

## SUBMISSION TO THE UN SPECIAL RAPPORTEUR ON TORTURE:

### The duty to investigate crimes of torture in national law and practice

25 November 2022

#### INTRODUCTION

1. This submission is based on REDRESS' experience combatting torture through strategic litigation and legal and policy advocacy, both internationally and in domestic jurisdictions around the world. It does not provide an exhaustive account of the challenges and impediments observed in REDRESS' work to date; rather, it focuses on issues which have arisen in our recent work.<sup>1</sup>
2. This submission responds to questions (i), (ii) and (vi) set out in the UN Special Rapporteur's questionnaire, and is structured as follows:
  - A. Inadequacies in **legal frameworks against torture**, including the failure to properly criminalise torture, and procedural barriers to accountability;
  - B. Obstacles to **national investigations and prosecutions of torture**, illustrated by the case of Sudan;
  - C. Specific challenges for the investigation of **discriminatory torture**, in particular, torture against LGBTIQ+ persons and Human Rights Defenders ("HRDs"); and
  - D. Opportunities to **strengthen mutual legal assistance** in the investigation and prosecution of torture as an international crime.

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<sup>1</sup> Key recent reports and briefings published by REDRESS and referred to in this response include: (i) REDRESS, *Unequal Justice: Accountability For Torture Against LGBTIQ+ Persons in Africa*, 2022, available at: <https://redress.org/publication/unequal-justice-accountability-for-torture-against-lgbtqi-persons-in-africa/>; (ii) Convention Against Torture Initiative (CTI) & REDRESS, *Anti-torture Standards in Common Law Africa: Good Practices and Way Forward*, 2022, available at: <https://redress.org/publication/anti-torture-standards-in-common-law-africa-good-practices-and-way-forward/>; (iii) REDRESS, *Torture-Tainted Trials in Sudan*, September 2022, available at: <https://redress.org/publication/torture-tainted-trials-in-sudan/>; and (iv) Center for Justice and International Law, *The Esperanza Protocol*, 2021, available at: <https://esperanzaprotocol.net/>. The States included in the first three reports are: Algeria, Angola, Botswana, The Democratic Republic of Congo, The Gambia, Ghana, Kenya, Malawi, Morocco, Mozambique, Nigeria, South Africa, Sudan, Uganda, and Zimbabwe.

## A. LEGAL FRAMEWORK

### Criminalisation and definition of torture

3. The absence of a specific offence of torture and/or inadequate definitions of torture in domestic law significantly hinder the investigation and prosecution of torture. While there is widespread ratification of the UN Convention against Torture (UNCAT), and States tend to provide for a constitutional prohibition of torture, only seven out of 15 African States recently studied by REDRESS criminalise torture as a separate offence, with two such States criminalising torture and ill-treatment together without differentiation.<sup>2</sup>
4. In jurisdictions where torture is not criminalised, acts amounting to torture are prosecuted through a variety of ordinary offences that criminalise bodily injury.<sup>3</sup> In addition, the absence of a gender perspective on torture and ill-treatment in the context of sexual and gender-based violence (SGBV) and LGBTIQ+ violence poses additional challenges, because such forms of violence are rarely characterised as torture or ill-treatment despite often meeting international definition standards.<sup>4</sup> SGBV offences disproportionately perpetrated against women also carry lower penalties in comparison to acts punishable as torture. Accordingly, though the possibility of investigating and prosecuting cases of torture under ordinary criminal offences may serve to avoid total impunity, this strategy fails to reflect the gravity of the crime of torture and ensure adequate penalties.
5. Where criminalised, definitions of torture enshrined in national legislation may still fall short of what is required under UNCAT.<sup>5</sup> Approaches also vary with regards to the modes of liability under which torture may be criminalised.<sup>6</sup> This makes effective investigation and prosecution very difficult.
6. See Annex I for extracts of Constitutional provisions for the prohibition of torture, and definitions of torture as set out in various researched States' national legislation.

### Amnesties, immunities, and limitation periods

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<sup>2</sup> See *Unequal Justice*, 2022, pp. 21 – 27. See also *Anti-Torture Laws in Common Law Africa*, 2022, pp. 10 – 18, 22 – 30. Countries which criminalise torture as a separate offence include Algeria, Angola, the DRC, Kenya, Morocco, Mozambique, Nigeria, South Africa, and Uganda. Countries which criminalise torture without differentiation from ill-treatment include Mozambique and Angola. Countries which have yet to criminalise torture or have only criminalised torture in limited contexts include Botswana, The Gambia, Ghana, Malawi, Sudan, and Zimbabwe. In respect of Gambia, we note that there is currently a Prevention and Prohibition of Torture Bill pending in Parliament. REDRESS can provide a copy of the Bill upon request.

<sup>3</sup> *Unequal Justice*, p. 21; *Anti-Torture Laws in Common Law Africa*, p. 23.

<sup>4</sup> *Anti-Torture Laws in Common Law Africa*, pp. 26 – 27.

<sup>5</sup> For example, Nigeria's definition of torture does not specify that pain or suffering must be "severe". With regards to the purposive element of the definition of torture, Nigeria seemingly conflates the purpose of "intimidation or coercion" with that of discrimination and Uganda does not include the discriminatory purpose. Angola and Mozambique criminalise torture and CIDTP together and make no reference to "public officials". Ghana and Sudan are yet to fully criminalise torture, and offences which refer to torture in these two States are limited in scope. Criminalisation of torture in Ghana is limited only to prison settings and in the context of domestic violence. In Sudan, torture is not substantively defined in the Criminal Law Act of 1991 and is only prohibited in relation to legal proceedings, though both psychological and physical torture are recognised as offences (see Article 115 of the Criminal Law Act as set out in Annex I). Elsewhere, the amended Criminal Procedure Act of 1991 explicitly prohibits the torture of an "accused person," but is only drafted as a "principle to be regarded" and not as a point of substantive law.

<sup>6</sup> For example, Uganda excludes criminalisation for attempts to commit torture, and Nigeria refers to *actual participation* in the infliction of torture or *being present during its commission* whilst holding liable, as accessories, commanding officers of the unit of the security or law enforcement agency for any act, omission, or negligence, on his part that may have led to the commission of torture by subordinates. For further details, see *Anti-Torture Laws in Common Law Africa*, p.30.

7. Investigations for torture are rendered ineffective where a prosecution is impossible due to amnesties or limitation periods, which still exist in the domestic laws of multiple States.<sup>7</sup> International law is very clear that such provisions violate the absolute prohibition of torture.<sup>8</sup> In the experience of REDRESS, many legal claims for torture are prevented by the application of such procedural bars.<sup>9</sup> Not all studied States have legislative provisions banning the application of statutes of limitation in relation to torture, and in the absence of specific legislation, general domestic provisions on statutes of limitation, which may provide for a limitation period of as low as two years, remain applicable to torture offences.<sup>10</sup> Given the complications of an investigation for torture, few cases will be completed in such a short period of time.

## B. OBSTACLES TO NATIONAL INVESTIGATIONS AND PROSECUTIONS

8. Even where countries have committed themselves to the criminalisation of torture, and at times have enacted important legislative changes, weak implementation and other practical challenges continue to impede effective national investigations and prosecutions. These include, but are not limited to:
  - a) *Lack of independent complaints and investigation mechanisms.*<sup>11</sup> All of the studied States have procedures in place to receive and investigate complaints against public officials, some including special oversight mechanisms mandated to receive and investigate allegations of human rights abuses. How these mechanisms operate in practice, however, is often unclear. Additional challenges include lack of independence, training, funding, and the difficulty for victims to access complaints mechanisms due to a lack of awareness of their rights, fear of reprisals, or other issues.<sup>12</sup>
  - b) *Lack of data.*<sup>13</sup> The absence of comprehensive, public, and accessible data regarding the number of complaints made, investigations conducted, recommendations for

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<sup>7</sup> As an example, Sudan not only grants immunity to government officials and law enforcement actors, but also affords higher-level officials' discretionary power to decide whether immunities should be waived or not, without judicial review. For example, Article 35 of Sudan's Criminal Procedure Act 1991 provides that no criminal suit shall be initiated against any person with procedural or substantive immunity, including in "offences relating to public servants." Article 52 of the National Security Act 2010 provides that members of the National Security Services for acts "done in good intention" while performing their official functions or duties. Similarly, Article 45(1) of the 2008 Police Forces Act provides that police are immune from criminal suit for acts committed during official duties, though such immunity can only be waived by the Minister of Interior. Similar provisions are included in Sudan's Armed Forces Act and other constitutive acts for Sudan's various paramilitary forces. For further examples of amnesties and immunities, see *Anti-Torture Laws in Common Law Africa*, pp. 74 – 76.

<sup>8</sup> For a summary of the relevant international law see REDRESS, Written Comments (third party) in *Mocanu v. Romania*, European Court of Human Rights (Grand Chamber), available at <https://redress.org/wp-content/uploads/2022/06/mocanu-ors-v-romania-redress.pdf> at para.30.

<sup>9</sup> For example, despite a finding of the European Court of Human Rights that Khaled el-Masri was subjected to torture in Skopje by the national authorities and a CIA rendition team, the perpetrators cannot be prosecuted as the limitation period has expired.

<sup>10</sup> Of the researched States, only Uganda has expressly banned the application of statutes of limitation in relation to torture. Other timeframes range from 3 years (Sudan), 6 years (Kenya), to 20 years (South Africa). For further details, see *Anti-Torture Laws in Common Law Africa*, p. 77.

<sup>11</sup> *Anti-Torture Laws in Common Law Africa*, pp. 64 – 69.

<sup>12</sup> For example, although Nigeria's National Committee on Torture, established in 2009, is considered a well-established independent monitoring mechanism, reports have noted challenges with its functioning, including a lack of independence, resources and inadequate recording of visits. NGOs have noted that "access to most detention facilities in Nigeria is still a big challenge, making monitoring of their activities practically impossible". For further details, see *Anti-Torture Laws in Common Law Africa*, p. 52.

<sup>13</sup> *Anti-Torture Laws in Common Law Africa*, p. 72.

prosecution of torture, actual prosecutions, and their outcomes limits efforts to analyse main areas of concern and develop targeted recommendations which could help governments overcome specific challenges.<sup>14</sup>

- c) *Lack of clear and adequate procedures or protocols into investigations.*<sup>15</sup> Many of the researched States lack specific protocols or guidelines on how authorities should effectively investigate instances of torture and ill-treatment. Some States have taken measures to make audio and video recordings of interviews a standard procedure and to provide training to law enforcement officials on effective interviewing techniques, but accusatory, coercive and confession-oriented proceedings remain common.<sup>16</sup> Investigations may also be hindered by the failure to adequately document torture resulting from lack of clear procedures, training, insufficient resources, and medical personnel.
9. The case study on Sudan set out below serves as a helpful illustration of how the various obstacles identified above may materialise on the ground within a specific national context.

#### **Case Study: Sudan**

10. Despite Sudan's ratification of UNCAT in August 2021, Sudan's laws do not unambiguously criminalise torture<sup>17</sup> or explicitly preclude the admissibility of confessions or other evidence obtained by torture.<sup>18</sup> Compounding these and other procedural shortcomings<sup>19</sup> is the difficulty faced by individuals seeking to instigate an investigation into alleged torture or ill-treatment.
11. In the context of judicial proceedings, judges have systematically ignored allegations raised by accused persons that they were forced to confess or otherwise subjected to torture. Defence lawyers told REDRESS that judges routinely tell them the only way to address the issue of "torture evidence" and/or the act of torture itself is to initiate separate proceedings against an alleged perpetrator(s) and not in an ongoing case against the defendant. For example, in a case concerning nine defendants from a Sudanese resistance committee accused of killing a paramilitary soldier in June 2019, lawyers alleged that confessions were extracted through torture; though the defendants were acquitted on other grounds after proceedings lasting nearly two years, the judge declined to address the allegations of torture. No investigations were conducted into the issue of torture-tainted evidence.<sup>20</sup>
12. In another similar case (recently brought to the attention of the Special Rapporteur on torture and Working Group on arbitrary detention in an urgent appeal), though a judge authorised a medical examination into defendants' allegations of torture, no such

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<sup>14</sup> Research by REDRESS, including interviews with stakeholders in the region.

<sup>15</sup> *Anti-Torture Laws in Common Law Africa*, pp. 48 – 51.

<sup>16</sup> For example, Ugandan police officers have been introduced to investigative interviewing using the PEACE method and are taking steps to move to audio and video recording of interviews of victims of violence and trauma. In South Africa, detailed instructions for interviewing persons in custody are included in a National Instruction, which specifies, amongst others, that if a system of electronic recording of interviews is available, then the system must be used. For further details, see *ibid.*

<sup>17</sup> See also FN5 above.

<sup>18</sup> REDRESS, *Torture-Tainted Trials in Sudan*, September 2022, available at <https://redress.org/publication/torture-tainted-trials-in-sudan/>

<sup>19</sup> These include inadequate safeguards for detained persons and limited judicial oversight over arrests and detentions. *Ibid.*

<sup>20</sup> *Ibid.*, p. 16.

examination was conducted, reportedly because a hospital team has not yet been established.<sup>21</sup>

13. Further, whether in the context of ongoing judicial proceedings or independently of a criminal prosecution, individuals seeking to initiate an investigation into torture must procure and complete a document known as “Form 8.”<sup>22</sup> Upon receipt of Form 8, either the police or Public Prosecution shall open an investigation where the information raises suspicion regarding the commission of torture.<sup>23</sup> However, because torture is not properly criminalised under Sudanese law, demonstrating the existence of a cognizable offence is often a challenge for individuals subjected to torture and/or ill-treatment.
14. Obtaining and completing Form 8 presents many challenges. The use of Form 8 itself is not explicitly mandated in Sudanese law, though “first information reports” for use by the police or Public Prosecution are set out in Sudan’s rules of criminal procedure. Form 8 is available at police stations or at some large hospitals which have internal police stations. Individuals who have suffered any kind of physical injury must independently obtain the form. In some cases, individuals are denied the form by police officers, while in other cases the cost of transport to a police station or hospital, or fees charged by hospitals upon entry, deter individuals from attempting to procure the form. Outside of the capital, access to Form 8 is significantly limited. A former Sudanese attorney general told REDRESS that in rural Sudan, doctors who do not have copies of the form itself will use blank pieces of paper as an alternative, which can then be rejected by courts. Stigma and a fear of reprisal from police also deters individuals from seeking Form 8, particularly in cases of SGBV.
15. Finding a doctor willing and able to complete the form can also be challenging, particularly in rural areas, where there is lack of qualified medical practitioners. In Khartoum, doctors are reluctant to complete Form 8 because they do not want to be called into court to testify—a common occurrence, despite a criminal circular which stipulates that such testimony is only required where the medical evidence is not clear.<sup>24</sup> The lack of training is a significant challenge.
16. Finally, because completed forms are typically returned to the police and not the Public Prosecution, doctors and lawyers have reported frequent cases of evidence tampering.
17. As this case study demonstrates, the barriers to an effective investigation of torture can stem from a constellation of different factors: (a) an inadequate legal framework which makes it difficult for prosecutors to take cognizance of an offence and/or fails to deter the use of torture by authorities; (b) a lack of judicial independence and/or training which results in the failure to authorise or enforce orders to conduct medical examinations; (c) unclear procedures for investigations into allegations of torture and accessibility issues which deter individuals from reporting; and (d) a lack of training for medical and other practitioners, resulting in weak evidence that is not sufficient for the prosecution of torture. Without an independent investigation mechanism, any evidence regarding torture or ill-treatment is also vulnerable to manipulation.

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<sup>21</sup> REDRESS, Sudanese Defenders Centre for Legal Aid, and the Missing Initiative, “UN Experts Urged to Intervene on Behalf of Eight Protestors Being Prosecuted in Case Marred by Torture and Fair Trial Violations,” November 2022, available at: <https://redress.org/news/un-experts-urged-to-intervene-on-behalf-of-eight-protestors-being-prosecuted-in-case-marred-by-torture-and-fair-trial-violations/>.

<sup>22</sup> REDRESS can provide a copy of Form 8 on request.

<sup>23</sup> Sudan Criminal Procedure Act 1991, articles 44 and 45.

<sup>24</sup> Criminal Circular No. 63, available at: <https://redress.org/wp-content/uploads/2022/11/Criminal-Circular-No.-63.pdf>.

- a) See Annex 2 for a flowchart summarising the process to initiate criminal investigations in Sudan.

### C. SPECIFIC CHALLENGES FOR THE INVESTIGATION OF DISCRIMINATORY TORTURE

#### Impunity for torture against LGBTIQ+ persons

18. Many of the challenges above disproportionately affect vulnerable individuals and groups. In the case of torture or ill-treatment against LGBTIQ+ persons, these challenges are compounded by numerous other factors, resulting in either no or severely limited investigations and prosecutions for LGBTIQ+ violence.<sup>25</sup>
- a) *Lack of the discriminatory purpose in national definitions of torture and of an understanding of violence against LGBTIQ+ persons as torture.*<sup>26</sup> The omission of a discriminatory element in national definitions of torture prevents forms of LGBTIQ+ violence from being prosecuted and dealt with as torture rather than minor or other ordinary offences.<sup>27</sup> Where national definitions of torture do enable the prosecution of acts of violence against LGBTIQ+ persons as torture, lack of sufficient training and understanding may still discourage authorities and courts from considering the root causes of such discriminatory violence. Accordingly, both domestic and international authorities, including regional human rights courts, must be encouraged to make assessments on discriminatory torture, particularly on the basis of gender identity and sexual orientation.<sup>28</sup>
- b) *Discriminatory laws against LGBTIQ+ persons.*<sup>29</sup> Discriminatory laws, including criminalisation of same-sex conduct or other behaviour linked to diverse sexual orientations or gender identities, legitimise and encourage direct and indirect discriminatory behaviour by State and non-State actors.<sup>30</sup> Recent years have seen a resurgence in legislation and legislative proposals in certain States targeting LGBTIQ+ individuals and groups.<sup>31</sup> These laws have a substantial impact on investigations into allegations of torture or ill-treatment by LGBTIQ+ persons, not only because victims fear stigmatisation and reprisals by State authorities, but also because complainants are themselves vulnerable to criminal investigation and prosecution based on their sexuality or gender identity.
19. Other political-cultural, societal and institutional issues which continue to pose significant practical challenges include:

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<sup>25</sup> For the purposes of Section III of this submission, references to studied or researched States refer to those States covered in the Unequal Justice Report.

<sup>26</sup> *Unequal Justice*, pp. 24 & 67; *Anti-Torture Standards in Common Law Africa*, p. 16.

<sup>27</sup> For example, the definition of torture in Nigeria conflates intimidation or coercion with discrimination of any kind. Uganda uses the expression “such purposes as” but does not reference discrimination at all. See *ibid*.

<sup>28</sup> Reluctance to make assessments on discriminatory torture extends beyond domestic borders. For example, in the European Court’s ruling in *Zontul v Greece*, 2012, the Court set out the argument of the Center for Justice and Accountability that a crime is aggravated if motivated by the sexuality of the victim but declined to rule on this point.

<sup>29</sup> *Unequal Justice*, 2022, pp. 48 & 56.

<sup>30</sup> For example, in Morocco, convictions “for homosexuality” can lead to reputational damage and harassment. Similarly, in Ghana, despite a lack of prosecutions or convictions for consensual same-sex sexual conduct, mob violence remains rampant. For further details, see REDRESS, *Unequal Justice Report*, 2022, pg. 61 – 62.

<sup>31</sup> For example, Ghana’s Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, amongst others, criminalises identifying as LGBTIQ+, “show of amorous relations” between LGBTIQ+ individuals, promotes conversion therapy and “gender realignment” for intersex children. Uganda’s Sexual Offences bill also allows for prosecution of consensual same-sex sexual acts even where performed outside of Uganda and forced HIV testing. For further details, see FN32.

- a) *Lack of political will.*<sup>32</sup> Discriminatory remarks against LGBTIQ+ persons are commonly made in public by political figures and/or featured in media outlets.<sup>33</sup> The effectiveness of protective laws is further stifled by the inadequacy and/or failure of State authorities to ensure accountability for violence committed against LGBTIQ+ individuals through their reluctance to document, investigate, and prosecute such incidents, or otherwise provide redress to victims.<sup>34</sup>
- b) *Lack of adequate protocols and training.*<sup>35</sup> States often lack clear protocols, proper training, and sensitisation on issues of torture and sexual orientation and gender identity to adequately address allegations of torture against LGBTIQ+ individuals. Consequently, authorities rarely assess whether violence was motivated by discrimination and often adopt inadequate forms of gathering evidence (including forced medical examinations, and discriminatory lines of enquiry when interviewing victims).<sup>36</sup> Actions such as court mandates requiring the adoption of binding protocols on effective investigations into LGBTIQ+ violence (see, for example, the Inter-American Court of Human Rights' judgement in *Azul v. Peru*)<sup>37</sup>, are an important step to reduce barriers to justice and accountability in cases of LGBTIQ+ violence.
- c) *Lack of protection for LGBTIQ+ victims and witnesses, including acts of State violence.*<sup>38</sup> In most States, LGBTIQ+ victims and witnesses are not afforded proper protection by the police. Victims are often discouraged from reporting crimes out of fear of prosecution or other reprisals, and face challenges in accessing health services. Practices such as beatings, rapes, and forced anal examinations continue to be used against LGBTIQ+ persons in police custody or in detention facilities, often with the purpose of obtaining 'evidence' to support prosecutions for criminal offences targeting LGBTIQ+ persons.<sup>39</sup>
- d) *Underreporting and lack of data.*<sup>40</sup> In many States, there is a significant lack of data and information about the violence facing the LGBTIQ+ community, which exacerbates difficulties in understanding the nature and scale of the problem, and compounds the challenges faced in investigating and adequately responding to it.<sup>41</sup>

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<sup>32</sup> *Unequal Justice*, pp. 10, 67 & 72.

<sup>33</sup> *Unequal Justice*, p. 62.

<sup>34</sup> For example, in Angola, police were found to have "failed to protect LGBTI people against homophobic violence and to hold the perpetrators accountable. The justice system has poor infrastructure and lacks adequately trained and qualified personnel, which resulted in cases taking a long time to finalise". This was also found to be the case in Kenya. For further details, see *Unequal Justice*, pp. 33 – 34.

<sup>35</sup> *Unequal Justice*, pp. 67 – 69.

<sup>36</sup> For example, in South Africa, Kenya and Ghana, persons who attempted to report incidents of violence to the police were subject to further abuse, including police harassing. In Algeria, Ghana and Morocco, victims felt unable to report crimes out of fear of being convicted for "public indecency"-like crimes and noted that "stigma, intimidation, and the negative attitude of police toward LGBTI persons were factors in preventing victims from reporting incidents of abuses". For further details, see *Unequal Justice*, pp. 70 – 71.

<sup>37</sup> Inter-American Court of Human Rights, *Caso Azul Rojas Marin Y Otra vs. Peru*, March 12, 2020.

<sup>38</sup> *Unequal Justice*, pp. 54 – 55 & 70 – 71.

<sup>39</sup> For example, in 2019, Human Rights Watch reported that in Uganda "the police carried out two mass arrests on spurious grounds, abused the detainees, and forced at least 16 to undergo anal examinations". See *ibid.*

<sup>40</sup> *Unequal Justice*, pp. 68 – 69.

<sup>41</sup> For example, Mozambique does not appear to have any official reports on State violence against LGBTIQ+ persons. Similarly, in Angola, there is no disaggregated data for crimes against, and victimisation of, individuals on the basis of sexual orientation and gender identity. See *ibid.*

- e) *Limitations on the operation of LGBTIQ+ organisations.*<sup>42</sup> LGBTIQ+ activists and civil society organisations working with the LGBTIQ+ community across many States face restrictions on their ability to organise, register, and otherwise function effectively. This significantly hinders accountability for LGBTIQ+ violence, limiting proper documentation of torture, and limiting representation and accompaniment of victims by NGOs.<sup>43</sup>

#### **Torture of HRDs: The Esperanza Protocol**

20. HRDs face particular challenges in seeking accountability for threats they have suffered. Impunity often leads to the perpetuation of threats, sometimes constituting torture and other violations. In a process led by the Center for Justice and International Law (CEJIL), REDRESS and other partners have worked toward the adoption of The Esperanza Protocol,<sup>44</sup> which provides guidelines on the effective investigation of threats faced by HRDs.
21. The Protocol: (i) underlines the individual and collective impact of threats on HRDs; (ii) serves as a guide for States to address impunity by improving legal standards and criminal policy measures to facilitate effective investigation and prosecution; (iii) encourages States to develop prevention policies; (iv) allows States to measure compliance with international obligations; and (v) establishes violations of international law when committed.
22. The Protocol highlights how the publication of further specific guidance and protocols on effective national investigations and prosecutions of torture may contribute decisively to making issues more visible, highlighting differentiated effects on victims with diverse identities, reiterating the importance of an intersectional approach to patterns of human rights violations, strengthening investigations, and promoting the adoption of reparation measures. Any such exercise may also serve to assist States with achieving certain standards of uniformity as to the robustness and effectiveness of their respective regulatory frameworks and help overcome a climate of impunity for torture violations.

#### **D. OPPORTUNITIES TO STRENGTHEN MUTUAL LEGAL ASSISTANCE IN THE INVESTIGATION OF TORTURE AS AN INTERNATIONAL CRIME**

23. REDRESS has been following the negotiation of a new treaty on Mutual Legal Assistance (MLA) on State cooperation in the fight against impunity for international crimes.<sup>45</sup>
24. In doing so, REDRESS and other NGOs have suggested that: (i) enforced disappearance and torture should be included as stand-alone crimes in Article 2 of the draft Treaty; and (ii) the Treaty's preamble should be amended to refer to the prohibition of

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<sup>42</sup> *Unequal Justice*, pp. 69 – 70.

<sup>43</sup> Examples of limitations which LGBTIQ+ organisations face on the ground include, for example, implementation of public morality laws (Algeria & Ghana), reported harassment and threats of imprisonment by government authorities and increase in number of arrests and detentions pending trial of journalists and activists (Algeria), obstacles in registering as civil society organisations (Malawi). See *ibid*.

<sup>44</sup> Center for Justice and International Law, The Esperanza Protocol, 2021, available at: <https://esperanzaprotocol.net/>.

<sup>45</sup> For further details, see: <https://www.centruminternationaalrecht.nl/mla-initiative>.

genocide, crimes against humanity, war crimes, torture, and enforced disappearance as peremptory norms of international law.<sup>46</sup>

25. Torture and enforced disappearance are currently included in Article 2 of the draft Treaty as elements of crimes against humanity and war crimes, and only mentioned as stand-alone crimes (and defined in accordance with UNCAT and the ICCPED) in the draft Treaty's optional Annex (Annexes F and G, respectively). The draft Treaty does not mention the *jus cogens* status of the norms enumerated in Article 2, and instead refers to those crimes as "among the most serious crimes of concern to the international community."
26. Despite its shortcomings, if adopted, the MLA treaty will be an important tool for national authorities to ensure proper cooperation in the investigation and prosecution of international crimes, including torture.

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<sup>46</sup> REDRESS et al., "Letter to the Core-Group and Co-Sponsoring States to the MLA Initiative", September 24, 2020, available at: <https://redress.org/publication/mla-initiative-joint-civil-society-letter/>.

## ANNEX 1: CONSTITUTIONAL PROHIBITIONS AND DEFINITIONS OF TORTURE IN NATIONAL LAWS

### Algeria

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#### [Constitution of Algeria](#), Art. 39:

The inviolability of the human being shall not be infringed. Any form of physical or moral violence or violation of dignity shall be prohibited and punishable by law. Torture or cruel, inhuman or degrading treatment, including human trafficking, shall be punishable by law.

#### [Penal Code](#), Art. 263bis:<sup>47</sup>

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for any purpose whatsoever.

### Angola

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#### [Constitution of Angola](#), Art. 36(3):

The right to physical freedom and individual security shall also involve: (a) the right not to be subjected to any form of violence by public or private entities; (b) the right not to be tortured or treated or punished in a cruel, inhumane or degrading manner; (c) the right to fully enjoy physical and mental integrity; (d) the right to protection and control over one's own body; (e) the right not to be submitted to medical or scientific experiments without prior informed and duly justified consent.

#### [Penal Code](#), Art. 320:

- 1) It is punished with sentence of imprisonment from 1 to 6 years, if a more serious sentence is not applicable by virtue of another criminal provision, who, having as their function the prevention, pursuit and investigation of offenses of any nature, the instruction of the respective processes, the execution of legally enforced criminal reactions or the protection, custody or surveillance of a person deprived of their liberty, perform acts of torture against him/her or any other person or subject him/her to cruel, inhuman or degrading treatment in order to: a) Obtain a confession from him/her or from a third party, information or testimony; b) To be punished for an act committed or allegedly committed by him/her or by a third party; c) To intimidate him/her or a third party.
- 2) For the purposes of the provisions of paragraph 1, an act of torture, cruel, inhuman or degrading treatment is understood to mean that which is deliberately inflicted on a person, causing him or her acute or intense physical or psychological pain or suffering or physical or intense psychic exhaustion, and, the use of chemical products, drugs or other means capable of disturbing or diminishing the capacity of determination or the free expression of will of the person subject to the custody or control of the agent.

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<sup>47</sup> This hyperlink is linked to the Algerian Penal Code in French. A copy in English could not be located. An approximate English translation of Art. 263bis is reproduced here.

## **Botswana**

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### [Constitution of Botswana, Art.7](#)

No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.

## **The DRC**

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### [Constitution of the DRC, Art. 61\(2\):](#)

In no case, even when the state of siege or the state of urgency has been proclaimed in accordance with Articles 85 and 86 of this Constitution, can there be derogation of the rights and fundamental principles enumerated as follows: (2) the prohibition of torture and of cruel, inhuman or degrading punishments or treatment.

### [Act No. 11/008, Article 48bis<sup>48</sup>:](#)

Any public servant, public official or person responsible for a public service, or anyone acting on their orders, at their instigation or with their express or tacit consent, who has intentionally inflicted severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, shall be punished by a term of imprisonment of 5 to 10 years and a fine of 5,000 to 100,000 Congolese francs. The perpetrator shall be punished by a term of imprisonment of 10 to 20 years and a fine of 100,000 to 200,000 Congolese francs if the acts referred to have caused the victim serious trauma or led to illness, a permanent incapacity to work or physical or psychological impairment, or if the victim is a pregnant woman, a minor, an elderly person or a person living with a disability.

A penalty of life imprisonment shall be imposed if the same acts have caused the death of the victim.

## **The Gambia**

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### [Constitution of The Gambia, Art. 21:](#)

No person shall be subject to torture or inhuman or degrading punishment or other treatment.

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<sup>48</sup> This hyperlink is linked to a report titled "Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure" published by the United Nations, Committee against Torture, dated September 11, 2017. The report contains the definition of torture as provided for in Art. 48bis of Act No. 11/008 of July 9, 2011, criminalising torture. A link to the Act itself could not be located.

## **Ghana**

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### [Constitution of Ghana, Art. 15\(2\):](#)

No person shall, whether or not he is arrested, restricted or retained, be subjected to – (a) torture or other cruel, inhuman or degrading treatment or punishment; (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being.

### [Constitution of Ghana, Art. 28\(3\):](#)

A child shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

## **Kenya**

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### [Constitution of Kenya, Art. 29:](#)

Every person has the right to freedom and security of the person, which includes the right not to be [...] (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; or (f) treated or punished in a cruel, inhuman and degrading manner.

### [Prevention of Torture Act, Art. 4:](#)

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person — (a) for the purposes of — (i) obtaining information or a confession from him or her or any other person; (ii) punishing him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or (iii) intimidating or coercing him or her or any other person to do, or to refrain from doing, anything; or (b) for any reason based on discrimination of any kind; when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public officer or a person acting on behalf of a public officer, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

## **Malawi**

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### [Constitution of Malawi, Art. 19\(3\)](#)

No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.

## **Morocco**

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### [Constitution of Morocco, Art. 22:](#)

The physical or moral integrity of anyone may not be infringed, in whatever circumstance that may be, and by any party that may be, public or private. No one may inflict on others, under whatever pretext there may be, cruel, inhuman, [or] degrading treatments or infringements of human dignity. The practice of torture, under any of its forms and by anyone, is a crime punishable by the law.

[Criminal Code, Art. 231-1:](#)<sup>49</sup>

For the purposes of this section, the term “torture” means any act which causes severe physical or mental pain or suffering, intentionally committed by or on behalf of a public official, instigated with his express or tacit consent, inflicted on a person for the purpose of intimidating, coercing, or pressuring him or a third person, to obtain information or indications or confessions, or to punish him for an act that he or a third person has committed or is suspected of having committed, or when such pain or suffering is inflicted for any other reason based on any form of discrimination. This term does not extend to pain or suffering resulting from legal sanctions or occasioned by these sanctions or which are inherent in them.

## **Mozambique**

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[Constitution of Mozambique, Art. 40:](#)

All citizens shall have the right to life and to physical and moral integrity, and they shall not be subjected to torture or to cruel or inhuman treatment. There shall be no death penalty in the Republic of Mozambique.

[Penal Code, Art. 194:](#)

- 1) Is punished with imprisonment from 2 to 8 years, if a more serious criminal provision does not fit, who, having the function of prevention, pursuit, investigation or knowledge of infringements criminal, administrative or disciplinary offenses, the execution of sanctions of the same nature or the protection, custody or surveillance of a detained or imprisoned person, practices torture or cruel, degrading or inhumane treatment to: a) obtain from him/her or another person a confession, testimony, statement or information; b) to punish him/her for an act committed or allegedly committed by him/her or by another person; or c) to intimidate him/her or another person.
- 2) The same penalty incurs whoever, on his own initiative or through higher order, usurp the function referred to in the previous paragraph to perform any of the acts described therein.
- 3) It is considered torture, cruel, degrading or inhumane, the act consisting of beatings, electroshocks, simulacra of execution or hallucinatory substances or the infliction of acute physical or psychological suffering, physical exhaustion or severe psychological damage or the use of chemicals, drugs or other means, natural or artificial, intended to disturb the capacity for determination or free expression victim's will.
- 4) If from the facts described in this article or in the previous article result in the victim's suicide or death, the agent is punished with prison term of 16 to 20 years.

## **Nigeria**

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[Constitution of Nigeria, Art. 34\(1\)\(a\):](#)

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<sup>49</sup> This hyperlink is linked to the Morocco Criminal Code in French. A copy in English could not be located. An approximate English translation of Art. 231-is reproduced here.

Every individual is entitled to respect for the dignity of his person, and accordingly – (a) no person shall be subject to torture or to inhuman or degrading treatment.

[Anti-Torture Act, Art. 2:](#)

Torture is deemed committed when an act by which pain or suffering, whether physical or mental, is intentionally inflicted on a person to – (a) obtain information or a confession from him or a third person; (b) punish him for an act he or a third person has committed or is suspected of having committed; or (c) intimidate or coerce him or a third person for any reason based on discrimination of any kind – when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity provided that it does not include pain or suffering in compliance with lawful sanctions.

## **South Africa**

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[Constitution of South Africa, Art. 12:](#)

Everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.

[Prevention of Combating and Torture of Persons Act, Art. 4\(3\):](#)

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person - (a) for such purposes as to – (i) obtain information or a confession from him or her or any other person; (ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or (iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or (b) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

## **Sudan**

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[Constitutional Document 2019, Art. 50:](#)<sup>50</sup>

No one may be subjected to torture or harsh, inhumane, or degrading treatment or punishment, or debasement of human dignity.

[Criminal Law Act, Art. 115:](#)

1. Whoever intentionally does any act which tends to influence the fairness of judicial proceedings, or any legal proceedings relating thereto, shall be punished, with imprisonment, for a term not exceeding three months, or with fine, or with both.

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<sup>50</sup> Post-coup political negotiations ongoing in Sudan may result in the amendment or replacement of the Constitutional Document 2019.

2. Every person who, having public authority, entices or threatens or tortures any witness or accused or opponent to give, or refrain from giving, any information in any action shall be punished, with imprisonment, for a term not exceeding three months, or with fine, or with both.

[Criminal Procedure Act, Art. 4\(d\) \(as amended by the Miscellaneous Amendments Law 2020\)](#):

It is prohibited to torture or assault the accused in any way and he should not be compelled to provide evidence against himself.

## **Uganda**

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[Constitution of Uganda, Art. 24](#):

No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.

[Prevention and Prohibition of Torture Act, Art. 2](#):

Torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official capacity or private capacity for such purposes as – (a) obtaining information or a confession from the person or any other person; (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.

## **Zimbabwe**

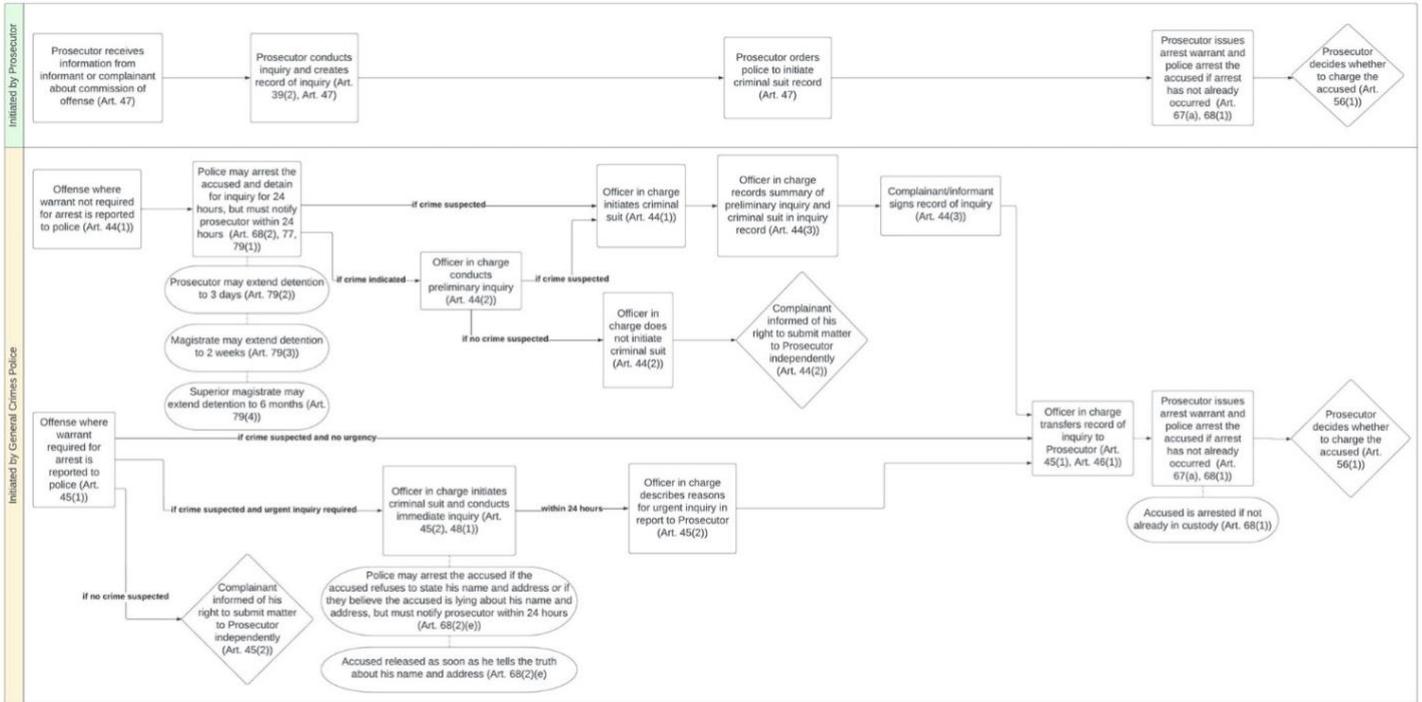
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[Constitution of Zimbabwe, Art. 53](#)

No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.

## ANNEX 2: CRIMINAL INVESTIGATIONS IN SUDAN FLOWCHART

### Process to Initiate Criminal Investigation



\*All police inquiries are conducted under "supervision and direction" of Prosecution Bureau and Minister of Justice has the right at any time to review the inquiry record and issue directives (Art. 39(1), Art. 55)