/51/44, para. 115; Concluding observations of the Committee against Torture: Croatia, UN Doc. A/51/44, paras.151-162, 9 July 1996at para. 162 (f) and (g).

³⁰ European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the CPT Standards, 12 th General Report, Council of Europe, October 2001, CPT/Inf (2002) 15, para.45.

impartial will depend on the individual circumstances of each case, however, “[f]or an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.”³¹ The European Court of Human Rights in *Assenov* referred to the requirement for sufficient public scrutiny of the investigation to ensure its legitimacy and “to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.”³²

How Formal Does the Complaint Need to Be?

Article 13 of the Convention against Torture does not require that a formal complaint be lodged. It is sufficient for the victim simply to bring the facts to the attention of a competent authority for the latter to be obliged to consider that act as a tacit, but unequivocal expression of the victim’s wish that the facts be promptly and impartially investigated.³³ This was recognised by the Committee against Torture in *E.A. v Switzerland*, *Encarnacion Blanco Abad v Spain* and *Henri Unai Parot v. Spain*.³⁴ A similar approach was confirmed by the Human Rights Committee in *Eduardo Bleier v. Uruguay* and by the European Court of Human Rights in *Aksoy v Turkey*.³⁵ The *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Istanbul Protocol, Annex I, hereinafter referred to as the Istanbul Protocol), also confirm that “even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred.”³⁶

States are obliged to open an investigation *ex officio*, at their own instigation and without any complaint at all, where there are sufficient grounds to suspect that torture has been committed. The Committee against Torture has emphasised in its concluding observations on State party reports that States have an obligation to investigate torture *ex officio* under the Convention.³⁷ This recognises that in certain cases, victims may not be in a position to submit a complaint. While the Committee has not provided clear guidance as to when exactly an investigation must be opened *ex officio*, it has recognised that allegations brought by trustworthy nongovernmental organisations or individuals constitute sufficient grounds.³⁸ The duty to investigate allegations of torture *ex officio* has been reiterated in Principle 2 of the Istanbul Protocol and Principle 7 of the *Body of Principles*. The *Body of Principles* further stipulates, as does the *Code of Conduct for Law Enforcement Officials*, that there is a duty of officials to report

³¹ *Jordan v. the United Kingdom* (2003) 37 E.H.R.R. 2, para. 106 See also *Güleç v Turkey*: (1999) 28 E.H.R.R. 121, paras 81-82.

³² *Assenov and Others v. Bulgaria* (1999), supra, para 140.

³³ *E. A. v. Switzerland*, Communication No. 28/1995, CAT/C/19/D28/1995; *Blanco Abad v. Spain*, Communication No. 59/1996.

³⁴ See *Henri Parot v Spain* Communication No. 6/1990, CAT/C/14/D/6/1990 at para 10.4; *Encarnacion Blanco Abad v Spain* Communication 56/1996 at para 8.6. See also, Chris Ingelse, *The UN Committee against Torture: An Assessment*, The Hague/London/Boston: Kluwer Law International, 2001, at p. 355.

³⁵ *Aksoy v. Turkey*, supra, para.56.

³⁶ Adopted by General Assembly resolution 55/89 Annex, 4 December 2000, Principle 2.

³⁷ *Blanco Abad v. Spain*, supra, at para 8.2.

³⁸ See CAT/C/SR.292§33, under E, 5 (Committee as a Whole); A/53/44 Annual Report of the Committee Against Torture 1998 at para 136.

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violations of torture or ill-treatment.³⁹ Moreover, the Body of Principles expressly provides that an inquiry is to be held *ex officio* in death in custody cases.⁴⁰

Regional human rights bodies have taken a similar approach. The European Court of Human Rights has repeatedly noted that “whatever mode [of investigation] is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures.”⁴¹ Article 8 of the Inter-American Convention to Prevent and Punish Torture expressly provides that “if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed *ex officio* and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.” The Inter-American Court held in *Velasquez Rodriguez v. Honduras* that “(a)n investigation must ... be assumed by the State as its own legal duty, not... [a duty] that depends upon the initiative of the victim or his family....”⁴² This has been affirmed in subsequent judgments.⁴³

When can complaints be filed?

Rule 36 (1) of the *Standard Minimum Rules for the Treatment of Prisoners* provide expressly that “(e)very prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorised to represent him.”

Other international standards are silent on the question of when a victim of torture should be able to complain about torture. Torture allegations must be investigated ‘promptly,’ in order to secure evidence and protect victims from further torture, and this would imply that victims should be entitled to lodge complaints without delay or obstacle.

³⁹ Article 8 of the Code of Conduct for Law-Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979 reads: “Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them. Law enforcement officials who have reason to believe that a violation of the present Code [which includes the prohibition of torture] has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.” The Commentary to Article 8 provides, *inter alia*, that: “ (b) The article seeks to preserve the balance between the need for internal discipline of the agency on which public safety is largely dependent, on the one hand, and the need for dealing with violations of basic human rights, on the other. Law enforcement officials shall report violations within the chain of command and take other lawful action outside the chain of command only when no other remedies are available or effective. It is understood that law enforcement officials shall not suffer administrative or other penalties because they have reported that a violation of this Code has occurred or is about to occur. (c) The term “appropriate authorities or organs vested with reviewing or remedial power” refers to any authority or organ existing under national law, whether internal to the law enforcement agency or independent thereof, with statutory, customary or other power to review grievances and complaints arising out of violations within the purview of this Code.”

⁴⁰ Principle 34: “Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.”

⁴¹ *Aktas v. Turkey* (2004) 38 E.H.R.R. 18, para 299; *Ilhan v Turkey*, (2002) 34 E.H.R.R. 36, para. 63; *Kaya v. Turkey*, (1999) 28 E.H.R.R. 1, para. 89 ; *Salman v. Turkey*, (2002) 34 E.H.R.R. 17, para. 105.

⁴² *Velasquez Rodriguez v. Honduras*, *supra*, para.177.

⁴³ *Maritza Urrutia Case*. Judgment of November 27, 2003, Series C No. 103. I/A Court H. R., para 96.

III.2. Elements of the Obligation to Investigate

What is the threshold for investigations?

The issue of threshold for investigations is not absolutely clear in the jurisprudence. In principle, any allegation of torture triggers an obligation on the part of the State to investigate the substance of the complaint promptly and impartially. This has been affirmed by the Committee against Torture in *E.A. v Switzerland, Encarnacion Blanco Abad v Spain and Henri Unai Parot v. Spain*⁴⁴, the Human Rights Committee in *Eduardo Bleier v. Uruguay*, the European Court of Human Rights in *Assenov v Bulgaria* and *Vezenardoglu v Turkey* and the Inter-American Court in the *Maritza Urrutia Case*.⁴⁵

It would seem evident that the obligation to investigate does not extend to clearly frivolous cases or those that are ‘manifestly unfounded.’ According to the Special Rapporteur on Torture, all torture allegations should be investigated and the alleged perpetrator(s) suspended from duty; however, the latter step should only be taken where the allegation is not manifestly ill-founded.⁴⁶ Rule 36 (4) of the *Standard Minimum Rules for the Treatment of Prisoners* obliges the authorities to deal with any complaint “(u)nless it is evidently frivolous or groundless”, while the *Body of Principles* imposes no such restrictions, providing in Principle 33 (4) that “(e)very request or complaint shall be promptly dealt with and replied to without undue delay.”

However, in respect of the impact of the failure to investigate upon victims’ access to a remedy and reparations, European jurisprudence suggests that States will have violated victims’ rights when they have failed to investigate despite the existence of an “arguable claim”. In *Vezenardoglu v. Turkey*, the European Court of Human Rights implied that a complaint needs to be “arguable” in order to trigger the State’s obligation to carry out an effective investigation.⁴⁷ What constitutes an “arguable claim” is determined on a case-by-case basis.⁴⁸ While the specific contents of this threshold have not been made clear, some European cases refer to a ‘reasonable suspicion.’⁴⁹ According to the case law, allegations have been classified as arguable when backed up by at least some other evidence, be this witness testimonies or medical evidence or through the demonstrated persistence of the complainant.⁵⁰

⁴⁴ See *Henri Parot v Spain*, supra, para 10.4 and *Encarnacion Blanco Abad v Spain*, supra, para 8.6. See also Inglese, *Torture*, supra, p. 355.

⁴⁵ *Maritza Urrutia Case*, Judgment of November 27, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003), para. 110; See, also, *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), para 176; Affirmed in *El Amparo Case*, Judgment of September 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28 (1996), para. 61 of the judgement on reparations; *Suárez Rosero Case*, Judgment of January 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44 (1999), para 79.

⁴⁶ General Recommendations of the Special Rapporteur, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (k).

⁴⁷ *Vezenardoglu v Turkey* (2001) 33 E.H.R.R. 59 ECHR, paras. 32 et seq.

⁴⁸ See *Boyle and Rice v. United Kingdom* (1988) 10 E.H.R.R. 425 ECHR: “The Court does not think that it should give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised...” See also, *McCallum v United Kingdom* (1991) 13 E.H.R.R. 597.

⁴⁹ *Vezenardoglu v Turkey*, supra, paras.34 et seq. *Assenov*, supra, para 101. The Court considers that the medical evidence, Mr Assenov’s testimony, the fact that he was detained for two hours at the police station, and the lack of any account from any witness of Mr Ivanov beating his son with sufficient severity to cause the reported bruising, together raise a reasonable suspicion that these injuries may have been caused by the police. See also *Toteva v. Bulgaria*, Application no. 42027/98, Judgment of 19 May 2004, para.61: “The Court considers that the medical evidence and the applicant’s complaints and testimony together raised a reasonable suspicion that her injuries could have been caused by the police.”

⁵⁰ *Toteva v. Bulgaria*, supra, para. 62; *Tanrikulu v. Turkey* (2000) 30 E.H.R.R. 950 ECHR. See also the negative conclusion as to arguability in *Kurt v. Turkey* (1999) 27 E.H.R.R. 373 ECHR: “It is to be observed in this regard that the applicant’s case rests entirely on presumptions deduced from the circumstances of her son’s initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State. The Court for its part considers that these arguments are not in themselves sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody.” (para 108) (the Court found violations of Article 13 and Article 3 as regards the complainant’s suffering for lack of information as to her son’s whereabouts and the state’s disregard of her complaint but held there was insufficient information to conclude that a violation of Article 3 had occurred as regards her son).

Effective Access to Complaints Authority

While international instruments do not explicitly define a right to effective access to complaints procedures, they do cover a range of subsidiary rights aimed at enhancing access to such mechanisms, these are:

- (i) The right to be informed about available remedies and complaints procedures;⁵¹
- (ii) The right to have access to lawyers, physicians and family members⁵² and, in the case of foreign nationals, diplomatic and consular representatives;⁵³
- (iii) The right to lodge complaints with appropriate bodies in a confidential manner⁵⁴ in any form and without delay;
- (iv) The right to have access to external bodies, such as the judiciary⁵⁵ and visiting bodies, including the right to communicate freely with such bodies;⁵⁶
- (v) The right to compel competent authorities to carry out an investigation,⁵⁷ and
- (vi) The right of effective access to the investigatory procedure,⁵⁸ including the right to undergo a timely medical examination.⁵⁹

⁵¹ Concluding Observations of the Human Rights Committee: Bolivia, UN Doc. CCPR/C/79/Add.74, 1 May 1997, para. 28; Principle 13 of the *Body of Principles* and Rule 35 of the *Standard Minimum Rules for the Treatment of Prisoners*. According to the European Committee for the Prevention of Torture, "Rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence. Consequently, it is imperative that persons taken into police custody are expressly informed of their rights without delay and in a language which they understand. In order to ensure that this is done, a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights." 12th General Report, supra, para.44.

⁵² CPT, 12th General Report, supra, para.40: "As from the outset of its activities, the CPT has advocated a trinity of rights for persons detained by the police: the rights of access to a lawyer and to a doctor and the right to have the fact of one's detention notified to a relative or another third party of one's choice." Principles 15-19 of the *Body of Principles*.

⁵³ Principle 16 (2) of the *Body of Principles*; Rule 38 of the *Standard Minimum Rules for the Treatment of Prisoners*. The International Court of Justice has in the *LaGrand Case (Germany v United States of America)*, ICJ Reports 2001, para.77 and the *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, recognised that Article 36 (1) of the Vienna Convention on Consular Relations creates individual rights for the national concerned.

⁵⁴ See CPT, Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 22-30 May 2000, CPT/Inf (2003) 1, para.41: "The right for prisoners to have confidential access to appropriate authorities is an important additional safeguard against ill-treatment. In this respect, the CPT's delegation noted that the prison authorities have installed locked boxes through which inmates may have direct access to the Director of Nicosia Central Prisons and to the Prison Board. This is a welcome development, which should be extended to allow prisoners direct access to bodies which are entirely independent of the prison system." See also Principle 33 (3) of the *Body of Principles*: "Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant."

⁵⁵ Report of the Special Rapporteur, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 39 and Principles 11 (1), 32 (1) and 37 of the *Body of Principles*.

⁵⁶ CPT, 12th General Report, supra, para. 50: "...the inspection of police establishments by an independent authority can make an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, help to ensure satisfactory conditions of detention. To be fully effective, visits by such authorities should be both regular and unannounced, and the authority concerned should be empowered to interview detained persons in private. Further, it should examine all issues related to the treatment of persons in custody: the recording of detention; information provided to detained persons on their rights and the actual exercise of those rights ...; compliance with rules governing the questioning of criminal suspects; and material conditions of detention. The findings of the above-mentioned authority should be forwarded not only to the police but also to another authority which is independent of the police" and Principle 29 of the *Body of Principles*: "(1) In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment; (2) A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places" and Principle 33 (1) according to which a detainee may complain about torture "when necessary, to appropriate authorities vested with reviewing or remedial powers."

⁵⁷ *Güleç v. Turkey* (1999) 28 E.H.R.R. 121 ECHR at para. 79.

⁵⁸ *Aksoy v. Turkey*, supra, para. 98; *Ilhan v. Turkey*, supra, para. 92 *Tekin v. Turkey*, supra, para 66.

⁵⁹ CPT, 12th General Report, supra, para.42: "Persons in police custody should have a formally recognised right of access to a doctor. In other words, a doctor should always be called without delay if a person requests a medical examination; police officers should not seek to filter such requests. Further, the right of access to a doctor should include the right of a person in

Obligation of the State to investigate allegations “promptly”

Articles 12 and 13 of the Convention against Torture and Article 8 of the Inter-American Convention to Prevent and Punish Torture both expressly require prompt or immediate investigations upon receipt of complaints of torture.⁶⁰ There are no hard and fast rules as to what constitutes “prompt” or “immediate.” The available case law indicates that it depends on the circumstances of the case but that the words would normally be given their literal meaning.

In *Halimi-Nedzibi v Austria*,⁶¹ the complainant raised the issue of torture with an investigating judge on 5 December 1988. The investigation into the alleged torture was only commenced in March 1990. The Committee against Torture found that this was an unreasonable delay. In *Encarnacion Blanco Abad v Spain*,⁶² the complainant alleged during her first arraignment on terrorism-related charges that she had been tortured. It took another 15 days before the complaint was taken up by a judge and another four days before an inquiry began. The investigation then took 10 months, with gaps of between one and three months between statements on forensic evidence reports. The Committee found this too to be an unacceptable delay. Promptness accordingly appears to relate not only to the time within which the investigation is commenced, but also the expediency with which it is conducted.⁶³

The Committee against Torture has also expressed concern about the lack of prompt investigations in its concluding observations, without, however, specifying what constitutes “prompt.”⁶⁴ Despite the fact that neither the International Covenant on Civil and Political Rights nor the European Convention on Human Rights contain express provisions relating to investigations, both the Human Rights Committee and the European Court on Human Rights have concluded that investigations must be carried out promptly.⁶⁵ The Special Rapporteur on Torture⁶⁶ as well as instruments such as the

custody to be examined, if the person concerned so wishes, by a doctor of his/her own choice (in addition to any medical examination carried out by a doctor called by the police). All medical examinations of persons in police custody must be conducted out of the hearing of law enforcement officials and, unless the doctor concerned requests otherwise in a particular case, out of the sight of such officials. It is also important that persons who are released from police custody without being brought before a judge have the right to directly request a medical examination/certificate from a recognised doctor”; Principle 24 of the Body of Principles: “A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. The care and treatment shall be provided free of care” and 26: “The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.” See also *Aydin v. Turkey* (1998) 25 E.H.R.R. 251 ECHR on the right to an examination by medical professionals with appropriate and relevant training and expertise, at para. 107; *Akkoç v. Turkey* (2002) 34 E.H.R.R. 51 ECHR, para. 118; *Ogur v. Turkey*, supra, para. 89-90.

⁶⁰ The CAT uses the word “prompt” while the Inter-American Convention uses “immediate”.

⁶¹ *Halimi-Nedzibi v Austria*, Communication No. 8/1991, 18 November 1993.

⁶² *Encarnacion Blanco Abad v Spain*, supra, 12 February 1996.

⁶³ See also Amnesty International: *Combating Torture: A Manual for Action*, Amnesty International publication, AI Index: ACT 40/001/2003, June 2003, p. 175.

⁶⁴ See, for example, Concluding Observations : Egypt, UN Doc. CAT/C/XXIX/Misc.4, 20 November 2002, para. 5(b).

⁶⁵ See General Comment 20, supra, para 14; *Aksoy v Turkey*, supra.

⁶⁶ Report of the Special Rapporteur of 23 December 2003, supra, at para. 39; General Recommendations of the Special Rapporteur on Torture UN Doc. E/CN.4/2003/68 at para. 26(i); See also Resolution Adopted by the General Assembly on the report of the Third Committee: “all allegations of torture or other cruel, inhuman or degrading treatment or punishment should be promptly and impartially examined by the competent national authority, that those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished, including the officials in charge of the place of detention where the prohibited act is found to have taken place, and that national legal systems should ensure that the victims of such acts obtain redress and are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation” at para. 2.

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Istanbul Protocol,⁶⁷ the *Body of Principles*⁶⁸ and the *Standard Minimum Rules for the Treatment of Prisoners*⁶⁹ have emphasised that complaints about torture should be investigated 'promptly' without ascribing meaning to the term.

The Human Rights Committee declared in its General Comment 20, "complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective." The Committee has repeatedly emphasised, e.g. in *Stephens v. Jamaica* that a "State party is under an obligation to investigate, as expeditiously and thoroughly as possible, incidents of alleged ill-treatment of inmates."⁷⁰ However, it has not specified the meaning of promptness but dealt with it on an individual case-basis, finding, for example, that a delay of more than six months failed to meet this obligation.⁷¹ The Human Rights Committee has also, in its consideration of State party reports, repeatedly called upon States to "ensure that all instances of ill-treatment and of torture and other abuses committed by agents of the State are promptly considered and investigated by an independent body."⁷²

When examining whether an investigation is effective, the European Court of Human Right has applied the test of whether "the authorities reacted effectively to the complaints at the relevant time."⁷³ The Court has in several cases based its finding of a failure by the authorities to investigate on the lack of prompt and timely investigations but has neither defined the meaning of "prompt" nor developed uniform criteria. In cases such as *Çiçek v. Turkey*⁷⁴ and *Timurtas v. Turkey*⁷⁵, the Court's reasoning indicates that there should be no unnecessary delay in beginning the investigation, which should be carried out within reasonably short succession after receiving the complaint. In *Tekin v. Turkey*, the delay consisted in the Public Prosecutor's opening of an investigation 10 months after the complaint was made.⁷⁶ Other delays have included delays in taking statements (*Akdeniz and others v. Turkey*; *Akdivar v. Turkey*). In *Assenov v. Bulgaria*, the Court observed that: "no attempt appears to have been made to ascertain the truth through contacting and questioning witnesses in the immediate aftermath of the incident, when memories would have been fresh." In *Tas v. Turkey*, a case concerning "disappearance", the Court expressly noted the failure of the authorities to promptly take steps in response to complaints about the disappearance.⁷⁷ In *Indelicato v. Italy*, the Court found fault with both the delay in commencing the initial inquiry and the length of time taken during the initial investigations.⁷⁸

⁶⁷ Principle 2 of the Istanbul Protocol, supra.

⁶⁸ Principle 33 (4): "Every request or complaint shall be promptly dealt with and replied to without undue delay."

⁶⁹ Rule 36 (4): "Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay."

⁷⁰ *Stephens v. Jamaica*, Communication No. 373/1989, UN Doc. CCPR/C/55/D/373/1989 (1995), para.9.2. See also *Irvine Reynolds v. Jamaica*, Communication No. 587/1994, UN Doc. CCPR/C/59/D/587/1994 (1997) and *Wayne Spence v. Jamaica*, Communication No. 599/1994, UN Doc. CCPR/C/57/D/599/1994 (1996).

⁷¹ *Stephens v. Jamaica*, supra.

⁷² See e.g. *Democratic People's Republic of Korea*, UN Doc. CCPR/CO/72/PRK, 27 August 2001, para.15.

⁷³ *Labita v Italy*, Application no. 26772/95 (unreported judgment of 6 April 2000), para. 131.

⁷⁴ *Çiçek v. Turkey* (2003) 37 E.H.R.R. 20 ECHR, para.149.

⁷⁵ *Timurtas v. Turkey* (2001) 33 E.H.R.R. 6 ECHR, para.89. See also *Tekin v. Turkey* (2001) 31 E.H.R.R. 4 ECHR, 67; and *Labita v. Italy*, supra, para. 133.

⁷⁶ *Tekin v. Turkey*, supra, para.67.

⁷⁷ *Tas v. Turkey* (2001) 33 E.H.R.R. 15 at paras. 70-72 where the public prosecutor did not commence an investigation until two years after the incident at issue.

⁷⁸ *Indelicato v. Italy* (2002) 35 E.H.R.R. 40 ECHR, para.37 "... In view of the very lengthy delay in conducting the initial enquiry, the negligence surrounding the identification of those alleged to have been responsible and the length of time that the first investigation took... the Court considers that the Italian authorities did not take the positive steps which were necessary in the face of a credible complaint."

The Inter-American Court of Human Rights has equally not specified the meaning of “promptness.” However in *Cantoral Benavides v Peru*, when considering the failure of the State party to open a formal investigation following the allegation of torture, it referred to Article 8 of the Inter-American Convention against Torture which “clearly sets forth the obligation of the State to proceed as a matter of routine and immediately in cases such as the present case,” thus implying a literal meaning.”⁷⁹

Obligation of States to investigate the allegation “impartially” and the question of independence of investigating bodies

Impartiality has been described as a key, if not the most important, requirement of the investigation process.⁸⁰ The term ‘impartiality’ means free from undue bias. It is conceptually different from ‘independence’ which denotes that the investigation is not in the hands of bodies or persons who have close personal or professional links with the alleged perpetrators.⁸¹ The two notions are, however, closely interlinked, as the lack of independence is commonly seen as an indicator of partiality.⁸²

Articles 12 and 13 of the Convention against Torture and Article 8 of the Inter-American Convention to Prevent and Punish Torture expressly require investigations to be impartial. The Human Rights Committee has also found impartiality to be an implicit requirement for any investigation contemplated by Article 7 of the International Covenant on Civil and Political Rights⁸³ as has the European Court of Human Rights.⁸⁴

The treaty bodies have approached the issue of impartiality by considering both procedural and institutional aspects. Impartiality may relate to the proceedings or deliberations of the investigating body,⁸⁵ or it may relate to any suspicion of, or apparent bias, that may arise from conflicts of interest. In the *Encarnacion* case, the Committee against Torture concluded that the particular investigation was partial because the court failed to take steps to identify the alleged perpetrators, and because it refused to allow the complainant to adduce further evidence to support the forensic doctor’s report. In *Khaled Ben M'Barek v Tunisia*,⁸⁶ the magistrate who led the inquiry was found to be partial because of his failure to give equal weight to evidence from both sides.

In its consideration of State party reports, the Committee against Torture criticised the absence of independent bodies to investigate torture, particularly in respect of torture

⁷⁹ *Cantoral Benavides v. Peru*, Judgment of August 18, 2000, Inter-Am. Ct. H.R., (Ser. C) No.69 (2000).

⁸⁰ David Sloss *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties* in 24 International Yale Journal of International Law 1999 129, at p. 143. See, also, Annex to A/54/426 (Report of Sir Nigel Rodley to the General Assembly, in accordance with General Assembly Resolution 53/139): “Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, UN Doc. E/CN.4/2001/66, 25 January 2001, para 1310; Principles 7 and 33 of the *Body of Principles*.

⁸¹ See the final report of Mr. L.M. Singhvi, then Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1985 (E/CN.4/Sub.2/1985/18 and Add.1-6), para.79. See also Inglesse, Torture, supra, p. 336 and J. Burgers and H. Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff, 1988, p. 145.

⁸² AI, Combating torture, supra, p. 175.

⁸³ See General Comment 20, supra, para 14.

⁸⁴ See *Assenov & Others v Bulgaria*, supra.

⁸⁵ It would appear that impartiality would follow standard principles of natural justice of *nemo iudex in sua causa* (no one may be a judge in his own cause)..

⁸⁶ *Khaled Ben M'Barek v Tunisia*, Communication 60/1996, UN Doc. CAT/C/23/D/60/1996.

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by the police, the institution that ordinarily would be tasked with investigating torture.⁸⁷ Similarly, in a number of its concluding observations on State party reports, the Human Rights Committee expressed concern about the lack of impartial investigations of complaints about torture, including the absence of an independent oversight mechanism, and urged States Parties to establish independent bodies competent to receive, investigate and adjudicate on all complaints of torture and ill-treatment.⁸⁸

The European Court of Human Rights has not expressly applied the criteria of “impartiality” when assessing whether investigations have met the standards derived from Articles 3 and 13 of the Convention. However, when assessing the effectiveness of investigations, the Court has often held that investigations lacked independence, for example where members of the same division or detachment as those implicated in the allegations were undertaking the investigation, such as in the cases of *Aktas v Turkey*, *Ilhan v Turkey*, *Gulec v. Turkey* and *Toteva v. Bulgaria*.⁸⁹ Moreover, in determining whether a remedy is effective, the Court applies institutional effectiveness as one of the relevant criteria by requiring that the responsible authority be “sufficiently independent” from the one responsible for the violation of the Convention right.⁹⁰ Furthermore, the Court has noted that independence means not only a lack of hierarchical or institutional connection, but also practical independence.⁹¹

The Inter-American Commission on Human Rights has also observed that the lack of independence negatively impacts on impartiality, which is a minimum requirement for any investigation process,⁹² and this approach has been confirmed in the jurisprudence of the Inter-American Court.⁹³

The European Committee for the Prevention of Torture has repeatedly stressed the importance of impartial and independent investigations as one of the means of strengthening the protection of detainees from torture and inhuman treatment. As noted following its visit to Cyprus in 2000 “...it is axiomatic that the investigations conducted into such [torture] cases should not only be, but also be seen to be, totally independent and impartial.”⁹⁴ It further observed, in relation to Spain “... that the investigation of complaints by the internal accountability mechanisms of the National Police and the Civil Guard cannot be said to be independent and impartial”⁹⁵ and emphasised “...that it is indispensable that the persons responsible for carrying out investigations into

⁸⁷ Concluding Observation of CAT, Latvia, UN Doc. CAT/C/CR/31/3, 5, February 2004, para. 6(b). Concluding Observation of CAT, Lithuania, UN Doc. CAT/C/CR/31/5, 5, February 2004, para. 5 (e); Concluding Observation of CAT, Cambodia, UN Doc. CAT/C/CR/31/7, February 2004 and Concluding Observation of CAT, Moldova, UN Doc. CAT/C/CR/30/7, May 2003, para. 6 (e). See also, Ingelse, *Torture*, p. 398 and Burgers and Danelius, *Torture*, supra, pp. 144-45.

⁸⁸ See, for examples, Concluding Observations of HRC, Lithuania, UN. Doc. CCPR/CO/80/LTU, 15 April 2004; Concluding Observations of HRC, Latvia, UN. Doc. CCPR/CO/79/LVA, 6 November 2003; Concluding Observations of HRC, Viet Nam, UN. Doc. CCPR/CO/75/VNM, 26 July 2002; Concluding Observations of HRC, Yemen, UN. Doc. CCPR/CO/75/YEM, 26 July 2002; Concluding Observations of HRC, Azerbaijan, UN. Doc. CCPR/CO/73/AZE, 12 November 2001; Concluding Observations of HRC, Switzerland, UN. Doc. CCPR/CO/73/CH, 12 November 2001; Concluding Observations of HRC, Czech Republic, UN. Doc. CCPR/CO/72/CZE, 27 August 2001; Concluding Observations of HRC, Venezuela, UN. Doc. CCPR/CO/71/VEN, 26 April 2001.

⁸⁹ *Aktas v. Turkey*, supra, para. 301; *Ilhan v. Turkey*, supra, para. 101; *Güleç v. Turkey* (1999) 28 E.H.R.R. 121 ECHR, paras. 80-82; *Toteva v. Bulgaria*, supra.

⁹⁰ *Anguelova v. Bulgaria* (2004) 38 E.H.R.R. 31 at para. 138; *Ergi v Turkey*: (2001) 32 E.H.R.R. 18, at paras. 83-84.

⁹¹ *Finucane v. United Kingdom* (2003) 22 E.H.R.R. 29 at para. 68. See also *Edwards v. United Kingdom*, supra, at para. 70.

⁹² See “*Report on the Situation of Human Rights in Mexico 1998*”, Inter-American Commission of Human Rights, September 24, 1998, OEA/Ser.LV/II.100, para 323.

⁹³ *Marritza Urrutia v. Guatemala*, supra, para. 119.

⁹⁴ *Report to the government of Cyprus on the visit to Cyprus carried out by the CPT Committee*, May 2000, supra, para. 13.

⁹⁵ *Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, from 22-26 July 2001, CPT/Inf (2003) 22, para. 30.

complaints against the police should be truly independent from those implicated in the events.⁹⁶

The obligation of States to investigate allegations “effectively”: Substance of Investigations

There is ample jurisprudence to indicate that investigations must be “thorough” and/or “effective”.⁹⁷

In *Radivoje v Yugoslavia*,⁹⁸ the Committee against Torture observed that investigations must be effective and thorough, and in *Encarnacion Blanco Abad v Spain*, the Committee specified that investigations must seek to ascertain the facts and establish the identity of any alleged perpetrators,⁹⁹ a principle reiterated in *Hajrizi Dzemajl v Yugoslavia*.¹⁰⁰ In *M'Barek v. Tunisia*, the State failed to order an exhumation, and the Committee determined that this prevented the facts surrounding the victim's death from being ascertained, and hence the investigation was ineffective.¹⁰¹

The Human Rights Committee has consistently held that States have a duty to investigate cases of torture and disappearances thoroughly.¹⁰² In its concluding observations, the Committee has called upon States to put into place procedures that ensure the effective and thorough investigation of complaints,¹⁰³ though it has not elaborated on what would meet this standard.

The European Court of Human Rights held in *Aksoy v. Turkey* that “the notion of effective remedy in this context [Article 13] includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure,”¹⁰⁴ and that it “must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State.”¹⁰⁵ Furthermore, what is considered to be effective may vary according to the particular circumstances,¹⁰⁶ though authorities must always make a serious attempt to find out what happened¹⁰⁷ and “should not rely on hasty or ill-founded conclusions to

⁹⁶ Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Sweden, from 27 January to 5 February 2003, CPT/Inf (2003) 27, p.5.

⁹⁷ Whereas the term “thorough” relates to the scope and nature of the steps taken in carrying out an investigation, “effective” relates to the quality of the investigation.

⁹⁸ *Radivoje v Yugoslavia*, Communication 113/1998, para 9.6.

⁹⁹ *Encarnacion Blanco Abad v Spain*, supra, para 8.8.

¹⁰⁰ *Hajrizi Dzemajl v Yugoslavia*, Communication 161/2000, para 9.4 :Criminal investigation must seek both to determine the nature and circumstances of the alleged act and to establish the identity of the persons involved.

¹⁰¹ Supra.

¹⁰² *José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication No. 612/1995 (14 June 1994), UN Doc. CCPR/C/60/D/612/1995; *Wayne Spence v. Jamaica*, Communication No. 599/1994, U.N. Doc. CCPR/C/57/D/599/1994 (1996); *Stephens v. Jamaica*, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995); *Katombe L. Tshishimbi v. Zaire*, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993(1996).

¹⁰³ See among others: Concluding Observations of the Human Rights Committee: Brazil, UN Doc. CCPR/C/79/Add.66, 24 July 1996, at para. 324; Concluding observations of the Human Rights Committee: Republic of Korea, UN Doc. CCPR/C/79/Add.114, 1 November 1999, at para. 14; Concluding observations of the Human Rights Committee: Ukraine, UN Doc. CCPR/CO/73/UKR, 12 November 2001, at para. 14.

¹⁰⁴ *Aksoy v. Turkey*, supra, para. 98; *Ilhan v. Turkey*, supra, para. 92; *Ogur v. Turkey*, supra, para 88.

¹⁰⁵ *Aksoy v. Turkey*, supra, para. 95; *Aydin v. Turkey*, supra, para. 103; and *Kaya v. Turkey*, supra, para. 89.

¹⁰⁶ *Aktas v. Turkey*, supra, para 299; *Ilhan v. Turkey*, supra, para 63.

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close their investigation or as the basis of their decisions.”¹⁰⁸ Investigations should be of reasonable scope and duration in relation to the allegations.¹⁰⁹

The European Court of Human Rights has analysed what steps authorities must take when gathering evidence, and has made reference in its jurisprudence to offers of assistance; objectivity; attitude of the authorities towards victims and alleged perpetrator(s); timely questioning of witnesses; seeking evidence at the scene, (for example by searching detention areas, checking custody records and carrying out objective medical examinations by qualified doctors); use of medical reports, and, in death in custody cases, obtaining forensic evidence and carrying out an autopsy.¹¹⁰

The Istanbul Protocol has further specified that: “the investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. These persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.” The investigators “shall have access to, or be empowered to commission investigations by impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards, and the findings shall be made public.”¹¹¹

The Special Rapporteur on Torture has expressly endorsed the principles laid down in the Istanbul Protocol, specifying in relation to the question of medical evidence that “the forensic medical services should be under judicial or other independent authority, not under the same governmental authority as the police and the penitentiary system. Public forensic medical services should not have a monopoly of expert forensic evidence for judicial purposes.”¹¹² Similarly, the European Committee for the Prevention of Torture has stressed that detainees should have the right of access to independent doctors, and should be medically examined by qualified doctors upon entering and leaving detention facilities as well as upon request without undue outside interference, such as the presence of police officers.¹¹³

In *Blake*, the Inter-American Court of Human Rights also referred to the need for ‘effectiveness’¹¹⁴ and specified the duty to adopt all the internal legal measures necessary to facilitate the identification and punishment of those responsible.¹¹⁵ The Court specified that the State fails to comply with its duty to investigate effectively if “the State apparatus acts in such a way that the violation goes unpunished and the

¹⁰⁷ *Timurtas v. Turkey*, supra, para.88.

¹⁰⁸ *Assenov v. Bulgaria*, supra, para. 104.

¹⁰⁹ *Akkoç v. Turkey*, supra, para.99.

¹¹⁰ See, for example, *Salman v. Turkey*, supra, para. 106; *Tanrikulu v Turkey*, supra, para.109; *Gül v Turkey* (2002) 34 E.H.R.R. 28, para.89.

¹¹¹ See Principles 1-5 of The Istanbul Protocol, supra.

¹¹² Report of the Special Rapporteur, December 2002, supra, Annex 1], (j).

¹¹³ CPT, 12th General Report, supra, para.42.

¹¹⁴ *Bámaca Velásquez* Case, Judgment of February 22, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 91 (2002), (Merits, para.212 and Reparation, para.73).

¹¹⁵ *Blake case*, Interpretation of the Judgment of Reparations (art. 67 American Convention on Human Rights), Judgment of October 1, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 57 (1999), Para.65. See also, *Paniagua Morales et al. Case*, Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998), para.91.

victim's full enjoyment of such rights is not restored as soon as possible",¹¹⁶ thereby stipulating the need for an effective result as well as an effective process. The Court has also specified that 'effectiveness' requires that victims have full access and capacity to act at all stages of the investigation.¹¹⁷

The obligation of States to publish the results of investigations

The European Court of Human Rights in *Anguelova v Bulgaria*¹¹⁸ and the Inter-American Court of Human Rights in the *Caracazo* case¹¹⁹ have equally found a duty of States to inform the complainants about the outcome of investigations and, in *Caracazo*, to publish the results of an investigation. The most detailed pronouncement of what publication entails is in the Istanbul Protocol, in relation to commissions of inquiry, according to which: "A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. On completion, the report shall be made public. It shall also describe in detail specific events that were found to have occurred, the evidence upon which such findings were based, and list the names of witnesses who testified with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation, and, as appropriate, indicate steps to be taken in response."

Both the Committee against Torture and the Human Rights Committee have called on States Parties to publish information relating to the number and nature of complaints, investigations undertaken, and steps taken following such investigations, including punishment of the perpetrators.¹²⁰ The Human Rights Committee has moreover urged States in its General Comment 20 to provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

Rights of Complainants (and Witnesses)

Right to Protection

Principle 33 (4) of the *Body of Principles* provides that neither the detained or imprisoned person nor any complainant shall suffer prejudice for making a request or a complaint and Article 13 of the Convention against Torture expressly requires States to protect complainants and witnesses from intimidation. International criminal tribunals have made major advances in the recognition of the rights of complainants and witnesses to be free from intimidation, harassment or ill-treatment. Separate units have been created to guarantee victim and witness protection, to respect their privacy and dignity and to provide rehabilitative services and support.¹²¹

¹¹⁶ *Velasquez Rodrigues*, supra, para. 176.

¹¹⁷ *Ibid.*, para.117.

¹¹⁸ *Anguelova v Bulgaria*, supra, para.139.

¹¹⁹ *Caracazo Case*, supra, para.181.

¹²⁰ Concluding observations of the Human Rights Committee on Germany's State Party report, UN Doc. CCPR/CO/80/DEU, 15 April 2004, para.16 and by the Committee against Torture, UN Doc. CAT/C/CR/32/7, 18 May 2004, para.4 (c); Israel's State Party report, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para.18, on Portugal's State Party Report, UN Doc. CCPR/CO/78/PRT, 5 July 2003, para.8 (b), on Estonia's State Party Report, UN Doc. CCPR/CO/77/EST, 15 April 2003, para.18 and on Togo's State Party Report, UN Doc. CCPR/CO/76/TGO, 26 November 2002, para.12.

¹²¹ Articles 43 (6), 54 (1) (b), 57 (3) (c), 64 (2) (6) (e), 68, 87, 93 (1) (j) of the Rome Statute of the International Criminal Court; Articles 15, 20 and 22 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (Articles 14, 19 (1) and 21

The Committee against Torture has expressed concern about the lack of adequate protection for victims and witnesses and the failure of State authorities to ensure protection from reprisals,¹²² while noting with approval the establishment of witness and victim protection services or programmes.¹²³ The Special Rapporteur on Torture has recommended that witness protection schemes be established to ensure protection, and that alleged perpetrators be suspended pending the results of investigations provided the allegation of torture is not manifestly ill-founded.¹²⁴

In *Kaya v Turkey* and *Kiliç v Turkey*, the European Court of Human Rights expressly recognised a right to protection under Article 2 (right to life). The Court set a considerable threshold for the violation of the right to protection: “it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an 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 ...”¹²⁵ While the Court has not explicitly recognised a right to protection under Article 3, in *Assenov & Others v Bulgaria*, it held that the fact that State agents had questioned the victim’s family members after a complaint of torture was submitted violated the complainant’s right to make a complaint without interference.¹²⁶

An indirect right to protection arises through Article 34¹²⁷ of the European Convention, which assures individuals a right to present and pursue complaints at the European Court. The Court summarized the scope of this right in *Assenov*, “It is of the utmost importance for the effective system of individual petition that applicants or potential applicants are able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.”¹²⁸ Actions by state authorities that have been found to constitute interference with the right to petition include direct intimidation or coercion, approaches by government agents to question or interrogate victims, their families or their legal representatives about applications at the European Court, requests that petitioners sign documents denying or repudiating the substance of their claims,¹²⁹ and threats of criminal proceedings.¹³⁰ In considering whether particular circumstances amount to

of the Statute of the International Criminal Tribunal for Rwanda) in conjunction with Rules 34, 39 (ii), 40 (iii), 65 (b), 69, 75, 77, 96 of the Rules of Procedure and Evidence of 11 February 1994, as amended; Section 24 of regulation No.15, UNTAET/REG/2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Offences, 6 June 2000, available at www.un.org/peace/etimor/untaetR/Reg0015E.pdf (East Timor Statute) and Article 23 Draft Agreement, 17 March 2003, Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, available at www.yale.edu/cqp/news.html.

¹²² See, for example, Concluding Observation of CAT, Azerbaijan, UN Doc. CAT/C/CR/30/1 and Corr.1, 14 May 2003, para. 6 (g), Concluding Observation of CAT, Venezuela, UN Doc. CAT/C/CR/29/2, December 2002, para. 10(e), Concluding Observation of CAT, Indonesia, UN Doc. CAT/C/XXVII/Concl.3, November 2001, para. 9(d), Concluding Observation of CAT, Slovakia, UN Doc. A/56/44, paras. 99-105, 11 May 2001, para. 104 (f), Concluding Observation of CAT, Guatemala, UN Doc. A/56/44, paras. 67-76, 6 December 2000, para. 72(f) and Concluding Observation of CAT, Australia, UN Doc. A/56/44, paras. 47-53, 21 November 2000, para. 53(e).

¹²³ See, for example, Concluding Observation of CAT, Lithuania, UN Doc. CAT/C/CR/31/5, February 2004, para. 4(j); Concluding Observation of CAT, Cyprus, UN Doc. CAT/C/CR/29/1, December 2002, par. 4 (b) and Concluding Observation of CAT, Indonesia, UN Doc. CAT/C/XXVII/Concl.3, November 2001, para. 5 (c).

¹²⁴ See Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, 3 July 2001, para 39(j). See also, Principle 3 (b) of The Istanbul Protocol, *supra*.

¹²⁵ *Kaya v Turkey*, *supra*, para.86.

¹²⁶ *Assenov and others v. Bulgaria*, *supra*, para 169.

¹²⁷ Formerly Article 25(1).

¹²⁸ *Assenov and others v. Bulgaria*, *supra*, para. 169; *Akdivar v. Turkey*, *supra*, para. 105; *Kurt v. Turkey*, *supra*, para. 159.

¹²⁹ *Assenov and others v. Bulgaria*, *supra*, para. 170; *Kurt v. Turkey*, *supra*, para. 160.

¹³⁰ *Kurt v. Turkey*, *supra*, para. 165.

unlawful pressure, the Court will consider the environment in which the claim is being brought and the general status of the complainant(s), including their degree of vulnerability¹³¹ or the existence on their part of a legitimate fear of reprisal.¹³²

The Inter-American Court has ordered interim measures to protect witnesses in cases pending before it, though it has not elaborated particular standards of protection.¹³³

Participatory Rights during investigations

International standards and treaty bodies recognise the rights of torture victims to take part in investigations and to receive information about the progress and outcome of investigations and prosecutions.¹³⁴

In *Encarnacion*, the Committee against Torture held that complainants are entitled to adduce evidence, and the failure to afford this opportunity goes to the root of the lack of impartiality in the investigation. In *Hajrizi v Yugoslavia*, the Committee noted that the failure to inform the complainants of the result of the investigation breached their right to a remedy.¹³⁵ In *Anguelova v Bulgaria*, the European Court of Human Rights has noted that in all cases, the next of kin of the victim should be entitled to be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.¹³⁶ To this end, the complainant must have effective access to the investigation process¹³⁷ and should have the opportunity to make statements.¹³⁸ In *Caracazo*, the Inter-American Court of Human Rights held that “the next of kin of the victims and the surviving victims must have full access and the capacity to act during all stages and levels of said investigations” and that “their results must be made known to the public, for Venezuelan society to know the truth.”¹³⁹

IV. COMPARATIVE SURVEY OF COMPLAINTS PROCEDURES

The following survey compares country specific experiences and approaches in law and practice worldwide and benefits from the extensive comparative research carried out by REDRESS in 2003 on national approaches to reparation for torture.¹⁴⁰ The section below covers various aspects of complaints procedures, focusing on independence, accessibility and effectiveness and also sets out the steps taken by numerous countries to address shortcomings. Three in-depth studies (Russia, India and Northern Ireland) exemplify very different approaches and contexts, and a variety of political, legal and practical challenges.

¹³¹ *Assenov and others v. Bulgaria*, supra, para. 170.

¹³² *Akdivar v Turkey*, supra, para. 105.

¹³³ *Velasquez Rodriguez*, supra, para.39, on interim measures to protect witnesses.

¹³⁴ See Principle 4 of the Istanbul Protocol, supra.

¹³⁵ *Hajrizi v. Yugoslavia*, supra, para.9.5.

¹³⁶ *Anguelova v. Bulgaria*, supra, para.139.

¹³⁷ *Ibid.*, See also, *Cakici v Turkey*, supra, para 49 ; *Ergi v. Turkey* (2001) 32 E.H.R.R. 18 ECHR, para. 83.

¹³⁸ *Mentes v. Turkey*, supra, para. 91.

¹³⁹ *Caracazo Case*, Judgment of August 29, 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 (2002), para.118.

¹⁴⁰ REDRESS, *Reparation for Torture*, supra. Where not otherwise indicated, the sources of information derive from the findings of this survey.

IV.1. Obstacles to effective investigations

Complaints procedures in torture cases presuppose a legal framework that enables competent authorities to effectively investigate and prosecute the alleged perpetrators. However, many countries do not recognise a specific offence of torture,¹⁴¹ and/or the characterisation of the crime of torture is narrower than what the Convention against Torture requires.¹⁴² In such cases, torture complaints would only be classified as other offences, and in some instances would only be subject to disciplinary proceedings.

Immunities, amnesties,¹⁴³ statutes of limitation and the requirement of prior authorisation for investigations against public officials¹⁴⁴ also impede investigations into torture allegations. A complaint will not result in a criminal investigation if such laws shield the alleged perpetrator.

Several countries have taken positive steps to remedy the obstacles to effective investigations. For example, in Peru, Turkey, Sri Lanka and Cameroon, legislation has been passed to make torture a specific offence, though not always in line with Article 1 of the Convention against Torture.¹⁴⁵ The Argentinean and, to a limited degree, Chilean, governments have lifted immunities and amnesties in certain cases, as has also been the case in Ethiopia; Bulgaria; Colombia; Ecuador; Paraguay; Venezuela; Guatemala and Cote d'Ivoire. Turkey has recently abolished the requirement of prior authorisation for the prosecution of public officials. Several countries, such as Egypt, have removed a further potential barrier to accountability by extending or doing away with statutes of limitations for the offence of torture.¹⁴⁶

IV.2. Ordinary Criminal Law

In most countries, victims may lodge criminal complaints with the police or the public prosecutor, and often also with a judge (either the examining magistrate in certain

¹⁴¹ This is a recurring theme in the observations of the Committee against Torture on State Party reports. See Ingelse, *Torture*, supra, pp. 218 et seq. In the survey of the relevant law and practice of 31 countries carried out by REDRESS, only 6 countries were found to have adopted a definition of torture in their legislation that corresponds fully or partially to the one found in Article 1 of the Convention against Torture. See REDRESS, *Reparation for Torture*, supra, p.45.

¹⁴² See e.g. the interpretation of the offence of torture according to official guidelines in China. Article 247 CL: "Judicial workers who extort a confession from criminal suspects or defendants by torture, or who use force to extract testimony from witnesses, are to be sentenced to three years or fewer in prison or put under criminal detention. Those causing injuries to others, physical disablement, or death, are to be convicted and severely punished according to articles 234 and 232 of this law." See Section 3 (2) of The Supreme People's Procuratorate, *Trial Rules on the Standard of Filing for Investigation of the Cases Directly under Investigation by People's Procuratorates (guanyu renmin zhijie shouli lian zhencha anjian lian biao zhun de guiding shixing)*, issued on 16 September 1999, according to which an investigation into torture is required where: "The method [of infliction of torture] is very cruel and has an extremely negative influence on society; [the torture] results in suicide or causes a mental disorder; [The torture] causes the torture victim to confess to a crime s/he did not commit; [The torturer] commits torture more than three times or tortures more than three people; [The torturer] instigates, instructs or forces [a third party to commit] torture.

¹⁴³ Amnesty laws have resulted in impunity in many countries around the world. In some cases they have been put in place to 'facilitate transition' while in others they are instituted by those in power before they leave office to ensure impunity. Amnesties are deplored by victims and have been outlawed in respect of serious international crimes. See e.g., the controversy over amnesties in South Africa, which was resented by many victims and challenged, albeit unsuccessfully, before the South African Constitutional Court in the case of *Azanian Peoples Organization (AZPO) and Others v The President of South Africa and Others*, Constitutional Court of South Africa, Case CCT 17/96, 25 July 1996. See on this point Brandon Hamber, *Rights and Reasons: Challenges for Truth and Recovery in South Africa and Northern Ireland*, in *Fordham International Law Journal*, Volume 26, April 2003, Number 4, pp. 1074-1094, in particular pp.1077 et seq. See also, as examples, section 57 of the Indian Prevention of Terrorism Act, 2002 and the Joint Drive Indemnity Act, 2003 in Bangladesh.

¹⁴⁴ See e.g. the relevant laws in India (as well as in Bangladesh and Pakistan, see section 197 of their respective Codes of Criminal Procedure), Lebanon, Sudan, and, until recently, Turkey.

¹⁴⁵ See the Peru country study in REDRESS, *Reparation for Torture*, supra. See also the Torture Act No.22 of 1994 in Sri Lanka and Article 132 bis of the Cameroon Penal Code, Act No.97-9 of 10 January 1997.

¹⁴⁶ See Article 57 of the Egyptian Constitution.

common law countries,¹⁴⁷ or the investigating judge in civil law systems¹⁴⁸), including allegations of crimes committed by police officers. In some cases complaints about torture will be dealt with by the same body that receives the complaint, namely the police, prosecution service or a judge. Upon receipt of a complaint, the competent authority will categorise and process it and determine whether it reveals police misconduct that warrants an investigation, and if so, whether the misconduct amounts to a criminal offence or to a breach of discipline only. Depending on the country, these initial determinations may be subject to prior internal review and open to external challenges by those who lodged the complaint. If these assessments reveal that the misconduct gives rise to a criminal offence, a criminal investigation would in principle be opened, and the case would be assigned to the responsible investigation department or prosecution service, which would in turn direct the investigations.

Judges who receive complaints will generally have the power to cause a criminal investigation to be opened by instructing judicial investigators directly or by forwarding the matter to the authority in charge of investigations.

Criminal investigations into torture-related complaints are commonly carried out either by the police or special investigation teams, at times under the supervision of the public prosecution services.¹⁴⁹ In countries with a civil law tradition, police will carry out the investigation under the supervision of the public prosecutor or investigating judge. In some countries, the prosecution service carries out the investigations directly.¹⁵⁰

In some countries, private prosecutions can be initiated by individuals with a substantial interest in the case. They may depend on a *nolle prosequi*, i.e. a declaration by the public prosecution that it will not prosecute, but they are rarely resorted to because the 'private prosecutor' bears the cost if the prosecution does not result in a conviction.¹⁵¹ In some instances these prosecutions may only be brought with prior consent by the Executive.¹⁵² Civil law jurisdictions generally provide more expansive rights for victims in the form of "*constitution de partie civile*."¹⁵³ In the criminal justice system of countries following *Shari'a* law, *qisas*¹⁵⁴ can commonly only be prosecuted privately.¹⁵⁵ In many

¹⁴⁷ This is the case in most countries in the Indian subcontinent. See Articles 200 et seq. of the Indian Code of Criminal Procedure, 1973. The system in Pakistan and Bangladesh, based on the Code of Criminal Procedure of 1898, is largely similar to the Indian one. See also Articles 77 of the Nigerian Criminal Procedure Act [CAP 80], 1945.

¹⁴⁸ See on the French legal system Richard Vogler, *Criminal Procedure in France*, in John Hatchard, Barbara Huber and Richard Vogler, *Comparative Criminal Procedure*, British Institute of International and Comparative Law, London, 1996, pp.34 et seq. This model is used not only in Francophone countries but has also been followed in countries such as Iraq. See Articles 1 (A) and 47 of the Iraqi Code of Criminal Procedure, as amended, Law No.23 of 1971. The ability for victims to start (or join) criminal proceedings ("*constitution de partie civile*") continues to play an important role in human rights cases.

¹⁴⁹ This is the case, for example, in China, Japan, the Philippines, Russia, Uzbekistan, Romania and the Republic of Korea. See also, UN Doc. CAT/C/32/Add.1, 30 May 1996, paras.187 ff.; Kazakhstan, UN Doc. CAT/C/47/Add.1, 7 February 2001, paras.120 et seq.; Bolivia, UN Doc. CAT/C/52/Add.1, 21 September 2000, paras.22 and 70 seq.; Federal Republic of Germany, Articles 152 et seq. of the Criminal Procedure Code; Armenia, Article 53 of the Criminal Procedure Code and Scotland, see Scottish Executive, *HM Inspectorate of Constabulary in Scotland, A Fair Cop?*, 6 April 2000, Part I, <http://www.scotland.gov.uk/hmic/docs/afcp-00.asp>.

¹⁵⁰ See Colombia's state report to the Committee against Torture, UN Doc. CAT/C/39/Add.4, 11 October 2002, paras.262 et seq.

¹⁵¹ See e.g. sections 7-17 of the South African Criminal Procedure Act, 1977 and *North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape)*, 1999 (2) SACR 669, 680.

¹⁵² In England and Wales, as in many other common law jurisdictions, prior consent must be obtained from the Attorney-General. See in this respect, the Prosecution of Offences Act 1985 and sections 134 and 135 of the Criminal Justice Act 1988. See also, section 88 of the Criminal Procedure Code of Kenya, Rev.1983 [CAP.75] and for Canada, Third Periodic Report of State Parties to the Committee against Torture, due in 1996, UN Doc. CAT/C/34/Add.13, 31 May 2000, para. 91.

¹⁵³ See for example, Article 85 of the French Code of Criminal Procedure, 1958. The victim may join public criminal proceedings as *partie civile*, or may directly initiate a criminal prosecution. For similar approaches in other civil law countries, see, for example, the reports to the Committee against Torture of Senegal, UN Doc. CAT/C/17/Add.4, 11 July 1995, paras.13 and 77 et seq.; Belgium, UN Doc. CAT/C/52/Add.2, 8 July 2002, para.347 and Cambodia, UN Doc. CAT/C/21/Add.5, 17 January 2003, paras.144 et seq.

¹⁵⁴ *Qisas* comprise homicide and bodily harm. According to *Shari'a* law, the victim or his/her heirs may demand the death penalty or the infliction of a punishment mirroring the injury inflicted on the victim. Instead of punishment, the victim may accept

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other countries, private prosecutions are confined to minor offences, on the grounds that there is no general public interest in the prosecution of those offences.¹⁵⁶

Police authorities may initiate disciplinary proceedings, which either run parallel to criminal investigations or, where the misconduct is characterised as non-criminal, they may amount to the sole investigation. Most police authorities have internal systems for investigating such complaints,¹⁵⁷ which usually operate independent of the standard criminal investigation process. The police may decide to open a criminal investigation, which runs parallel to any disciplinary action or they may forward the complaint and/or the findings of the internal investigation to the prosecuting authorities. In most countries under study, disciplinary investigations will be suspended pending the outcome of any criminal investigation.

While the internal processes vary from country to country, they are normally undertaken by superior officers, special investigators or panels within the police authority or Ministry of Interior. The applied standard of evidence is often the “balance of probabilities” instead of “beyond all reasonable doubt”, the standard that is commonly used in criminal proceedings.¹⁵⁸ Disciplinary sanctions range from admonishment to dismissal.¹⁵⁹

Impartiality

Impartiality, and the perception of impartiality, are perhaps the most important factors in any complaints procedure. Irrespective of the complaints procedures in place, victims often perceive the police to be biased, especially in those countries where torture is widespread, or where the police are seen as not reflecting the interests of particular tribal, ethnic or religious groups.¹⁶⁰ Such perceptions may also result from a lack of transparency by the police or a lack of awareness on the part of victims of internal police procedures, as has been acknowledged, for example, by the Czech Republic in regard to its former system.¹⁶¹

diya (blood money) as specified by law. See for a recent case study, Prof. Dr. Ruud Peters with the assistance of Maarten Barends, *The Reintroduction of Islamic Criminal Law in Northern Nigeria, A Study Conducted on Behalf of the European Commission*, Lagos, September, 2001.

¹⁵⁵ This is for example the case in Iran; Sudan; Northern Nigeria and Saudi Arabia. See the respective country studies in REDRESS, *Reparation for Torture, and Torture in Saudi Arabia, No protection, No redress*, Report published by REDRESS and the Parliamentary Human Rights Group, 1997, pp.45 et seq.

¹⁵⁶ See e.g. Articles 374 of the German Code of Criminal Procedure, 1877 as amended.

¹⁵⁷ See e.g. reports of the Special Rapporteur on Torture following his missions to Pakistan, UN Doc. E/CN.4/1997/7/Add.2, 15 October 1996, para.86; Cameroon, UN Doc E/CN.4/2000/9/Add.2 11 November 1999, para.60 and Azerbaijan, UN Doc. E/CN.4/2001/66/Add.1, 14 November 2000, paras.95, 96. See also Croatia: Law on Police; Bosnia and Herzegovina: Law on the Judicial Police of Bosnia and Herzegovina and the Law of Police of the Brcko district of Bosnia and Herzegovina, provided by Maria Bideke at <http://www.legislationline.org/index.php?topic=11> and for Southern Africa, Amnesty International, *Policing to protect human rights, A survey of police practice in countries of the Southern African Development Community, 1997-2002*, AI Index: AFR 03/004/2002, 2002, pp.52 et seq.

¹⁵⁸ See e.g. Scotland, *A Fair Cop?*, supra.

¹⁵⁹ See e.g. Australia, UN Doc. CAT/C/25/Add.11, 15 May 2000, para. 95 and Republic of Moldova, UN Doc. CAT/C/32/Add.4, 30 August 2002, para. 274.

¹⁶⁰ Examples of minority and/or marginalised groups avoiding contact with the police due to real or perceived biases include the police in Apartheid South Africa, the largely Protestant former Ulster Constabulary in Northern Ireland as well as the Israeli police force. Also, minorities such as the Roma, have reportedly refrained from lodging complaints as this was seen as futile in the face of police hostility. See Niels Uildriks, *Dealing with complaints against the police in Romania, Bulgaria and Poland: a human rights perspective*, Netherlands Quarterly of Human Rights, Vol.19/3 (2001), pp.269-293, p.280.

¹⁶¹ See e.g. report of the Czech Republic to the CAT, UN Doc. CAT/C/38/Add.1, 22 June 2000, para.110.

i. Police

Systems that require complaints to be firstly, or solely, lodged with the police have in practice proved to be the most problematic, especially when the police are responsible not only for the receipt of the complaint but also for carrying out the investigation and/or forwarding complaints to prosecution services. The main difficulty here is the lack of independence of the police vis-à-vis the alleged perpetrator(s),¹⁶² and the prevalence of a protective police culture inimical to taking steps that might be injurious to police officers and to the reputation of the police as an institution.¹⁶³ Further, in some cases the police institutions themselves may serve as tools of authoritarian governments¹⁶⁴ responsible for torture.

However, there are instances where the fact that police lack formal independence does not inhibit impartiality or effectiveness. For example, special investigation units, even if they are internal, may be sufficiently impartial and effective if they are adequately supervised at arm's length and exert operational independence in practice.¹⁶⁵ This, however, is more often the exception rather than the rule: many police authorities lack a policy, internal rules and supervisory mechanisms that ensure the proper handling of complaints.¹⁶⁶ Consequently, complaints processes and investigations that are fully within the control of the police often do not lead to a full and impartial assessment of the available evidence, or to criminal or disciplinary accountability.¹⁶⁷

While the responses to the widely acknowledged challenges facing police complaints procedures have been far from consistent, governments and police authorities in several countries have taken steps to address identified shortcomings. A key step has been the setting up of independent oversight bodies, such as police complaints authorities, and the establishment of internal special complaints units or restructured procedures so that complaints are automatically dealt with by units other than those whose members stand accused.¹⁶⁸ Some special units have been established to

¹⁶² This is a recurring theme, see e.g. the various contributions in L. Lindholt et al. (eds.), 'Human Rights and the Police in Transitional Countries', Kluwer Law International, 2003. The problem has been expressly referred to by the Czech Republic in its report to the Committee against Torture, UN Doc. CAT/C/60/Add.1, 4 October 2002, para.85: "In keeping with the existing legislation, investigations were conducted by police investigators assisted by police authorities. However, the task of detecting criminal offences committed by police officers and identifying the offenders was discharged by the Ministry of the Interior's Division for Inspection Activities..., i.e. a body which falls-just like the police itself- under the jurisdiction of the Ministry of the Interior. In many cases, this particular situation came under criticism of international as well as domestic human rights authorities and organizations..."; and, in UN Doc. CAT/C/38/Add.1, 22 June 2000, para. 110: "The basic shortcoming of the whole system was the fact that the police themselves dealt with the complaints and were, in fact, the "judge" in their own case."

¹⁶³ This has been one of the key rationales for establishing independent police complaints authorities. See Liberty, *An Independent Police Complaints Commission*, 2000, pp.1 et seq. and for the opposition of police forces to oversight processes, Peter Flint, *Citizen Review of Police: Approaches and Implementation*, National Institute of Justice, March 2001, at <http://virilib.ncjrs.org/LawEnforcement.asp>. The Police Ombudsman of São Paulo pointed to the police *esprit de corps* as one of the continuing obstacles to police accountability. See Brazil's report to the Committee against Torture, UN Doc. CAT/C/9/Add.16, 18 August 2000, para.165.

¹⁶⁴ As is the case in many Asian countries. See Basil Fernando, *Police and the Rule of Law in Asia*, in L. Lindholt, *Human Rights and Police*, supra, pp.29-49. See on Africa, Etannibi E.O. Alemika, *Police, Policing and Rule of Law in Transitional Countries*, *ibid.*, pp.63-95.

¹⁶⁵ See e.g. on the Polish system of investigating complaints against the police, Uildriks, *Dealing with complaints*, supra, pp .292, 293.

¹⁶⁶ This is compounded in those countries where the police are part of a military structure and lack any civilian oversight. This has until recently been the case in many Central and Eastern European countries, such as Romania, see Renate Weber, *Police Organization and Accountability: A Comparative Study*, in András Kádár (ed.), 'Police in Transition, Essays on the Police Forces in Transition Countries', Central European University Press, Budapest, 2001, pp.39 et seq. See, for similar concerns raised by the Human Rights Committee in its concluding observations on the Dominican Republic, UN Doc. CCPR/CO/71/DOM, 26 April 2001, para.10.

¹⁶⁷ See for a concrete example, the experience with the Complaints against Police Office (CAPO) in Hong Kong, Hong Kong Human Rights Monitor, *Submissions to the United Nations Committee Against Torture in relation to the Report of the Hong Kong Special Administrative Region under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, May 2000, paras.48 et seq.

¹⁶⁸ See, for example, the Complaints Investigation Bureau in Mauritius, the Complaints and Discipline units in Namibia and the New York Police Department Investigations Group. See for recent references, the Unit for Complaint Investigations in the

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undertake specific tasks, such as the special police team belonging to the Criminal Investigation Division of the National Police in Peru, which has been set up to investigate disappearances and other human rights violations committed in the past. The record of such oversight bodies, specialised units or procedures in effectively investigating torture and police ill-treatment differs considerably.¹⁶⁹

Clear rules for recording, forwarding and investigating complaints regarding police misconduct have been adopted in England and Wales.¹⁷⁰ In efforts to break the protective police culture regarding crimes committed by other police officers, several police authorities, including the Police Service of Northern Ireland, have adopted special codes of conduct, which include as a disciplinary offence the failure to notify the competent authorities of criminal offences or other misconduct committed by fellow police officers.¹⁷¹

Moreover, some police authorities have taken steps to make the complaints process more transparent, including providing information to the complainants about the progress of complaints and general statistics about the complaints procedure.¹⁷² Such measures often tie in with larger police reform aimed at making police services more accountable, for example by separating the police from military structures, as has been the case in certain Central and Eastern European countries,¹⁷³ by enhancing the independence of the police from political influences,¹⁷⁴ and by introducing forms of democratic oversight, as is the case in Northern Ireland.¹⁷⁵ South Africa's police services have adopted a specific policy aimed at preventing torture,¹⁷⁶ though to date it has had only limited impact.

General Police Directorate in Slovenia, UN Doc. A/55/44, paras.189-212, 16 May 2000, para.201; the Human Rights Division in the National Police of Venezuela, set up in June 2000, Concluding observations of the Human Rights Committee, CCPR/CO/78/SLV, 22 July 2003, para.5 and the Police Human Rights Office in Cyprus concluding observations by the Committee against Torture, UN Doc. CAT/C/CR/29/1, 18 December 2002, para.4 (l). See also in Israel the Department for the Investigation of Police Officers, Machash, set up within the Ministry of Justice. See, in this respect, Israel's State party report to the Committee against Torture, UN Doc. CAT/C/33/Add.3, 6 March 1998, para.74 and Sergio Herzog, *Evaluating the New Civilian Complaints Board in Israel*, in Andrew Goldsmith and Colleen Lewis (eds.), 'Civilian Oversight of Policing', Oxford, Portland, Hart Publishing, 2000, pp.124 et seq.

¹⁶⁹ See, for example, the concerns raised by the Committee against Torture about the independence and impartiality of the competent Internal Security Office of the State Police in Latvia, UN Doc. CAT/C/CR/31/3, 5 February 2004, para.6 (b).

¹⁷⁰ See UK Home Office, New Police Complaints System, Thematic Paper No.10, *Recording of Complaints and Conduct Matters*, August 2003.

¹⁷¹ See e.g. the former SAPS Prevention of Torture Policy, *infra*, and the safe call line to report wrongdoing set up by the Police Service in Northern Ireland, allowing members of staff to report wrongdoing on a confidential basis around the clock as an integral part of the Police Code of Ethics. This Code of Ethics can be found in the schedule to section 2 of the Police Services of Northern Ireland (Conduct) Regulations, 2003, Statutory Rule 2003, No.68, also available on the internet at: <http://www.northernireland-legislation.hmso.gov.uk/sr/sr2003/20030068.htm#2>.

¹⁷² See for example, recent legislation in Poland, Article 244 (2) of the Criminal Procedure Code, 1998. The system was found to meet with public confidence as evidenced by the substantial number of complaints. See Niels Uildriks, *Dealing with complaints*, *supra*, pp.284 et seq. See also the responses of the Polish Government to the Report on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 19 May 2000; CPT Inf (2002) 10; available at <http://www.cpt.coe.int/documents/pol/2002-09-inf-eng.htm>.

¹⁷³ See contributions in Kádár, *Police in Transition*, *supra*.

¹⁷⁴ Basil Fernando suggests the following indicators for police independence: "(1) Does a structure exist for the police as separate from political structure?; (2) Are the functions of the highest officer in the force defined?; (3) Is the relationship between the highest officers and his next high-ranking officers defined?; (4) Are the basic duties of all officers of all ranks defined?; (5) Penal Code, Criminal Procedure and Investigations?; (6) Do the police engage in surveillance of civilians involved in legitimate political activities?; (7) Are high-ranking police officers appointed on the basis of their political loyalties? See Basil Fernando, *Police and the Rule of Law in Asia*, in Lindholt, *Human Rights and Police*, *supra*, pp.29-49, at pp.37, 38.

¹⁷⁵ See *infra*, at V.3.

¹⁷⁶ See Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Services, at www.saps.gov.za/17_policy/tort.htm, which is, however, much less detailed than the previous policy on prevention of torture, at http://www.saps.gov.za/17_policy/policy.htm.

ii. Public Prosecutor

Complaints may be either lodged directly to the prosecution services or forwarded to them. While prosecution services are often independent from the police as far as organisational structures are concerned, there are at times concerns about their actual independence.

In practice, prosecution services depend on the co-operation of the police. In all countries the police and prosecutorial institutions work closely together to combat crime and often share a common or similar outlook and mutual respect.¹⁷⁷ At times, this may result in a real or perceived reluctance on the part of prosecution services to investigate allegations against police officers. Particular concerns have been raised with regard to military prosecutors responsible for investigating police torture, such as the case until recently, in Romania.¹⁷⁸

A further factor that increases the dependence of prosecutors upon the police is the prosecution's limited power and resources, as has been reported in Cambodia.¹⁷⁹ In some countries, such as Brazil, Guatemala and El Salvador, prosecutors have been targeted and threatened for investigating crimes committed by state agents, including the police.¹⁸⁰ Finally, prosecution services, as part of the executive branch of government, are often subject to political interference, for example in China,¹⁸¹ or are said to have displayed a deferential attitude towards the authorities when investigating torture cases, such as in Turkey.¹⁸²

The lack of political will, resources, expertise and low priority accorded to effectively combating torture are all factors that have combined to serve as disincentives for prosecution services to establish and/or implement effective complaints procedures against the police. Certain prosecutors, such as in Russia, have reportedly actively discouraged victims of torture from lodging complaints¹⁸³ or, as has been reported in Uzbekistan, "denied having received any complaints regarding alleged torture..."¹⁸⁴

Several countries have sought to strengthen prosecutorial independence. While such changes have often been motivated by broader considerations of institutional autonomy and enhanced professionalism, at times they have been aimed specifically at reinforcing complaints procedures against the police. Also, special

¹⁷⁷ See on the experiences in England, Liberty, IPCC, supra, p.42. See on Bulgaria, Uildriks, Dealing with complaints, supra, p.283.

¹⁷⁸ See for example the former system in Romania, which is in the process of being changed, *ibid.*, pp.273 et seq.

¹⁷⁹ See e.g. Cambodia's country report to the Committee against Torture, UN Doc. CAT/C/21/Add.5, 17 January 2003, para.127.

¹⁸⁰ See the joint urgent appeal by the Special Rapporteur on the Independence of Judiciary, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on Torture, in relation to death threats received by three public prosecutors who were bringing charges for torture against 26 police officers and prison guards in Brazil in early 2001, UN Doc. E/CN.4/2002/72, 11 February 2002, Annex, para.17. See on Guatemala, the concluding observations of the Committee against Torture, UN Doc. A/56/44, paras.67-76, 6 December 2000, para. 72 (a) and Amnesty International, *Guatemala, Concern for Safety of Special Prosecutor on Cases of Human Rights Defenders*, AI Index: AMR 34/004/2003, 31 January 2003. See on El Salvador, UN Doc. CCPR/CO/78/SLV, 22 July 2003, para.13.

¹⁸¹ See e.g. Amnesty International, *People's Republic of China, Torture: A growing scourge in China- Time for Action*, February 2001, AI Index: ASA 17/004/2001, pp.49 et seq.

¹⁸² *Aydin v. Turkey*, supra, para. 106.

¹⁸³ See European Committee for the Prevention of Torture, Report to the Russian Government on the visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 17 December 2001, CPT Inf (2003) 30, Section 10/48, para.43.

¹⁸⁴ See in relation to the case of Iskander Khudoberganov, Mission to Uzbekistan, Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted in accordance with Commission resolution 2002/38, UN Doc. E/CN.4/2003/68/Add.2, 3 February 2003, para.56.

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complaints/investigation units to curb torture have been established within certain prosecution services,¹⁸⁵ not always with clear success.¹⁸⁶

In some cases, existing complaints procedures of prosecution services have been strengthened, either generally or in response to corruption or human rights violations, including torture. In Peru, the “*fiscal ad hoc*” was appointed in April 2002 to investigate past human rights violations, such as forced disappearances, in conjunction with the Truth and Reconciliation Commission and the Peruvian Ombudsman. Some prosecution services, such as that of Scotland, either as part of a government policy or on their own initiative, have adopted and implemented a policy of receiving, recording and investigating thoroughly all complaints against the police and have allocated considerable resources to accomplish this objective.¹⁸⁷

Certain prosecution services have also reached out to national human rights institutions, civil society groups and the public at large, providing information and inviting co-operation.¹⁸⁸ As noted with regard to the establishment of specialised bodies that focus on the investigation and prosecution of serious violations of human rights,¹⁸⁹ “(a)lthough not always successful, this approach may enable Governments to mobilize the political and material resources necessary to prosecute serious crimes under international law.”¹⁹⁰

iii. Judges

In many countries including Brazil, Turkey, the Russian Federation and Sudan, the judiciary, often referred to as a bastion for the protection of human rights,¹⁹¹ has failed to act upon complaints brought by torture survivors, either in the course of *habeas corpus* proceedings¹⁹² (especially during states of emergency,¹⁹³) criminal trials or fundamental rights cases. The main reason for this failure is the lack of independence

¹⁸⁵ Such as the Prosecution of Torture Perpetrators Unit in Sri Lanka and the Human Rights Unit of the Office of the Prosecutor in Colombia, see UN Doc. CAT/C/39/Add.4, 11 October 2002 para.264.

¹⁸⁶ Torture reportedly continues to be committed on a considerable scale in Sri Lanka, see *Second Special Report: Endemic torture and the collapse of policing in Sri Lanka*, in Asian Human Rights Commission, Article 2, Vol.3, No.1, 2004 and Concluding observations of the Human Rights Committee on Sri Lanka’s State party report, UN Doc. CCPR/CO/79/LKA, 1 December 2003, para.9. Colombia’s prosecution service, including the Human Rights Unit, has also been criticised for its failure to combat impunity, see Comisión Colombiana de Juristas, *Alternative Report to the Third Periodic Report Submitted by the Colombian State to the Committee against Torture*, October 2003, pp.60 et seq.

¹⁸⁷ See e.g. in Scotland, *A Fair Cop?*, supra.

¹⁸⁸ One rather exceptional example in the Russian Federation, is the Office of the Chief Procurator in Tatarstan that has shown a willingness to collaborate with local NGOs, i.e. the Kazan Human Rights Centre, albeit only to a limited extent in respect of torture investigations. See also the outreach programme by the Prosecutor and Registrar of the Sierra Leone Special Court, which has been described as exemplary in a study by Professor Diane Orentlicher, *Independent Study on Best Practices, including recommendations, to assist in strengthening their domestic capacity to combat all aspects of impunity*, UN Doc. E/CN.4/2004/88, 27 February 2004, para.40.

¹⁸⁹ Orentlicher, *Impunity*, supra, para.41: “A number of other States, including Argentina, Bosnia and Herzegovina, Canada, Chile, Ethiopia, Guatemala, Indonesia, Mexico, the Netherlands, Serbia and Montenegro, Timor-Leste and the United Kingdom of Great Britain and Northern Ireland, have established specialized prosecutors’ offices, police investigation units, judges and/or courts that focus on serious violations of human rights.”

¹⁹⁰ *Ibid.*

¹⁹¹ See on this point the report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc. E/CN.4/2004/60, 31 December 2003, para.30.

¹⁹² See by way of example, Albania as highlighted in the 2001 CPT Report, *Rapport au Gouvernement de l’Albanie relative à la visite effectuée en Albanie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 22 au 26 octobre 2001*, CPT/Inf (2003) II, para. 20 and Brazil, Report by the Special Rapporteur on his country visit, UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001, para.136.

¹⁹³ In many countries, *habeas corpus* proceedings are unavailable or curtailed under emergency legislation, see on Sri Lanka, UN Doc. CCPR/CO/79/LKA, 1 December 2003, para.13. See general considerations in Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987.

of the judiciary that still prevails in many countries.¹⁹⁴ Military courts are in many States competent to try torture and other serious human rights violations,¹⁹⁵ and are widely seen as having failed to combat impunity.¹⁹⁶ Judges often see themselves as part of the State apparatus, and the judiciary is perceived by others as showing a deferential attitude to the police and other law-enforcement agencies, as has been reported in Uzbekistan.¹⁹⁷ In several countries, including Guatemala, judges who are seen as taking a strong stance against alleged perpetrators of torture have been subjected to threats, intimidation and harassment.¹⁹⁸ A further problem is the “frequency and extent of the phenomenon of corruption within the judiciary throughout the world”¹⁹⁹ that allows alleged perpetrator(s) to escape justice. Judges have also been criticised for their lack of awareness about torture, which has been attributed to a lack of adequate training, amongst other reasons.²⁰⁰

Equally, the lack of effective legislation, clear procedures and political will to act upon judicial orders has impeded the effectiveness of the judiciary in ensuring investigations into torture. Some countries, such as Uzbekistan, recognise no right to *habeas corpus*.²⁰¹ In many countries, judges do not have the power to open a criminal investigation even if they hear credible allegations of torture during *habeas corpus* proceedings or criminal trials. The allegation is reviewed only with a view to determining the admissibility of evidence allegedly extracted under torture, without notifying the competent authorities of the allegations.²⁰² This is compounded in countries like Brazil, where the defendant carries the burden of proof to demonstrate that a confession or statement was extracted by means of torture.²⁰³ Even where judges have notified the authorities of torture allegations, the competent authorities have not taken any further action in several reported instances, in, for example, Lebanon, Egypt and Zimbabwe.²⁰⁴ Finally, in many instances, the orders to institute investigations arising out of fundamental rights applications to Supreme or High Courts, e.g. in India and Sri Lanka, have in many cases not been implemented.²⁰⁵

¹⁹⁴ See e.g. Reports of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc.E/CN.4/2004/60, 31 December 2003, p.11, where he noted an overall lack of independence of the judiciary and/or obstacles to the free exercise of the legal profession in 44 states in the period between 1994 and 2003, and UN Doc. Addendum, Situations in specific countries or territories, E/CN.4/2004/60/Add.1, 4 March 2004 as well as reports by the International Commission of Jurists at www.icj.org. See for a country specific example AI, Torture in China, supra, pp.49 et seq. and Human Rights in China, *Impunity for Torturers Continues Despite Changes in the Law, Report on the Implementation of the Convention against Torture in the People's Republic of China*, April 2000, Article 4.

¹⁹⁵ Military judges have in some countries jurisdiction over both civilians accused of certain categories of crimes as well as the police where subject to military laws. See International Commission of Jurists, *Military jurisdiction and international law, Military courts and gross human rights violations*, 2004.

¹⁹⁶ See Orentlicher, Impunity, supra, para. 42.

¹⁹⁷ See Mission to Uzbekistan, Report of the Special Rapporteur, supra, para.57.

¹⁹⁸ See in this regard the summary of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2000/60/Add.1, supra, para.49: “... the work of the Commission over a period of 10 years shows how frequently judges and lawyers are exposed to risks that may range from harassment, intimidation or threats to assault, including physical violence and murder, to arbitrary arrest and detention, to restrictions on their freedom of movement, or to economic or other sanctions for measures they have taken in accordance with recognized professional obligations and standards of ethics” and for a country specific example, namely Guatemala, UN Doc. A/56/44, paras.67-76, 6 December 2000, para.72 (a), supra.

¹⁹⁹ See report of the Special Rapporteur, UN Doc. E/CN.4/2004/60, supra, para.39.

²⁰⁰ See on the lack of training in Uzbekistan the concluding observations of the Committee against Torture, UN Doc. CAT/C/CR/28/7, 6 June 2002, para. 5 (d) and the Russian Federation, UN Doc. CAT/C/CR/28/4, 6 June 2002, para.6 (f).

²⁰¹ See Mission to Uzbekistan, Report of the Special Rapporteur, supra, para.11.

²⁰² See on proceedings to determine the validity of a confession allegedly extracted under torture the report of Zambia to the Committee against Torture, UN Doc. CAT/C.47/Add.2, paras.123-125 and the Sri Lanka country study in REDRESS, *Reparation for Torture*, supra.

²⁰³ See e.g. country study on Brazil in REDRESS, *Reparation for Torture*, supra.

²⁰⁴ REDRESS, *Ibid*. See also Report on the Visit by the Special Rapporteur against Torture to Pakistan, UN Doc. E/CN.4/1997/7/Add.2, 15 October 1996, para.87.

²⁰⁵ See REDRESS, *Ibid*. See also the similar jurisprudence of the Supreme Court of the Philippines, *People of the Philippines vs. Manliguez*, 206 SCRA 812 (1992).

Strengthening the role of the judiciary is a key element in establishing and/or maintaining the rule of law. Several countries, in particular those undergoing political transition, such as in Germany (in relation to the former GDR), Georgia and Bosnia and Herzegovina, have taken measures to strengthen the independence and integrity of the judiciary, albeit with varying degrees of success.²⁰⁶ Steps have also been taken to restrict the competence of military courts so that they can no longer try serious human rights violations.²⁰⁷

There is little practice of courts taking the initiative to open an investigation into allegations of torture, or to forward cases to the competent authorities.²⁰⁸ However, there are notable exceptions: the High Courts of several countries, including Argentina, Chile and several South Asian countries, have issued a wide range of judgments calling for the introduction of safeguards against torture and accountability for the alleged perpetrator(s), including the removal of immunities and amnesties, and the provision of other forms of reparation.²⁰⁹ There has been little progress in ensuring that such court orders are adequately implemented, as experiences in Bangladesh, India and Sri Lanka have shown, limiting the impact of the judiciary's remarkable efforts in these countries to ensure accountability of police officers.

Procedure

i. Accessibility of complaints procedures

Philip Stenning, in his evaluation of police complaints legislation,²¹⁰ suggests the following criteria for evaluating access:

- (a) How easy is it for a potential complainant to lodge and pursue a complaint;
- (b) What range of complaints can be dealt with through the process
- (c) Who may lodge and pursue a complaint;
- (d) What resources will be available to complainants; and
- (e) What are the protections against abuse of the process

²⁰⁶ See, for example, International Crisis Group, *Courting Disaster, The Misrule of Law in Bosnia & Herzegovina*, 25 March 2002, pp.41 et seq.

²⁰⁷ Orentlicher, Impunity, supra, para.42: "While specialized civilian courts may strengthen domestic efforts to combat impunity, human rights treaty bodies and a wide range of special mechanisms of the Commission on Human Rights have concluded that military courts should not be competent to try serious human rights violations [footnote and brackets omitted]. Several countries have made progress in complying with this norm. In Germany, Greece, Guatemala, Haiti, Honduras, Italy, Mexico, Nicaragua, Paraguay and Venezuela, the jurisdiction of military courts has been strictly limited by the country's constitution or fundamental law. In Bolivia, Colombia, Guatemala, Haiti, Nicaragua and Venezuela, either pursuant to the constitution, fundamental law or regular legislation, only civil courts can try military personnel for alleged human rights violations."

²⁰⁸ See Visit to Azerbaijan, Report by Special Rapporteur, supra, paras. 98, 99. While the Ministry of Justice has apparently asked magistrates to play a more proactive role in the evaluation of evidence and investigation of torture cases, the Chairperson of the Supreme Court stated her opinion that "most torture allegations in court were made by defendants to escape responsibility for confessions they had previously made freely", a view not uncommon in many countries.

²⁰⁹ See e.g. on safeguards against torture, the Indian case of *D.K. Basu v State of West Bengal* (1997) 1 SCC 416 and *Bangladesh Legal Aid and Services Trust (BLAST) and others vs Bangladesh and others*, High Court Division (Special Original Jurisdiction), The Supreme Court of Bangladesh, Writ Petition No 3806 of 1998, April 7, 2003, 55 DLR (2003) 383; on the illegality of amnesties for serious human rights violations, in particular disappearances in Chile, *En cuanto a los recursos de casación en la forma interpuestos por los procesados Fernando Laureani Maturana, a fs. 1604; y Miguel Krassnoff Marchenko, a fs. 1611, Rol N° 11.821-2003, la Quinta Sala de la Iltma. Corte de Apelaciones de Santiago* and in Argentina *Simón, Julio y otros s/sustracción de un menor- Causa No 8686/00, Juzgado Nacional en lo Criminal y Correccional Federal No 4, Secretaria No7 and Causa No 17.889 "Incidente de apelación de Simón, Julio", Jdo. Fed. No 4, No 7, Reg. No 19.192*; on the invalidity of immunity in relation to a "crack-down" on crime Order of High Court Division of the Supreme Court issued on 13 April 2003 concerning lawfulness of Joint Drive Indemnity Act 2003; on taking steps to hold alleged perpetrators of torture accountable *V v Mr. Wijesekara and Others*, Supreme Court, Sri Lanka, 24 August 2002, SC App. No. 186/2001.

²¹⁰ Philip C. Stenning, *Evaluating Police Complaints Legislation: A Suggested Framework*, in Goldsmith/Lewis, *Civilian Oversight*, supra, pp.147-163, at pp.150 et seq.

Few of the complaint processes under review afforded adequate access. The low number of complaints reported from some countries, such as Vietnam and the Democratic Republic of Korea, highlights the inherent obstacles in lodging complaints and the lack of confidence in the system.²¹¹ Often procedures are overly complex or otherwise not victim-friendly. Victims will not necessarily use such procedures because of a general lack of awareness about the process, as has been reported in Cameroon, Kenya, India and many other countries.²¹² Even where torture survivors know about the existence of complaints procedures, they often do not know how and with whom to lodge complaints nor what to expect from the process.²¹³ This is a particular problem in a country such as the Philippines, where the complaints procedure itself lacks clarity, because of the proliferation of public bodies competent to deal with torture-related complaints.²¹⁴ Without widely available information about complaints procedures or access to affordable legal advice, as in China and Uzbekistan for instance, victims are known to have refrained from bringing complaints.

The standing to lodge complaints is a crucial element in any complaint procedure. In many countries, e.g. Lebanon and Sudan, it is commonly only victims of a crime and their legal representatives, or, if the victim dies as a result of torture, his or her relatives, who have the right to lodge complaints against the alleged perpetrator(s). Victims are often exposed to great pressure by the perpetrator(s) or others not to bring, or to withdraw, a complaint. In some countries including Nepal and Russia, victims have been bribed to drop complaints. These practices occur most frequently in countries where officials are not obliged to report torture and the responsible authorities are under no duty to open an investigation *ex officio*.

A further factor limiting the function of complaints mechanisms is the physical inaccessibility of public bodies competent to receive complaints in those cases where complaints have to be lodged in person. Such bodies are sometimes located at a considerable distance from major centres and/or transportation links, in particular in rural areas.²¹⁵ Even if the receiving body is within easy reach, the very location may act as a deterrent. This is especially the case where complaints have to be lodged at the same place where the torture occurred as is the case in Zimbabwe and elsewhere.²¹⁶ Complainants are known to have refrained from lodging complaints where there were concerns about their safety at the relevant location, for example in Hong Kong.²¹⁷

Certainly, many victims have refrained from filing complaints as a result of the shame associated with what they endured, or the stigma attached to bringing complaints, in particular in cases of torture with a sexual element.²¹⁸

²¹¹ See concluding observations of the Human Rights Committee on State party reports of Viet Nam, UN Doc. CCPR/CO/75/VNM, 26 July 2002, para.11 and of the Democratic Republic of Korea, UN Doc. CCPR/CO/72/DRK, 27 August 2001, para.13. See also comparative data on "likelihood of complaints over police abuse" in Bulgaria, Poland and Romania, in Uldriks, *Dealing with complaints*, supra, pp. 291-2.

²¹² See e.g. country reports on Cameroon, Chile, Kenya, Peru, Nepal, India and Sudan in REDRESS, *Reparation for Torture*, supra, and Report on the visit by the Special Rapporteur on Torture to Cameroon, UN Doc. E/CN.4.2000/9/Add.2, 11 November 1999, paras.56 and 60 and Kenya, UN Doc.E/CN.4/2000/9/Add.4, 9 March 2000, para. 67.

²¹³ Ibid. See also, the instructive findings of a review of complaints procedures in Scotland, *A Fair Cop?*, supra.

²¹⁴ Free Legal Assistance Group and Foundation for Integrative and Development Studies, *Torture Philippines: Law and Practice*, 2003, p.104. A similar problem has been reported in Chechnya, where the overlapping competence of several authorities has reportedly resulted in delays in the registration of cases, see the concluding observations of the Committee against Torture on the State party report of the Russian Federation, UN Doc. CAT/C/CR/28/4, 6 June 2002, para.7 (d).

²¹⁵ This has been reported to be a problem in parts of Kenya.

²¹⁶ This is also the case in Botswana, see *AI, Policing*, supra, p.52; Kenya, report of the Special Rapporteur on Torture following his country visit, UN Doc. E/CN.4/2000/9/Add.4, 9 March 2000, para.68.

²¹⁷ See e.g. the assessment of CAPO in Hong Kong, Hong Kong Human Rights Monitor, supra, para.48.

²¹⁸ This is widespread, in particular in South Asia but also in countries such as Turkey. See by way of example *AI Amin & Others v State*, High Court of Bangladesh, Judgment of 10 December 1998, 51 DLR (1999) 154, 19 BLD (HCD) (1999) 307, (1998) 2

More generally, the lack of openness and approachability of the complaints body, whether real or perceived, has discouraged victims from coming forward. Officials may treat potential complaints in a rude and dismissive manner or be overly bureaucratic in dealing with them. In Germany, Switzerland, Russia and Turkey, there have been reports of police officers lodging counter-complaints against victims of ill-treatment and torture, alleging assault or resisting arrest.²¹⁹

The requirement to produce accompanying evidence constitutes yet a further obstacle in some countries. In the Philippines, complaints must be sworn written statements or accompanied by affidavits and other supporting documents to establish probable cause.²²⁰

In many countries, especially where there is no specific offence of torture, general statutes of limitation apply. These are commonly based on non torture-specific considerations of balancing the interest of society in prosecuting crimes with the need to account for the passage of time as a factor militating against prosecutions. Statutes of limitation do not take into account the fact that it often takes victims years before they are able to speak about what they endured.²²¹ In several countries, such as Slovenia and Turkey, actions against the police are subject to particularly short time limits.²²² Many torture survivors are not aware of existing time limits for bringing complaints, and, even where they are, often refrain from lodging complaints shortly after the torture occurred because of the traumatic experience of the event.²²³ Even seemingly lengthy statutes of limitation might be inadequate where no effective complaints procedures are in place over a long period, such as in long-term dictatorships, war zones and “failed states”, as for example in Iraq under the Ba’ath party regime and Afghanistan throughout most of the last two decades.

The Office of the Public Prosecutor in Peru recently closed a case against alleged perpetrators on the grounds of an expired statute of limitations, in defiance of a decision of the Inter-American Court of Human Rights. Such a decision again dramatically highlights the problems inherent in such procedural bars.²²⁴ Finally, even where a complaint has been lodged in time, the length of proceedings may result in the discontinuance of trials and consequent impunity on the grounds of statutes of limitations, as has been reported in Spain.²²⁵

CHRLD 453, para.32 and in Turkey, the Project Legal Aid for Women Raped or Sexually Assaulted by State Security Forces, *Sexual Violence: perpetrated by the state, A Documentation of Victim Stories*, 2000.

²¹⁹ See on the practice in Germany Amnesty International, *Germany: Back in the Spotlight, Allegations of police ill-treatment and excessive use of force in Germany*, AI Index: EUR 23/001/2004, 14 January 2004, p.4 and Conclusions and recommendations of the Committee against Torture on Germany’s third State party report, UN Doc. CAT/C/CR/32/7, 18 May 2004, para.4 (b): “The Committee expresses its concerns at some allegations that criminal charges have been laid, for punitive or dissuasive purposes, by law enforcement authorities against persons who have laid charges of ill-treatment against law enforcement authorities.”

²²⁰ See Rules 110 and 112 of the Revised Rules of Criminal Procedure, 2000.

²²¹ The statutes of limitation for torture vary considerably, in most countries from 3 to 20 years depending on gravity of the crime.

²²² See e.g. concerns expressed by the Committee against Torture with regard to the period of limitation in Slovenia, UN Doc. CAT/C/CR/30/4, 27 May 2003, para.5 (b) and recommendation to repeal existing statutes of limitation for torture in Turkey, UN Doc. CAT/C/CR/30/5, 27 May 2003, para.7 (c).

²²³ See Metin Başoğlu, *Torture and its Consequences, Current Treatment Approaches*, Cambridge University Press, 1992.

²²⁴ See Walter Chiara and Lisa J. Laplante, *Prosecutors in Peru Testing the Limits of Impunity*, in REDRESS, *Reparation Report*, Vol. 3, April 2004.

²²⁵ See e.g. concerns raised by the Special Rapporteur on Torture following his visits to Spain, UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004, para.45 and Brazil, UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001, para. 138.

Steps taken by countries to facilitate access to complaints procedures have been piecemeal. Some competent authorities have developed outreach programmes, including the publication of notices at police stations and community centres, and/or the provision of information to persons coming into contact with the police with information about their rights.²²⁶ Several projects aimed at raising awareness about existing rights and how to use them have been initiated, in particular “Your rights” awareness campaigns, e.g. in India, taking place against the broader objective of providing access to justice.²²⁷

While some countries have introduced a decentralised system to facilitate physical accessibility, one of the main techniques is to allow complaints to be lodged in various ways, including informally, such as by letter, fax, e-mail or phone, for example at the command centre for receiving complaints of the New York Police Department.²²⁸ Where complaints have to be lodged in person, in most countries this can be done in places other than the police station or detention facility where the torture occurred (unless the complainant is still in detention).

The legal systems of several countries, such as Nigeria, Republic of Korea and Ireland to name but a few, allow not only the victim but others, either the victims’ representative, family members, NGOs or anyone, to lodge a complaint against the police²²⁹ and/or to bring private prosecutions or otherwise to participate in criminal proceedings. Equally, many criminal procedure codes or other applicable laws, for example in Argentina, require that serious offences be investigated *ex officio* even though such provisions have in most instances been adopted out of general, non torture-specific considerations.²³⁰

Several states, such as Egypt, have done away with statutes of limitation for the crime of torture²³¹ while others, such as Argentina, Poland, Germany, Australia and South Africa, have done so for genocide, crimes against humanity and war crimes, but not for torture as such.²³²

²²⁶ See e.g. the policy of the South African Police Services.

²²⁷ See in particular initiatives undertaken by the United Nations Development Programme <http://www.undp.org/governance/cd/html/access.html> and for a country specific example the All India Seminar on Access to Justice, 26-27 April 2003, at <http://www.undp.org.in/events/AISAJ/default.htm>.

²²⁸ This has become common practice in many countries. Mauritius informed the Committee against Torture in its State party report that it operates a 24 hour voice message system in the police information and operation room that allows members of the public to lodge complaints. See UN Doc. CAT/C/43/Add.1, 23 June 1998, para.47.

²²⁹ See e.g. in Israel, Kenya, Morocco, Nigeria, *ibid* and Republic of Korea, UN Doc. CAT/C/32/Add.1, 30 May 1996, para.188. In some countries, such right is limited to those affected by crimes as well as witnesses, such as in Iran and Ireland. See for the latter Section 4 (1) (a) of the Garda Síochána (Complaints) Act, 1986.

²³⁰ See e.g. Bolivia, UN Doc. CAT/C/52/Add.1, 21 September 2000, para.23 and Belgium, UN Doc. CAT/C/52/Add.2, 8 July 2002, paras.326 et seq.

²³¹ See e.g. Articles 57 of the Egyptian Constitution and Article 15 of the Egyptian Criminal Procedure Code of 1950, as amended, as well as Article 99 of the Penal Code of El Salvador of 1998 (see on the latter the State party report of El Salvador, UN Doc. CAT/C/137/Add.4, 12 October 1999, para.140 and concluding observations of the Committee against Torture, UN Doc. A/55/44, paras.152-174, 12 May 2000, para.158 (a).) See furthermore Article 5 of the 1992 Constitution of Paraguay, Article 28 of the 1994 Ethiopian Constitution and Article 23 (2) of the Ecuadorian Constitution of 1998.

²³² See on this point, legislation implementing the statute of the International Criminal Court, such as in Argentina, Australia, Germany and South Africa, available at www.iccnw.org. See also, Article 43 of the Polish Constitution of 1997 and the recent decision of an Argentine Court according to which crimes against humanity are not subject to any statutes of limitation. See “Resolución en contra de la apelación de Santiago Omar Riveros, admitiendo la imprescriptibilidad de los delitos en contra de la humanidad”, Buenos Aires 7 Agosto 2003, at <http://www.derechos.org/nizkor/arg/doc/riveros1.html>.

ii. Protection of victims and witnesses

As noted in the previous section, reports and anecdotal evidence from a range of countries indicate that many victims refrain from lodging or pursuing complaints because of physical violence, threats, and other forms of intimidation.²³³ Lodging and pursuing complaints bears the risk of harm not only for victims but also for families, witnesses and human rights defenders. There is a glaring absence of effective protection programmes for victims and witnesses, as has been highlighted in regard to Venezuela, Guatemala and Indonesia.²³⁴ Existing legislation and/or jurisprudence that makes it a criminal offence to threaten such individuals and offers victims recourse to authorities or courts for protection, such as in the Russian Federation and in India, have largely proved ineffective unless complemented by practical victim and witness protection schemes. This is compounded by the failure to automatically suspend police officers when criminal proceedings have been opened against them following credible allegations of torture, as has been reported in Turkey.²³⁵

Several countries, such as Japan, the Philippines, South Africa and Switzerland, have passed legislation making harassment of victims and witnesses a criminal offence, and in some cases providing for the establishment of victims and witness protection programmes.²³⁶ Certain courts, such as the Supreme Court in Bangladesh, have also recognised the duty of the State to provide protection for the victims of crime.²³⁷ Often, victim and witness protection legislation and services, where they do exist, are general programmes for the benefit of all victims of crime or are directed at victims of specific crimes such as rape,²³⁸ and therefore may not always tackle the special problems involved in the protection of those who allege offences against public officials. Even where specific programmes have been set up, as is recently the case in Brazil, concerns about effective witness protection remain.²³⁹

²³³ This has been reported from countries as diverse as Azerbaijan, Cameroon, China, Guatemala, India, Israel, Iran, Indonesia, Kenya, Lebanon, Mexico, Morocco, Nepal, Nigeria, Peru, Philippines, Romania, Russia, Serbia and Montenegro, Slovakia, Sri Lanka, Sudan, Turkey, Uzbekistan, and Venezuela. See for example, the reports of the Special Rapporteur on his visits to Cameroon, supra, para.69; Azerbaijan, supra, para.94; Concluding observations of the Committee against Torture on Slovakia, UN Doc. A/56/44/paras.99-105, 11 May 2001, para.104 (f); Concluding observations of the Human Rights Committee on Sri Lanka, UN Doc. CCPR/CO/79/LKA, 1 December 2003, para.9 and Hong Kong, Human Rights Monitor, supra, para.48 and paras.77 et seq.

²³⁴ See e.g. concerns raised by the Committee about Torture about information regarding threats and harassment of complainants who allege ill-treatment against police officers and the lack of adequate protection for witnesses and victims in Venezuela, UN Doc. CAT/C/CR/29/2, 23 December 2002, para.10 (e). See also concluding observations of the Committee against Torture on Indonesia, UN Doc. CAT/C/XXVII/Concl.3, 22 November 2001, para.9 (d) and Guatemala, UN Doc. A/56/44, paras.67-76, 6 December 2000, para.72 (f).

²³⁵ See, e.g., the concerns raised by the Special Rapporteur on Torture following his country visit to Turkey, UN Doc. E/CN.4/1999/61/Add.1, 27 January 1999, para.110. Of note, the Police Service in Northern Ireland has recently adopted measures to suspend police officers where there is *prima facie* evidence that they have been implicated in the commission of criminal offences.

²³⁶ See e.g. in 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; South Africa, Witness Protection Act, 1998 and Switzerland, Federal Assistance to Victims of Offences Act, 1991. See also the State party reports to the Committee on Torture of the Republic of Moldova, UN Doc. CAT/C/32/Add.4, 30 August 2002, para. 279, the Czech Republic, UN Doc. CAT/C/60/Add.1, 4 October 2002, 106 and comments by the Committee against Torture on the establishment of the Witness and Victim Protection Service of the Police Department in Lithuania, UN Doc. CAT/C/CR/31/5, 5 February 2003, para. 4 (j). Legislation that provides for the establishment of a witness protection programme was passed in Guatemala in 1996, "*Ley para la Proteccion de testigos y otros sujetos procesales*" of 1996, though it has yet to be implemented.

²³⁷ See *Tayazuddin and another vs. The State*, 21 BLD (HCD) (2001) 503.

²³⁸ Such programmes and special sex crimes/domestic violence investigation units have been set up in Ghana, Namibia, South Africa, Jordan, Japan, Philippines, Singapore, Sri Lanka, Argentina, Chile, Dominican Republic, Ecuador, Honduras, Nicaragua, Peru, Uruguay, Canada, US and several European States. See International, regional and national developments in the area of violence against women, Report by the Special Rapporteur on Violence against Women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/2003/75/Add.1, 27 February 2003.

²³⁹ See Brazil's report to the Committee against Torture, UN Doc. CAT/C/9/Add.16, 18 August 2000, paras.147 et seq.

iii. Prompt and effective investigations

The initial recording of a complaint is crucial to later stages of any complaint procedure. It ensures that there is an accessible and reliable record of the complaint, on the basis of which the appropriate next steps can be taken. The record itself also constitutes proof that the complainant has notified the authorities, forestalling later assertions that the authorities were unaware of the allegations.

A variety of shortcomings have been identified in relation to the recording of complaints. While several countries have adopted clear rules for the recording of complaints,²⁴⁰ in others there are no rules or forms to guide officials recording complaints. In some countries, such as the Philippines, complaints that are considered incomplete (for example, if the alleged perpetrator(s) cannot be identified or if there is no evidence to support the allegation) may not be acted upon. In Pakistan, Bangladesh and Uzbekistan, officials have the discretion not to open an investigation into complaints if they are considered to be without merit.²⁴¹ The lack of clarity and the leeway given to authorities to determine what constitutes sufficient evidence to act on an allegation constitutes a major hurdle at this initial stage.

Even where explicit rules exist for the recording of complaints, police officers and other authorities have reportedly often refused to record complaints.²⁴² Instances have been recounted from countries such as Turkey, China and Uzbekistan, where police officers or other competent officials appear to record complaints only to later deny that any complaint was ever lodged. This has been attributed to inadequate rules, insufficient supervision and in some cases a deliberate policy on the part of police officers and their superiors not to act on complaints against the police.

In Ireland, complainants must be given a copy of their complaint, including the date and name of the recording officer,²⁴³ though this is far from standard practice in many other countries. In Russia, complainants are not given a copy of the complaint, and are often not informed about what steps, if any, have been taken in follow-up.²⁴⁴ While in some countries, complainants have the rights to challenge a decision not to record a

²⁴⁰ For example South Africa and the Republic of Korea according to its report to the Committee against Torture, UN Doc. CAT/C/32/Add.1, 30 May 1996, para.189; Georgia, Presidential Decree No.42 of 18 February 2002, described in detail in Comments by the Government of Georgia on the concluding observations of the Human Rights Committee [UN Doc. CCPR/CO/74/GEO, 28 March 2003], UN Doc. CCPR/CO/74/GEO/Add.1, 14 May 2003, paras.28 et seq, however it is not clear to what extent and how effectively this decree has been implemented. In Poland, all complaints are recorded by the complaints units (Zespół Skarg) within the the police headquarters. Complainants can use a toll-free number to complain of police misconduct. Each complaint has to be recorded on a daily basis by the complaints unit pursuant to the Code of Administrative Procedure of 1960, as amended, and the Ordinance of the Council of Ministers of 8 January 2002 on the organisation of recording and dealing with complaints and other motions. While the inspectorate deals with disciplinary matters, all complaints concerning criminal conduct are to be forwarded to the Public Prosecutor. The National Police Headquarters published statistical data on the number of offences, criminal proceedings and convictions as well as sanctions taken against police personnel, without however providing a detailed breakdown as to the nature of offences. See <http://www.kgp.gov.pl> (in polish). See on the complaint system in Poland the summary record on Poland's third report to the Committee against Torture, UN Doc. CAT/C/SR.415, 10 May 2000, the recommendations by the Committee against Torture in UN Doc. A/55/44, paras.82-95, 5 May 2000, para.94 and the assessment of the complaints system by Uildriks, Dealing with complaints, supra, pp.284 et seq.

²⁴¹ See e.g. Section 157 (1) (b) of both the Criminal Procedure Code of Pakistan and Bangladesh of 1898, "b) if it appears to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case." See also on Uzbekistan the report by the Special Rapporteur on Torture, UN Doc.E/CN.4/2003/68/Add.2, 3 February 2003, para.29.

²⁴² See Amnesty International, *India, The battle against fear and discrimination, The impact of violence against women in Uttar Pradesh and Rajasthan*, 8 May 2001, AI Index: ASA 20/016/2001, p.25.

²⁴³ See e.g. section 4 (2) of the Garda Síochána (Complaints) Act, 1986 in Ireland.

²⁴⁴ This is reportedly commonplace in China, Indonesia, Iran, Israel, Kenya, Morocco, Nepal, Romania, Russia and Sudan. In contrast, complainants are accorded the right to be kept informed about their complaint in Kyrgyzstan, UN Doc. CAT/C/42/Add.1, 25 August 1999, para.87 and Senegal, UN Doc. CAT/C/17/Add.14; 11 July 1995, para.77. In the Republic of Korea, a complainant is to be informed about the reasons why the public prosecution has decided not to investigate/prosecute further, see UN Doc. CAT/C/32/Add.1, 30 May 1996, para.189.

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complaint or to compel an authority to forward it to the investigating authorities,²⁴⁵ this is not a uniform practice.²⁴⁶ This is of particular concern in countries such as Russia, where investigations into torture cases usually fail to get past the preliminary inquiry stage.

Where investigations are carried out, authorities often act only after substantial delay,²⁴⁷ impeding access to timely medical examinations.²⁴⁸ Often they take measures that are clearly inadequate or are even aimed at frustrating a proper investigation. In Turkey, for example, the competent agencies often appear to confine themselves to questioning police officers from the unit allegedly responsible without taking any witness statements or requesting timely medical examinations.²⁴⁹ While recent improvements in access to medical examinations have been noted in respect of Argentina, Brazil, Poland and Sri Lanka, the practice in Kazakhstan and several other countries is for officials to intimidate victims and witnesses and actively suppress or destroy evidence, including medical, reports that might have led to a prosecution of the alleged perpetrator(s).²⁵⁰

The law commissions of India²⁵¹ and Bangladesh²⁵² have recommended that the evidentiary burden in police torture cases be shifted, though these amendments have not yet been implemented.

²⁴⁵ Complainants have the right to challenge the non-recording of a complaint according to new procedures in England and Wales. See, in this respect, UK Home Office, New Police Complaints System, Thematic Paper No.10, *Recording of Complaints and Conduct Matters*, August 2003. Inaction can also be challenged, for example in Bulgaria (Uildriks, Dealing with complaints, supra, and in several countries, complainants may appeal against the decision not to institute proceedings, e.g. the Russian Federation, Georgia, CAT/C/48/Add.1, 2 June 2000 para.104; Kyrgyzstan, UN Doc. CAT/C/42/Add.1, 25 August 1999, para.88 and Republic of Korea, UN Doc. CAT/C/32/Add.1, 30 May 1996, para.194.

²⁴⁶ In India, victims have no such rights under the Code of Criminal Procedure, 1973. However, they may file a petition for an order of mandamus to compel a judicial inquiry into cases of custodial deaths. See *Peoples' Union of Civil Liberties v Union of India & Anor* (1997) 3 SCC 433.

²⁴⁷ See e.g. concerns raised by the Committee against Torture about the practice in Spain, UN Doc. CAT/C/CR/29/3, 23 December 2002, para.11 (a) and Egypt, UN Doc. CAT/C/CR/29/4, 23 December 2002, para.5 (g). See on Turkey, Report to the Turkish Government on the visits to Turkey carried out by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 27 March and 1 to 6 September 2002, CPT/Inf (2003), 28, paras.22 and 39 et seq. and the jurisprudence of the European Court of Human Rights, e.g. in the cases of *Tekin v. Turkey*, supra, para.67; *Timurtas v. Turkey*, supra, para.89; *Çiçek v. Turkey* (2003) 37 E.H.R.R. 20 ECHR, para.149 and, in relation to Italy, *Indelicato v. Italy*, supra.

²⁴⁸ See the report to the Government of Cyprus on the visit to Cyprus carried out by the CPT Committee from 22-30 May 2000, CPT/Inf (2003) 1, para. 22, in which there were numerous complaints about police officers that had refused requests by detainees to see prison doctors in order to have injuries apparently resulting from ill-treatment examined. Similar or related problems with timely access to independent medical examinations were highlighted in the CPT reports following visits to Georgia from 6-18 May 2001, CPT/Inf (2002) 14, para.44; to Ireland from 20-28 May 2002, CPT/Inf (2003) 36, paras.23 and 54 and Lithuania from 14-23 February 2000, CPT/Inf (2001) 22, para.46.

²⁴⁹ See e.g. *Aktas v. Turkey*, supra, para. 353.

²⁵⁰ See for example the concluding observations of the Committee against Torture on Kazakhstan's State party report, UN Doc. A/56/44, paras.121-129, 17 May 2001, para.128 (d): "The Committee appreciates, but expresses concern, over the Government's acknowledgement of superficial investigations, destruction of evidence, intimidation of victims, and forced repudiation of testimony by investigators and personnel of the Ministry of Internal Affairs." See also, on the alleged practice of falsifying medical reports to cover up police ill-treatment in Romania, Uildriks, Dealing with complaints, supra, pp.276-7. See also, in relation to Brazil, report of the Special Rapporteur on Torture, UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001, para.147 and Turkey, CPT report on its visit to Turkey in 2002, CPT/Inf (2003), 28, paras.39 et seq.

²⁵¹ See Law Commission of India, 185th Report on Review of the Indian Evidence Act 1872, by Judge M.J.Rao, Chairman, 2003, Annexure, The Indian Evidence (Amendment) Bill, 2003, Insertion of new Section 114B, para.65: "**Presumption as to bodily injury while in police custody**" 114B. (1) In a prosecution of a police officer for an offence committed by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the Court may presume that the injury was caused by the police officer having custody of that person during that period. (2) The Court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard to all the relevant circumstances, including, in particular, (a) the period of custody; (b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence; (c) the evidence of any medical practitioner who might have examined the victim; and (d) evidence of any magistrate who might have recorded or attempted to record the victim's statement. (3) For the purpose of this section, the expression 'police officer' includes officers of the para-military forces and other officers of the revenue, who conduct investigation in connection with economic offences."

²⁵² See Law Commission of Bangladesh, *Final Report on The Evidence Act, 1872 Relating to Burden of Proof In Cases of Torture on Persons in Police Custody*, Report No.17, 1998, which made an identical recommendation as the Indian Law Commission, *Ibid*. This recommendation was endorsed by the Bangladesh Supreme Court in *BLAST and others vs. Bangladesh and others*, 2003, supra, in relation to death in custody.

Considerations concerning particular groups of victims

i. Detainees

Detainees, both in police lock-ups and prisons, face the greatest obstacles in lodging complaints against the police. They are often in the power of the very persons they complain against, especially when in pre-trial custody, and are therefore most vulnerable to threats and other forms of retribution.²⁵³ Detainees often encounter problems in accessing existing complaints procedures and are rarely informed about their right to complain.²⁵⁴ In some cases, detainees will only have access to the police or prison officials, or their complaints will have to go through them first.²⁵⁵ In Uzbekistan, police or prison officials enjoy wide discretion in dealing with complaints and are subject to insufficient supervision.²⁵⁶ Further limitations are in place in some countries, where complaints may only be brought at certain particular times or after a specific number of days.²⁵⁷ In Russia and Turkey, there is reportedly a practice of only processing complaints once the signs of injuries have disappeared.

In those countries where detainees may be denied access to lawyers, such as in Albania, Togo and Turkey,²⁵⁸ and/or where there are no independent visiting bodies, the lodging of complaints is dependent on the co-operation of police and prison officials. This increases the likelihood of harassment.²⁵⁹ Detainees also encounter problems in using *habeas corpus* proceedings as an opportunity to complain about torture. In Turkey, detainees are often accompanied to *habeas corpus* hearings by police officers or other officials who make it clear in advance that the detainee will

²⁵³ Following his visit to Brazil, the Special Rapporteur on Torture highlighted the fact that “ a number of the detainees he interviewed indicated that because of the constant presence of law-enforcement officials in these circumstances [first court hearing] they did not dare to complain about the treatment they were subjected to for fear of reprisals as they were usually taken back to the same police lock-up where the torture allegedly occurred.” See UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001, para.136.

²⁵⁴ See United Nations Standards and Norms in the Field of Crime Prevention and Criminal Justice, Report of the Secretary General, Addendum, Use and Application of the Standard Minimum Rules for the Treatment of Prisoners, UN Doc. E/CN.15/1996/16/Add.1, 22 March 1996, paras.51 et seq., para 51: “Five sixths of responding countries reported that every prisoner on admission was provided with information about the regulations governing the treatment of prisoners of his or her category, the disciplinary requirements of the institution and the authorized methods of seeking information and making complaints (Rule 35). Five other countries reported that the Rule was usually applied. Six countries reported that while prisoners were informed of the regulations governing their treatment, they were not always told about the disciplinary requirements and the means of seeking information and making complaints. In Pakistan, Rule 35 was only applied exceptionally and in Haiti never. In the latter case it was pointed out that the prison regimes were not yet clearly established.”

²⁵⁵ See the State Party report of the Czech Republic to the Committee against Torture, UN Doc. CAT/C/38/Add.1, 22 June 2000, para.106: “Complaints sent by the prisoners to the central complaints department of the Prison Service were always passed to the internal complaints section in the respective prison to be dealt with. The officer who controlled the internal complaints department enjoyed a special position of review authority who also submitted the background documents and proposals concerning decision on the complaints to the prison director in cases of complaints involving his colleagues. ... this way of dealing with complaints can easily deter prisoners from insisting that their complaints be addressed.” The system has since been considerably changed.

²⁵⁶ See e.g. Mission to Uzbekistan, Report by the Special Rapporteur, *supra*, para.29: “It should be underlined that senior/head investigators have discretionary powers in deciding whether to forward a complaint, with a recommendation or not, to the General Procurator’s Office...”

²⁵⁷ See UN Report on Use and Application of Standard Minimum Rules for the Treatment of Prisoners, *supra*, para 52: “Five sixths of responding countries reported that prisoners had the opportunity of making requests or complaints to the director of the institution or the officer authorized to represent him, every day or on request or at least three times a week (Rule 36 (1)). In Colombia, Côte d’Ivoire, Papua New Guinea and Vanuatu such an opportunity was available usually or with exceptions; in Chile, Croatia, Morocco, Myanmar, Pakistan, Tajikistan, the former Yugoslav Republic of Macedonia and Turkey it was available at least once a week, in the Islamic Republic of Iran its availability depended on the behaviour of the prisoner and in Mexico no such opportunity was reported to be available.”

²⁵⁸ See on Albania, CPT Report, *supra*, para.23; the CPT report on its visit to Turkey in 2002, CPT/Inf (2003), 28, *supra*, paras.34 et seq., and on Togo, UN Doc. CCPR/CO/76/TGO, 26 November 2002, para.14.

²⁵⁹ See Audrey Wolffs, *Obstacles to prisoner complaints in Hong Kong, Thailand and Malaysia*, in Asian Human Rights Commission, Article 2, Vol.2, No.4, August 2003, <http://www.article2.org/mainfile.php/0204/95/>.

suffer serious disadvantages, including further torture, if he or she complains to the judge.

Access to relatives, lawyers, independent doctors and external visiting mechanisms provides safeguards against torture and makes it easier for steps to be taken by or on behalf of victims. The lack of timely outside access has been a particular concern in Egypt, where detainees can often be questioned for prolonged periods without being charged. This is also a serious issue with regard to persons held under recent “anti-terrorism” legislation enacted, for example by the United States.²⁶⁰

ii. Foreign Nationals

Foreign nationals who suffer torture regularly face added difficulty in lodging complaints as they may be less familiar with local laws and language.²⁶¹ Asylum seekers and illegal immigrants are particularly vulnerable, commonly having an uncertain legal status, and they are therefore less likely to complain about ill-treatment.²⁶² These factors are compounded for those who are tortured or ill-treated while awaiting deportation in special holding facilities or while in the process of being deported. In some countries, such as Switzerland, no special complaints procedures or independent mechanisms are in place for foreign nationals to complain about torture or ill-treatment, either in general or during the deportation process.²⁶³ There have been recent developments in response to criticism of the practices of several European countries. Some governments, including the Federal German State of North Rhine-Westphalia, have put into place specific procedures aimed at facilitating complaints and preventing torture and ill-treatment in holding facilities or during deportation, which include the facilitation of complaints.²⁶⁴

Despite the right of consular access, foreign nationals may not receive regular or private visits from consular officers and if the torture is ongoing, are often threatened into silence.

IV.3. Independent Complaints Bodies

Overview

Many countries have set up independent oversight bodies that may receive complaints and institute investigations. There is a wide range of such institutions and no uniform practice has developed with regard to terminology, mandate and scope of powers. Police complaints/oversight authorities are commonly tasked with investigating or overseeing police misconduct, whereas national human rights institutions are mandated to protect human rights and investigate human rights violations by all public

²⁶⁰ See Human Rights Watch, *Egypt's Emergency without End, Rushed Renewal of Repressive Legislation*, 25 February 2003 and Annual Reports of the Egyptian Organization for Human Rights. See on the detention of so-called enemy combatants by the US in Guantanamo Bay, Amnesty International, *United States of America, Undermining security: violations of human dignity, the rule of law and the National Security Strategy in "war on terror" detentions*, AI Index: AMR 51/061/2004, 9 April 2004.

²⁶¹ See Amnesty International, *Welcome to Japan?*, May 2002, AI INDEX: ASA 22/002/2002, p.8 and the cases against the United States of America before the International Court of Justice, *Case concerning Avena and other Mexican Nationals (Mexico v United States of America)*, Judgment of 31 March 2004.

²⁶² See for example AI, Germany, *Back in the Spotlight*, supra, p.10.

²⁶³ See concluding observations of the Human Rights Committee on Switzerland's State party report, UN Doc. CCPR/CO/73/CH, 12 November 2001, para.11 et seq. and Second periodic report on Germany by the Council of Europe's Commission on Racism and Intolerance, CRI (2001) 36, 3 July 2001, para.33.

²⁶⁴ See e.g. the establishment of the “Airport Forum” to monitor deportation procedures in North Rhine-Westphalia, AI, Germany, *Back in the Spotlight*, supra, pp.59, 60.

bodies, including the police. Ombudsman institutions are traditionally called upon to investigate administrative malpractice but may also have a mandate to investigate police misconduct, including torture.

Police Complaints Authorities/Oversight bodies

The move to establish agencies to receive and investigate complaints against the police has gathered momentum since the 1970s against the backdrop of calls for more democratic policing and enhanced police accountability.²⁶⁵ A considerable number of such bodies have been set up in Canada, USA, England and Wales, Ireland, Australia, New Zealand, Jamaica, Trinidad and Tobago, Guyana, Brazil, Lesotho, Zambia, Hong Kong, South Africa, and recently, Northern Ireland.

Five types of bodies exercising oversight of the police have been identified, namely:

- 1) Agencies responsible for receiving and investigating citizen complaints;
- 2) Agencies that review complaint investigations conducted by the police department;
- 3) Agencies hearing appeals of complaint investigations and dispositions made by the police department;
- 4) Agencies auditing or monitoring the police department's complaint process;
- 5) Non-sworn persons who are employed by the police and who have some input or control over the complaint process.²⁶⁶

The rationale for the establishment of these bodies is twofold, namely to ensure effective investigations of police misconduct, and to introduce an independent public element into complaints procedures in order to instil public confidence.

The strongest bodies are those that are competent to receive and investigate complaints against the police themselves, such as the Police Ombudsman for Northern Ireland and the Independent Complaints Directorate (ICD) in South Africa. These bodies commonly have the power to receive and investigate complaints concerning some or all forms of police misconduct, including torture, even though acts of torture might sometimes be downgraded to "oppressive behaviour" or "assaults." In some cases, these bodies may investigate complaints about torture independently, using similar or the same powers as the police, and recommend prosecution or disciplinary measures to the competent body, such as the Police Ombudsman for Northern Ireland.²⁶⁷ In other cases, bodies have some power of investigation but must rely on the

²⁶⁵ See e.g. Lord Scarman's report into the Brixton riots (1981) which led to the establishment of the Police Complaints Authority in England and Wales in 1985; the report by Liberty, *An Independent Police Complaints Commission*, 2000 and the reports by the Australian Law Reform Commission, *Complaints Against Police* (ALRC 1), 1975 and *Complaints Against Police* (Supplementary Report) (ALRC 9), 1978 resulting in the establishment of several oversight bodies in Australia. See also A.J. Goldsmith (ed.), *Complaints against the Police: The Trend to External Review*, Clarendon Press, Oxford, Oxford University Press, 1990 and on oversight of police, especially in the USA, <http://www.policeaccountability.org/citzooversight.htm>. See for a history of oversight bodies in the US, Peter Finn, *Citizen Review of Police, Approaches & Implementation*, National Institute of Justice, March 2001, p.4. <http://www.ncjrs.org/pdffiles1/nij/184430.pdf>. and on democratic policing Lone Lindholt, *The Police and Human Rights in Transitional Countries: A Legal Analysis*, in Lindholt, *Human Rights and Police*, supra, pp.11-27, pp.17 et seq.

²⁶⁶ Samuel Walker, *Police Accountability: The Role of Citizen Oversight*, Belmont, CA; Wadsworth, 2001 and www.policeaccountability.org. See similar model employed by Finn, *Citizen Review*, supra, p.6.

²⁶⁷ See separate study on the Police Ombudsman for Northern Ireland infra, at V.3.

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co-operation of the police, such as the ICD in South Africa²⁶⁸ and the Independent Police Complaints Commission in the United Kingdom.²⁶⁹

The second category of oversight bodies is confined to reviewing investigations undertaken by the police.²⁷⁰ This oversight function is often carried out by special internal investigations departments or similar structures within the police. Some of these oversight bodies, such as the Garda Síochána Complaints Board in Ireland, also have powers to direct the police to carry out investigations.²⁷¹ The jurisdiction of these bodies differs considerably, in particular with regard to the types of complaints reviewed, the scope of review, the power to impose or recommend disciplinary or other charges against individual officers, or to recommend more systemic changes.

National Human Rights Institutions/Commissions (NHRCs)

Most countries in Africa, the Middle East and other parts of Asia have preferred to establish national human rights institutions, instead of police complaints authorities. Such institutions have also been set up in a few countries in Latin America and Europe²⁷² as well as Canada.

While the *Principles relating to the status of national institutions (Paris Principles)* serve as a point of reference for the establishment of NHRCs,²⁷³ in practice NHRCs differ considerably in virtually all respects.²⁷⁴ In some cases, NHRCs may be able to investigate human rights violations on their own motion, as is the case with the Indian NHRC. Other NHRCs, such as the Indonesian Komnas Ham, have only been vested with the mandate to carry out (initial) investigations into human rights violations that amount to criminal conduct.²⁷⁵

Ombudsman Institutions

The institution of the Ombudsman was first established in Sweden as early as 1809 to ensure accountability of the public administration. There has since been a proliferation of Ombudsman institutions, referred to as the Public Defender (*Defensor del Pueblo*) in Spain and Latin America.²⁷⁶ Not all of these Ombudsman institutions have followed the original Scandinavian model, especially with regard to their practices in response to

²⁶⁸ See Chapter 10 of the South African Police Service Act, No.68 of 1995 and Bronwen Manby, *The South African Independent Complaints Directorate*, in Goldsmith/Lewis, *Civilian Oversight*, supra, pp.195-222 and Jeremy Sarkin, *An evaluation of the role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission on Gender Equality, the Auditor-General, the Public Prosecutor and the Truth and Reconciliation Commission in developing a human rights culture in South Africa*, in SA publikereg, 15 (2000) 2, pp.385-425.

²⁶⁹ www.ipcc.gov.uk.

²⁷⁰ This is the role of most police oversight bodies, such as in Jamaica, Trinidad and Tobago, Guyana, Hong Kong and the former Police Complaints Authority in England and Wales. Most oversight bodies in the US also fall into this category. See Finn, *Citizen Review*, supra, pp.18 and 19.

²⁷¹ Section 6 of the Garda Síochána (Complaints) Act, 1986.

²⁷² See Birgit Lindsnaes, Lone Lindholt and Kristine Yigen, *National Human Rights Institutions, Articles and working papers*, The Danish Centre for Human Rights, 2001, Appendix III, p.228.

²⁷³ See Principles relating to the status of national institutions ("Paris Principles") UN Doc. E/CN.4/1992/43, 16 December 1991.

²⁷⁴ See Lindsnaes, Lindholt and Yigen, *National Human Rights Institutions*, supra, pp.14 et seq. and Appendices.

²⁷⁵ Komnas Ham may receive reports or complaints from individuals or groups concerning the incidence of gross violations of human rights and conduct an inquiry. There is neither a time limit for bringing complaints nor a statute of limitations for these offences. Should Komnas Ham consider there to be sufficient preliminary evidence, a summary of the findings will be submitted to the competent investigator. In practice, the impact of Komnas Ham has been rather limited, as the Attorney-General has decided against prosecuting nearly half of the perpetrators put forward by Komnas Ham.

²⁷⁶ See for an overview and analysis of the effectiveness of ombudsman offices in Latin America, Rachel Neild, *Confronting a Culture of Impunity: The Promise and Pitfalls of Civilian Review of Police in Latin America*, in Goldsmith/Lewis, *Civilian Oversight*, supra, ppp.223-257.

human rights violations.²⁷⁷ The term Ombudsman has also been employed by bodies that are, by their nature, closer to human rights commissions or police complaints authorities. While some Ombudsman institutions have the power to receive and investigate complaints about police torture, the mandate of most is confined to dealing with complaints about public maladministration.²⁷⁸

The only exception is perhaps in Latin America where so-called Ombudsman offices have been set up to effectively fulfil the role of police oversight bodies.²⁷⁹ One pertinent example is the Office of the Procurator for the Protection of Human Rights (OPPHR) in El Salvador, which has a broad mandate of receiving complaints and investigating human rights violations.²⁸⁰ Oversight bodies with a weaker mandate vis-à-vis the police, sometimes referred to as Ombudsman offices, have also been set up in several other Latin American countries, such as Guatemala, Colombia, Honduras, Peru and Argentina.²⁸¹ Their effective impact has apparently been limited.

Commissions of Inquiry

Commissions of inquiry, often composed of senior judges, are commonly set up by Parliament or Government, in response to a perceived shortcoming in procedures, to inquire into a particular incident or pattern of human rights violations. Commissions may also have broader mandates to investigate human rights violations, including torture, committed during a particular timeframe or political era.²⁸² Most commissions with a torture-related mandate, such as the Commission of Inquiry appointed by the President of the Republic of Zambia,²⁸³ are vested with the power to receive or follow-

²⁷⁷ See for an overview Peter Vedel Kessing, *Implementation of the Western Ombudsman Model in Countries in Democratic Transition*, in Lindsnaes, Lindholt and Yigen, *National Human Rights Institutions*, supra, pp.121 et seq.

²⁷⁸ See for an overview of Ombudsman institutions worldwide, www.law.ualberta.ca/centres/oi/eng/worldwide.html. Compare the broad mandate of the Ombudsman in Australia (UN Doc. CAT/C/25/Add.11, 15 May 2000, paras. 96 et seq.) and Bolivia (UN Doc. CAT/C/52/Add.1, 21 September 2000, paras.71 et seq.) with the more traditional, narrow mandate of their counterparts in Fiji (UN Doc. HRI/CORE/1/Add.122, 25 November 2002, paras.186 et seq.) and the Philippines (www.ombudsman.gov.ph) as well as the specific mandates concerning criminal investigations and prison services of the Ombudsman in Georgia (UN Doc. CAT/C/Add.1, 2 June 2000, para.107) and the Czech Republic (UN Doc. CAT/C/60/Add.1, 4 October 2002, paras.87 et seq.).

²⁷⁹ See Gonzalo Elizondo and Irene Aguilar, *Ombudsman Institution in Latin America: Minimum Standards for its existence*, in Lindsnaes, Lindholt and Yigen, *National Human Rights Institutions*, supra, pp.209-220, noting on p.209 that "The institution of the ombudsman in Latin America has been given diverse technical names, such as *Defensor dels Pueblo* in Ecuador, Bolivia, Peru, and Colombia, among others; *Defensor de los Habitantes* in Costa Rica; *Comisionado Nacional de Derechos Humanos* in Honduras and Mexico; or *Sindic de Greuges* in some localities in Spain" and Rachel Neild, *Confronting a Culture of Impunity*, supra, p.223.

²⁸⁰ The Procurator also has authority, by his own accord, to carry out inspections to ensure respect for human rights, oversee the police disciplinary process, formulate recommendations to the police and promote reforms. In contrast to other civilian police oversight institutions in South America, the OPPHR has been equipped with some unusual powers, in particular the power to assume that allegations of police misconduct are true if the police refuse to provide sufficient information in the course of an investigation. See for an official description of this body Core Document Forming Part of the Reports of State Parties: El Salvador, UN Doc. HRI/CORE/Add.34, Rev.2, 15 July 2003, para.83 et seq.

²⁸¹ Ibid.

²⁸² Priscilla B. Hayner, *Unspeakable Truths, Facing the Challenge of Truth Commissions*, Routledge, New York, London, 2002, in particular pp.86 et seq.

²⁸³ See e.g. the ad-hoc Commission of Inquiry appointed by the President of the Republic of Zambia in 1998 to "investigate and report on the allegations of torture, abuses or violations of human rights on the persons suspected of involvement in the failed coup of 28 October 1997 by members of the security and police forces as raised in the report of the Human Rights Commission dated 30 March 1998." The commission had the following terms of reference: "(a) To identify security and police officers, if any, involved in the acts of torture; (b) In light of the findings, to recommend appropriate administrative and disciplinary measures that should be taken in order to avoid recurrence in the future of torture, abuse or violations of human rights during investigations by security and police forces and to recommend measures to improve on investigative methods by the forces; (c) To make such recommendations, including the awarding of compensation where applicable, as it may in the light of the findings deem appropriate." See Initial reports of State parties due in 1999, Zambia, UN Doc. CAT/C/47/Add.2, 26 March 2001, paras.137 and 138. Amnesty International commented on the inquiry as follows: "In 1998-1999 a judicial commission of inquiry in Zambia found that 21 police and security officers had tortured suspects in an alleged coup plot in 1997. It recommended the retirement of three police officers against whom there was serious evidence. The government, however, failed to act on the report's recommendations. Recommending retirement rather than prosecution in a case in which there was serious evidence

up on allegations already made against the police (or other bodies as specified) and to investigate those cases that fall within their remit. An example of commissions set up against the background of widespread torture, disappearances and impunity in Sri Lanka were the three Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons established on 13 November 1994, which operated on a zonal basis.²⁸⁴

The mandates of commissions of inquiry are often the outcome of political considerations, and consequently they may have only limited independence.²⁸⁵ Nonetheless, they may provide additional avenues of complaint for victims in particular circumstances, especially to examine patterns of torture, but they are not a substitute for more formal complaints procedures.²⁸⁶

Independence and Effectiveness

i. Weakness of bodies as common problem and challenge

Oversight bodies and national human rights institutions have in practice often failed to ensure independent and effective investigations. In particular, the often overly broad mandates of NHRCs tends to weaken their effectiveness when compared with the more targeted work of police complaints authorities and specific oversight bodies.

ii. Genuine independence

Many of these bodies suffer from a lack of genuine independence. This is particularly the case for those institutions that have been established by decree and those that are semi-official, but dependent on the good will of the executive. This has been highlighted in respect of bodies in Yemen, Zimbabwe, Syria and Hong Kong.²⁸⁷ Another

discredits the investigative mechanism, and the government's failure to act on such a recommendation discredits the whole process." See AI, Policing, *supra*, p.58.

²⁸⁴ The Commissions were mandated to inquire into and report on the following -Whether any persons have been involuntarily removed or have disappeared from their places of residence at any time after 1st January 1988; The evidence available to establish such alleged removals or disappearances; The present whereabouts of the persons alleged to have been so removed, or to have so disappeared; Whether there is any credible material indicative of the person or persons responsible for the alleged removals or disappearances; The legal proceedings that can be taken against the persons held to be so responsible; The measures necessary to prevent the occurrence of such alleged activities in the future; The relief, if any, that should be afforded to the parents, spouses and dependents of the persons alleged to have been so removed or to have so disappeared. The Commissions issued public notices inviting "public representations" over a period of one month, which was subsequently extended to two months. They received complaints both from "affected parties and various NGOs". The commissions received a total of around 30,000 complaints. Even though not all complaints had been dealt with, in the summer of 1997 they were ordered to halt their inquiries and to submit their final reports. The Commissions issued a list of recommendations but refrained from recommending specific prosecutions or disciplinary action. See the final report of the Commission of inquiry into the involuntary removal or disappearance of persons in the Northern and Eastern Provinces, http://www.disappearances.org/mainfile.php/frep_sl_ne/.

²⁸⁵ Regarding the use of public inquiries in Northern Ireland, see Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, in *Fordham International Law Journal*, Volume 26, April 2003, No.4, pp. 1148-1192.

²⁸⁶ See also, on commissions of inquiry, the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, para.5 (a): "In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse, or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under the Principles; (b) A written report, made within a reasonable time, shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. On completion, this report shall be made public. It shall also describe in detail specific events that were found to have occurred, the evidence upon which such findings were based, and list the names of witnesses who testified with the exception of those whose identities have been withheld for their own protection. The State shall, within a reasonable period of time, reply to the report of the investigation, and, as appropriate, indicate steps to be taken in response."

²⁸⁷ For example, the government appointed National Commission for Human Rights in Yemen that lacks independence according to the observations by the Human Rights Committee, see UN Doc. CCPR/CO/75/YEM, 26 July 2002 and the members of the largely ineffective Office of the Ombudsman in Zimbabwe, who are appointed by the President. In Syria, the

factor is the composition of these bodies, as members are often associated with the government or the ruling elite, a fact that has repeatedly cast doubt on their independence in decision-making, for example in Zimbabwe and Uganda.²⁸⁸ Finally, actual independence is undermined by the fact that certain oversight bodies receive their funding from sources that are also responsible for the police forces, or at the discretion of the government, such as the NHRC in India.²⁸⁹

Steps have also been taken in a number of countries, such as the recently established Independent Police Complaints Commission in England and Wales, to ensure that the bodies can be seen as more representative of civil society or as having genuine independence from the executive and ruling elites.²⁹⁰

iii. Powers of investigation

Not all oversight bodies or NHRCs have the power to receive and investigate torture-specific complaints against the police. Many of these bodies may only receive complaints without having the power to conduct independent investigations. Bodies exercising a review and monitoring function, such as the Police and Complaints Authority in Trinidad and Tobago, have voiced their frustration about the continuous failure of internal police investigation units to investigate complaints effectively and satisfactorily²⁹¹ or, as with the Police Complaints Authority in Guyana, to even forward complaints for review.²⁹²

Where bodies have the power to conduct investigations, such powers may be confined to certain categories of complaints, commonly cases of death and serious injuries. This may exclude certain cases of torture that do not result in serious physical injury. Another notable problem area is where the police enjoy discretion in determining whether a complaint constitutes a 'serious injury' and act as a gatekeeper of the system.²⁹³ The problem is compounded where the complainant has no right of appeal

complaints bureau attached to the Office of the President was seen as lacking independence as evidenced by the comments of the Human Rights Commission in its concluding observations on the report, UN Doc. CCPR/CO/71/SYR 24 April 2001, para. 11: "The Committee is concerned about the absence of any independent oversight body and of non-governmental organizations in a position to consider the implementation of the human rights guaranteed by the Constitution and governed by law." See also concerns raised in regard to the Independent Police Complaints Council in Hong Kong, Hong Kong Human Rights Monitor, *supra*, paras.109 et seq. In Colombia, the external police commission was abolished by Presidential Decree in September 1996. See Andrew J Goldsmith, *Police Accountability Reform in Colombia: The Civilian Oversight Experiment*, in Goldsmith/Lewis, *Civilian Oversight*, *supra*, pp.167 et seq.

²⁸⁸ Concerns have for example been raised concerning the composition of the Ugandan Inspector General of Government and National Human Rights Commission, Marcus Topp, *Uganda: Human Rights Protection by the State in Uganda* and Kofi Quashigah, *The Ghana Commission on Human Rights and Administrative Justice*, in Lindholt, *National Human Rights Institutions*, pp.178, 179. See on this point also Kristine Yigen, *Guarantees of Independence of National Human Rights Institutions: Appointment and Dismissal Procedures of Leading Members*, in Lindsnaes, Lindholt and Yigen, *National Human Rights Institutions*, *supra*, pp.59-81.

²⁸⁹ See the case studies by Finn, *Citizen Review*, *supra*, pp.17 et seq.

²⁹⁰ See on the composition of the Independent Police Complaints Commission in England and Wales www.ipcc.gov.uk. See on a positive assessment of the composition of the Nigerian National Human Rights Commission in terms of gender and ethnicity as well as its attempts to gain independence, Obiora Chinedu Okafor and Shedrack C. Agbakwa, *On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context*, in *Human Rights Quarterly*, 24/3 (2002), pp.702 and 703.

²⁹¹ Police Complaints Authority in Trinidad and Tobago, *Annual Report for year 1998-1999*, p.1 and pp.23 et seq. See for Hong Kong the analysis by the Human Rights Monitor, *supra*, para.115.

²⁹² According to figures released by the Police Complaints Authority in Guyana in 2002, the police has referred 29 complaints to it in 1991, 9 in 1992, 15 in 1993, 3 in 1994, 0 in 1995, 1 in 1996, 0 in 1997, 1 in 1998 and no complaints in the years 1999, 2000, 2001 respectively. See also the concluding observations of the Human Rights Committee on Ireland's State party report, UN Doc. A/55/40, paras.422-451, 24 July 2000, para.13: "While it welcomes the existence of a mechanism to investigate complaints made against the police force, namely the Garda Complaints Board, the Committee regrets that the Board is not fully independent, in that investigations of complaints against the Garda are often entrusted to members of the Garda without consultation with the Board. It emphasizes that the availability of recourse to the courts to address allegedly unlawful conduct by the police does not displace the need for independent and transparent investigation of allegations of abuse."

²⁹³ Such concerns have been raised with regard to the Special Investigations Unit in Ontario. See the comparative study of several systems in Liberty, *IPCC*, *supra*, pp.18 et seq.

should the police fail to register a complaint or decide to investigate it internally instead of referring it to the oversight body.²⁹⁴

Many oversight bodies are not given the same powers of investigation as those of the police, a factor that either lessens the weight of their findings or results in greater dependency on police co-operation.²⁹⁵ This also applies to NHRCs, as has been reported in respect of Colombia and Nepal.²⁹⁶ While NHRC investigations tend to be weaker than those carried out by more specific oversight bodies, some NHRCs, such as those in India, have made valuable contributions to police reforms and/or recommending measures aimed at preventing recurrence of police misconduct, in particular in relation to deaths in custody.²⁹⁷

iv. Public and institutional support

Political backing, police cooperation, activist support and public attitudes have been identified as important factors that impact on the effectiveness of oversight bodies.²⁹⁸ Political support has often been strongest where there was a realisation that major reforms are needed to prevent either serious human rights violations on a large scale or specific kinds of violations that are widely seen as intolerable.²⁹⁹ This has particularly been the case in countries undergoing political transition, as evidenced by the establishment of the ICD in South Africa. There is considerable institutional resistance in countries with an overbearing and unaccountable police force, often with a lingering colonial legacy. Nevertheless, reform movements are underway, for example in India and Kenya, driven by civil society groups, members of the relevant authorities and politicians supporting such initiatives.³⁰⁰ As experiences in Northern Ireland and South Africa demonstrate, police cooperation and institutional support by the police is a major factor impacting on the effectiveness of investigations and the institution of systemic reforms. In addition, human rights groups have not only lobbied successfully for the establishment of these bodies but they have also provided critical expertise throughout their operation.³⁰¹

Even where the relevant body enjoys a degree of formal independence and adequate powers of investigation, its capacity to carry out its mandate is often undermined by the lack of sufficient or skilled staff and adequate resources. Perhaps exceptionally, the Police Ombudsman for Northern Ireland has been vested with considerable resources to fulfil its mandate.³⁰² In some countries, it may be genuinely difficult to provide these bodies with sufficient means, but in other cases the shortage of resources is more likely

²⁹⁴ See on this point, *ibid.*, pp.20 et seq. This has also been a problem for the ICD in South Africa, Manby, *South African ICD*, supra, pp.216 et seq.

²⁹⁵ The lack of police co-operation has seriously hampered the work of the ICD in South Africa, see Manby, *South African ICD*, supra, pp.214 et seq.

²⁹⁶ See for an overview Lindsnaes, Lindholt and Yigen, *National Human Rights Institutions*, supra, Appendix V.

²⁹⁷ E.g. National Human Rights Commission of India, *Important Instructions/Guidelines*, New Delhi, 2000.

²⁹⁸ See Joel Miller, *Civilian Oversight of Policing, Lessons from the Literature*, Vera Institute of Justice, May 2002, pp.10 et seq.

²⁹⁹ This has for instance been the case in England and Wales where the establishment of the Police Complaints Authority was preceded by the Scarman Inquiry into the Brixton riots in 1981 and where the Independent Police Complaints Commission was set up as a response to the inadequacies of the PCA.

³⁰⁰ See the initiatives on police reform of the Commonwealth Human Rights Initiative, e.g. *Report of the Roundtable Conference on Police Reforms*, Chennai, August 30, 2003 and *Police as a service Organisation: An agenda for change*, Roundtable Conference on Police Reform in East Africa, A report, organised by Commonwealth Human Rights Initiative (CHRI) in collaboration with Kenya Human Rights Commission (KHRC) & The Kenya Police Force, Nairobi, 24 & 25 April 2003.

³⁰¹ See for example the role of CAJ in Northern Ireland, Liberty in the United Kingdom and the Centre for the Study of Violence and Reconciliation in South Africa.

³⁰² See separate study *infra*, at V.3. See for the budget of US Oversight bodies, Finn, *Citizen Review*, supra, p.18.

to be an indication of lack of political will.³⁰³ This routinely creates a large backlog of cases, tempting such bodies to dispose of cases quickly or to transfer them to the police for further investigations, as has happened in Sri Lanka.³⁰⁴ Other bodies have introduced time limits for bringing complaints, thereby limiting access to the procedures.³⁰⁵

v. Decision-making and enforcement powers

Oversight bodies are commonly confined to making recommendations only, for example, directing the relevant authorities to bring charges against the alleged perpetrators and/or to take disciplinary action. Most bodies have no power to challenge a decision by the prosecutor or other relevant authorities not to act upon their recommendations.³⁰⁶ When the Komnas Ham in Indonesia has recommended further investigations or prosecutions of the suspected perpetrator(s), such calls have often been ignored or watered down by the authorities, a practice bound to erode the authority of the oversight bodies as well as public confidence in the monitoring system.

vi. Systemic impact

A further related limitation has been the lack of positive systemic impact of the work of oversight bodies on police conduct. This has not only been attributed to the lack of powers of oversight bodies to deal with operational conduct and address issues of policing, but also to insufficient coordination with internal police mechanisms and engagement with police bodies to institute structural reforms.³⁰⁷

vii. Victim-friendliness

Many oversight bodies and NHRCs are based in the capitals or large cities, which may not only colour the nature of their work but also makes them less accessible to people from rural areas.³⁰⁸ Many of these bodies are said not to have adopted a victim-centred approach and to follow cumbersome procedures that fail to empower victims during the

³⁰³ According to Manby, South African ICD, *supra*, p.218: "Perhaps the most serious problem facing the ICD is its lack of resources when faced with the size of its mandate." This has also plagued bodies in Latin America, see Rachel Neild, *Confronting a culture of impunity*, *supra*. Equally, on the Human Rights Commission of Uganda and the Commission on Human Rights and Administrative Justice in Ghana, see Topp, Uganda, *supra*, and Kofi Quashigah, *The Ghana Commission on Human Rights and Administrative Justice*, in Lindholt, National Human Rights Institutions, *supra*, pp. 169-197 and 199-207 respectively. See also, Human Rights Watch, *Protectors or Pretenders?*, 2001, <http://hrw.org/reports/2001/africa/overview/summary.html>, which mentions financial support from external sources, such as donor governments, international foundations and the UNDP as additional but often insufficient sources of income.

³⁰⁴ In Sri Lanka, the handling of complaints by the Commission has been severely criticised for its alleged practice of referring victims to using alternative avenues and/or failing to investigate complaints effectively, Asian Legal Resource Centre, *National Human Rights Commission of Sri Lanka in serious need of reform*, 3 March 2004. The Chairperson of the commission has reportedly "attributed many of the problems to a shortage of staff. She stated that there has been a rapid increase in complaints, but the number of inquiry officers is insufficient." This statement was disputed by the Asian Human Rights Commission, which "pointed out that the problems relate more to the lack of an effective investigation procedure, rather than a shortage of resources." *Ibid*. See also recommendations by the Human Rights Committee that: "The capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations should be strengthened" in UN Doc. CCPR/CO/79/LKA, 1 December 2003, para.9.

³⁰⁵ For example, a complaint to the Garda Síochána Complaints Board in Ireland is inadmissible if not brought "within six months of the date of the conduct." Section 4 (1) of the Garda Síochána (Complaints) Act, 1986.

³⁰⁶ See e.g. KomnasHam in Indonesia, *supra*, and the IPCC in Hong Kong, Hong Kong Human Rights Monitor, *supra*, paras. 114 et seq. In contrast, the Indian NHRC may bring contempt of court proceedings against the relevant authority, a step which has remained exceptional in practice.

³⁰⁷ See in respect of South Africa, Manby, South African ICD, *supra*, pp.203 et seq. and El Salvador, Neild, *Confronting a Culture of Impunity*, *supra*, pp. 238 et seq.

³⁰⁸ See e.g. Okafor and Agbakwa, Nigerian National Human Rights Commission, *supra*, pp.714 et seq. who contrast positive aspects such as investigating violations of human rights *suo moto* and conducting periodic and unscheduled visits to prisons with a view to monitoring compliance of the agencies in question with the detainee's rights with the "failure to establish offices at the grassroots (it has established only four offices in the last five years for a population of over one hundred and twenty million people)". See also findings of Human Rights Watch, *Protectors or Pretenders?*, *supra*.

investigations.³⁰⁹ Concern has also been raised about a perceived preference to settle complaints through informal resolution.

V. CASE STUDIES

V.1. The Russian Federation

Torture and ill-treatment by the police reportedly remain widespread in the Russian Federation, and in some regions are said to be systematic.³¹⁰ To date, no effective independent human rights institution has been set up with a mandate to receive and investigate torture-related complaints.³¹¹ Consequently, complaints about torture are investigated solely by the penal authorities. While the particulars of the system have recently been changed, including the adoption of a new Criminal Code of Procedure, impunity persists.

General legal framework

Several deficiencies have been reported in relation to the general legal framework applicable in torture cases. While recent amendments have somewhat improved the situation, the recently adopted amendment to the Criminal Code that includes a new specific offence of torture is not consistent with Article 1 of the UN Convention against Torture.³¹²

Lodging and recording of complaints

Any person may lodge a complaint or inform the police about the commission of a crime. A complaint may also be lodged with the Ministry of Internal Affairs, of which the police are a part.³¹³

Complaints may be made in writing or orally but not by e-mail, fax or telephone, and must be lodged within the applicable statute of limitations. The recently adopted offence of torture and the crime of abuse of office, which was previously applied in torture cases, are subject to a limitation period of ten years or less.³¹⁴ There is no special procedure for lodging complaints relating to torture or other serious human rights violations and consequently the standard procedures apply. In this respect, oral complaints made at police stations are recorded by the duty officer, the district police

³⁰⁹ Mohammad-Mahmoud Mohamedou, *The Effectiveness of National Human Rights Institutions* in Lindsnaes, Lindholt, Yigen, National Human Rights Institutions, supra, pp.49-58, p.52: "Accessibility is assessed in relation to the *location* of the commission's offices, a commitment to *openness* and to a consultative approach, and the use of different *languages*."

³¹⁰ Conclusions and Recommendations of the Committee against Torture: Russian Federation, supra, para. 5 and Concluding Observations of the Human Rights Committee on the State party report of the Russian Federation, UN Doc. CCPR/CO/79/RUS, 6 November 2003, paras.12 and 13. See also, the Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, UN Doc. E/CN.4/2001/66, 25 January 2001, paras. 865-939; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT): Public statement concerning the Chechen Republic of the Russian Federation (made on 10 July 2001), CPT/Inf (2001) 15 and Alternative Report to the UN Committee against Torture submitted by Russian NGOs (HPOO Committee against Torture, Union of Committees of the Mothers of Soldiers of Russia, Memorial, Committee for Civil Rights, Krasnoyarsk Committee on Protection of Human Rights, Moscow Helsinki Group) at the 28th session of CAT, April-May 2002.

³¹¹ The Federal Commissioner for Human Rights, also known as the Ombudsman was established in 1998. While this office may receive individual complaints about violation of constitutional rights, it is not empowered to carry out independent investigations into torture. Its role is largely confined to submitting annual reports to the State Duma and various official bodies or special reports on violations of the rights of individuals. www.ombudsman.gov.ru (in Russian).

³¹² Olga Shepeleva, *Russia amends its Torture Laws: Not far enough*, REDRESS, Reparation Report, April 2004.

³¹³ A complaint would in that case be submitted to the head of the police department or to the regional or higher directorate of internal affairs.

³¹⁴ See Article 78 of the Russian Criminal Procedure Code.

inspector or the head of division, and complaints filed with the Ministry of Internal Affairs are received by the Registrar and forwarded to the head of the investigation division.³¹⁵

Similar rules apply in respect of complaints lodged directly with the Office of the Prosecutor (*Procuratura*). If a complaint has been made to any other body, it will be referred to the district division of the Ministry of Internal Affairs or to the *Procuratura*.

While there are no overall statistics on complaints about torture and ill-treatment by law enforcement personnel and the army, statistics released by the Ministry of Internal Affairs and the *Procuratura* indicate that there are many complaints against officials belonging to Internal Affairs Agencies (including the police), mainly concerning abuse of power/office, which encompass a wide range of misconduct.³¹⁶ However, in practice, complaints about torture have often been met with a hostile reaction by the police or inspection authorities and in several cases they have failed to register the complaints or they have not acted upon them. Moreover, a considerable number of torture survivors have reportedly refrained from lodging complaints. This has been attributed to coercion to withdraw complaints, the absence of effective victim and witness protection programmes, and/or threats made by police officers to charge victims with offences such as resisting arrest or making unfounded accusations. It is in particular detainees who have been exposed to harassment and further ill-treatment when they attempt to complain about ill-treatment or torture.³¹⁷ Detainees have also complained to the European Committee for the Prevention of Torture about the existing complaints procedure, particularly concerning the lack of opportunity to “complain in a confidential manner to an outside authority.”³¹⁸ The new (2002) Criminal Procedure Code³¹⁹ allows victims to request that the Court order measures of protection,³²⁰ though to date there is no specific victim or witness protection programme.

Investigations

Should evidence of a crime emerge during an investigation, the relevant materials should be submitted to the *Procuratura*, the body with competence to prosecute crimes committed by the police.³²¹ Similarly, when a defendant alleges before a Court that s/he has been tortured, a judge may suspend proceedings and appoint a prosecutorial inquiry to determine the truth of the allegation, but the judge has no power to direct an

³¹⁵ Directive No. 350 of the Ministry of Internal Affairs, 1 November 1980.

³¹⁶ See Committee against Torture, Summary record of the 523rd meeting concerning the Third periodic report of the Russian Federation, UN Doc. CAT/C/SR. 523, 23 May 2002, para. 13. According to this report, during the period 1998-2000, citizens submitted 78,219 complaints and communications against actions of employees of the internal affairs agencies' security units. As a result, 44,839 internal investigations were carried out and subsequent action was taken in respect of 17,193 agency employees. 4,598 of these were dismissed and 1,134 demoted. 10,374 files were submitted to the *Procuratura* and criminal proceedings were opened in 5,093 of these cases.

³¹⁷ See Alternative NGO Report on Observance of ICCPR by the Russian Federation, Submitted to the Attention of the UN Human Rights Committee in Connection with the Upcoming Consideration of the Fifth Periodical Report of the Russian Federation, Moscow, May 2003, , p.32.

³¹⁸ Report to the Russian Government on the visit to the Russian Federation by the CPT Committee from 2-17 December 2001, CPT/Inf (2003) 30, para 125.

³¹⁹ For instance, they have the right to, *inter alia*, know about the charges brought against the accused, furnish evidence, submit evidence, enter petitions, have a representative, take part in investigative actions, get acquainted with materials of the criminal case after the end of the investigations, be notified of decisions relating to the institution and discontinuance of the case, participate in the judicial proceedings and to lodge complaints against the actions and decisions of the investigation bodies, the procuror and the court. The victim also has the right to claim any expenses made in connection with his or her participation in the preliminary investigation and the trial, including expenses for a legal representative. See Article 42 and 131 of the RSFCCP for further details. If the victim dies as a result of the crime, his or her rights shall pass on to the closest relatives pursuant to Article 42 (9) RSFCCP.

³²⁰ Article 11(3) RSFCCP.

³²¹ See Law on the Procurator Office, 1992.

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investigation against the concerned police officer(s). In practice, judges usually refrain from appointing such inquiries and have reportedly accepted as admissible evidence testimonies allegedly extracted by torture.³²²

On receipt of a complaint, the *Procuratura* will carry out a preliminary inquiry within three to ten days.³²³ As a result of this first consideration, the *Procuratura* will determine whether to embark on a full investigation.³²⁴ This will depend on the sufficiency of evidence adduced thus far.³²⁵ While some *Procuraturas* at the district level have taken steps to investigate and prosecute complaints of torture,³²⁶ this is exceptional. Investigations are often superficial and they are routinely closed at the initial preliminary inquiry stage. The *Procuratura* has even openly discouraged victims to pursue their cases,³²⁷ and there are serious questions about its independence. While the *Procuratura* is formally independent of the police and the Ministry of Internal Affairs, in practice the district offices of the *Procuratura* and the police work closely together in investigating crimes in joint "investigation brigades."³²⁸

If the *Procuratura* decides not to proceed with a full inquiry, a resolution to this effect will be issued and the complainant will be informed about the decision and his/her right of appeal to the Prosecutor.³²⁹ There is a further right of appeal to the Court, which can declare that the decision of the *Procuratura* not to proceed is unlawful and can order further actions.³³⁰ These possibilities to challenge the decisions of the *Procuratura* have on many occasions resulted in the reopening of investigations. Nonetheless, numerous investigations have subsequently dragged on for months, if not years, without any conclusive results.³³¹

The Ministry of Internal Affairs commonly carries out internal disciplinary proceedings in parallel with preliminary inquiries, which may result in sanctions ranging from reproach to dismissal even if no criminal conduct can be proven.³³² It may also suspend officials during such an investigation, but this is not common practice.

³²² See Concluding Observations of the Committee against Torture on the State party report of the Russian Federation, *supra*, paras. 5 (c) and 6 (d) and Alternative NGO Report on Observance of ICCPR by the Russian Federation, Submitted to the Attention of the UN Human Rights Committee in Connection with the Upcoming Consideration of the Fifth Periodical Report of the Russian Federation, Moscow, May 2003, p.30.

³²³ Article 144 Code of Criminal Procedure. The time limit for preliminary inquiries conducted by the internal investigations department of the Ministry of Internal Affairs is one month.

³²⁴ Article 145, *Ibid.*

³²⁵ Article 21, *Id.*

³²⁶ So e.g. the collaboration between the Chief Prosecutor of Tatarstan and the Kazan Human Rights Centre, *supra*.

³²⁷ CPT, Report of Visit to the Russian Federation in 2001, CPT Inf (2003) 30, Section 10/48, para.43: "At the beginning of the December 2001 visit, officials of the Ministry of Internal Affairs in Moscow informed the delegation that no complaints against physical ill-treatment by Militia staff had been lodged in the Russian Federation in 2001. Similar information was received by senior staff at the Department of Internal Affairs in Khabarovsk. In the CPT's view, this is certainly not an indication that there have not been cases of ill-treatment, but rather that the complaints system is not working properly. In this context, it is noteworthy that a person interviewed by the delegation in Vladivostok alleged that when he complained to the prosecutor about being beaten by Militia, the prosecutor apparently told him "if you complain about my officials, I will give you a hard time in the SIZO". It was also alleged that lawyers sometimes dissuade their clients from lodging complaints concerning ill-treatment by Militia staff (cf. paragraph 39)."

³²⁸ See Alternative NGO Report ICCPR, *supra*, p.31. See also concerns expressed concluding observations of the Committee against Torture, *supra*, UN Doc. CAT/C/CR/28/4, 6 June 2002, para.6 (h), about " (t)he insufficient level of independence and effectiveness of the Procuracy, due, as recognized by the State party, to the problems posed by the dual responsibility of the Procuracy for prosecution and oversight of the proper conduct of investigations."

³²⁹ Article 148, *Id.*

³³⁰ Article 125, *Id.*

³³¹ Alternative NGO Report ICCPR, *supra*, p.32.

³³² See Regulations on Service in Agencies of Internal Affairs of the Russian Federation adopted by the Decree of the Supreme Soviet of the Russian Federation of 21.12.1992, N 2404-I.

V.2. The Indian National Human Rights Commission

In 1993, the Protection of Human Rights Act established the National Human Rights Commission of India to ensure a better protection of human rights. While the NHRC has played an important role in awarding compensation for torture and issuing instructions aimed at preventing torture, more than ten years on, torture at the hands of police forces is still reported to be endemic in India.³³³ This points at shortcomings in the Indian system of complaints procedures, including the role and effectiveness of the NHRC.

The complaints procedure pursuant to Indian criminal procedural and disciplinary laws

There are several features in the general legal framework applicable in torture cases that militate against an effective complaints procedure, which would ensure accountability for torture. A victim of torture may lodge a complaint with the police³³⁴ or a magistrate.³³⁵ An investigation may also be instituted following directions by the High Court or the Supreme Court to the Government concerned.³³⁶ However, torture is not recognised as a specific offence in Indian criminal law so that the complaint would be recorded only in relation to similar offences under the Indian Penal Code that might carry inadequate punishments.³³⁷ The subsequent investigation and prosecution of any public official requires the prior approval of the relevant authorities, thus making the investigation dependent on an executive decision.³³⁸ Finally, law-enforcement personnel engaged in anti-terrorism operations may benefit from immunity under law.³³⁹

When investigations are commenced, it is commonly the police or, in serious cases, the Central Bureau of Investigation that carry out investigations themselves. Alternatively, investigations are carried out under the supervision of a district magistrate, who is an executive authority.³⁴⁰ In practice, this system has resulted in a lack of criminal accountability for a number of reasons: lack of accessibility and

³³³ See e.g. report of the Special Rapporteur on Torture, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 2000/43, UN Doc. E/CN.4/2001/66, 26 January 2001, para.57; the annual reports of the National Human Rights Commission available at <http://nhrc.nic.in/>; G.P. Joshi, *Police Brutality in India*, Commonwealth Human Rights Initiative, November 2000 and reports by Amnesty International on West Bengal, *India: Time to act to stop torture and impunity in West Bengal*, AI Index: ASA 20/033.2001, 10 August 2001 and *Punjab, India: Breaking the cycle of impunity and torture in Punjab*, AI-Index: ASA 20/002.2003, 20 January 2003.

³³⁴ Section 154 Criminal Code of Procedure (Cr. PC).

³³⁵ Section 200 Cr. PC.

³³⁶ This has been a consistent practice of the High Courts and the Supreme Court. For instance, in *Punjab & Haryana High Court Bar Association v State of Punjab and Ors*, (1996) 4 SCC 742, a case concerning the abduction and murder of an advocate, his wife and their two year old child for which the police appeared to be responsible on the basis of the available evidence, the Supreme Court held that: "The police officers in question must be suspended by the State and the trial is transferred to the Designated Court at Chandigarh. The Court is to direct the trial expeditiously within six months of its commencement. In accordance with the requirements of the Criminal Procedure Code the State of Punjab is to sanction the prosecution of the police officers immediately, within one month of receiving this order." In *Sebastian M. Hongray v. Union of India*, AIR 1984 SC 571, the Supreme Court issued a mandamus writ to the Superintendent of Police directing him to take its judgment "as information of cognisable offence and to commence investigation as prescribed by the relevant provisions of the Code of Criminal Procedure." In *State of Punjab v. Vinod Kumar*, (2000) 9 SCC 742, the High Court directed the State Government to sanction the prosecution of the officials in question, as required by Section 197 of the Code of Criminal Procedure, without delay when asked by the investigating Central Bureau of Investigation.

³³⁷ See in particular sections 320, 331 and 348 of the Penal Code.

³³⁸ Section 197 Cr. Pr.C.

³³⁹ See sections 57 and 58 of the Prevention of Terrorism Act, 2002.

³⁴⁰ Alternatively, but less common in practice, an investigation can also be ordered by a judicial magistrate. See on this point section 200 Cr. Pr.C. according to which a victim who prefers not to lodge a complaint with the police may complain directly to the magistrate.

confidence in the system, including the absence of victim and witness protection programmes in the light of reportedly widespread harassment and corruption; inconsistent practice with regard to recording and acting on complaints, mostly only following public pressure to take action; failure to investigate complaints about torture promptly and effectively and to prosecute suspected perpetrators as well as inadequate procedural safeguards for victims during the process. Internal disciplinary investigations have lacked transparency, casting doubt on their effectiveness in the light of a general lack of police accountability.³⁴¹ Furthermore, investigating authorities are mainly bodies that enjoy no independence from the executive and are widely seen as protective towards the police unless compelled to act by external pressure.³⁴²

The role of the National Human Rights Commission in the present complaints system

The members of the NHRC, mainly drawn from the judiciary, are appointed by the President on the recommendation of a Committee.³⁴³ Concerns have been raised that the NHRC is not representative of the various social forces in India.³⁴⁴ Moreover, the funding of the NHRC falls into the seemingly unfettered discretion of the Central Government.³⁴⁵

Any victim of a human rights violation including those acting on his or her behalf may lodge a complaint with the NHRC, either in writing or in person. Information about complaints is made available through “MADAD,” an information and facilitation counter established by the NHRC.³⁴⁶ The NHRC has also set up a Complaints Management System that enables the complainant to follow the status of complaints throughout the procedure online.³⁴⁷ Complaints are recorded according to the NHRC system for categorising complaints, which to date includes no separate category for torture.³⁴⁸ The NHRC has apparently no publicly available guidelines with respect to dealing with complaints, such as registration, acceptance and rejection of complaints.³⁴⁹

³⁴¹ See G.P. Joshi, *The Padmanabhaiah Committee on Police Reforms- A Critical Analysis of Some Important Recommendations*, 2001, pp.8 et seq. at http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis_padmanabhaiah.pdf and CHRI, Report on the Roundtable Conference on Police Reform, (2003), Chennai- Mandeep Tiwana, p.9: “An overwhelming majority of the participants felt that the police accountability was an area requiring urgent intervention as ineffectiveness of accountability mechanisms was directly contributing to a culture of impunity. The conference expressed dissatisfaction with the lack of openness displayed by the police establishment in disclosing action taken against police personnel guilty of misconduct or negligence. The necessity for people to know about disciplinary action against errant police personnel was stressed, as transparency of accountability mechanisms would go a long way in inspiring public confidence and in improving police image.”

³⁴² See in this regard e.g. *ibid.*, pp.5 et seq.

³⁴³ Article 4 (1) Protection of Human Rights Act, 1993. The Committee consists of the Prime Minister, the Speaker of the House of the People, the Minister-in-charge of the Ministry of Home Affairs in the Government of India, the Leader of the Opposition in the House of the People, the Leader of the Opposition in the Council of States and the Deputy Chairman of the Council of States.

³⁴⁴ Asia Pacific Human Rights Network, *National Human Rights Commission of India: Time to Stand up and Speak out*, February 2004, p.3, at http://www.asiapacificforum.net/activities/annual_meetings/eighth/ngo_india.pdf and G.P. Joshi, *National Human Rights Commission-Need for Review* (unpublished), available at http://www.humanrightsinitiative.org/programs/aj/police/papers/gpi/national_human_rights_commission.pdf.

³⁴⁵ *Ibid.*, p.5. See Article 32 (1) of the Protection of Human Rights Act, 1993: “The Central Government shall after due appropriation made by Parliament by law in this behalf, pay to the Commission by way of grants such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.” Article 33 (1) contains an identical provision in respect of grants by the State Government to State Commissions.

³⁴⁶ See NHRC, Annual Report 2001-2002, p.144.

³⁴⁷ *Ibid.*, pp.142 and 143.

³⁴⁸ *Ibid.*, Annexure 11, listing the following categories: Custodial deaths; custodial rapes; disappearances; illegal detention/arrest; false implication; other police excesses; failure in taking action; indignity to women; sexual harassment; jail conditions; atrocities on scheduled cast/scheduled tribes and others.

³⁴⁹ See APHRN, *Time to Stand Up*, supra, p.17.

The Commission does not carry out criminal investigations but rather performs a monitoring role that consists of, *inter alia*, carrying out its own investigation in order to determine whether there has been a violation of human rights. In so doing, it “may inquire, *suo moto* or on petition presented by a victim or any person on his behalf, into complaints of i) violation of human rights or abetment thereof; or ii) negligence in the prevention of such violation, by a public servant.”³⁵⁰ However, the NHRC can only investigate allegations of human rights violations that have occurred within a year of the filing of the complaint,³⁵¹ an unduly short time limit especially in cases of serious violations such as torture. It is also barred from investigating cases that are pending before other commissions.³⁵² In practice, State human rights commissions have reportedly refrained from investigating complaints on the ground that an internal police investigation is taking place.³⁵³

The NHRC has been vested with a number of powers in carrying out its inquiry into complaints about human rights violations, mainly to question witnesses and to examine documents. In so doing, it can call for a report from the police, monitor the police investigations in other ways or conduct an inquiry itself.³⁵⁴ However, these powers resemble those of a civil (as opposed to criminal) complaint.³⁵⁵ The NHRC has an Investigation Division and may employ the services of police and investigative staff as well as NGOs.³⁵⁶ Where the inquiry discloses a violation of human rights or negligence in the prevention of a violation, it has the discretionary power to recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as it deems fit.³⁵⁷ The Government or authority is obligated to report within one month on the action it has taken in respect of the NHRC’s recommendation. The NHRC publishes the results of its investigations and decisions taken together with the responses by the concerned Government or authority.³⁵⁸

In its practice, the NHRC has dealt with a large number of complaints, for example 71,555 for the year 2000-2001 and 69,083 for the year 2001-2002 alone, many of which are torture-related.³⁵⁹ While this indicates that the NHRC provides an accessible complaints system for many victims, the workload has resulted in a worrying backlog of complaints that threatens to undermine the effectiveness of the complaints procedures.³⁶⁰ The NHRC not only suffers from limited capacity, especially given that a number of human rights commissions operating on the state level are yet to be established, but also from an inadequately staffed and equipped investigation division.³⁶¹ Concern has also been expressed about the lack of police and state government co-operation or even cover-ups in such inquiries.³⁶² Given that the police

³⁵⁰ Section 12 (a), The Protection of Human Rights Act 1993.

³⁵¹ Section 36 (2) *ibid.*

³⁵² Section 36 (1) *ibid.* See also comments by the NHRC on this point in its 2001-2002 Annual Report, p.16.

³⁵³ See in relation to Punjab AI, Punjab, *supra*, p.42.

³⁵⁴ See Sections 12 et seq. of the Protection of Human Rights Act, 1993.

³⁵⁵ Section 13 *ibid.*

³⁵⁶ NHRC, Annual Report 2000-2001, pp.140 et seq.

³⁵⁷ Sections 13 et seq., in particular Section 18, 1) of the Protection of Human Rights Act, 1993.

³⁵⁸ Sections 18 (6) and 20 *ibid.*

³⁵⁹ NHRC, Annual Report 2000-2001, p.138 and Annexure 11.

³⁶⁰ See APHRN, *Time to Stand Up*, *supra*, pp.5,6.

³⁶¹ This has been criticised by the NHRC itself, see Annual Report 2000-2001, pp.141,142. In practice, for e.g. in Punjab, investigations have been carried out by the police on behalf of the human rights commission, which negates the independence of investigations carried out by the commission. See AI, Punjab, *supra*, p.41.

³⁶² See NHRC, Annual Report 2000-2001, pp.140 et seq.

or CBI carries out the investigations, the role of the NHRC remains necessarily limited. This is mainly due to the restricted and rather weak powers of investigation that the NHRC has been vested with, which is one of the biggest obstacles to its effectiveness. However, the NHRC has played a prominent role in taking action aimed at preventing further violence in Gujarat and ensuring accountability of the perpetrators.³⁶³

The NHRC has in some cases recommended prosecutions and/or disciplinary action against police officers suspected of torture.³⁶⁴ While the NHRC makes details about complaints and investigations at least partly available to the public, it provides no systematic information about the actual compliance of the authorities with its recommendations.³⁶⁵ While it is believed that most recommendations have been adhered to by the authorities, the success of subsequent prosecutions depends largely on the strength of the police investigations rather than the findings of the NHRC, also in light of the fact that enforcement powers and follow-up procedures are weak.³⁶⁶ In addition, the NHRC has been criticised for its reluctance to take a more powerful stance in investigating serious human rights violations independently of political considerations, in particular in politically sensitive cases.³⁶⁷ Against this background, the NHRCs practice of awarding compensation as palliative has tended to displace liability and the question of identifying the perpetrator(s).³⁶⁸

On the other hand, the fact that cases have been taken up by the NHRC has in several instances apparently exerted pressure on the authorities to take more vigorous action against the alleged perpetrators and the NHRC has also pursued a proactive policy in death in custody cases, such as reporting custody deaths within 24 hours of their occurrence and videotaping of post mortems, albeit with mixed success to date.³⁶⁹ However, it has not focused in a similar fashion upon custodial violence, in particular torture, by suggesting equivalent measures aimed at preventing such practice.³⁷⁰ The NHRC has also not yet undertaken a systematic collection and comprehensive analysis of patterns relating to torture that arise out of investigations, which would allow it to make systemic findings.

While the NHRC has since its inception become a focal point for human rights protection and has highlighted the need for a reformed police culture in line with human rights standards, its initiatives have to date not resulted in profound changes in torture practices and enhanced accountability of the perpetrators.

³⁶³ Ibid., pp.20 et seq.

³⁶⁴ See relevant chapters in the Annual Reports of the NHRC, including description of exemplary cases.

³⁶⁵ See NHRC, Annual Report, 2000-2001, pp.138 and the NHRC website.

³⁶⁶ APhRN, *Time to Stand Up*, supra, p. 7 and Joshi, NHRC, supra. This is not compensated for by the possibility that the NHRC may approach the High Court or Supreme Court for an order directing the responsible public body to implement its recommendation(s), as this constitutes a rather exceptional course of action, with obvious political implications.

³⁶⁷ See APhRN, *Time to Stand Up*, supra, pp.8 et seq., Ravi Nair, *Impunity and Torture in India*, paper submitted at the occasion of seminar on the right to reparation for torture survivors in India, Nepal and Sri Lanka, New Delhi, 14 September 2002, and AI, Punjab, supra, p.44, according to which the National Human Rights Commission in Punjab has confined itself to recommending compensation but has, in the period 1997-2001, not recommended a single prosecution of police officers even though there had been 26 cases of death in custody.

³⁶⁸ See e.g. Ravi Nair, *Impunity and Torture*, supra.

³⁶⁹ See the relevant Instructions of the NHRC on custodial deaths and Annual Report 2000-2001, pp.32 et seq.

³⁷⁰ Some measures to this effect are contained in the NHRC's instructions *On Visits to Police Lock-ups/Guidelines on Polygraph Tests and Arrests*.

Findings on effectiveness of NHRC complaint procedure

This brief review demonstrates that the existing legislation accords the NHRC a secondary role in the current complaints mechanisms against the police. While the NHRC is empowered to monitor the human rights record of the police forces, it has restricted powers with regard to investigations and subsequent prosecutions or disciplinary proceedings to ensure accountability of suspected perpetrators of torture. It has had limited impact upon structural police reforms enhancing police accountability.³⁷¹ The oversight by the NHRC built into the complaints procedure system in India is clearly insufficient, also because of the institutional weaknesses and constraints outlined above. Against the background of outdated colonial legislation, such as the Police Act of 1861,³⁷² little, if any, accountability of the police and widespread agreement that a thorough police reform is overdue,³⁷³ the NHRC has not been vested with sufficient powers and resources to constitute an effective complaints mechanism. The Central Government has to date largely failed to strengthen the NHRC as repeatedly urged to by the NHRC and others.³⁷⁴ It is in this context that many observers call for new legislation and the establishment of an independent complaints mechanism, such as a police complaints authority.³⁷⁵ This is an express acknowledgement of the structural limitations of the role of the NHRC.³⁷⁶ However, any such legislation would have to be backed by sufficient political will in practice to ensure that the envisaged bodies are truly independent and vested with sufficient powers and resources and are supported by concerned authorities to carry out their mandate effectively. There are concerns, seemingly justified by past experience, as to whether any such system will find sufficient political support in India, including from the police themselves.³⁷⁷

The experience with and of the NHRC in India is in many ways exemplary for the limited impact of NHRCs in complaints procedures in torture cases. Where NHRCs on the one hand receive complaints but on the other are not involved in any subsequent criminal or disciplinary investigation, but for some limited monitoring, their role is largely confined to recommending action in cases over which they have little influence. Such

³⁷¹ The NHRC has however recommended systemic reforms of the police, see its 2000-2001 Annual Report, pp.36 et seq.

³⁷² See in this regard the Summary of Recommendations made by the Padmanabhaiah Committee on Police Reforms, 2001, at http://www.humanrightsinitiative.org/programs/ai/police/india/initiatives/summary_padmanabhaiah.pdf according to which the Police Act of 1861 should be replaced by a new Act. Such step has recently been taken in Pakistan where The Police Order 2002 [Chief Executive's Order No. 22 of 2002] replaced the Police Act of 1861. The Police Order 2002 provides for the establishment of the District Public Safety Commission and the Federal and Provincial Police Complaints Authorities to deal with complaints against the police. While Public Safety Commissions have been set up, which are reportedly in some districts controlled by politicians rather than independent members, the Police Complaints Authorities are yet to be established. See for the text of the Order http://www.nrb.gov.pk/publications/police_order_2002.pdf.

³⁷³ See the reports on the three roundtable conferences on police reform organised by the Commonwealth Human Rights Initiative and others in 2003, available at www.humanrightsinitiative.org.

³⁷⁴ See NHRC, Annual Report, 2000-2001, pp.8 et seq.

³⁷⁵ CHRI, Report on the Roundtable Conference on Police Reform, (2003), Chennai- Mandeep Tiwana, pp.13 et seq. See also the Complaints Authority recommended by the Padmanabhaiah Committee on Police Reforms, supra: "A non statutory District Police Complaints Authority (DPCA) should be set up with the District Magistrate as the Chairman and a senior Additional Sessions Judge, the District Superintendent of Police and an eminent citizen nominated by the DM as members. Investigations into public complaints against the police should in the first instance be done by the police department itself. Those who are not satisfied can approach the DPCA." The DPCA has, however, seemingly been conceived as a weak body having review functions only, i.e. not one empowered to investigate complaints against the police independently and effectively. See on this point critical comments by Joshi, Padmanabhaiah Committee, supra, pp. 8,9.

³⁷⁶ See CHRI, Report on Police Reform, supra, p.14: "[Question:] Would not the Police Complaints Authority duplicate the functions of human rights commissions? [Reply:] Undoubtedly human rights commissions are doing good work in dealing with police related complaints. However, they suffer from structural limitations as police oversight is just one area of their wider charter. Most human rights commissions are deluged with complaints on a variety of issues and are already functioning beyond capacity. The scope of their work is extensive but their resources are limited. They can barely manage to do justice even to very serious complaints against the police such as extra-judicial killings, custodial death, torture or extortion. To expect them to go through large number of complaints that they receive against the police is somewhat unrealistic."

³⁷⁷ *Ibid.*, pp.15 et seq.

complaints procedures, in particular in instances where they are not accompanied by police reform and a policy to address systemic causes of torture, instil little confidence in victims of torture and other serious human rights violations and remain of limited significance in ensuring police accountability and preventing future violations.

V.3. The Police Ombudsman for Northern Ireland

Introduction

The situation in Northern Ireland is in many ways unique. It is only now emerging from a violent conflict dividing nationalists and unionists that involved the United Kingdom State apparatus, during which torture and ill-treatment were reportedly used by various actors.³⁷⁸ The complaints system in Northern Ireland, established in the current transitional context, has undergone remarkable changes in recent years. The Police Ombudsman for Northern Ireland (PONI) is probably the most independent and effective body of its kind worldwide.

Police Ombudsman for Northern Ireland

Until the late 1990's, the police itself was responsible for receiving and investigating complaints against the police.³⁷⁹ Given the sense of institutional loyalty within most police forces, the public often doubts the fairness of such a system. This scepticism is even greater in a highly divided society such as Northern Ireland, where the police force is largely drawn from one group only.³⁸⁰ In addition, the complaints system was not backed up by any other mechanisms to ensure accountability. Following the Government-commissioned "Hayes Report" of 1997, implementing legislation was adopted in 1998 that led to the creation of the Police Ombudsman for Northern Ireland, whose offices opened on 6 November 2000.³⁸¹ The establishment of the PONI was welcomed by civil society groups, who continue to closely follow its progress.³⁸²

The PONI is an independent office that is accountable to Parliament through the Secretary of State only. It has the status of a non-departmental public body, which is funded by grant-in-aid from the Northern Ireland Office. The objective of the PONI is to secure "the efficiency, effectiveness and independence of the police complaints system"; and "the confidence of the public and of members of the police force in that system."³⁸³ To this end, it is the main body for dealing with complaints against the police. It is competent to receive and investigate complaints made by members of the

³⁷⁸ See European Court of Human Rights, *Ireland v the United Kingdom* (1979-80) 2 E.H.R.R. 25). See also the various publications of the Committee on the Administration of Justice on ill-treatment in Northern Ireland throughout the years, www.caj.org.uk and Amnesty International, *Torture in the Eighties*, AI Index: ACT 04/01/84, pp.50 et seq. and recent reports on politically motivated violence at <http://web.amnesty.org/library/eng-gbr/reports&start=1>.

³⁷⁹ See Committee on the Administration of Justice, CAJ, *Cause for Complaint, The system for dealing with complaints against the police in Northern Ireland*, 1990, p.28, and CAJ, *A fresh look at complaints against the police*, 1993.

³⁸⁰ See also, the assessment of Mary O'Rawe and Linda Moore, *Accountability and Police Complaints in Northern Ireland: Leaving the Past Behind?*, in Goldsmith/Lewis, *Civilian Oversight*, supra, pp.259 et seq., pp.291, 292: "Oversight bodies have failed because the legacy of Northern Ireland's past has never been coherently addressed at an official level. A highly politicised and unrepresentative police force, given extended powers to police civil unrest in a society deeply divided as to the legitimacy of the state itself, calls out for strong pro-active accountability systems. Instead, there has been an almost continual abdication of government responsibility in terms of building credible police accountability structures through acknowledging and addressing key sites of alienation."

³⁸¹ See Police (Northern Ireland) Act 1998, Part VII, secs. 50 et seq. The legislation is available on the website of the PONI www.policeombudsman.org.

³⁸² See CAJ, *Human Rights on Duty, Principles for better policing-International lessons for Northern Ireland*, 1997, pp.117 et seq. The CAJ is presently preparing a commentary on the work undertaken by the Police Ombudsman "to facilitate wider community debate on the progress towards policing goals established in 1998."

³⁸³ Section 51 (4) Police (Northern Ireland) Act, 1998.

public, and “matters” referred by the Secretary of State, Chief Constable and the Policing Board. It may also investigate police misconduct on its own motion where this is considered to be in the public interest.³⁸⁴ The PONI is not competent to receive public complaints by police officers themselves, but has used its *ex officio* powers in cases of police officers “blowing the whistle.”

Complaints can be lodged with the Ombudsman in a number of ways, including by telephone, fax, e-mail or in person.³⁸⁵ The PONI has an outreach programme and complainants are informed about progress of complaints throughout the process.³⁸⁶ Complaints have to be made within 12 months after the incident but the timeline can be extended in serious cases.³⁸⁷ There is no specific complaints category of torture, and complaints relating to torture and ill-treatment would be classified as oppressive behaviour, a category including a wide range of misconduct. This category constitutes the majority of complaints.³⁸⁸

Once a complaint is recorded, it will either be formally investigated,³⁸⁹ referred to informal resolution,³⁹⁰ a practice that has met with some criticism,³⁹¹ or closed. When investigating complaints, the PONI has the same powers as the police,³⁹² and will refer all cases relating to criminal conduct to the Director of Public Prosecution (DPP).³⁹³ In practice, only a few allegations relating to criminal offences are substantiated by the PONI and put to the DPP.³⁹⁴ One important reason for this that has been identified by the PONI is the lack of co-operation of complainants.³⁹⁵

³⁸⁴ Section 52 *ibid.* Pursuant to Section 52 (1) (b), with regard to complaints that are not made to the Ombudsman “if made to a member of the police force, the Police Authority or the Secretary of State, [the complaint shall] be referred immediately to the Ombudsman.”

³⁸⁵ The particularities of the complaints procedure are laid down in Part VII of the Police (Northern Ireland) Act, 1998; Part VIII of the Police (Northern Ireland) Act, 2000; Section 13 of the Police (Northern Ireland) Act, 2003 and the Royal Ulster Constabulary Regulations 2000 and 2001, which are available on the PONI website www.policeombudsman.org.

³⁸⁶ See information for complainants on the PONI website www.policeombudsman.org.

³⁸⁷ Section 25 (1) (b) of the Royal Ulster Constabulary Regulations 2000 and sections 5 (2) and 6 of the RUC Regulations, 2001.

³⁸⁸ See Police Ombudsman for Northern Ireland, Annual Report, April 2002-March 2003, Section 3.

³⁸⁹ Section 54 *ibid.*

³⁹⁰ The Ombudsman may refer cases to informal resolution provided that the complainant gives his consent and the complaint is not a serious one (Section 53 (1) and (2) Police (Northern Ireland) Act 1998). A complaint that is suitable for informal resolution is referred to the appropriate disciplinary authority, commonly a superior police officer. According to Section 10 (3) of the RUC Regulations 2000: “A complaint is not suitable for informal resolution where the Ombudsman is satisfied that the conduct complained of, if proved, would justify a criminal charge.”

³⁹¹ According to information provided by CAJ, many complainants have expressed their dissatisfaction with the informal resolution procedure and claimed that they feel they should accept informal resolution because the PONI does not think it is a serious matter. One of the main concerns raised concerns the lack of independence as complaints are resolved by the Police without the involvement of the PONI.

³⁹² The Police and Criminal Evidence (Application to Police Ombudsman) Order (NI) 2000.

³⁹³ Section 58 (2) Police (Northern Ireland) Act 1998.

³⁹⁴ For the period April 2003-March 2004, the PONI referred 174 cases to the DPP and recommended charges in ten cases, three of which related to assaults, one to racially aggravated offence, one to intimidation and one to harassment. [The other charges concerned dangerous driving (2), breach of data protection and breach of section 17 of the Criminal Procedure Act that deals with disclosure]. According to the Annual Report of the PONI, April 2002-March 2003, Figure 15, concerning the outcome of closed cases, 42% of cases were closed for non-cooperation, 6% closed because the complaints was withdrawn, 8% closed because the complaint was held to be ill-founded and 8% informally resolved. While some other 13% of cases were closed for other reasons, only 18% of complaints were investigated. In 7% of cases a file with recommendations to take action was sent to the DPP or Chief Constable, which includes cases relating to criminal conduct sent to the DPP where the PONI did not recommend prosecution.

³⁹⁵ See Section 3 of the report on complaints and investigations, 2002-2003.

The DPP decides independently whether to follow the PONI's recommendations or not. Since the inception of the PONI, the DPP has directed prosecutions in only a relatively small number of cases.³⁹⁶

Disciplinary action

In those cases where no criminal prosecutions are recommended, the PONI can recommend the institution of internal disciplinary charges.³⁹⁷ It will transfer the file to the appropriate authority, normally the internal investigation department of the Police Service of Northern Ireland (PSNI), which, if it agrees with the recommendations, is thereafter solely responsible for the disciplinary hearings.³⁹⁸ If the PSNI disagrees, the PONI might order disciplinary hearings before a panel including civilian representatives.³⁹⁹ The internal investigations department commonly awaits the outcome of the investigations of the PONI before taking action itself but may suspend a police officer independently according to internal guidelines, in particular in cases of serious allegations.⁴⁰⁰ A recent addition to the legal framework governing disciplinary action is the Code of Ethics for the PSNI, which takes international, especially European, human rights standards into account.⁴⁰¹

Systemic findings

In 2003, the PONI was finally⁴⁰² given express powers to investigate policy and practice issues when it is in the public interest to do so, and to make systemic findings and issue recommendations as to how to improve policing.⁴⁰³ In this respect, it complements the work of the Northern Ireland Policing Board.⁴⁰⁴

Impact of the Police Ombudsman for Northern Ireland

The PONI has carried out several studies examining public awareness and acceptance, both by complainants and the police, and other issues relating to its operation.⁴⁰⁵ While it is perhaps too early to assess the question of accessibility and acceptance, the experience to date shows that considerable time, effort and resources

³⁹⁶ See *ibid*: "Referrals to the Director of Public Prosecutions, Police Ombudsman Recommendations: Since the Office opened 260 cases have been referred to the DPP involving criminal allegations. As a result the DPP has directed 20 prosecutions in cases involving 18 police officers. No prosecution was directed in respect of 190 of the cases and direction is pending in the remaining 50. The 20 prosecutions directed include a variety of offences from serious assault, perverting the course of justice, causing death by dangerous driving to lesser driving offences and common assaults."

³⁹⁷ See Section 59 (1) Police (Northern Ireland) Act 1998.

³⁹⁸ Section 59 (4) *ibid*.

³⁹⁹ Section 59 (5) *et seq.* *ibid*.

⁴⁰⁰ See Sections 5 *et seq.* of The Royal Ulster Constabulary (Conduct) Regulations 2000. According to section 59 (4) Police (Northern Ireland) Act 1998, "No disciplinary proceedings shall be brought by the appropriate disciplinary authority before it receives the memorandum of the Ombudsman under subsection (2) [containing recommendations *etc.*]."

⁴⁰¹ Police Service of Northern Ireland (Conduct) Regulations 2003.

⁴⁰² These changes were only made after extensive lobbying by human rights groups in Northern Ireland. See Mary O'Rawe and Linda Moore, *Accountability and Police Complaints*, *supra*, pp.259 *et seq.*

⁴⁰³ Section 13, Police (Northern Ireland) Act 2003.

⁴⁰⁴ The Northern Ireland Policing Board is an independent body, established on 4 November 2001, which is responsible for ensuring that the police and other bodies, as specified, are efficient and effective. In carrying out its functions, the Board shall, *inter alia*, "hold the Chief Constable to account for the exercise of his or functions and those of the police..., monitor the performance of the police..., keep itself informed as to the workings of Part VII of the 1998 Act (police complaints and disciplinary proceedings) and trends and patterns in complaints under that Part..., assess ...the effectiveness of the code of ethics issued under section 52..." See on an assessment of the performance of the Northern Ireland Policing Board in its first years, CAJ, *Commentary on the Northern Ireland Policing Board*, November 2003.

⁴⁰⁵ See the studies on Public Awareness of Northern Ireland Police Complaints System and A Study on the Attitudes of the Members of the Police Service of Northern Ireland to the Office of the Police Ombudsman for Northern Ireland and the New Complaints System, available on the PONI website at www.policeombudsman.org.

are needed in order to ensure that the complaints system reaches the target audience while simultaneously gaining the acceptance of the police whose conduct the system is meant to improve.⁴⁰⁶ Initial findings indicate that the independence of the PONI and the handling of complaints and investigations have increased the confidence of the public in the complaints system against the police in Northern Ireland.⁴⁰⁷ Moreover, statistics show that complaints about “oppressive behaviour” by the police have decreased, perhaps indicating a change of practice.⁴⁰⁸ While senior police officers reportedly support the Ombudsman, there is still concern about translating a human rights policy of policing into practice, including human rights training.⁴⁰⁹

A further critical factor that goes beyond the complaints procedure itself and impacts on the independence and effectiveness of the PONI as an institution has been the lack of effective Government support in some incidents, for example the apparent defence of the former Chief Constable’s critique of the PONI report on the Omagh bomb investigation of 12 December 2001.⁴¹⁰ Furthermore, while the funding has been sufficient to ensure the functioning of the PONI, there have been concerns about the effectiveness of the PONI in respect of investigating retrospective cases, for example where a request by the Police Ombudsman Nuala O’Loan for financial support to carry out a full investigation into allegations about Special Branch Involvement with a loyalist informer in murder cases was not fully met by the Northern Ireland Office.⁴¹¹ On the other hand, concerns have been raised about the position taken by the PONI in respect of such questions as the use of baton rounds and CS gas, raising the spectre that the PONI has acted in a deferential manner to the police and the authorities.⁴¹² These examples illustrate that the PONI is not operating in a political vacuum and that it is not only the PONI itself but also the actions of other actors that will define the actual degree of its independence and effectiveness.

While the PONI experience is in many ways unique, i.e. an institution vested with considerable resources responsible for a relatively small population (1.5 million people), the degree of independence enjoyed by it, the complaints procedure and division of labour with the internal investigations department, and the efforts by the PONI to make the system both accessible and widely acceptable, are all features that despite some possible shortcomings,⁴¹³ point at the PONI as a possible model for other complaints systems. Consequently, there has been considerable interest by officials and others working on police complaints mechanisms worldwide on the work and experience of the PONI.⁴¹⁴

⁴⁰⁶ While the police constable has criticised the PONI about the Omagh bombing inquiry into shortcomings of police investigations (see Mary O’Rawe, *Transitional Policing Arrangements in Northern Ireland: The Can’t and the Won’t of the Change Dialectic*, in Fordham International Law Journal, Transitional Justice- Northern Ireland and Beyond, Volume 26, April 2003, Number 4, pp. 1015-1073, pp.1060 et seq. and PONI, Annual Report, April 2002-March 2003, Section 1), the PONI itself has been criticised for not taking a tougher stance on the police use of batons in its report *A study of complaints involving the use of batons by the police in Northern Ireland*, March 2003. See Northern Ireland, Critique of Ombudsman’s report on Plastic Bullets- Pat Finucane Centre, at <http://www.statewatch.org/news/2002/may/16niplastic.htm>.

⁴⁰⁷ PONI, Annual Report, April 2002-March 2003, Section 1 and surveys published at www.policeombudsman.org.

⁴⁰⁸ See PONI, Press Release, A change of culture within PSNI, 16 March 2004.

⁴⁰⁹ Northern Ireland Human Rights Commission, *An Evaluation of Human Rights Training for Student Police Officers in the Police Service of Northern Ireland*, November 2002. This report and subsequent evaluations can be found at www.nihrc.org.

⁴¹⁰ See CAJ, *Commentary on the Northern Ireland Policing Board*, November 2003, pp.21 et seq.

⁴¹¹ See CAJ, Just News, July/August 2003, p.3.

⁴¹² See on CS Spray *ibid.*, pp.18, focusing mainly on the role of the Northern Ireland Policing Board and on the baton round report, *supra*.

⁴¹³ See the concerns referred to in this study. The performance of the PONI to date is currently being examined by the NGO CAJ.

⁴¹⁴ See PONI, Press Release, European Conference on Police Accountability, 5 November 2003.

VI. OVERALL FINDINGS

VI.1. Summary

The overall findings of this study indicate a multiplicity of standards. It is clear, therefore, that a broad *corpus juris* on the subject exists and that it is possible to determine, from international instruments and jurisprudence, the definition, scope and nature of the rights of victims. However, the abundant jurisprudence and international norms that form this *corpus juris* are extremely dispersed. Moreover, the international instruments base the issue of reparation and the right to an effective remedy on the inevitable specificity derived from the rights they protect (for example the right to life, the right to liberty and security, freedom from torture, freedom from slavery, etc). The legal framework therefore, is fragmented and not systematized. The sudden development and unprecedented nature of international human rights law, and its rapid expansion in recent years, has created an uneven proliferation of international complaints mechanisms and techniques that has produced a mixture of remedies.

VI.2. Gaps in the International Framework

Access to complaints mechanisms: The review of existing international standards reveals a number of shortcomings with regard to the substance of the right to complain. This concerns not only the contents of the right itself but also the practical implementation, i.e. what constitutes proper access to complaints mechanisms. Consequently, States are left with wide discretion and little guidance on what is meant by effective access to complaints procedures. As the survey of comparative practice reveals, this is a crucial area riddled with obstacles for victims. The practical implementation of the right of victims to complain would be enhanced if more specific international standards were developed. This applies in particular to detainees' access to satisfactory complaints procedures and external bodies, but also to specific obstacles faced by persons belonging to marginalised groups.

Right to protection: A further shortcoming concerns the rights of victims and witnesses to protection. While the right of victims to protection has been elaborated in detail in the context of international criminal law, these rights have not yet been fully integrated into human rights standards. In particular, it is not clear what kind of protection victims and witnesses are entitled to and what steps States are obliged to take in order to guarantee effective protection. Such standards could usefully address the reportedly widespread practice of police officers lodging counter-complaints and using other tactics of intimidation to deter complainants.

Impartiality of investigating body: Additionally, the impartiality of the investigating body is a primary contributing factor in the effectiveness of investigations. International standards are unequivocal in requiring investigations to be impartial, but the requirements for impartiality are unclear. Standards could usefully be clarified, by spelling out what degree of independence such impartiality entails in terms of legal basis, composition, mandate, powers and resources, and for example by drawing on the *Paris Principles* and other relevant sources.

What constitutes effective investigations: International courts and treaty bodies have regularly specified the measures investigators ought to have taken in a given case and how measures that were taken failed to comply with the duty to investigate.

As this has been done on a case-by-case basis, the jurisprudence gives no clear guidance on 'minimum requirements' for States when investigating torture. The *Istanbul Protocol* is to date the only instrument providing some guidance on the nature of investigations in torture cases. However, it is not binding nor is it accompanied by a monitoring body, and it does not appear to have been applied in State practice. This Protocol could, however, serve as a useful starting point for the Committee against Torture and other monitoring bodies in specifying what the obligation to carry out "effective" investigations entails.

The reasons for these shortcomings are not only that States have not agreed on more explicit international instruments, but also the approach taken by human rights courts and treaty bodies has been inadequate. The European Court of Human Rights and the Inter-American Court of Human Rights have dealt with the right to complain largely on a case-by-case basis without fully elaborating on the applicable standards. The Human Rights Committee and the Committee against Torture have equally not developed a set of standards in their views and recommendations as they have not dealt with the right to complain in a systematic fashion. While General comments 20 and 31 of the Human Rights Committee both touch on the need for effective investigations, they are not precise enough to guide States as to how to comply in practice.

The adoption of the *Istanbul Protocol*, the work on the draft *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*, as well as the emerging practice in international criminal law, all significantly contribute to the development and clarification of standards on the right to complain and the corresponding obligation to investigate. Nonetheless, the practice of international and regional human rights courts is somewhat disjointed, and existing standards are neither uniform nor self-evident, nor are they accessible. There is also a considerable regional difference. This multiplicity of standards offers insufficient guidance to States on practical measures they could take to enhance compliance, something which is clearly needed in light of their practice. The present challenge is therefore to elaborate existing standards in the core areas and spell them out clearly.

VI.3. Recommendations to Improve Complaints Procedures

i. Express policy to combat torture

Governments are encouraged to publicly stress their commitment to the eradication of torture and cruel, inhuman or degrading treatment or punishment. Furthermore, they are encouraged to foster public dialogue with a view to adopting and implementing a comprehensive and wide-ranging policy to combat the practice of torture and other forms of ill-treatment, and to end impunity for such crimes. Once adopted, such a policy should be well integrated into the culture of police and other law enforcement bodies, through thorough awareness-raising initiatives and regular training.

The heads of police and other law enforcement bodies should be required to regularly report to the Government on progress made in achieving the policy objectives, and/or to identify priority problem areas. Such reports should be available for public scrutiny. The data should include statistics on all complaints about torture and cruel, inhuman or degrading treatment or punishment, as well as other relevant statistical breakdowns, such as: sex, region, religious and/or ethnic affiliation, nature and date of the complaint. Furthermore, statistics should be gathered on the person(s) and/or units/forces said to

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be responsible, on reports of harassment or intimidation of complainants, on the outcome of investigations and on the implementation of recommendations where made. This data should be regularly analysed to establish patterns and, where possible, systemic causes of police misconduct, and to make complaints procedures more effective. The range of underlying factors that hinder investigations and prosecutions in torture cases must be systematically analysed by law enforcement agencies, prosecution services, the judiciary and the Government, as appropriate. In particular, efforts to foster the independence of the judiciary must be actively encouraged. Sufficient funds should be made available to enable qualitative collection, analysis and publication of data with a view to enhancing accountability and to instituting reforms where indicated.

While recognising that a comprehensive and effective policy to eradicate the practice of torture, end impunity for perpetrators, and provide adequate and enforceable remedies to victims requires a range of legislative, policy and institutional reforms that will depend in part on the particularities of the identified problem areas in each country, the following list of recommendations constitutes a priority list of first steps applicable in most, if not all country situations.

ii. Bring the legal framework into compliance with international standards

Torture and cruel, inhuman or degrading treatment or punishment should be prohibited by law and made a criminal offence in accordance with the definition set out in Article 1 of the Convention against Torture. The legal framework should ensure that complaints, investigations and any subsequent prosecution and punishment of perpetrator(s) adequately takes into account the heinous nature of the crime of torture and the impact it has on victims and communities. In order to ensure an end to impunity for torture and cruel, inhuman or degrading treatment or punishment, no legislation providing for amnesties or immunities for such crimes should be retained, regardless of the position of the perpetrators or the context in which the crimes were committed. Furthermore, in view of the specificity of the crime of torture and the difficulties faced by survivors in revealing what they have endured, statutes of limitation applicable to such crimes should be abolished.

The inalienable right of detainees of access to *habeas corpus* proceedings in order to challenge the legality of their detention must be safeguarded in practice. By law, judges should be obliged to adequately follow up on credible allegations of torture that are brought to their attention at whatever stage of the proceedings. This can include: ordering an immediate medical examination to safeguard physical evidence of torture; causing a criminal investigation to be opened by the competent law enforcement agencies or, if it is within their jurisdiction, instituting criminal proceedings directly. Where courts direct the opening of an investigation, they should have the capacity as of right to oversee the implementation of such orders, and the capacity to enforce their orders through contempt of court proceedings or other similar sanctions when their orders have not been respected.

Victims' access to the courts must be guaranteed in law and made feasible in practice.

iii. Adopt detailed procedural changes to strengthen the impartiality of complaints processes and enhance victims' access to these processes

The right to complain about torture and cruel, inhuman or degrading treatment should be expressly guaranteed by law. Governments and complaints authorities as appropriate, should undertake a review of all available complaints processes with a view to simplifying and systematising procedures for complainants. The procedures for lodging complaints should be easy to understand and follow and should be made accessible to victims and those that come into contact with them.

Direct and indirect victims should have standing to lodge complaints, but additionally, others, in particular nongovernmental organisations or other civil society representatives working directly with victims should have standing to lodge complaints regarding torture and other forms of ill-treatment in the public interest. Extending the right to complain to organisations working with victims removes one of the key motivations for threats and other pressure put on victims and their relatives.

Irrespective of any complaints, public officials, in particular police officers, should be obligated to report torture cases to the competent authorities, which in turn should be required to investigate *ex officio* any credible allegations of torture that come to their attention. The failure to report the criminal conduct of fellow police officers should constitute both a disciplinary and criminal offence. Special measures should be taken, such as developing or amending codes of conduct, training and provision of confidential call lines, to create a culture within law enforcement agencies that accepts and facilitates such internal complaints.

Clear and accessible rules and procedures for recording and processing complaints should be put in place, preferably through legislation. Ideally, all complaints should be recorded in a daily log with the process adequately supervised. Complaints regarding torture and cruel, inhuman or degrading treatment or punishment should be separately categorised in order to easily generate statistics for monitoring and follow-up.

Once a complaint regarding torture or cruel, inhuman or degrading treatment is made, and/or in the absence of a complaint, when the act is known of, the competent investigating officials should be obliged to open an investigation without delay, or to forward the complaint promptly to the competent authorities or investigators. The failure to do so should result in disciplinary and/or criminal sanction.

By law, complainants should be provided with a copy of their complaint together with a file reference number and should be kept regularly informed about the steps taken following its recording and follow-up. Complainants should be afforded the right to challenge the non-recording of complaints (as well as any further decisions not to open an investigation on the grounds that the complaint is ill-founded) before a higher authority and/or a court of law. In addition, complainants should be afforded the right to bring a private prosecution as an alternative to challenging a decision not to record or to discontinue the case.

Alleged perpetrator(s) of torture and cruel, inhuman or degrading treatment or punishment should be automatically suspended for the duration of the investigation unless the allegation is manifestly ill-founded.

iv. Assess the practical impediments in accessing complaints procedures

The local reality must dictate what will work and what will not – there is no unique answer to the protection of victims and the raising of awareness of all the issues involved. Consequently, it is recommended that Governments commission an independent and thorough review of complaints procedures, which would necessarily include the confidential interviewing of victims to understand more intimately the practical problems that they have faced at different stages of the procedures.

In order to ensure that victims are well apprised of their right to complain and the necessary procedural steps to initiate complaints, detailed and easy to understand information on the process must be disseminated to victims and those that are in contact with them. This could be achieved by developing outreach programmes, to the public in general and to potential victims groups, such as detainees.

In order to facilitate access to complaints procedures, complainants should be provided with a choice of the medium and location for lodging complaints, and those authorities or institutions that are competent to receive and investigate complaints should provide an environment that is conducive to overcoming the psychological barriers to the bringing of complaints. This would include an open-door policy, guarantees of confidentiality, ensuring that officers receiving the complaints adequately reflect gender and ethnic/religious minorities, establishment of victim support groups and counselling services. Officers receiving complaints should receive specialised training in dealing with trauma victims.

Specific measures need to be taken for groups of persons who traditionally encounter obstacles in accessing complaints procedures, such as marginalised communities and foreign nationals. Such measures can consist in specifically reaching out to these groups of persons through community groups or leaders, guaranteeing consular access, allowing complaints to be lodged in languages other than the national language, providing special assistance for lodging complaints and having liaison officers for specific community groups.

Detainees should be informed about their rights upon arrest, including the right to lodge complaints about any form of ill-treatment and the procedures to be followed. Moreover, detainees should have a right to be medically examined when entering and leaving detention facilities and during their detention, upon request. Such medical examination should be carried out by independent physicians or, where carried out by official doctors, should be undertaken out of sight of police officers in a confidential manner.

Detainees should not only have the right to complain to prison authorities at any time, however, in addition they need to be provided with the opportunity of lodging timely complaints to independent bodies without facing disadvantages for doing so. This requires regular and confidential channels of communication to outside bodies, i.e. independent visitors, national human rights institutions, oversight bodies, prosecution services or judges, and effective guarantees against adverse consequences for lodging complaints, such as protection provided by law and monitored by independent bodies. This should be complemented by internal complaint procedures that allow detainees instead to lodge complaints about forms of ill-treatment or other issues to higher ranking officials who are in turn responsible for investigating any such complaint and for taking effective action, not only with regard to the individual aspects of a case but also to addressing institutional shortcomings revealed by such complaints.

Victims of torture and witnesses should be provided with protection against harassment and ill-treatment by means of effective protection programmes. Such programmes should be based on legislation and be institutionalised rather than being set up on an *ad-hoc* basis. These measures should be complemented by legislation criminalising victim harassing, intimidation or bribery, and the bringing of unfounded, counter-accusations against complainants.

v. Create workable accountability structures

Governments are strongly encouraged to take concrete measures to address the real and/or perceived lack of independence and impartiality of investigating bodies vis-à-vis the alleged perpetrators.

This report has set out a number of concrete solutions that have been implemented in various contexts to enhance the impartiality of complaints processes. These include: training programmes, professional ethics codes, and resort to arm's length or independent (external) oversight bodies. In many cases, the use of arm's length or fully independent oversight bodies has significantly improved the accountability of police officers and other law enforcement personnel responsible for torture and other cruel, inhuman or degrading treatment or punishment. There are other instances, however, when the creation of a new institution to deal with the problem has merely shifted the problem.

Arm's length or independent (external) oversight bodies should therefore be provided with sufficient investigative and decision-making power, resources and safeguards to ensure their independence. They should be empowered either to issue recommendations for the competent authorities to bring prosecutions and/or disciplinary sanctions, or as appropriate, to charge the suspected perpetrator(s) directly. Where the body can only make recommendations, it should be mandated to undertake follow-up procedures to ensure implementation of its recommendations. Furthermore, arm's length or independent (external) oversight bodies should have the power to make recommendations regarding institutional reform with a view to addressing patterns of misconduct and improving existing complaints procedures.

vi. Address key problems in the investigation process

One of the key problems identified in this report is the lack of sufficient evidence to support allegations of torture and cruel, inhuman or degrading treatment or punishment. In order to address this deficiency, as a rule, any such allegation should be followed by a prompt medical examination, both for physical and psychological indicia of torture. Further investigations into the allegations must equally proceed without delay, including the questioning of the complainant, witnesses and the alleged perpetrator(s), inspection of the alleged scene of the crime and the checking of custody records. In death in custody cases or other instances where the victim has allegedly died as a result of torture or other forms of ill-treatment, it should be mandatory to carry out a post-mortem examination by an independent forensic expert.

The Istanbul Protocol provides helpful and practical standards to guide investigations into allegations of torture and ill-treatment and should be made widely available to investigators and medical experts.

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