OXFORD COMMENTARIES ON INTERNATIONAL LAW

General Editors: *Professor Philip Alston*, Professor of International Law at New York University, and *Laurence Boisson de Chazournes*, Professor of Law at the University of Geneva

The United Nations Convention Against Torture and its Optional Protocol

The United Nations Convention Against Torture and its Optional Protocol

A Commentary

SECOND EDITION

Edited by

MANFRED NOWAK

MORITZ BIRK

GIULIANA MONINA

Published with the support of Austrian Science Fund (FWF): PUB 644-G

FWF Der Wissenschaftsfonds.

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© The Several Contributors 2019

The moral rights of the authors have been asserted

First Edition published in 2008
Second Edition published in 2019

Impression: 1

Some rights reserved. No part of this publication may be reproduced,
stored in a retrieval system, or transmitted, in any form or by any means,
for commercial purposes, without the prior permission in writing of
Oxford University Press, or as expressly permitted by law, by licence or
under terms agreed with the appropriate reprographics rights organization.



This is an open access publication, available online and distributed under the terms
of a Creative Commons Attribution – Non Commercial 4.0 International
licence (CC BY-NC 4.0), a copy of which is available at http://creativecommons.org/licenses/by-nc/4.0/.

Enquiries concerning reproduction outside the scope of this licence
should be sent to the Rights Department, Oxford University Press, at the address above.

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2019939192

ISBN 978–0–19–884617–8

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

Preface to the Second Revised Edition

The first edition to this Commentary was written during the early years of Manfred Nowak's term as UN Special Rapporteur on Torture, i.e. between 2004 and 2006. Thanks to the financial support of the Governments of Austria, Switzerland, Liechtenstein and Germany, he was able to establish an "anti-torture team" of highly skilled and dedicated researchers at the Ludwig Boltzmann Institute of Human Rights (BIM), which was founded by Manfred Nowak and Hannes Tretter in 1992 and directed by them jointly since then. Elizabeth McArthur was employed at the BIM as the lead researcher for the Commentary with funds provided by the Austrian Science Fund (FWF). The website www.atlas-of-torture.org was established to document and promote the work of the Special Rapporteur and observe the worldwide situation of torture and ill-treatment. In addition, Manfred Nowak had served since 2000 as head of a visiting commission to all places of police detention in Austria, established as part of the Human Rights Advisory Board in the Ministry of Interior. In this task, he was also supported by members of the "anti-torture team" at the BIM. These practical experiences and the theoretical research on the Commentary complemented each other in the most productive and fruitful manner. Besides Elizabeth McArthur also Julia Kozma, Roland Schmidt and Isabelle Tschan, who prepared and carried out many missions and reports of the Special Rapporteur, as well as Kerstin Buchinger participated in the academic research work for the Commentary. In other words, the first edition, although finally authored by Manfred Nowak and Elizabeth McArthur, was a joint product of many researchers and practitioners at BIM.

The mandate of Manfred Nowak as UN Special Rapporteur on Torture came to an end in October 2010. However, the torture-related work of the BIM continued. The "anti-torture team" had grown into the Department of "Human Dignity and Public Security" and is currently led by Moritz Birk, who was already part of the Special Rapporteur's team. The Special Rapporteur's work was followed up by a three-year project - financed by the European Union and in partnership with local civil society organisations - to assist a group of selected States (Moldova, Paraguay, Togo and Uruguay) in the implementation of the Special Rapporteur's recommendations. Manfred Nowak continued to serve as head of a visiting commission monitoring the Austrian police, which was in 2012 transferred to the Austrian Ombuds-Board, which assumed the function of National Preventive Mechanism (NPM) in accordance with OPCAT. The researchers at the BIM provided their services to two visiting commissions and thereby gained also significant experience with the practice of an NPM. The diverse experiences were used in a variety of other projects of applied research and practical assistance to States notably to support the establishment and functioning of NPMs. The different projects to fight torture and ill-treatment worldwide and promote human rights in the criminal justice system by the Department can be accessed on the Institutes' website: https://bim.lbg.ac.at/en/human-dignity-and-public-security.

When we decided, again upon request of Oxford University Press and with the generous financial support of the Austrian Science Fund (FWF), to prepare a second edition of the Commentary, it was clear that this would have to become a truly joint endeavour

of the "Human Dignity and Public Security" Department at the BIM, based upon our joint research and broad practical experience. Manfred Nowak, Moritz Birk and Giuliana Monina serve as joint editors, but the different Articles of the Convention against Torture (CAT) and its Optional Protocol (OPCAT) are written under the individual responsibility of a variety of highly experienced authors, who are either current or former staff of the Ludwig Boltzmann Institute of Human Rights: Moritz Birk, Giuliana Monina, Nora Katona, Margit Ammer, Kerstin Buchinger, Stephanie Krisper, Johanna Lober, Roland Schmidt, Andrea Schüchner, and Gerrit Zach.

The ten-year interval since the first edition has seen several important developments in the field. There has been a considerable change in the ratification status of both the Convention and its Optional Protocol, with 162 States having ratified the CAT and 88 States having ratified the OPCAT.

Since 2008, the *CAT Committee* has adopted three new General Comments; more than 200 new individual complaints covering all substantial articles; new rules of procedure as well as conducted four new inquiry procedures under Article 20 CAT (in Egypt, Lebanon, Nepal and Brazil). In the framework of the treaty body strengthening process, it has developed various measures aimed at improving the States parties' compliance with their Convention obligations, above a simplified reporting procedure to guide States parties in their reporting duties; a procedure on follow-up to concluding observations, individual complaints and inquiry procedure to better monitor the implementation of its recommendations; and a mechanism to prevent, monitor and follow-up cases of intimidations and reprisals against civil society organizations, human rights defenders, victims and witnesses that engage and cooperate with the Committee.

In relation to the *Optional Protocol*, the first edition of this Commentary was published at a time when the SPT was not yet operational, thus, it relied primarily on the practice of the European Committee for the Prevention of Torture (CPT). The second edition contains a detailed analysis of the initial ten years of work of the SPT taking into account the work of National Preventive Mechanisms (NPMs).

To reflect these changes and developments this edition has been substantially revised. As the earlier version, it attempts to be an in-depth analysis of all substantive, organizational and procedural provisions of the Convention against Torture and its Optional Protocol and wants to ensure that the Commentary continues to serve as a comprehensive guide for researchers and practitioners alike. For that purpose, it was attempted to make the manuscript more user friendly by modifying the original structure merging the practice of the Committee with the analysis of the issues of interpretation, thereby trying to avoid repetitions and providing a more concise analysis. The structural changes and the significant developments in the jurisprudence and practice of the two treaty bodies required considerable revision, re-organisation and expansion of many Articles. Other Articles, however, required only minor updates and build more strongly on the text of the first edition authored by Manfred Nowak and Elisabeth McArthur (ie Articles 8, 9, 10, 17, 18, 23-27, 29, and 31-33 CAT). Moreover, the second edition leaves untouched the thorough analysis of the *travaux préparatoires* of the Convention and its Optional Protocol in the Commission on Human Rights and its inter-sessional Working Group already drafted by the authors of the first edition.

We wish to express our sincere gratitude to many individuals who provided us with information and advice during our research work, above all *Patrice Gilbert* from the Office

of the United Nations High Commissioner for Human Rights in Geneva, *Jens Modvig,* Chair of the UN Committee against Torture and *Malcom Evans,* Chair of the SPT, as well as all the members of the Committee against Torture who participated in a side meeting during the 62nd session in Geneva in November 2017 to discuss key issue of interpretation with the editors. We also extend our gratitude to *Carin Benninger-Budel* (OMCT), *Barbara Bernath and Veronica Filippeschi* (APT), *Elina Steinerte* (Bristol University) and *Lutz Oette* (SOAS University of London) for providing valuable comments on the drafts.

We are also deeply indebted to numerous research fellows and interns who conducted research on specific questions of interpretation and contributed in a most professional manner to the preparation of the Commentary. In this context, special thanks go to *Elena Dietenberger* and *Miranda Merkviladze*. We are also grateful to *Laura Alberti, Samory Badona Monteiro, Aram Bajalan, Shimels S. Belete, Elisa Klein-Diaz, Nabila Ehrhardt, Katharina Heymann, Saskia Kaltenbrunner, Julia Kostal, Nicole Metz, Felix Steigmann*. Finally, we wish to express our gratitude to *Oxford University Press* and, especially *Natasha Flemming* and *Merel Alstein*, who have always encouraged and patiently cooperated with us throughout the whole period, the *Ludwig Boltzmann Institute of Human Rights in Vienna*, home to fruitful exchanges and discussions that have ultimately flew into the pages of this Commentary and the *FWF Austrian Science Fund* whose generous support only made this publication possible.

The practice of the CAT Committee and the SPT was taken into account until 31 March 2017. Other key developments, such as the General Comment No. 4 adopted by the CAT Committee at the 62nd session from November/December 2017, have been taken into account by the authors up until the end of December 2017.

The first edition of this Commentary was written in the middle of the so-called "war on terror", which had seriously undermined the universal consensus on the absolute prohibition of torture and other forms of ill-treatment. The "war on terror" seems to be over, but the practice of torture, cruel, inhuman or degrading treatment or punishment has certainly not improved since then. When he finished his activities as UN Special Rapporteur on Torture, which had included 18 official fact-finding missions to countries in all world regions, three joint investigations with other special procedures of the UN Human Rights Council and comprehensive research, Manfred Nowak concluded that torture is occurring in more than 90% of all States, is practiced routinely in more than 50% of all States and systematically in roughly 10%. In addition, he identified a global prison crisis and inhuman conditions of detention in the majority of States in all world regions.[1] The reports of his two successors in this mandate, Juan Mendez and Nils Melzer, show that the situation is unfortunately not improving. On the contrary, the erosion of the universal consensus on the absolute prohibition of torture has reached such an alarming level that persons have recently been elected as Presidents of powerful States in both the Global North and the Global South, who openly advocate torture. This illustrates that we would need a radical change in world politics if we wish to achieve the ultimate goal of eradicating the practice of torture, preventing the risk of torture and improving conditions of detention. We hope that this second edition of our Commentary

[1] See the final study of the Special Rapporteur on Torture and his report to the UN Human Rights Council in UN Doc. A/HRC/13/39 and Add. 5 of 9 February 2010. See also Manfred Nowak, Torture – An Expert's Confrontation with an Everyday Evil, University of Pennsylvania Press, Philadelphia 2018.

on CAT and OPCAT may remind States of their legally binding obligations and provide useful insights on the measures that need to be taken to provide future generation with the right to live in freedom from fear, torture and similar forms of State violence.

Manfred Nowak, Moritz Birk and Giuliana Monina
Vienna, June 2018

Table of Contents

Preface to the Second Revised Editon v
Table of Cases xv
International Instruments xxxi
List of Contributors xlv
List of Abbreviations xlvii

Introduction 1

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 13

Preamble 15

PART I: SUBSTANTIVE ARTICLES 21

Article 1. Definition of Torture (Gerrit Zach) 23
Article 2. Obligation to Prevent Torture (Gerrit Zach) 72
Article 3. Principle of Non-Refoulement (Margit Ammer and Andrea Schuechner) 98
Article 4. Obligation to Criminalize Torture (Nóra Katona) 176
Article 5. Types of Jurisdiction over the Offence of Torture (Roland Schmidt) 194
Article 6. Procedural Safeguards During the Preliminary Investigation Phase (Roland Schmidt) 249
Article 7. Aut Dedere aut Judicare (Roland Schmidt) 267
Article 8. The Convention as a Basis for Extradition (Roland Schmidt) 292
Article 9. Mutual Judicial Assistance (Roland Schmidt) 302
Article 10. Training of Personnel (Giuliana Monina) 309
Article 11. Review of Detention and Interrogation Rules (Giuliana Monina) 318
Article 12. *Ex Officio* Investigations (Moritz Birk) 336
Article 13. Right of Victims to Complain (Moritz Birk) 357
Article 14. Right of Torture Victims to Adequate Remedy and Reparation (Johanna Lober and Andrea Schuechner) 370
Article 15. Non-Admissibility of Evidence Obtained by Torture (Giuliana Monina) 417

Article 16. Cruel, Inhuman or Degrading Treatment or Punishment (Gerrit Zach and Moritz Birk) 441

PART II: PROCEDURAL ARTICLES 473

Article 17. Committee against Torture (Giuliana Monina) 475
Article 18. Rules of Procedure (Giuliana Monina) 496
Article 19. State Reporting Procedure (Giuliana Monina) 507
Article 20. Inquiry Procedure (Giuliana Monina) 540
Article 21. Inter-State Communications (Giuliana Monina) 567
Article 22. Individual Complaints Procedure (Giuliana Monina) 582
Article 23. Privileges and Immunities (Giuliana Monina) 638
Article 24. Annual Report (Giuliana Monina) 642

PART III: FINAL CLAUSES 649

Article 25. Signature and Ratification (Giuliana Monina) 651
Article 26. Accession and Succession (Giuliana Monina) 655
Article 27. Entry into Force (Giuliana Monina) 663
Article 28. Opting Out of the Inquiry Procedure (Giuliana Monina) 667
Article 29. Amendment (Giuliana Monina) 673
Article 30. Settlement of Disputes (Giuliana Monina) 679
Article 31. Denunciation (Giuliana Monina) 691
Article 32. Notification by the Secretary-General (Giuliana Monina) 695
Article 33. Authentic Texts (Giuliana Monina) 698

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 701

Preamble (Stephanie Krisper) 703

PART I: GENERAL PRINCIPLES 713

Article 1. System of Preventive Visits to Places of Detention (Stephanie Krisper) 715
Article 2. Establishment of a UN Subcommittee on Prevention (Kerstin Buchinger) 726
Article 3. National Preventive Mechanism (Stephanie Krisper) 735
Article 4. Obligation to Allow Preventive Visits to All Places of Detention (Stephanie Krisper) 739

PART II: SUBCOMMITTEE ON PREVENTION 753

Article 5. Size and Composition of the Subcommittee on Prevention (Kerstin Buchinger) 755
Article 6. Nomination of Subcommittee Members (Kerstin Buchinger) 766
Article 7. Election of the Subcommittee (Kerstin Buchinger) 773
Article 8. Filling of Vacancies (Kerstin Buchinger) 782
Article 9. Term of Office (Kerstin Buchinger) 786
Article 10. Rules of Procedures (Kerstin Buchinger) 792

PART III: MANDATE OF THE SUBCOMMITTEE ON PREVENTION 801

Article 11. Mandate of the Subcommittee (Kerstin Buchinger) 803
Article 12. Obligations of States Parties to Cooperate with the Subcommittee (Kerstin Buchinger) 820
Article 13. Obligations of the Subcommittee Concerning Country Missions (Kerstin Buchinger) 834
Article 14. Obligation of States Parties to Facilitate Visits by the Subcommittee to Places of Detention (Kerstin Buchinger) 848
Article 15. Prohibition of Sanctions against any Source of Information of the Subcommittee (Kerstin Buchinger) 861
Article 16. Reports of the Subcommittee (Kerstin Buchinger) 867

PART IV: NATIONAL PREVENTIVE MECHANISMS 879

Article 17. Establishment of National Preventive Mechanisms (Stephanie Krisper) 881
Article 18. Independence, Pluralism, and Efficiency of National Preventive Mechanisms (Stephanie Krisper) 890
Article 19. Mandate and Power of National Preventive Mechanisms (Stephanie Krisper) 911
Article 20. Obligations of States Parties to Facilitate Visits by the National Preventive Mechanisms (Stephanie Krisper) 921
Article 21. Prohibition of Sanctions against any Source of Information of the NPM (Stephanie Krisper) 938
Article 22. Obligation of States Parties to Examine the Recommendations of National Preventive Mechanisms (Stephanie Krisper) 944

Article 23. Annual Reports of the National Preventive Mechanisms (Stephanie Krisper) 951

PART V: DECLARATION 955

Article 24. Temporary Opting-Out Declaration (Kerstin Buchinger) 957

PART VI: FINANCIAL PROVISIONS 963

Article 25. Financing of the Subcommittee (Kerstin Buchinger) 965
Article 26. Special Fund (Kerstin Buchinger) 973

PART VII: FINAL PROVISIONS 981

Article 27. Signature, Ratification, and Accession (Stephanie Krisper) 983
Article 28. Entry into Force (Stephanie Krisper) 988
Article 29. Validity in Federal States (Stephanie Krisper) 993
Article 30. Prohibition of Reservations (Stephanie Krisper) 997
Article 31. Relation to Regional Systems of Preventive Visits to Places of Detention (Stephanie Krisper) 1001
Article 32. Relation to the International Committee of the Red Cross (Stephanie Krisper) 1007
Article 33. Denunciation (Kerstin Buchinger) 1011
Article 34. Amendments (Stephanie Krisper) 1016
Article 35. Privileges and Immunities (Stephanie Krisper) 1020
Article 36. Obligations of Members of the Subcommittee during Country Missions (Kerstin Buchinger) 1026
Article 37. Authentic Texts (Stephanie Krisper) 1031

APPENDICES 1033

A. Texts relating to the Convention Against Torture 1035
1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1035
2. Selected Draft Convention Texts 1045
3. Status of Ratification of the Convention and Acceptance of Optional Procedures as of 31 December 2017 1060
4. Reservations, Declarations, Notifications, and Objections Relating to the Convention 1072
5. Rules of Procedure 1149
6. Members of the Committee since 1988 as of 31 December 2017 1178
7a. Article 3—Table 1: Article 3 Decisions Broken Down by State Party (Host Country) as of 31 March 2017 1181

7b. Article 3—Figure 1: Share of Article 3 Cases Submitted to the Committee in Comparison with Other Articles of the Convention, as of 31 March 2017 1182
7c. Article 3—Figure 2: Share of Admissibility Decisions and Decisions on the Merits in relation to Article 3 CAT 1183
7d. Article 3—Figure 3: Main Receiving Countries relating to Violations of Article 3 1184
B. Texts relating to the Optional Protocol 1185
1. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1185
2. Selected Draft Optional Protocol Texts 1195
3. Status of Ratification of the Optional Protocol as of 31 December 2017 1231
4. Rules of Procedure 1234
5. Members of the Subcommittee since 2007 as of 31 December 2017 1242

Bibliography 1245
Index 1271

Table of Cases

UNITED NATIONS TREATY BODIES

United Nations Committee against Torture (CAT Committee)

A. v Canada, No 583/2014, UN Doc CAT/C/57/D/583/2014, 9 May 2016. . . . . 118, 166, 609
A v The Netherlands, No 91/1997, UN Doc CAT/C/21/D/91/1997,
13 November 1998. . . . . 147, 149, 166, 173
AA et al v Switzerland, No 285/2006, UN Doc CAT/C/41/D/285/2006,
10 November 2008 . . . . . 133, 148, 165
AA v Azerbaijan, No 247/2004, UN Doc CAT/C/35/D/247/2004, 25 November 2005 605
AA v Denmark, No 412/2010, UN Doc CAT/C/49/D/412/2010, 13 November 2012. . . . 343, 453, 459–60
AA v Switzerland, No 268/2005, UN Doc CAT/C/38/D/268/2005,
1 May 2007 . . . . . 129, 130, 140, 147, 149
AAC v Sweden, No 227/2003, UN Doc CAT/C/37/D/227/2003, 16 November 2006. . . . . 147, 150, 614
AAM v Sweden, No 413/2010, UN Doc CAT/C/48/D/413/2010, 23 May 2012 . . . . . 134, 140, 146, 167
8v Sweden, No 539/2013, UN Doc CAT/C/54/D/539/2013, 11 May 2015 . . . . . .147, 148, 167
Abdelli v Tunisia, No 188/2001, UN Doc CAT/C/31/D/188/2001, 14 November 2002 . . . . . .191, 192,
361, 362, 392, 596, 613, 615, 627
Abdulrahman Kabura v Burundi, [2017] CAT No 549/2013, UN Doc CAT/C/59/D/549/2013 . . .79, 84,
321, 322, 323, 328, 358, 392, 431, 451
Abed Azizi v Switzerland, No 492/2012, UN Doc CAT/C/53/D/492/2012,
27 November 2014. . . . . 131, 138, 145
ABGAB v Switzerland, No 440/ 2010, UN Doc CAT/ C/ 54/ D/ 440/2010, 4 May 2015 . . . . . 146, 168
Abichou (Inass) v Germany, No 430/2010, UN Doc CAT/C/50/D/430/2010, 21 May 2013. 115,
120–1, 134, 137, 158, 603
Abolghasem Faragollah et al v Switzerland, No 381/2009, UN Doc CAT/C/47/D/381/2009,
21 November 2011. . . . . 134, 138, 139, 141, 146, 147, 149, 151, 152, 174
AD v Netherlands, No 96/1997, UN Doc CAT/C/23/D/96/1997, 12 November 1999. 157
Adel Tebourski v France, No 300/2006 *see* Tebourski v France, No 300/2006
AE v Switzerland, No 24/1995, UN Doc CAT/C/14/D/24/1995, 2 May 1995. . . . . .611, 615
AEM and CBL v Spain, No 10/1993, UN Doc CAT/C/13/D/10/1993, 14 November 1994 . . . . . 603, 616
Aemei (Seid Mortesa) v Switzerland, No 34/1995, UN Doc CAT/C/18/D/94/1997,
19 May 1998 . . . . . 99, 114, 126, 133, 146, 151, 157, 172, 173, 621, 629
AF v Sweden, No 89/1997, UN Doc CAT/C/20/D/89/1997, 8 May 1998 . . . .146, 147, 150, 151, 167, 174
AG v Sweden, No 140/1999, UN Doc CAT/C/24/D/140/1999, 2 May 2000. 603
Agiza v Sweden, No 233/2003, UN Doc CAT/C/34/D/233/2003, 20 May 2005 . . . . . .115, 122, 123,
135, 136–7, 144, 161, 162, 174, 596, 614, 621, 624, 630, 633
AH v Sweden, No 250/2004, UN Doc CAT/C/35/D/250/2004, 15 November 2005 . . . . . .604, 607,
608, 609, 610, 620
AH v Sweden, No 265/2005, UN Doc CAT/C/37/D/265/2005, 16 November 2006. . . . . 164, 614, 630
AI v Switzerland, No 182/2001, UN Doc CAT/C/32/D/182/2001, 12 May 2004. 173
Alan v Switzerland, No 21/1995, UN Doc CAT/C/16/D/21/1995, 8 May 1996. . . . . .99, 138, 144,
147, 149, 151, 154, 157, 166, 167, 173
Alexander Gerasimov v Kazakhstan, No 433/2010 *see* Gerasimov (Alexander) v Kazakhstan,
No 433/2010
Alexey Kalinichenko v Morocco, No 428/2010, UN Doc CAT/C/47/D/428/2010,
25 November 2011. . . . . 114, 134, 140, 159, 175
Ali Aarrass v Morocco, No 477/2011, UN Doc CAT/C/52/D/477/2011, 19 May 2014 . . . . . 84, 322,
325, 326, 346, 351, 353, 358, 431, 432, 602, 634
Ali Ben Salem v Tunisia, No 269/2005, UN Doc CAT/C/39/D/269/2005,
7 November 2007 . . . . . 48, 63, 80, 322, 346, 392, 596, 613
AK v Australia, No 148/1999, UN Doc CAT/C/32/D/148/1999, 5 May 2004. . . . . 166, 171

AM v France, No 302/2006, UN Doc CAT/C/44/D/302/2006, 5 May 2010 . . . . 134, 140, 165, 169, 596
AMA v Switzerland, No 344/2008, UN Doc CAT/C/45/D/344/2008,
12 November 2010. . . . . 134, 140, 165, 166, 167
AR v Sweden, No 170/2001, UN Doc CAT/C/27/D/170/2001, 23 November 2001 . . . . . 608, 609, 614
AR v The Netherlands, No 203/2002, UN Doc CAT/C/31/D/203/2002, 14 November 2003 . . . 133, 148, 165
ARA v Sweden, No 305/2006, UN Doc CAT/C/38/D/305/2006, 30 April 2007 605
Arana (Josu Arkauz) v France, No 63/1997, UN Doc CAT/C/23/D/63/1997,
9 November 1999 . . . . . 140, 143, 173, 174, 612, 622, 628, 629, 632, 636
AS v Sweden, No 149/1999, UN Doc CAT/C/25/D/149/1999, 24 November 2000. . . . . 126, 130, 166, 167, 168, 170, 173, 174, 617
Asfari (Ennaâma) v Morocco, No 606/2014, UN Doc CAT/C/59/D/606/2014, 15 November 2016. . . . 79, 346, 368, 368, 393, 426, 431, 432, 451
Asghar Tahmuresi v Switzerland, No 489/2012, UN Doc CAT/C/53/D/489/2012,
26 November 2014. 138
Attia (Hanan Ahmed Fouad Abd El Khalek) v Sweden, No 199/2002, UN Doc
CAT/C/31/D/199/2002, 17 November 2003. . . . . 134, 136, 137, 151, 161

Bakatu-Bia (Sylvie) v Sweden, No 379/2009, UN Doc CAT/C/46/D/379/2009, 3 June 2011 . . . . 61, 132, 134, 140, 141, 151, 153, 166, 174, 423
BM'B v Tunisia, No 14/1994, UN Doc CAT/C/14/D/14/1994, 5 May 1994 . . . . . 382, 626
Blanco Abad v Spain, No 59/ 1996, UN Doc CAT/ C/ 20/ D/ 59/ 1996,
14 May 1998 . . . . . 341, 342, 343, 344, 345, 346, 347, 349, 351, 361, 365, 367, 431, 614
BMS v Sweden, 437/2010, UN Doc CAT/C/49/D/437/2010, 12 November 2012 615
BS v Canada, No 166/2000, UN Doc CAT/C/27/D/166/2000, 14 November 2001 . . . . . 127, 128, 448, 599, 600, 608
BSS v Canada, No 183/2001, UN Doc CAT/C/32/D/183/2001, 12 May 2004. . . . . 148, 154, 448, 597, 598
Bachan Singh Sogi v Canada, No 297/2006, UN Doc CAT/C/39/D/297/2006,
16 November 2007 . . . . . 114, 115, 133, 137, 172, 174, 448, 622
Besim Osmani v Republic of Serbia, No 261/2005, UN Doc CAT/C/42/D/261/2005,
8 May 2009 . . . . . 349, 449, 450, 607, 636
Boniface Ntikarahera v Burundi, No 503/2012, UN Doc CAT/C/52/D/503/2012,
12 May 2014 . . . . . 48, 63, 80, 84, 322, 328, 346, 393, 451, 636
Brada (Mafhoud) v France, No 195/2002, UN Doc CAT/C/34/D/195/2002,
17 May 2005 . . . . . 135, 137, 171, 174, 612, 621–2, 632

CARM et al v Canada, No 298/2006, UN Doc CAT/C/38/D/298/2006, 18 May 2007 . . . . 140, 165, 613
Cecilia Rosana Núñez Chipana v Venezuela, No 110/1998, UN Doc CAT/C/21/D/110/1998,
10 November 1998. . . . . 173, 621
CM v Switzerland, No 355/2008, UN Doc CAT/C/44/D/355/2008, 14 May 2010. . . . 134, 149, 165, 611
Combey Brice Magloire Gbadjavi v Switzerland, No 396/2009, UN Doc CAT/C/48/D/396/2009,
1 June 2012 . . . . . 134, 144, 145, 150, 169, 173, 174
CT and KM v Sweden, No 279/2005, UN Doc CAT/C/37/D/279/2005, 17 November 2006 . . . . . 48, 51, 133, 140, 141, 147, 148 165, 166, 167

Dadar (Mostafa) v Canada, No 258/2004, UN Doc CAT/C/35/D/258/2004,
23 November 2005 . . . . . 51, 114, 133, 142, 147, 148, 165, 172
Danilo Dimitrijevic v Serbia and Montenegro, No 172/2000, UN Doc CAT/C/35/D/172/2000,
16 November 2005 . . . . . 353, 367, 392, 613, 614, 628, 635, 661
DIS v Hungary, No 671/2015, UN Doc CAT/C/56/D/671/2015, 8 December 2015 . . . . . 605, 622, 623
Déogratias Niyonzima v Burundi, No 514/2012, UN Doc CAT/C/53/D/514/2012,
21 November 2014. . . . . 45, 63, 80, 84, 321, 322, 323, 328, 346, 358, 368, 390, 393, 431, 432, 451, 602, 603, 613
Diory Barry v Morocco, No 372/2009, UN Doc CAT/C/52/D/372/2009, 19 May 2014. . . . 450, 468, 609
Djamila Bendib v Algeria, No 376/2009, UN Doc CAT/C/51/D/376/2009,
8 November 2013. . . . . 63, 80, 84, 322, 323, 346, 358, 364, 382–3, 384, 393, 413, 602
DM v Australia, No 595/2014, UN Doc CAT/C/58/D/595/2014, 8 August 2016 . . . . . 118, 140, 149, 152, 167, 171, 172
Dmytro Slyusar v Ukraine, No 353/2008, UN Doc CAT/C/47/D/353/2008,
14 November 2011 . . . . . 63, 80, 84, 346, 392

Dragan Dimitrijevic v Serbia and Montenegro, No 207/2002, UN Doc CAT/C/33/D/207/2002, 24 November 2004 . . . . . 353, 367, 392, 445, 613, 614, 628–9, 633, 661
Dzemajl (Hajrizi) et al v Yugoslavia, No 161/2000, UN Doc CAT/C/29/D/161/2000, 21 November 2002 . . . . . 353, 367, 386, 387, 449, 450, 470, 615, 630, 661

EA v Switzerland, No 28/1995, UN Doc CAT/C/19/D/28/1995, 10 November 1997 . . . . . 133, 165
ECB v Switzerland, No 369/2008, UN Doc CAT/C/46/D/369/2008, 26 May 2011 . . . . . 126, 134, 140, 150, 165, 166, 172
EE v Russian Federation, No 479/2011, UN Doc CAT/C/50/D/479/2011, 24 May 2013 . . . . . 603, 604
EEE v Switzerland, No 491/2012, UN Doc CAT/C/54/D/491/2012, 8 May 2015. . . . . 147, 148, 169
EJ et al v Sweden, No 306/2006, UN Doc CAT/C/41/D/306/2006, 14 November 2008. . . 133, 140, 150
EJVM v Sweden, No 213/2002, UN Doc CAT/C/31/D/213/2002, 14 November 2003 . . . . . 138, 151
EKW v Finland, No 490/2012, UN Doc CAT/C/54/D/490/2012, 4 May 2015. . . . 61, 132, 143, 151, 153
EL v Canada, No 370/2009, UN Doc CAT/C/48/D/370/2009, 21 May 2012. . . . 115, 134, 140, 147, 172
EL v Switzerland, No 351/2008, UN Doc CAT/C/47/D/351/2008, 15 November 2011 . . . 134, 140, 167
El Rgeig (Gamal) v Switzerland, No 280/2005, UN Doc CAT/C/37/D/280/2005, 15 November 2006 . . . . . 133, 134, 142, 149, 165, 169
Elif Pelit v Azerbaijan, No 281/2005, UN Doc CAT/C/38/D/281/2005, 1 May 2007. . . . . 141, 152, 159, 160, 161, 174–5, 621, 629, 630
EN v Burundi, No 578/2013, UN Doc CAT/C/56/D/578/2013, 25 November 2015 . . . . . 45, 53, 56, 60, 63, 80, 84, 86, 321, 322, 346, 358, 392, 409
Encarnación Blanco Abad v Spain, No 59/ 1996 *see* Blanco Abad v Spain, No 59/1996
Ennaâma Asfari v Morocco see Asfari (Ennaâma) v Morocco, No 606/2014
Enrique Falcon Ríos v Canada, No 133/1999 *see* Falcon Ríos (Enrique) v Canada, No 133/1999
EO Akhidenor et al v Canada, No 67/1997, UN Doc CAT/C/21/D/67/1997, 17 November 1998 . . . . . 382, 613
ERK and YK v Sweden, Nos 270 & 271/2005, UN Doc CAT/C/38/D/270&271/2005, 30 April 2007. . . . . 133, 140, 630
ES v Australia, No 652/2015, UN Doc CAT/C/59/D/652/2015, 6 December 2016 . . . . . 118, 140, 167, 171, 172, 600
ET v Switzerland, No 393/2009, UN Doc CAT/C/48/D/393/2009, 23 May 2012 . . . . 134, 140, 149, 150
Eveline Njamba and her daughter Kathy Balikosa v Sweden see Njamba (Eveline) and Balikosa v Sweden, No 322/2007
EVI v Sweden, No 296/2006, UN Doc CAT/C/38/D/296/2006, 1 May 2007 . . . . . 133, 140, 597, 615

Falcon Ríos (Enrique) v Canada, No 133/1999, UN Doc CAT/C/33/D/133/1999, 23 November 2004 . . . . . 133, 141, 144, 147, 165, 167, 171, 608, 609, 629, 630, 636
Fatou Sonko v Spain, No 368/2008, UN Doc CAT/C/47/D/368/2008, 25 November 2011 . . . . . 90–1, 349, 467–8, 593
FB v The Netherlands, No 613/2014, UN Doc CAT/C/56/D/613/2014, 20 November 2015. . . . . 140, 165, 166
FFZ v Denmark, No 180/2001, UN Doc CAT/C/28/D/180/2001, 30 April 2002. . . . . 150, 164, 169
FK v Denmark, No 580/2014, UN Doc CAT/C/56/D/580/2014, 23 November 2015 . . . . . 134, 165, 170, 171, 343
FM-M v Switzerland, No 399/2009, UN Doc CAT/C/46/D/399/2009, 26 May 2011 615
Fuad Jahani v Switzerland, No 357/2008, UN Doc CAT/C/46/D/357/2008, 23 May 2011 . . . . . 134, 141, 144, 146, 152

GBM v Sweden, No 435/2010, UN Doc CAT/C/49/D/435/2010, 14 November 2012. . . . . 148, 150, 170
Gerasimov (Alexander) v Kazakhstan, No 433/2010, UN Doc CAT/C/48/D/433/2010, 24 May 2012 . . . . . 48, 63, 80, 84, 345, 349, 368, 393, 395, 601, 609
GK v Switzerland, No 219/2002, UN Doc CAT/C/30/D/219/2002, 7 May 2003 . . . . . 135, 173, 422, 426, 431, 432, 433, 621
GR v Australia, No 605/2014, UN Doc CAT/C/57/D/605/2014, 13 May 2016. . . . . 118, 140, 167
GRB v Sweden, No 83/1997, UN Doc CAT/C/20/D/83/1997, 15 May 1998 . . . . . 131, 448, 598
Guridi (Kepa Urra) v Spain, No 212/2002, UN Doc CAT/C/34/D/212/2002, 17 May 2005 . . . . . 79, 86, 87, 97, 177, 189, 191–2, 290, 378, 408, 409, 591, 609

HAD v Switzerland, No 126/1999, UN Doc CAT/C/24/D/126/1999, 10 May 2000 148
Hajrizi Dzemajl et al v Yugoslavia, No 161/2000 *see* Dzemajl (Hajrizi) et al v Yugoslavia, No 161/2000

Halimi-Nedzibi v Austria, No 8/1991, UN Doc CAT/C/11/D/8/1991, 18 November 1993 . . . . . .346, 431, 432, 613, 625
Hamid Reza Eftekhary v Norway, No 312/2007, UN Doc CAT/C/47/D/312/2007, 25 November 2011 . . . . . 134, 141, 144, 146, 151, 173, 174
Haydin (Halil) v Sweden, No 101/1997, UN Doc CAT/C/21/D/101/1997, 20 November 1998 . . . . . 133, 140, 141, 147, 154, 165, 167, 174
HB v Algeria, No 494/2012, UN Doc CAT/C/55/D/494/2012, 6 August 2015 . . . . . .45, 52, 86, 322, 346, 358, 393, 409
HBA et al v Canada, No 536/2013, UN Doc CAT/C/56/D/536/2013, 2 December 2015 594
HBH et al v Switzerland, No 192/2001, UN Doc CAT/C/30/D/192/2001, 29 April 2003. . . . . 168, 174
HD v Switzerland, No 112/1998, UN Doc CAT/C/22/D/112/1998, 30 April 1999 166
Helle Jensen v Denmark, No 202/2002, UN Doc CAT/C/32/D/202/2002, 5 May 2004 607
Hilda Mariolyn Hernández Colmenarez and Francisco Arturo Guerrero Sánchez v Bolivarian Republic of Venezuela, No 456/2011, UN Doc CAT/C/54/D/456/2011, 15 May 2015 . . . . . 80, 85
HK v Switzerland, No 432/2010, UN Doc CAT/C/49/D/432/2010, 23 November 2012 . . . . .146, 149, 150
HMHI v Australia, No 177/2001, UN Doc CAT/C/28/D/177/2001, 1 May 2002. . . . . .132, 134, 141, 146, 153–4
HSV v Sweden, No 229/2003, UN Doc CAT/C/32/D/229/2003, 12 May 2004 . . . . . 597, 610

IAFB v Sweden, No 425/2010, UN Doc CAT/C/49/D/425/2010, 13 November 2012 596
IAO v Sweden, No 65/1997, UN Doc CAT/C/20/D/65/1997, 6 May 1998 . . . . . 141, 167
ISD v France, No 194/2001, UN Doc CAT/C/34/D/194/2001, 3 May 2005. 612

JAGV v Sweden, No 215/2002, UN Doc CAT/C/31/D/215/2002, 11 November 2003 . . . . . 603, 622
JAMO v Canada, No 293/2006, UN Doc CAT/C/40/D/293/2006, 9 May 2008 . . . .140, 152, 164, 165, 166
JB v Canada, No 529/2012, UN Doc CAT/C/57/D/529/2012, 6 May 2016 611
Jean Patrick Iya v Switzerland, No 299/2006, UN Doc CAT/C/39/D/299/2006, 16 November 200 . . . . . 133, 140, 141, 148, 173
JHA v Spain, No 323/2007, UN Doc CAT/C/41/D/323/2007, 10 November 2008 . . . . . .118–19, 592, 593
JI v Sweden, No 616/2014, UN Doc CAT/C/58/D/616/2014, 12 August 2016 . . . . . .118, 134, 147, 166
JK v Canada, No 562/2013, UN Doc CAT/C/56/D/562/2013, 23 November 2015 . . . 118, 151, 167, 170
JLL v Switzerland, No 364/2008, UN Doc CAT/C/48/D/364/2008, 18 May 2012 . . .134, 140, 146, 615
JMUM v Sweden, No 58/1996, UN Doc CAT/C/20/D/58/1996, 15 May 1998. 614
JN v Denmark, No 628/2014, UN Doc CAT/C/57/D/628/2014, 13 May 2016 . . . . . 118, 151, 153, 172
Josu Arkauz Arana v France, No 63/1997 *see* Arana (Josu Arkauz) v France, No 63/1997
Jovica Dimitrov v Serbia and Montenegro, No 171/2000, UN Doc CAT/C/34/D/171/2000, 3 May 2005 . . . . . 353, 361, 362, 613, 614, 661

K v Australia, No 591/2014, UN Doc CAT/C/56/D/591/2014, 25 November 2015. . . . . 150, 166, 169
KA v Sweden [2007] CAT No 308/2006, UN Doc CAT/C/39/D/308/2006, 16 November 2007 597
Karoui (Chedli Ben Ahmed) v Sweden, No 185/2001, UN Doc CAT/C/28/D/185/2001, 8 May 2002 . . . . . 133, 147, 166, 167, 168, 170, 173, 174
Kasombola Kalonzo (Arthur) v Canada, No 343/2008, UN Doc CAT/C/48/D/343/2008, 18 May 2012 . . . . . 149, 609
KH v Denmark, No 464/2011, UN Doc CAT/C/49/D/464/2011, 23 November 2012 165
Khairullo Tursunov v Kazakhstan, No 538/2013, UN Doc CAT/C/54/D/538/2013, 8 May 2015 . . . . . 115, 121, 151, 159, 160, 161, 175, 622, 623
Khaled Ben M'Barek v Tunisia, No 60/1996, UN Doc CAT/C/23/D/60/1996, 10 November 1999 . . . . 345, 346, 350, 382, 392, 615, 626
Khan v Canada, No 15/1994, UN Doc CAT/C/13/D/15/1994, 15 November 1994. . . . . 99, 114, 138, 148, 150, 151, 166, 168, 170, 174
KK v Switzerland, No 186/2001, UN Doc CAT/C/31/D/186/2001, 11 November 2003. . . .144, 173, 174
KKH v Canada, No 35/1995, UN Doc CAT/C/15/D/35/1995, 22 November 1995. 615
KN et al v Switzerland, No 481/2011, UN Doc CAT/C/52/D/481/2011, 19 May 2014 131
KN v Australia, No 649/2015, UN Doc CAT/C/59/D/649/2015, 23 November 2016. . . . . 118, 140, 167, 171, 172
KN v France, No 93/1997, UN Doc CAT/C/23/D/93/1997, 18 November 1999 615

KN v Switzerland, No 94/1997, UN Doc CAT/C/20/D/94/1997, 19 May 1998 621
Korban (Avedes Hamayak) v Sweden, No 88/1997, UN Doc CAT/C/21/D/88/1997,
16 November 1998. . . . . 126, 138, 174
Kostadin Nikolov Keremedchiev v Bulgaria, No 257/2004, UN Doc CAT/C/41/D/257/2004,
11 November 2008 . . . . . .317, 322, 350, 603, 635–6
KSY v The Netherlands, No 190/2001, UN Doc CAT/C/30/D/190/2001, 15 May 2003 . . . . . 148, 151
KV v Australia, No 600/2014, UN Doc CAT/C/58/D/600/2014, 11 August 2016 . . . . . .118, 140, 167
Kwami Mopongo et al v Morocco, No 321/2007, UN Doc CAT/C/53/D/321/2007,
7 November 2014. 612

LA v Algeria, No 531/2012, UN Doc CAT/C/57/D/531/2012, 12 May 2016. . . . . 79, 358
LJR v Australia, No 316/2007, UN Doc CAT/C/41/D/316/2007, 10 November 2008. . . . . .129, 130,
131, 140, 164, 597
LMTD v Sweden, No 164/2000, UN Doc CAT/C/28/D/164/2000, 15 May 2002 141
LMVRG and MABC v Sweden, No 64/1997, UN Doc CAT/C/19/D/64/1997, 19 November 1997 608
LO v Canada, No 95/1997, UN Doc CAT/C/24/D/95/1997, 19 May 2000. . . . . 608, 622
LP v Australia, No 666/2015, UN Doc CAT/C/59/D/666/2015, 1 December 2016 . . . . . 118, 140, 141, 167
Ltaief v Tunisia, No 189/2001, UN Doc CAT/C/31/D/189/2001, 14 November 2002 . . . . 191, 192, 361,
362, 392, 596, 613, 615, 628, 636

MA and MN v Sweden, No 566/2013, UN Doc CAT/C/55/D/566/2013, 30 July 2015 . . . . .147, 148, 166
MA v Canada, No 22/1995, UN Doc CAT/C/14/D/22/1995, 3 May 1995 610
MAH and FH v Switzerland, No 438/2010, UN Doc CAT/C/51/D/438/2010,
7 November 2013. . . . . 149, 150
MAK v Germany, No 214/2002, UN Doc CAT/C/32/D/214/2002, 12 May 2004 . . . .165, 595, 607, 630
Mallikathevi Sivagnanaratnam v Denmark, No 429/2010, UN Doc CAT/C/51/D/429/2010,
11 November 2013. . . . . 141, 146, 148, 149, 150
MAMA et al v Sweden, No 391/2009, UN Doc CAT/C/48/D/391/2009, 23 May 2012. . . . 134, 140, 152
Mariano Eduardo Haro v Argentina, No 366/2008, UN Doc CAT/C/52/D/366/2008,
23 May 2014 . . . . . .350, 358, 604, 605, 613–14
MB et al v Denmark, No 634/2014, UN Doc CAT/C/59/D/634/2014, 25 November 2016. . . . . .79, 118,
147, 165, 167, 169
MB v Switzerland, No 439/2010, UN Doc CAT/C/50/D/439/2010, 31 May 2013 . . . . 147, 150, 151, 152
MBB v Sweden, No 104/1998, UN Doc CAT/C/22/D/104/1998, 5 May 1999 . . . . . .114, 116, 168
MC v The Netherlands, No 569/2013, UN Doc CAT/C/56/D/569/2013, 30 November 2015 . . . 118, 169
MCMVF v Sweden, No 237/2003, UN Doc CAT/C/35/D/237/2003, 14 November 2005 146
MDT v Switzerland, No 382/2009, UN Doc CAT/C/48/D/382/2009, 14 May 2012 . . . . 134, 140, 146, 150
Mehdi Zare v Sweden, No 256/2004, UN Doc CAT/C/36/D/256/2004, 12 May 2006. . . . 133, 164, 630
MF v Sweden, No 326/2007, UN Doc CAT/C/41/D/326/2007, 14 November 2008. . . . . .130, 132, 133,
140, 148, 448, 597, 598
MF v Switzerland, No 658/2015, UN Doc CAT/C/59/D/658/2015, 15 November 2016 . . . . . 118, 167
MM et al v Sweden, No 332/2007, UN Doc CAT/C/41/D/332/2007, 11 November 2008. . . . . .133, 140,
148, 149, 597
MMK v Sweden, No 221/2002, UN Doc CAT/C/34/D/221/2002, 3 May 2005 . . . . . 448, 615
MN v Australia, No 608/2014, UN Doc CAT/C/58/D/608/2014, 2 August 2016 . . . . 118, 140, 141, 152, 167
MN v Sweden, No 566/2013 *see MA and MN v Sweden*, No 566/2013
MPS v Australia, No 138/1999, UN Doc CAT/C/28/D/138/1999, 30 April 2002. . . . . 157, 166, 170, 172
MS v Denmark, No 571/2013, UN Doc CAT/C/55/D/571/2013, 10 August 2015. . . . . 144, 148, 150
MSG et al v Switzerland, No 352/2008, UN Doc CAT/C/46/D/352/2008, 30 May 2011 . . . . . 134, 140
MSH v Sweden, No 235/2003, UN Doc CAT/C/35/D/235/2003, 14 November 2005 147
MT v Sweden, No 642/2014, UN Doc CAT/C/55/D/642/2014, 7 August 2015 605
Mükerrem Güclü v Sweden, No 349/2008, UN Doc CAT/C/45/D/349/2008,
11 November 2010. . . . . .133, 140, 145, 164
Mumin Nasirov v Kazakhstan, No 475/2011, UN Doc CAT/C/52/D/475/2011, 14 May 2014114, 116, 151
Munir Aytulun and Lilav Guclu v Sweden, No 373/2009, UN Doc CAT/C/45/D/373/2009,
19 November 2010. . . . . .133, 138, 141, 164, 164
Mutombo v Switzerland, No 13/1993, UN Doc CAT/C/12/D/13/1993, 27 April 1994 . . . . .99, 126, 133,
138, 139–40, 141, 144, 146, 150, 151, 156, 157, 166, 170, 173, 629

MV v The Netherlands, No 201/2002, UN Doc CAT/C/30/D/201/2002, 2 May 2003 . . . . 128, 151, 448
MX v Switzerland, No 311/2007, UN Doc CAT/C/40/D/311/2007, 7 May 2008 . . . . . 126, 133, 140
MZA v Sweden, No 424/2010, UN Doc CAT/C/48/D/424/2010, 22 May 2012 . . . . . 134, 140, 147, 150

Nadeem Ahmad Dar v Norway, No 249/2004, UN Doc CAT/C/38/D/249/2004, 11 May 2007 . . .611, 623
NB v Russian Federation, No 577/2013, UN Doc CAT/C/56/D/577/2013, 25 November 2015. 603
NB-M v Switzerland, No 347/2008, UN Doc CAT/C/47/D/347/2008, 14 November 2011 . . . 165, 166, 167
ND v France, No 32/1995, UN Doc CAT/C/15/D/32/1995, 20 November 1995. 614
Nicmeddin Alp v Denmark, No 466/2011, UN Doc CAT/C/52/D/466/2011,
14 May 2014 . . . . . 148, 150, 169, 171
Nikolic (Slobodan) and Ljiljana Nikolic v Serbia and Montenegro, No 174/2000,
UN Doc CAT/C/35/D/174/2000, 24 November 2005 . . . . . 366, 382, 391, 661
Nirmal Singh v Canada, No 319/2007, UN Doc CAT/C/46/D/319/2007, 30 May 2011 . . . . . 140, 141, 147, 149, 150, 155, 164, 169, 172, 607
Njamba (Eveline) and Balikosa v Sweden , No 322/2007, UN Doc CAT/C/44/D/322/2007,
14 May 2010 . . . . . 61, 132, 134, 135, 140, 141, 151, 153, 166, 174, 448, 598
Nouar Abdelmalek v Algeria, No 402/2009, UN Doc CAT/C/52/D/402/2009, 23 May 2014 . . . . .63, 80, 84, 322, 346, 358, 393, 432
NS v Canada, No 582/2014, UN Doc CAT/C/59/D/582/2014, 1 December 2016 . . . . . 118, 148, 150, 155, 171, 607, 609
NS v Switzerland, No 356/2008, UN Doc CAT/C/44/D/356/2008, 6 May 2010 . . . . . 134, 140, 152, 169
NTW v Switzerland, No 414/2010, UN Doc CAT/C/48/D/414/2010, 16 May 2012 . . . 134, 140, 149, 150
NZ v Kazakhstan, No 495/2012, UN Doc CAT/C/53/D/495/2012,
28 November 2014. . . . . 349–50, 354, 601
NZS v Sweden, No 277/2005, UN Doc CAT/C/37/D/277/2005, 22 November 2006. . . . 144, 148, 614, 630

Oleg Evloev v Kazakhstan, No 441/2010, UN Doc CAT/C/51/D/441/2010,
5 November 2013. . . . . .60, 349, 353, 358, 367, 393, 395, 421, 431, 432
OR et al v Argentina, Nos 1/1988, 2/1988 and 3/1988, UN Doc CAT/C/WG/3/DR/1, 2 and 3/1988,
23 November 1989. . . . . 191, 243, 288, 382, 396, 600, 627, 630
Orhan Ayas v Sweden, No 97/1997, UN Doc CAT/C/21/D/97/1997,
12 November 1998. . . . . 126, 141, 147, 166, 167, 174
Oskartz Gallastegi Sodupe v Spain, No 453/2011, UN Doc CAT/C/48/D/453/2011,
23 May 2012 . . . . . 393, 431, 432, 607

PA v The Netherlands, No 611/2014, UN Doc CAT/C/57/D/611/2014, 2 May 2016 . . . . . 118, 148
Parot v Spain, No 6/1990, UN Doc CAT/C/14/D/6/1990, 2 May 1995. . . . . .361, 606–7, 616, 625
Patrice Gahungu v Burundi, No 522/2012, UN Doc CAT/C/55/D/522/2012,
10 August 2015 . . . . . .45, 55–6, 63, 80, 84, 322, 346, 392, 451
Pauline Muzonzo Paku Kisoki v Sweden, No 41/1996, UN Doc CAT/C/16/D/41/1996,
8 May 1996 . . . . . .147, 151, 166, 167, 174
PE v France, No 193/2001, UN Doc CAT/C/29/D/193/2001, 21 November 2002 . . . . . 421, 426, 431, 433, 618
PMPK v Sweden, No 30/1995, UN Doc CAT/C/15/D/30/1995, 20 November 1995. . . . . 610, 615
PQL v Canada, No 57/1996, UN Doc CAT/C/19/D/57/1996, 17 November 1997 149
PR v Spain, No 160/2000, UN Doc CAT/C/25/D/160/2000, 23 November 2000 596
PS v Canada, No 86/1997, UN Doc CAT/C/23/D/86/1997, 18 November 1999. 610
PSB and TK v Canada, No 505/2012, UN Doc CAT/C/55/D/505/2012, 13 August 2015. . . . . .148, 149, 150, 174, 622
PSS v Canada, No 66/1997, UN Doc CAT/C/21/D/66/1997, 13 November 1998. . . . . 608, 614

R v France, No 52/1996, UN Doc CAT/C/19/D/52/1996, 10 November 1997 . . . . . 607, 612
RA v Switzerland, No 389/2009, UN Doc CAT/C/49/D/389/2009, 20 November 2012 . . . . . 149, 169
Ramiro Ramírez Martínez et al v Mexico, No 500/2012, UN Doc CAT/C/55/D/500/2012,
4 August 2015 . . . . . 48, 63, 80, 84, 85, 346, 358, 392, 415, 421, 427, 431, 432, 608, 613, 618, 622, 623, 634
Rasim Bairamov v Kazakhstan, No 497/2012, UN Doc CAT/C/52/D/497/2012,
14 May 2014 . . . . . 63, 346, 349, 350, 393, 395, 432, 597, 598
RAY v Morocco, No 525/2012, UN Doc CAT/C/52/D/525/2012, 16 May 2014. . . . . 426, 432, 609, 611

RD (Ruben David) v Sweden, No 220/2002, UN Doc CAT/C/34/D/220/2002, 2 May 2005 598
RD et al v Switzerland, No 558/2013, UN Doc CAT/C/57/D/558/2013, 13 May 2016 . . . . .79, 126, 167, 169
RD v Switzerland, No 426/2010, UN Doc CAT/C/51/D/426/2010, 8 November 2013. . . . 141, 149, 150, 166
REG v Turkey, No 4/1990, UN Doc CAT/C/6/D/4/1990, 29 April 1991. . . . . 610, 614
Régent Boily v Canada, No 327/2007, UN Doc CAT/C/47/D/327/2007, 14 November 2011. . . . 140, 159, 160, 165, 174, 175
RG et al v Sweden, No 586/2014, UN Doc CAT/C/56/D/586/2014, 25 November 2015. . . . . 140, 141, 147, 165, 167, 172, 597
Ristic v Yugoslavia, No 113/1998, UN Doc C AT/C/26/D/113/1998, 11 May 2001 . . . . . .349, 350–1, 361, 382, 391–2, 661
RK et al v Sweden, No 309/2006, UN Doc CAT/C/40/D/309/2006, 16 May 2008. . . . . .133, 140, 148, 149, 150, 615
RK v Australia, No 609/2014, UN Doc CAT/C/58/D/609/2014, 11 August 2016. . . . . .118, 133, 140, 149, 150, 151, 153
RK v Canada, No 42/1996, UN Doc CAT/C/19/D/42/1996, 20 November 1997. 610
RO v Sweden, No 644/2014, UN Doc CAT/C/59/D/644/2014, 18 November 2016 118
Roitman Rosenmann v Spain, No 176/2000, UN Doc CAT/C/28/D/176/2000, 30 April 2002. . . . . 215, 246, 269, 298, 306, 590, 591, 599, 609, 630
Rouba Alhaj Ali v Morocco, No 682/2015, UN Doc CAT/C/58/D/682/2015, 3 August 2016 . . . . 114, 130, 171
RS et al v Switzerland, No 482/2011, UN Doc CAT/C/53/D/482/2011, 21 November 2014. . . . . .147, 174, 622, 623
RS v Denmark, No 225/2003, UN Doc CAT/C/32/D/225/2003, 19 May 2004 597–8
RSAN v Canada, No 284/2006, UN Doc CAT/C/37/D/284/2006, 17 November 2006. . . . . 607, 611
RSM v Canada, No 392/2009, UN Doc CAT/C/50/D/392/2009, 24 May 2013. . . . . .141, 146, 150, 168, 169, 609
RT v Switzerland, No 242/2003, UN Doc CAT/C/35/D/242/2003, 24 November 2005 597
RT-N v Switzerland, No 350/2008, UN Doc CAT/C/46/D/350/2008, 3 June 2011 134

S v Sweden, No 691/2015, UN Doc CAT/C/59/D/691/2015, 25 November 2016 605
SA v Sweden, No 243/2004, UN Doc CAT/C/32/D/243/2004, 6 May 2004 . . . . . 596, 597, 598
Saadia Ali v Tunisia, No 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008 . . . . 63, 80, 322, 346, 353, 367, 392, 611, 613, 636
SAC v Monaco, No 346/2008, UN Doc CAT/C/49/D/346/2008, 13 November 2012 . . . . . 605, 611
Said Amini v Denmark, No 339/2008, UN Doc CAT/C/45/D/339/2008, 15 November 2010. . . . . 134, 140, 147, 164, 165, 169, 597
Saidi Ntahiraja v Burundi, No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015 . . . . . .48, 79, 84, 322, 346, 358, 393, 409, 451, 613
Sahli (Fatiha) v Algeria, No 341/2008, UN Doc CAT/C/46/D/341/2008, 3 June 2011. 611
SAP et al v Switzerland, No 565/2013, UN Doc CAT/C/56/D/565/2013, 25 November 2015. 167
Sathurusinghe Jagath Dewage v Australia, No 387/2009, UN Doc CAT/C/51/D/387/2009, 14 November 2013. 132
SC v Denmark, No 143/1999, UN Doc CAT/C/24/D/143/1999, 10 May 2000. 138
Sergei Kirsanov v Russian Federation, No 478/2011, UN Doc CAT/C/52/D/478/2011, 14 May 2014 . . . . . .46, 49, 192, 358, 387, 409, 432, 437 449, 451, 600
SG v Netherlands, No 135/1999, UN Doc CAT/C/32/D/135/1999, 12 May 2004. . . . . 148, 620
SH v Norway, No 121/1998, UN Doc CAT/C/23/D/121/1998, 19 November 1999 611
Singh Khalsa (Harminder) et al v Switzerland, No 336/2008, UN Doc CAT/C/46/D/336/2008, 26 May 2011 . . . . . 138, 139, 143, 147, 150, 154–5
SK and RK v Sweden, No 365/2008, UN Doc CAT/C/47/D/365/2008, 21 November 2011. . . . . .610, 614, 615
SK et al v Sweden, No 550/2013, UN Doc CAT/C/54/D/550/2013, 8 May 2015 . . . . . 147, 148, 167, 169, 578
SL v Sweden, No 150/1999, UN Doc CAT/C/26/D/150/1999, 11 May 2001. . . . . .164, 165, 169, 630
SM et al v Sweden, No 374/2009, UN Doc CAT/C/47/D/374/2009, 21 November 2011. . . . . .134, 140, 151, 169
SM v Switzerland, No 406/2009, UN Doc CAT/C/49/D/406/2009, 23 November 2012 . . . . . .134, 140, 149, 150
SMR and MMR v Sweden, No 103/1998, UN Doc CAT/C/22/D/103/1998, 5 May 1999 133
SNAW et al v Switzerland, No 231/2003, UN Doc CAT/C/35/D/231/2003, 24 November 2005. 629

SPA v Canada, No 282/2005, UN Doc CAT/C/37/D/282/2005, 7 November 2006 . . . . 164, 170, 597, 630
SS and SA v The Netherlands, No 142/1999, UN Doc CAT/C/26/D/142/1999, 11 May 2001 . . . 153, 171
SS Elmi (Sadiq Shek Elmi) v Australia, No 120/1998, UN Doc CAT/C/22/D/120/1998,
14 May 1999 . . . . . 61, 132, 138, 141, 146, 151, 152, 174, 229, 615, 636
SS v Canada, No 581/2014, UN Doc CAT/C/59/D/581/2014, 30 November 2016. . . . . 118, 148, 166
SS v The Netherlands, No 191/2001, UN Doc CAT/C/30/D/191/2001, 5 May 2003. . . . . 144, 148, 173, 174
SSS v Canada, No 245/2004, UN Doc CAT/C/35/D/245/2004, 16 November 2005 . . . . . .148, 154, 595, 597, 598, 615
Suleymane Guengueng et al v Senegal, No 181/2001, UN Doc CAT/C/36/D/181/2001,
17 May 2006 . . . . . 221, 222, 223, 224, 262, 269, 278, 279, 280, 282, 285, 286, 591, 594, 618
SV et al v Canada, No 49/1996, UN Doc CAT/C/26/D/49/1996, 15 May 2001 448

T v Australia, No 599/2014, UN Doc CAT/C/58/D/599/2014, 3 August 2016 . . . . . 118, 140, 141, 149, 153, 173
TA v Sweden, No 226/2003, UN Doc CAT/C/34/D/226/2003, 6 May 2005 . . . . 133, 147, 148, 149, 634
TA v Sweden, No 303/2006, UN Doc CAT/C/39/D/303/2006, 22 November 2007 140
Tala (Kaveh Yaragh) v Sweden, No 43/1996, UN Doc CAT/C/17/D/43/1996,
15 November 1996. . . . . 126, 146, 147, 167, 173, 629
Taoufik Elaïba v Tunisia, No 551/2013, UN Doc CAT/C/57/D/551/2013, 6 May 2016. . . . . .63, 79, 321, 323, 358, 393, 431, 432
Tapia Paez (Gorki Ernesto) v Sweden, No 39/1996, UN Doc CAT/C/18/D/39/1996,
19 January 1996. . . . . 114, 116, 151, 152
TD v Switzerland, No 375/2009, UN Doc CAT/C/46/D/375/2009, 26 May 2011 . . . . 139, 149, 150, 165
Tebourski v France, No 300/2006, UN Doc CAT/C/38/D/300/2006, 1 May 2007. . . 114, 115 , 126, 135, 137, 141, 172, 174, 612, 621, 622, 633
Thabti v Tunisia, No 187/2001, UN Doc CAT/C/31/D/187/2001, 14 November 2003 . . . . 191, 192, 341, 367, 392, 596, 613, 615
Thu Aung v Canada, No 273/2005, UN Doc CAT/C/36/D/273/2005, 15 May 2006 610
TI v Canada, No 333/2007, UN Doc CAT/C/45/D/333/2007, 15 November 2010. . . . . 140, 609, 611
TM v Republic of Korea, No 519/2012, UN Doc CAT/C/53/D/519/2012, 21 November 2014. 596
TM v Sweden, No 228/2003, UN Doc CAT/C/31/D/228/2003, 18 November 2003 . . . . 127, 448, 599, 630
TPS v Canada, No 99/1997, UN Doc CAT/C/24/D/99/1997, 16 May 1999 . . . . . 135, 578, 610, 621, 630
Toirjon Abdussamatov et al v Kazakhstan, No 444/2010, UN Doc CAT/C/47/D/444/2010,
15 November 2011 . . . . . 115, 116, 121, 134, 140, 151, 159, 160, 161, 172, 173, 175, 622, 629
Tony Chahin v Sweden, No 310/2007, UN Doc CAT/C/46/D/310/2007, 30 May 2011 . . . . . 140, 141, 144, 147, 149, 150, 164, 168, 169, 170, 173, 174, 597

U v Sweden, No 643/2014, UN Doc CAT/C/56/D/643/2014, 23 November 2015 605
US v Finland, No 197/2002, UN Doc CAT/C/30/D/197/2002, 1 May 2003 . . . . . 144, 173
Uttam Mondal v Sweden, No 338/2008, UN Doc CAT/C/46/D/338/2008,
23 May 2011 . . . . . 140, 141, 147, 151, 155, 169

VL v Switzerland, No 262/2005, UN Doc CAT/C/37/D/262/2005, 20 November 2006 . . . . . 57, 146, 147, 148, 168
VNIM v Canada, No 119/1998, UN Doc CAT/C/29/D/119/1998, 12 November 2002 . . . . . 141, 613
VV v Canada, No 47/1996, UN Doc CAT/C/20/D/47/1996, 19 May 1998. 622
VXN and HN v Sweden, No 130/1999 and 131/1999, UN Doc CAT/C/24/D/130&131/1999,
15 May 2000 . . . . . 114, 602

WGD v Canada, No 520/2012, UN Doc CAT/C/53/D/520/2012, 26 November 2014. . . . . 166, 607
WJ v Austria, No 5/1990, UN Doc CAT/C/5/D/5/1990, 22 November 1990 603

X v Australia, No 324/2007, UN Doc CAT/C/42/D/324/2007, 30 April 2009 . . . . . 134, 140, 165
X v Burundi, No 553/2013, UN Doc CAT/C/55/D/553/2013, 10 August 2015 . . 57, 63, 80, 84, 321, 322, 346, 358, 392, 431, 432, 451
X v Denmark, No 458/2011, UN Doc CAT/C/53/D/458/2011, 28 November 2014. . . . . 147, 148, 150
X v Kazakhstan, No 554/2013, UN Doc CAT/C/55/D/554/2013, 3 August 2015 . . . . . 622, 623, 159, 161, 172, 174

X v Russian Federation, No 542/2013, UN Doc CAT/C/54/D/542/2013, 8 May 2015 . . . . . 121, 146, 174, 615, 622, 623
X v Spain, No 23/1995, UN Doc CAT/C/15/D/23/1995, 15 November 1995 157
X v Switzerland, No 17/1994, UN Doc CAT/C/13/D/17/1994, 17 November 1994. 597
X v Switzerland, No 27/1995, UN Doc CAT/C/18/D/27/1995, 28 April 1997. . . . . 621, 622
X v Switzerland, No 686/2015, UN Doc CAT/C/59/D/686/2015, 5 December 2016 606
X et al v Switzerland, No 697/2015, UN Doc CAT/C/59/D/697/2015, 25 November 2016 597
X and Y v The Netherlands, No 31/1995, UN Doc CAT/C/15/D/31/1995, 20 November 1995. 157
X, Y and Z v Sweden, No 530/2012, UN Doc CAT/C/55/D/530/2012, 4 August 2015 . . . .147, 148, 150, 166
X, Y and Z v Sweden, No 61/1996, UN Doc CAT/C/20/D/61/1996, 6 May 1998 . . . . . .151, 174

Y v Switzerland, No 431/2010, UN Doc CAT/C/50/D/431/2010, 21 May 2013 . . . . . 147, 148, 149, 152
YBF et al v Switzerland, No 467/2011, UN Doc CAT/C/50/D/467/2011, 31 May 2013. . . . 146, 150, 169
YHA v Australia, No 162/2000, UN Doc CAT/C/27/D/162/2000, 23 November 2001 . . . . . 146, 595
Yousri Ktiti v Morocco, No 419/2010, UN Doc CAT/C/46/D/419/2010, 26 May 2011. . . . . .134, 140, 141, 171, 426, 431, 432, 433, 634
YS v Australia, No 633/2014, UN Doc CAT/C/59/D/633/2014, 15 November 2016. . . . . .118, 140, 167, 171, 172, 173
YS v Switzerland, No 147/1999, UN Doc CAT/C/25/D/147/1999, 15 May 2001 152
YZS v Australia, No 417/2010, UN Doc CAT/C/49/D/417/2010, 23 November 2012. . . . . 134, 140, 150

Z v Australia, No 511/2012, UN Doc CAT/C/53/D/511/2012, 26 November 2014. . . . . 400, 402
Z v Denmark, No 555/2013, UN Doc CAT/C/55/D/555/2013, 10 August 2015 . . . . . 148, 597
Z v Sweden, No 556/2013, UN Doc CAT/C/54/D/556/2013, 8 May 2015 . . . . . 147, 149, 166, 167
Z v Switzerland, No 545/2013, UN Doc CAT/C/56/D/545/2013, 25 November 2015 600
ZH v Canada, No 604/2014, UN Doc CAT/C/56/D/604/2014, 20 November 2015 606
ZK v Sweden, No 301/2006, UN Doc CAT/C/40/D/301/2006, 9 May 2008 . . . . . .133, 140, 148, 149, 150, 164, 167, 169, 615
ZT v Australia, No 153/2000, UN Doc CAT/C/31/D/153/2000, 11 November 2003 126
ZT v Norway (No 2), No 238/2003, UN Doc CAT/C/35/D/238/2003, 14 November 2005 . . . . .611, 616
ZT v Norway, No 127/1999, UN Doc CAT/C/23/D/127/1999, 19 November 1999 . . . . . .611, 616

UNITED NATIONS HUMAN RIGHTS COMMITTEE (HRC)

Arhuacos v Colombia, No 612/1995, UN Doc CCPR/C/56/D/612/1995, 14 March 1996 52
Bautista de Arellana v Colombia, No 563/1993, UN Doc CCPR/C/55/D/563/1993, 27 October 1995 52
Brough v Australia, No 1184/2003, UN Doc CCPR/C/86/D/1184/2003, 17 March 2006 451
Buffo v Uruguay, No 33/1978, UN Doc Supp. No 40 (A/36/40) at 125, 27 March 1981 451
Charles Chitat Ng v Canada, No 469/1991, UN Doc CCPR/C/49/D/469/1991, 5 November 1993. . . . . 130, 449
Delia Saldías de López v Uruguay, No 52/1979, UN Doc CCPR/C/13/D/52/1979, 29 July 1981 749
El-Megreisi v Libyan Arab Jamahiriya, No 440/1990, UN Doc CCPR/C/50/D/440/1990, 23 March 1994. . . . . 52, 436
Errol Pryce v Jamaica, No 793/1998, UN Doc CCPR/C/80/D/793/1998, 13 May 2004 67
Faurisson v France, No 786/1997, UN Doc CCPR/C/58/D/550/1993 19, July 1995 578
HCMA v The Netherlands, No 213/1986, UN Doc CCPR/C/35/D/213/1986, 30 March 1989 279
Higginson v Jamaica, No 792/1998, UN Doc CCPR/C/74/D/792/1998, 28 March 2002 67
Hugo Rodriguez v Uruguay, No 322/1988, UN Doc CCPR/C/51/D/322/1988, 19 July 1994 . . . 189, 191
Judge v Canada, No 829/1998, UN Doc CCPR/C/78/D/829/1998, 13 August 2003 . . . . . 130, 281
Ländsmann v Finland, No 511/1992, UN Doc CCPR/C/52/D/511/1992, 26 October 1994 578
Mohammed Alzery v Sweden, No 1416/2005, CCPR/C/88/D/1416/2005, 25 October 2006 161
Njaru v Cameroon, No 1353/2005, UN Doc CCPR/C/89/D/1353/2005, 19 March 2007 51
Osbourne v Jamaica, No 759/1997, UN Doc CCPR/C/68/D/759/1997, 13 April 2000 . . . . . 67, 460
Polay Campos v Peru, No 577/1994, UN Doc CCPR/C/61/D/577/1994, 6 November 1997 49
Quinteros Almeida (Elena) and Maria del Carmen Almeida de Quinteros v Uruguay, No 107/1981, UN Doc CCPR/C/OP/2, 15 October 1982 . . . . . .51, 216, 384, 413
Rafael Mojica v Dominican Republic, No 449/1991, UN Doc CCPR/C/51/D/449/1991, 15 July 1994 436
Sooklal v Trinidad and Tobago, No 928/2000, UN Doc CCPR/C/73/D/928/2000, 25 October 2001. 67
Teesdale v Trinidad and Tobago, No 677/1996, UN Doc CCPR/C/74/D/677/1996, 1 April 2002 460
Womah Mukong v Cameroon, No 458/1991, UN Doc CCPR/C/51/D/458/1991, 10 August 1994 452

INTERNATIONAL COURTS AND TRIBUNALS

International Court of Justice (ICJ)

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russian Federation*), Preliminary Objections, Judgment, ICJ Reports 2011 70 (cited: ICJ Reports 2011 70) 685
Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v Rwanda*), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006 41 687
Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*), Judgment, ICJ Reports 2002 3. . . . . 197, 237
Certain Criminal Proceedings in France (*Republic of the Congo v France*), Application instituting proceedings of 9 December 2002. . . . . 233, 234
Certain Criminal Proceedings in France (*Republic of the Congo v France*), Request for Indication of Provisional Measures, Order of 17 June 2003. . . . . 233, 234
Certain Criminal Proceedings in France (*Republic of the Congo v France*), Order of 16 November 2010, ICJ Report 2010 635 . . . . . 233, 234
Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950 74 685
Jurisdictional Immunities of the State (*Germany v Italy: Greece intervening*), Judgment, ICJ Reports 2012 99 402
Lagrand (*Germany v United States of America*), Judgment, ICJ Reports 2001 466 616
Questions relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), Judgment, ICJ Reports 2012 422 (cited: ICJ Reports 2012 42) 218, 219,225–6, 262–3, 276–7, 279, 680, 685, 686, 687, 690
South West Africa (*Ethiopia v South Africa; Liberia v South Africa*), Preliminary Objections, Judgment, ICJ Reports 1962 328) (cited: ICJ Reports 1962 328) 685
The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) Judgement, ICJ Reports 2007 43 407

Permanent Court of International Justice

The Case of the *SS Lotus (France v Turkey),* Judgment of 7 September 1927, Permanent Court of International Justice 237

Extraordinary African Chambers

Extraordinary African Appeals Chambers [Chambre Africaine Extraordinaire d'Assises d'Appel], *Ministère Public v Hissein Habré*, Judgment of 30 May 2016. 223
Extraordinary African Appeals Chambers [Chambre Africaine Extraordinaire d'Assises d'Appel], Le *Procureur Géneral v Hissein Habré*, Judgment of 27 April 2017 . . . . . 223, 285

Extraordinary Chambers in the Courts of Cambodia (ECCC)

Ieng Thirith (ECCC Pre Trial Chamber, Case 002, Decision D130/21 of 18 December 2009). 439
Ieng Thirith (ECCC -Office of the Co-Investigating Judges, Case 002, Order E3/1555 of 28 July 2009) 439, 440
Khieu Samphan and Nuon Chea (ECCC Supreme Court, Case 002, Decision F26/12 of 31 December 2015) 418, 435, 437, 439
Khieu Samphan and Nuon Chea (ECCC Trial Chamber, Case 002, Decision E350/8 of 5 February 2016) 421, 424, 439

International Criminal Tribunal for the Former Yugoslavia

Tadic Case (ICTY-94–1, Judgment of 26 January 2000) 284
Prosecutor v Delalic et al [1998] ICTY No IT-96–21–T, 16 November 1998. 54

REGIONAL BODIES

African Commission on Human And Peoples' Rights (ACMHPR)

Egyptian Initiative for Personal Rights and Interight v Egypt, Comm No 323/2006 (ACmHPR, December 2011). 410

Malawi African Association et al v Mauritania, Comm Nos 54/91, 61/91, 98/93, 164–196/97 and 210/98 (ACmHPR, 11 May 2000) 435, 464
Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan Comm Nos 279/03 and 296/05 (ACmHPR, 27 May 2009) 380

Ecowas Community Court of Justice

Hissein Habre c Republique du Senegal No ECW/CCJ/JUD/06/10 (ECOWAS Court of Justice, 18 November 2010) 223

European Court of Human Rights (ECTHR) and European Commission of Human Rights (ECMHR)

A and Others v Bulgaria App no 51776/08 (ECtHR, 29 November 2011) 747
Abdulazhon Isakov v Russia App no 14049/08 (ECtHR, 8 July 2010) 163
Aerts v Belgium ECHR 1998–V 451
Al-Adsani v the United Kingdom [GC] App no 35763/97 (ECtHR, 21 November 2001) 402–3
Al Nashiri v Poland, App no 28761/ 11 (ECtHR, 24 July 2014) 122
Al-Saadoon and Mufdhi v the United Kingdom App no 61498/08 (ECtHR, 2 March 2010) 464
Amine Güzel v Turkey App no 41844/09 (ECtHR, 17 September 2013) 345
Amuur v France (ECHR 1996–III) 744, 747
Ashot Harutyunyan v Armenia App no 34334/ 04 (ECtHR, 15 June 2010) 444
Austin and Others v the United Kingdom [GC] App nos 39692/ 09, 40713/ 09, and 41008/ 09 (ECtHR, 15 March 2012) 744, 747
Babar Ahmad and Others v the United Kingdom App nos 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09 (ECtHR, 10 April 2012) 120, 128
Bankovic and Others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom [GC] ECHR 2001–XII 750
Bartesaghi Gallo and Others v Italy App nos 12131/13 and 43390/13 (ECtHR, 22 June 2017) 57, 58
Bati and Others v Turkey App nos 33097/96 and 57834/00 (ECtHR, 3 June 2004) . . . 342, 345, 352, 353
Bouyid v Belgium App no 23380/ 09 (ECtHR, 28 September 2015) 444
Brega v Moldova App no 52100/ 08 (ECtHR, 20 April 2010) 747
Brega and Others v Moldova App no 61485/08 (ECtHR, 24 January 2012) 747
Çakici v Turkey [GC] ECHR 1999–IV 381, 410
Cestaro v Italy App no 6884/11 (ECtHR, 7 April 2015) 58
Chahal v United Kingdom, App no 22414/93 (ECtHR 1, September 1994) 449
Chahal v United Kingdom ECHR 1996–V 155
Creangă v Romania [GC] App no 29226/ 03 (ECtHR, 23 February 2012) 744, 747
Cruz Varas v Sweden (1991) Series A no 201 617
Cyprus v Turkey App no 25781/94 (ECtHR 10 May 2001) 750
Dacosta Silva v Spain ECHR 2006–XIII 747
DD v Lithuania App no 13469/ 06 (ECtHR, 14 February 2012) 745
De Wilde, Ooms, and Versyp v Belgium (1971) Series A no12 . . . . . 744, 747
El Haski v Belgium App no 649/08 (ECtHR, 25 September 2012) 435
El-Masri v the Former Yugoslav Republic of Macedonia [GC] App no 39630/09 (ECtHR, 13 December 2012) 122, 405, 413
Engel and others v the Netherlands (1976) Series A no 22 744
Farhad Aliyev v Azerbaijan App no 37138/ 06 (ECtHR, 9 November 2010) 747
Foka v Turkey App no 28940/ 95 (ECtHR, 24 June 2008) 747
Frérot v France App no 70204/01 (ECtHR, 12 June 2007) 330
Gäfgen v Germany [GC] App no 22978/05 (ECtHR, 1 June 2010) 421, 422, 423
Gillan and Quinton v the United Kingdom App no 4158/05 (ECtHR, 12 January 2010) 744, 747
Guzzardi v Italy App no 7367/76 (ECtHR, 6 November 1980) 744
Hilal v United Kingdom App no 45276/99 (ECtHR, 6 March 2001) 155
Hirsi Jamaa and Others v Italy [GC] App no 27765/09 (ECtHR, 23 February 2012) 120
HL v the United Kingdom App no 45508/99 (5 October 2004) 744, 745, 747
HM v Switzerland App no 39197/98 (ECtHR, 26 May 2002) 747
Hugh Jordan v the United Kingdom App no 24746/94 (ECtHR, 4 May 2001) 347
Husayn (Abu Zubaydah) v Poland, App no 7511/ 13 (ECtHR, 24 July 2014) 122

II v Bulgaria App no 44082/ 98 (ECtHR, 9 June 2005) 747
Indelicato v Italy App no 31143/96 (ECtHR, 18 October 2001) 345
Ipek v Turkey App no 25760/94 (ECtHR, 17 February 2004) 51, 410
Ireland v United Kingdom App no 5310/ 71 (ECtHR, 20 March 2018) 43
Ireland v United Kingdom App no 5310/ 71 (ECtHR, 18 January 1978) 31, 43, 578
Jabari v Turkey ECHR 2000–VIII 149 449
Jalloh v Germany App no 54810/ 00 (ECtHR, 11 July 2006) 422, 423, 432, 444
Jones and Others v the United Kingdom, App nos 34356/06 and 40528/06 (ECtHR, 14 January 2014) 403
Karimov v Russia, App no 54219/08 (ECtHR, 29 July 2010) 163
Khider v France App no 39364/05 (ECtHR, 9 July 2009) 330
Khlaifia and Others v Italy [GC] App no 16483/12 (ECtHR, 15 December 2016) 744
Khodorkovskiy and Lebedev v Russia App nos 11082/06 and 13772/05 (ECtHR, 25 July 2013) 444
Koktysh v Ukraine App no 43707/07 (ECtHR, 10 December 2009) 131
Kudła v Poland [GC] ECHR 2000–XI 197 444
Kurt v Turkey ECHR 1998–III 51, 382, 384
Lavents v Latvia App no 58442/ 00 (ECtHR, 28 November 2002) 747
Loizidou v Turkey (Preliminary Objections) (1995) Series A No 310 750
Mahdid and Haddar v Austria App no 74762/ 01 (ECtHR, 8 December 2005) 747
Mahmut Kaya v Turkey, App no 22535/93 (ECtHR, 28 March 2000) 132
Mamatkulov and Askarov v Turkey App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) 617, 863
Mancini v Italy App no 44955/ 98 (ECtHR, 2 August 2001) 747
Medvedyev and Others v France [GC] App no 3394/ 03 (ECtHR, 29 March 2010) 744
Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia App no 71156/01 (ECtHR, 3 May 2007) 342
Mikheyev v Russia App no 77617/ 01 (ECtHR, 26 January 2006) 347, 410
Mogos v Romania App no 20420/ 02 (ECtHR, 13 October 2005) 747
Mustafa Tunç and Fecire Tunç v Turkey App no 24014/05 (ECtHR, 14 April 2015) 349
Naït-Liman v Switzerland App no 51357/07 (ECtHR, 21 June 2016) 400
Nasr and Ghali v Italy, App no 44883/ 09 (ECtHR, 23 February 2016) 122
Nikolova v Bulgaria (No 2) App no 40896/ 98 (ECtHR, 30 September 2004) 747
Nielsen v Denmark App no 10929/ 84 (ECtHR, 28 November 1988) 747
Nurmagomedov v Russia App no 30138/02 (ECtHR, 7 June 2007) 863
Öcalan v Turkey App no 46221/99 (ECtHR, 12 March 2003) 464
Osypenko v Ukraine App no 4634/ 04 (ECtHR, 9 November 2010) 747
Othman (Abu Qatada) v the United Kingdom App no 8139/09 (ECtHR, 17 January 2012) 163, 421, 434–5
Ould Dah v France App no 13113/03 (ECtHR, 17 March 2009) 197, 227–8, 232–3, 235, 247, 250, 259–60, 268
Özgür Kılıç v Turkey App no 42591/98 (ECtHR, 24 September 2002) 345
Paladi v Moldova [GC] App No 39806/ 05 (ECtHR, 10 July 2007) 863
Piruzyan v Armenia App no 33376/ 07 (ECtHR, 26 June 2012) 444
Pugžlys v Poland App no 446/ 10 (ECtHR, 14 June 2016) 444
Rantsev v Cyprus and Russia, App no 25965/04 (ECtHR, 7 January 2010) 744
Riad and Idiab v Belgium Apps nos 29787/03 and 29810/03 (ECtHR, 24 January 2008) 747
Ribitsch v Austria (1995) Series A no 336 343
Saadi v United Kingdom [GC] App no 13229/03 (ECtHR, 29 January 2008) 163
Salayev v Azerbaijan App no 40900/ 05 (ECtHR, 9 November 2010) 747
Salmanoğlu and Polattaş v Turkey App no 15828/03 (ECtHR, 17 March 2009) 410
Shamsa v Poland App nos 45355/ 99 and 45357/ 99 (ECtHR 27 November 2003) 747
Shimovolos v Russia App no 30194/ 09 (ECtHR, 21 June 2011) 747
Shtukaturov v Russia App no 44009/05 (ECtHR, 27 March 2008) 745
Soering v the United Kingdom (1989) Series A no 161 . . . . . 130, 449, 463–4
Stanev v Bulgaria [GC] App no 36760/ 06 (ECtHR, 17 January 2012) 744, 745
Storck v Germany ECHR 2005–V 744, 745, 747
Svinarenko and Slyadnev v Russia [GC] App nos 32541/08 and 43441/08 (ECtHR, 17 July 2014) 444
Tekin v Turkey App no 22496/93 (ECtHR, 9 June 1998) 347
Timurtaş v Turkey App no 23531/94 (ECtHR, 13 Jue 2000) 347

Tyrer v United Kingdom (1978) Series A no 26 . . . . . 53, 67, 460
Yuldashev v Russia App no 1248/09 (ECtHR, 8 July 2010) 163
Governments of Denmark, Netherlands, Norway and Sweden v the Government of Greece App nos 3321–3323, 24 January 1968 576
Governments of Denmark, France, the Netherlands, Norway and Sweden v Turkey App nos 9940– 9944/ 82, 6 December 1983 576
Council of Europe Committee of Ministers, Resolution DH (70) 1 on the case before the European Commission of Human Rights: *Governments of Denmark, Netherlands, Norway and Sweden v the Government of Greece:* App nos 3321–3323/67 of 24 January 1968 (Adopted by the Committee of Ministers on 15 April 1970) 576
Council of Europe Committee of Ministers, Resolution DH (74) 2 on the case before the European Commission of Human Rights: *Governments of Denmark, Netherlands, Norway and Sweden v the Government of Greece*: App no 3344/67 of 31 May 1968 (Adopted by the Committee of Ministers on 26 November 1974) 576

European Committee of Social Rights (ECSR)

OMCT v Belgium, No 21/2003, [2004] ECSR 463
OMCT v Greece, No 17/2003, [2003] ECSR 463
OMCT v Ireland, No 18/2003, [2003] ECSR 463

Inter-American Court of Human Rights (IACtHR)

Aloeboetoe v Suriname, Reparations and Costs, Series C No 15 (IACtHR, 10 September 1993) 384, 385
Bámaca Velásquez v Guatemala, Reparations and Costs, Series C No 91 (IACtHR, 22 February 2002) 410
Blake v Guatemala, Merits, Series C No 48 (IACtHR, 24 January 1998) 384
Blake v Guatemala, Series C No 36 (IACtHR, 2 July 1998) 51
Cabrera García and Montiel Flores v Mexico, Series C No 220 (IACtHR, 26 November 2010) 352, 423, 435
Cantoral Benavides v Peru (Reparations and Costs), Series C No 88 (IACtHR, 3 December 2001) 384, 408, 410
Constitutional Court Case v Peru, Provisional Measures, Order Series E No 14 (Provisional Measures, Order of 14 August 2000, IACtHR, 14 August 2000) 616
Favela Nova v Brazil (IACtHR, 16 February 2017) 343
Gomes Lund et al ('Guerrilha do Araguaia') v Brasil, Preliminary Objections, Merits, Reparations, and Costs, Series C No 219 (IACtHR, 24 November 2010) 413
Loayza Tamayo v Peru, Reparations and Costs, Series C No 42 (IACtHR, 27 November 1998) 408, 410
Lysias Fleury et al v Haiti, Series C No 236 (IACtHR, 23 November 2011) 47, 50
Maldonado Vargas y otros v Chile (IACtHR, 2 September 2015) 346, 352
Michael Gayle v Jamaica (IACtHR, 24 October 2005) 58
Neira Alegría et al v Peru (Reparations and Costs) Series C No 29 (IACtHR, 19 September 1996) 410
Plan de Sánchez Massacre v Guatemala (Reparations) Series C No 116 (IACtHR, 19 November 2004) 380, 410
Rosendo Cantú et al v Mexico, Series C No 216 (IACtHR, 31 August 2010) 58
Velásquez Rodriguez v Honduras, Series C No 4 (IACtHR 29 July 1988) 62
Winston Caesar v Trinidad and Tobago, Series C 12 No 147 (IACtHR, 11 March 2005) 463

NATIONAL COURTS

Belgium

Cour d'Appel de Bruxelles, Chambre des Mises en Accusation (Court of Appeals of Brussels), *Sharon and Yaron*, 26 June 2002 . . . . . 238, 239
Cour de Cassation de Belgique (Court of Cassation of Belgium), *HSA et al v SA et al* (Decision related to the indictment of Ariel Sharon, Amons Yaron and Others), No P02.1139F/2, Judgment of 12 February 2003 239

France

Cour de Cassation, Chambre Criminelle (Court of Cassation of France), Rejet, No 95–81527, 26 March 1996 231

Tribunal de Grande Instance de Paris (High Court of Paris), Order No 94 052 2002/7 of 6 May 1994 231
Tribunal de Grande Instance de Paris (High Court of Paris), *Kovač et al v Karadžic et al* No 05/10617, Judgment of 14 March 2011 401
Cour de Cassation, Chambre Criminelle (Court of Cassation of France) No Q 04–87.245 FS-P+F+I, Judgment of 10 January 2007 235
Tribunale de Grande Instance de Paris (High Court of Paris) *Kalinda* (complaint) (filed 4 July 1994) 231
Tribunale de Grande Instance de Paris (High Court of Paris), *Depaquier v Zigiranyirazo* (complaint) (filed 19 July 1994) 231
Cour de Cassation, Chambre criminelle (Court of Cassation of France) No 02–85379, 23 October 2002 . . . . . 232, 233
Cour d'Appel de Montpellier (Court of Appeal of Montpellier) Ordonnance et mise en accusation devant la Cour d'Assises et de non-lieu partiel et Ordonnance de prise de corps, 25 May 2001 247

Germany

OLB Hamburg (German Higher Regional Court of Hamburg), *Mounir El-Motassadeq*, No IV-1/04, Judgment of 19 August 2005 . . . . . 418, 425, 434, 435–6
OLB Hamburg (German Higher Regional Court of Hamburg), *Mounir El-Motassadeq*, Decision of 14 June 2005, 58 in Neue Juristische Wochenzeitschrift 2326 . . . . . 418, 425, 433–4
Bundesgerichshof (German Federal Court of Justice) No 1 StR 140/05, Judgment of 10 August 2005
Bundesverfassungsgericht (German Constitutional Court), BVerfGE 45 187, Judgment of 21 June 1977 460
Landgericht Frankfurt am Main (Court of Frankfurt am Main) NJW 2005 692, Judgment of 20 December 2004 . . . . . 92, 181

Italy

Corte di Cassazione Civile Sezioni Unite (Court of Cassation of Italy), *Ferrini v Federal Republic of Germany*, No 5044/2004, 11 March 2004 402

Kenya

Court of Appeal of Kenya, *Godfrey Ngotho Mutiso v Republic*, H.C.CR.C.NO.55 of 2004, 30 July 2010 466

The Netherlands

Hoge Raad (Supreme Court of the Netherlands), *Prosecutor-General of the Supreme Court v Desiré Bouterse,* LJN: AB1471, Judgment of 18 September 2001 . . . . . 197, 229–31, 235, 236, 243–4
District Court of The Hague, *Ashraf Ahmed El-Hojouj v Harb Amer Derbal et al,* No 400882/HA ZA 11–2252, Judgment of 21 March 2012 401
Gerechtshof Amsterdam (District Court of Amsterdam), *Wijngaarde et al v Bouterse*, LJN: AA8395, 20 November 2000 230

Spain

Tribunal Supremo (Spanish Supreme Court), '*Guatemala Genocide Case*', No 327/2003, Judgment of 25 February 2003 241
Tribunal Constitucional (Spanish Constitutional Court), '*Guatemala Genocide Case*', No 237/2005, Judgment of 26 September 2005 . . . . . 217, 241

Senegal

Cour d'appel de Dakar, Chambre d'accusation (Court of Appeal of Dakar), No 135, 4 July 2000 221

South Africa

Supreme Court of Appeal of South Africa, *Bongani Mthembu v South Africa*, No 379/09, 10 April 2008 423
South African Constitutional Court, *State v Makwanyane and Mchunu*, No CCT/3/94, Judgment of 6 June 1995 463

United Kingdom

A and Others v SSHD [2005] UKHL 71 . . . . . 418, 425, 434
A and Others v SSHD [2004] EWCA Civ 1123. 418
Al-Skeini and Others (Respondents) v Secretary of State for Defence (Appellant), Al-Skeini and others (Appellants) v Secretary of State for Defence (Respondent) (Consolidated Appeals) [2007] UKHL. 26 750
Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others [2006] UKHL 26
Pinochet, In re [1998] UKHL 197, 215, 216, 227, 228, 229, 236, 244–6
Regina v Faryadi Sarwar Zardad [2007] EWCA Crim 279. . . . . 197, 227, 228–9, 268, 307–8
Regina v Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) and Regina v Evans and another and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) [1998] UKHL 246
Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division) [1999] UKHL 246

United States

US Supreme Court, *Kiobel v Royal Dutch Petroleum Co*, 133 SCt 1659, Judgment of 17 April 2013 . . . . . 399, 401, 402
US Supreme Court, *Khaled El-Masri v the United States of America*, No 06–1613, Judgment of 2 March 2007 405
US Supreme Court, *Nix v Williams* [1984] 467 US 431 422
US Supreme Court, *Rasul et al v Bush*, President of the United States et al [2004] 542 US 466 211
Court of Appeal for Ontario, *Bouzari v Islamic Republic of Iran*, OJ No 2800 Docket No C38295, Judgment of 30 June 2004 401
Court of Appeal for the Second Circuit of the United States, Filártiga v Peña-Irala [1980] No 191 Docket 79–6090, Judgment of 30 June 1980. 401

International Instruments

[Page references in bold indicate that the text is reproduced in full]

African Charter of Human and Peoples' Rights (ACHPR) 679, 1004
Art 5 . . . . . **1**, 2, 56, 63, 441
Art 7 . . . . . 418n
Art 36 . . . . . 491n
Art 43 640
Art 47 568
Art 55. 588
American Convention on Human Rights 1969 (ACHR) 585, 602, 616, 617, 679
Art 2 55
Art 4 463
Art 5 . . . . . 2, 63
Art 5(2) 441
Art 8(3) 418
Art 27 . . . . . 2, 93
Art 29(b) 69
Art 37 491
Art 44 . . . . . 584, 588
Art 45. 568
Art 46(1)(b) 604
Art 47(d) 603
Art 54 491
Art 63(2) 616
Art 70 . . . . . 640, 1020, 1023
Art 78 691
Art 78(1) 693
Art 78(2) 693
Apartheid Convention 1973. . . . . 3, 484
Art IX 482
Charter of the International Military Tribunal of Nuremberg *see* Nuremberg Charter
Convention Against Torture 1985 (CAT) **1035–44**
Preamble 10, **15**, 15–20, 30, 63, 67, 72, 78, 91, 130, 287, 427
Art 1 . . . . . 7, 19, **23**, 23–71, 73, 80, 82, 84, 86, 100, 101, 127, 128, 129, 130, 131, 132, 176, 178, 181, 182, 183, 184, 185, 188, 190, 202, 203, 207, 214, 321, 447, 470, 471, 556, 591, 600, 707, 718
Art 1(1) 28, 31, 32, 32, 33, 33, 39, 42, 64, 67, 70, 130, 182, 186, 442
Art 1(2) 28, 39, 40, 67, 69, 70, 71, 471, 472
Art 2 . . . . . 7, 46, 53, 63, 66, **72**, 73–97, 188, 211, 213, 227, 321, 322, 324, 378, 383, 437, 442, 447, 448, 450, 455, 460, 470, 528, 709, 710, 711, 1029
Art 2(1) 63, 73, 75, 78, 79, 80, 81, 83, 84, 85, 318, 320, 321, 358, 443, 749
Art 2(2) 73, 76, 91, 92, 93, 94
Art 2(3) 73, 76, 77, 94, 95, 96, 97, 189, 191
Art 3 . . . . . 7–8, 28, 29, 61, 73, 75, 79, **98**, 98–175, 219, 240, 281, 296, 375, 386, 387, 432, 433, 442, 446, 447, 448, 464, 472, 528, 575, 584, 585, 590–1, 596, 597–98, 599, 600, 602, 607, 608, 610, 611, 613, 618, 619, 621, 622, 625, 626, 630, 635
Art 3(1) 101, 106, 110, 113, 116, 133, 163, 472
Art 3(2) 101, 105–6, 108, 111–12, 113, 171, 174
Arts 3–15 . . . . . 179, 437, 446–50
Art 4 . . . . . 8, 73, 77, 79, 82, 94, 102, 103, **176**, 176–93, 203, 210, 211, 212, 214, 217, 219, 220, 224, 290, 291, 300, 302, 303, 306, 307, 337, 378, 388, 430, 591
Art 4(1) 179, 180, 181–2, 184, 193
Art 4(2) 187, 188, 189, 191, 193, 195, 257
Arts 4–9. . . . . 73, 180, 302, 309, 358, 371, 387, 442, 447,
Art 5 . . . . . 8, 183, **194**, 194–248, 250, 252, 253, 254, 263, 264, 266, 272, 273, 275, 276, 278, 281, 282, 291, 312, 590, 591, 593, 594, 595, 686
Art 5(1) 196, 203, 204, 208, 214, 219, 224, 228, 236, 239, 240, 247, 253, 264, 265, 268, 278, 279, 280, 282, 283, 289, 312
Art 5(1)(a) 203, 204, 209, 210–12, 215, 227, 239, 272, 280
Art 5(1)(b) 203–4, 209, 210, 212–14, 215, 227, 261, 264, 265, 301, 770
Art 5(1)(c) 196, 204, 209, 214–18, 222, 227, 261, 265, 268, 301, 591, 599, 770
Art 5(2) 196, 197, 204, 205, 206, 207, 217, 219–47, 255, 258, 261, 263, 275, 276, 277, 279, 280, 283, 286, 287, 288, 289, 302, 312, 575
Art 5(3) 204, 205, 236, 247–8
Arts 5–9. . . . . 8, 79, 192, 197, 337, 338, 591
Art 6 . . . . . 197, 207, 208, 209, 210, 219–20, 226, 232, **249**, 249–66, 268, 276, 277, 464, 594, 595, 686, 731
Art 6(1) . . . 219, 232, 252, 253–61, 262, 264, 290
Art 6(2) 219, 226, 252, 253, 261–3, 264, 265, 277, 285, 288, 338, 686

Art 6(3) 210, 219, 220, 253, 263–4, 265, 771
Art 6(4) 207, 219, 253, 264–6, 273, 276
Art 6(5) 253
Arts 6–9. . . . . .196, 250
Art 7 . . . . . .26, 35, 51, 110, 111, 183, 197, 202, 206, 207, 208, 209, 210, 219–20, 223, 224, 225, 226, 239, 250, 252, 253, 254, 261, 263, 266, **267**, 267–91, 299, 302, 338, 575, 591, 594, 593, 594, 595, 600, 686, 731
Art 7(1) 226, 255, 256, 268, 278–89, 686
Art 7(2) 220, 258, 278, 279, 289–90
Art 7(3) 220, 290–1
Art 8 . . . . . 26, 35, 196, 201, 202, 215, 219, 239, 250, 282, **292**, 292–301, 302, 304, 306, 590, 591
Art 8(1) 298–9
Art 8(2) 299–300
Art 8(3) 300
Art 8(4) 301
Art 9 . . . . . .197, 215, 219, 229, 261, 283, **302**, 302–8, 360, 590, 591
Art 9(1) 265, 289, 305–6
Art 9(2) 304, 306–8
Art 10. . . . . 7, 29, 73, 79, 81, **309**, 309–17, 318, 320, 332, 360, 376, 442, 446, 591
Art 10(1) 312–16
Art 10(2) 312, 316
Arts 10–13 . . . 180, 309, 310, 386, 442, 446, 447
Art 11. . . . 7, 29, 73, 79, 85, 202, 320, 321, 322, 328, 376, 383, 442, 446, 455, 591, 688
Art 11(1). 272, 316, 317, **318**, 318–35, 450, 451, 455
Art 12 . . . . . 7, 29, 73, 79, 196, 263, 268, 290–1, 320, 332, **336**, 336–56, 357, 358, 361, 365, 371, 376, 382, 383, 386, 391, 392, 393, 412, 432, 442, 446, 455, 470, 591, 600, 607, 688
Art 13 . . . . 8, 29, 73, 79, 116, 196, 215, 291, 320, 337, 338, 340, 341, 346, **357**, 357–69, 371, 376, 382, 386, 391, 392, 393, 412, 442, 446, 455, 470, 480, 538, 565, 566, 584, 590, 591, 599, 600, 605, 606, 636, 637, 688
Art 14 . . . . . 8, 28–9, 30, 79, 87, 89, 192, 202, 215, 295, 351, 358, **370**, 370–416, 422, 442, 446, 447, 449, 528, 579, 589, 590, 591, 599, 600, 606, 629, 632
Art 14(1) 384–5, 590
Art 14(2) 373, 385–6,
Art 15. . . . . 7, 28, 29, 73, 79, 93, 375, 386, 387, **417**, 417–40, 442, 446, 447, 450, 591, 600, 618, 621, 634
Art 16 . . . . . .7, 23, 28, 29–30, 39, 40, 45, 46, 65, 66, 68, 69, 73, 78, 79, 93, 95, 101, 127, 128, 180, 310, 312–13, 318, 321, 322, 324, 328, 332, 367, 375, 376, 383, 384, 386, 387, 420, 437, **441**, 441–74, 512, 591, 596, 598, 599, 709, 710, 711
Art 16(1) 27, 28, 29, 39, 320, 321, 338, 342, 357, 374, 375, 386, 387, 388, 442–3, 446, 449, 470, 471, 472, 749
Art 16(2) 27, 28, 40, 70, 71, 91–2, 128, 375, 471, 472
Art 17. . . . . **475**, 475–95, 544, 547, 726, 779
Art 17(1). 485–8
Art 17(2) 484, 486, 488–93
Art 17(3) 488–93, 778
Art 17(4) 488–93, 778
Art 17(5) 488–93
Art 17(6) 483, 488–93, 778, 782, 784
Art 17(7) 476, 483, 493–5, 506, 672, 676, 678, 965
Art 18. . . . . 572, 622, **496**, 496–506, 513, 562, 622, 792, 795, 796
Art 18(1) 500, 648, 795, 796
Art 18(2) 498, 502–3, 797
Art 18(2)(a) 502, 505, 797
Art 18(2)(b) 502
Art 18(3) 503–4, 640, 795, 969
Art 18(4) 494, 504–6, 795, 798
Art 18(5) 493, 494, 503, 506, 672, 676, 678, 965
Art 19. . . . . 4, 9, 144, 476, 499, 501, 505, **507**, 507–39, 547, 548, 549, 566, 572, 575, 590, 629, 637, 645, 647, 659, 668, 669, 670, 693, 694
Art 19(1) 81, 517–21
Art 19(3) 4, 513, 515, 516, 522–8, 547, 668, 670
Art 19(4) 515, 516, 527, 547, 646, 668, 670
Arts 19–22. . . . . .484, 496, 497
Art 20. . . 4, 5, 9, 84, 93, 144, 145, 173, 477, 499, 501, 505, 514, 515, 516, 538, **540**, 540–66, 576, 581, 586, 587, 637, 645, 647, 667, 668, 669, 675, 683, 694, 721, 725, 733, 743, 821, 957
Art 20(1) 548, 549, 556–8, 669, 670, 672
Art 20(2) 558–9, 560, 672
Art 20(3) 559–63, 580, 672, 725
Art 20(4) 563–4
Art 20(5) 564, 581, 646, 670
Art 21. . . . 9, 21, 476, 505, 527, **567–8**, 567–81, 647, 661, 662, 667, 668, 669, 672, 680, 685, 687, 688, 689, 690, 693
Art 21(1). 5, 8, 11, 569, 574, 575, 576, 581, 689, 697
Art 21(1)(a). 574, 576, 577, 690
Art 21(1)(b) 576, 577–8
Art 21(1)(c). 577–8
Art 21(1)(d) 574, 580
Art 21(1)(e). 578–9, 687, 690
Art 21(1)(f). 580
Art 21(1)(g) 580
Art 21(1)(h) 580–1
Art 21(1)(h)(ii) 580
Art 21(2) 5, 576, 577, 581
Art 22 . . . . . 8, 9, 73, 99, 119, 138, 157,

174, 177, 193, 223, 256, 28, 316, 362, 476, 499,501, 504, 505, 505, 527, 528, 538, 556, 566, **582**, 582–637, 647, 661, 662, 667, 668, 669, 672, 693, 733
Art 22(1) 5, 8, 11, 380, 588, 589–95, 602
Art 22(2) 588, 595–6, 598–602, 697
Art 22(3) 223, 623–32
Art 22(4) 528, 623–32
Art 22(5) 627
Art 22(5)(a) 578, 602–5, 689
Art 22(5)(b) 604, 605–16
Art 22(6) 581, 623–32
Art 22(7) 581, 623–32
Art 22(8) 5, 588, 589
Art 23 .....485, 563, **638**, 638–41, 1023
Art 24 .....527, 543, 642, 642–50, 877
Art 25 ....589, **651**, 651–4, 655, 658, 666, 696
Art 25(1) 653
Art 25(2) 653
Art 26 .. 589, 651, **655**, 655–62, 666, 696, 697
Art 27 ..... 657, **663**, 663–6, 669, 988, 991
Art 27(1) 490, 663, 665
Art 27(2) 660
Art 28 ....4, 5, 9, 477, 541, 549, 550, 556, 661, **667**, 667–72, 675, 684, 697, 725
Art 28(1) 11, 672, 957, 960
Art 29 .....513, **673**, 673–8, 692, 696, 697, 965, 994, 1016, 1018, 1019
Art 29(1) 494, 675, 676, 697, 1018
Art 29(2) 506, 676, 677
Art 29(3) 673, 677, 678
Art 30 ..... 545, 575, 578, 581, 661, **679**, 679–90, 688, 689, 697
Art 30(1) 5, 684, 685, 687, 689, 690, 693, 957
Art 30(2) 5, 11, 672, 680, 684–5, 957, 960
Art 30(3) 684–5
Art 31..... 11, 427, 573, 659, 661, 670, 684, **691**, 691–4, 696, 1011, 1014
Art 31(1).....693
Art 31(2) 693, 1013
Art 31(3) 694
Art 32 .....427, 587
Art 32(a) 697
Art 32(c).....693, **695**, 695–7
Art 33 ..... 427, **698**, 698–9, 1032
Art 33(2) 472, 699
Optional Protocol *see* Optional Protocol to Convention Against Torture 2002 (OPCAT)
Convention Against Torture: Draft Texts
Byelorussian Soviet Socialist Republic Amendment to the Draft Resolution
Art 28 544
Byelorussia Soviet Socialist Republic Proposal, 29 November 1984
Art 28 668
Brazil Draft, 1983
Art 5 200
Brazil/Sweden Joint Draft 1981
Art 7 271
Chairman-Rapporteur Draft, 1982 271
Chairman-Rapporteur Draft Implementation Provisions, 1 February 1982
Art 17.....478–9, 497, 644
Art 18.....510–11
Art 19.....542
Art 20 .....571, 681
Annex 571–2, 681–2
Chairman-Rapporteur Four Draft Articles on Implementation, with Explanatory Note, 24 December 1982
Art 17..... 479–80
Art 18.....497
Art 19.....511
Art 20 543
Chairman-Rapporteur Revised Set of Final Clauses, 31 January 1983
Art 25 652
Art 26 .....652, 656
Art 27 664
Art 28 674
Art 29 692
IAPL Draft, 15 January 1978 .....**1047–51**
Art I.....26, 42
Art II 24–5
Art III 35
Art IV 74, 101–2, 177, 339, 359–60, 372
Art V 74, 94
Art VI 74, 76
Art VII.....419
Art VIII.....177
Art IX 199
Art IX(1) 38, 210
Art X 293, 297, 298
Art X(2).....295, 299
Art X(3) 300
Art XII.....294
Art XIII.....477
Art XIII(1).....480
Art XIV.....680
Art XV.....651
Art XVII 651
Art XVIII 656
Art XIX..... 664
Art XX.....674
Art XXI..... 695–6
International Association of Penal Law Draft, 15 January 1978
Art XIII..... 643
Netherlands Amended Text, 1981
Art 7 271
Netherlands Draft Resolution submitted to the General Assembly, 23 November 1984
Art 19.....511–12
Art 20 543

Sweden Original Draft, 18 January 1978 . . . . . **1051–1055**
Art 1 25
Art 1(2) 26, 27
Art 2 74
Art 2(1) 75
Art 2(2) 75
Art 3 . . . . . .74, 75
Art 4 102
Art 5 311
Art 5(2) 206
Art 6 319
Art 6(4) 204
Art 7 177–8
Art 8 199
Art 8(2) 4
Art 9 360
Art 10 339
Art 11 . . . . . .4, 269
Art 11(1) 361
Art 11(2) 272
Art 12 372
Art 13 419
Art 14 . . . . . .4, 269, 294
Art 15 303
Art 16 . . . . . .477–8, 510
Art 17 542
Art 18 569
Art 19 569
Art 20 585
Art 21 643
Sweden Revised Draft, 19 February 1979 . . . . . **1055–1058**
Art 1 25
Art 1(3) 27, 40, 69
Art 2 75
Art 2(1) 75
Art 3 . . . . . .75, 102, 104
Art 3(1) 106
Art 4 178
Art 4(1) 178–9
Art 5 . . . . . .200, 203
Art 5(2) 204
Art 6 251–2
Art 6(1) 261
Art 6(2) 252
Art 6(5) 272, 290
Art 7 . . . . . .270, 273
Art 8 294–5
Art 9 303–4
Art 10 311–12
Art 11 319
Art 12 . . . . . .360, 361
Art 13 . . . . . .340, 438
Art 14 372
Art 15 . . . . . .420, 440
Art 16 27
Art 16(1) 27
Art 16(2) 27
Sweden Proposal for the Preamble and the Final Provisions, 22 December 1980 . . . . . **1058–1059**
Art A 652, 656
Art A(2) 652, 656, 657, 665
Art B 652, 656
Art C 664
Art C(1) 652, 656, 665
Art C(2) 665
Art D 674
Art E 696
Art F 698–9
Sweden Proposal for Implementation Provisions, 22 December 1981
Art 17 478
Art 29 510
Art 30 542
Art 31 569–71
Art 32 585–6
Art 32(5)(b) 606
Art 33 640
Art 34 644
Switzerland Draft, 19 December 1978
Art 7 270
United Kingdom Draft, 19 December 1978 . . . 270
Art 7 270
United States Draft, 19 December 1978
Art 5 311
Art 6 . . . . . 251, 319
Art 7 270
Art 8 294
Art 9 . . . . . .339, 360
Arts 10 . . . . . .339, 360
Art 11 319
Art 15 . . . . . .303, 304, 419
USSR Draft, 7 March 1979
Art 3 102
Working Group Report, 25 March 1983
Art 24 644
Convention on the Elimination of Discrimination against Women of 1967 (CEDAW) 88, 476, 482, 484, 485, 492, 494, 499, 502, 520, 529, 533, 538, 565, 636, 639, 640, 642, 663, 665, 688, 691, 991
Art 17 . . . . . .762, 770, 779, 789
Art 17(2) 771
Art 17(5) 491, 789
Art 17(8) 494, 498, 970
Art 17(9) 494, 498, 971
Art 18 512
Art 21 . . . . . 642, 646
Art 21(1) 642
Art 27 665
Art 28 997
Art 28(1) 697

Art 29 688
Art 30 . . . . . .698, 699
Optional Protocol 588, 602, 678
Art 4(2)(i). 603
Art 5 623
Art 8 541
Art 11. . . . . 538, 565, 636, 863
Art 16. 991
Art 17. 1000
Convention on the Elimination of Racial Discrimination 1963 (CERD) . . . 482, 483, 485, 492, 493, 494, 497, 520, 529, 533, 579, 602, 639, 640, 645, 653, 658, 663, 676, 688, 689, 965
Art 8 . . . . . .770, 779, 789
Art 8(2) 771
Art 8(5) 491
Art 8(5)(a) 789
Art 8(6) 493
Art 9 512
Art 9(1) 520
Art 9(2) 525, 642, 646
Art 11. . . . . .568, 579
Art 11(3) 578
Art 12 . . . . . .568, 579
Art 14. . . . . .588, 589
Art 17. . . . . 653, 658
Art 21. . . . . 691, 693
Art 22 . . . . . .683, 688, 689
Art 23 675
Art 24 695
Art 24(c) 697
Art 25 698
Convention on the Physical Protection of Nuclear Material 1979
Art 8(1)(b) 214
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973 . . . . . 178, 204, 205, 274, 276
Art 2(2) 178, 186
Art 6 257
Art 6(1)(b) 214
Art 8 . . . . . .295, 296
Convention on the Prevention and Punishment of the Crime of Genocide *see* Genocide Convention
Convention on the Privileges and Immunities of the United Nations 1946 . . .638, 639, 1042
ss 22 and 23 . . . . . 1020, 1021, 1022, 1194, 1209, 1217, 1230
Convention on the Rights of Persons with Disabilities 2006 (CRPD) 476, 485, 490, 499, 520, 533, 602, 790, 991
Art 34(7) 789, 790
Art 34(11) 494, 971
Art 34(12) 494, 970
Art 34(13) 639
Art 39 642
Art 45. 665
Art 48 691
Art 50 699
Optional Protocol 584, 603
Art 2(c) 603
Art 4 623
Art 6 541
Art 13 991
Convention on the Rights of the Child 1924, 1959 & 1989 (CRC) . . . 70, 456, 462, 476, 485, 492, 520, 533, 557, 565, 568, 578, 588, 636, 639, 640, 663, 678, 1019
Art 1 456
Art 43(2) 678
Art 43(6) 491, 789, 790
Art 43(11) 494, 971
Art 43(12) 494, 970
Art 44(5) 445
Art 49 665
Art 50 673
Art 50(2) 678
Art 50(3) 678, 1019
Art 51. 997
Art 51(1). 697
Art 52. 691
Art 53. . . . . 697, 699
Art 54 . . . . . .698, 699
Optional Protocol-SC 508, 520, 678, 1000
Optional Protocol-AC 508, 520, 678, 1000
Convention on the Safety of United Nations and Associated Personnel 1994
Art 6 . . . . . .1022, 1027
Convention Relating to the Status of Refugees 1951 *see* Refugee Convention 1951
Covenant on Civil and Political Rights 1966 (CCPR) 10, 27, 33, 68, 70, 75, 91, 160, 180, 279, 281, 440, 466, 467, 476, 478, 481, 482, 483, 485, 488, 489, 492, 493, 514, 520, 544, 547, 573, 576, 579, 589, 658–9, 663, 665, 668, 691, 708, 985, 986, 994, 997, 1011
Art 2(2) 78
Art 2(3) 191, 379, 387
Art 4 2
Art 4(1) 93
Art 4(2) 91
Art 5(2) 69, 70
Art 6 . . . . . .130, 463, 464
Art 6(1) 464
Art 6(2) 464
Art 7 . . . . . 2, 6, 16, 19, 24, 33, 63, 67, 68, 70, 72, 77, 78, 91, 92, 100, 128, 130, 180, 191, 243, 328, 359, 387, 422, 436, 441, 444, 445, 448, 449, 451, 460, 464, 466, 472, 481, 486, 732, 986

Art 7(1) 464
Art 7(1) 464
Art 9 . . . . . 290, 310, 324, 346, 732, 743, 744
Art 9(3) 257, 258
Art 10. . . . . 68, 328, 329, 451, 732
Art 12(4) 297
Art 13 . . . . . 116, 123, 281, 290, 297
Art 14. . . . . 281, 290, 324, 346, 347, 902
Art 14(3)(e) 417, 418
Art 14(3)(g) 417, 418
Art 15(1). 244
Art 15(2) 244
Art 17. . . . . .281, 297
Art 27 908
Art 28 . . . . . 476, 477, 480, 512
Art 28(2) 486
Arts 28–32. 485
Art 29 770
Art 29(2) 488, 771
Art 30 . . . . . .489, 770, 779
Art 30(1) 490
Art 30(2) 487, 488
Art 32 . . . . . .789, 790
Art 32(1) 490
Art 33 . . . . . .483, 492, 493
Art 33(1) 493
Art 34 . . . . . .483, 492, 782
Art 35. 493
Arts 35–39. . . . . .496, 792
Art 36 . . . . . .493–4, 498, 503
Art 37(1) 498
Art 37(2) 498
Art 39(1) 498, 500
Art 39(2) 498
Art 40 . . . . . 508, 512, 514, 516, 520, 528
Art 40(1) 518, 520
Art 40(2) 518
Art 40(4) 525, 526
Art 41. . . . . 568, 573, 574, 581
Art 41(2) 576, 581
Art 42 . . . . . 568, 572, 579, 639, 640
Art 42(1)(b) 579
Art 42(1)(c) 578
Art 43 . . . . . .568, 638, 640, 1020, 1023
Art 44 688
Art 45. . . . . .642, 645, 646
Art 48 . . . . . .653, 658
Art 49 665
Art 50 . . . . . .993, 994
Art 51. . . . . 673, 675, 676, 1016
Art 51(2) 673, 677, 1018
Art 51(3) 678
Art 52. 695
Art 53. 698
First Optional Protocol 516, 572, 587, 588, 589, 601, 602, 603, 669, 693, 985
Art 1 589
Arts 1–6. 623
Art 2 589
Art 3 595
Art 4 623
Art 5(1) 629
Art 5(2)(a) 603
Art 5(2)(b) 606
Art 5(3) 623
Art 5(4) 631
Art 8 986
Art 8(5) 697
Art 9 991
Art 10. 993
Art 11. 1018
Art 12 . . . . . .588, 691, 693, 1011, 1013
Art 14. 698
Second Optional Protocol 66, 691
Art 19(a). 697
Art 19(b) 697
Art 11. 698
Covenant on Economic, Social and Cultural Rights (CESCR) 476, 485, 487, 499, 502. 520, 526, 533, 538, 565, 636, 663, 665, 994
Art 26 . . . . . .653, 658
Art 27 665
Art 31. 698
Optional Protocol 588, 678, 688
Art 5 623
Art 10. 568
Art 10(1)(c) 578
Art 11. 541
Art 13 . . . . . .538, 565, 636, 863
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 (ECPT). 5, 10, 657, 733, 735, 737, 762, 778, 826, 829, 841, 854, 856, 862, 867, 874, 876
Art 2 . . . . . .**746–7**, 821
Art 3 862
Art 5(3) 790
Art 6(1) 797
Art 7(2) 835
Art 8 821
Art 8(1) 829
Art 8(2)(b) 829
Art 9 . . . . . .849, 855, 859
Art 9(1) 859, 860
Art 10. 733
Art 10(1) 874
Art 10(2) 876
Arts 10–13. 874
Art 11. 733
Art 11(3) 876
Art 12 877
Art 17(3) 1008, 1009, 1010
Art 21. 1000
Art 22 1012

First Protocol 737
Second Protocol 789
European Convention on Extradition 1957 . . . 297
European Convention on Human Rights 1950 (ECHR) 27, 180, 342, 345, 381, 432, 464, 585, 602, 604, 617, 679, 686, 1019
Art 1 750
Art 2 463
Art 3 . . . . . .2, 42, 63, 100, 122, 130, 180, 403, 423, 441, 448, 449, 451, 460, 464, 472
Art 5 743
Art 5(1)(a) 68
Art 6 . . . . . .400, 418
Art 6(1) 403
Art 13 379
Art 14 382
Art 15 2
Art 15(1) 93
Art 23(3) 491
Art 24 568
Art 34 . . . . . .584, 568, 605, 863
Art 35 605
Art 35(1) 604
Art 35(2)(b) 603
Art 51 . . . . . .640, 1020, 1023
Art 53 69
Art 55 . . . . . .688, 691
Art 58(1) 693
Art 58(2) 693
Protocols Nos 2, 3, 5, 8, 9, and 10 1019
Protocols Nos 11 and 14 . . . . . 44, 1019
European Union Convention on Mutual Assistance in Criminal Matters 2000 306
Geneva Conventions on Humanitarian Law 1949 . . . . . 70, 76, 231, 237, 239, 274, 277, 716, 1007, 1008, 1009, 1010
Art 3 2
Third Geneva Convention (Relative to the Treatment of Prisoners of War) 826
Art 126 1007
Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War) 826
Art 143 1007
Additional Protocols 1977 . . . . . .67, 70, 76, 716, 1009, 1010
Protocol I, Art 75(4) 38
Genocide Convention 1948 . . . . . 3, 221, 686
Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (Hijacking Convention) . . . 198, 205, 208, 209, 274, 275, 279, 684
Art 2 186
Art 4 198
Art 6 . . . . . .250–1, 257
Art 7 . . . . . .239, 269, 272, 277
Art 8 . . . . . .202, 293, 295, 296
Art 8(1) 298
Art 8(2) 299
Art 8(3) 300
Art 8(4) 301
Art 10 303
Art 10(2) 304
ICC Statute *see* Rome Statute of the ICC
ICJ Statute 617
Art 9 487
Art 13 491
Art 21(1) 500
Art 36(1) 688, 690
Art 36(2) 688
Art 41 616
ICTR Statute (Statute of the International Criminal Tribunal for Rwanda) 369
ICTY Statute (Statute of the International Criminal Tribunal for the former Yugoslavia) 369
Art 7(3) 77
Art 7(4) 77
Art 22 369
Inter-American Convention on Extradition 1981 297
Inter-American Convention on Forced Disappearances of Persons 1996 277
Art 6 277
Inter-American Convention to Prevent and Punish Torture 1985 . . . . . .10, 277
Art 1 63
Art 2 23
Art 10 440
Art 12 277
International Convention Against the Taking of Hostages 1979 (New York Hostages Convention/Hostage Convention) 203, 204, 208, 252, 272, 274, 295
Art 2 186
Art 5 200
Art 6 257
Art 6(2)(d) 215
Art 6(2)(e) 214
Art 8(1) 270, 272
Art 10 295
International Convention for the Protection of all Persons from Enforced Disappearance 1992 and 2006 (CED) 216, 277, 413, 476, 790
Art 9(2) 277
Art 11(1) **283**
Art 22 216
Art 24 51
Art 26(4) 789, 790
Art 26(7) 970, 971
Art 31 . . . . . .584, 588, 623
Art 31(2)(c) 603
Art 32 . . . . . .568, 578
Art 33 541

Art 39 665
Art 42 688
Art 44 673
Art 45. 698
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) . . . 476, 485, 492, 499, 520, 533, 602, 688
Art 72(5)(a) 789
Art 72(5)(c) 790
Art 72(7) 494, 971
Art 72(8) 494, 970
Art 72(9) 639
Art 74(7) 642
Art 76. 568
Art 76(1)(c) 578
Art 77 588
Art 77(3)(a) 603
Art 85 . . . . . .697, 699
Art 87 665
Art 89 691
Art 90 673
Art 91. 997
Art 91(1). 697
Art 92 688
Art 93 698
Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 . . . . . 205, 274, 276
Art 3 186
Art 5 198
Art 6 257
Art 8 . . . . . .295, 296
Art 11. 303
Art 11(2) 304
New York Hostages Convention see International Convention Against the Taking of Hostages 1979
Nuremberg Charter 231
Art 8 . . . . . 76, 77, 95, 96
Optional Protocol to Convention Against Torture 2002 (OPCAT). . . 6, 115, **1185–94**
Preamble **703,** 703–12, 718, 725, 749, 914
Art 1 . . . . . 709, **715**, 715–725, 842, 893
Art 1(1) 718, 719, 721
Art 1(2) 719
Art 2 . . . . . **726**, 726–34, 759, 761, 820, 844, 1026
Art 2(2) 917
Art 2(3) 734, 797, 865, 867
Art 2(4) 820, 856, 860, 876, 1029
Art 3 . . . . . 708, 717, 728, **735**, 735–38, 761, 806, 807, 825, 854, 881, 882, 884, 914
Art 3(3) 709
Art 4 . . . . . 321, **739**, 739–52, 760, 761, 820, 830, 831, 833, 857, 896, 925
Art 4(1) 745, 746, 788, 915
Art 4(2) 743, 746, 761, 915
Art 5 . . . **755**, 755–65, 769, 778, 779, 784, 788, 845
Art 5(1) 771, 778, 780, 797
Art 5(2) 769, 778, 907, 908
Art 5(3) 778, 788, 790
Art 5(4) 788
Art 5(6) 788
Arts 5–9. 780
Art 6 . . . . . 760, 761, **766**, 766–72, 991, 992
Art 6(1) 781, 788
Art 6(2) 781
Art 7 . . . . . .760, **773**, 773–81, 783, 795
Art 7(1) 794–5
Art 7(1)(a) 779
Art 7(1)(b) 779, 992
Art 7(1)(d) 779, 780, 781
Art 7(2) 779, 781
Art 8 . . . . . .709, 720, 721, **782**, 782–5, 809, 840, 841, 842
Art 9 . . . . . .771, 780, **786**, 786–91, 809
Art 9(4) 1009
Art 10 . . . . 499, 742, **792,** 792–9, 840, 841, 842
Art 10(1) 796
Art 10(2) 797
Art 10(2)(c) 797
Art 10(3) 484, 797, 798
Art 11 . . . 742, **803**, 803–19, 820, 840, 841, 842
Art 11(a). 811, 816, 874, 978
Art 11(b) 804, 812, 816, 831, 932, 959
Art 11(b)(i). 812–13, 889, 959, 961
Art 11(b)(ii) 814, 831
Art 11(b)(iii). 815–16
Art 11(b)(iv) 978
Art 11(c). 817
Art 11(1)(a). 914
Art 11(1)(b) 843
Arts 11–13 811
Arts 11–16 . . . . . 9, 1029
Art 12 . . . . . .709, 811, **820**, 820–33, 834, 840, 842, 848, 849, 854, 855, 856, 864, 876, 959, 1026, 1029
Art 12(a) 811, 830
Art 12(b) 831, 856
Art 12(c) 831, 931
Art 12(d) 832, 944, 945, 973
Arts 12–16. 804
Art 13 . . . . . .709, 811, 820, 826, **834**, 834–47, 855, 856
Art 13(1) 734, 843
Art 13(2) 731, 844, 845, 856
Art 13(3) 846, 1023
Art 13(4) 847, 978
Art 14. . . . . 820, 829, 833, 834, 842, **848**, 848–60, 872, 873, 873, 876, 922, 924, 959, 1026, 1027
Art 14(1)(a) 831, 856
Art 14(1)(b) 831, 856
Art 14(1)(c). 830, 856, 857, 926, 927
Art 14(1)(d) 857, 928
Art 14(1)(e). 856, 857
Art 14(2) 830, 847, 849, 856, 859, 860, 926, 1000

Art 15. . . . . 820, **861**, 861–6, 872, 873, 876, 877, 938, 939, 959
Art 16. . . . . 726, 820, **867**, 867–77, 917, 968, 969, 974, 975, 976, 977
Art 16(1) 733, 821, 874, 875, 876, 969, 973
Art 16(2) 796, 865, 876, 969
Art 16(3) 484, 502, 642, 646, 797, 877
Art 16(4) 485, 502, 797, 832, 865, 876, 877, 949
Art 17. . . . . 345, 813, 873, **881**, 881–9, 893, 911, 932, 959, 961
Art 17(1). 992
Arts 17–23 . . . . . 7, 804, 813
Art 18. . . . . 708, 738, 882, **890**, 890–910, 911, 978
Art 18(1) 886, 888, 893, 894, 897, 900, 903, 904, 906, 909, 1024, 1025
Art 18(2) 904, 906, 907, 908, 909
Art 18(3) 899, 900, 901, 909
Art 18(4) 891, 894, 909
Art 19. . . . . 724, 733, 738, 882, 884, 896, **911**, 911–20, 930, 945, 946
Art 19(a). 914, 917
Art 19(b) 916, 942, 973
Art 19(c). 918, 919
Art 20 . . . . . 896, **921**, 921–37
Art 20(a) 924
Art 20(b) 924, 925
Art 20(c) 924, 926, 927
Art 20(d) 924, 928
Art 20(e) 924. 925, 930
Art 20(f) 931
Arts 20–23. . . . . 882, 911
Art 21. . . . . 865, **938**, 938–43
Art 21(1). 897, 938, 939
Art 21(2) 938, 940, 941
Art 22 . . . . . 884, 896, 897, 917, **944**, 944–50, 973, 1012, 1018, 1027
Art 23 . . . . . 942, 946, **951**, 951–3
Art 24 . . . . . 821, 888, 957, 957–61, 971, 992, 100, 1032
Art 24(1) 959, 960, 961
Art 24(2) 960, 961
Art 25 . . . . . 799, **965**, 965–72, 973
Art 25(1) 970, 971
Art 25(2) 971
Art 26 . . . . . 799, 804, 815, 817, 819, 847, 972, **973**, 973–80, 1014
Art 26(1) 977, 978
Art 26(2) 979
Art 27 . . . . . **983**, 983–7
Art 27(1) 986
Art 27(5) 984
Art 28 . . . . . **988**, 988–92
Art 28(1) 988
Art 28(2) 992
Art 29 . . . . . 750, 884, **993**, 993–6
Art 30 . . . . . 11, 997, 997–1000
Art 31. . . . . **1001**, 1001–6
Art 32 . . . . . **1007**, 1007–10
Art 33 . . . . . 11, **1011**, 1011–15
Art 33(1) 1015
Art 33(2) 1014
Art 33(3) 1015
Art 34 . . . . . **1016**, 1016–19
Art 34(1) 1018, 1019
Art 34(2) 1019
Art 35. . . . . 639, 904, **1020**, 1020–5
Art 36 . . . . . **1026**, 1026–30
Art 36(a) 829, 1029
Art 36(b) 1029
Art 37 . . . . . **1031**, 1031–2
Optional Protocol to Convention Against Torture 2002 (OPCAT): Draft Texts Chairperson-Rapporteur Proposal, 17 January 2002 . . . . . **1221–1230**
Art 6 768
Art 8 783
Art 12 . . . . . 828, 855
Art 13 . . . . . 842, 855
Art 14. 856
Art 15. 864
Art 17. 882
Art 22 945
Art 23 952
Art 24 958–9
Art 30 998
Art 33 1013
Art 34 1017
Art 35. 1021
Art 36 . . . . . 1026, 1028
Art 37 1032
Costa Rica Original Draft, 6 March 1980. . . . . 5, 6, **1195–1196**
Preamble 704, 1195
Art 1 . . . . . 715–16, 740, 1008, 1195
Art 2 727
Art 3 727
Art 4 . . . . . 478, 756
Art 5 . . . . . 478, 767, 774, 786
Art 6 786
Art 7 793
Art 8 . . . . . 804, 835
Art 9 835
Art 10. . . . . 822, 835, 849
Art 11. . . . . 644, 868
Art 13 966
Art 14. . . . . 984, 1195
Art 15. . . . . 988–9, 1196
Art 16. . . . . 1012, 1199
Costa Rica Revised Draft Optional Protocol, 15 January 1991 . . . . . 704, **1196–1201**
Preamble 704
Art 1 . . . . . 716, 740
Art 1(2) 1009
Art 4 756
Art 5 . . . . . 767, 774, 787
Art 6 787

Art 7 793
Art 8 . . . . . .804–5, 836
Art 9 . . . . . .805, 1002, 1008
Art 10. 836
Art 11. 836
Art 12 . . . . . .822–3, 836, 849–50, 863
Art 12(4) 864
Art 13 850
Art 14. 869
Art 15. 869
Art 16. . . . . .966, 974
Art 17. 984
Art 18. . . . . .958, 989, 998
Art 18 bis 998
Art 19. 1012
Art 21. 1031
Art 23 1021
EU Draft, 22 February 2001 . . . . . **1209–1217**
Preamble 705
Art 1 741–2
Art 2 728
Art 3 717
Art 5 758–9
Art 7 . . . . . .759, 776–7
Art 9 . . . . . 808, 839–40
Art 9(1)(e) 817
Art 10. 787–8
Art 13 . . . . . .825, 854
Art 14. . . . . .871, 942
Art 15. . . . . 892, 912, 923, 939, 951
Art 15(g) 942
Art 17. 967
Art 18. . . . . .975, 978
Art 19 bis 958, 998
Art 22 1013
Art 25 1026
Mexico Draft, 13 February 2001 . . . **1201–1209**
Preamble 705
Art 1 . . . . . 717, 736, 741
Art 2 728
Art 3 882
Art 4 891–2
Art 4(3) 907
Art 5 912
Art 6 . . . . . .922–3, 939
Art 7 923
Art 8 944
Art 9 758
Art 10. 768
Art 11. 776
Art 12 783
Art 13 787
Art 14. 794
Art 15. 807
Art 15(3) 815
Art 16. . . . . .825, 853
Art 17. 870
Art 19. 1022
Art 20 967
Art 21. 975
Art 21(1). 978
Art 23 . . . . . 838–9, 853–4
Art 27 1013
Art 30 1026
Text of the Articles which Constitute the Basis for Future Work, 2 December 1999
Preamble 704–5
Art 1 . . . . . 716–17, 741
Art 19. 989–90
Art 20 994
Art 21. 1013
Art 22 . . . . . 1017–18, 1027
Art 23 1021–2
Text of the Articles which Constitute the Outcome of the First Reading, (25 December 1994
Art 12 863
Text of the Articles which Constitute the Outcome of the First Reading, 25 January 1996
Art 1 . . . . . 716–17, 740
Art 2 727
Art 3 727
Art 4 757
Art 5 . . . . . .767–8, 774–5, 782–3
Art 6 787
Art 7 793–4
Art 8 . . . . . .805, 836–7
Art 9 . . . . . .806, 1009
Art 9(3) 817
Arts 10 and 11 837
Art 12 . . . . . 823–4, 850–1
Art 13 851–2
Art 14. 869–70
Art 15. 870
Art 16. 966–7
Art 16 bis 974
Art 17. . . . . .974, 984–5
Art 18. . . . . .958, 989, 993
Art 18 bis 998
Art 19. 1012
Art 19 bis 1017
Art 20 1021
Art 21. 1032
Text of the Articles which Constitute the Outcome of the Second Reading, 26 March 1999
Art 2 728
Art 3 728
Art 4 757–8
Art 5 768–9
Art 6 775–6
Art 7 783
Text of the Articles which Constitute the Outcome of the Second Reading, 2 December 1999
Art 8 806–7

Art 9(6) 787
Art 10. 794
Art 12 . . . . . .825, 852
Art 13 . . . . . .838, 852–3
Art 14. 838
Art 16. 967
Art 17. 974
US Draft, 16 January 2002 . . . . . **1217–1221**
Preamble 706
Art 1 . . . . . 717, 729, 736, 742, 759
Art 2 808
Art 3 913
Art 4 871
Art 5 777
Art 6 794
Art 7 794
Art 8 1021
Art 9 967
Art 9(2) 966, 967
Art 10. . . . . .1002, 1008
Art 11. 985
Art 12 989
Art 13 1013
Refugee Convention 1951 . . . .100, 104, 134, 152, 156, 157, 158, 602
Art 1A(2) 153, 156
Art 1F 116
Art 1F(c) 116
Art 33 . . . . . 116, 117, 123
Art 33(1) 104, 116, 117
Art 33(2) 123–4, 472
Art 35. 157
Rome Statute of the ICC 277
Art 7(1)(f) 95
Art 7(2)(e) 58, 59
Art 7(2)(i). 60
Art 30 54
Art 33 95
Art 43(6) 369
Art 68 863
Art 69(7)(a) 418
Art 120 1000
Art 125(1) 657
Slavery Convention 1926
Art 1 1
UN Charter. 1028, 1029
Art 1 732
Art 2 732
Art 2(1) 732
Art 2(4) 732
Art 2(7) 3, 732
Art 2(7) 3
Art 55. 19
Art 102(1) 699, 1032
Art 105. 638
UN Convention on the Law of the Sea of 10 December 1982 683
UN Declaration on the Protection of All Persons from being subjected to Torture 1975 (GA Res 3452 (XXX) of 9 December 1975) 3, 18, 19, 20, 30, 31, 33, 36, 37, 38, 59, 69, 76, 91, 181, 209, 442
Art 1 . . . . . .38, 39, 44
Art 3 . . . . . .76, 91
Art 4 . . . . . .75, 90
Art 6 319
Art 7 181
Art 8 357
Art 11. . . . . .28, 378, 384, 385
Art 12 . . . . . .436, 438
Universal Declaration of Human Rights 1948 (UDHR). 20, 67, 70, 708
Art II 38
Art 5 . . . . . 2, 16, 19, 70, 243, 441
Vienna Convention on Consular Relations 1963. 264
Art 36 263
Art 36(1)(c) 264
Vienna Convention on the Law of Treaties (VCLT) 95, 288, 573, 659, 683, 703, 997, 999, 1016, 1019, 1032
Art 2(1)(b) 983
Art 7 983
Art 14(1)(a) 653
Art 15(a). 657
Art 16(b) 657
Art 18. 983
Art 18(a). 653, 653
Art 19(a). 997, 1000
Art 19(b) 672
Art 19(c). 11, 997
Art 20(5) 11
Art 27 . . . . . 67, 286, 288, 622, 1139
Art 29 . . . . . .749, 993, 995
Art 31. . . . . .10, 15, 67, 427, 1032
Art 31(1). 703, 749, 1024
Art 31(2) 703
Art 31(3) 10
Art 32 . . . . . 10, 427, 926, 1032
Art 32(b) 678
Art 33 . . . . . .698, 960
Art 33(4) 427, 698, 1032
Art 39 1016
Art 40 1018
Arts 54–72. 1011
Art 56 659691,
Art 66(b) 573
Art 77 653
Art 77(1)(f) 653, 663
Art 80 . . . . . .699, 1032

RESOLUTIONS

CHR Res[SH1]18 (XXXIV) of 7 March 1978 . . .3
CHR Res 1984/21 of 6 March 1984. 4
CHR Res 2002/33 of 22 April 2002. . . . 730, 762, 770, 783, 810, 828, 843, 856, 959, 970, 977
ECOSOC Res 663c (XXIV), 31 July 1957 . . . 324

ECOSOC Resolution 1235 (XLII) of 1967 . . . 143
ECOSOC Resolution 1503 (XLVIII) of 1970 . . . . . 112, 142, 143
ECOSOC Res 2076 (LXII) 13 May 1977 324
ECOSOC Resolution 1997/30 of 21 July 1997 . . . 733
ECOSOC Resolution 1984/50 314
ECOSOC Res 1985/17 491
ECOSOC Resolution 2002/12 of 24 July 2002. 733
ECOSOC Resolution 2005/20 of 22 July 2005 733
GA-Res 2200/A (XXI) of 16 December 1966 . . . 16
GA Res 26/25 (XXV) of 24 October 1070 428
GA Res 3059 (XXVIII) of 2 November 1973. 2
GA Res 3068 (XXVIII) of 30 November 1973 . . . 482
GA Res 3166 (XVIII) of 14 December 1973 . . . 178
GA Res 3190 (XXVIII) of 18 December 1973 . . . 698
GA Res 3452 (XXX) of 9 December 1975 . . . 3, 16, 24, 73, 177, 311, 338, 339, 359, 371, 378, 419, 732, 1045
see also UN Declaration on Torture 1975
GA Res 32/62 of 8 December 1977 . . . . . 3, 17
GA Res 32/130 of 16 December 1977 . . . 105, 107, 112, 142, 143
GA Res 34/46 107
GA Res 34/154. 373
GA Res 34/169 of 17 December 1979 . . . 314, 732
GA Res 37/194 of 18 December 1982. . . . 314, 732
GA Res 39/46 of 10 December 1984 . . 5, 512, 517, 651, 655
GA Res 40/33 of 29 November 1985 . . . . 324, 732
see also Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)
GA Res 40/34 of 29 November 1985 . . . . 390, 732
GA Res 43/173 of 9 December 1988 . . . 314, 327, 732
GA Res 45/110 of 14 December 1990. . . . 324, 732
see also Minimum Rules for Non-custodial Measures (Tokyo Rules)
GA Res 45/111 of 14 December 1990. 314
GA Res 45/112 of 14 December 1990. . . . 324, 733
see also Minimum Rules for the Prevention of Juvenile Delinquency (Riyadh Guidelines)
GA Res 45/113 of 14 December 1990. . . . 314, 733
GA Res 45/116 of 14 December 1990. 297
GA Res 46/111 of 17 December 1991. 676
GA Res 46/119 of 17 December 1991. 733
GA Res 47/111 of 16 December 1992 . . . . 494, 506, 677, 965, 969, 971
GA Res 47/133 of 18 December 1992. 314
GA Res 48/134 of 20 December 1993 . . . . . 347, 891, 919
GA Res 49/177 of 23 December 1994 648
GA Res 50/155 of 21 December 1995. 678
GA Res 52/88 of 12 December 1997 297
GA Res 52/149 of 12 December 1997 663
GA Res 53/144 of 8 March 1999 364
GA Res 55/89 of 4 December 2000 . . . . . 338, 733
GA Res 55/89 of 22 February 2001 . . . . 314, 338, 342, 351, 733
GA Res 56/272 of 27 March 2002 495
GA Res 57/199 of 18 December 2002 6
GA Res 57/228 of 13 May 2013 439
GA Res A/60/147 of 16 December 2005 . . . 378, 584
GA Res 60/251 of 15 March 2006 . . . . . 143, 643
GA Res 61/153 of 19 December 2006. 648
GA Res 67/177 of December 2006. 436
GA Res 64/153 of 18 December 2009 . . . . . 711, 891, 972
GA Res 65/229 of 21 December 2010 . . . 324, 733
see also Minimum Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)
GA Res 65/230 of 21 December 2010 324
GA Res 66/137 of 19 December 2011 315
GA Res 67/161 of 20 December 2012. 418
GA Res 67/187 of 20 December 2012 326
GA Res 67/232 of 24 December 2012 648
GA Res 68/268 of 9 April 2014 . . . 486, 487, 488, 504, 509, 518, 519, 523, 526, 527, 530, 535, 646, 647, 765, 772, 818, 819, 972
GA Res 69/157 of 18 December 2014. 457
GA Res 70/175 of 17 December 2015. . . . . 67, 314, 324, 356, 359, 451, 732, 925
see also Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)
GA Res 71/177 of 19 December 2016. 457

RULES

Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). 324, 451, 456, 732
r 67. 330
Minimum Rules for Non-custodial Measures (Tokyo Rules) 324, 329, 458, 732
Minimum Rules for the Prevention of Juvenile Delinquency (Riyadh Guidelines) . . . 324, 733
Minimum Rules for the Treatment of Women Prisoners and Non- custodial Measures for Women Offenders (Bangkok Rules) 324, 451, 454, 457. 458, 733
r 22 . . . . . 330, 454
r 25(1) 364
r 57(2) 364
CAT Committee Rules of Procedure (RoP) **1149–77**
r 1 504
rr 1–64. . . . . 497, 499
r 2 504
r 2(2) 504
r 3 504
r 4 504
r 6 . . . . . 503, 504

r 7 504
r 11. 781
rr 11–14 500
rr 11–15 488
r 12 . . . . . 490, 500, 781
r 12(1) 490, 491
r 12(2) 490
r 13 . . . . . 491, 492
r 13(1) 492, 493
r 13(2) 492
r 14. 485
r 15. . . . . 485, 489, 490, 500
r 15(3) 485
r 16. . . . . 487, 500, 648
rr 16–21 500
r 17. . . . . 500, 501, 648
r 21. 501
r 22 503
r 23 503
r 25 503
r 27 . . . . . 504, 624
r 28 504
r 29 504
r 30 504
r 31. . . . . 504, 505, 797, 798
r 32 505
r 34 505
r 35. 505
r 35(1) 647
r 35(2) 505
r 36 505
rr 36–48 505
rr 37–40. 506
rr 41–44. 506
r 45. 506
r 46 506
r 47. 506
r 48 506
r 50 . . . . . 503, 630
r 50(2) 630
r 51. . . . . 502, 503, 630
r 52. 503
r 53. 503
r 55. 503
r 56 503
r 57 503
r 58 . . . . . 502, 503
r 59 503
r 60 503
r 61. . . . . 523, 530, 624
r 61 (1) 501, 625
r 61(3) 500, 501
r 62 . . . . . 484, 502
r 63 . . . . . 168, 484, 502, 629
r 64 646
rr 64–121. . . . . 497, 499
r 65(2) 521, 536
r 65(4) 518
r 66 532–6
r 67. 536
r 67(1) 536
r 67(2) 646
r 67(3) 537–8
r 68 . . . . . 523, 526
r 68(2) 523
r 68(2)(a) 523
r 68(2)(b) 523, 524
r 69 519
r 69(2) 519, 524
r 71(3) 646
r 72 . . . . . 501, 530, 563, 694
r 72(2) 530
r 74. . . . . 526, 528
r 74(2) 646
r 75 556
rr 75–90. 550
r 78 550
r 79 . . . . . 505, 550, 559
r 79(1) 559
r 80 505
r 81. . . . . 556, 557
r 81(1). 557
r 82(1) 558
82(2) 558
82(3) 558
82(4) 558
r 83 563
r 84 . . . . . 560, 564
r 84(1) 559
r 85(2) 560
r 85(3) 560
r 85(4) 560
r 85 560
r 86 560
r 87 562
r 88(1) 563
r 88(2) 563
r 88(3) 563, 641
r 89 563
r 90(1) 564
r 90(2) 564
r 90(3) 564, 646
rr 91–101 574
r 92 689
r 92(2) 577
r 92(2)(c) 689
r 92(c) 578
r 93 577
r 95 505
rr 96–115 623
r 96 . . . . . 505, 580
r 98 619
r 99 580
r 100 580
r 102–121. 623
r 102. 588

r 102(1) 588
r 102(2) 588
r 103(1) 625
r 103(2) 625
r 104 . . . . . 625, 626
r 104(2) 626
r 104(2)(b) 595
r 104(2)(c) 626
r 104(b) 595
r 105. 626
r 105(5) 626
r 105(a). 595
r 107. 505
r 107(1). 623
r 107(2) 624
r 108. . . . . 505, 619
r 109. 624
r 109(2) 624
r 110. . . . . 592, 624
r 112. . . . . 501, 625, 631
r 112(3) 619, 625
r 112(4) 631
r 112(5) 589
r 113. . . . . 362, 592, 630
r 113(1)(a). 626
r 113(a). 592
r 113(b) 596, 597
r 113(c). 598
r 113(d) 602
r 113(e). 606
r 113(f). 613
r 114. . . . . 618, 620, 623
r 114(1). 617
r 114(3) 619, 620
r 114(4) 619
r 114(7) 620
r 114(8) 621
r 114(9) 617, 619, 620
r 115. 626
r 115(1). 627, 632
r 115(2). 627
r 115(3). 627
r 115(4). 627
r 115(5). 627
r 115(6) 627
r 115(7) 629
r 115(8). 627
r 116. 615
r 116(1). 627
r116(2) 605
r 116(3) 620
r 117(1). 628
r 117(3). 628
r 117(4). 629
r 117(5). 628
r 117(7) 628
r 118. 631
r 118(2) 629
r 118(4) 584
r 118(5) 633
r 119. . . . . 630, 631
r 120 . . . . . 501, 563, 634, 693
r 120(2) 634
r 120(3) 635
r 121. 632
r 121(2) 646
Annex 485
SPT Rules of Procedure **1234–41**
r 1(4) 798
r 1–29 798
r 8 784
r 10(1) 796
r 28 765
r 30 798
r 31. 798
rr 32–34. 798
Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules, GA Res 70/175 of 17 December 2015) . . . 2, 30, 36–7, 67, 69, 70, 314, 324, 330, 331, 356, 359, 451, 452–3, 462, 732
r 11(a). 457
r 11(c). 329
r 31. . . . . 37, 67, 70
r 32 330
r 37(d) 69
r 43 329
r 43(1)(d) 462
r 43(2) 453
r 44 . . . . . 330, 453
r 45. 330
r 45(2) 331
r 46 331
r 47. 453
rr 47–49. 331
r 50 453
r 52(2) 453
rr 50–53. 329
r 56 359
r 56(1) 363
r 56(2) 363, 365
r 56(3) 365, 366
r 56(4) 362
r 57(3) 356
r 71(3) 369
r 82(2) 452
r 82(2)S 457
r 84(1)(a) 925

List of Contributors

Margit Ammer is Senior Researcher at the department 'Asylum, Anti-discrimination and Diversity' at the Ludwig Boltzmann Institute of Human Rights. Her main areas of expertise include the fields of asylum and migration as well as environment-related forms of mobility. She is lecturing on international human rights law, EU asylum and migration policy, and environment and human rights at the University of Vienna.

Moritz Birk is Head of the department 'Human Dignity and Public Security' at the Ludwig Boltzmann Institute of Human Rights. He joined the Institute in 2009 as Assistant to the UN Special Rapporteur on Torture (2010) and has since implemented numerous research and technical capacity projects on torture and ill-treatment worldwide. Before joining the Institute he worked with the UNHCR and human rights organizations in Ghana, Mexico, Senegal, and Sweden. He holds an LL.M. in International Human Rights Law, studied law in Germany and France and is certified as organizational consultant.

Kerstin Buchinger holds a position as a scientific legal officer at the Austrian Constitutional Court. She is currently being assigned referee to the Austrian Ombudsman Board (Austria's NPM), where she is mainly entrusted with OPCAT issues. Before that, she worked as a legal researcher at the Ludwig Boltzmann Institute of Human Rights in Vienna with a research focus on asylum and anti-discrimination law.

Nora Katona holds a degree in law from the University of Vienna and a Master degree in Human Rights and Democratisation from the European Inter-University Centre in Venice. Currently, she works as a researcher at the Ludwig Boltzmann Institute of Human Rights (Vienna, Austria) in the team Human Dignity and Public Security. Her research focuses on the prevention of torture and ill-treatment, protection of human rights in the criminal justice system as well as trafficking in human beings.

Stephanie Krisper completed her legal studies in Vienna and Paris as well as a master on human rights and democratization in Venice and Maastricht. She worked in humanitarian aid, refugee law, and as human rights expert for NGOs, the Foreign Ministry and the Ludwig Boltzmann Institute of Human Rights where she assisted Manfred Nowak in his work on anti-torture by coordinating a national commission monitoring places of detention (later part of the Austrian NPM).

Johanna Lober LL.M. currently coordinates the component 'dealing with the past' in the GIZ-project to support stabilization and peace in Mali, where she advises the Commission for Truth, Justice and Reconciliation on a comprehensive reparation programme and commemoration policy. Previously, she worked as researcher, project expert, and co-team leader for the Human Dignity and Public Security Team at the Ludwig Boltzmann Institute of Human Rights (Vienna) on torture prevention and human rights in the context of security and justice sector reform. As former member of a Human Rights Monitoring Commission in Vienna, she has practical experience in monitoring the rights of persons in police detention. Holding an LL.M. in International Human Rights Law, her current interest focuses on transitional justice processes in context of fragility and ongoing conflict.

Giuliana Monina is researcher at the Ludwig Boltzmann Institute of Human Rights—Human Dignity and Public Security Department. She joined in 2016 and has since focused on several research projects on the topics of torture and ill-treatment as well as migration and asylum. She has completed her legal studies at the Universities of Bologna. Before the Ludwig Boltzmann Institute of Human Rights, Giuliana was a practicing lawyer in Italy and has worked with several human rights organizations, including the European Union Agency for Fundamental Rights.

Manfred Nowak was appointed as independent expert leading the United Nations Global Study on Children Deprived of Liberty in October 2016. He is Professor for International Human Rights at the University of Vienna, where he is the scientific director of the Vienna Master of Arts in Human Rights and co-director of the Ludwig Boltzmann Institute for Human Rights. In addition, he serves as Secretary General of the Global Campus of Human Rights in Venice.

He has carried out various expert functions for the UN, the Council of Europe, the EU, and other inter-governmental organizations. Most importantly, he served for many years in various functions as UN Expert on Enforced Disappearances (1993–2006) and as one of eight international judges in the Human Rights Chamber for Bosnia and Herzegovina in Sarajevo (1996–2003). Most prominently, he served as UN Special Rapporteur on Torture (2004–2010), where he also visited numerous institutions in all world regions where children were deprived of liberty in unimaginable conditions.

Aside from Vienna University, Manfred Nowak was Professor of International Law and Human Rights at various prestigious universities, such as Utrecht, Lund, Stanford, and the Graduate Institute in Geneva, and has published more than 600 books and articles in this field, including various language editions of the CCPR-Commentary, a CAT-Commentary, and an introduction to the International Human Rights Regime.

Roland Schmidt is an associate researcher with the Ludwig Boltzmann Institute of Human Rights. From 2006 to 2011, he worked as assistant to the institute's director, Manfred Nowak, including his role as UN Special Rapporteur on Torture. Mr Schmidt participated in various UN fact-finding missions and contributed also to the first edition of the Commentary on the UN Convention against Torture. Furthermore, he focuses in his research on so-called 'deeply divided societies' and the role of political and legal institutions when it comes to attenuating intercommunal tensions.

Andrea Schüchner is a human rights-oriented philologist who has worked with the European Commission, the UNDPKO, the Ludwig Boltzmann Institute of Human Rights, and the German Center for International Peace Operations (ZIF) on topics of democratization, human rights in development, racism and xenophobia, and peace-building.

Gerrit Zach has a background in law and sociology and has been working on human rights and rule of law issues for over 10 years. She was with the Human Rights Department of the Austrian Ministry of Foreign Affairs, then spent two years in Afghanistan in international development on strengthening the rule of law, specifically the access to a lawyer. Gerrit worked with the Ludwig Boltzmann Institute of Human Rights from 2014 to 2018 on torture prevention and human rights in the criminal justice system before joining the OSCE Programme Office in Dushanbe in 2018.

List of Abbreviations

ACHPR	African Charter on Human Rights and Peoples' Rights
ACHR	American Convention on Human Rights
ACLU	American Civil Liberties Union
ACmHRP	African Commission on Human Rights and Peoples' Rights
Add	Addendum
AFA	African Legal Aid
AFDI	Annuaire Francais de Droit International
AfrYIL	African Yearbook of International Law
AI	Amnesty International
AJIL	American Journal of International Law
AJPIL	Austrian Journal for Public and International Law
ALR	Albany Law Review
Am U Int'l L Rev	American University International Law Review
AMDI	Anuario Mexicano de Derecho Internacional
APF	Asia Pacific Forum
APJHRL	Asia Pacific Journal on Human Rights and the Law
App	Application
APT	Association for the Prevention of Torture
Art	Article
Austr YIL	Australian Yearbook of International Law
BBC	British Broadcasting Corporation
Berk JIL	Berkeley Journal of International Law
BIM	Ludwig Boltzmann Institute of Human Rights
BJIL	Brooklyn Journal of International Law
BYBIL	British Yearbook of International Law
BYIL	Baltic Yearbook of International Law
CAMPACC	Campaign Against Criminalising Communities
CAT	Convention against Torture
CCAIL	Code of Crimes Against International Law (Germany)
CCPR	Covenant on Civil and Political Rights
CDL	Commission for Democracy through Law (Venice Commission)
CEAJ	Committee of Eminent African Jurists
CED	Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Covenant on Economic, Social and Cultural Rights
cf	compare
CHR	United Nations Commission on Human Rights
CIA	Central Intelligence Agency

CICR	Comité International de la Croix Rouge
CIDT	Cruel, Inhuman and Degrading Treatment
CIVPOL	International Civilian Police
CJIL	Chicago Journal of International Law
CLF	Criminal Law Forum
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CoE	Council of Europe
Comm.	Communication
Contd.	Continued
CPS	Crown Prosecution Service
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
CRPT	Convention on the Rights of Persons with Disabilities
CWRJIL	Case Western Reserve Journal of International Law
CWRJIL	Case Western Reserve Law Review
DJCIL	Duke Journal of Comparative and International Law
DJILP	Denver Journal of International Law and Policy
Doc	Document
ECCC	Extraordinary Chambers in the Court of Cambodia
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights)
ECmHR	European Commission of Human Rights
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
eg	for example
EHRLR	European Human Rights Law Review
EHRR	Essex Human Rights Review
EJIL	European Journal of International Law
ELR	European Law Review
et al	and others
ETS	European Treaty Series
EU	European Union
EUGRZ	Europäische Grundrechte-Zeitschrift
EWCA	England and Wales Court of Appeal
ex p	ex parte
FBI	Federal Bureau of Investigation
ff	and the following
FIDH	Fédération Internationale des Droits de l'Homme
FILJ	Florida International Law Journal
FRA	European Union Agency for Fundamental Rights
FYIL	Finnish Yearbook of International Law
GA	General Assembly

GAOR	General Assembly Official Record
GenC	General Comment
GLJ	German Law Journal
GRULAC	Group of Latin America and Caribbean Countries
GYIL	German Yearbook of International Law
HICLR	Hastings International and Comparative Law Review
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HRR	Human Rights Review
HRW	Human Rights Watch
IACtHR	Inter-American Court of Human Rights
IAPL	International Association of Penal Law
ICC	International Criminal Court
ICCPR	see CCPR
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ie	that is
IFACAT	International Federation of Action of Christians for the Abolition of Torture
IFHRL	International Federation of Human Rights Leagues
IICLR	Indiana International and Comparative Law Review
IIHR	Inter-American Institute of Human Rights
IJHR	International Journal of Human Rights
IJIL	Indian Journal of International Law
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILSA JICL	International Law Students Association Journal of International and Comparative Law
IRCT	International Rehabilitation Council for Torture Victims
IRRC	International Review of the Red Cross
ISA	Israel Security Agency
ISHR	International Service for Human Rights
IYHR	Israel Yearbook on Human Rights
JAP	Journal of Applied Philosophy
JICJ	Journal of International Criminal Justice
JILE	Journal of International Law and Economics
JILFA	Journal of International Law and Foreign Affairs
JILP	Journal of International Law and Politics
LDH	Ligue des Droits de l'Homme
LJIL	Leiden Journal of International Law

LQR	Law Quarterly Review
MINUGUA	United Nations Verification Mission in Guatemala
MoU	Memorandum of Understanding
MTI	Mouvement de la Tendance Islamiste
NATO	North Atlantic Treaty Organization
NELR	New England Law Review
NGO	non-governmental organization
NHRI	National Human Rights Institution
NILR	Netherlands International Law Review
NJCM	Nederlands Juristen Comité voor de Mensenrechten (Dutch section of the International Commission of Jurists)
NJIL	Nordic Journal of International Law
NJW	Neue Juristische Wochenschrift
No	Number
NPM	National Preventive Mechanism
NQHR	Netherlands Quarterly of Human Rights
NY L Sch L Rev	New York Law School Law Review
OASTS	Organization of American States Treaty Series
ODCCP	United Nations Office for Drug Control and Crime Prevention
OHCHR	United Nations Office of the High Commissioner for Human Rights
ÖIMR	Österreichisches Institut für Menschenrechte
OLA	Office of Legal Affairs
OMCT	Organisation Mondial Contre la Torture
OP	Optional Protocol
OPCAT	Optional Protocol to the Convention against Torture
OSCE	Organization for Security and Co-operation in Europe
ÖZÖR	Österreichische Zeitung für öffentliches Recht
para	paragraph
PDRCC	Post-Determination Refugee Claimant in Canada
PRRA	Pre-Removal Risk Assessment (Canada)
PTSD	Post-Traumatic Stress Disorder
PYIL	Palestine Yearbook of International Law
RdM	Recht der Medizin
REDI	Revista Espanola de Derecho International
Res	Resolution
RIDP	Revue Internationale de Droit Pénal
RNC	Rapporteur on New Complaints and Interim Measures
RoP	Rules of Procedure
SAJHR	South African Journal on Human Rights
SAYIL	South African Yearbook of International Law
SC	Security Council
SCSL	Special Court for Sierra Leone
SIM	Netherlands Institute of Human Rights
SJICL	Singapore Journal of International and Comparative Law
SPT	Subcommittee on the Prevention of Torture
SRT	United Nations Special Rapporteur on Torture
SYIL	Spanish Yearbook for International Law

TIAS	Treaties and Other International Acts Series
TILJ	Texas International Law Review
TVPA	Torture Victim Protection Act (US)
U Rich L Rev	University of Richmond Law Review
UDHR	Universal Declarations of Human Rights
UHR	Universal Human Rights
UKHL	United Kingdom House of Lords
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner of Refugees
UNICEF	United Nations International Children's Emergency Fund
UNIFEM	United Nations Development Fund for Women
UNMIK	United Nations Mission in Kosovo
UNTS	United Nations Treaty Series
UST	United States Treaties and Other International Agreements
v	versus
VCLT	Vienna Convention on the Law of Treaties
VFTC	Voluntary Fund for Technical Cooperation
VJIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
WILJ	Wisconsin International Law Journal
YB	Yearbook
YBIHL	Yearbook of International Humanitarian Law
YIHL	Yearbook of International Humanitarian Law
YLJ	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZfV	Zeitschrift für Verwaltung

Introduction

1.	**The Phenomenon of Torture**	1
2.	**Drafting History, Entry into Force, and Status of Ratification of the Convention and Protocol**	3
3.	**Content and Significance of the Convention and Protocol**	6
4.	**Rules of Interpretation**	10
5.	**Reservations, Declarations of Interpretation, and Denunciation of the Convention and Protocol**	11

1. The Phenomenon of Torture

Torture constitutes a direct and deliberate attack on the core of the human personality and dignity. As slavery, it aims at depriving human beings of their humanity. Slavery is defined in Article 1 of the Slavery Convention of 1926 as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. While slavery deprives the victim *ex lege* of his or her status as a human being by allowing the slave owner to exercise unrestricted legal power over the victim, torture describes a situation in which one person exercises unrestricted factual power over another person. Slavery and torture, as the two most extreme forms of dehumanizing human beings by depriving them of human dignity, have more in common than one would expect at the outset. In ancient Greek and Roman times, for example, witness testimony of slaves in civil or criminal proceedings was only admitted if confirmed under torture. This relationship between slavery, torture, and the right to human dignity is best expressed in Article 5 of the African Charter of Human and Peoples' Rights (ACHPR).[1]

The powerlessness of the victim, which in our opinion constitutes one of the essential definitional criteria of torture,[2] is illustrated by many of the typical methods of torture, including short-shackling, suspension in painful positions such as '*strapado*' or 'Palestinian hanging', stripping victims naked and subjecting them to various forms of beatings, electric shocks, rape, and other sexual assaults, repeated immersion into water while being fixed on a board ('water boarding') or into a mixture of blood, urine, vomit, and excrement ('*submarino*'), simulated executions or amputations. Such a situation of absolute power and control over the victim usually means that the victim is detained and held behind closed doors. If the victim is held incommunicado in a secret place of detention, without any contact with the outside world, the feeling of being isolated, frightened, powerless, and subject to the unrestricted power of the torturer is indeed most extreme. Torture aims at breaking the will of the victim in order to achieve a certain purpose, such as extracting a confession or other relevant information.

[1] Art 5 ACHPR reads as follows: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

[2] See below Art 1, §§ 114–21.

Torture was practised by many peoples and in various cultures during different historical periods.[3] Particular brutal and well documented examples were the practices of torture against slaves and Christians during Roman times, against criminal suspects during the Middle Ages, against witches by the Roman Catholic inquisition in Europe, against African slaves in the American hemisphere, and against peoples under colonial domination of European powers in Africa, Asia, and Latin America. Although torture, as slavery, was *legally abolished* in Europe and the American hemisphere during the eighteenth and nineteenth centuries as a result of the age of Enlightenment, natural law, humanism, and rationalism, it continued to exist or re-appeared in practice. Most notorious were the systematic and extremely cruel practices of torture under the totalitarian regimes of Stalinism and National Socialism before and during World War II.

With the development of international human rights law after World War II, the prohibition of slavery (as well as slave trade and servitude) and torture (as well as cruel, inhuman or degrading treatment or punishment) soon emerged as two human rights which were formulated as absolute and non-derogable rights, even in times of war, terrorism, and similar public emergencies threatening the life of the nation. The absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment can be found, for instance, in Article 5 UDHR 1948, common Article 3 of the four Geneva Conventions on Humanitarian Law 1949, Article 3 (together with 15) ECHR 1950, the UN Standard Minimum Rules for the Treatment of Prisoners 1955 (and the revised 'Mandela Rules' of 2015), Article 7 (together with 4) CCPR 1966, Article 5 (together with 27) ACHR 1969 and Article 5 ACHPR.

Nevertheless, torture continued to be systematically practised in many parts of the world. Well-known and documented cases during the 1960s and 1970s include the French practices in Algeria, the Portuguese practices in its former African colonies, the practices under the Greek military junta, and those under Latin American military dictatorships.[4] Increasing reports of torture and massive ill-treatment from many parts of the world made Amnesty International (AI) launch a worldwide campaign against torture on Human Rights Day in 1972. Most notorious were the cruel methods of torture practised by the military junta under General *Augusto Pinochet Ugarte*, who had overthrown the democratically elected Government of Salvador Allende in Chile on 11 September 1973. The widely documented cases of torture and enforced disappearances in Chile turned out to be the starting point for a number of far-reaching measures and reforms in international human rights law. In November 1973, the UN General Assembly expressed serious concerns about these torture practices and put the question of torture and cruel, inhuman or degrading treatment or punishment as a standing item on its agenda.[5] In spring 1974, the Human Rights Commission, in a telegram addressed to the Chilean Government, expressed its concerns about torture which, at that time, constituted an

[3] See eg Max Bauer and Franz Helbing, *Die Tortur Geschichte der Folter im Kriminalverfahren aller Völker und Zeiten* (Aalen 1973); George Riley Scott, *A History of Torture throughout the Ages* (Luxor Press 1959); Alec Mellor, *La torture, son histoire, son abolition, sa réapparition au XXème siècle* (Maison Mame 1961); Wolfgang Schild, *Von peinlicher Frag. Die Folter als rechtliches Beweisverfahren* (Rothenburg odT 2002); Edward Peters, *Torture* (2nd expanded edn, University of Pennsylvania Press 1996). For a short overview see Manfred Nowak, 'Die UNO-Konvention gegen die Folter vom 10 Dezember 1984' (1985) 12 EuGRZ 109–116.

[4] According to AI's first world survey published in 1973, torture was practised in more than sixty countries. See AI, *Report on Torture* (2nd rev edn, Amnesty International 1975).

[5] GA Res 3059 (XXVIII) of 2 November 1973; see [1977] Revue Internationale de Droit Pénal 213ff.

unprecedented step that was still widely regarded as an undue interference with the domestic jurisdiction of States under Article 2(7) of the UN Charter. A year later the UN General Assembly adopted the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, hereinafter referred to as 'the Declaration'.[6] This non-binding Declaration, based on a draft prepared during the Fifth UN Congress on Crime Prevention, already contained the use of criminal law for the prevention of torture.[7] The adoption of the Declaration was the first step in the process of drafting a binding Convention against Torture and its text served as a model.

2. Drafting History, Entry into Force, and Status of Ratification of the Convention and Protocol

In December 1977, the General Assembly formally requested the Commission on Human Rights to draft the text of a binding Convention against Torture on the basis of the 1975 Declaration.[8] When the Commission in February 1978 entrusted this task to an informal, inter-sessional Working Group,[9] the International Association of Penal Law (IAPL) and the Swedish Government had already prepared draft texts with innovative ideas regarding international human rights law.

The *IAPL Draft* of 15 January 1978 put the focus on the obligation of States to criminalize torture and to bring the perpetrators to justice.[10] Similar to the Genocide Convention of 1948 and the Apartheid Convention of 1973, it aimed at declaring torture a crime under international law. With respect to international monitoring, it envisaged a State reporting procedure before the Human Rights Committee, assisted by a Special Committee on the Prevention of Torture, and the possibility to bring disputes before the ICJ. The draft was only concerned with torture but not with cruel, inhuman or degrading treatment or punishment.

The original *Swedish Draft* of 18 January 1978 closely followed the 1975 Declaration. It also focused on the criminalization of torture but proposed the principle of universal jurisdiction, in combination with the principle '*aut dedere aut iudicare*', similar to earlier

[6] GA Res 3452 (XXX) of 9 December 1975.

[7] cf J Herman Burgers and Hans 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) 13–18; Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 68–72.

[8] GA Res 32/62 of 8 December 1977. For the *travaux préparatoires* of the CAT see, in particular, Burgers and Danelius (n 7); Alois Riklin (ed), *Internationale Konventionen gegen die Folter—St Galler Expertengespräch 1978* (Bern 1979); Stefan Trechsel, 'Probleme und aktueller Stand der Bemühungen um eine UN-Konvention gegen die Folter' (1982) 33 ÖZÖR 245; Christine Chanet, 'La Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants' (1984) 30 AFDI 625; Carlos Villan Duran, 'La Convención contra la tortura y su contribución a la definición del derecho a la integridad fisica y moral en el derecho internacional' (1985) 27 REDI 377; Nowak, Die UNO-Konvention (n 3); Manfred Nowak, 'Recent Developments in Combating Torture' (1987) 19 SIM Newsletter 24; Maxime E Tardu, 'The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (1987) 56 NJIL 303; Peter R Baehr, 'Nederland en de totstandkoming van de VN-conventie tegen martelingen' (1987) 41 International Spectator 549; Ingelse (n 7); Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999).

[9] CHR Res 18 (XXXIV) of 7 March 1978.

[10] See E/CN4/NGO/213 of 15 January 1978 and [1977] Revue Internationale de Droit Pénal Vols 3 and 4. See also Thoolen in Riklin (n 8) 41.

treaties against hostage-taking and other forms of terrorism.[11] In addition to obligations aimed at bringing individual perpetrators of torture to justice before domestic criminal courts, the Swedish Draft also contained a number of suggestions for the prevention of torture. With respect to international monitoring, it proposed to entrust the Human Rights Committee with special tasks of examining State reports, deciding on individual and inter-State complaints, as well as conducting *ex officio* inquiries. The Swedish Draft was chosen by the Working Group as the main basis for its deliberations.[12]

In 1980, Costa Rica proposed to the Human Rights Commission a draft for an Optional Protocol to the draft Convention against Torture which was based on the experiences of the ICRC and a private Swiss proposal of *Jean-Jacques Gautier*, a Geneva-based banker. The *Costa Rica Draft*, which was actively supported by the International Commission of Jurists and the Swiss Committee against Torture, aimed at introducing a system of preventive and unannounced visits to places of detention.[13]

Between 1978 and 1984, the *inter-sessional Working Group of the Human Rights Commission* under the chair of the Dutch diplomat *Herman Burgers*, despite strong ideological differences between the Western, Socialist, and other concepts of human rights, succeeded in finding a compromise on most of the controversial issues, including the principle of universal jurisdiction.[14] Instead of entrusting the Human Rights Committee with the additional task of monitoring compliance with the CAT, the Working Group proposed to establish a Committee against Torture consisting of ten independent experts.

When the Human Rights Commission adopted the draft Convention of the Working Group in March 1984 and transmitted it to the *General Assembly*,[15] only two controversial questions remained open: the competence of the Committee against Torture to issue country specific comments and suggestions in relation to State reports under Article 19 and the mandatory character of the inquiry procedure under Article 20 CAT.[16] Since most States were eager to adopt the Convention quickly, Western States in the Third Committee of the General Assembly gave in to certain demands of Socialist States.[17] The result is the 'opting-out clause' in Article 28 CAT and a highly ambiguous provision about 'general comments' on specific State reports in Article 19(3) CAT.[18]

[11] Arts 8(2), 11, and 14 of the Swedish Draft in E/CN.4/1285 of 18 January 1978. See also Danelius in Riklin (n 8) 35.

[12] See Burgers and Danelius (n 7) 38.

[13] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409; see also Stefan Trechsel, 'Privater Schweizer Entwurf Für Eine Internationale Konvention Gegen Die Folter' in Alois Riklin (ed), *Internationale Konventionen gegen die Folter: Conventions Internationales Contre la Torture: International Conventions against Torture* (P Haupt 1979) 45; ICJ and Swiss Committee against Torture (eds), *Torture—How to Make the International Convention Effective: A Draft Optional Protocol* (2nd edn, 1980); Cristian Dominicé, 'Le projet Gautier: utile et nécessaire' in André Bieler, *Francis Blanchard and Cristian Dominicé, Il Faut Croire À La Lumiére: mélanges offerts à Jean-Jacques Gautier initiateur d'un nouveau moyen de lutte contre la torture* (Comité Suisse contre la torture 1982) 11; Trechsel, 'Probleme und aktueller Stand' (n 8) 245, 249ff; Hans Haug, 'Das Projekt eines Fakultativprotokolls zur Internationalen Konvention gegen die Folter' 91 (1982) Das Schweizerische Rote Kreuz 8.

[14] cf Burgers and Danelius (n 7) 34–99.

[15] CHR Res 1984/21 of 6 March 1984.

[16] cf Nowak, 'Die UNO-Konvention' (n 3) 114 et seq.

[17] cf Report of the Third Committee, thirty-ninth Session (1984) UN Doc A/39/708.

[18] cf Nowak in M Nowak, D Steurer and H Tretter (eds), *Fortschritt im Bewußtsein der Grund- und Menschenrechte: Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora* (Engel 1988) 493, 499ff. See also below Art 19, §§ 60–70; Art 28.

With these compromises, the *Convention against Torture was unanimously adopted by the UN General Assembly on 10 December 1984*.[19] When the Convention was opened for signature on 5 February 1985, a total of twenty States, including twelve member States of the Council of Europe, had already signed it. The Convention *entered into force on 26 June 1987*, exactly thirty days after the date of deposit of the twentieth instrument of ratification.[20] Since the required number of five optional declarations in accordance with Articles 21(2) and 22(8) CAT had already been achieved at an earlier stage, the individual and inter-State complaints procedures entered into force on 26 June 1987 as well.[21] On 26 November 1987, the States parties to the Convention elected the first ten members of the Committee against Torture,[22] which held its first session in Geneva from 18 to 22 April 1988.[23]

As of 31 December 2017, the Convention against Torture has been ratified or acceded to by a total of 162 States from all regions of the world.[24] Of these 162 States parties, sixty-three have made the optional declaration under Article 21(1) recognizing the inter-State complaints procedure, and sixty-nine States parties have made the optional declaration under Article 22(1) recognizing the individual complaints procedure.[25] Since the adoption of the Convention, twenty-six States parties have availed themselves of the 'opting out' possibility under Article 28 in relation to the inquiry procedure under Article 20, some of which withdrew this reservation later. Presently, only fourteen of the 162 States have opted out, which means that a total of 148 States parties have in fact accepted this additional monitoring procedure.[26] Finally, thirty-three States parties have over time availed themselves of the 'opting out' possibility under Article 30(2) in relation to the dispute settlement procedure and the competence of the ICJ under Article 30(1), but again some have withdrawn their reservation, and presently there are twenty-four States parties that have opted out.[27]

The *Costa Rica draft Optional Protocol* aimed at establishing a system of preventive visits to places of detention was not taken up during the drafting of the CAT. During the Cold War, the competence of an international monitoring body to carry out preventive and unannounced missions and visits to the territory of States parties was politically simply unacceptable and regarded as undue interference with State sovereignty. But the Council of Europe took up this idea of *Jean-Jacques Gautier*, actively supported by the Swiss Committee against Torture (which later became the Association for the Prevention of Torture (APT)) and the International Commission of Jurists, and adopted the European Convention for the Prevention of Torture (ECPT) in 1987.[28] After the entry into force of this innovative Convention on 1 February 1989, the European Committee for the Prevention of Torture (CPT) was established, consisting of one independent expert per State party (presently forty-seven), with the task of organizing missions to the territory of States parties, conducting unannounced visits to places of detention and carrying out private interviews with detainees. In practice, the missions and visits of the CPT and its

[19] GA Res 39/46 of 10 December 1984.
[20] See below Art 27.
[21] See below Art 21, § 41; Art 22, § 17.
[22] CAT/SP/SR.1. See below Art 17.
[23] CAT, 'Report of the Committee Against Torture' (1988) UN Doc A/43/46; cf Manfred Nowak, 'First session of the UN Committee against Torture' (1988) 2 NQHR 111. See below Art 18.
[24] See below Art 25, § 11; Art 26, 3; as well as Appendix A3.
[25] See below Art 21, §§ 2, 18; Art 22, §§ 4, 15; as well as Appendix A3.
[26] See below Art 28, §§ 2, 14; as well as Appendix A3.
[27] See below Art 30, §§ 2, 15; as well as Appendix A3.
[28] The ECPT (ETS No 126) was opened for signature on 26 November 1987.

reports to States parties with far-reaching recommendations have had a significant impact on improving conditions of detention and the treatment of detainees in most of the member States of the Council of Europe.[29]

After the end of the Cold War, the *UN Commission on Human Rights* took up the idea of *Jean-Jacques Gautier* and entrusted another inter-sessional Working Group with the task of drafting an Optional Protocol to the CAT. The Working Group based its deliberations on a revised draft submitted by Costa Rica and was chaired by *Elizabeth Odio Benito*, former Minister of Justice of Costa Rica.[30] The highly controversial and political discussions between European and most Latin American States on the one hand, and a broad variety of other States on the other, concerning primarily issues of State sovereignty, blocked any significant progress during the 1990s. Only after Mexico had reacted on the European States' suggestion of a very strong SPT with a far-reaching mandate and introduced the idea of establishing domestic visiting commissions (so-called national preventive mechanisms)[31] in addition to the international monitoring body (the UN Subcommittee on Prevention of Torture [SPT]),[32] could a broad majority be formed to adopt the OP by majority vote.

The *OP was adopted on 18 December 2002 in the General Assembly* by a vote of 127 States in favour, four against and forty-two abstentions.[33] On *22 June 2006*, ie thirty days after the date of deposit of the twentieth instrument of ratification, the *OP entered into force*.[34] On 18 December 2006, the States parties to the OP elected the first ten independent experts of the *SPT*,[35] which held its first session in Geneva from 19 to 23 February 2007.[36] As of 31 December 2017, a total of 84 States parties to CAT had ratified or acceded to the OP.[37]

3. Content and Significance of the Convention and Protocol

The Convention against Torture was adopted in 1984 as a specialized human rights treaty in response to the widespread and systematic practice of torture in Latin America and other regions of the world. Since the prohibition of torture and cruel, inhuman or degrading treatment or punishment has been recognized in Article 7 CCPR and other international and regional human rights treaties as an absolute and non-derogable human right and is also considered as *jus cogens*, the drafters of the Convention abstained from reiterating this principle. Rather, the Convention is based on the explicit desire of its drafters 'to make more effective the struggle against torture and other cruel, inhuman or

[29] cf eg Malcolm D Evans and Rodney Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press/OUP 1998); Malcolm D Evans and Rodney Morgan (eds), *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture* (Oxford University Press 1999); Ursula Kriebaum, *Folterprävention in Europa: Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung* (Verlag Österreich, 2000).

[30] For the drafting history of the OP see below Preamble OP.

[31] See below Arts 17 to 23 OP.

[32] See below Arts 5 to 16 OP.

[33] GA Res 57/199 of 18 December 2002; see below Preamble OP; Art 27 OP, § 17; see also APT, 'Position Paper on the Optional Protocol to the UN Convention against Torture: Added Value of the Optional Protocol for States Parties to the European Convention for the Prevention of Torture' (2003); APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010).

[34] See below Art 28 OP.

[35] See below Art 7 OP; as well as Appendix B5.

[36] See below Art 10 OP.

[37] See below Art 27 OP; as well as Appendix B3.

degrading treatment or punishment throughout the world'.[38] This goal was achieved by three different types of measures: repression against individual perpetrators of torture by means of domestic criminal law and the principle of universal jurisdiction; recognition of the right of victims of torture to a remedy and adequate reparation; and comprehensive obligations of States parties to prevent torture and cruel, inhuman or degrading treatment or punishment. Although the term 'cruel, inhuman or degrading treatment or punishment' has not been defined and the different categories of ill-treatment not delineated,[39] Article 1 CAT is the first provision in international law which provides for a *legal definition of torture* which, nevertheless, is subject to controversial discussions in legal theory and practice.[40] Since most of the Convention's provisions, above all those related to the criminal responsibility of the perpetrators, only apply to torture and not to cruel, inhuman or degrading treatment or punishment, the legal distinction between torture and other forms of ill-treatment is significant.

Most *preventive obligations of States parties* equally apply to torture and cruel, inhuman or degrading treatment or punishment.[41] In addition to the general obligation of States parties under Articles 2 and 16 to take effective legislative, administrative, judicial, or other measures to prevent torture and cruel, inhuman or degrading treatment or punishment in any territory under their jurisdiction, States also have specific obligations to include the prohibition of torture and cruel, inhuman or degrading treatment or punishment in the training curricula of law enforcement and prison personnel (Article 10), to keep interrogation rules and methods under systematic review (Article 11), and to carry out prompt and impartial *ex officio* investigations, wherever there is reasonable ground to believe that an act of torture or cruel, inhuman or degrading treatment or punishment has been committed (Article 12). Since victims of torture are often too afraid or unable to lodge a complaint against their tormenters, this obligation of police chiefs, prison directors, public prosecutors, police and prison doctors, and others to start *ex officio* a thorough investigation before an independent body whenever they suspect that an act of torture or cruel, inhuman or degrading treatment or punishment might have occurred, is of utmost importance for the prevention of torture. In addition, no confession or information extracted by torture shall be admitted as evidence in any judicial or administrative proceedings (Article 15). If the relevant authorities were to take the inadmissibility of torture tainted evidence seriously, a major incentive for extracting information and confessions through torture would disappear. Finally, States parties to the OP have an additional preventive obligation to establish one or several independent national preventive mechanisms with the power to carry out unannounced visits to all places of detention, to conduct private interviews with all detainees, and to make recommendations to the relevant authorities with the aim of preventing torture and improving conditions of detention (Articles 17–23 OP).

Another important provision for the prevention of torture is the *principle* of *non-refoulement* in Article 3 CAT. States are not only under an obligation to refrain from practising torture and cruel, inhuman or degrading treatment or punishment by their own officials on their own territory, but they are also required to refrain from expelling, returning, or extraditing a person to another State where there are substantial grounds

[38] See below Preamble. [39] See below Art 16. [40] See below Art 1, 3.1.

[41] See below Art 16, which contains an explicit reference to the obligations contained in Arts 10, 11, 12, and 13, in particular.

for believing that he or she would be in danger of being subjected to torture. Since many victims of torture flee their country and seek refuge in other countries, the principle of *non-refoulement* constitutes an important means of protecting vulnerable groups. If States were to respect this important principle properly, many cases of torture could be prevented. It is interesting to note that the vast majority of individual complaints under Article 22 CAT so far decided by the Committee against Torture relate to the principle of *non-refoulement*.[42]

In addition to these measures aimed at preventing torture, a second category of State obligations relates to the *right of victims of torture to a remedy and adequate reparation* for the harm suffered. Article 13 provides that every victim of torture and cruel, inhuman or degrading treatment or punishment has the right to complain to a competent domestic authority which shall promptly and impartially examine every allegation and ensure that victims and witnesses are adequately protected against intimidation and reprisals. If domestic remedies are not effective, Article 22 provides for the possibility for victims to submit an individual complaint against the State party concerned to the Committee against Torture. As mentioned above, this individual complaints procedure is, however, optional and only sixty-eight out of the 162 States parties to CAT have made the respective declaration in accordance with Article 22(1).[43] Victims of torture also have the right to adequate reparation for the harm suffered, which consists primarily of fair and adequate monetary compensation as well as medical, psychological, and other types of rehabilitation (Article 14).

The third category of State obligations relates to the use of *domestic criminal law against perpetrators of torture* and constitutes a special *raison d'être* for the entire Convention. First of all, States are under an obligation to ensure that all acts of torture are offences under their criminal law punishable by appropriate penalties which take into account their grave nature (Article 4). This obligation of States parties to criminalize torture is modelled on earlier counterterrorism treaties and was at the time of drafting of the Convention new and almost revolutionary in the context of a typical human rights treaty. However, thirty years after the entry into force of the Convention, we realize that only a minority of States parties in fact fully complied with this important legal obligation.

In addition to including torture as a crime in their domestic criminal codes, States parties have an obligation to establish their jurisdiction on the basis of the *territoriality, flag, active and passive nationality as well as the universal jurisdiction principles* (Article 5). In other words, no safe havens for perpetrators of torture shall continue to exist in our contemporary global world. Wherever a perpetrator of torture is travelling or residing, the authorities of the respective State have an obligation to arrest him or her, to make a preliminary inquiry into the facts, and to decide in accordance with the principle '*aut dedere aut iudicare*' whether to extradite the person to his or her country of origin, residence, or commission of the act of torture, or to prosecute the person before their own domestic criminal courts (Articles 5 to 9). Unfortunately, very few countries have so far complied with these obligations, but a few encouraging cases show that the awareness is growing that safe havens for perpetrators of torture, whether police officers, prison guards, military commanders, or Heads of State or Government of States responsible for systematic practices of torture, are no longer permissible.[44]

[42] See below Art 3, § 2 and Annex A7b, Figure 1.

[43] See below Art 22, § 4.

[44] See the survey of selected cases below Art 5.

The *international monitoring of States' compliance* with their obligations under the Convention follows that of other UN human rights treaties: the establishment of an independent treaty monitoring body, the *Committee against Torture* consisting of ten independent experts from different fields of expertise, with a mandate to examine mandatory State reports (Article 19) and optional inter-State (Article 21) and individual complaints (Article 22). The only innovative provision was the introduction of an *ex officio* inquiry procedure by the Committee in case it 'receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised' (Article 20). This procedure is not dependent on any complaints and may lead to a fact finding investigation on the spot. However, during the drafting of the Convention this potentially strong procedure has been considerably watered down. States parties may 'opt out' of the procedure by a reservation in accordance with Article 28, the entire procedure is highly confidential, and any fact-finding visits to the territory of the country concerned are dependent on an explicit agreement by the respective Government. Nevertheless, the Committee so far has completed ten inquiries in relation to Turkey, Egypt, Peru, Sri Lanka, Mexico, Serbia and Montenegro, Brazil, Nepal, Lebanon, and, again, Egypt.[45] Finally, with respect to States parties to the OP, the Subcommittee on Prevention (SPT) has the mandate to carry out preventive missions and unannounced visits to all places of detention, to conduct private interviews with all detainees, to assist the respective national preventive mechanisms and to make recommendations to the States parties concerned (Articles 11–16 OP).

More than thirty years after the entry into force of the CAT 162 States have ratified the main treaty to fight torture and other forms of ill-treatment. However, despite the broad ratification and the universal recognition of the prohibition of torture and other forms of ill-treatment we witness a 'global crisis'[46] affecting the majority of countries worldwide. At the end of his six-year term as UN Special Rapporteur on Torture, Manfred Nowak concluded that torture exists in roughly 90% of all States, that it constitutes a routine phenomenon of police behaviour in more than half of all States, and that it is systematically practised in some 10% of all States. In addition, he identified a global prison crisis as the conditions of detention in most States of the world amount to inhuman or degrading treatment.[47] The lack of implementation of the CAT obligations is due to dysfunctional criminal justice systems, corruption and insufficient capacities of state authorities, as well as a lack of political will to fight this horrible practice. In recent years the protection of human rights is experiencing a particularly serious crisis—also affecting the phenomenon of torture—in which official narratives and public belief often trivialize and even endorse such practices in the name of security and the fight against terrorism, ignoring the suffering and damages it causes. On the other hand, the positive experiences in some States illustrate that torture can be eradicated if the provisions of CAT and OPCAT are taken seriously and are being fully implemented.

[45] See below Art 20, § 37.

[46] See the last global campaign against torture by AI, 'Torture: A Global Crisis' <https://www.amnesty.org/en/get-involved/stop-torture/> accessed 1 June 2017.

[47] See UNSRT (Nowak) 'Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention' (2010) UN Doc A/HRC/13/39/Add.5; Manfred Nowak, *Torture: An Expert's Confrontation with an Everyday Evil* (University of Pennsylvania Press 2018).

4. Rules of Interpretation

According to Article 31 VCLT, an international treaty 'shall be interpreted … in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'. Thus, of primary significance is the textual, contextual, systematic and teleological interpretation, whereby, in addition to the treaty wording, consideration is also given to the Preamble.[48] The *object and purpose of the Convention* and *Protocol* can be derived from the desire of the drafters, as laid down in the respective Preambles: on the one side to make the struggle against torture and cruel, inhuman or degrading treatment or punishment 'more effective' and, on the other side, to strengthen the protection of persons deprived of their liberty against torture and other forms of ill-treatment by establishing a system of preventive visits to all places of detention. Any interpretation which would lead to the weakening of already existing norms for the prohibition and prevention of torture and cruel, inhuman or degrading treatment or punishment has thus been avoided. Systematic interpretation may be facilitated by a comparative analysis of similar international or regional human rights treaties, such as the CCPR, the Inter-American Convention to Prevent and Punish Torture 1985, or the ECPT. The *subsequent practice of States parties*, to be considered pursuant to Article 31(3) VCLT, can in part be derived from relevant reservations and declarations of interpretation, as well as from State reports and observations submitted by States parties.

Human rights texts are often characterized by a high degree of abstraction and vagueness. If the textual, contextual, systematic, and teleological interpretation 'leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable', Article 32 VCLT permits additional tools to be drawn upon, in particular, the preparatory work of the treaty ('*travaux préparatoires*'). The historical background of the CAT and the OP, above all the detailed discussions in the respective inter-sessional Working Groups of the UN Commission on Human Rights, has been outlined in relation to every Article and was used in the present Commentary as a source of interpretation whenever the meaning of a certain provision remained ambiguous.

The most important sources of information used in this Commentary as a tool for interpreting the provisions of the Convention is the *practice of the Committee against Torture*, be it in the State reporting, individual complaints and inquiry procedures. The same is valid for the practice of the SPT with regard to the Optional Protocol. In particular, decisions and statements of the Committee based on consensus rank highly in the interpretation of the Convention, even though these are not internationally binding. For the purpose of the present Commentary, the entire case law on individual complaints, the 'General Comments', country-specific comments, and observations in the State reporting procedure, as well as the reports in the inquiry procedure have been treated as an 'authoritative interpretation' of the relevant provisions of the Convention. The case law and practice of other treaty monitoring bodies, such as the UN Human Rights Committee, Special Procedures of the Human Rights Council, above the Special Rapporteur on Torture, as well as regional bodies, such as the European, African, and Inter-American

[48] See eg Ian Brownlie, *Principles of Public International Law* (5th edn, Clarendon Press 1998) 605; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) (*CCPR Commentary*) XXVI.

Courts/Commissions of Human Rights or the CPT, have also been taken into account, as was the case with relevant literature.

5. Reservations, Declarations of Interpretation, and Denunciation of the Convention and Protocol

Article 19(c) VCLT provides that reservations are, in the absence of a treaty provision to the contrary, permissible in so far as they are not 'incompatible with the object and purpose of the treaty'. While the CAT permits specific 'opting-out' reservations under Articles 28(1) and 30(2), no general provision concerning the permission or prohibition of reservations or declarations of interpretation can be found. In our opinion, the fact that Articles 28(1) and 30(2) permit specific reservations cannot be used as an argument that other reservations and declarations of interpretation are generally prohibited.[49] However, Article 30 OP contains a general prohibition of reservations to the Protocol.[50]

In addition to the specific *'opting-out' reservations* foreseen in Articles 28(1) and 30(2) and the optional declarations in accordance with Articles 21(1) and 22(1) CAT, only a few States have submitted reservations or declarations of interpretation.[51] Article 20(5) VCLT states that, in the absence of a treaty provision to the contrary, a reservation qualifies as accepted if a State does not raise an objection within twelve months of notification. In practice, very few objections have been lodged. For example, eight States parties objected to a reservation by *Qatar* regarding any interpretation of the provisions of the Convention incompatible with the precepts of Islamic law and the Islamic religion.[52]

Whether a reservation is compatible with the object and purpose of the Convention is a question which needs to be determined by the Committee against Torture.[53] If the Committee finds a certain reservation to be incompatible with the object and purpose of the Convention, this reservation must be considered as invalid and can be severed from the instrument of ratification, so that the reserving State is fully bound by the treaty, including the provisions to which the reservation related.[54] In practice, the Committee has on several occasions voiced its concern over broad and imprecise reservations, as well as reservations having a limiting effect on the Convention, and has issued recommendations to these States parties to withdraw them.[55]

Article 31 CAT and Article 33 OP explicitly provide for the *right of States parties to denounce the Convention and the Protocol* at any time by written notification addressed to the Secretary General of the United Nations. So far, no State party has made use of this right.[56]

[49] But see the first chairman of the Committee, Joseph Voyame, in the discussion of the initial State report of Chile: 'The Convention permitted reservations only in particular cases but not on a general basis, and he accordingly concluded that other reservations besides those provided for in the Convention were not admissible': CAT/C/SR.40, para 36. See also Ingelse (n 7) 237.

[50] See below Art 30 OP. [51] See below Appendices A3 and A4.

[52] Finland, France, Germany, Luxembourg, Netherlands, Norway, Spain, and Sweden.

[53] This legal opinion on a controversial topic is based on the HRC General Comment No 24/52 on issues relating to reservations and the respective jurisprudence of the ECtHR and IACtHR. See below Art 22, §§ 163–170 and Nowak, *CCPR Commentary* (n 48) XXVIII ff with further references.

[54] cf Nowak, *CCPR Commentary* (n 48) XXXII ff.

[55] See eg A/55/44, paras 179(b) and 180(a) (USA) and CAT/C/QAT/CO/1, para 9 (Qatar).

[56] See below Art 31, § 2 CAT, and Art 33 OP.

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Preamble

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

1. Introduction 15
2. Travaux Préparatoires 16
2.1 Chronology of Draft Texts 16
2.2 Analysis of Working Group Discussions 17
3. Issues of Interpretation 19

1. Introduction

Under Article 31 of the VCLT, the provisions of international treaties are not to be interpreted in isolation but rather in their context. The treaty's text including the preamble and annexes, together with relevant agreements between the States parties, may be drawn upon. This legal significance of the preamble has been generally recognized under international law.[1]

Like most other international human rights treaties, the Convention against Torture contains an extensive preamble. It places the obligations of States parties contained in the Convention in the context of the principles proclaimed in the Charter of the United Nations, and it emphasizes the natural-law origins of human rights. The text is based on

[1] cf ILC Yearbook, Vol 2 (1964) 57, 203.

the preambles of the two International Covenants of 1966[2] and of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of 1975.[3] The text, as proposed in the original Swedish draft of 1980, was unanimously adopted with only a few changes suggested during the drafting in the Working Group of the Commission on Human Rights. The preamble reiterates the absolute prohibition of torture and CIDT, as contained in Article 5 UDHR and Article 7 CCPR, and expresses the desire 'to make more effective the struggle against Torture' and CIDT. This seems to constitute the central object and purpose of the Convention.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

Declaration (9 December 1975)[4]

> The General Assembly,
>
> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Considering that these rights derive from inherent dignity of the human person,
>
> Considering also the obligation of States under the Charter, in particular article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,
>
> Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,
>
> Adopts the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the text of which is annexed to the present resolution, as a guideline for all States and other entities exercising effective power.

Proposals for the preamble and the final provisions of the Draft Convention, submitted by Sweden (2 December 1980)[5] The States Parties to the present Convention,

> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Recognizing that these rights derive from the inherent dignity of the human person,

[2] GA Res 2200/A (XXI) of 16 December 1966.
[3] GA Res 3452 (XXX) of 9 December 1975.
[4] ibid.
[5] Proposal for the Preamble and the Final Provisions of the Draft Convention (1980) UN Doc E/CN.4/1427.

> Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,
>
> Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,
>
> Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)),
>
> Desiring to convert the principles of the Declaration into binding treaty obligations and to adopt a system for their effective implementation,
>
> Have agreed as follows:

2.2 Analysis of Working Group Discussions

Whereas the Working Group of the Commission on Human Rights had already begun discussing the substantive elements of the Convention in 1980, work on the preamble only began in 1983. The Group took as its basis the draft clauses submitted by Sweden in 1980.[6]

The first issue raised by various delegations within the Working Group concerned the scope of the Convention as defined in the title and reflected in the text. The preamble was regarded by all as a reiteration of the purpose of the Convention at hand. In order to ascertain whether the object and purpose of the treaty was accurately reflected in the text, it was deemed relevant to discuss the overall scope of the Convention within the specific discussion of the preamble itself. While some delegations expressed the view that the draft Convention related principally to criminal law and procedure and that this should be reflected in the title of the instrument,[7] others noted that this was not necessarily the case. As one representative pointed out, the subject-matter of the Convention against Torture is inherently linked to the agenda item under which it had previously been discussed, namely, 'The question of the human rights of all persons subjected to any form of detention or imprisonment'.[8] The Swedish delegation, however, argued that the subject-matter of the Convention had already been defined by the mandate given to the Commission as laid out in General Assembly Resolution 32/62:

> To draw up a draft Convention against torture and other cruel, inhuman or degrading treatment or punishment in the light of the principles embodied in the Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[9]

This mandate had been confirmed by subsequent General Assembly resolutions. According to the Swedish representative, it therefore followed that no limitations applied

[6] Draft Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1983) UN Doc E/CN.4/1983/WG.2/WP.16, para 5. See E/CN.4/1427 (n 5) for the draft preambular clauses.

[7] E/CN.4/1983/WG.2/WP.16 (n 6) para 6.

[8] ibid.

[9] GA Res 32/62 of 8 December 1977.

to the subject-matter of the Convention other than those specified in the aforementioned mandate.

Discussion then proceeded onto the preambular clauses themselves. A first suggestion made was to delete the phrase 'of the inherent dignity and' which existed in both the first and the second paragraphs. Since there was general agreement that the words were redundant, the suggestion was accepted and the change made to the first paragraph.[10]

With regard to the third paragraph, a proposal was made to include a reference to the principle of non-discrimination as enshrined in either Article 55 of the United Nations Charter, or in Article 2(1) of the International Covenant on Civil and Political Rights. This suggestion received wide support from the Working Group and the text was amended so as to include a mention of Article 55.[11]

Several delegations within the Working Group expressed discontent with the sixth preambular clause as drafted by Sweden.[12] The observer for Amnesty International, for instance, argued that the clause in question risked undermining the authority and effectiveness of the 1975 Declaration.[13] As a result, the following phrase was proposed by the Argentine delegation as a replacement for the Swedish draft: 'Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'.[14] The proposal gained general support and was subsequently accepted by the Working Group.

The appropriate amendments, as detailed above, were made and the Chairman-Rapporteur of the sessional Working Group, Jan Herman Burgers, submitted the revised set of preambular clauses which were then adopted by the Group during its 1983 session.[15]

There was still, however, one outstanding issue. During the second reading of the draft preambular clauses, which took place at the 11th meeting,[16] the Peruvian delegation had proposed the following paragraph for inclusion in the preamble:

> Recognizing that the essential rights of men are not derived from one's being a national of a certain State, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention.[17]

The Group was of the opinion that this was a proposal that warranted careful deliberation at a later stage. The Group recommenced the discussion of this proposal in 1984 when it was agreed that although the intention of the Peruvian delegation was commendable, the ideas contained in the proposal were too broad and too controversial for inclusion.[18] Moreover, it was largely agreed that the existing second paragraph of the preamble incorporated many of the same ideas without being couched in as broad terms. The Peruvian delegation thus withdrew its proposal and the Group decided that the preamble would consist of the revised set of clauses as adopted in 1983.[19]

[10] E/CN.4/1983/WG.2/WP.16 (n 6) para 8. See also Herman Burgers and Hans 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) 84.

[11] E/CN.4/1983/WG.2/WP.16 (n 6) para 9; Burgers and Danelius (n 10) 84.

[12] E/CN.4/1983/WG.2/WP.16 (n 6) para 10. [13] Burgers and Danelius (n 10) 84.

[14] E/CN.4/1983/WG.2/WP.16 (n 6) para 10.

[15] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 6.

[16] ibid. [17] E/CN.4/1983/WG.2/WP.16 (n 6) para 12.

[18] E/CN.4/1984/72 (n 15) para 7. [19] Burgers and Danelius (n 10) 92.

3. Issues of Interpretation

The first paragraph is modelled on the first preambular paragraph of both Covenants. The phrase 'recognition of the inherent dignity' was, however, deleted during the Working Group discussions because these words were also contained in the second paragraph. The term 'principles proclaimed in the Charter of the United Nations' refers both to the principles enshrined in Article 2 and to the purposes of the United Nations laid down in Article 1 of the Charter,[20] ie peace and security, development and human rights. The interdependence of these three main objectives of the world organization was emphasized by former Secretary General Kofi Annan in his well-known report 'In Larger Freedom' of 21 March 2005 as follows: 'Accordingly, we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights'.[21] The significance of human rights as a precondition for both security and development was already envisaged in the preambles of both Covenants and the CAT which state that recognition of human rights 'is the foundation of freedom, justice and peace in the world'.

The second paragraph is identical with the second preambular paragraph of both Covenants and expresses, like the first paragraph, that human rights have their origin in natural law. The reference to the 'inherent dignity of the human person' is of particular relevance for the prohibition and prevention of torture as any act of torture, like slavery, constitutes a direct and deliberate attack on the dignity of the human person. Torture presupposes a situation in which one person exercises total control over another person. The victim of torture finds itself in a situation of powerlessness, and the perpetrator aims at depriving the victim of its dignity and humanity.[22]

The third paragraph is taken from the fourth preambular paragraph of both Covenants. During the drafting in the Working Group, a particular reference to Article 55 of the UN Charter was added. According to Article 55(c), the United Nations shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. It is this emphasis on the principle of non-discrimination which the drafters had in mind when proposing an explicit reference to Article 55.[23] This principle is also stressed in Article 1 CAT: in addition to extraction of a confession or information, punishment and intimidation, discrimination is explicitly listed as one of the purposes of torture.[24]

The fourth paragraph refers to the absolute prohibition of torture and CIDT, as contained in already existing instruments, such as Article 5 UDHR and Article 7 CCPR. Apart from its preamble, the Convention against Torture does not contain any provision explicitly prohibiting torture or CIDT or providing for a human right not to be subjected to torture or CIDT. The Convention only contains additional obligations of States parties to criminalize torture under domestic law, to provide victims of torture with a right to remedy and reparation, and to prevent torture and CIDT.

The fifth paragraph refers to the 1975 Declaration which forms the direct basis for the Convention against Torture. In the United Nations, binding human rights treaties

[20] cf Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 2.

[21] A/59/2005, para 17.

[22] On the significance of the situation of powerlessness for the definition of torture see below Art 1.

[23] See above 2.2.

[24] See below Art 1, 3.1.4

are often preceded by a non-binding declaration on the same subject. As the UDHR of 1948 formed the basis for the two Covenants of 1966, the same three steps (declaration, convention, and implementation) are often found in relation to specialized human rights topics as well.[25] Most of the ideas of strengthening the prohibition and prevention of torture and CIDT, which are elaborated in the Convention against Torture, were already contained in the 1975 Declaration. The original Swedish Draft of 1980, which formed the principal basis for the drafting of the Convention in the Working Group, is to a great extent modelled on the 1975 Declaration. This was explicitly mentioned in the sixth preambular paragraph of the Swedish Draft which expressed the desire 'to convert the principles of the Declaration into binding treaty obligations and to adopt a system for their effective implementation'.[26] During the discussions in the Working Group, the observer for Amnesty International and others regarded this formulation as undermining the authority and effectiveness of the 1975 Declaration and, consequently, replaced it with a stronger wording.[27]

The final wording of the sixth paragraph is based on an Argentine amendment in the Working Group of 1983.[28] This formulation expresses the overall objective of the Convention against Torture: the desire 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. It reflects the experience that the mere prohibition of torture and other ill forms of ill treatment under international human rights law is not enough to eradicate this 'plague of the twentieth century'. Innovative ideas were brought forward to make the struggle against torture more effective: the IAPL Draft proposed to make torture a crime under international law, similar to genocide and apartheid, and to require States to bring the perpetrators of torture to justice before domestic courts; the original Swedish Draft introduced the principle of universal criminal jurisdiction, based on various treaties combating the crimes of terrorism and hijacking, and contained a number of specific State obligations to prevent torture; and the Costa Rica Draft suggested a system of preventive visits to all places of detention, based on the experience of the ICRC. It is surprising that, despite strong opposition by a large number of States from all regions of the world, the Working Group, under the efficient chair of Jan Herman Burgers from the Netherlands, succeeded to include most of these ideas in the final text of the Convention.[29] In addition to a broad variety of provisions aimed at preventing torture, providing support to torture victims, and at bringing perpetrators of torture to justice before domestic courts, the Convention also contains a new procedure of international monitoring, ie an *ex officio* inquiry procedure in case of systematic practice of torture.[30] The following article by article analysis of all provisions of the Convention will show the extent to which these innovative provisions of combating torture and other ill-treatment were actually implemented by States parties during the thirty years since the entry into force of the Convention on 26 June 1987.

[25] cf eg the Declaration and Convention on the Elimination of Racial Discrimination of 1963 and 1965; the Declaration and Convention on the Elimination of Discrimination against Women of 1967 and 1979; the Declaration and Convention on the Rights of the Child 1924, 1959 and 1989; and the Declaration and Convention on Enforced Disappearance 1992 and 2006.

[26] See above 2.1. [27] See above 2.2. [28] E/CN.4/1983/WG.2/WP.16 (n 6) para 10.

[29] The system of preventive visits to places of detention, proposed by Costa Rica, was only realized by the adoption of the OPCAT in 2002: see below Preamble OP.

[30] See Manfred Nowak in *Fortschritt im Bewußtsein der Grund- und Menschenrechte: Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora* (Engel 1988) 189 and see below Art 20.

PART I

SUBSTANTIVE ARTICLES

Article 1

Definition of Torture

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

1. Introduction 23

2. Travaux Préparatoires 24

2.1 Chronology of Draft Texts 24

2.2 Analysis of Working Group Discussions 25

2.3 Reservations, Declarations, and Understandings 40

3. Issues of Interpretation 42

3.1 The Definition of Torture 42

3.1.1 Conduct 42

3.1.2 Infliction of Severe Pain and Suffering 42

3.1.2.1 Severity as a Distinguishing Element between Torture and Ill-Treatment? 42

3.1.2.2 Meaning of 'severe pain and suffering' 48

3.1.3 Intention 53

3.1.4 Purpose 54

3.1.5 Powerlessness 56

3.1.6 Involvement of a Public Official 59

3.1.6.1 Meaning of 'public official' 59

3.1.6.2 Meaning of 'other person acting in an official capacity' 60

3.1.6.3 Meaning of 'instigation', 'consent', and 'acquiescence' 61

3.2 Is there a State Obligation Emanating Out of Article 1? 63

3.3 Lawful Sanctions 64

3.4 Savings Clause 69

1. Introduction

1 Article 1 CAT is the first provision in an international treaty which defines torture. It served as a model for the definition contained in Article 2 of the Inter-American Convention to Prevent and Punish Torture adopted in 1985. Article 1 has to be read in conjunction with Article 16, which requires States parties to prevent 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as

defined in article 1'. The distinction between torture and other forms of ill-treatment, all of which are absolutely prohibited under Article 7 CCPR and other international and regional treaty provisions as well as customary international law, was introduced because some of the specific State obligations laid down in the CAT, above all the obligation to punish the perpetrators of torture by means of domestic criminal law, were meant to apply to torture only. While there have been different approaches regarding how to differentiate torture and other ill-treatment—either by the severity of pain or the purpose of the conduct—there is an increasing consensus that purpose constitutes the relevant distinguishing criterion. Additionally, powerlessness has become a significant criterion to distinguish between torture and other forms of ill-treatment.

2 The main elements of the definition of torture are the following:

- involvement of a public official;
- infliction of severe pain or suffering;
- intention;
- specific purpose

3 As with any legal definition, many questions of interpretation arise which will be addressed on the basis of the *travaux préparatoires*, reservations and declarations of States parties, information provided in State reports, the practice of the Committee and other relevant monitoring bodies, legal literature, and other sources. Beside the discussions on how to distinguish torture from other forms of ill-treatment and the meaning of powerlessness, the interpretation of the lawful sanctions clause has been particularly controversial.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *Declaration (9 December 1975)*[1]

Article 1

> 1. For the purposes of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
>
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

5 *IAPL Draft (15 January 1978)*[2]

Article II

> For the purposes of this Convention, torture is any conduct by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at

[1] GA Res 3452 (XXX) of 9 December 1975.

[2] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

the instigation of a public official or for which a public official is responsible under Article III, in order:

(a) to obtain from that person or another person information or a statement or confession; or

(b) to intimidate, discredit or humiliate that person or another person; or

(c) to inflict punishment on that person or another person, save where such conduct is in proper execution of a lawful sanction not constituting cruel, inhuman or degrading treatment or punishment.

6 *Original Swedish Draft (18 January 1978)*[3]

Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

7 *Revised Swedish Draft (19 February 1979)*[4]

Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. [Torture is an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.]

3. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application relating to the subject matter of this Convention.

2.2 Analysis of Working Group Discussions

8 Regarding the scope of Article 1, the preliminary deliberations in the Human Rights Commission's various Working Groups on this point were conducted on the basis of a draft Convention submitted by Sweden to the thirty-fourth Session of the Human Rights

[3] Draft International Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[4] Revised Draft Convention submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

Commission in 1978.[5] States were also presented with a draft text submitted by the International Association of Penal Law[6] whose definition only included acts of torture. There was very little debate on the IAPL draft concerning Article I.

9 Discussions began within the Informal Working Group in 1978 and later during the session of the Working Group in 1979 without any agreement being reached as to the scope of Article 1. It emerged that certain delegates rejected the reference in Article 1(2) of the draft Swedish Convention to torture as an 'aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment' on the basis that the concept was too vague to be included in a Convention which was to form the basis for criminal legislation in the contracting States.[7] The opposing opinion was that both concepts should be included in the Convention given that it was not deemed possible to draw a strict line between acts of torture and other lesser forms of acts of cruel, inhuman or degrading treatment or punishment, reasoning that torture is merely the most extreme of such acts.

10 In written comments in 1978 the *United States* made clear their position that the Convention should be focused primarily on the prevention and suppression of acts clearly identifiable as torture, arguing that this was necessary in light of the severe penalties, broad jurisdictional provisions, and definitional difficulties embodied in the Convention along with the need for broad international acceptance. The United States further stated that it was not their intention to denigrate the fact that acts of cruel, inhuman or degrading treatment not clearly amounting to torture are serious offences. At the same time, they sought to emphasize that torture is the most extreme form of acts of cruel, inhuman or degrading treatment and that unfortunately it was not possible to draw a sharp line between other lesser forms of cruel, inhuman or degrading treatment and torture.

11 Several Governments suggested that the definition of torture should be modified and that the concept of cruel, inhuman or degrading treatment should be clarified. *Spain* argued that the difficulties inherent in arriving at a legal definition of cruel, inhuman or degrading treatment made it advisable to limit the scope of the Convention exclusively to torture which, they argued, was the main concern of the Convention according to Articles 7 and 8. The *German Democratic Republic* was of the same opinion, stating that there was no clear definition of the criteria by which other cruel, inhuman or degrading treatment was to be judged and that these defects could not be remedied by listing certain actions described as torture and that therefore it would be appropriate to limit the draft Convention to torture. The *USSR* were also of the opinion that the concepts of torture and cruel, inhuman or degrading treatment should be regarded as legally distinct in order to avoid imprecision and ambiguity as to the specific meaning of cruel, inhuman or degrading treatment since the institution of punishment is legally applicable to persons who have committed an offence.[8] The Federal Republic of Germany argued that since the draft Convention establishes legal obligations for States, the term torture should be defined and distinguished as precisely as possible from the 'marginally different' term of cruel, inhuman or degrading treatment.[9]

[5] E/CN.4/1285 (n 3). [6] E/CN.4/NGO/213 (n 2).

[7] Report of the Working Group of the Commission on Human Rights (1979) UN Doc E/CN.4/L.1470, para 22.

[8] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314.

[9] Summary Prepared by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.2.

12 On the other hand France made clear its position that cruel, inhuman or degrading treatment involves acts of physical or mental torture and that no distinction should be drawn between the two; that, on the contrary, torture should be defined in such a way as to encompass both. At the same time Switzerland argued that any definition could have the effect of limiting the scope of the concept which it sets out to define and that therefore it was essential to ensure that the definition of torture did not result in any weakening of existing law, which prohibits torture and inhuman treatment unconditionally and in the same manner and makes no distinction as to the respective seriousness of such acts. The Swiss Government argued that for these reasons the Convention should cover acts of torture and cruel, inhuman or degrading treatment, on the same footing and proposed the following text: 'the term "torture" includes, cruel, inhuman or degrading treatment or punishment.'[10]

13 During deliberations in the 1979 Working Group many delegations expressed the view that Article 1(2) of the original Swedish draft risked unduly restricting the definition of torture and should be deleted. On the other hand several delegates pointed out that the deletion of this reference would not in any case prejudge the broader issue of whether subsequent articles of the Convention should apply only to torture or also to other forms of cruel, inhuman or degrading treatment. Article 1(2) was placed in square brackets to be discussed at a later date.

14 This matter was resolved during the 1980 Working Group through the inclusion in Article 16(1) of language providing that the obligations in the Convention and, 'in particular', contained in the text of Articles [3], 10, 11, 12, 13, [14] and [15] which only apply to torture, should also apply to other forms of cruel, inhuman or degrading treatment. During the debate in the 1980 Working Group one delegate pointed out that Article 1(3) of the revised Swedish text had specified that the Article was without prejudice to provisions of a wider application relating to the subject matter of the Convention and that similarly Article 16 (of the revised Swedish draft) was a saving clause affirming the continued validity of other instruments prohibiting punishments or cruel, inhuman or degrading treatment. It was at this point that a proposal was made to have the following text as paragraph 1 of Article 16 with the original text of the revised Swedish version appearing as Article 16(2):

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not constitute torture as defined in Article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles [3], 10, 11, 12,13, [14] and [15] shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.[11]

15 In support of the proposal it was emphasized that international conventions that prohibit cruel, inhuman or degrading treatment, and in particular the CCPR and the ECHR, were already in force and that the prohibition was necessary to prevent offenders from taking advantage of an unduly narrow interpretation of the word 'torture'. Other

[10] E/CN.4/1314 (n 8) para 36.

[11] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367, para 87, referring to the proposal in document HR/XXXVI/WG.10/WP.5/Rev.1.

delegates felt that the concepts were too vague to be applied at the criminal law and police regulation levels.

16 Some delegates proposed replacing the term 'to prevent' by 'to prohibit' in the above proposal for the text of Article 16(1). However, this proposal was not taken up in the final text of Article 16.

17 At the same time the authors of the proposal agreed to delete the words 'in particular' in the French text of the proposal (although the wording of the CAT retains the words '*en particulier*'). Further, one delegate expressed a reservation with respect to Article 16(2) stating that there was no necessity for such a provision.

18 During the 1981 and 1982 Working Groups certain delegations argued for and against the retention of the bracketed Article 1(2). Those arguing in favour of retaining Article 1(2) considered it essential to affirm from the very outset that the prohibition of cruel, inhuman or degrading treatment was included within the scope of the Convention and to make it clear that torture was, in their view, at the highest end of a scale of such treatment or punishment. Such a clarification was necessary in order that the crime of torture be defined with sufficient precision for purposes of their domestic criminal law. Other delegations, pointing out that there was no universally accepted concept of cruel, inhuman or degrading treatment, felt that the reference in Article 1(2) as then worded would be far too vague for inclusion in a treaty, and that it would tend to bring imprecision to the concept of torture which had been agreed upon in Article 1(1).[12] As a result of the discussion in the 1982 Working Group and the incorporation of new language in Article 16(1), the Group decided to delete Article 1(2). At the same time it was agreed that the term 'national legislation' in Article 1(3) be replaced with 'national law' in order to bring that paragraph into line with Article 16(2).

19 Debate on the scope of the proposed Article 16 and in particular its reference to Articles 3, 14, and 15 continued in the 1981 Working Group. Some delegates were of the opinion that no reference should be made to Articles 3, 14, and 15. After discussion, the Working Group decided to delete the reference to Articles 3 and 15 and to retain the reference to Article 14, between square brackets. Articles 16 (1) and (2) were adopted.

20 Discussion continued in the 1982 Working Group where the United States introduced an amendment to include either the following phrases, 'which are not sufficient to constitute torture' or 'which do not amount to torture', after the words 'inhuman or degrading treatment or punishment'. In support of the amendment, several speakers considered it important to indicate clearly in the Convention that torture was the gravest form of cruel, inhuman or degrading treatment and that the whole range of such treatment or punishment should be covered by some articles at least of the Convention. Some other delegations felt, however, that the proposal introduced an undesirable element of vagueness into the text. One opinion was that the difference between torture, as defined or referred to in national laws and in some international decisions, and cruel, inhuman or degrading treatment was one of substance and not of degree. After some debate, it was agreed to adopt the second alternative on the understanding that no delegation maintained its objection against this formulation.

21 As regards the reference to Article 14 in Article 16(1) regarding compensation some speakers, referring to Article 11 of the 1975 Declaration against Torture, favoured a reference on the grounds that victims of cruel, inhuman or degrading treatment may have

[12] Report of the Working Group of the Commission on Human Rights (1981) UN Doc E/CN.4/L.1576 and Report of the Working Group of the Commission on Human Rights (1982) UN Doc E/CN.4/1982/L.40.

a legitimate claim to compensation. Other representatives did not feel that extension of the scope of their compensation laws to an ill-defined field to include all such treatments would be warranted. Since no consensus could be reached, the Group decided to revert to this question at a later stage.[13] No consensus was possible either in the 1983 Working Group. During the 1984 Working Group several delegates expressed themselves in favour of including the reference to Article 14 in Article 16(1). Some of the other speakers opposed the reference, fearing that the concept of cruel, inhuman or degrading treatment was too imprecise as a basis for an enforceable right to compensation and might lead to difficulties of interpretation and possible abuses. While one representative suggested that the Working Group might try again to agree on a definition of this concept, others, who were in favour of including the reference, expressed the opinion that a definition was not necessary and that each country would develop its own case law on this matter. India asked that reference be made in the report to the general reservation concerning Article 14 which her delegation had entered at the previous session. The representative of *Spain* proposed the inclusion of references to Articles 3, 14, and 15 in Article 16(1), in order for the mechanism of protection to be in harmony with the title of the Convention itself which included 'other cruel, inhuman or degrading treatment or punishment' arguing that if reference to these three articles was not acceptable to the Working Group, then the second sentence of paragraph 1 should be deleted. One other representative also proposed the deletion of the second sentence. In light of the ensuing discussion and in view of the fact that some of these issues had been debated in the past, the representative of Spain, in a spirit of compromise, withdrew his proposal. The representative of the *USSR*, in an effort to help overcome the difficulties with regard to the question, suggested that the Convention could specify that, in such a case, compensation would be limited to material damage and damage to the health of a person.[14] After further consultations, the Chairman Rapporteur noted that several delegations which had favoured the inclusion of a reference to Article 14 had now indicated that they would not insist on such a reference if it created an obstacle to reaching agreement on draft Article 16. At its eleventh meeting, the Working Group decided to adopt draft Article 16, limiting the reference in the first paragraph to Articles 10, 11, 12, and 13. The delegations of Canada and Ireland stated that they had not opposed the adoption of Article 16, but that they wished to see registered in the report that their Governments retained a strong preference for including a reference to Article 14 in this provision. In written comments the representative of *Canada* outlined that his delegation had made considerable concessions in the Working Group, particularly in the matter of compensation for victims of cruel or degrading treatment and that the very definition of torture did not seem to his delegation to go far enough.[15] The delegation of the *USSR*, drawing attention to the fact that Article 16 was

[13] E/CN.4/1982/L.40 (n 12).

[14] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 42 referring to the proposal E/CN.4/1984/WG.2/WP.5: '1. In the second sentence of paragraph 1 of article 16, delete the words "and [14]"; 2. At the end of the paragraph, add the sentence: "The obligation contained in Article 14 shall apply with the substitution indicated above in the event that such treatment or punishment caused its victim material loss or loss of health." 3. After the first paragraph, insert a new paragraph: "2. In the determination of acts referred to in paragraph 1 of this article, each State Party shall act in accordance with the relevant international agreements binding on it and its national law" … 4. Paragraph 2 of article 16 should be renumbered as paragraph 3.'

[15] Summary Record of the thirty-second Meeting (1984) of the Commission on Human Rights UN Doc E/CN.4/1984/SR.32, 14, para 74.

the only provision referring to acts of cruel, inhuman or degrading treatment or punishment which did not amount to torture, expressed the view that the provision should have been presented in a more detailed way, with a more precise definition, so that the article would have a stronger effect. To this end the delegation had proposed reproducing the provisions of other instruments which had binding force for States parties.[16] The delegation, considering it possible to adopt Article 16 without a reference to Article 14, stated that it would not insist on its proposal. However, it emphasized that, if in the course of the further consideration of Article 16 some delegations again raised the question of the necessity of including a reference to Article 14 in Article 16, it would return to its proposal.[17]

22 There was no difficulty encountered in the drafting stage about the meaning of '*any act* by which severe pain or suffering …'. The wording of the alternative IAPL draft referred to '*any conduct*'. In written comments *Barbados* sought to change the phrase in Article III (a) from 'such conduct' to 'acts of torture'.[18] However there was no mention of the question in the preparatory works about whether or not an *omission* such as omission of food, water, or medical attention would be regarded as a prohibited act and neither is this mentioned *expressis verbis* in the Convention.

23 It is interesting to note that during the drafting of the UN Declaration on Torture of 1975, from which the language of Article 1 of the original Swedish draft of 1978 was borrowed, a proposal that the word 'severe' be deleted and that it be made clear that the Article would not apply to a penalty or punishment imposed by a judicial tribunal in accordance with law or to a disciplinary administrative action taken under the provisions of the Standard Minimum Rules, had been rejected.[19] The final text of the Declaration thus defined torture as 'any act by which severe pain or suffering … is … inflicted'. This notion of severity of pain or suffering was adopted in the original Swedish draft ('torture means any act by which severe pain or suffering … is … inflicted') and appeared also in the alternative IAPL draft ('torture is any conduct by which severe pain or suffering … is … inflicted').

24 In written comments, this point was addressed by a number of States. The *United States*, being of the opinion that torture is the most extreme form of acts of cruel, inhuman or degrading treatment, supported the inclusion of the notion of severity of pain or suffering, arguing that a requisite 'intensity' and 'severity' of pain or suffering was an inherent element of the offence of torture and proposing the language 'extremely severe pain and suffering' as an alternative to mere 'severe' pain and suffering as appeared in the original Swedish draft.[20] At the same time they indicated that in their view, although conduct which may result in permanent impairment of physical or mental faculties may be indicative of torture, it is not an essential element of the offence. The German Democratic Republic drew attention to the fact that the wording '… act by which severe pain or suffering, whether physical or mental …' could be interpreted in many ways. The

[16] Summary Record of the thirty-thirrd Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.33, 5, para 11.

[17] E/CN.4/1984/72 (n 14).

[18] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights' (1979) UN Doc E/CN.4/1314/Add.4.

[19] Report of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1975) A/CONF.56/10, 38, para 293.

[20] E/CN.4/1314 (n 8) 6, para 23.

Swiss delegation, of the opinion that no distinction should be made between torture and cruel, inhuman or degrading treatment, advocated that no distinction be made as to the respective seriousness of the acts.[21]

25 The *United Kingdom* was of the opinion that the definition of torture in the original Swedish draft should be made more consistent with the definition in the jurisprudence of the ECtHR and to this end suggested that the word 'extreme' should be substituted for the word 'severe'.[22] In the same year the ECtHR in the *Ireland v. United Kingdom* case had drawn a distinction between torture and inhuman and degrading treatment based primarily on a progression of severity, arguing that the distinction was necessary because a 'special stigma' attaches to torture. It has been suggested that the United Kingdom wanted to reaffirm the relative intensity of pain and suffering notion, presumably to preserve the perceived benefits of the decision in *Ireland v United Kingdom*.[23] This proposal was not taken up and Article 1, with its reference to the word 'severe', was adopted by the Working Group prior to the thirty-fifth session of the Commission on Human Rights.

26 Following its finalization by the Working Group of the Commission on Human Rights the representative of the *USSR* introduced amendments to the draft resolution[24] which proposed the deletion of the word 'severe' before 'pain and suffering' in the debates of the Third Committee.[25] However, the final text of the Convention retained the notion of severity as it appeared in the original Swedish draft text.

27 The 1975 Declaration, the original Swedish draft, the IAPL draft, and the final text of the Convention all refer to 'severe pain or suffering, whether physical or *mental*'. During the drafting *Portugal* considered that it would be useful expressly to include a reference to the use of psychiatry for political purposes in the definition of torture[26] and proposed that 'the abuse of psychiatry with a view to prolonging the confinement of any person subjected to a measure or penalty involving deprivation of freedom shall be regarded as torture' be added to the text of Article 1(1). While this proposal could be indicative of the types of acts which the delegations considered could in certain instances constitute mental torture, the criteria as to what constitutes 'mental pain or suffering', as with the concepts of torture or indeed cruel, inhuman or degrading treatment, are unclear and were not debated by the Working Group. The German Democratic Republic stated that the wording could be interpreted in many ways. One delegation felt that the term 'mental torture' was not a clear enough term for the purpose of the criminal law of States.[27] The *United Kingdom* went along with this, arguing that the concept was too ambiguous for national courts of States to assess, especially when dealing with the motive of

[21] E/CN.4/1314 (n 8).

[22] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1.

[23] Sir Nigel Rodley, 'The Definition(s) of Torture in International Law' (2002) 55 Current Legal Problems 467.

[24] Union of Soviet Socialist Republics: Amendments to the Annex to the Draft Resolution Contained in Document A/C.3/39/L.40 (1984) UN Doc A/C.3/39/L.63 and Union of Soviet Socialist Republics: Amendments to the Annex to the Draft Resolution Contained in Document A/C.3/39/L.40* (1984) UN Doc A/C.3/39/L.64.

[25] Report of the Third Committee, thirty-ninth Session (1984) UN Doc A/39/708.

[26] Portugal drew attention to the fact that this question was being debated by certain international bodies, most notably the Parliamentary Assembly of the Council of Europe which referred explicitly to this question in recommendation 818 (1977) concerning the situation of the mentally ill.

[27] Report of the Commission on Human Rights on its thirty-fifth Session (1979) UN Doc E/CN.4/1347 (1979) UN Doc E/CN.4/WG.1/WP.2, 39.

discrimination.[28] They expressed concern that in certain aspects the definition of Article 1 of the draft Convention was rather loose and susceptible to subjective interpretation, highlighting in particular that it would be difficult for courts to assess the concept of mental suffering, particularly when linked to a motive such as discrimination.

28 Regarding situations where no physical or mental pain or suffering is apparent in the complainant, *Barbados* proposed that the Commission consider expanding the definition of torture to include the use of more sophisticated weapons such as 'truth drugs' where no physical or mental suffering is apparent in the complainant.[29]

29 The above conduct is prohibited when it 'is *intentionally inflicted on a person*'. This seems to imply the exclusion of negligent conduct from the application of Article 1. However, no reference was made to the question as to when a particular conduct ceases to be considered purely negligent in the drafting history. The *United States* expressed dissatisfaction with this term, preferring 'deliberate' and 'malicious' over 'intentional'. They proposed that Article 1(1) read 'for the purposes of the present convention, the offence of torture includes any act by which extremely severe pain or suffering, whether physical or mental, is deliberately and maliciously inflicted on a person by or with the consent or acquiescence of a public official'.[30] The concept of *acquiescence* of a public official rather than 'instigation by' was proposed in order that it be made clear that the public official has a clear duty to act to prevent torture. No other State commented on this point and it elicited no serious discussion by the Working Group. The US proposal was not adopted. Neither was a UK proposal that the pain not only be intentionally, but also 'systematically' inflicted.[31] It appears that the drafters of the present Convention considered the phrase 'severe pain' sufficient to convey the idea that only acts of a certain gravity be considered to constitute torture and that it was not considered necessary that the pain be inflicted systematically. It follows that even single, isolated acts can be considered to constitute torture.

30 The conduct must be carried out for the purpose of achieving a specific result. Article 1(1) contains a non-exhaustive list of objectives, leaving room to qualify action as torture if it is applied with a different objective than that stated. *Burgers* and *Danelius*[32] note that the words 'such purposes as …' mean that other objectives than those named must indeed have something in common with the objectives mentioned, ie the existence of some—even remote—connection with the interests or policies of the State and its organs. This is supported by the objective of the Convention as it appears in the *travaux préparatoires* and the preamble, ie the bringing to an end of torture by or under the responsibility of public authorities.

31 Regarding the purposes for which torture was used, while some States supported a reference to it in Article 1, others stated that it should be deleted as too restrictive.[33] The legislative history indicates that the list of purposes is meant to be 'indicative' rather than 'all-inclusive'.[34] The United Kingdom made the point that greater precision would have

[28] Report of the Secretary-General (1984) UN Doc A/39/499, para 19.

[29] E/CN.4/1314/Add.1 (n 22) para 24.

[30] E/CN.4/1314 (n 8) para 27. See also Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 20.

[31] E/CN.4/1314/Add.1 (n 22).

[32] Herman Burgers and Hans 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) 119.

[33] Report of the Informal Working Group to the Commission (1978) UN Doc E/CN.4/L.1400.

[34] E/CN.4/1314/Add.1 (n 22) para 2. See also Boulesbaa (n 30) 21.

been achieved if the purposes were listed rather than exemplified in Article 1(1) while the Swiss delegation doubted that an exhaustive list would cover infliction of pain or suffering as a result of medical or scientific experimentation not required by the state of health of the individual. They therefore proposed that the following language be inserted after the first sentence of Article 1(1): 'It also means medical or scientific experiments that are not justified by a person's state of health and serve no therapeutic purpose.'[35] This would have been consistent with the CCPR and its *travaux préparatoires* but was not included in the final text. *France*, in its written comments on Article 1, was adamant that torture should not be defined in terms of the status and motives of the perpetrators of acts of torture owing to the fact that this reference might afford States parties a means of evading their commitment to prevent or punish all acts of torture regardless of the identity and goals of the perpetrators.[36] The Netherlands were also of the opinion that the list of purposes mentioned in Article 1(1) was illustrative, rather than exhaustive.[37]

32 The same issue came up again at the thirty-fifth session of the Commission on Human Rights. During the 1979 Working Group there had been considerable discussion as to whether Article 1 should specify the purposes for which acts of torture might be perpetrated. Some delegates suggested that it would be unduly restrictive to specify any purposes at all; others indicated that the list of purposes was not an exhaustive one.[38] Several proposals were made for extending the list and general agreement was reached to include as torture such acts as inflict severe pain and suffering for any reason based on discrimination of any kind.[39] The *United Kingdom* expressed concern about including the phrase 'or for any reason based on discrimination of any kind' as it did not see the need to isolate this particular motivation and felt that it did not have the necessary degree of precision for a criminal offence. It requested that the following statement be included in the Group's report:

> The United Kingdom shares the concern to eliminate all forms of torture, including any motivated by discrimination. The United Kingdom is doubtful of the need to isolate this particular motivation and in practical terms the United Kingdom thinks that there will in any case be difficulties in doing so with the necessary degree of precision for a criminal offence.[40]

During the consideration of the Convention by the General Assembly for its adoption in 1984 the United States expressed its view that Article 1 should be understood to apply to both specific purposes mentioned in the definition, and to purposes or motives regardless of whether or not they were mentioned in Article 1.[41] This proposal was reminiscent of similar proposals made during the drafting of the 1975 Declaration for the inclusion of 'or for any other purpose' after the words 'or other persons'.[42] The *United Kingdom* made a further proposal to include in the definition the phenomenon of 'gratuitous torture'.[43] Finally *Portugal* sought to add to the non-exhaustive list, the use of psychiatry 'for the purpose of prolonging the confinement of any person subjected to a measure or penalty involving deprivation of freedom'.[44] It was also agreed that coercion should be included amongst the purposes listed in order to broaden their scope.[45]

[35] E/CN.4/1314 (n 8) 9, para 37. [36] ibid 6, para 31. [37] A/39/499 (n 28).
[38] E/CN.4/L.1470 (n 7) 5, para 19. [39] ibid. [40] ibid 5, para 27.
[41] A/39/499 (n 28) 21. [42] A/CONF.56/10 (n 19) 40. See also Boulesbaa (n 30) 22, n 73.
[43] E/CN.4/1984/SR.33 (n 16) 8, para 25. [44] E/CN.4/1314 (n 8) 7, para 34.
[45] Burgers and Danelius (n 32) 119.

33 The language of the draft Swedish text[46] upon which the Working Group based the main part of its discussions refers to torture inflicted 'by or at the instigation of a *public official*'. There was a lengthy discussion but no agreement on the definition of 'public official' by the Working Group. It was suggested that torture inflicted by persons other than public officials be included in the text of the Convention.[47] At the same time some speakers pointed out that the act of torture committed by a public official was different in nature from, and inherently more serious than, that inflicted by a private person, and that the elimination of the former category of torture should be the main target of the Convention.

34 During the discussion on the Convention in 1978 in the Third Committee of the General Assembly the French delegation proposed that private individuals be mentioned in Article 1. The Director of the UN's Division of Human Rights intervened in favour of the proposal and pointed out that some States provided information on methods of torture and that perhaps States should give more consideration to the point.[48]

35 In their written comments, some Governments submitted alternative text proposals. Austria proposed that the concept could be expanded to include 'persons acting in an official capacity'.[49] The United Kingdom proposed to insert 'or any other agent of the state' after public official to add clarity to the definition.[50] Both the United States and the Federal Republic of Germany proposed that the term 'public official' be defined.[51] The FRG's proposal covered a wide range of cases and extended to individuals outside the Government. In particular they felt it should be made clear that public official included persons who, regardless of legal status, have been assigned public authority by State organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to Government authority or—be it temporarily—has replaced Government authority or whose authority has been derived from such persons.[52] The *United States* proposed a more elaborate definition of the concept 'public official' which sought to clarify the breadth of the concept and to make clear that both civil and military officials were included, expressing concern that the situation might arise where any person vested with the exercise of some official power of the State may well have sufficient authority to coerce another individual, and could escape prosecution under national law because of his public office. They therefore proposed the following language in order to cover such a scenario:

> any public official who a) consents to an act of torture, b) assists, incites, solicits, commands, or conspires with others to commit torture, or c) fails to take appropriate measures to prevent or suppress torture when such person has knowledge or should have knowledge that torture has or is being committed and has authority or is in a position to take such measures, also commits the offence of torture within the meaning of this convention.[53]

36 *Barbados* expressed the opinion that the definition be extended to cover acts of private individuals in light of the provisions of Articles 7 and 8 of the original Swedish draft.

[46] E/CN.4/1285 (n 3). [47] E/CN.4/1314 (n 8) 9, para 43.

[48] Summary Record of the seventy-third Meeting of the Third Committee, General Assembly, thirty-third Session (1978) UN Doc A/C.3/33/SR.73, 2.

[49] E/CN.4/1314/Add.1 (n 22) para 43. [50] ibid, para 2, § 3. [51] E/CN.4/1314 (n 8).

[52] E/CN.4/1314/Add.2 (n 9) 2. See also reference 94 in Boulesbaa (n 30).

[53] E/CN.4/1314 (n 8) para 45. This language was intended as a restatement of Art 7 of the Swedish draft defining the responsibility for committing an offence under the Convention.

They argued that Article 7 extends the concept of torture to cover the offences of complicity, participation, incitement, and attempt, and that since these offences are committed by private citizens this article was inconsistent with Article 1 which limits the definition of torture to acts of public officials. In the same way they argued that Article 8, which deals with offences committed on board ships and aircraft, necessarily referred to acts of individuals and therefore should be redefined to apply to the offences in Articles 7 and 8 as well as other acts of private individuals.[54]

37 The draft IAPL Convention had also left room for the interpretation that it be applied to private individuals. Article II referred to acts 'inflicted on a person by or at the instigation of a public official'. Article III of this draft referred to 'a person' (ie rather than a public official).[55] Article III of the draft went on to illustrate the particular instances in which certain conduct would engender responsibility of a person for torture.[56]

38 In written comments on the IAPL draft Barbados suggested that the definition should be extended to cover acts of individual citizens in order to harmonize Article III which treats the offences of incitement, participation, attempt, and complicity as acts of torture. *Morocco* went on to point out that it was not always easy for a public official to have 'reasonable belief' that torture had been committed by one of his subordinates and that it would also be difficult to prove that such a 'senior public official' had 'reasonable belief' or even knowledge that torture had been committed since, as far as the police, for example, were concerned, an interrogation frequently took place in private between the police officer and the suspect or accused, without witnesses. Furthermore, the legal repercussions of the articles seemed to imply a 'kind of immediate collective responsibility of public officials, whereas law always decreed the individuality of offences and therefore of penalties'. According to Morocco, Article II of the draft could give rise to a broad interpretation and lead to a general responsibility of officials, or even of the State, without even requiring that an investigation be carried out and before a decision on such responsibility is taken. Morocco went on to elaborate its views on State responsibility which it indicated could not be involved in such a situation because a crime involving torture committed by the officials of a State could not be attributed to that State except within the strict framework of the rules of international law governing State responsibility. None of the bilateral or multilateral international legal assistance agreements made such a 'hasty judgement' concerning State responsibility and it was therefore extremely desirable that the terms of the article be carefully amended. It should not, as it appeared to do, endorse a procedure which was as clearly contrary to legal practice as trials by hearsay; on the contrary it should insist that a preliminary legal investigation be carried out. It should also set out clearly the criteria for defining principal guilt and complicity, including (in view of the spirit of the Article) passive complicity.

39 During its thirty-fifth session some States reiterated that the definition should not be limited to 'public official' and should apply to all individuals under the jurisdiction of a contracting State. It was said that such an approach was preferable because of the possible incidence of acts of torture committed by those other than public

[54] E/CN.4/1314/Add.4 (n 18) para 9. [55] E/CN.4/NGO/213 (n 2) Arts 2 and 3.

[56] According to Art III of the IAPL draft a person is responsible for acts of torture when that person: (a) personally engages in or participates in such conduct; or (b) assists, incites, solicits, commands, or conspires with others to commit torture; or (c) being a public official, fails to take appropriate measures to prevent or suppress torture when such person has knowledge or reasonable belief that torture has been or is being committed and has authority or is in a position to take such measures.

officials. Others felt that such acts should be covered by existing or future national law, and that international action was primarily designed to cover situations where national action was otherwise least likely. In the end it was generally agreed that the definition of acts committed by public officials should be expanded to cover acts committed by, or at the instigation of, or with the acquiescence of a public official or any other person acting in an official capacity.[57] This wording was adopted by the Working Group in 1980.

40 During General Assembly debates in 1984, *Panama* expressed dissatisfaction with the definition of torture, arguing that the language limited the definition and suggesting that it did not apply to acts of torture committed by individuals, civilian organizations, or pseudo religious sects.[58] Panama and Spain felt that the prohibition should not have been limited to public officials alone since the purpose of the Convention is to eradicate any and all activities which result in torture. Spain preferred that the scope be wider and consistent with the General Assembly's 1975 Declaration on the Protection of All Persons from being subjected to Torture.

41 It is hard to say what sanctions are '*inherent in or incidental to lawful sanctions*' in a particular legal system. The Working Group did not provide any criteria on how to make this determination nor did it define the terms. Even if it had been able to do so this would have given rise to serious disputes amongst States parties due to the disparity of different legal systems.

42 The starting point was the 1978 Swedish draft which qualified its application as being consistent with the *UN Standard Minimum Rules for the Treatment of Prisoners* (adopted by the General Assembly in the form of a recommendation and not as internationally binding legal obligations).[59] There was considerable discussion at the Working Group's thirty-fourth session on this topic. The United Kingdom, the Federal Republic of Germany, the German Democratic Republic, Spain, and the United States proposed the deletion of this reference to the rules as they felt that their inclusion would grant the rules the character of a legally binding instrument.[60]

43 In written comments the United Kingdom noted in particular that it was apparent from the last sentence of paragraph 1 of the original Swedish draft that the Convention would accept the Standard Minimum Rules as a standard and that therefore the last sentence should be deleted.[61] The Federal Republic of Germany also preferred to omit the reference, arguing that the Standard Minimum Rules were 'lower ranking regulations which could be altered by non-legislative means and that could therefore directly modify the contents of the convention'.[62] The German Democratic Republic recalled that the reference had not been common practice with the United Nations in the past and that such a reference would make the Standard Minimum Rules 'an essential criterion in a binding international instrument, thereby depriving them of their recommendatory nature'. The Spanish delegation noted that they sought the deletion of the reference as it was 'not only unnecessary (bearing in mind the concept being described) but also because the

[57] E/CN.4/L.1470 (n 7) 4, § 17.

[58] Report of the Secretary General (1984) UN Doc A/39/499/Add.1, para 14.

[59] ECOSOC, 'Standard Minimum Rules for the Treatment of Prisoners' of 30 August 1955, on 31 July 1957, arts 31–34.

[60] Report of the Commission on Human Rights on its thirty-fourth Session (1978) UN Doc E/CN.4/1292, para 31.

[61] E/CN.4/1314/Add.1 (n 22).

[62] E/CN.4/1314/Add.2 (n 9).

rules constitute a "recommendation" to the Government and, for technical legal reasons, it is inadmissible to bring them into a convention which, as an international treaty, gives rise to legal obligations among States Parties'. In addition the Swiss delegation noted that the Standard Minimum Rules were not rules of positive law and that it would therefore be appropriate to limit further the number of possible exceptions.[63] There was a Danish proposal to amend the reference to '… to the extent consistent with international rules for the treatment of persons deprived of their liberty'.

44 This question provoked serious concern in the Working Group's thirty-fifth session. Some felt the reference to the Standard Minimum Rules should be reintroduced. Others suggested the inclusion of a reference to 'existing international standards' or using some other formulation in order to ensure that certain existing or future 'lawful sanctions' did not frustrate the spirit of the Convention. It was argued that the rules were limited in scope in that they dealt only with punishment relating to matters of prison discipline and that they lacked legally enforceable status in international law. One representative pointed out that the Standard Minimum Rules did not cover treatment during the period preceding actual trial and sentencing after which the detained person was designated a 'prisoner'.[64]

45 Certain States argued that while the Convention was intended to strengthen the already existing prohibition of torture in international law, it was not intended to lead to reform of the system of penal sanctions in different States and that, if that had been the intention, the Convention would have been unacceptable to a number of countries. Certain Islamic States for example did not want to be party to an instrument which deemed the imposition of certain corporal punishments under Shari'a to be a breach of the Convention.[65] It was also in the interest of these States that 'lawful' refer to national and not international law.

46 On the other hand there were those States who thought that this was too far reaching an exception since it might be interpreted so as to allow States to practise methods which would normally be regarded as torture, by making them lawful sanctions under its own legal system.[66] This ambiguity could mean for instance that the amputation of a hand for theft in certain Arab States following traditions of Islamic law would be lawful in one country but not in others. Many States argued for clarification whilst feeling it important to retain the clause in order to stop encroachment into national criminal law. They argued that there must be a limit beyond which sanctions provided for by national law are so cruel as to constitute torture.

47 The clause had already appeared in the 1975 Declaration. During the Declaration's drafting process a number of participants proposed that it be made clear in the Declaration that the article would not apply to 'a penalty or punishment imposed by a judicial tribunal in accordance with law or to a disciplinary administrative action taken under the provisions of the law and in accordance with the Standards Minimum Rules'.[67] The reference to the Standard Minimum Rules was inserted in order to make clear that certain limits should be set and that particular sanctions could not be imposed. Article 31 of the Standard Minimum Rules for instance states that 'corporal punishment, punishment by

[63] E/CN.4/1314 (n 8). [64] ibid.

[65] See Burgers and Danelius (n 32) 103: 'several Islamic states sought assurances that the death penalty and certain forms of punishment prescribed by Islamic law were compatible with the convention.'

[66] ibid 121. [67] A/CONF.56/10 (n 19) 38, para 293.

placing in a dark cell, and all cruel inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences'.

48 Article 1 of the original Swedish draft (which was identical to Article 1 of the 1975 Declaration) contained an exception relating to 'pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules'. However, for reasons noted above several delegations objected to the reference to the Standard Minimum Rules and it was not included in the final text of the Convention.

49 Article II (c) of the draft submitted by the IAPL suggested alternative wording '… save where such conduct is in a proper execution of a lawful sanction not constituting cruel, inhuman or degrading treatment or punishment'. There were no comments made on the IAPL proposal.

50 In written comments in 1978[68] the United States accepted the concept that pain or suffering 'arising only from, inherent in or incidental to sanctions lawfully imposed' should be exempted from the definition of torture, arguing that it would be 'inappropriate and politically unacceptable to use the convention as a means of reaching sanctions practised by one culture of which another culture may disapprove'.

51 France proposed a clear distinction between penalties affecting the person and honour of the criminal (*peines afflictives et infamantes*) which could legitimately be imposed as punishment and treatment which by causing violent physical pain or extreme mental suffering, altering the physical capacity of the victims or making the victim an object of derision or hatred, tortures the person to whom it is applied. The USSR highlighted the need to draw a clear distinction between measures that legitimately applied to offenders and forms of treatment or punishment which, because of their cruel, inhuman or particularly degrading nature, cannot be regarded as acceptable.

52 While the United States felt that it would be desirable to retain the concept that sanctions must be lawfully imposed in order to be exempted from the definition of torture, they suggested that language should be added to make the defence that a sanction was 'lawfully imposed' inapplicable when it was 'imposed in flagrant disregard of accepted international standards'. The United States went on to elaborate that the negotiating history should show that 'such standards are presently embodied in article II of the Universal Declaration of Human Rights and Article 75(4) of Protocol I to the 1949 Geneva Conventions (although such standards are subject to amendments over time)'.

53 During the discussion in the 1979 Working Group some representatives made the point that the limitation clause relating to 'pain or suffering arising only from, inherent in or incidental to lawful sanctions' should have been deleted as too broadly worded. Several delegates stated that it was desirable to refer to 'existing international standards' or to use some other formulation in order to ensure that certain existing or future 'lawful sanctions' did not frustrate the spirit of the international Convention. However, it was widely agreed that, in the absence of specific existing international standards, it was not advisable to refer to universally acceptable principles.[69] As no agreement was possible on reference to accepted international standards, the adopted text removed the reference to the Standard Minimum Rules while maintaining a general exception for pain and suffering resulting from lawful sanctions.

[68] E/CN.4/1314 (n 8). [69] E/CN.4/L.1470 (n 7) para 21.

54 This outcome was clearly the result of a compromise between two opposing views. During the fortieth session of the Commission the United Kingdom voiced concern over the lawful sanctions clause, arguing that in order to prevent the provisions of the Convention from being bypassed, it should not exclude pain and suffering deriving from the use of lawful sanctions. Uruguay expressed serious misgivings in relation to Article 1 and in particular to the lawful sanctions clause, asking 'how can sanctions which might cause pain or suffering be considered lawful?'[70] The Observer for Norway voiced that his delegation would have preferred to have seen the omission of the exemption for lawful sanctions.[71] Canada also complained about the exclusion of pain or suffering arising only from, inherent in or incidental to lawful sanctions.[72] While accepting the wording of Article 1(1) as a compromise, Belgium voiced concern over the notion of 'lawful sanction', arguing that it was imprecise and thus constituted an even broader 'escape clause' than had Article 1 of the 1975 Declaration. In their written comments the Netherlands ('the word "lawful" must be understood as referring to compatibility with both national and international law'), the United Kingdom ('it should be understood that any such sanctions must be lawful under international as well as national law'), Italy ('perplexed by the definition contained in Article 1(1), above all in relation to "lawful sanctions" which in any case must be understood as referring also to international law') and the United States ('lawful sanctions … must be understood to mean sanctions which are "lawful" under both national and international law') took the view that the expression must be interpreted as reflecting commonly accepted international legal standards.[73]

55 The result was that certain *Islamic States* were now offered an opening to be party to this instrument. The Working Group did not include the same exception in Article 16. During the 1981 Working Group it was suggested that a provision similar to the last sentence of paragraph 1 of Article 1 should be inserted in Article 16, in order to exclude from the scope of Article 16 suffering arising only from lawful sanctions, as had been done in the definition of torture in Article 1 of the draft Convention. That suggestion was opposed by several members who pointed out that the purpose of Article 16 was to prohibit the existence of cruel, inhuman or degrading treatment and punishment, not to legalize it by having such treatment incorporated into law. The reply elicited by that interpretation of the suggestion was that the last sentence in paragraph 1 of Article 1 did not admit the legalization of torture. Attention was also drawn to the distinction between the legal connotations of the concepts of 'punishment' and 'lawful sanctions'. It has been pointed out that punishment on the basis of Shari'a law could now be in conflict with Article 16 of the Convention.[74]

56 The so called '*saving clause*' in Article 1(2) outlines that the definition does not affect the protection which can be derived from other international instruments from national legislation of wider application. At the same time other international instruments or national law can never restrict the protection which individuals enjoy under the Convention. This clause was first proposed by Sweden as a draft Article 1(3) at the pre-sessional discussions at the thirty-fourth session with different wording: '… this Article is

[70] E/CN.4/1984/SR.33 (n 16) 10.

[71] Summary Records of the thirty-fourth Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.34, 17, para 104.

[72] E/CN.4/1984/72 (n 14).

[73] See A/39/499 (n 28), 3 (Belgium), 11 (Italy), 13 (Netherlands), 19 (UK), 21 (US).

[74] Burgers and Danelius (n 32) 46–47.

without prejudice to any international instrument or national legislation which does or may establish wider prohibitions.'[75]

57 The revised Swedish text of Article 1(3) which read '… this Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application relating to the subject matter of this Convention' was adopted by consensus and later considered by the 1981 Working Group where the wording 'national legislation' was changed to 'national law' to make it consistent with Article 16(2).

58 However, as adopted by the Commission during its thirty-seventh session in 1981, Article 1(2) read:

> … this Article is without prejudice to any international instrument or national law which does or may contain provisions of wider application.

59 There was no further debate on the paragraph at the thirty-eighth Working Group session as it appears in the annex and contains 'national legislation' instead of 'national law'. *Boulesbaa* has suggested that this may have been a mistake as it appears there had been a deliberate attempt to bring the paragraph into line with Article 16(2).

2.3 Reservations, Declarations, and Understandings

60 Some Governments made reservations relating to the definition of torture in Article 1.[76] *Botswana* considered itself bound by Article 1 only to the extent that 'torture' means the 'torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana'. A similar reservation, limiting the Convention's definition of torture to the definition enshrined in national legislation, was made by *Fiji* and *Thailand*.[77] The *Lao People's Democratic Republic* noted that the term 'torture', as in Article 1, 'means torture as defined in both national law and international law.'[78] *Qatar* even made a reservation aimed at ruling out 'any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion'—a very general reservation, which *Qatar* partly withdrew, however 'keeping in effect a limited general reservation within the framework of Articles 1 and 16 of the Convention'.[79] The United Arab Emirates issued a controversial declaration regarding its understanding of lawful sanctions, which was strongly rejected by many European States.[80]

61 The *United States* ratified the CAT only subject to a number of 'understandings' as previously advised by the Senate.[81] A considerable number of these 'understandings', some of which go beyond a mere declaration of interpretation and, in fact, amount to a

[75] CHR/XXXV/Items 10 and 11/WP.2, cited in E/CN.4/L.1470 (n 7) para 16 and Burgers and Danelius (n 32) 43.

[76] For a list of declarations and reservations see below Appendices A3 and A4.

[77] Reservation upon ratification by Fiji (14 March 2016); Declaration upon accession by Thailand (2 October 2007).

[78] Declaration upon ratification by Lao People's Democratic Republic (26 September 2012).

[79] Qatar partially withdrew its general reservation on 14 March 2000.

[80] Declaration upon accession (19 July 2012). This declaration is discussed in detail below in sub-section 3.3 below. Austria, Belgium, Czech Republic, Finland, Ireland, Netherlands, Norway, Poland, Portugal, Romania, Sweden, and Switzerland objected to this declaration.

[81] See below Appendix A4

reservation, are related to the definition of torture in Article 1. For example, the United States 'understands' that

> in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[82]

Furthermore, it understands the definition of torture 'is intended to apply only to acts directed against persons in the offender's custody or physical control', that the term 'acquiescence' requires that 'the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity', and that 'non-compliance with applicable legal procedural standards does not per se constitute torture'.[83] In response to these notable limitations on the scope of the definition, the Committee recommended that the United States enact a federal crime of torture in terms consistent with Article 1 and withdraw such reservations, interpretations, and understandings relating to the Convention.[84]

62 A number of predominantly European Governments rightly objected to these far-reaching reservations: Denmark, Norway and Sweden objected to the reservation of Botswana as being incompatible with the object and purpose of the CAT; Portugal, Italy, Peru and Latvia objected to the reservation by Fiji with the same line of argumentation; Norway objected to the 'declaration' by Lao People's Democratic Republic and Sweden objected to Thailand's 'declaration', underlining that 'it is unclear to what extent the Kingdom of Thailand considers itself bound by the obligations of the treaty.' Finland, France, Germany, Luxembourg, the Netherlands, Norway, Spain and Sweden objected to the general reservation by Qatar. With respect to the US 'understandings', the Government of Sweden expressed the view that they 'do not relieve the United States of America as a party to the Convention from the responsibility to fulfil the obligations undertaken therein'. The Government of the Netherlands considered some 'understandings' as insufficiently clear, while others appeared to 'restrict the scope of the definition of torture' or 'diminish the continuous responsibility of public officials for behaviour of their subordinates'.[85] The Committee recommended in its Concluding Observations to the US, that 'it should give further consideration to withdrawing its interpretative understandings and reservations',[86] especially making sure that 'acts of psychological torture are not qualified as "prolonged mental harm" '.[87]

[82] Understandings by the United States of America upon ratification (21 October 1994).
[83] ibid.
[84] CAT, 'Report of the Committee Against Torture' (2000) UN Doc A/55/44, para 180(a).
[85] See below Appendix A4.
[86] CAT, 'Concluding Observations: USA' (2014) UN Doc CAT/C/USA/CO/3-5, para 9.
[87] ibid.

3. Issues of Interpretation

3.1 The Definition of Torture

63 According to Article 1(1), the term 'torture' means 'any act by which severe pain or suffering' is intentionally inflicted on a person for a specific purpose. The different elements of torture—conduct, infliction of severe pain and suffering, intention, purpose, the involvement of a public official, as well as powerlessness as an important distinguishing criterion—shall be discussed subsequently.

64 There is a clear understanding, underlined by the Committee as well as the UNSRT, that the definition of torture is not only to apply to interrogation settings, but also to areas like gender-based violence, abuses in healthcare, etc.[88] Both in the Concluding Observations, as well as in in the individual complaints procedure, the Committee has outlined which acts or omissions may amount to torture and how the different elements are to be interpreted.

3.1.1 Conduct

65 Whereas Article I of the IAPL draft refers to 'any conduct', Article 1 CAT is based in this respect on Article 1 of the Declaration and the Swedish draft which use the term 'act' which might give rise to a more narrow interpretation excluding omissions. Nothing in the *travaux préparatoires* indicates, however, that the drafters had in mind such a narrow interpretation that would exclude a conduct which intentionally deprives detainees of food, water and medical treatment from the definition of torture.

66 Already in the *Greek case*, which was one of the main sources of inspiration for Article 1 CAT, the European Commission on Human Rights had held that 'the failure of the Government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners constitutes an "act" of torture in violation of article 3 of the ECHR'.[89] Since States have a legal duty arising from various human rights to provide detainees with adequate food, water, medical care, clothing, etc., it would indeed, as Boulesbaa suggested, be 'absurd to conclude that the prohibition of torture in the context of Article 1 does not extend to conduct by way of omission'.[90] The Committee has equally clarified that States are responsible for both, acts and omissions.[91]

3.1.2 Infliction of Severe Pain and Suffering

3.1.2.1 Severity as a Distinguishing Element between Torture and Ill-Treatment?

67 Torture is a particularly grave human rights violation. During the drafting of Article 1, it was, therefore, generally agreed that only conduct which causes severe pain or suffering, whether physical or mental, can amount to torture. Otherwise this term would be used in an inflationary manner. The word 'severe' can be found in the 1975

[88] CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 18; SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc A/HRC/7/3, para 68; SRT (Mendez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc A/HRC/22/53, para 81.

[89] Opinion of the Commission of 5 November 1969 in the Greek Case (1969) XII Yearbook, 461.

[90] Boulesbaa (n 30) 14ff. See also Burgers and Danelius (n 32) 118; Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 208.

[91] CAT/C/GC/2 (n 88) para 15.

Declaration, in the Swedish and IAPL drafts. Only the USSR proposed in the General Assembly to delete the word 'severe', but no convincing reasons were provided for this surprising amendment. On the other hand, the US and UK Governments wished even to strengthen the required intensity of the pain or suffering by adding the word 'extremely' before 'severe'. Finally, the Swiss Government advocated that no distinction should be made between torture and inhuman treatment as to the respective severity of the suffering.[92]

68 These differences of opinion, at least to some extent, are also reflected in the approaches between the European Commission and Court of Human Rights. In the *Greek case*, the Commission took the position that the severity of pain or suffering distinguishes inhuman treatment (including torture) from other (including degrading) treatment, whereas the purpose of such conduct constitutes the decisive distinguishing criteria between torture and inhuman treatment.[93] On the basis of this definition, the Commission had no problems in qualifying the five combined 'deep interrogation techniques' which had been used by British security forces against suspected terrorists in *Northern Ireland* (wall-standing in a 'stress position', hooding, subjection to noise, deprivation of sleep, food, and drink for long periods of time) as torture.[94]

69 The UK and US position, on the other hand, seems to be inspired by the more cautious approach of the ECtHR in the *Northern Ireland* case. In its well-known judgment of 18 January 1978, the Court held:[95]

> In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted … Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.

In other words, the Court arrived at the conclusion that the severity and intensity of the suffering (and not the specific purpose as assumed by the Commission) was the decisive criterion for distinguishing torture, to which a 'special stigma' is attached ('deliberate inhuman treatment causing very serious and cruel suffering'), from other forms of inhuman or degrading treatment.

[92] E/CN.4/1314 (n 8) paras 23, 36; see also E/CN.4/1314/Add.1 (n 22), para 2.

[93] Opinion of the Commission of 5 November 1969 in the Greek Case (1969) (n 89) 186: 'It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.'

[94] Report of the Commission of 25 January 1976, ECHR Ser B, No 23–1, 410. This jurisprudence was also not revised in the Court's 2018 ruling on this matter: *Ireland v United Kingdom* App no 5310/71 (ECtHR, 20 March 2018). Consequently, the ruling was strongly criticized, eg by Amnesty International, 'UK/Ireland: Hooded Men Torture Ruling Is "Very Disappointing"' (20 March 2018) <https://www.amnesty.org/en/latest/news/2018/03/uk-ireland-hooded-men-torture-ruling-is-very-disappointing/> accessed 21 March 2018.

[95] *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 167. See the dissenting opinion of Matscher.

70 In its reasoning, the Court has also made reference to the last sentence of Article 1 of the 1975 Declaration, according to which torture constitutes an 'aggravated' and deliberate form of cruel, inhuman or degrading treatment. During the drafting of Article 1 CAT, this sentence had been deleted. Similarly, the UK and US proposals to qualify the intensity as 'extremely severe pain or suffering' was defeated. This indicates that the UN wished to follow more the approach of the European Commission than that of the ECtHR which, moreover, had been subjected to criticism in the public and legal literature.[96]

71 The fact that the UN definition of torture seems to be based on the approach of the European Commission has another important consequence: the distinction between justifiable and non-justifiable treatment causing severe suffering. According to the Commission, inhuman treatment covers at least such 'treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable'.[97] In other words, there may be some purposes of deliberately causing severe suffering which might nevertheless be justified and, therefore, do not constitute inhuman treatment. One might think of justified use of force by the police in the exercise of law enforcement policies (lawful arrest of a person suspected of having committed a crime, preventing a person lawfully detained from escaping, quelling a riot or insurrection, dissolution of a violent demonstration, defending a person against crime and unlawful violence, etc)[98] and of the military in the case of armed conflict. Whether such use of force can be justified or must be qualified as inhuman treatment depends on the particular circumstances of a given situation to which the principle of proportionality needs to be applied.[99] If severe pain or suffering is intentionally caused, however, by any of the purposes listed in Article 1 CAT, no justification and, consequently, no proportionality test seems to be permitted. This line of thinking also confirms that victims of torture are persons who are under the factual power of control of the person inflicting the pain or suffering and therefore in a particularly vulnerable situation.[100] Finally, this approach might shed some light on the understanding of the 'lawful sanctions clause' in Article 1.[101]

[96] See eg RJ Spjut, 'Torture under the European Convention on Human Rights' (1979) 73 AJIL 267; Manfred Nowak, 'What Practices Constitute Torture? US and UN Standards' (2006) 28 HRQ 809; Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23 NQHR 674.

[97] See the Opinion of the Commission of 5 November 1969 in the Greek Case (1969) XII Yearbook 186.

[98] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 1950 (ECHR). See eg the list of purposes in Art 2(2) which might even justify lethal use of force by the police. See Sir Nigel Rodley, *The Treatment of Prisoners Under International Law* (Oxford University Press 1999) 84 according to whom 'the direct benefit of the recipient' seems to be the only legitimate objective of intentionally inflicting severe pain or suffering on a person. On the discussion about the justifiability and proportionality in relation to inhuman and degrading treatment in reaction to the Commission's holding in the Greek Case see eg AI, *Report on Torture* (AI 1975) 35 et seq; Rodley, 'The Treatment of Prisoners' (n 98) 78 et seq; Malcolm D Evans, 'Getting to Grips with Torture' (2002) 51 ICLQ 365. See also Nowak, 'Challenges to the Absolute Nature' (n 96) 674. See also SRT (Nowak) 'Report of the Special Rapporteur on the Question of Torture' (2005) UN Doc E/CN.4/2006/6.

[99] SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/HRC/13/39, para 60; SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2010) UN Doc A/HRC/13/39/Add.5, para 188; SRT (Melzer) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) UN Doc A/72/178, paras 41–45 with reference to relevant ECtHR jurisprudence.

[100] See below 3.1.5. [101] See below 3.3.

72 It follows that the *severity of pain or suffering, although constituting an essential element of the definition of torture, is not a criterion distinguishing torture from cruel and inhuman treatment*.[102] In principle, every form of cruel and inhuman treatment (including torture) requires the infliction of severe pain or suffering. Only in the case of particularly humiliating treatment might the infliction of non-severe pain or suffering reach the level of degrading treatment or punishment in violation of Article 16.[103] Whether or not cruel or inhuman treatment can also be qualified as torture depends on the fulfilment of the other definition requirements in Article 1, above all whether inhuman treatment was used for any of the purposes spelt out therein.

73 The practice of the Committee partly, but not consistently confirmed the interpretation that severity is not the decisive criterion when it comes to distinguishing between torture and other forms of ill-treatment, but that the purpose and intention are relevant when undertaking this legal qualification.[104] In the individual complaints procedure, when finding a case of torture in accordance with the definition of Article 1, the Committee mostly does not explain exactly how it comes to the conclusion that each of the elements is fulfilled.[105] But it often seems to make sure, that it establishes that one of the purposes in line Article 1 is fulfilled.[106] For example, in *Patrice Gahungu v. Burundi*, the Committee concluded, that the treatment inflicted was 'probably aimed at forcing a confession from him'[107] and without any additional analysis found torture in accordance with Article 1.

74 The examination of the reports submitted by *Israel* also provides for a good basis in assessing the Committee's approach to the definition of torture under Article 1, as well as the distinguishing elements between the definition of torture under Article 1 and cruel, inhuman, or degrading treatment under Article 16.[108] In 1987, the Government of Israel had appointed the Landau Commission of Inquiry, headed by former Supreme Court President, Justice *Moshe Landau*, to examine the General Security Service's (GSS) methods of interrogation of terrorist suspects. The Landau Commission's guidelines on interrogation, which were adopted by the Israeli authorities, determined that in dealing with dangerous terrorists who represent a grave threat to the State of Israel and its citizens, the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information, was unavoidable under certain circumstances.[109] To ensure that disproportionate pressure was not used, the Landau Commission identified several

[102] See also Rodley, 'The Definition(s) of Torture' (n 23) 491: 'So I maintain my preference for suppressing the element of aggravation in the understanding of the notion of torture'; Evans (n 98) 365–83: 'Why not abandon all thoughts of a "vertical model" and replace it with a "horizontal model", in which "torture" and "inhuman" and "degrading" treatment all stand alongside each other.' On the distinction between torture and CIDT, see SRT (Nowak) E/CN.4/2006/6. See also Nowak, 'Challenges to the Absolute Nature' (n 96) 674.

[103] See below Art 16.

[104] A/HRC/13/39 (n 99) para 60; A/72/178 (n 99) para 31; Nowak, 'What Practices Constitute Torture?' (n 96).

[105] See eg *Déogratias Niyonzima v Burundi*, No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014; *HB v Algeria*, No 494/2012, UN Doc CAT/C/55/D/494/2012, 6 August 2015, para 6.2.

[106] eg *Patrice Gahungu v Burundi*, No 522/2012, UN Doc CAT/C/55/D/522/2012, 10 August 2015, paras 7.2, 7.3; *HB v Algeria*, No 494/2012 (n 105) para 6.2; *EN v Burundi*, No 578/2013, UN Doc CAT/C/56/D/578/2013, 25 November 2015, para 7.2. See also below 3.1.4.

[107] *Patrice Gahungu v Burundi*, No 522/2012 (n 106) para 7.2.

[108] See also Rodley, 'The Treatment of Prisoners' (n 98) 83ff; Ingelse (n 90) 226ff.

[109] cf the revised version of a special report submitted by Israel on 17 February 1997 in accordance with a request of the Committee, CAT/C/33/Add.2/Rev.1, para 5. See Israel, 'Consideration of Reports submitted by States Parties under article 19 of the Convention' (1997) Doc CAT/C/33/Add.2/Rev.1, para 5.

measures, such as that the use of specific measures must be weighed against the degree of anticipated danger, that the physical and psychological means of pressure must be defined and limited in advance by issuing binding directives, and that there must be strict supervision of the implementation in practice of these directives. In a second section of its report, the Landau Commission went on to detail precisely the exact forms of pressure permissible to the GSS interrogators. This section had been kept secret out of concern that, should the narrow restrictions binding the interrogators be known to the suspects undergoing questioning, the interrogation would be less effective.[110] Already in its conclusions and recommendations regarding the initial report of Israel adopted in April 1994, the Committee considered the 'moderate physical pressure' permitted by the Landau Commission Report as a 'lawful' method of interrogation 'completely unacceptable' as it created 'conditions leading to the risk of torture or cruel, or inhuman or degrading treatment or punishment', and, 'by retaining in secret the crucial standards of interrogation to be applied in any case, such secrecy being a further condition leading inevitably to some cases of ill-treatment'.[111]

75 In its consideration of the Israeli interrogation practices, the Committee did not make a clear distinction between torture and other forms of ill-treatment which might be an indication that it does not consider the severity of pain or suffering a decisive criterion distinguishing torture from inhuman treatment.[112] In light of this analysis, one might conclude that the CAT Committee applies a fairly strict interpretation of both torture and other forms of ill-treatment prohibited by Article 16 CAT, which seems similar to the approach of the European Commission in the Greek and Northern Ireland cases. Since the other definition criteria of Article 1 CAT (intention and purpose of extracting information from a detainee) were clearly met, the Committee found a violation of both Articles 1 and 16.

76 However, in *Sergei Kirsanov v Russian Federation*, the Committee concluded that 'the conditions in which the complainant was detained … do not appear to have caused "severe pain and suffering" within the meaning of article 1, paragraph 1, of the Convention'.[113] Subsequently, the Committee, without any other explanation, found cruel, inhuman or degrading treatment within the meaning of Article 16 and seems to have reached this conclusion because in its view the severity criterion was not fulfilled.

77 In its General Comment 2 on Article 2, the Committee has recognized that there may be a difference between torture and other forms of ill-treatment in the severity of pain and suffering but also that in any case torture does 'not require proof of impermissible purposes'.[114] This formulation leaves room for interpretation but seems to indicate that the Committee considers both the severity of pain and suffering as well as the purpose, as distinguishing elements. It thereby

> retains the concept of differing thresholds of relative severity as between 'torture' and 'cruel or inhuman treatment', but applies the CAT Convention threshold of simple 'severe pain and

[110] CAT/C/33/Add.2/Rev.1, para 10.

[111] CAT/C/SR.183 and 184; CAT, 'Report of the Committee Against Torture' (1994) UN Doc A/49/44, para 168.

[112] CAT/C/SR.339, para 6. See also the similar conclusions of the UN Special Rapporteur on Torture in SRT (Rodley) 'Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment' (1997) UN Doc E/CN.4/1997/7, para 121.

[113] *Sergei Kirsanov v Russian Federation*, No 478/2011, UN Doc CAT/C/52/D/478/2011, 14 May 2014, para 11.2.

[114] CAT/C/GC/2 (n 88) para 10.

suffering' to the definition of torture, and considers that the intensity of pain and suffering necessary to constitute 'cruel or inhuman treatment' must therefore be something substantially less 'severe'.[115]

Consequently, the Committee partly has confirmed in its invidual complaints procedure, but also in its General Comment, that the distinguishing criterion between torture and other forms of ill-treatment is purpose, but still has not given up its understanding that there is also a difference in the severity of pain or suffering.

78 However, the difference in the severity of pain and suffering the Committee relates to in its General Comment, should instead rather be interpreted in line with the IACHR's analysis, as meaning that, due to endogenous and exogenous factors (eg duration of torture and other forms of ill-treatment, age, sex, health, context, etc), the physical and mental consequences of torture and other forms of ill-treatment can vary in intensity for every person and not in the sense that severity is the distinguishing criterion.[116]

79 The Human Rights Committee has in the meantime also confirmed purpose as the main distinguishing criterion between torture and other forms of ill-treatment: as the CCPR does not contain any definition of the concepts covered by Article 7 CCPR and as no legal consequences derive from the precise qualification of a particular practice, the *Human Rights Committee* has previously stipulated that it does not consider it necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment.[117] Yet, in *Giri v Nepal*, the Human Rights Committee argued after having stated that it follows the UNCAT definition of torture, that its 'general approach is to consider that the critical distinction between torture on the one hand, and other cruel, inhuman or degrading treatment or punishment, on the other, will be the presence or otherwise of a relevant purposive element'.[118]

80 The legal opinion that torture and other forms of ill-treatment are to be differentiated by the purpose element and not the level of pain or suffering is also shared by the UNSRT, as well as by academia and practitioners. There is in the meantime growing international consensus 'to establish a common threshold of 'severe pain and suffering' for both torture and cruel or inhuman treatment, and to shift emphasis from the intensity of suffering to its 'purpose' and motivation'.[119] Especially psychiatrists and traumatologists have pointed to evidence suggesting that torture, cruel, inhuman, and degrading treatment are associated with similar levels of mental pain or suffering and that a differentiation between the two based on the level of pain is not reasonable.[120]

[115] Nigel Rodley and Matt Pollard, 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) 2 EHRLR 99.

[116] *Lysias Fleury et al v Haiti*, Series C No 236 (IACtHR, 23 November 2011) para 73. Also see A/72/178 (n 99) para 28.

[117] HRC, General Comment No 20 on Art 7 (1992), para 4.

[118] *Giri v Nepal*, No 1761/2008, UN Doc CCPR/C/101/D/1761/2008, 27 April 2011, para 7.5.

[119] Pau Pérez-Sales, *Psychological Torture: Definition, Evaluation and Measurement* (Routledge 2017) 6; A/HRC/13/39 (n 99) para 60; Nowak, 'What Practices Constitute Torture?' (n 96); Nowak, 'Challenges to the Absolute Nature' (n 96).

[120] See Metin Başoğlu, 'A Theory- and Evidence Based Approach to the Definition of Torture' in M Başoğlu (ed), *Torture and its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press 2017); Pérez-Sales (n 119) 6, 221. Pérez-Sales (n 119) 6, 261, has underlined: 'The distinction between torture and CIDT on the basis of the amount of pain and physical suffering has no basis': '… *this definition reflects the reality of contemporary torture (as well as torture in the foreseeable future), in which interrogators use more subtle mechanisms that are not necessarily based on pain or suffering*.'

3.1.2.2 Meaning of 'severe pain and suffering'

81 As defined in the *travaux préperatoires*, only conduct which causes severe pain or suffering, whether physical or mental, can amount to torture. Consequently, any treatment below this threshold, will not constitute torture. In its assessment whether the severity criterion is fulfilled, the Committee usually refers to Article 1 as a whole, and states that a specific treatment will amount to severe pain or suffering, but does not go into detail, why and how it came to this conclusion.[121] In *Alexander Gerasimov v Kazakhstan*, the complainant was inflicted several heavy blows to his kidneys and was threatened with sexual violence, before he was forced to the floor with his hands tied behind his back. Afterwards a polypropylene bag was placed over his head with which the complainant was suffocated until he bled from his nose, ears, and from the abrasions on his face, before he lost consciousness.[122] The Committee clearly found that 'this treatment can be characterized as severe pain and suffering'[123] and did not add any additional reasoning or analysis.

82 The Committee also found a violation of Article 1 of the Convention in *Ntahiraja v Burundi* on two accounts, without specifically explaining that the inflicted treatment amounted to severe pain and suffering. The Committee concluded torture firstly, because the complainant was violently beaten during the arrest, as well as heavily abused, humiliated, and threatened with murder during the interrogation. The Committee found a violation also on a second account the complainant was subjected to humiliations and punishments, eg by having to remove all his clothes and to sleep handcuffed on a cold cement floor. Additionally, the treatment was inflicted upon the complainant in a context where he did not have access to a judge for thirty-two days, nor to visits or the presence of a lawyer or medical care. The Committee concluded that the humiliations and extreme conditions of detention added to the abuse and the apparent lack of medical care following these abuses also amount to torture in accordance with article 1 of the Convention.[124]

83 The Committee has also clearly recognized rape and other forms of gender-based violence as torture. In the case *CT and KM v Sweden*, the Committee found that rape committed by public officials constitutes torture, thereby acknowledging the severity of pain and suffering caused.[125]

84 The Committee has also found that when a complainant was brutally beaten with blows to the face and buttocks this constitutes a treatment which amounts to torture.[126] Other torture methods identified for example in the inquiry procedure regarding Mexico included handcuffing behind the back, blindfolding, deprivation of sleep, food, water and using the bathroom, mock executions, electric shocks, blows to various parts of the body, above all the ears, placing of plastic bags over the head and tightened around the neck to cause a sensation of asphyxiation, and pouring of water containing irritants such as carbonic acid or chilli powder into the mouth and/or nose while pressure is applied

[121] See eg *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012, UN Doc CAT/C/55/D/500/2012, 4 August 2015.

[122] *Gerasimov v Kazakhstan*, No 433/2010, UN Doc CAT/C/48/D/433/2010, 24 May 2012, paras 2.3, 12.2.

[123] ibid, para 12.2.

[124] *Saidi Ntahiraja v Burundi*, No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015, para 7.6.

[125] *CT and KM v Sweden*, No 279/2005, UN Doc CAT/C/37/D/279/2005, 17 November 2006, para 7.5.

[126] See eg *Ali Ben Salem v Tunisia*, No 269/2005, UN Doc CAT/C/39/D/269/2005, 7 November 2007, para 16.4; *Boniface Ntikarahera v Burundi*, No 503/2012, UN Doc CAT/C/52/D/503/2012, 12 May 2014, para 6.2.

to the victim's stomach.[127] In one prison, the Committee also considered certain punishments and other forms of ill-treatment, such as handcuffing and shackling for days at a time, and putting inmates undressed in a freezing, air-conditioned room for days at a time as torture.[128]

85 Under the inquiry procedure with respect to *Turkey*, the Committee found in 1992, that solitary confinement in so-called 'coffins', ie inadequately ventilated cells of 60 by 80 centimetres, without light, where the detainee could only stand or crouch, constituted 'a kind of torture'.[129] Similarly, disciplinary confinement in punishment cells in *Bolivia* of the kind known as '*el bote*' (meaning 'the can', being cold and damp cells measuring 2m by 1.5m, without any beds and sanitation) was, in the Committee's view, tantamount to torture as well.[130]

86 In all of these cases, the Committee did not separately provide any analysis regarding the different elements being fulfilled, but since the Committee found torture, one may conclude that the treatments outlined were found to cause severe pain or suffering, with the other elements of torture in line with Article 1 being equally fulfilled.

87 The Committee also concluded, without any more detailed analysis, that 'prolonged detention [3.5 months and 1 month], in a 'temporary confinement ward' without bedding or toiletry items, table, toilet, sink, showers seldom allowed and then only with cold water, no walks outside the cell, insects in the cell, light always being on, and no ventilation, as well as food once a day 'do not appear to have caused "severe pain and suffering" within the meaning of article 1'.[131]

88 In the inquiry proceedings on *Peru*, the Committee found that the prison conditions in the El Callao naval base, where six prominent guerrilla leaders served sentences between thirty years and life imprisonment in complete solitary confinement, amounted to torture. The prisoners were kept for twenty-three hours a day in isolation cells which were totally soundproofed against outside noise. For one hour a day they had the right to go outside, albeit alone, to a small yard surrounded by high walls. Once a month they were allowed visits by close family members for half an hour. In the view of the Committee, this sensorial deprivation and the almost total prohibition of communication caused 'persistent and unjustified suffering which amounts to torture'.[132] The conditions of detention at the maximum security prisons at Challapalca and Yanamayo, situated in the Andes of southern Peru at a height of more than 4,500 metres above sea level, with no electricity and drinking water and temperatures of minus 10° or 15° C without heating, on the other hand, were however qualified as 'only' amounting to cruel and inhuman treatment and punishment.[133] Finally, in a number of places of detention under the authority of the Ministry of Interior, the Committee found that arrested persons may be

[127] CAT, 'Report on Mexico produced by the Committee under Article 20 of the Convention, and Reply from the Government of Mexico' (2003) UN Doc CAT/C/75, paras 143–44.

[128] CAT/C/75 (n 127) paras 165, 218.

[129] See the report in CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey' (1993) UN Doc A/48/44/Add.1, para 52.

[130] CAT, 'Report of the Committee Against Torture' (2001) UN Doc A/56/44, para 95 (g). See report of AI, 'Bolivia. Torture and Ill-Treatment: Amnesty International's Concerns' (2001) 25 <https://www.amnesty.org/en/documents/AMR18/008/2001/en/> accessed 3 Decemeber 2017.

[131] *Sergei Kirsanov v Russian Federation*, No 478/2011 (n 113) para 11.2.

[132] A/56/44 (n 130) paras 185 and 186.

[133] ibid, para 183. See also the HRC, which considered the detention conditions only as a violation of Art 10 CCPR: see *Polay Campos v Peru*, No 577/1994, UN Doc CCPR/C/61/D/577/1994, 6 November 1997, para 8.4.

detained there for periods of up to thirty-five days. In certain cases, persons under interrogation were forced to spend the night in the interrogation rooms lying on the floor and handcuffed. Although the precise conditions in these places of detention are not revealed in the summary account, the Committee members expressed the view that

> a long period of detention in the cells of the detention places referred to above, ie two weeks, amounts to inhuman and degrading treatment. Longer periods of detention in those cells amount to torture. Moreover, the practice of forcing persons under interrogation to spend the night in the interrogation rooms lying handcuffed on the floor also amounts to torture.[134]

No arguments have been developed for this surprising and inconsistent legal qualification. Why does one night lying handcuffed on the floor of an interrogation room per se amount to torture whereas spending many months in a maximum security prison at an altitude of 4,500 metres without heating and electricity and with freezing temperatures amount 'only' to cruel and inhuman treatment? Why does the length of detention (less or more than two weeks) change the qualification from inhuman and degrading treatment to torture? Is it the severity of pain and suffering or the purpose that changes?

89 The Committee thus seems to decide based on the specific circumstances of each case, whether an inflicted treatment amounts to 'severe pain and suffering' in line with Article 1, without providing any detailed analysis or assessment, why it would find or not find that a treatment fulfils the legal qualification.[135] Sometimes this assessment does not seem to be fully consistent.

90 It is important to underline that the level of pain and suffering is relative and may differ subjectively.[136] As the IACHR has stipulated, due to endogenous and exogenous factors (eg duration of torture and other forms of ill-treatment, age, sex, health, context, etc), the physical and mental consequences of torture and other forms of ill-treatment can vary in intensity for every person.[137]

91 'Severe pain and suffering' relates to physical and mental suffering equally, with psychological torture and other forms of ill-treatment being 'by no means less severe than physical abuse'.[138] This is very important, as mental suffering of the same intensity than physical pain and suffering can be inflicted without actual physical contact.[139] Consequently, the Committee has confirmed that acts which may lead to severe mental suffering, such as sleep deprivation, sensory deprivation, or manipulation techniques, may amount to torture, because they fulfil the severity criterion outlined in Article 1.[140] Referring to the 2002 authorization of the use of certain interrogation techniques that have resulted in the death of some detainees during interrogation, the Committee concluded that the *United States* should rescind any interrogation technique, including methods involving sexual humiliation, 'waterboarding', 'short shackling', and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply

[134] ibid, para 178.

[135] Also see AI, *Combating Torture and other Ill-Treatment: A Manual for Action* (AI 2016) 68.

[136] SRT (Nowak) 'Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc A/63/175, para 47.

[137] *Lysias Fleury et al v Haiti*, Series C No 236 (n 116) para 73. Also see A/72/178 (n 99) para 28.

[138] A/HRC/13/39 (n 99) para 46. This has also been confirmed by medical experts, eg see Başoğlu (n 120) 37.

[139] AI, *Combating Torture* (n 135) 67.

[140] CAT, 'Report of the Committee Against Torture' (1997) UN Doc A/52/44, para 250.

with its obligations under the Convention.[141] In relation to the *Republic of Korea*, the Committee noted that the sleep deprivation practised on suspects amounted to torture in many cases and was unacceptable.[142]

92 The Human Rights Committee has held that the 'enhanced interrogation techniques' constitute a violation of Article 7, but has not clarified whether it holds that they amount to torture or other ill-treatment.[143]

93 The Committee has made clear that acts of psychological torture should not be limited to 'prolonged mental harm' as set out in the US understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.[144] Thus, not only systematic or prolonged conduct can inflict severe pain and suffering, but also a single act which causes severe mental suffering fulfils the criterion outlined in Article 1.[145] Both the Committee against Torture and the Human Rights Committee have found that *threats*, in particular against the life of a person, amount to torture, because of the severe pain and suffering inflicted and fulfilment of the other elements of Article 1.[146] The Committee also found that leading persons to a river bank and threatening them with drowning if not confessing or pointing a gun to the head of the person, constitutes torture, thereby acknowledging the severe pain and suffering inflicted.[147]

94 The Committee has found repeatedly, that national definitions of torture not encompassing mental pain or suffering are in breach of the Convention.[148]

95 In its Concluding Observations on *Sri Lanka*, the Committee has also pointed out that the definition in the Sri Lankan Criminal Code, restricting torture to 'any act which causes severe pain, whether physical or mental' and thus omitting 'suffering', is not sufficient, as it does not cover acts that are not violent per se, but nevertheless inflict suffering.[149]

96 Also dehumanizing practices such as enforced disappearance, which can have long-lasting and very damaging consequences for the disappeared persons, as well as for family and loved ones, may qualify as causing severe pain and suffering under Article 1.[150] The Committee found 'regrettable' the view of the *United States* that involvement in enforced disappearances did not constitute a form of torture.[151] It reiterated its view that enforced disappearance constitutes torture within the meaning of Article 1 in the case

[141] CAT, 'Concluding Observations: USA' (2006) UN Doc CAT/C/USA/CO/2, para 24.

[142] A/52/44 (n 140) para 56.

[143] HRC, 'Concluding Observations: USA' (2006) UN Doc CCPR/C/USA/CO/3/Rev.1.

[144] CAT/C/USA/CO/2 (n 141) para 13; see also CAT/C/USA/CO/3-5 (n 86) para 9 and above 2.3.

[145] AI, *Combating Torture* (n 135) 67.

[146] A/52/44 (n 140) para 257; *Mostafa Dadar v Canada*, No 258/2004, UN Doc CAT/C/35/D/258/2004, 23 November 2005, paras 2.3, 8.6; *CT and KM v Sweden*, No 279/2005 (n 125) paras 2.1, 7.5; *Njaru v Cameroon*, No 1353/2005, UN Doc CCPR/C/89/D/1353/2005, 19 March 2007, paras 3.1, 6.1.

[147] CAT/C/75 (n 127) para 143.

[148] CAT, 'Concluding Observations: Gabon' (2013) UN Doc CAT/C/GAB/CO/1, para 7; CAT, 'Concluding Observations: Rwanda' (2012) UN Doc CAT/C/RWA/CO/1, para 7; CAT, 'Concluding Observations: China' (2008) UN Doc CAT/C/CHN/CO/4, para 33; CAT, 'Concluding Observations: China' (2016) UN Doc CAT/C/CHN/CO/5, para 7.

[149] CAT, 'Concluding Observations: Sri Lanka' (2011) UN Doc CAT/C/LKA/CO/3-4, para 25.

[150] art 24 CED; *Almeida de Quinteros v Uruguay*, No 107/1981, CCPR/C/19/D/107/1981, 15 October 1982, para 14; *Kurt v Turkey* ECHR 1998-III para 134; *Ipek v Turkey* App no 25760/94 (ECtHR, 17 February 2004) para 183; *Blake v Guatemala*, Series C No 36 (IACtHR, 2 July 1998) para 116. See also AI, *Combating Torture* (n 135) 136.

[151] CAT/C/USA/CO/2 (n 141) para 18.

Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela,[152] as well as in its Concluding Observations.[153] The HRC, with respect to *Colombia*, made explicit findings of torture in disappearance cases, after the cases were investigated and the mortal remains had been found.[154]

97 Every instance of secret detention amounts to enforced disappearance.[155] Consequently, in the case *HB v Algeria*, the Committee held that the secret detention of the complainant, inflicted humiliation, and inhumane conditions of detention constituted a violation of Article 1 of the Convention.[156]

98 In the case of *Megreisi v Libyan Arab Jamahiriya*, the Human Rights Committee established that 'incommunicado' detention in a secret location for more than three years per se constitutes torture and cruel and inhuman treatment.[157]

99 Regarding the meaning of 'severity', the UNSRT has clarified that severity 'does not have to be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions or even death', as suggested by the so-called 'torture memos' under the Bush administration in the US.[158] The memorandum drafted by Jay S Bybee in 2002 suggested that 'severe' means that 'the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure', as well as 'associated with a sufficiently serious physical injury, such as death, organ failure, or serious impairment of body functions'.[159] The memorandum was rescinded after the Abu Ghraib scandal in June 2004 and replaced by the 'Levin memorandum', which explicitly rejected the Bybee memorandum's assertions.[160] The UNSRT has also underlined that while injuries might constitute an aggravating factor, torture should never be reduced to its consequences, especially since many torture methods nowadays are designed not to leave any marks.[161]

100 Finally, the Convention, like any other human rights instrument, has to be considered a 'living instrument which must be interpreted in light of present-day

[152] *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011, UN Doc CAT/C/54/D/456/2011, 15 May 2015, paras 6.4, 6.6.

[153] See the Committee's 'Concluding Observations on Mexico' (2014) UN Doc CAT/C/MEX/CO/5-6, para 12; Rwanda, CAT/C/RWA/CO/1 (n 149) para 14; Turkmenistan (2011) UN Doc CAT/C/TKM/CO/1, para 15; Sri Lanka, CAT/C/LKA/CO/3-4 (n 150) paras 8 and 9; Colombia (2010) UN Doc CAT/C/COL/CO/4, paras 11 and 17; Chad (2009) UN Doc CAT/C/TCD/CO/1, paras 14 and 17.

[154] cf *Bautista de Arellana v Colombia*, No 563/1993, UN Doc CCPR/C/55/D/563/1993, 27 October 1995 and *Arhuacos* v Colombia, No 612/1995, UN Doc CCPR/C/56/D/612/1995, 14 March 1996.

[155] Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair Jeremy Sarkin (2010) UN Doc A/HRC/13/42, para 28; AI, Combating Torture (n 135) 138.

[156] *HB v Algeria*, No 494/2012 (n 105) para 6.3. See also below 3.2 on the legal obligation emanating out of Article 1.

[157] *El-Megreisi v Libyan Arab Jamahiriya*, No 440/1990, UN Doc CCPR/C/50/D/440/1990, 27 December 1991.

[158] SRT (Nowak) A/HRC/13/39 (n 99) para 44.

[159] US Department of Justice, Memorandum for Alberto R Gonzales, Counsel to the President. Re: standards of conduct for interrogation under 18 USC paras 2340–2340A 1 August 2002 (hereinafter Bybee memorandum).

[160] Manfred Nowak, 'Powerlessness as a Defining Characteristic of Torture' in Başoğlu (n 120) 439.

[161] A/HRC/13/39/Add.5 (n 99) para 54.

conditions'[162] and as a consequence, the understanding of what constitutes severe pain and suffering falling under the definition of torture has changed over time.

3.1.3 Intention

101 Article 1 requires that severe pain or suffering must be intentionally inflicted on the victim in order to qualify as torture. Purely negligent conduct, therefore, can never be considered as torture. When a detainee is, for example, forgotten by the prison guards and slowly starves to death, such conduct certainly produces severe pain and suffering, but it lacks intention and purpose and, therefore, can 'only' be qualified as cruel and/or inhuman treatment. During the drafting, the *United States* wished to make this requirement stronger by referring to 'deliberately and maliciously' inflicting extremely severe pain or suffering.[163] Since the US proposal was not adopted, the US Government ratified the Convention with the explicit 'understanding' that, 'in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering'.[164] This interpretation does, however, not seem to go beyond the requirement of intention as spelt out in the text of Article 1.

102 The intention must be directed at the conduct of inflicting severe pain or suffering as well as at the purpose to be achieved by such conduct. This follows from the clear wording of Article 1 ('is intentionally inflicted on a person for such purposes as'). If severe pain or suffering is inflicted, for instance, in the course of a fully justified medical treatment, such conduct cannot constitute torture as it lacks both a purpose enumerated in Article 1 and the intention in relation to such a purpose.[165]

103 A UK proposal that the pain must not only be inflicted intentionally, but also systematically, was not adopted by the Working Group.[166] It follows that even single, isolated acts can be considered to constitute torture if they fulfil the other definition criteria.[167]

104 The Committee has underlined in its General Comment on Article 2 that the elements of intent and purpose do not involve a subjective inquiry into the motivation of the perpetrators, but there must rather be 'objective determinations under the circumstances'.[168] This means that there must not be direct evidence on the mental state of the perpetrator, but the conclusion that intent was given in the specific case can be inferred from facts and circumstances of the case, that demonstrate that pain and suffering was inflicted knowingly for a purpose stipulated in Article 1.[169] In practice, the Committee very often simply states that a certain conduct was intentional, but it has also added—again without any detailed explanation—why it came to that conclusion: 'The Committee observes that the treatment inflicted on the complainant was intentional, since it occurred while he was in the hands of agents of the State party.'[170] This suggests, that when a detainee is ill-treated at the hands of the State party, it can be inferred from

[162] *Tyrer v UK* App no 5856/72 (ECtHR, 25 April 1978); SRT (Nowak), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2009) UN Doc A/HRC/10/44, para 47; Juan Mendez, 'Evolving Standards for Torture in International Law' in Başoğlu (n 120) 220.

[163] See above 2.2, § 29. [164] See above 2.3.

[165] Burgers and Danelius (n 32) 119 speak in this respect of an 'unintended side-effect of the treatment'.

[166] See above 2.2 § 29. [167] Burgers and Danelius (n 32) 118.

[168] CAT/C/GC/2 (n 88) para 9.

[169] Oonna Hathaway and others, 'Tortured Reasoning: The Intent to Torture under International and National Law' (2012) 52 VJIL 791.

[170] *EN v Burundi*, No 578/2013 (n 106) para 7.2.

the circumstances of the case, that pain and suffering was inflicted knowingly for a purpose in line with Article 1.

105 The notorious 'torture memos'[171] in the US 'War on Terror' also tried to restrict the definition of torture by arguing that a defendant must act with specific intent to inflict severe pain and 'the infliction of such pain must be the defendant's precise objective'.[172] From this, the memo concluded that 'even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.' The memorandum has been rescinded and the legal view strongly rejected.[173] From the text and the *travaux préparatoires* for the Convention one can conclude that the element of intent for the definition of torture does not require that the perpetrator's *purpose* is the causing of pain or suffering. The perpetrator must intentionally, ie knowingly, not negligently or recklessly, inflict pain or suffering and this pain must be inflicted for one of the purposes prohibited under the Convention. This means that the perpetrator must not act with the specific intent to inflict *severe* pain and suffering.[174] As pain and suffering is subjective and levels of pain and suffering for the same treatment might differ from person to person, it cannot be a requirement that intention encompasses the infliction of *severe* pain and suffering, but it is sufficient that a perpetrator intended the conduct in which he consequently inflicted severe pain or suffering and at least took into consideration that the treatment could inflict pain or suffering.[175] It is therefore the specific purpose, as outlined in Article 1's definition of torture, that determines whether an act or an omission constitute torture, making torture a specific intent crime.[176]

106 If torture is inflicted on a person by a private individual with the acquiescence of a public official, the question arises whether the requirement of intention applies to the private perpetrator or to the public official or both.[177]

3.1.4 Purpose

107 As stated above, the requirement of a specific purpose seems to be the most decisive criterion which distinguishes torture from cruel or inhuman treatment.[178] That ill-treatment can only amount to torture if it serves a specific purpose seemed to be uncontroversial during the drafting of Article 1. Opinions differed, however, as to the precise list of purposes enumerated therein.[179] Switzerland wished to add non-therapeutic medical or scientific experiments, Portugal the use of psychiatry for the purpose of prolonging the confinement of a person, and the UK delegation wished to include

[171] See paras 91, 99 above. [172] Bybee memorandum (n 159) 3.
[173] See also above 3.1.2.2; AI, *Combating Torture* (n 135) 68; Hathaway and others (n 169).
[174] Also see AI, *Combating Torture* (n 135) 68. [175] See § 82 above.
[176] Hathaway and others (n 169) 804–805.
[177] For this difficult question of interpretation see below 3.1.6.
[178] This interpretation is based on the case law of the European Commission of Human Rights (see above 3.1.2.1.) and has been confirmed, eg by the ICTY in *Prosecutor v Delalic et al* [1998] ICTY No IT-96-21-T, 16 November 1998, para 442. See also in this respect Rodley, 'The Definition(s) of Torture' (n 23) 489; Lene Wendland, *A Handbook on State Obligations under the UN Convention against Torture* (2002) 28 <https://www.apt.ch/content/files_res/A%20Handbook%20on%20State%20Obligations%20under%20the%20UN%20CAT.pdf> accessed 3 December 2017; Evans (n 98) 365. See also the UNGA, Rome Statute of the International Criminal Court (ICC) (last amended 2010), 17 July 1998, Part III, Art 30, according to which the purpose constitutes the only element to distinguish the war crime of torture from the war crime of cruel and inhuman treatment.
[179] Burgers and Danelius (n 32) 118; Boulesbaa (n 30) 27.

'gratuitous torture' and to delete discrimination as a specific purpose. While most delegations agreed that the list of purposes in Article 1 is meant to be indicative rather than exhaustive, the US proposal that any purposes or motives regardless of whether or not they were mentioned in Article 1 would suffice was not adopted by the General Assembly.

108 Article 2 ACHR has a wider application by adding the words 'or for any other purpose'. A similar proposal to add such a clause to the definition in the 1975 UN Declaration had been defeated,[180] and these words are also missing in Article 1 CAT despite efforts of the US and other delegations to broaden the definition. A grammatical interpretation as well as the *travaux preparatoires*, therefore, lead to the conclusion that the words 'for such purposes as' must be understood in a narrow sense. Not every purpose is sufficient but only a purpose which has 'something in common with the purposes expressly listed'.[181]

109 What is the common denominator of the purposes listed in Article 1? They include

– extracting a confession
– obtaining from the victim or a third person information;
– punishment;
– intimidation and coercion;
– discrimination.

110 In its Concluding Observations, the Committee has repeatedly asked States parties to make sure their national legislation is in line with the Convention's Article 1. The Committee criticized eg the *Chinese* legislation, as it does not include any other purposes than extracting confessions.[182] In relation to several States parties, the Committee expressed its concern, that the purpose of discrimination was not included in the definition of torture[183] or that the Criminal Code included a list of specific discrimination grounds (political views, sexual orientation) but not 'any reason based on discrimination of any kind'.[184]

111 As *Burgers* and *Danelius* rightly observe, the purposes listed in Article 1 are not necessarily illegitimate, but are directly linked to 'the interests or policies of the State and its organs'.[185] While the purpose of the perpetrator needs be linked to the purposes listed, the SRT has also argued that the relatively broad phrasing of the listed purposes means that 'it is difficult to envisage a realistic scenario of purposeful ill-treatment against a powerless person'[186] which would not be encompassed by the definition of Article 1, if severe pain or suffering is inflicted.

112 In the individual complaints procedure, the Committee normally makes sure to indicate which of the purposes in Article 1 it deems to be fulfilled. In the case *Patrice Gahungu v. Burundi*, the Committee concluded that the treatment inflicted was 'probably aimed at forcing a confession from him'[187] and consequently found

[180] Boulesbaa (n 30) 22 with further references. [181] Burgers and Danelius (n 32) 118.
[182] CAT, 'Concluding Observations: China (2016) UN Doc CAT/C/CHN/CO/5, para 7b.
[183] CAT, 'Concluding Observations: Azerbaijan' (2009) UN Doc CAT/C/AZE/CO/3, para 8; CAT, 'Concluding Observations: Cabo Verde' (2017) UN Doc CAT/C/CPV/CO/1, para 10; CAT, 'Concluding Observations: Portugal' (2013) UN Doc CAT/C/PRT/CO/5-6, para 7.
[184] CAT, 'Concluding Observations: Norway' (2012) UN Doc CAT/C/NOR/CO/6-7, para 7.
[185] ibid 119; see also Ingelse (n 90) 211. [186] A/72/178 (n 99) para 31.
[187] *Patrice Gahungu v Burundi*, No 522/2012 (n 106) para 7.2.

torture in accordance with Article 1. In *EN v Burundi*, the State party argued that the act of severe beatings committed by police officers in a police station after arrest cannot be classified as torture because the Burundian Criminal Code requires that acts of torture must be committed to obtain information or a confession.[188] The Committee concluded that the beating was most likely undertaken in order to punish him for an act he was thought to have committed. In both of the cases the Committee seems to have followed the approach stipulated in its General Comment, namely that the elements of intent and purpose do not involve a subjective inquiry into the motivation of the perpetrators, but there must instead be 'objective determinations under the circumstances'.[189]

113 The Committee has recognized that in comparison to torture, other forms of ill-treatment do 'not require proof of impermissible purposes' and therefore has acknowledged purpose as a decisive criterion to distinguish torture from other forms of ill-treatment.[190] Thus the definition of torture does not necessarily depend on a subjectively verified purpose or intensity of the inflicted pain or suffering, but on the intentionality and purposefulness of that infliction in combination with the powerlessness of the victim.[191]

3.1.5 Powerlessness

114 All purposes listed in Article 1 as well as the *travaux préparatoires* of both the Declaration and the Convention seem to refer to a situation in which the victim of torture is a detainee or a person 'at least under the factual power or control of the person inflicting the pain or suffering',[192] and where the perpetrator uses this unequal and powerful situation to achieve a certain effect, such as the extraction of information, intimidation, or punishment. The 'ideal' environment for torture is prolonged incommunicado detention in a secret place, ie a situation in which the victim is totally subordinated to the will and power of the torturer. Such a situation of powerlessness strongly resembles the condition of slavery, and both torture and slavery can be described as most direct and brutal attacks on the core of human dignity and personality. This link between the right to human dignity and the absolute prohibition of torture and slavery has been established most convincingly in Article 5 ACHPR.[193]

115 The UNSRT has confirmed that powerlessness means that 'someone is overpowered, in other words, has come under the direct physical or equivalent control of the

[188] *EN v Burundi*, No 578/2013 (n 106) para 4.4.

[189] CAT/C/GC/2 (n 88) para 9. For *EN v Burundi*, No 578/2013 (n 106) see CAT/C/56/D/578/2013, paras 4.4, 7.2, 7.3.

[190] CAT/C/GC/2 (n 88) para 10. See also above 3.1.2.1.

[191] A/HRC/13/39 (n 99), para 60; A/HRC/13/39/Add.5 (n 99) para. 37; A/72/178 (n 99) para 31.

[192] Burger and Danelius (n 32) 120. See also Rodley, 'The Definition(s) of Torture' (n 23) 484: 'It is no accident that the purposive element of torture reflects precisely state purposes or, at any rate, the purposes of an organized political entity exercising effective power'.

[193] 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.' See also Chapter I of the EU Charter of Fundamental Rights on human dignity. In the State reporting procedure under the CAT the Committee has also asked Mauritania to criminalize slavery and to include an adequate definition, covering all forms of slavery in its legislation. See CAT, 'Concluding Observations: Mauritania' (2013) UN Doc CAT/C/MRT/CO/1, para 21.

perpetrator and has lost the capacity to resist or escape the infliction of pain or suffering'.[194] This will usually be the case in a situation of detention as well as arrest, eg when the victim is handcuffed or lying on the street without resisting his or her arrest or any other similar situation, in which the victim is under the direct control of another person.[195]

116 The Committee has not only emphasized that the States parties' obligations to prohibit, prevent, and redress torture extend 'to all contexts of custody and control',[196] but pointed out that States are under a special obligation to

> take effective measures to prevent torture and ensure that persons deprived of their liberty can exercise the rights enshrined in the Convention, since they bear a special responsibility owing to the extent of the control that prison authorities exercise over such persons. States parties must therefore take the necessary steps to prevent individuals from inflicting acts of torture on persons under their control.[197]

It has thereby explicitly underlined that a person deprived of liberty is especially vulnerable due to the extent of control that this person is subjected to.

117 The Committee has found torture also outside a detention context, while confirming the element of powerlessness. In *VL v Switzerland*, the Committee held that 'the complainant was clearly under the physical control of the police even though the acts concerned were perpetrated outside formal detention facilities'.[198] After having found that severe pain and suffering was inflicted on the victim, for purposes such as interrogation, intimidation, and punishment, as well as humiliation and discrimination based on gender, the Committee concluded that the sexual abuse by the police amounted to torture, even though it was carried 'outside formal detention facilities'.[199] The Committee thereby acknowledged that rape by public officials constitutes torture, even if it does not happen in a context of detention. What is relevant, therefore, is the powerlessness of the victim.[200]

118 In the case *X v Burundi*, the Committee stipulated regarding the circumstances of the case, that the complainant was arrested by State officials, who beat and kicked him in the chest, ribs, back, and head while pointing a weapon at his head.[201] The complainant was tied up 'with his hands behind his back, having been completely overpowered by the State officials'[202] when this treatment was inflicted. While the State party argued that injuries happened to the complainant because he resisted to the law enforcement officials, the Committee concluded that 'the injuries occurred while the claimant was under the

[194] A/72/178 (n 99) para 31. Also see Manfred UNSRT reports; Nowak, 'Powerlessness as a Defining Characteristic' (n 160).

[195] See eg *Bartesaghi Gallo and Others v Italy* App nos 12131/13 and 43390/13 (ECtHR, 22 June 2017).

[196] CAT/C/GC/2 (n 88) para 15.

[197] *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011 (n 152) para 6.4. See also CAT/C/GC/2 (n 88) para 25.

[198] *VL v Switzerland*, No 262/2005, UN Doc CAT/C/37/D/262/2005, 20 November 2006, Annex para 8.10.

[199] ibid A/72/178 (n 99) para 38, referring to A/50/44, para 126; CAT, 'Concluding Observations: Venezuela' (2014) UN Doc CAT/C/VEN/CO/3-4, para 12; CAT, 'Concluding Observations: Turkey' (2016) UN Doc CAT/C/TUR/CO/4, para 15; CAT, 'Concluding Observations: Republic of Korea' (2017) UN Doc CAT/C/KOR/CO/3-5, para 13.

[200] *VL v Switzerland*, No 262/2005 (n 198) para 8.10. See also below 3.1.5.

[201] *X v Burundi*, No 553/2013, UN Doc CAT/C/55/D/553/2013, 10 August 2015, para 7.2.

[202] ibid.

control of the State party's authorities'.[203] Consequently, the Committee concluded that the respective acts constituted torture.

119 Similar findings were made by the IACHR in *Rosendu Cantú et al v Mexico*,[204] the Inter American Commission in *Gayle v Jamaica*,[205] as well as by the ECtHR in *Cestaro v Italy* and *Bartesaghi Gallo and Others v Italy*.[206] In all of these cases, courts found that victims were subjected to severe pain and suffering, while being under the direct control of the State party, even though that control was exercised outside of a detention context.

120 It follows that torture, as the most serious violation of the human right to personal integrity, presupposes a situation of *powerlessness* of the victim which usually, but not only, means *deprivation of personal liberty*.[207] The Convention does not generally and absolutely prohibit the intentional infliction of severe pain or suffering by a public official. If a police officer, for example, deliberately shoots into the legs of a person in order to effect a lawful arrest or prevent the escape of a person lawfully detained, or uses physical force with truncheons, pepper spray, and other weapons for the purpose of breaking up an unlawful demonstration or quelling a riot, he or she might intentionally inflict severe pain on the person concerned. Whether the use of force amounts to cruel, inhuman or degrading treatment depends on the proportionality of the force applied in relation to the lawful goal to be achieved. As soon as the person is, however, arrested or in a similar way under the direct power or control of the police officer the further use of physical force for the purpose of intimidation, punishment or discrimination will be qualified as torture.

121 Even though the prohibition of both torture and other forms of cruel, inhuman or degrading treatment are laid down in international human rights law as absolute human rights, the principle of *proportionality* nevertheless might apply as we have seen in the examples cited above. But it only applies for the purpose of defining the scope of application of the right not to be subjected to cruel, inhuman or degrading treatment, and not for the right not to be subjected to torture. If severe physical or mental pain or suffering is intentionally inflicted for lawful purposes outside the scope of Article 1 in a proportional manner, then this conduct is a justified use of force and by definition does not amount to cruel, inhuman or degrading treatment. If the use of force is not absolutely necessary for achieving such purpose, the treatment might be qualified as degrading, inhuman, or cruel.[208] If the same force is applied in a situation of *powerlessness* for any of the

[203] ibid, para 7.3.

[204] A/72/178 (n 99) paras 39–46, quoting, eg *Rosendo Cantú et al v Mexico*, Series C No 216 (IACtHR, 31 August 2010) para 118: 'that rape may constitute torture even when it consists of a single act or takes place outside State facilities … because the objective and subjective elements that define an act as torture do not refer to the accumulation of acts or to the place where the act is committed, but rather to the intention, the severity of the suffering and the purpose of the act.'

[205] The intentional and violent beating of a person before their arrest was found to constitute torture by the IACtHR, *Michael Gayle v Jamaica* (IACtHR, 24 October 2005) paras 59–64.

[206] The ECtHR in *Cestaro v Italy* and *Bartesaghi Gallo and Others v Italy* found torture when anti-globalization protestors were violently punched, kicked, and beaten in a school, where the protestors were sleeping or sitting with their hands raised above their heads, being unarmed and not showing any resistance. See *Cestaro v Italy*, ECtHR (n 204) paras 170–90. *Bartesaghi Gallo and Others v Italy*, ECtHR (n 195) paras 114, 117.

[207] See in this sense, eg Burgers and Danelius (n 32) 120; Ingelse (n 90) 211. The US ratified the Convention with the 'understanding' that 'the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control': see above 2.3 on the US 'understanding'; see also Boulesbaa (n 30) 25ff. See further the definition of torture as a crime against humanity in Art. 7(2)(e) of the ICC Statute: ' "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.'

[208] For the difference between these forms of ill-treatment see below Art 16, 3.1.

purposes listed in Article 1 and leads to severe pain or suffering, it amounts to torture and can never be justified by applying the principle of proportionality, not even in the '*ticking time bomb*' scenario.[209] The powerlessness of the victim is the essential criterion which the drafters of the Convention had in mind when they introduced the legal distinction between torture and other forms of ill-treatment.[210]

3.1.6 Involvement of a Public Official

122 Severe pain or suffering only constitutes torture in the understanding of the Convention if it 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'. The formulation in the 1975 Declaration and the original Swedish draft ('by or at the instigation of a public official') reflects the traditional view that States can only be held accountable for human rights violations committed by State actors. Since the main purpose of the Convention was to require States parties to use domestic criminal law for the purpose of punishing perpetrators of torture, several Governments, such as France, Barbados, Panama, and Spain, advocated an extension of the definition covering also private individuals.[211] Germany did not go as far but wished to include also non-State actors who exercise authority over others and whose authority is comparable to Government authority. Since other Governments, including the United States, United Kingdom, Morocco, and Austria, insisted on a traditional State-centred definition, the Working Group finally agreed on a US compromise proposal which extended State responsibility to the consent or acquiescence of a public official. Since the delegations could not agree on a definition of the term 'public official', the Austrian proposal to add the phrase 'or other person acting in an official capacity' was adopted.

3.1.6.1 Meaning of 'public official'

123 As to the definition of public official itself, the Committee has repeatedly criticized in its Concluding Observations that States have incorporated a definition that may not cover all public officials and persons acting in an official capacity.[212] The Committee for example expressed its concern regarding the fact that members of the armed forces are not included as public officials in the definition of torture in the *Honduran* Criminal Code.[213] While there exists a similar provision in the Honduran Military Code, this however carries much lower sanctions. In the State reporting procedure regarding *Ethiopia*, the Committee criticized that the definition of torture is much narrower than under the Convention, inter alia only referring to 'acts committed in the performance of duties

[209] The ticking bomb scenario is a thought experiment regarding a situation, where a person with knowledge of a terrorist attack about to happen and potentially risking the lives of many persons, is at the hands of the authorities. The question is whether to use torture in order to have the person confess details about the attack in order to potentially avoid it.

[210] On the element of powerlessness, it is also worth referring to the work of medical experts in order to draw attention to the seriousness of the victim's situation of vulnerability. Pérez-Sales (n 119) 85 for example elaborates on the element of powerlessness: 'As a "spectacle of power", torture is not just about inflicting pain, but also a demonstration in inflicting pain … Humiliation is related to the absolute loss of one's power. In torture there is not only an absence of recognition as a human being, but also a total stripping of agency: that is its humiliating core.'

[211] See above 2.2. See also Art 7(2)(e) of the ICC Statute which defines torture as a crime against humanity in the broad sense of applying to both State and non-State actors.

[212] CAT/C/CHN/CO/5 (n 148) para 7.

[213] CAT, 'Concluding Observations: Honduras' (2009) UN Doc CAT/C/HND/CO/1, para 8.

by public servants charged with the arrest, custody, supervision, escort or interrogation of a person under suspicion, arrest, detention or summoned to appear before a court or serving a sentence'.[214] Regarding the reports of *Cap Verde* and *Macao*, the Committee criticized that torture is limited to acts that are committed by persons vested with specific public functions listed in the article or persons usurping those functions.[215] It follows that the Committee interprets the term 'public official' in a broad sense.

124 In the individual complaints procedure, the Committee has outlined how it deals with the involvement of public officials, when States argue that its representatives are not responsible for torturing or ill-treating individuals: in *EN v Burundi*, the State party argued that actions of the police were unplanned, police officers were not acting on orders, and following from this, the injuries inflicted could not be classified as torture.[216] The Committee observed that the persons beating and interrogating the complainant were 'uniformed police officers armed with rifles and belts. Furthermore, the complainant was severely beaten for two hours by police officers within the police station itself.'[217] Consequently, the Committee concluded that the acts were committed by 'agents of the State party acting in an official capacity'[218] and with the other criteria fulfilled as well, found an act of torture. Similarly, in the case *Oleg Evloev v Kazakhstan*, the State party did not contest the physical injuries of the complainant but argued, that there was no involvement by officials in the infliction of these injuries.[219] The Committee concluded that

> the complainant was placed in pretrial investigation at the premises of the Ministry of Internal Affairs in Astana at the time his injuries were incurred. Under these circumstances, the State party should be presumed liable for the harm caused to the complainant unless it provides a compelling alternative explanation. In the present case, the State party provided no such explanation and thus the Committee must conclude that the investigating officers are responsible for the complainant's injuries.[220]

It is thus made clear by the Committee that a State party is responsible for the acts committed by its public officials, such as police, for any acts of ill-treatment that happen within its premises and that such acts amount to torture, as soon as the other elements of Article 1 are fulfilled as well.

3.1.6.2 Meaning of 'other person acting in an official capacity'

125 The term '*other person acting in an official capacity*' is clearly broader than just State officials. It was inserted on the proposal of *Austria* in order to meet the concerns of the Federal Republic of Germany that certain non-State actors whose authority is comparable to governmental authority should also be held accountable.[221] These de facto *authorities* seem to be similar to those 'political organizations' which, according to Article 7(2)(i) ICC Statute, can be held accountable for the crime of enforced disappearance before the ICC. One might think of rebel, guerrilla, or insurgent groups who exercise de facto authority in certain regions or of warring factions in so-called 'failing States'.

126 In the case of *Elmi v Australia*, the Committee had to decide whether the forced return of a Somali national belonging to the Shikal clan to *Somalia*, where he was at a

[214] CAT, 'Concluding Observations: Ethiopia' (2011) UN Doc CAT/C/ETH/CO/1, para 9.
[215] CAT/C/CPV/CO/1 (n 183) para 10; CAT, 'Concluding Observations: Macao' (2016) UN Doc CAT/C/CHN-MAC/CO/5, para 14.
[216] *EN v Burundi*, No 578/2013 (n 106) para 7.3. [217] ibid. [218] ibid.
[219] *Oleg Evloev v Kazakhstan*, No 441/2010, UN Doc CAT/C/51/D/441/2010, 5 November 2013, para 9.2.
[220] ibid, para 9.2. [221] See above 2.2. See also Wendland (n 178) 29.

substantial risk of being subjected to torture by the ruling Hawiye clan, constituted a violation of the prohibition of *refoulement* pursuant to Article 3. The Committee found a violation of Article 3 and explicitly rejected the argument of the Australian Government that the acts of torture the applicant feared he would be subjected to in Somalia would not fall within the definition of torture set out in Article 1. The Committee has noted that since Somalia has been without a central Government for years and a number of warring factions de facto exercise prerogatives that would normally be practised by legitimate Governments, the members of these factions could fall within the phrase 'public officials or other persons acting in an official capacity' contained in Article 1, according to the Committee.[222]

127 The Committee has repeatedly criticized States parties that have not criminalized torture 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.[223] In its Concluding Observations to *Kazakhstan* the Committee has expressed its concern that the definition does not encompass acts of torture committed by any 'other person acting in an official capacity' and has held that this might lead to impunity.[224] In the Concluding Observations to *Morocco*, the Committee criticized that the definition of torture included in the Criminal Code does not encompass complicity or explicit or tacit consent of law enforcement, security staff, or any other person acting in an official capacity.[225] The Committee voiced its concern regarding *Chinese* legislation that restricts the prohibition of torture to the actions of judicial officers and officers of an institution of confinement, but does not cover acts by 'other persons acting in an official capacity', including those acts that result from instigation, consent, or acquiescence of a public official.[226]

3.1.6.3 Meaning of 'instigation', 'consent', and 'acquiescence'

128 The term 'instigation' means incitement, inducement, or solicitation and as such requires the direct or indirect involvement and participation of a public official.[227] The terms 'consent or acquiescence' are, however, much broader and in fact can be interpreted to cover a wide range of actions committed by private persons if the State in some way or another permits such activities to continue.[228] The Committee has underlined that States parties have an obligation to adopt effective measures to prevent 'public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture'.[229]

129 In the US 'understanding', the term 'acquiescence' requires that 'the public official, prior to the activity constituting torture, have awareness of such activity and

[222] *SS Elmi v Australia*, No 120/1998, UN Doc CAT/C/22/D/120/1998, 14 May 1999, para 6.5. See also below Art 3 § 131, which refers to cases where the Committee accepted claims under Article 3 CAT involving the risk of torture by non-State actors, where the state failed to exercise due diligence in preventing and stopping abuses by private actors. These cases are *Eveline Njamba et al v Sweden* [2010] CAT No 322/2007; *EKW v Finland*, No 490/2012, UN Doc CAT/C/54/D/490/2012, 4 May 2015; *Sylvie Bakatu-Bia v Sweden*, No 379/2009, UN Doc CAT/C/46/D/379/2009, 3 June 2011.

[223] CAT, 'Concluding Observations: Bosnia and Herzegovina' (2011) UN Doc CAT/C/BIH/CO/2-5, para 8.

[224] CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 24.

[225] CAT, 'Concluding Observations: Morocco' (2011) UN Doc CAT/C/MAR/CO/4, para 5.

[226] CAT/C/CHN/CO/4 (n 148) para 33.

[227] Boulesbaa (n 30) 26; Wendland (n 178) 28.

[228] Ingelse (n 90) 210.

[229] CAT/C/GC/2 (n 88) 17. See CAT/C/GC/2 (n 88) on what is understood by effective measures.

thereafter breach his legal responsibility to intervene to prevent such activity'.[230] A typical example of torture by acquiescence would be the outsourcing of interrogations to private contractors when the competent State officials know or should know that such private security companies might resort to torture practices.

130 The Committee in the meantime has very clearly outlined that States bear responsibility not only for the acts and omissions of their officials, but also for others, such as agents, private contractors, and others acting in official capacity or on behalf of the State, in conjunction with the State under its direction or control, or otherwise under colour of law.[231] The Committee has also clarified that in case of privately run or owned detention centres, the staff is acting in official capacity and carrying out a State function, with State officials having the obligation to monitor as well as taking effective measures to prevent torture and ill-treatment. The Committee has equally underlined that while the States parties' obligations extend to all contexts of custody and control, this does not only include prisons, but also hospitals, schools, institutions taking care of children, aged, and mentally-ill or disabled persons, military services and 'other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm'.[232]

131 As in other cases of State obligations to protect human rights against interference by private persons, the *due diligence test* as developed by the Inter-American Court of Human Rights in cases of enforced disappearances might be applied.[233] On the due diligence test, the Committee has stated, that if acts of torture or ill-treatment are being committed by non-State officials or private actors and State authorities or others acting in official capacity or under the colour of law know or have reasonable grounds to believe that these are taking place and they do not exercise due diligence to prevent, investigate, prosecute, and punish these non-State officials or private actors in accordance with the Convention, the State as well as its officials will be responsible for the committed acts.[234] The Committee has applied this principle to States parties' not preventing and protecting victims from gender-based violence, including rape, FGM, trafficking, and domestic violence. It thereby also reiterates that these practices may amount to torture.[235]

132 Thus, one may conclude that a State is responsible for acts or omissions of public officials and other persons acting in an official capacity, be it for directly committing, instigating, inciting, encouraging, acquiescing in, or otherwise participating or being complicit in torture. Especially from the acquiescence element, one may derive an important responsibility for States, when torture is committed by non-State actors: States in such cases have to exercise due diligence to prevent, investigate, and punish such acts. Consequently, the Committee also emphasized that rape and violence committed by non-State actors may equally amount to torture if the State fails to exercise due diligence to 'intervene to stop, sanction and provide remedies to victims of torture'.[236]

[230] US Reservation II.1.d to the Convention. See below Appendix A4.
[231] CAT/C/GC/2 (n 88) para 15. [232] ibid.
[233] See the judgment *Velásquez Rodriguez v Honduras*, Series C No 4 (IACtHR 29 July 1988).
[234] CAT/C/GC/2 (n 88) para 18.
[235] This is equally underlined in the Committee's State Reporting procedure in relation to art 2: see above Art 2.
[236] CAT/C/GC/2 (n 88) para 18; see also above 3.1.6.3.

3.2 Is There a State Obligation Emanating Out of Article 1?

133 Article 1 contains a legal definition of torture, which needs to be applied in conjunction with State obligations applicable to torture. The CAT lacks a general provision prohibiting torture or granting an individual human right not to be subjected to torture and other forms of ill-treatment, similar to Article 7 CCPR, Article 3 ECHR, Article 5 ACHR, or Article 5 ACHPR.[237] The CAT seems to presuppose such a human right as part of customary international law. As spelt out in the Preamble, the States parties to the CAT, 'desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world', merely intended to establish additional and specific State obligations to prevent torture and ill-treatment as well as to punish torture.[238]

134 Because of the lack of a provision prohibiting torture in Article 1, it has previously—and rightly—been argued that Article 1 does not contain a specific State obligation and that an individual wishing to complain against having been subjected to torture, must prove that the State party concerned has failed to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction', as spelt out in Article 2(1).[239] In the meantime, the Committee has repeatedly found violations of Article 1 in the indvidual complaints procedure.[240] There are still a few cases where the Committee found a violation of Article 2(1) read in conjunction with Article 1, but not of Article 1.[241] In other cases, the Committee found a violation of Article 1 and not of Article 2.[242]

135 Not only are there obviously inconsistencies in the Committee's jurisprudence, but from a legal perspective it is also not understandable how a legal definition is interpreted in a way so as to constitute an obligation. This means that legally it is not possible to find a violation of a provision that is nothing but a definition. Thus the correct way would be, as was also recently confirmed by the Committee, to find a violation of Article 2 (1) in conjunction with Article 1.[243]

[237] art 1 of the Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67 (IAPPT), which contains a general State obligation to prevent and punish torture.

[238] Manfred Nowak and Elizabeth McArthur, *The UNCAT: A Commentary* (Oxford University Press 2008) para 82. See above Preamble.

[239] Nowak and McArthur (n 238) para. 82.

[240] *Ali Ben Salem v Tunisia*, No 269/2005 (n 126) para 16.5; *Dmytro Slyusar v Ukraine*, No 353/2008, UN Doc CAT/C/47/D/353/2008, 14 November 2011, para 9.4; *Gerasimov v Kazakhstan*, No 433/2010 (n 122) para 13; *Djamila Bendib v Algeria*, No 376/2009, UN Doc CAT/C/51/D/376/2009, 8 November 2013, paras 6.2, 6.3; *Boniface Ntikarahera v Burundi*, No 503/2012 (n 126) para 7; *Nouar Abdelmalek v Algeria*, No 402/2009, UN Doc CAT/C/52/D/402/2009, 23 May 2014, para 11.2; *Rasim Bairamov v Kazakhstan*, No 497/2012, UN Doc CAT/C/52/D/497/2012, 14 May 2014, para 8.4; *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 121) para 17.4; *X v Burundi*, No 553/2013 (n 201) para 7.2; *Patrice Gahungu v Burundi*, No 522/2012 (n 106) paras 7.2–7.4; *Taoufik Elaïba v Tunisia*, No 551/2013, UN Doc CAT/C/57/D/551/2013, 6 May 2016, para 7.4; *EN v Burundi*, No 578/2013 (n 106) paras 7.3, 7.4.

[241] *Déogratias Niyonzima v Burundi*, No 514/2012 (n 105) para 8.2; *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011 (n 152) paras 6.6, 7.

[242] *Ali Ben Salem v Tunisia*, No 269/2005 (n 126) para 16.5; *Saadia Ali v Tunisia*, No 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008, paras 15.4, 15.5.

[243] Informal consultation with the CAT Committee, 21 November 2017.

3.3 Lawful Sanctions

136 The last sentence of Article 1(1) specifies that the definition of torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. This clause was already the most controversial element of the definition during the drafting of Article 1[244] and remains highly controversial today.[245] It derives from the 1975 UN Declaration which, however, allows lawful sanctions as an exception to torture only 'to the extent consistent with the *Standard Minimum Rules for the Treatment of Prisoners*'. In the Declaration, the lawful sanctions clause accordingly was meant to apply to certain disciplinary measures against prisoners below the threshold of corporal punishment, placing a detainee in a dark cell, and similar measures prohibited by the Standard Minimum Rules. One example which was sometimes cited was to put a prisoner for some time into *solitary confinement*.[246]

137 The reference to the Standard Minimum Rules was deleted from Article 1 CAT only on the ground that certain Governments, notably from Western Europe, did not wish to include in a binding treaty a reference to a non-binding soft law instrument. As soon as these Governments realized that the deletion of the reference to the Standard Minimum Rules would in fact open the door to a far-reaching escape clause which would even exempt serious types of *corporal punishment* provided for in the criminal law of Islamic States from the prohibition of torture, they tried to replace it by another limitation referring to binding international standards. The United States, for instance, proposed that lawful sanctions 'imposed in flagrant disregard of accepted international standards' would not be permitted. As the drafters could not reach agreement on defining these 'accepted international standards', many Governments, including the United Kingdom, Uruguay, Norway, Canada and Belgium, unsuccessfully tried to delete the clause altogether. Others insisted in their written comments that the term 'lawful sanctions' must be interpreted to refer both to domestic and international law.[247] At the time of ratification, the Governments of Luxembourg and the Netherlands reiterated this legal opinion in specific declarations of interpretation. The respective 'understanding' of the US Government is more ambiguous. On the one hand, the *United States* understands that the term 'sanctions' includes 'judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law'; on the other hand, the United States understands 'that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture'.[248]

138 The Committee has originally been cautious in the reporting procedure to avoid any confrontation with Governments on the interpretation of the lawful sanctions clause, but has made it clear in recent years that it does not accept corporal punishments as covered by the lawful sanctions clause.[249] When the Swiss representative in 1990 stressed

[244] See above 2.2.

[245] The lawful sanctions clause is usually criticized in the literature without, however, giving a clear answer as to how it should be interpreted. See eg Burgers and Danelius (n 32) 121 et seq; Boulesbaa (n 30) 31 et seq; Nigel Rodley, 'The Treatment of Prisoners' (n 98) 322 et seq; Ingelse (n 90) 211 et seq; Wendland (n 178) 29ff.

[246] During the discussion of the initial report of Sweden in 1989, the representative of Sweden replied to a question concerning the practice of placing prisoners in isolation cells by invoking the lawful sanctions clause. See CAT/C/5/Add.1 and CAT/C/SR.11, para 35. See also Ingelse (n 90) 231.

[247] See the written references of the Netherlands, UK, Italy, and the US, above 3.2.

[248] For the interpretative declarations of the Governments of Luxembourg and the Netherlands and the 'understanding' of the US Government with regard to art 1, see Appendix A4.

[249] Ingelse (n 90) 231ff.

that his Government considered as lawful sanctions only such punishments as were permitted under national and international law, which clearly excluded a punishment such as the severing of limbs, Committee members remained silent.[250] When the Dutch delegation in 1990 asked the question whether corporal punishment in general fell under lawful sanctions, the Committee did not use this opportunity to address this delicate issue.[251] It was only during the consideration of the *Namibian* report in 1997 that the Committee for the first time in clear terms recommended the 'prompt abolition of corporal punishment insofar as it is legally possible under the Prisons Act of 1959 and the Criminal Procedure Act of 1977'.[252]

139 Most revealing and controversial was the fairly long and somewhat polemical debate on the question whether corporal punishment was covered by the lawful sanctions clause during the examination of the report of *Saudi Arabia* in 2002.[253] In response to a respective Committee question, the representative of Saudi Arabia explained that corporal punishment was administered under full medical, judicial, and administrative supervision, full account being taken of the health status of the person concerned. The Quran set out specific sanctions such as amputation, flogging (whipping), and stoning for certain crimes. These sanctions emanated from God, were the law of the land and, therefore, permitted by the lawful sanctions clause in Article 1 CAT. In its Concluding Observations, the Committee expressed deep concern and recommended that the State party re-examine its imposition of corporal punishment (including in particular flogging and amputation of limbs), 'which are in breach of the Convention'.[254] A similar recommendation was expressed more recently, when the Committee recommended Saudi Arabia to stop immediately the practices of flogging/lashing, amputation of limbs, and any other form of corporal punishment and prohibit their use by law, as they amount to torture and ill-treatment and constitute a violation of the Convention.[255]

140 When considering the report of *Yemen* in 2003, the Committee attempted to distinguish between Articles 1 and 16 in relation to corporal punishment:[256] On the matter of flogging, the Committee had been apprised that the purpose of the punishment was not so much to inflict pain as to humiliate the victim. The Committee noted, that if the purpose was to inflict pain, the punishment would seem to violate Article 1, and if the object was simply to humiliate the victim, it appeared to constitute a violation of Article 16.

141 The Committee also expressed concern regarding certain provisions of the Criminal Code of *Qatar* allowing punishments such as flogging and stoning to be imposed as criminal sanctions by judicial and administrative authorities and, whilst not referring to a specific article, concluded that these practices constituted a breach of the obligations imposed by the Convention. It asked the State party to review the relevant legal provisions of the Criminal Code with a view to abolishing them immediately.[257]

[250] CAT, 'Consideration of Reports submitted by States Parties under Article 19 of the Convention, Addendum Switzerland' (1989) UN Doc CAT/C/5/Add.17 and CAT/C/SR.28, para 11.

[251] CAT/C/SR.47, paras 81ff. [252] A/52/44 (n 140) para 250.

[253] CAT/C/SR.519 and 525. See also Faria Coracini and Eduardo Celso, 'The Lawful Sanctions Clause in the State Reporting Procedure before the Committee against Torture' (2006) 24 NQHR 305.

[254] CAT, 'Concluding Observations: Saudi Arabia' (2002) UN Doc CAT/C/CR/28/5, paras 4(a), (b), and 8(b).

[255] CAT, 'Concluding Observations: Saudi Arabia' (2016) UN Doc CAT/C/SAU/CO/2, para 11.

[256] CAT/C/SR.583, para 10.

[257] CAT, 'Concluding Observations: Qatar' (2006) UN Doc CAT/C/QAT/CO/1, para 12.

The Committee also welcomed the enactment of legislation banning flogging as a disciplinary penalty for prisoners.[258] In all of these cases the Committee has thus made it very clear that it understands that these punishments violate the Convention and cannot be subsumed under the lawful sanctions clause.

142 The United Arab Emirates, when accessing the Convention in 2012, also issued a 'declaration', confirming that 'the lawful sanctions applicable under national law, or pain or suffering arising from or associated with or incidental to these lawful sanctions, do not fall under the concept of "torture" defined in article 1 of this Convention or under the concept of cruel, inhuman or degrading treatment'.[259] This 'declaration', which in fact is a reservation, was strongly objected by a number of European States, underlining that it is incompatible with the object and the purpose of the Convention.

143 Regarding the death penalty and methods of execution, with reference to Articles 1, 2, and 16, in 2006, the Committee expressed concern at substantiated information indicating that executions in the United States 'can be accompanied by severe pain and suffering'[260] and recommended that the State party carefully review its execution methods, in particular, in order to prevent severe pain and suffering.[261] One can conclude from this reference that the Committee understands that capital punishment might very well amount to torture. The Committee in the meantime also regularly recommends States parties to accede to the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.[262]

144 More recently, the Committee also expressed its concern that Hong Kong, China in its legislation still includes 'lawful authority, justification or excuse' of illicit conduct.[263] The Committee not only reiterated that the prohibition of torture is absolute and non-derogable and that it does not permit any possible defence, but it also considered that the defence of 'lawful authority, justification or excuse' is broader in scope than the lawful sanction clause in Article 1. The Committee thus concludes that this regulation could lead to interpretations that are not in line with the Convention.

145 Regarding the *Kazakh* report, the Committee criticized that the definition in the Criminal Code excludes 'physical and mental suffering caused as a result of "legitimate acts" '.[264] It subsequently asked that the State party should ensure 'that only pain or suffering arising from, inherent in or incidental to lawful sanctions are excluded from the definition, and should remove the reference to "legitimate acts" in that context'.[265] It did not specify in any way about its understanding regarding the scope of the lawful sanctions clause.

146 It is difficult to find any meaningful scope of application for the lawful sanctions clause. One extreme interpretation is the one advocated by Saudi Arabia and other Islamic States maintaining that any sanction imposed in accordance with domestic law, including the most severe forms of corporal punishment and executions of capital punishment, was

[258] CAT, 'Concluding Observations: Egypt' (2002) UN Doc CAT/C/CR/29/4, para 3(a).
[259] See declaration by United Arab Emirates in Appendix A.4.
[260] CAT/C/USA/CO/2 (n 141) para 31. [261] ibid.
[262] CAT, 'Concluding Observations: Burkina Faso' (2014) UN Doc CAT/C/BFA/CO/1, para 24; CAT/C/CHN/CO/5 (n 148) para 50; Ethiopia, CAT/C/ETH/CO/1 (n 215) para 24; CAT, 'Concluding Observations: Guinea' (2014) UN Doc CAT/C/GIN/CO/1, para 25; CAT, 'Concluding Observations: Kuwait' (2011) UN Doc CAT/KWT/CO/2, para 17; CAT/C/USA/CO/3-5 (n 86) para 25. See also below Art 16.
[263] CAT, 'Concluding Observations: Hong Kong' (2016) UN Doc CAT/C/CHN-HKG/CO/5, para 10.
[264] CAT/C/KAZ/CO/3 (n 224) para 24. [265] ibid.

covered by the wording of the second sentence in Article 1(1).[266] Such an interpretation is in clear contradiction with general international human rights (and humanitarian) law as expressed, for instance, in the case law of the *Human Rights Committee* in relation to Article 7 CCPR which considers any form of corporal punishment as a violation of international law.[267] Such interpretation would suggest that the CAT, which was adopted in 1984 with the clear object and purpose of strengthening the already existing State obligations to prevent and punish torture,[268] in fact had lowered this international standard. Accordingly, such an interpretation is clearly incompatible with the object and purpose of the Convention and can, therefore, not be upheld in light of the Vienna Convention on the Law of Treaties, which outline that States 'may not invoke provisions of its internal law as justification for its failure to perform a treaty'.[269] This provision by now forms part of customary international law.[270] In addition, the savings clause in Article 1(2) prevents such an interpretation.[271]

[266] This interpretation seems to be supported by Boulesbaa (n 30) 39 who concludes that the 'exclusion of lawful sanctions therefore enables Parties to violate the Convention without being found in breach of it'.

[267] The HRC has already in its General Comment 7 of 27 July 1982, para 2, expressed the unanimous opinion that the prohibition of Art. 7 CCPR 'must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure'. See CCPR, 'General Comment No 7: Article 7. Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment' (1982). Since the landmark decision of *Osbourne v Jamaica*, No 759/1997, UN Doc CCPR/C/68/D/759/1997, 13 April 2000, para 9.1, in which the Committee unanimously confirmed its 'firm opinion' that 'corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant', this interpretation has developed into constant jurisprudence. See eg *Higginson v Jamaica*, No 792/1998, UN Doc CCPR/C/74/D/792/1998, 28 March 2002; *Sooklal v Trinidad and Tobago*, No 928/2000, UN Doc CCPR/C/73/D/928/2000, 25 October 2001; *Errol Pryce v Jamaica*, No 793/1998, UN Doc CCPR/C/80/D/793/1998, 13 May 2004; and cf Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 167ff. The ECtHR had already held in 1978 that birching of a juvenile as a traditional punishment on the Isle of Man was no longer compatible with a modern understanding of human rights: see *Tyrer v UK*, ECtHR (n 163). In the context of colonialism, both the Trusteeship Council and the General Assembly of the United Nations had already in the late 1940s condemned corporal punishment in trust territories: see UNGA, Res 323(IV), 15 November 1949 and Rodley 'The Treatment of Prisoners' (n 98) 311ff. Similarly, the Geneva Conventions of 1949 and both Additional Protocols of 1977 clearly prohibit any form of corporal punishment, either as a penal or as a disciplinary sanction, in international and non-international armed conflicts: see Rodley 'The Treatment of Prisoners' (n 98) 316ff. Furthermore, r 31 of the UN Standard Minimum Rules for the Treatment of Prisoners, which were adopted in 1955 by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, and unanimously endorsed by ECOSOC in 1957 and the General Assembly in 1971, clearly prohibit corporal punishment as a sanction for disciplinary offences in prison. Also see UNGA, 'United Nations Standard Minimum Rules for the Treatment of Prisoners', as revised by Res 70/175 of 17 December 2015 (Mandela Rules). Finally, the UN Special Rapporteur on Torture (Nigel Rodley), in his 1997 report to the Human Rights Commission, in unambiguous terms, expressed the view that 'corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment' enshrined, inter alia, in the Universal Declaration, CCPR, and CAT. In this context, he also clearly rejected the argument that corporal punishment might be justified by the lawful sanctions clause: see SRT (Rodley) E/CN.4/1997/7 (n 112) paras 4–11. When the Government of Saudi Arabia challenged the mandate of the Special Rapporteur to take up the issue of corporal punishment, the Commission responded by adopting Res 1997/38 which in para 9 'reminds Governments that corporal punishment can amount to cruel, inhuman or degrading punishment or even to torture': see Rodley 'The Treatment of Prisoners' (n 98) 314. See also SRT (Nowak) 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2005) UN Doc A/60/316. SRT (Mendez) 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2012) UN Doc A/67/279, para 27.

[268] In the Preamble to the CAT, States parties expressed the desire 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. See also Ingelse (n 90) 214.

[269] arts 27 and 31 VCLT.

[270] Also see AI, *Combating Torture* (n 135) 70.

[271] See also below 3.4.

147 Another interpretation has been advocated by a number of predominantly Western Governments during the drafting process and by means of declarations of interpretation. According to this opinion, the word 'lawful' refers to both domestic and international law.[272] In other words, a Government may only invoke the lawful sanctions clause if a certain sanction is in conformity with its own domestic law and with international law. But what are the relevant standards of international law? One would first have to think of Article 16 CAT, Articles 7 and 10 CCPR, and the prohibition of all forms of torture, cruel, inhuman or degrading treatment or punishment as a rule of customary international law. Even when a State party to the CAT has not ratified the CCPR and does not accept the prohibition of cruel, inhuman or degrading treatment as a rule of customary international law, it is still bound by the provision of Article 16 CAT which does not contain a lawful sanctions clause.[273]

148 *Nigel Rodley* in his function as UN Special Rapporteur on Torture in 1997 took the view that the lawful sanctions exclusion

> must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems. Deprivation of liberty, however unpleasant, as long as it comports with basic internationally accepted standards, such as those set forth in the United Nations Standard Minimum Rules for the Treatment of Prisoners, is no doubt a lawful sanction.[274]

149 Of course, imprisonment after conviction by a competent and independent court is a lawful sanction as it constitutes one of the explicit exceptions to the right to personal liberty.[275] It is difficult to see how lawful imprisonment, which adheres to international standards and domestic law, can amount to torture as defined in Article 1 CAT, but there could be individual cases, where all elements of Article 1 are fulfilled, even though the application in such cases was not necessarily envisaged in the *travaux préparatoires*. The reason why Article 1 could apply in 'normal' prison settings, is that even a detention setting that adheres to international and domestic standards, can be a traumatic experience and inflict severe mental suffering for some individuals.[276] Other elements of Article 1 would usually not be fulfilled in such cases: while there will often be the purpose to punish the individual, normally, there would not be an intent to inflict pain or suffering with such a prison sentence, especially in restorative justice systems. However, in retributive systems, there might be an intent to inflict suffering through a prison sentence and together with the purpose of punishment, this might lead to severe suffering being inflicted through one (or several) public official(s). Should indeed all domestic and international standards be fulfilled—and only then—the application of the lawful sanction clause might in fact be warranted, as otherwise a prison sentence as such might not

[272] This interpretation is also sometimes found in legal literature: cf eg Ingelse (n 90) 216 who called the lawful sanctions clause 'a monstrosity'.

[273] Such a provision has been discussed in the Working Group but was finally not adopted. See Burgers and Danelius (n 32) 74: 'Nor was any conclusion reached on the suggestion to insert in article 16 a provision which would exclude suffering due to lawful sanctions from the scope of this article.'

[274] SRT (Rodley) E/CN.4/1997/7 (n 112) para 8. This view is also taken by Yuval Ginbar, 'Making Human Rights Sense of the Torture Definition' in Başoğlu (n 120) 284ff.

[275] eg art 5(1)(a) ECHR.

[276] Ginbar (n 274) 284–85. See also Craig Haney and Shirin Bakhshay, 'Contexts of Ill-Treatment: The Relationship of Captivity and Prison Confinement to Cruel, Inhuman, or Degrading Treatment and Torture' in Başoğlu (n 120).

be possible to be implemented. From the *travaux préparatoires* one may conclude that it was not envisaged to prevent prison sentences all together, although there is a clear international tendency to avoid them to the extent possible and have sentences as short as possible. Since in the majority of cases not all domestic and international standards will be fulfilled, one may conclude that practically there is only very rarely a scope of application for the lawful sanctions clause.

150 It has also been argued, correctly, that 'where officials issue clear instructions aimed at creating poor and oppressive conditions of detention as a means of punishing individual prisoners, groups of prisoners, or all prisoners within a facility or a system, their actions may amount to torture and cannot be justified under the 'lawful sanctions' exception'.[277] If there is no intent to create such conditions, there might nevertheless be a violation of Article 16 CAT.

151 Another scenario to be discussed could be solitary confinement: *Sweden* tried to justify *solitary confinement* as a temporary disciplinary measure by invoking the lawful sanctions clause. This interpretation indeed comes close to the original purpose of the lawful sanctions clause in the 1975 Declaration as it falls below the threshold of disciplinary measures prohibited by the Standard Minimum Rules for the Treatment of Prisoners. If a prison ward places an inmate into solitary confinement in line with international and national standards and he or she does so with the purpose of establishing order or for the safety of the prisoner, then Article 1 does not apply. If the prison ward places the person there as a disciplinary sanction, ie for the purpose of punishment, but in line with the Mandela Rules, especially Rule 37(d), and other international and national standards, the individual is placed there nevertheless with the purpose of punishing him/her. If a prison ward has the intent to inflict suffering, then all elements of Article 1 are fulfilled. In fact, this might in principle be another scope of application for the lawful sanctions clause. However, as in the majority of cases not all national and international standards will be fulfilled, in practice only a very limited scope of application for the lawful sanctions clause can be envisaged.

152 Since individual intention and purpose are often not easy to prove, it has also been—rightly—argued that it might be easier and more effective in many cases to demonstrate that conditions of detention amount to other forms of ill-treatment and thus a violation of Article 16.[278] It is clear that also other forms of ill-treatment are absolutely prohibited under international law—while such a finding might not oblige a State to prosecute the responsible actors, there will be a clear legal obligation to alleviate the situation of detention for the persons affected and make sure conditions are humane and in line with Article 16.

3.4 Savings Clause

153 Article 1(2) provides that the definition of torture is 'without prejudice to any international instrument or national legislation which does or may contain provisions of wider application'. This is a typical savings clause as we find it in Article 5(2) CCPR, Article 53 ECHR, Article 29(b) ACHR, and other human rights treaties. It was introduced for the first time by *Sweden* in 1979 and can be found in a slightly amended version in Article 1(3) of the revised Swedish draft in 1979. Although some words have been

[277] Ginbar (n 274) 286. [278] ibid 287.

changed during the discussions, this clause did not give rise to any substantial discussions during the drafting process.[279]

154 Whereas Article 5(2) CCPR refers to 'law, conventions, regulations or custom', Article 1(2) CAT only includes 'any international instrument or national legislation'. Customary international law, therefore, does not seem to be included in this savings clause. The reference to '*national legislation*' means that any prohibition of torture in domestic law which goes beyond the definition of torture in Article 1(1) must be preferred to the CAT definition. This corresponds to the general rule that international human rights treaties only provide minimum standards, which may be exceeded by domestic law.

155 The term '*international instrument*', as it is usually applied by the United Nations,[280] contains both binding international treaties as well as non-binding declarations, principles and other 'soft law' documents. Relevant international instruments in the field of torture are, inter alia, the UDHR, the CCPR, the CRC, the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Standard Minimum Rules for the Treatment of Prisoners, as well as the Geneva Conventions and Additional Protocols. As far as treaties are concerned, the savings clause only applies to treaties which have been ratified by the respective State party. If a State party to CAT, for example, is also a party to the CCPR, then it is prevented by the savings clause in Article 1(2) CAT from invoking the lawful sanctions clause in Article 1(1) for the justification of corporal punishment because Article 7 CCPR, according to the case law of the Human Rights Committee, prohibits any form of corporal punishment.[281] But even if that State party has not ratified any other human rights treaty, the savings clause still prevents it from invoking the lawful sanctions clause as Rule 31 of the Standard Minimum Rules for the Treatment of Prisoners clearly prohibits corporal punishment as a disciplinary sanction, and as the prohibition of inhuman and degrading punishment in Article 5 UDHR must today be interpreted as including every form of corporal punishment. The savings clause is, therefore, another argument to support the finding that the lawful sanctions clause in Article 1(1) needs to be interpreted in line with international standards and cannot be applied to justify corporal punishment.

156 In its Concluding Observations on the US report, the Committee refuted the argument of the *United States* that the Convention is not applicable in times and in the context of armed conflict on the basis of the argument that the 'law of armed conflict' is the exclusive *lex specialis* applicable, and that the Convention's application 'would result in an overlap of the different treaties which would undermine the objective of eradicating torture'. The Committee concluded that the United States should recognize and ensure that the Convention applies at all times, whether in peace, war, or armed conflict, in any territory under its jurisdiction and that the application of the Convention's provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its Articles 1 and 16.[282]

157 On the argument by the Israeli Government that the Convention is not applicable in West Bank or in the Gaza strip and that the law of armed conflict is the *lex specialis*

[279] cf Boulesbaa (n 30) 37. See also above 2.2.

[280] See eg OHCHR, 'Human Rights: A Compilation of International Instruments' (2002) UN Doc ST/HR/1/Rev.6 (Vol I, Part 1 and 2).

[281] See above para 146. [282] CAT/C/USA/CO/2 (n 141) para 13.

and thus the legal regime that takes precedence, the Committee argued in its Concluding Observations that the State party 'maintains control and jurisdiction in in many aspects on the occupied Palestinian territories'.[283] The Committee also recalled regarding the argument of *lex specialis*, that it 'considers that the application of the Convention's provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its articles 1 and 16'.[284] The Committee also referred to the ICJ's Advisory Opinion on the construction of a wall in the Occupied Palestinian Territory, according to which international human rights treaties ratified by the State Party, including the Convention, are applicable in the occupied Palestinian territories.

GERRIT ZACH

[283] CAT, 'Concluding Observations: Israel' (2009) UN Doc CAT/C/ISR/CO/4, para 11.
[284] ibid.

Article 2

Obligation to Prevent Torture

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

1. Introduction 72
2. Travaux Préparatoires 74
2.1 Chronology of Draft Texts 74
2.2 Analysis of Working Group Discussions 75
3. Issues of Interpretation 77
3.1 The Obligation to Take Effective Measures to Prevent Torture 77
3.1.1 Scope of Application 77
3.1.2 Legislative, Administrative, Judicial, or Other Measures 81
3.1.2.1 Criminalization of Torture and Other Legislative Measures 82
3.1.2.2 Detention and Interrogation Safeguards 83
3.1.2.3 Ensuring Independent Monitoring of Places of Detention 85
3.1.2.4 Non-Refoulement and Asylum Procedure 86
3.1.2.5 Investigations and Prosecution 86
3.1.2.6 Providing Redress 87
3.1.2.7 Independence of the Judiciary and Access to Justice 87
3.1.2.8 Combating Trafficking, Sexual, and Gender-based Violence, Including Domestic Violence and Violence against Children, Persons with Disabilities, and Other Groups in Situations of Vulnerability 87
3.1.2.9 Collection of Disaggregated Data 89
3.2 Meaning of 'any territory under its jurisdiction' 90
3.3 The Absolute Nature of the Prohibition of Torture 91
3.4 The Non-Derogable Nature of the Prohibition of Torture 92
3.5 Prohibition of Defence of Obedience to Superior Orders in Domestic Criminal Proceedings 94
3.6 Superior Orders as a Reason for Mitigating Circumstances 96

1. Introduction

1 The Convention does not contain any provision providing for a human right to personal integrity and dignity or not to be subjected to torture, cruel, inhuman or degrading treatment or punishment, similar to Article 7 CCPR or respective provisions in regional human rights treaties. By making reference to Article 7 CCPR in the Preamble, the Convention rather presupposes the existence of this human right and, in 'desiring to make more effective

the struggle against torture' and cruel, inhuman or degrading treatment, creates a number of specific additional State obligations aimed at preventing and punishing torture and cruel, inhuman or degrading treatment. During the drafting process, the drafters decided to make a distinction between torture on the one hand, and cruel, inhuman or degrading treatment on the other. Article 16 requires States parties to prevent cruel, inhuman or degrading treatment and refers to a number of specific obligations in other articles of the Convention which shall equally apply to cruel, inhuman or degrading treatment. Article 2(1) constitutes the corresponding umbrella clause in respect of torture as defined in Article 1.

2 According to Article 2, States parties shall take effective legislative, administrative, judicial, and other measures to prevent torture in any territory under their jurisdiction, ie also on board ships and aircraft, in occupied, and other territories under their jurisdiction. In addition to the preventive obligations explicitly enlisted in the Convention, such as the prohibition of *refoulement* (Article 3), the obligations relating to the criminal prosecution of perpetrators of torture (Articles 4 to 9), the obligation to provide education and training to law enforcement and other personnel (Article 10), to systematically review interrogation methods and conditions of detention (Article 11), to investigate *ex officio* possible acts of torture (Article 12), and any torture allegations (Article 13), and the prohibition of invoking evidence extracted by torture in any proceedings (Article 15), the umbrella clause in Article 2(1) requires States parties also to take other effective measures aimed at preventing torture. Such measures relate primarily to guarantees in the context of the right to personal liberty and the right to a fair trial.

3 The comprehensive State obligations deriving from Article 2(1) are subject to international monitoring by the CAT Committee in all relevant procedures. In addition to the State reporting and inquiry procedure, individual applicants can also invoke violations of this provision in the individual complaints procedure under Article 22 CAT. If applicants claim that they have been subjected to torture in the past, the Committee concludes that the respective State party has failed to take effective measures to prevent torture and, therefore, finds a violation of Article 2(1) in conjunction with Article 1. If the treatment amounts to cruel, inhuman or degrading treatment, the Committee finds a violation of Article 16. But the Committee can also find violations of Article 2(1) in conjunction with other State obligations, such as the obligation in Article 4 to punish perpetrators of torture with appropriate penalties.

4 Article 2(2) confirms that the prohibition of torture is one of the few absolute and non-derogable human rights. No State may invoke any exceptional circumstances, such as war or terrorism, as a justification of torture. This provision, therefore, provides a clear answer to all attempts aimed at undermining the absolute prohibition of torture for the sake of national security in combating global terrorism, such as the 'ticking bomb scenario' or special interrogation methods in the framework of counterterrorism strategies.

5 Finally, Article 2(3) prohibits in criminal proceedings against torturers any defence of obedience to superior orders by any civil or military authority. Domestic laws providing for such a defence therefore violate Article 2(3). But this provision does not exclude criminal courts from applying mitigating circumstances if a perpetrator of torture was forced by a superior order to apply torture.[1]

[1] CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

6 *Declaration (9 December 1975)*[2]

Article 3

No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 4

Each state party shall, in accordance with the provisions of this declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.

7 *IAPL Draft (15 January 1978)*[3]

Article IV

The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture …

Article V

The fact that a person was acting in obedience to superior orders shall not be a defence to a charge of torture.

Article VI

Torture can in no circumstances be justified or excused by a state or threat of war or armed conflict, a state of siege, emergency or other exceptional circumstances, or by any necessity or any urgency of obtaining information, or by any other reason.

8 *Original Swedish Draft (18 January 1978)*[4]

Article 2

1. Each State Party undertakes to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place within its jurisdiction. Under no circumstances shall any State Party permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 3

Each State Party shall, in accordance with the provisions of the present convention, take legislative, administrative, judicial and other measures to prevent torture and

[2] GA Res 30/3452 of 9 December 1975.

[3] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[4] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.

9 *Revised Swedish Draft (19 February 1979)*[5]

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture

3. An order from a superior officer or a public authority may not be invoked as a justification of torture [however, this may be considered a ground for mitigation of punishment, if justice so requires].

2.2 Analysis of Working Group Discussions

10 In written comments *Austria* suggested that Article 3 of the original Swedish draft be merged with Article 2(1)[6] and later, during the 1979 Working Group discussions, it was agreed that the obligations of States in Articles 2(1) and 3 of the original Swedish draft could be consolidated.[7] It was further agreed to delete Article 3 on the basis that its objective had been achieved by the revised Article 2(1) which generally corresponds to Article 4 of the 1975 Declaration.[8] Regarding the precise duty of States parties to the Convention, it was pointed out by one delegate that while a State could undertake to adopt measures to prevent torture, it could not undertake to ensure that torture would never occur. Other delegates also questioned whether Article 2(1) was not too broad, or was juridically sound.[9]

11 There were differing views as to whether reference should be made to torture alone or also to other forms of cruel, inhuman or degrading treatment or punishment. During the 1979 Working Group several delegates suggested the deletion of references to other forms of cruel, inhuman or degrading treatment or punishment because of the difficulty of defining the term.[10] In written comments, the United States expressed the view that it considered it appropriate that Article 3 of the Swedish draft also address cruel, inhuman or degrading treatment or punishment since virtually identical obligations were already imposed under the CCPR and because 'the nature of the obligation was not likely to deter many States from ratifying the Convention'. The United States also sought to incorporate Article 7(2) of the Swedish draft as a second paragraph to this Article which requires that torture be punished by severe penalties.[11] At the same time, the United States took the opposite view regarding Article 2(2) of the Swedish draft, preferring to limit its scope to torture alone.

12 During the discussion in the 1979 Working Group there was a *French* proposal that the words 'within its jurisdiction' be replaced by 'any territory under its jurisdiction'.[12] It was stated that the phrase 'within its jurisdiction' might be interpreted too widely so as to cover citizens of one State who are resident within the territory of another

[5] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

[6] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, para 52.

[7] Report of the Working Group of the Commission on Human Rights (1979) UN Doc E/CN.4/L.1470, para 31.

[8] ibid, para 38. [9] ibid, para 31. [10] ibid, para 34. [11] E/CN.4/1314 (n 6) para 57.

[12] ibid, para 54.

State. In support of a proposal to use the wording 'any territory under its jurisdiction', it was emphasized that such wording would cover torture inflicted aboard ships or aircraft registered in the State concerned as well as occupied territories.[13] According to *Burgers* and *Danelius* 'territory under its jurisdiction' is intended to include not only the actual land and territory of the State and its territorial sea, but also ships flying its flag and aircraft registered in the State concerned as well as platforms and other installations on its continental shelf.[14]

13 In written comments the *United States* proposed a new article, very similar to Article 2(2) and (3) which would provide that there is no justification for any act of torture. However, they chose to limit the proposed article to torture as they argued that there was no precise definition of cruel, inhuman or degrading treatment or punishment. The United States argued that cruel, inhuman or degrading treatment or punishment was a relative term and that 'international standards are more difficult to achieve and what might constitute cruel, inhuman or degrading treatment in times of peace might not rise to that level during emergency conditions'.[15] The *Holy See* welcomed the provision rejecting any justification of torture on grounds of exceptional circumstances 'in light of certain schools of thought which seek to give national security priority over the rights of the person'.[16] It is interesting to note that the drafters of the 1975 Declaration were unable to reach consensus on the same issue. A proposal to delete the second sentence of Article 3 of the Declaration which referred to 'exceptional circumstances which should not be invoked as a justification for torture' was not taken up and the language remained in the final text.[17] Regarding the term 'internal political instability', France felt that this term did not correspond to any clear legal concept and could be deleted.[18] The *Swiss* delegation noted that Article 2(2) of the original Swedish draft and its analogous provision in Article VI of the IAPL draft were consistent with existing international law, which prohibits acts of torture and ill treatment at all times.[19] At the same time they proposed a safeguard clause according to which the provision stating that 'no exceptional circumstances could justify torture or other cruel, inhuman or degrading treatment or punishment' would be without prejudice to the provisions of the four Geneva Conventions of 12 August 1949 for the protection of victims of armed conflicts as well as the two Additional Protocols thereto of 10 June 1977.[20]

14 It is clear that an order by a superior official of a State organ may be no justification for torture. The Nuremberg Principles had already established that *respondeat superior* was no justification for the perpetration of serious international crimes including torture.[21]

[13] E/CN.4/L.1470 (n 7) para 32.

[14] J Herman Burgers and Hans 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) 124–25.

[15] E/CN4/1314 (n 6) para 53.

[16] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.3, para 6.

[17] Report of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1975) A/CONF.56/10, para 294.

[18] E/CN.4/1314 (n 6) para 54. [19] ibid, para 55.

[20] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1, para 5.

[21] Article 8 of the Charter of the International Military Tribunal of Nuremberg reads: 'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.'

This was the first time that this principle of *respondeat superior* had been included in a human rights treaty and therefore also the first time that this principle was rejected as a justification for torture in a human rights treaty. During the drafting there was discussion as to the possibility of whether the order of a superior, although not being a justification, could still be an extenuating fact justifying a milder penalty in line with Article 8 of the Nuremberg Charter.[22] In written comments the *United States* noted that although orders from a superior officer cannot justify torture, it is a factor that should be considered in mitigation of punishment and proposed the following new Article 4:

1. No exceptional circumstances whatsoever, whether a state or threat of war, internal political instability or any other public emergency may be invoked as a justification for torture.
2. An order from a superior officer or a public authority may not be invoked as a justification for torture.[23]

15 During the 1979 Working Group discussions one (unidentified) delegate proposed the addition to paragraph 3 of a provision indicating that superior orders may be considered in mitigation of punishment if justice so requires. At the same time one (unidentified) delegate expressed his reservation about this paragraph. It was agreed to include the addition in brackets for consideration by the Commission on Human Rights.[24] Following discussion in the 1980 Working Group it was decided that the wording in square brackets should be deleted in Article 2(3).[25] There is nothing in the records that indicates what was actually said. *Burgers* and *Danelius* are also silent on this point. It is interesting to note that the ILC, in its formulation of the Nuremberg Principles, had deleted the sentence that dealt with the mitigation of punishment in Principle IV, regarding the reference to 'mitigation of punishment' as unnecessary.[26] Principle IV was adopted as '[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible for him'.[27] In its report to the General Assembly the ILC explained that the question of leniency in punishment should be determined by a competent court during the sentencing process, stating that the text was based on the principle contained in Article 8 of the Charter of the Nuremberg Tribunal.

3. Issues of Interpretation

3.1 The Obligation to Take Effective Measures to Prevent Torture

3.1.1 Scope of Application

16 The Convention, strictly speaking, does not prohibit torture or cruel, inhuman or degrading treatment. A provision stating that no one shall be subjected to torture and cruel, inhuman or degrading treatment, as contained in Article 7 CCPR and similar

[22] The same principle could be found later in Art 7(3) and (4) of the ICTY Statute.

[23] E/CN.4/1314 (n 6) para 53. [24] E/CN.4/L.1470 (n 7) para 35.

[25] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367, para 13.

[26] See International Law Commission (ILC) Yearbook, Vol 1 (1950), 288. See Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 84, n 165.

[27] See International Law Commission Yearbook, Vol 2 (1950) 375. See Boulesbaa (n 26) 84, n 167.

provisions in regional human rights treaties, is missing in the CAT and had already been missing in the various proposals discussed during the drafting history.[28] It is likely that such an individual right was taken for granted by the drafters and needs to be assumed to be implicit in the Convention.[29] After all, in the Preamble the Convention explicitly refers to Article 7 CCPR and expresses the desire to make more effective the struggle against torture and cruel, inhuman or degrading treatment throughout the world.

17 The formulation of Article 2 (1) must be interpreted as including the obligation of States parties to *respect* and *protect* the human right not to be subjected to torture. But the main emphasis of this formulation, as in Article 16, is put on the positive obligation of States parties to *fulfil*.[30] Article 2(1) CAT is drafted in similar words as Article 2(2) CCPR. The obligation to fulfil, derived from the latter provision, means to enact laws, to provide an effective remedy and procedural guarantees, to establish relevant legal institutions and other legislative, administrative, political, or judicial measures.[31] Article 2(1) CAT puts the focus of the obligation to fulfil on effective measures to *prevent* acts of torture. This reflects the general object and purpose of the Convention, which is to strengthen the existing prohibition of torture by specific measures of criminal law aimed at deterring torture and other measures of a preventive nature.

18 The Committee has stipulated that the obligation to prevent torture and other ill-treatment under Articles 2 and 16 are 'indivisible, interdependent and interrelated'[32] and that the obligation to prevent cruel, inhuman or degrading treatment in practice very much overlaps and is largely congruent with the obligation to prevent torture.[33] This is also reflected in the practice of the Committee, as it usually references Articles 2 and 16 together in its recommendations to States as part of the Concluding Observations.

19 The Committee has clarified in its General Comment on Article 2 that States parties are obliged to undertake 'effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture' as laid down in the Convention'.[34] The Committee has emphasized that States bear responsibility not only for the acts and omissions of their officials, but also for others, such as agents, private contractors, and others acting in official capacity or on behalf of the State, in conjunction with the State under its direction or control, or otherwise under colour of law.[35] States parties not fulfilling these obligations violate the Convention.

20 The question of whether the violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment is at the same time a violation of the CAT and whether a victim of an act of torture or cruel, inhuman or degrading treatment can

[28] See above 2.2; see also Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 242ff.

[29] Pieter Kooijmans, 'The Ban on Torture: Legal and Socio-Political Problems' in Franz Matscher (ed), *Folterverbot sowie Religions- und Gewissensfreiheit im Rechtsvergleich* (Kehl 1990), 95; Ingelse (n 28) 243.

[30] On the obligations of States to respect, fulfil and protect human rights under international human rights law see Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill/Nijhoff 2003).

[31] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 38 (*CCPR Commentary*).

[32] CAT/C/GC/2 (n 1) para 3.

[33] See below Art 16, 3.2 on whether Arts 3 to 15 apply not only to torture but also to other forms of ill-treatment.

[34] CAT/C/GC/2 (n 1) para 18. See also Art 1 for a more detailed discussion of these terms.

[35] CAT/C/GC/2 (n 1) para 15. See also above Art, 1 § 130.

submit an individual complaint to the CAT Committee under Articles 2 or 16, respectively by now is clearly settled:[36] not only *Pieter Kooijmans*, the first UNSRT, answered this question in the affirmative by referring to the implicit obligation of States under Article 2(1),[37] but extensive case law of the Committee in which it has found a violation of Article 2(1) confirm this.

21 Generally, Article 2(1) is seen as an umbrella clause encompassing all the obligations to prevent torture as included but not limited to the in various provisions of the Convention, and Article 16 as constituting an obligation for States parties to prevent cruel, inhuman and degrading treatment. The typical obligations to prevent torture can be found in Articles 10 (education and training of law enforcement and other personnel), 11 (systematic review of interrogation methods), 12 (*ex officio* investigation of torture cases), 13 (investigation of allegations by torture victims), and 15 (non-admissibility of evidence extracted by torture in any proceedings). But also the prohibition of *refoulement* in Article 3 and the obligation of States to make torture a criminal offence with appropriate penalties in Article 4 and related provisions about universal and other forms of criminal jurisdiction in Articles 5 to 9 have a strong preventive character. Even Article 14, which provides for the right of torture victims to redress, can be interpreted as a measure with a deterrent effect aimed at preventing torture in the future.[38] If the individual torturers were held accountable to pay full compensation for all long-term rehabilitation costs of their torture victims, this would probably have a stronger deterrent effect than many criminal sanctions.[39]

22 The understanding of Article 2 as an umbrella clause is partly, but not consistently reflected in the Committee's individual complaints procedure: when finding violations of other Articles of the Convention, the Committee in most cases (except with regard to Article 3) seems to find a violation of Article 2 (1).[40] At the same time, the Committee has found numerous violations of the Convention, especially with regard to Article 3, without finding a violation of Article 2(1).[41] When consistently interpreting Article 2(1) as umbrella clause of the Convention, in principle, every time there is an act of torture, the Committee would actually also have to find a violation of Article 2(1).

23 Another question has been whether every single act of torture means that the State concerned has failed to take effective measures to prevent torture and, therefore, violated its respective obligation in Article 2(1). The practice of the Committee differs in this

[36] See Ingelse (n 28) 243. In contrast to the original Swedish draft which still combined torture and cruel, inhuman or degrading treatment, the drafters agreed to separate the respective obligations. But Article 16 contains a provision similar to Article 2(1) requiring States parties to prevent in any territory under their jurisdiction other acts of cruel, inhuman or degrading treatment not amounting to torture as defined in Article 1. See below Art 16, 3.6.

[37] Kooijmans (n 29) 95.

[38] See also below Art 14.

[39] See the landmark decision of *Guridi v Spain*, No 212/2002, UN Doc CAT/C/34/D/212/2002, 17 May 2005, where the Committee confirmed this broad interpretation.

[40] See eg *Abdulrahman Kabura v Burundi*, No 549/2013, UN Doc CAT/C/59/D/549/2013, 11 November 2016 with regard to Arts 2(1), 11, 12, 13, 14, 15, and 16; *Elaïba v Tunisia*, No 551/2013, UN Doc CAT/C/57/D/551/2013, 6 May 2016, with regard to Arts 2(1), 11, 13–15; *Saidi Ntahiraja v Burundi*, No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015, with regard to Arts 2(1), 11, 13, and 14.

[41] See eg *MB et al v Denmark*, No 634/2014, UN Doc CAT/C/59/D/634/2014, 25 November 2016; *RD et al v Switzerland*, No 558/2013, UN Doc CAT/C/57/D/558/2013, 13 May 2016; *LA v Algeria*, No 531/2012, UN Doc CAT/C/57/D/531/2012, 12 May 2016 and many more cases in which a violation of Article 3 but not Article 2(1) was found. In the case *Ennaâma Asfari v Morocco*, No 606/2014, UN Doc CAT/C/59/D/606/2014, 15 November 2016 a violation of Arts 13, 14, and 15, but not Art 2 was found.

regard: In a case of torture it usually finds both, a violation of Article 1, as well as Article 2(1).[42] However, it has also found violations of Article 2(1) read in conjunction with Article 1, but not of Article 1,[43] as well as a few cases where it found a violation of Article 1 and not of Article 2.[44] In *Ali Ben Salem v Tunisia* and *Saadia Ali v Tunisia*, where the Committee only found a violation of Article 1, but rejected finding a violation of Article 2, it did not dispute that a case of torture occurred but concluded—without any more detailed argumentation or analysis—that 'the documents communicated to it furnish no proof that the State party has failed to discharge its obligations under these provisions of the Convention'.[45] This conclusion is insofar surprising, as that every single act of torture means that the State has failed to take effective measures to prevent torture and, therefore, violated its respective obligation in Article 2(1). As already concluded above,[46] it would be expected that in a case of torture, the Committee finds a violation of Article 2 (1) in conjunction with Article 1.[47]

24 While Article 2(1) stipulates that each State party has to take effective measures to prevent torture, there is no explicit reference in Article 2(1) to the time frame to be applied in implementing these measures. The question therefore arises as to whether such measures can be implemented gradually through progressive implementation or whether States parties are required to meet their obligations immediately.[48] In general, the Committee has not accepted the principle of progressive implementation. It has rejected the argument that compliance with Article 2 was dependent on '… limited budgetary resources or limited professional awareness among staff'.[49] The Committee, however, has not always interpreted this provision as to require strict immediate implementation. In its concluding observations to *Kazakhstan*, it recommended that the State party proceed 'promptly' to amend its domestic penal law to include the crime of torture, consistent with the Convention, and to take 'urgent and effective steps' to ensure the investigation, prosecution, and punishment regarding torture allegations.[50] In contrast, in the case of *Romania*, the Committee stated that 'the existing Government could not be seriously blamed, because it was quite clear that prison conditions could not be changed overnight and that considerable financial investment was needed. Nevertheless, the Romanian

[42] *Dmytro Slyusar v Ukraine*, No 353/2008, UN Doc CAT/C/47/D/353/2008, 14 November 2011, para 9.4; *Gerasimov v Kazakhstan*, No 433/2010, UN Doc CAT/C/48/D/433/2010, 24 May 2012, para 13, *Djamila Bendib v Algeria*, No 376/2009, UN Doc CAT/C/51/D/376/2009, 8 November 2013, paras 6.2 and 6.3; *Boniface Ntikarahera v Burundi*, No 503/2012, UN Doc CAT/C/52/D/503/2012, 12 May 2014, para 7; *Nouar Abdelmalek v Algeria*, No 402/2009, UN Doc CAT/C/52/D/402/2009, 23 May 2014, para 11.2; *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012, UN Doc CAT/C/55/D/500/2012, 4 August 2015, para 17.4; *X v Burundi*, No 553/2013, UN Doc CAT/C/55/D/553/2013, 10 August 2015, para 7.2; *Patrice Gahungu v Burundi*, No 522/2012, UN Doc CAT/C/55/D/522/2012, 10 August 2015, paras 7.2–7.4; *EN v Burundi*, No 578/2013, UN Doc CAT/C/56/D/578/2013, 25 November 2015, paras 7.3 and 7.4. See also above Art 1, §§ 134 and 135 on the question of whether there can be a legal obligation emanating out of Art 1.

[43] *Déogratias Niyonzima v Burundi*, No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014, para 8.2. *Hilda Mariolyn Hernández Colmenarez and Francisco Arturo Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011, UN Doc CAT/C/54/D/456/2011, 15 May 2015, paras 6.6, 7.

[44] *Ali Ben Salem v Tunisia*, No 269/2005, UN Doc CAT/C/39/D/269/2005, 7 November 2007, para 16.5; *Saadia Ali v Tunisia*, No 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008, paras 15.4, 15.5.

[45] *Ali Ben Salem v Tunisia*, No 269/2005 (n 44) para 16.6; *Saadia Ali v Tunisia*, No 291/2006 (n 44) para 15.6.

[46] See also above Art 1 §§ 134 and 135.

[47] This was also confirmed in an informal consultation with the CAT Committee, 21 November 2017.

[48] Boulesbaa (n 26) 70ff; Ingelse (n 28) 261ff. See also above 2.1.

[49] CAT/C/SR.101, para 15.

[50] A/56/44, para 129.

authorities should do everything they could to demonstrate their intention to improve the situation.'[51] The Committee therefore has allowed some degree of flexibility concerning the time frame of implementation. There may be circumstances in which a State is allowed, temporarily, some latitude in its compliance, while at the same time the State has an obligation to continually improve its national laws as well as the practical application of these laws in line with the Convention and the Committee's concluding observations and views adopted on individual communications.[52] An act of torture, however, can never be justified. The Committee has made clear that 'torture should be prohibited whatever the stage of development of a country and whatever the nature of the offence being investigated'.[53]

25 *Boulesbaa* rejects the idea of *progressive implementation* but at the same time asserts that the obligation of States to prevent torture is not absolute: 'The obligation is rather to take steps to achieve reasonable results in the prevention of torture'.[54] This contradiction is based on a simple misunderstanding of the obligations of States to respect and ensure human rights. Of course, the obligation of States to refrain from practicing torture (*obligation to respect*), which is also implicit in Article 2(1) as we have seen above, is absolute and, therefore, not subject to progressive implementation. Every individual case of torture, as defined in Article 1, constitutes a violation of this absolute and non-derogable right. But positive obligations of States, be they obligations of conduct or result, aimed at fulfilling a certain human right by means of legislative, administrative, judicial, political, and other measures are always relative and, therefore, subject to the principle of progressive implementation. Taking into account the indivisibility and interdependence of all human rights, this principle can no longer be applied exclusively to economic, social, and cultural rights, but must be applied to civil and political rights as well.[55] Just to give an example: if there exists a reasonable training programme on how to prevent torture for prison and police officials, States parties are still under an obligation under Article 10 CAT to improve this training programme further in accordance with 'good practices' by means of 'progressive implementation' and to report on these 'new measures taken' to the Committee in accordance with Article 19(1). But the total absence of any anti-torture training would clearly violate the State obligation under Article 10 as well as its general obligation to take effective administrative measures to prevent acts of torture under Article 2(1).

26 While the Committee has recognized that States parties may choose the measures through which they implement their obligations, it has equally emphasized that a States party must take measures that are effective and consistent with the object and purpose of the Convention.[56] In the reporting procedure, the Committee interprets this provision in the broadest sense and requests States parties to take a variety of measures aimed at preventing torture.

3.1.2 Legislative, Administrative, Judicial, or Other Measures

27 Article 2 stipulates that each State Party shall take 'effective legislative, administrative, judicial or other measures to prevent acts of torture'. The formulation that

[51] CAT/C/SR.111, para 18. [52] CAT/C/GC/2 (n 1) para 4. [53] A/47/44, para 65.
[54] Boulesbaa (n 26) 71 and 53. [55] See Nowak, 'Introduction' (n 30).
[56] CAT/C/GC/2 (n 1) para 6. CAT/C/SR.12, para 22; CAT/C/SR.14, para 34; CAT/C/SR.32, paras 24 and 34; CAT/C/SR.36, para 32; CAT/C/SR.61, para 57; CAT/C/SR.77, para 22; CAT/C/SR.91, paras 36 and 43; CAT/C/SR.122, para 68; CAT/C/SR.143/Add.2, para 39; CAT/C/SR.162, para 77; CAT/C/SR.193, para 44; CAT/C/SR.203, para 51; CAT/C/SR.232, para 38; CAT/C/SR.238, para 35.

'legislative, administrative, judicial or other measures' are to be taken to prevent torture means that there can be other measures than legislative, administrative, or judicial, as the word 'or' indicates.

28 Though the Committee has considered in a general sense which measures must be taken by States parties to prevent torture, it has equally emphasized that no exhaustive list exists and obligations to take preventive measures go beyond the items enumerated specifically in the Convention or in its interpretation.[57] Further, as methods of prevention are continuously evolving, the Committee has explained that Article 2 provides it with the authority to expand the scope of the measures required to prevent torture by building on other articles.[58] In its Concluding Observations the Committee has developed a wealth of measures to be comprised the formulation 'legislative, administrative, judicial or other measures', some of them with concrete reference to other articles of the Convention, some of them developed from the broad understanding of the formulation of Article 2 as an umbrella clause for State obligations to prevent torture.[59]

3.1.2.1 Criminalization of Torture and Other Legislative Measures

29 The Committee has affirmed that taking effective measures against torture requires the States parties to ensure the implementation of Convention provisions by providing for the direct effect of these provisions. This may be by means of the transposition of the Convention provisions into national provisions or by recognizing the direct effect of the Convention provisions.[60] Recognizing the Convention text only is not sufficient, but rather it must be transposed into clear national provisions and instructions, also in order to allow the Convention to be directly invoked in Court.[61] The Committee has expressed much approval for those States parties that have adopted a special law to implement Convention provisions directly.[62]

30 In particular, States must criminalize torture under its criminal law, in accordance, at a minimum, with the elements of torture as defined in Articles 1 and 4 of the Convention.[63] The Committee has also on many other occasions affirmed the importance of *other legislative measures*, eg to adopt a definition for terrorist acts and ensure treatment in compliance with the Convention and to ensure that counterterrorism and national security legislation are in compliance with the Convention,[64] to prohibit corporal punishments[65]

[57] CAT/C/GC/2 (n 1) paras 13 and 25. See eg UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'.

[58] CAT/C/GC/2 (n 1) para 14. [59] See above § 18 on Art 2 as umbrella clause.

[60] CAT/C/SR.1, para 23; CAT/C/SR.34, para 21; CAT/C/SR.35, para 13; CAT/C/SR.63, paras 33 and 57; CAT/C/SR.122 (n 56), paras 7, 17 and 29; CAT/C/SR.123, para 25, CAT, 'Concluding Observations: Mauritania' (2013) UN Doc CAT/C/MRT/CO/1, para 9; CAT, 'Concluding Observations: Netherlands' (2013) UN Doc CAT/C/NLD/CO/5-6, para 9; CAT, 'Concluding Observations: New Zealand' (2015) UN Doc CAT/C/NZL/CO/6, para 8; CAT, 'Concluding Observations: Norway' (2012) UN Doc CAT/C/NOR/CO/6-7, para 6. See also below Art 4.

[61] CAT/C/NOR/CO/6-7 (n 60) para 6.

[62] CAT/C/SR.16, para 41; CAT/C/SR.46, para 97; CAT/C/SR.111 (n 51) para 28.

[63] CAT/C/GC/2 (n 1) para 8. See also below Art 4.

[64] CAT, 'Concluding Observations: Australia' (2014) UN Doc CAT/C/AUS/CO/4-5, para 14. CAT/C/MRT/CO/1 (n 60) para 10.

[65] CAT, 'Concluding Observations: Belgium' (2014) UN Doc CAT/C/BEL/CO/3, para 27.

and criminal sanctions such as flogging and stoning by law,[66] and to prohibit hazing in the armed forces.[67]

31 A the same time, legislative measures by themselves are not deemed sufficient. For example its Concluding Observations on Peru, the Committee expressed the opinion that the legislative and administrative measures adopted in order to comply with the Convention were not effective and therefore did not meet the requirement of Article 2(1).[68] This is also why the Committee usually recommends States parties to take a combination of measures, ie a mix of legislative, administrative, judicial, as well as practical implementation measures. One example in this regard is that in connection with implementation of the Convention and legislative measures to this end, States parties should at the same time make sure that public officials, judges, magistrates, prosecutors, and lawyers receive training so that they can apply the Convention and the jurisprudence of the Committee.[69]

3.1.2.2 Detention and Interrogation Safeguards

32 The Committee has confirmed on many occasions that Article 2 requires the guarantee of a number of fundamental safeguards of suspected persons without which torture and other ill-treatment would be more likely to occur.[70] Also in the inquiry procedure, in finding that torture was systematically practiced in *Lebanon*, the Committee put particular emphasis on the lack of adequate legislation and implementation of fundamental legal safeguards.[71] These rights include, inter alia, the right of prompt, unimpeded, confidential access to a lawyer, including during detention and if necessary to legal aid from the moment of the arrest and irrespective of the nature of the alleged crime.[72] Furthermore, notification of relatives[73] and access to an independent medical assistance, without the presence of an officer, or at least out of hearing of authorities and free of charge should be ensured.[74]

[66] CAT, 'Concluding Observations: Qatar' (2013) UN Doc CAT/C/QAT/CO/2, para 12.

[67] CAT, 'Concluding Observations: Russia' (2012) UN Doc CAT/C/RUS/CO/5, para 16.

[68] A/50/44, paras 62–73.

[69] CAT, 'Concluding Observations: Rwanda' (2012) UN Doc CAT/C/RWA/CO/1, para 8; CAT/C/MRT/CO/1 (n 60) para 9; CAT/C/NLD/CO/5-6 (n 60) para 9; CAT/C/NZL/CO/6 (n 60) para 8.

[70] See also below Art 11, 3.5.2.

[71] The Committee has found that the systematic practise of torture 'seems to a large extent to be the result of the liberate disregard for fundamental legal safeguards' and that the lack of granting the right to a lawyer and to an independent medical examination 'contribute to the impunity of perpetrators': Report of the Committee against Torture to the General Assembly, A/69/44, Annex VIII, para 32ff. See also below Art 20.

[72] CAT, 'Concluding Observations: Armenia' (2012) UN Doc CAT/C/ARM/CO/3, para 11, CAT, 'Concluding Observations: Austria' (2010) UN Doc CAT/C/AUT/CO/4-5, para 11; CAT, 'Concluding Observations: Azerbaijan' (2009) UN Doc CAT/C/AZE/CO/3, para 11; CAT, 'Concluding Observations: Azerbaijan' (2016) UN Doc CAT/C/AZE/CO/4 (n 72) para 12; CAT, 'Concluding Observations: Belarus' (2011) UN Doc CAT/C/BLR/CO/4, para 6; CAT, 'Concluding Observations: Mexico' (2012) UN Doc CAT/C/MEX/CO/5-6, para 9; CAT, 'Concluding Observations: Mongolia' (2011) CAT/C/MNG/CO/1, para 8; CAT, 'Concluding Observations: Montenegro' (2014) UN Doc CAT/C/MNE/CO/2, para 7; CAT, 'Concluding Observations: Morocco' (2011) UN Doc CAT/C/MAR/CO/4, para 7; CAT, 'Concluding Observations: Paraguay' (2011) UN Doc CAT/C/PRY/CO/4-6, 11; CAT, 'Concluding Observations: Philippines' (2009) UN Doc CAT/C/PHL/CO/2, para 7; CAT, 'Concluding Observations: Poland' (2013) CAT/C/POL/CO/5-6, para 8.

[73] CAT/C/SR.51, para 34; CAT/C/SR.130, para 13; CAT/C/SR.201, paras 16 and 26; CAT/C/SR.234, para 79; CAT/C/24/3, para 21. CAT/C/ARM/CO/3 (n 72) para 11. CAT/C/AZE/CO/4 (n 72) para 12. CAT/C/BLR/CO/4 (n 72) para 6. CAT, 'Concluding Observations: Mauritius' (2011) UN Doc CAT/C/MUS/CO/3, para 10.

[74] A/48/44/Add.1, para 26; CAT/C/SR.50, para 21; CAT/C/SR.91 (n 56) para 56; CAT/C/SR.201 (n 73) paras 16 and 26; CAT, 'Concluding Observations: Andorra' (2013) CAT/C/AND/CO/1, para 8; CAT/C/ARM/CO/3 (n 72) para 11; CAT/C/AZE/CO/3 (n 72) para 11. CAT/C/AZE/CO/4, para 12; CAT/C/BLR/CO/4 (n 72) para 6; CAT, 'Concluding Observations: Portugal' (2008) UN Doc CAT/C/PRT/CO/4,

33 States parties shall make sure that all detainees are promptly brought before a judge from the moment of their actual deprivation of liberty and have the possibility to challenge the legality of their detention or treatment effectively and expeditiously, including when under administrative detention.[75] The Committee stipulated repeatedly that the maximum period of detention before a person is brought before a judge shall be forty-eight hours.[76] Thus, in the inquiry procedure under Article 20 of the Convention, the Committee unsurprisingly found in its report on *Turkey*, that detention for thirty days before involving a magistrate was too long.[77] In cases of a lacking supervision of detention by the competent judicial authorities or a competent oversight mechanism, the Committee has also found a violation of Article 2, paragraph 1, read in conjunction with article 1 of the Convention, due 'to an increased risk of being subjected to acts of torture and [the deprivation] of any possible remedy'.[78]

34 The Committee confirmed on many occasions that these rights are to be afforded by law and in practice from the very outset of their deprivation of liberty and have to be the same for all detainees, including non-citizens, including in any form of administrative detention.[79] In case detention safeguards were not granted, also in case of administrative detention, the Committee has repeatedly found a violation of Article 2 in individual complaints proceedings.[80]

35 According to the Committee, other essential safeguards are the verbal and written information relating to the detainee's rights in a language that they understand and generally to receive language assistance through translation and interpretation,[81] the right to be informed of charges, and the right to remain silent.[82]

para 9; CAT, 'Concluding Observations: Romania' (2015) UN Doc CAT/C/ROU/CO/2, para 7; CAT/C/PRY/CO/4-6 (n 72).

[75] CAT/C/GC/2 (n 1) para 13. CAT, 'Concluding Observations: Albania' (2012) UN Doc CAT/C/ALB/CO/2, para 13; CAT/C/ARM/CO/3 (n 72) para 11; CAT/C/AZE/CO/3 (n 72) para 11. CAT/C/BLR/CO/4 (n 72) para 6; CAT, 'Concluding Observations: Moldova' (2010) UN Doc CAT/C/MDA/CO/2, para. 10.

[76] A/54/44, para 103. CAT/C/ALB/CO/2 (n 75) para 17; CAT/C/MRT/CO/1 (n 60) para 10; CAT/C/RWA/CO/1 (n 69) para 11.

[77] A/48/44/Add.1, para 25.

[78] *Djamila Bendib v Algeria*, No 376/2009 (n 42) para 6.5. Also see *Nouar Abdelmalek v Algeria*, No 402/2009 (n 42) para 11.5. *Boniface Ntikarahera v Burundi*, No 503/2012 (n 42) para 6.3.

[79] CAT/C/ARM/CO/3 (n 72) para 11; CAT/C/QAT/CO/2 (n 66) para 10; CAT/C/MDA/CO/2 (n 75) para 10; CAT/C/RUS/CO/5 (n 67) para 9; CAT/C/RWA/CO/1 (n 69) para 12.

[80] CAT/C/GC/2 (n 1) para 17; *Ali Aarrass v Morocco*, No 477/2011, UN Doc CAT/C/52/D/477/2011, 19 May 2014, para 10.3. The Committee noted with concern that the Anti-Terrorism Act did not allow access to a lawyer until after six days. See *Boniface Ntikarahera v Burundi*, No 503/2012 (n 42) para 6.3; and *Déogratias Niyonzima v Burundi*, No 514/2012 (n 43) para 8.2; *Abdulrahman Kabura v Burundi*, No 549/2013 (n 40). Decision adopted by the Committee under article 22 of the Convention, concerning communication No 549/2013, CAT/C/59/D/549/2013 against Burundi (*Abdulrahman Kabura v Burundi*, No 549/2013 (n 40), para 7.8); *Déogratias Niyonzima v Burundi*, No 514/2012 (n 43) para 8.3; *EN v Burundi,* No 578/2013 (n 42) para 7.5; *Saidi Ntahiraja v Burundi*, No 575/2013 (n 40) para 7.8; *Patrice Gahungu v Burundi*, No 522/2012 (n 42) para 7.6; *X v Burundi*, No 553/2013 (n 42) para 7.5; *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 42) para 17.5; *Djamila Bendib v Algeria*, No 376/2009 (n 42) para 6.5; *Gerasimov v Kazakhstan*, No 433/2010 (n 42) para 12.2; *Dmytro Slyusar v Ukraine*, No 353/2008 (n 42) para 9.2.

[81] CAT/C/SR.162 (n 56), para 52; CAT/C/SR.191, para 46; CAT/C/SR.203 (n 56) para 37; CAT/C/SR.213, para 37; CAT/C/SR.219, para 33; CAT/C/SR.234 (n 73), para 54; CAT/C/SR.245, para 20; CAT/C/SR.247, para 37; CAT/C/SR.254, para 2; CAT/C/SR.256/Add.1, para 37; CAT/C/ALB/CO/2 (n 75) para 13; CAT/C/SR.329, para 22; CAT, 'Concluding Observations: Saudi Arabia' (2016) UN Doc CAT/C/SAU/CO/2, para 14.

[82] A/48/44, para 53; CAT/C/BLR/CO/4 (n 72) para 6; CAT, 'Concluding Observations: Madagascar' (2011) UN Doc CAT/C/MDG/CO1, para 9; CAT/C/PRT/CO/4 (n 74) para 8.

36 Also, the maintaining of an official (electronic) register where all detainees are systematically registered from the moment of deprivation of liberty was recommended by the Committee,[83] with lawyers and relatives of those detained having access to these records.[84] Unrecorded places of detention are not permissible.

37 A worldwide study looking at the effectiveness of torture prevention measures equally concluded that procedural protections in the first moments of arrest have the greatest impact to prevent torture.[85]

38 *In Ramiro Ramírez Martínez et al v Mexico*, the Committee has voiced its concern regarding preventive custody being implemented in military facilities, particularly its excessive duration and the lack of monitoring, as well as the number of complaints of torture by persons subjected to preventive custody, which lead to an environment that encouraged confessions obtained under torture and these being used as evidence.[86] The Committee has therefore found a violation of Article 2(1). As part of the State reporting procedure, the Committee has also recommended that States parties should reduce preventive detention to an absolute minimum and consider abolishing the practice for young offenders.[87]

39 In the case of the State party's failure to introduce measures to prevent torture of prisoners by or with the acquiescence of authorities, as well as prisoner-on-prisoner violence and in the absence of an independent prison monitoring mechanisms, the Committee has equally found a violation of Articles 2 and 11 of the Convention in the individual complaints procedure.[88]

3.1.2.3 Ensuring Independent Monitoring of Places of Detention

40 The Committee has stipulated that States parties should ensure that there are impartial mechanisms that visit and inspect places of deprivation of liberty.[89] With the entry into force of the OP in June 2006, States parties to the CAT are provided with an excellent opportunity to open up their prisons and detention centres to more transparency and independent monitoring by both the *UN Subcommittee on Prevention* and so-called *National Preventive Mechanisms* (NPMs). Preventive visits to places of detention have a double purpose. The very fact that national or international experts have the power to inspect every place of detention at any time without prior announcement has a strong deterrent effect by shedding light on closed institutions. At the same time, such visits create the opportunity for independent experts to examine, at first hand, the treatment of prisoners and detainees and the general conditions of detention. One may therefore conclude that the ratification of the OP by States parties to the CAT and the creation of independent national preventive mechanisms in line with OPCAT and the Paris Principles constitute important measures in the sense of Article 2(1) CAT.[90]

[83] CAT/C/GC/2 (n 1) para 13; CAT/C/ARM/CO/3 (n 72) para 11. CAT/C/AZE/CO/3 (n 72) para 11; CAT/C/MUS/CO/3 (n 73) para 10. CAT/C/PHL/CO/2 (n 72) para 7.

[84] CAT/C/ARM/CO/3 (n 72) para 11; CAT/C/BLR/CO/4 (n 72) para 6.

[85] Carver and Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016) 68.

[86] *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 42) para 17.5. For State obligations to ensure conditions of detention in line with the Convention, see also Art 16, 3.4.

[87] CAT/C/NOR/CO/6-7 (n 60) para 9.

[88] *Hilda Mariolyn Hernández Colmenarez and Francisco Arturo Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011 (n 43) para 6.7.

[89] CAT/C/GC/2 (n 1) para 13.

[90] CAT/C/GC/2 (n 1) 13. See also below Art 11 and OPCAT.

41 Where NPMs have not yet been established, States parties should cooperate closely with NGOs and provide them free access to places of detention in order to guarantee independent monitoring.[91] Unhindered and unaccompanied access to all places of deprivation of liberty shall be guaranteed[92] and recommendations by monitoring mechanisms shall be taken into account and followed up with practical measures by the States parties in order to prevent torture and improve the situation in prisons.[93] The Committee has equally encouraged NPMs to avail themselves of the expertise of civil society organizations working in the same area.[94]

3.1.2.4 Non-Refoulement and Asylum Procedure

42 Pursuant to the Committee, States parties' obligations under Article 2 encompass that they adopt all necessary measures to effectively implement its non-refoulement obligations under the Convention.[95] It shall, inter alia, be guaranteed that persons can submit applications for asylum, that all applications are thoroughly examined, and that persons have a genuine opportunity to effectively appeal any adverse decisions adopted, that appeals have suspensive effect, and ensured that 'all asylum seekers have access to independent, qualified and free-of-charge legal assistance during the entire asylum procedure'.[96]

3.1.2.5 Investigations and Prosecution

43 The Committee has repeatedly emphasized that as part of its obligations under Article 2, States parties are to promptly, impartially and effectively investigate all alleged acts of torture and ill-treatment,[97] eg when traces of torture or ill-treatment are found during a medical examination,[98] in cases of deaths of persons in custody,[99] in case of excessive use of force by law enforcement agencies,[100] regarding non-field related deaths in the army,[101] in case of summary executions and enforced disappearances,[102] in cases of trafficking and sex tourism.[103] Those responsible shall be prosecuted and appropriately punished and victims or their families provided with redress.[104] In a number of individual complaints the Committee found a violation of Article 2, read in conjunction with Article 1, because no such investigations were undertaken by the State party or these investigations have been dragging for many years without any outcome.[105]

[91] CAT/C/MDG/CO1 (n 82) para 10.
[92] CAT/C/MDA/CO/2 (n 75) para 13.
[93] CAT/C/AUS/CO/4-5 (n 64) para 21, CAT, 'Concluding Observations: Senegal' (2013) UN Doc CAT/C/SEN/CO/3, para 23.
[94] CAT/C/ROU/CO/2 (n 74) para 16.
[95] CAT/C/AUS/CO/4-5 (n 64) para 15. Also see CAT/C/MRT/CO/1 (n 60) para 16, CAT/C/MAR/CO/4 (n 72) para 25, CAT/C/NZL/CO/6 (n 60) para 18. See also CAT/C/GC/2 (n 1) para 19; and below Art 3.
[96] CAT/C/AUS/CO/4-5 (n 64) para 15. Also see CAT/C/MAR/CO/4 (n 72) para 25.
[97] CAT/C/MNG/CO/1 (n 72) para 11. CAT, 'Concluding Observations: Mozambique' (2013) UN Doc CAT/C/MOZ/CO/1, para 18; CAT/C/POL/CO/5-6 (n 72) para 18; CAT/C/PRT/CO/4 (n 74) para 9. See below Arts 12 and 13.
[98] CAT/C/ALB/CO/2 (n 75) para 16; CAT/C/AUT/CO/4-5 (n 72) para 9; CAT/C/AZE/CO/4 (n 72) para 12.
[99] CAT, 'Concluding Observations: Bolivia' (2013) UN Doc CAT/C/BOL/CO/2, para 19; CAT/C/AUS/CO/4-5 (n 64) para 11; CAT/C/AZE/CO/4 (n 72) para 24; CAT, 'Concluding Observations: Bulgaria' (2011) UN Doc CAT/C/BGR/CO/4-5, para 23.
[100] CAT/C/BEL/CO/3 (n 65) para 13.
[101] CAT/C/AZE/CO/3 (n 72) para 26.
[102] CAT/C/MDG/CO1 (n 82) para 8.
[103] CAT/C/MDG/CO1 (n 82) para 12.
[104] CAT/C/BOL/CO/2 (n 99) para 19; CAT/C/AUS/CO/4-5 (n 64) para 11. CAT/C/BEL/CO/3 (n 65) para 13; CAT/C/AZE/CO/3 (n 72) para 9; *Guridi v Spain*, No 212/2002 (n 39) para 6.6.
[105] *HB v Algeria*, No 494/2012, UN Doc CAT/C/55/D/494/2012, 6 August 2015, para 6.5; *EN v Burundi*, No 578/2013 (n 42) para 8.3.

3.1.2.6 Providing Redress

44 In the landmark decision *Guridi v Spain* the Committee confirmed the broad interpretation that even Article 14, which provides for the right of torture victims to redress, can be interpreted as a measure aimed at preventing torture in the future. The Committee found a violation of Article 2 of the Convention because members of the Civil Guard who were convicted for torture and were sentenced to more than four years of imprisonment and payment of compensation were later pardoned by the Government and the King of Spain.[106] The Committee also clarified that States need to exercise due diligence to intervene and stop, sanction, and provide remedies to victims of torture in order not to let non-State actors get away with impunity.[107]

3.1.2.7 Independence of the Judiciary and Access to Justice

45 The Committee has called upon States to ensure the full independence and impartiality of the judiciary in accordance with relevant international standards, such as the Basic Principles on the Independence of the Judiciary, and make sure they can operate free from any interference from the executive.[108] This inter alia means that the selection, appointment, compensation, tenure, and dismissal need to comply with objective criteria such as qualification, integrity, ability, and efficiency.[109] Dismissal of judges has to be in line with the Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct.[110] To this end, States parties should provide the judiciary with the necessary human, technical, and financial resources.[111] Also, rules of procedures of courts should be defined by the State party and an independent disciplinary body established.[112] Victims of torture and ill-treatment should have access to justice, with States parties having to ensure that the judiciary is capable of addressing impunity and providing redress in accordance with the Convention.[113] States parties should ensure that security forces comply with court orders.[114] The Committee also emphasized the importance of a gender sensitive judiciary, eg by recommending to *Saudi Arabia* the appointment of women judges.[115]

3.1.2.8 Combating Trafficking, Sexual, and Gender-based Violence, Including Domestic Violence and Violence against Children, Persons with Disabilities, and Other Groups in Situations of Vulnerability

46 The Committee, as well as the UNSRT, have stipulated that sexual violence can constitute a form of torture.[116] According to the Committee, States parties should 'redouble their efforts' to prevent and combat violence against women, including femicide, gender-based murders, disappearances, rape and sexual harassment, violence against

[106] *Guridi v Spain*, No 212/2002 (n 39). See below Art 14 for more details.
[107] CAT/C/GC/2 (n 1) para 18.
[108] CAT/C/MRT/CO/1 (n 60) para 15, CAT/C/MDA/CO/2 (n 75) para 11, CAT/C/SAU/CO/2 (n 81) para 22,
[109] CAT, 'Concluding Observations: Serbia' (2009) UN Doc CAT/C/SRB/CO/1, para 8.
[110] CAT/C/ARM/CO/3 (n 72) para 17. CAT/C/BLR/CO/4 (n 72) para 12, CAT/C/MNE/CO/2 (n 72) para 10.
[111] CAT/C/MRT/CO/1 (n 60) para 15. [112] CAT/C/SRB/CO/1 (n 109) para 8.
[113] CAT/C/SAU/CO/2 (n 81) para 22, CAT/C/MOZ/CO/1 (n 97) para 11.
[114] CAT, 'Concluding Observations: Nepal' (2007) UN Doc CAT/C/NPL/CO/2, para 16.
[115] CAT/C/SAU/CO/2 (n 81) para 22.
[116] CAT/C/BLR/CO/4 (n 72) para 20. The SRT has confirmed this assessment: A/HRC/31/57, paras 51 and 55.

children, including corporal punishment, and violence against persons with disabilities.[117] The UNSRT has emphasized that by not acting with due diligence to protect victims of domestic violence, trafficking, female genital mutilation, and similar practices, States may commit torture or ill-treatment by acquiescence.[118]

47 According to the Committee, States parties should adopt legislation that criminalizes all forms of violence against women and children, including domestic violence, marital rape, forced marriages, and sexual harassment.[119] They should enact comprehensive anti-trafficking legislation, including a definition for trafficking, as well as labour legislation that legally protects migrant domestic workers and effectively implement this legislation.[120] Legislation has to be in conformity with international standards, including the CEDAW and the General Recommendation No 19 of 1994 on violence against women of the Committee on the CEDAW Committee.[121]

48 States parties should make sure that victims can lodge a complaint, that all complaints are registered, eg in a special record-keeping system,[122] and that all allegations of trafficking, rape, domestic violence are appropriately investigated, while witnesses should be protected.[123] In its Concluding Observations the Committee recommended to ensure that rapists cannot avoid criminal responsibility by marrying their victims.[124] Generally the Committee 'strongly discourages' the settlement of sexual violence cases outside the formal justice system.[125]

49 According to the Committee, research should be undertaken on the causes and extent of trafficking, violence, including sexual and domestic violence, as well as the impact of preventive measures, National Action Plans, and criminal justice responses in order to increase their efficiency.[126] States should make sure that law enforcement officials, lawyers, prosecutors, judges, social workers or migration officials or labour inspectors are familiar with legislation, are sensitized to all forms of violence against women, can detect domestic violence or trafficking victims, sexual violence, violence against children, and adequately respond.[127] Awareness raising shall also address the

[117] CAT/C/MEX/CO/5-6 (n 72) para 13; CAT, 'Concluding Observations: Monaco' (2011) UN Doc CAT/C/MCO/CO/4-5, para 11. CAT/C/PRY/CO/4-6 (n 72) para 21; CAT, 'Concluding Observations: Peru' (2013) UN Doc CAT/C/PER/CO/5-6, paras 14 and 20; CAT/C/SEN/CO/3 (n 93) para 15.

[118] SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/HRC/13/39, para 62.

[119] CAT/C/MUS/CO/3 (n 73) para 16; CAT/C/MDG/CO1 (n 82) para 13, CAT/C/MNG/CO/1 (n 72) para 20; CAT/C/MAR/CO/4 (n 72) para 23; CAT/C/MOZ/CO/1 (n 97) para 23; CAT/C/POL/CO/5-6 (n 72) para 22; CAT/C/SAU/CO/2 (n 81) para 36.

[120] CAT/C/MNG/CO/1 (n 72) para 21; CAT/C/MAR/CO/4 (n 72) para 27; CAT/C/MOZ/CO/1 (n 97) para 26; CAT, 'Concluding Observations: Namibia' (2017) UN Doc CAT/C/NAM/CO/2, para 40; CAT/C/NZL/CO/6 (n 60) para 25; CAT/C/POL/CO/5-6 (n 72) para 24; CAT/C/QAT/CO/2 (n 66) para 20; CAT/C/SAU/CO/2 (n 81) para 38.

[121] CAT/C/PRY/CO/4-6 (n 72) para 21.

[122] CAT/C/SRB/CO/1 (n 109) para 16; CAT/C/PER/CO/5-6 (n 117) para 14.

[123] CAT/C/MDG/CO1 (n 82) para 12; CAT/C/MRT/CO/1 (n 60) para 23; CAT/C/MAR/CO/4 (n 72) para 27; CAT/C/NLD/CO/5-6 (n 60) para 25; CAT/C/PRY/CO/4-6 (n 72) para 23; CAT/C/PHL/CO/2 (n 72) para 26; CAT/C/SEN/CO/3 (n 93) para 16; CAT/C/MUS/CO/3 (n 73) para 16; CAT/C/MEX/CO/5-6 (n 72) para 13; CAT/C/MNG/CO/1 (n 72) para 20; CAT/C/NZL/CO/6 (n 60) para 11; CAT/C/RUS/CO/5 (n 67) para 14. See also Art 13 below.

[124] CAT/C/MAR/CO/4 (n 72) para 23.

[125] CAT/C/NAM/CO/2 (n 120) para 28.

[126] CAT/C/NLD/CO/5-6 (n 60) para 25; CAT/C/PRT/CO/4 (n 74) para 19; CAT/C/SRB/CO/1 (n 109) para 17; CAT/C/MAR/CO/4 (n 72) para 23; CAT/C/PRT/CO/4 (n 74) para 17.

[127] CAT/C/BLR/CO/4 (n 72) para 20; CAT/C/MUS/CO/3 (n 73) para 16; CAT/C/MDG/CO1 (n 82) para 13; CAT/C/MNG/CO/1 (n 72) para 20; CAT/C/NOR/CO/6-7 (n 60) para 12; CAT/C/PER/CO/

general public and already children should be educated about violence against women and children.[128]

50 Trafficking victims should have access to shelters and protection, including protecting orders; cultural and financial barriers to access these should be removed.[129] States parties should prevent the return of trafficked persons to their countries of origin if there are 'substantial grounds to believe that they would be in danger of exploitation and torture or ill-treatment'.[130] The Committee has underlined repeatedly that trafficking victims should not be penalized for acts committed as a result for being trafficked, be provided with immediate and genuine access to medical, social, and legal services, and receive rehabilitation, eg through programmes of assistance, recovery, and reintegration, in line with Article 14.[131] The Committee also recommended States parties work with NGOs and establish systems and mechanisms of regional, international, and bilateral co-operation to prevent and punish trafficking and monitor their impact.[132]

51 States parties should ensure that women, especially rape victims, have access to safe and legal abortions.[133] In the case of *Peru*, it was recommended that legislation should also allow distribution of oral emergency contraception for rape victims.[134] Women should have the possibility to seek emergency medical care in case of abortions without having to go through extraction of confessions for prosecution purposes and medical personnel being penalized when they exercise their professional duty, as denying medical care to these women might constitute cruel and inhuman treatment.[135] States parties should ensure that health professionals are informed about protocols on legal abortions as well as preserve confidentiality between doctors and patients in case of medical care in case of complications arising from an abortion.[136]

3.1.2.9 Collection of Disaggregated Data

52 The Committee has underlined the importance of continuous evaluation and that States parties provide statistical data to enable it to adequately evaluate the Convention's implementation at the national level.[137] Data should be disaggregated by gender, age, geographical region, and type and location of place of deprivation of liberty. States parties should also provide data on preventive measures, disaggregated by relevant status,

5-6 (n 117) para 14; CAT/C/PHL/CO/2 (n 72) para 25; CAT/C/MRT/CO/1 (n 60) para 23; CAT/C/MNG/CO/1 (n 72) para 21. CAT/C/MOZ/CO/1 (n 97) para 26; CAT/C/NLD/CO/5-6 (n 60) para 25; CAT/C/NZL/CO/6 (n 60) para 12; CAT/C/PRT/CO/4 (n 74) para 19.

[128] CAT/C/NAM/CO/2 (n 120) para 28; CAT/C/PRY/CO/4-6 (n 72) para 21, CAT/C/SAU/CO/2 (n 81) para 36; CAT/C/SEN/CO/3 (n 93) para 14.

[129] CAT/C/MNG/CO/1 (n 72) para 20; CAT/C/MAR/CO/4 (n 72) para 23; CAT/C/NZL/CO/6 (n 60) para 11; CAT/C/MDA/CO/2 (n 75) para 23.

[130] CAT/C/NLD/CO/5-6 (n 60) para 25. Also see CAT/C/POL/CO/5-6 (n 72) para 24.

[131] CAT/C/MDG/CO1 (n 82) para 12; CAT/C/MAR/CO/4 (n 72) para 27; CAT/C/NLD/CO/5-6 (n 60) para 25; CAT/C/PRY/CO/4-6 (n 72) para 23; CAT/C/MDA/CO/2 (n 75) para 22; CAT/C/SRB/CO/1 (n 109) para 17; CAT/C/RWA/CO/1 (n 69) para 16.

[132] CAT/C/NZL/CO/6 (n 60) para 12; CAT/C/PRY/CO/4-6 (n 72) para 25; CAT/C/POL/CO/5-6 (n 72) para 24; CAT/C/QAT/CO/2 (n 66) para 19.

[133] CAT/C/POL/CO/5-6 (n 72) para 23; CAT/C/PER/CO/5-6 (n 117) para 15; CAT/C/PRY/CO/4-6 (n 72) para 21.

[134] CAT/C/PER/CO/5-6 (n 117) para 15

[135] CAT/C/PER/CO/5-6 (n 117) para 15, CAT/C/PRY/CO/4-6 (n 72) para 22.

[136] CAT/C/PRY/CO/4-6 (n 72) para 22; CAT/C/PER/CO/5-6 (n 117) para 15

[137] CAT/C/GC/2 (n 1) 23; CAT/C/ALB/CO/2 (n 75) para 28. CAT/C/AUT/CO/4-5 (n 72) para 26; CAT/C/AZE/CO/3 (n 72) para 7; CAT/C/BGR/CO/4-5 (n 99) para 31.

complaints filed against public servants, investigations, prosecutions and convictions of cases of torture and ill-treatment by law enforcement, security, military, and prison personnel or results of disciplinary proceedings, as well as on honour crimes, trafficking, domestic and sexual violence, including sexual violence in detention, deaths in custody, enforced disappearances, violence against minorities, and on means of redress, including compensation and rehabilitation provided to the victims.[138]

3.2 Meaning of 'any territory under its jurisdiction'

53 Article 4 of the 1975 Declaration and Article 3 of the Swedish draft referred to the obligation of a State to take measures to prevent torture and other forms of ill-treatment from being practised 'within its jurisdiction'.[139] In 1979, *France* proposed to replace these words with 'any territory under its jurisdiction', because otherwise the obligation to prevent torture might even extend to a State's own citizens resident in another country.[140] But it was stressed that 'any territory under its jurisdiction' would also cover torture inflicted aboard ships, aircrafts and in occupied territories.[141]

54 This formulation, therefore, seems to be fairly clear. States have an obligation to take measures to prevent torture in their own territory (land and sea), but also under any other territory under their jurisdiction, such as aboard ships flying their flag, aircraft registered in accordance with their laws, occupied territories, or other territories where civilian or military authorities of the State exercise jurisdiction, whether lawful or not.

55 The Committee has explained that it understands the concept of 'any territory under its jurisdiction' to be linked with the principle of non-derogability, and that it includes 'any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the jure or de facto control of a State party'.[142] This does not only mean the State party's sovereign territory but 'all areas where the State partly exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law'.[143] According to the Committee, States have an obligation to take measures to prevent torture not only on board of ships or aircrafts under the flag of the State party, but also during military occupation or peacekeeping operations, in places such as embassies, military bases, detention facilities, or any other areas over which the State party exercises factual or effective control. This interpretation is applicable also to other CAT Articles as well as the OPCAT.

56 The Committee has confirmed this interpretation equally in the individual complaints procedure, as well in its Concluding Observations. In the case *Fatou Sonko v Spain*, where Spanish Civil Guard officers exercised control over persons on board of a vessel and the Committee therefore emphasized the State Party's responsibility for the persons' safety.[144] In its Concluding Observations to the UK's report the Committee underlined its concern and called upon the UK to 'publicly acknowledge that the Convention applies to all individuals who are subject to the State party's jurisdiction or control, including to its armed forces, military advisers and other public servants deployed on operations

[138] CAT/C/GC/2 (n 1); CAT, 'Concluding Observations: Cambodia' (2011) UN Doc CAT/C/KHM/CO/2, para 19; CAT/C/SEN/CO/3 (n 93) para 11; CAT/C/NZL/CO/6 (n 60) para 12; CAT/C/ROU/CO/2 (n 74) para 11; CAT/C/RUS/CO/5 (n 67) para 15; CAT/C/BOL/CO/2 (n 99) para 19.

[139] See above 2.1. [140] See above 2.2.

[141] See E/CN.4/1347, para 32; Burgers and Danelius (n 14) 123ff. See also Boulesbaa (n 26) 74.

[142] CAT/C/GC/2 (n 1) para 7. [143] CAT/C/GC/2 (n 1) para 16.

[144] *Fatou Sonko v Spain*, No 368/2008, UN Doc CAT/C/47/D/368/2008, 25 November 2011, para 10.3.

abroad'.[145] Also the position previously taken by the US, that Article 2 was geographically limited to US territory in the strict sense,[146] excluding detainees at Guantánamo Bay from international scrutiny, was not only clearly rejected by the five independent experts of the UN Commission on Human Rights,[147] but also by the CAT Committee.[148] The US in the meantime has reviewed its position concerning extraterritorial application of the Convention and specifically acknowledged that it applies to Guantanamo Bay, as well as US registered ships and aircraft.[149]

3.3 The Absolute Nature of the Prohibition of Torture

57 The prohibition of torture and cruel, inhuman or degrading treatment is one of the few absolute human rights. Both torture and cruel, inhuman or degrading treatment are prohibited, without any exception, in Article 7 CCPR and similar provisions in regional human rights treaties. This absolute prohibition is also regarded as customary international law and even *ius cogens*.[150] Furthermore, Article 4(2) CCPR provides that even in times of public emergency threatening the life of the nation, no derogation from the absolute prohibition of torture and cruel, inhuman or degrading treatment may be made. Consequently, Article 3 of the 1975 Declaration and Article 2(2) of the original Swedish draft provided that no exceptional circumstances whatsoever may be invoked as a justification of torture or cruel, inhuman or degrading treatment. In written comments, the delegation of the *United States* in 1979 proposed a new article providing that there is no justification for an act of torture. The United States argued, however, that cruel, inhuman or degrading treatment was a relative term and what might constitute cruel, inhuman or degrading treatment in times of peace 'might not rise to that level during emergency situations'.[151] Although the Holy See had welcomed the broader text of the Swedish draft 'in light of certain schools of thought which seek to give national security priority over the rights of the person',[152] the US position seemed to have been accepted by the drafters without much opposition. The revised Swedish draft on which the final text of Article 2(2) CAT is based no longer contained any reference to cruel, inhuman or degrading treatment, which means that there is no explicit provision in the Convention that prohibits any derogation from the prohibition of cruel, inhuman or degrading treatment. However, since the Preamble of the Convention clearly refers to the existing standards under the CCPR and the 1975 Declaration and affirms the desire of the drafters to make more effective (and not less effective) the struggle against torture and cruel, inhuman or degrading treatment, one should not give too much weight to this retrogressive provision. The Committee has in the meantime also confirmed that the prohibition of cruel, inhuman and degrading treatment is non-derogable.[153] In addition, Article 16(2)

[145] CAT, 'Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its Fiftieth Session (6–31 May 2013)', 24 June 2013, UN Doc CAT/C/GBR/CO/5, para 9. Also see CAT/C/CR/33/3, para 4(b).

[146] See US report in accordance with Art 19 CAT of 13 January 2006, CAT/C/48/Add.3/Rev.1.

[147] See E/CN.4/2006/120, para 11.

[148] CAT, 'Concluding Observations: United States of America' (2006) UN Doc CAT/C/USA/CO/2, para 15.

[149] CAT, 'Concluding Observations: United States of America' (2014) UN Doc CAT/C/USA/CO/3-5, para 10.

[150] See eg Nowak, *CCPR Commentary* (n 31) 157ff.

[151] E/CN.4/1314 (n 6) (1979), para 53.

[152] E/CN.4/1314/Add.3 (n 16) para 6.

[153] See CAT/C/GC/2 (n 1).

CAT contains an explicit savings clause in relation to other treaty provisions prohibiting cruel, inhuman or degrading treatment.[154]

58 The prohibition of torture is both an absolute and a non-derogable right. Both concepts are sometimes confused. Not all absolute rights are at the same time non-derogable, and not all non-derogable rights are at the same time absolute. A human right is considered as *absolute* if, under normal circumstances, no limitations are permitted, ie the Government is not authorized by a specific limitation clause to balance the individual claim against certain State interests. A human right is considered *non-derogable* if States, under exceptional circumstances, are not permitted to derogate from their respective treaty obligations in relation to this right.

59 The *absolute prohibition of torture*, therefore, means that, under normal circumstances, torture must not be balanced against any other interest, including national security or the protection of human rights of others. All attempts to justify the practice of torture in the 'war against global terrorism' in order to extract information from a suspected terrorist for the purpose of, for example, saving the life of innocent civilians who are in danger of being subjected to an imminent terrorist attack (the so-called *'ticking bomb' scenario*), clearly violate the absolute prohibition of torture as laid down in Article 2(2) CAT and Article 7 CCPR.[155] Accordingly, during the consideration of the US report in May 2006, the Committee urged the US Government to ensure that any interrogation rules, instructions, or methods 'do not derogate from the principle of absolute prohibition of torture'.[156] Similarly, *Israel* has been repeatedly criticized for undermining the absolute prohibition of torture by having authorized 'moderate physical pressure' against suspected terrorists.[157]

3.4 The Non-Derogable Nature of the Prohibition of Torture

60 Article 2(2) stipulates that torture can never be justified, even in the most exceptional circumstances.[158] It was primarily meant to stress the non-derogable nature of the prohibition of torture, ie the rule that even under exceptional circumstances, such as war, terrorism, or natural disasters, States parties are not permitted to derogate from their obligation to respect and ensure the absolute prohibition of torture. Apart from the successful attempt of the United States to delete cruel, inhuman or degrading treatment from this

[154] See below Art 16, 3.8.

[155] For an example of the 'ticking-bomb' scenario, see the judgment against Wolfgang Daschner of 20 December 2004 of the twenty-seventh penal chamber, Landgericht (court) Frankfurt am Main, NJW 2005 Wolfgang Daschner [2004] NJW 2005, 692; M Nowak, 'Legal Controversies Relating to Torture' in Rikke Frank Jørgensen and Klaus Slavenskys (eds), *Implementing Human Rights: Essays in Honour of Morten Kjaerum* (Institut for Menneskerettigheder 2007) 238; Ralf Poscher, 'Menschenwürde und Staatsnotstand' in Wolfgang Lenzen (ed), *Ist Folter erlaubt?* (Mentis 2006) 47–65; APT, *Defusing the Ticking Bomb Scenario: Why We Must Say No To Torture, Always* (APT 2007); Vittorio Bufacchi and Jean Maria Arrigo, 'Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument' (2006) 23 JAP 355; Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press 2002); Henry Shue 'Torture in Dreamland: Disposing of the Ticking Bomb' (2006) Case Western Reserve Journal of International Law 231.

[156] See CAT/C/USA/CO/2 (n 148) para 24.

[157] See eg A/49/44, paras 167ff; CAT/C/SR.295; CAT/C/SR.339. See also Ingelse (n 28) 265ff. For the practice of the Committee in the State reporting procedure see above 3.1.

[158] Of all the drafts, art 6 IAPL expressed this meaning in the strongest terms: 'Torture can in no circumstances be justified or excused by a state or threat of war or armed conflict, a state of siege, emergency or other exceptional circumstances, or by any necessity or any urgency of obtaining information, or by any other reason.'

non-derogation clause, there was little discussion during the drafting of this provision. Although the French delegation wished to delete the reference to internal political instability because of its unclear meaning in international law,[159] this phrase remained in the final text. But the different examples are not exhaustive and only serve the purpose of illustrating what is meant by exceptional circumstances.[160]

61 Although Article 2(2) does not use the term 'derogation', its purpose is clearly to prohibit any derogation which might justify torture. Article 2(2) follows in this respect the examples of regional human rights treaties, such as Article 15(1) ECHR ('war or other public emergency threatening the life of the nation') and Article 27 ACHR ('war, public danger, or other emergency that threatens the independence or security of a State Party'), whereas Article 4(1) CCPR only speaks of a 'public emergency which threatens the life of the nation' without giving any examples. Since Article 2(2) CAT, in contrast to Article 4(1) CCPR, does not authorize but prohibit any derogation, the scope of application of the terms 'exceptional circumstances' or 'any other public emergency' is not relevant and, therefore, only of a declaratory nature.

62 The Committee has confirmed repeatedly that no exceptional circumstances whatsoever may be invoked by States parties to justify acts of torture, including political instability, terrorist acts, violent crime, or armed conflict.[161] Referencing its statement made in relation to the September 11, 2001 attacks, the Committee also specified in its General Comment No. 2 that Article 2 obligations, as well as Articles 15 and 16 are provisions that 'must be observed in all circumstances'.[162] In this respect, the legal opinion of the Bush administration, as illustrated in the infamous '*Bybee Memorandum*' of 1 August 2002, which implies that outside the territory of the *United States* acts of torture in the context of the 'war on terror' might be justified as an act of '*self-defence*',[163] clearly contradicts the obligation of the United States under Article 2(2) CAT.

63 The Committee has repeatedly recommended to States parties to introduce in its legislation that no exceptional circumstances may be invoked as a justification for torture.[164] The Committee has also absolutely rejected 'any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies …' and 'any religious or traditional justification that would violate this absolute prohibition'.[165] It has also emphasized that amnesties or all other obstacles to prompt and effective prosecution as well as punishment of perpetrators violate the principle of non-derogability.[166]

64 In the inquiry procedure under Article 20 CAT, the Committee reminded the Government of *Egypt* of its obligations under Article 2(2) notwithstanding its legitimate efforts to combat terrorism. In this connection, the Government was urged to

[159] See E/CN.4/1314 (n 6) para 54. [160] See also Boulesbaa (n 26) 79.

[161] CAT/C/GC/2 (n 1) para 5; CAT/C/MDG/CO1 (n 82) para 8.

[162] CAT/C/GC/2 (n 1) para 6. See statement of 22 November 2001 in connection with the events of 11 September, A/57/44, paras 17–18.

[163] See US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R Gonzales, Counsel to the President, dated 1 August 2002 (the 'Bybee Memorandum') 2ff cf Manfred Nowak, 'What Practices Constitute Torture? US and UN Standards' (2006) 28 Human Rights Quarterly 809. See also eg Louis-Philippe F Rouillard, 'Misinterpreting the Prohibition of Torture under International Law: The Office of the Legal Counsel Memorandum' (2005) 21(1) Am U Int'l L Rev 9. See also Robert K Goldman, 'Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture' (2004) 12(1) Human Rights Brief 3.

[164] CAT/C/MUS/CO/3 (n 73) para 9; CAT/C/RWA/CO/1 (n 69) para 9.

[165] CAT/C/GC/2 (n 1) para 2; CAT/C/MDG/CO1 (n 82) para 11.

[166] CAT/C/GC/2 (n 1) para 5. Also see CAT/C/SEN/CO/3 (n 93) para 9.

'make particular efforts to prevent its security forces from acting as a State within a State, for they seem to escape control by superior authorities'[167] and that all provisions of the Convention, including those of Article 2 (2) 'are implemented strictly by all State authorities'.[168]

3.5 Prohibition of Defence of Obedience to Superior Orders in Domestic Criminal Proceedings

65 While Article 2(2) is primarily directed at Governments not to derogate from their obligations to respect and to ensure the absolute prohibition of torture even in exceptional circumstances (no justification of torture by the Government, in particular the legislative and executive branch), Article 2(3) is primarily directed at criminal courts not to accept any defence by the accused based on a superior order (no justification of torture by the judicial branch in individual cases). This aspect was most clearly expressed in Article V of the IAPL draft: 'The fact that a person was acting in obedience to superior orders shall not be a defence to a charge of torture'.[169] But the final text is based on the original Swedish draft which did not refer explicitly to criminal proceedings.

66 As with Article 2(2), a *US proposal* to delete the reference to cruel, inhuman or degrading treatment or punishment from the Swedish draft during the negotiations of the Convention has been adopted, seemingly without much discussion.[170] The legal consequences of this deletion might be serious and at the same time confusing. States certainly can use the *argumentum a contrario*, ie that an order from a superior officer or a public authority may be invoked as a justification of cruel, inhuman or degrading treatment. This would mean, to give a concrete example, that US military officers, by applying the infamous interrogation methods authorized by Defence Secretary *Donald Rumsfeld* for suspected terrorists detained at Guantánamo Bay, could invoke an order by a superior officer to apply these methods in a particular case only if such methods are legally qualified as cruel, inhuman or degrading treatment. If these methods are, however, considered as torture, the officer could not invoke the order and would have to be sentenced for having committed a crime. How should the military officer know whether the superior's interrogation methods amount to torture or 'only' cruel, inhuman or degrading treatment if up to the present day there is an ongoing dispute as to how to qualify them?[171] Since both torture and cruel, inhuman or degrading treatment is absolutely prohibited under general international law, would such an interpretation not seriously undermine the absolute prohibition of cruel, inhuman or degrading treatment? Although the obligation of States parties under Article 4 CAT to stop impunity only applies to torture and not to cruel, inhuman or degrading treatment, this interpretation of Article 2(3) sends the dangerous message that even in countries which criminalize cruel, inhuman or degrading treatment, such treatment can be practised with impunity as long as it has been ordered by a superior. It, therefore, must be concluded that the deletion of the reference to cruel, inhuman or degrading treatment in Article 2(3) seriously weakened the absolute prohibition of cruel, inhuman or degrading treatment. But since it was deliberately deleted

[167] CAT, 'Report of the Committee Against Torture' (1996) UN Doc A/51/44, paras 211 and 212.
[168] A/51/44 (n 167) paras 180–222. [169] See above 2.1. [170] See above 2.2.
[171] See the report of five UN experts on the situation of detainees at Guantánamo Bay, 'Situation of detainees at Guantánamo Bay: Summary' (2006) UN Doc E/CN.4/2006/120; see also Nowak, 'What Practices Constitute Torture?' (n 163).

upon proposal of the United States, there seems to be no other meaningful interpretation in line with the clear wording of this provision, read in conjunction with Article 16 CAT. Whether this interpretation is in line with the object and purpose of the Convention is highly doubtful but not relevant for the interpretation in accordance with the respective rules of the VCLT.

67 The prohibition to invoke a superior order as a defence in criminal proceedings goes back to Article 8 of the Charter of the International Military Tribunal of Nuremberg.[172] It was also adopted in Article 33 of the Rome Statute of the ICC, which provides that a superior order shall not relieve the defendant of criminal responsibility unless the person was under a legal obligation to obey orders of the Government or the superior in question; the person did not know that the order was unlawful; and the order was not manifestly unlawful.[173]

68 According to Article 7(1)(f) of the ICC Statute, torture qualifies as a crime against humanity 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. In such circumstances, an order to practise torture is by definition 'manifestly unlawful'. Consequently, such order cannot relieve the defendant of his or her criminal responsibility even if he or she was under a legal obligation to obey this order and did not know that the order was unlawful.

69 Article 2(3) CAT goes beyond Article 33 of the ICC Statute in so far as it applies also to individual cases of torture and does not provide for any exception. In other words, a legal obligation to obey orders and lack of knowledge that an order to practise torture is unlawful does not relieve the defendant of criminal responsibility. Article 2(3) simply states that no order from a superior whatsoever may be invoked as a justification of torture.

70 In its Concluding Observations, the Committee repeatedly stressed that Article 2(3) allows for no exception, that its provisions must be incorporated or transformed into domestic criminal law, that any domestic provision to the contrary must be abolished, and that the provision needs to be effectively implemented.[174] Subordinates are thus to be held accountable individually in case of acts of torture that were committed. The issue was discussed in 1989 in relation to the well-known individual cases of *ORM, MM and MS v Argentina*, in which relatives of Argentine citizens, who were allegedly tortured to death by Argentine military authorities during the 'dirty war' in 1976, claimed that the infamous 'Full Stop Law' [*Ley de Punto Final*] of December 1986 and 'Due Obedience Act' [*Ley de Obediencia Debida*] of June 1987 violated various provisions of the Convention.[175] The obligations of *Argentina* under Article 2(3) CAT were allegedly violated by the Due Obedience Act, which presumed, without admitting proof to the contrary, that those persons who held lower military ranks at the time the crimes were committed were acting under superior orders. Although the Committee had to declare these complaints inadmissible *ratione temporis*, it expressed, in a strongly worded *obiter*

[172] See above n 23; Burgers and Danelius (n 14) 124.

[173] Article 33(2) specifies that for the purposes of this article, 'orders to commit genocide or crimes against humanity are manifestly unlawful'. See eg the critical remarks by Paola Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 European Journal of International Law 172; but see Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied' (1999) 836 International Review of the Red Cross 785.

[174] CAT/C/GC/2 (n 1) para 26. Also see Lebanon inquiry procedure, para 38, CAT/C/MRT/CO/1 (n 60) para 12; CAT/C/MAR/CO/4 (n 72) para 6. See also Ingelse (n 28) 266ff.

[175] See above 3.2.

dictum, its concern that 'it was the democratically elected post-military authority that enacted the Punto Final and the Due Obedience Act'. The Committee deemed this 'to be incompatible with the spirit and purpose of the Convention' and urged the Argentine Government not to leave the victims of torture and their dependents wholly without a remedy.[176] In 2004 the Committee welcomed with satisfaction the promulgation of an Act No. 25.779 in September 2003, declaring the 'Due Obedience' and 'Clean Slate' Acts absolutely null and void.[177]

71 The Committee has also emphasized that States parties should establish a system to protect subordinates from reprisals, if they refuse to execute an order from a superior in violation of the Convention or cooperate in the investigation of torture or ill-treatment, including by superior officials.[178] At the same time, those who exercise superior authority—including public officials—are to be held fully accountable for torture or ill-treatment committed by subordinates if they knew or should have known about the conduct of their subordinates and failed 'to take reasonable and necessary preventive measures'.[179] The Committee also emphasized that the responsibility of any superior officials, 'whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein',[180] has to be thoroughly, effectively, independently, and impartially investigated by prosecutorial and judicial authorities. Consequently, each State party should identify and report to the Committee any incidents of torture or ill-treatment and the measures taken to investigate, punish, and prevent future incidents, 'with particular attention to the legal responsibility of the both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence'.[181]

3.6 Superior Orders as a Reason for Mitigating Circumstances

72 During the drafting of Article 2(3) there was a discussion as to the possibility of whether the order of a superior, although not being a justification, could still be an extenuating fact justifying a milder penalty in line with Article 8 of the Nuremberg Charter. In 1979, the Working Group agreed to add a provision to Article 2(3) to the effect that superior orders may be considered in mitigation of punishment if justice so requires.[182] But two years later, this phrase was deleted again by the Working Group without any explanation to be found in the *travaux préparatoires*.[183] Was this phrase deleted because the Working Group found it unnecessary to state the obvious or must the deletion be interpreted as a sign that Article 2(3) CAT even prevents domestic criminal courts from taking superior orders into account as mitigating circumstances?

73 *Boulesbaa* refers in this context to the work of the ILC, which in its formulation of the Nuremberg Principles had taken the same approach as the Working Group.[184]

[176] OR, MM, and MS v Argentina, No 1/1988, 2/1988, 3/1988, UN Doc CAT/C/WG/3/DR/1, 2 and 3/1988, 23 November 1989, para 9.

[177] CAT, 'Concluding Observations: Argentina' (2004) UN Doc CAT/C/CR/33/1, para 3(a).

[178] CAT/C/GC/2 (n 1) para 26; CAT/C/MRT/CO/1 (n 60) para 12, CAT/C/MCO/CO/4-5 (n 117) para 8.

[179] CAT/C/GC/2 (n 1) para 26.

[180] CAT/C/GC/2 (n 1) para 26.

[181] CAT/C/GC/2 (n 1) para 7.

[182] See E/CN.4/1347 (n 141) para 40. See also Boulesbaa (n 26) 83.

[183] See E/CN.4/1475, para 53; Burgers and Danelius (n 14) 73; Boulesbaa (n 26) 84. See also above 2.2.

[184] Boulesbaa (n 26) 84ff. See also ILC Yearbook, Vol I (1950) 288; Yoram Dinstein, *The Defence of Obedience to Superior Orders in International Law* (Oxford University Press 1965) 226ff.

The ILC felt that the reference to mitigation of punishment was unnecessary and, therefore, deleted it from the text. But it reported to the General Assembly that the question of leniency in punishment should be determined by a competent court during the sentencing process. *Boulesbaa* takes this parallel situation as a basis for concluding that the 'mitigation of punishment for carrying out superior orders is applicable to this Convention'.[185] *Burgers* and *Danelius* also state that mitigation of punishment 'cannot be excluded' but warn, however, that 'it would be contrary to the spirit of the Convention if the penalty was so lenient as not to take into account the very serious nature of the offence'.[186] *Ingelse* finds a lighter punishment 'reasonable considering the pressure to which a subordinate is subjected or his ignorance of the prohibition of *respondeat superior*'.[187] It is to be noted that this interpretation is also supported by the wording of Article 2(3), which speaks of a 'justification of torture'. While the acceptance of the defence of obedience to superior orders would provide a justification of torture by making it lawful, mitigating circumstances can only be applied at the stage of sentencing the defendant, ie after he or she has been found guilty of the crime of torture. In other words, mitigating circumstances do not justify torture and can, therefore, be applied if a perpetrator of torture convincingly argues that he or she was forced to apply torture practices and had no real moral choice.[188] On the other hand, *Burgers* and *Danelius* are certainly right that obedience to superior orders should not be used as an excuse and should never lead to lenient sentences.[189]

GERRIT ZACH

[185] Boulesbaa (n 26) 85. [186] Burgers and Danelius (n 14) 124. [187] Ingelse (n 28) 246.

[188] The ILC, in adopting Principle IV of the Nuremberg Principles, referred to a 'moral choice' instead of mitigating circumstances. See Boulesbaa (n 26) 84.

[189] See in this respect also, *mutatis mutandis*, the case of *Guridi v Spain*, No 212/2002 (n 39); above 3.1.2.6.

Article 3

Principle of Non-Refoulement

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

1. Introduction 99

2. Travaux Préparatoires 101

2.1 Chronology of Draft Texts 101

2.2 Analysis of Working Group Discussions 102

3. Issues of Interpretation 114

3.1 The Absolute Nature of the Prohibition of Refoulement 114

3.2 Forms of Prohibited Conduct 116

3.2.1 Meaning of 'expel' and 'return' ('refouler') 117

3.2.2 Non-admission 118

3.2.3 Meaning of 'extradite' 120

3.2.4 Rendition 121

3.3 Meaning of 'a Person' 123

3.4 Meaning of 'to Another State' 124

3.4.1 Indirect Refoulement 126

3.4.2 'Safe third States' 126

3.5 Meaning of 'Torture' 127

3.5.1 Applicability of Article 3 to Cruel, Inhuman and Degrading Treatment 127

3.5.2 Lawful Sanctions 129

3.5.3 Corporal and Capital Punishment 130

3.5.4 Torture Perpetrated by Non-State Actors 131

3.6 Probability of the Torture Risk (Risk Assessment) 133

3.6.1 Time of Risk Assessment 134

3.6.2 Relevant Factors for the Risk Assessment 137

3.6.2.1 Objective and Subjective Test: General Human Rights Situation in Receiving State and Individual Situation 137

3.6.2.2 General Human Rights Situation in Receiving State 142

3.6.2.3 Past Torture or Other Ill-treatment 147

3.6.2.4 Activities and Personal Factors Making the Individual Particularly Vulnerable to Torture Risk 149

3.6.3 Internal Flight Alternative 153

3.6.4 Refoulement and Asylum Procedure 156

3.6.5 Diplomatic Assurances 158

3.7 Burden of Proof 163

3.7.1 Substantiation of the Risk by the Applicant 164

3.7.1.1 Credibility and Plausibility of the Claim and Applicant 165

3.7.1.2 Evidence in Support of the Claim 168

3.7.2 Shift of Burden of Proof to the State Party 170
3.7.3 Procedure by Domestic Authorities 171
3.7.4 Procedure by the Committee 172
3.8 Interim Measures under Article 3 CAT 174

1. Introduction

1 The prohibition of refoulement in Article 3 CAT codifies an important principle of general international law and a norm of customary international law. According to this principle a State violates the absolute prohibition of torture not only if its own authorities subject a person to torture, but also if its authorities send a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. The Committee's task is to determine whether the expulsion, return, or extradition would violate the returning State party's obligation under Article 3[1]—and not whether the applicant's rights under CAT have been violated by the receiving State. The CAT Committee has dedicated a General Comment to the principle of non-refoulement: General Comment No 4 (2017).[2]

2 The vast majority of individual complaints decided by the CAT Committee concerns Article 3.[3] Until 31 March 2017, out of 318 Article 3-related complaints, 61 were admissibility decisions.[4] Out of the 257 decisions on the merits, in 79 cases the Committee found a violation, in 178 cases a non-violation of Article 3.[5] Most cases in which the Committee found a violation of Article 3 concerned applicants whose asylum applications were rejected and who were being or had been returned to the receiving State.[6] This practice has led to criticism that the Committee acted as a kind of fourth instance in asylum proceedings, particularly in the Global North, rather than concentrating its efforts on denouncing torture in the States where it is perpetrated. The fact that countries of the Global North, such as Switzerland and Sweden, are those where the Committee has found the highest number of violations of Article 3[7] can be explained by the high level of awareness of international complaints procedures among the legal profession, and the availability of legal aid, as well as by the fact that the optional individual complaints procedure under Article 22 has been less readily accepted by States with a record of systematic practice of torture. These cases also show that, in times of increasingly restrictive asylum and immigration laws in Europe and other States of the Global North, the authorities are put under a heavy political pressure which can lead to a substantial number of violations

[1] See eg *Mutombo v Switzerland*, No 13/1993, UN Doc CAT/C/12/D/13/1993, 27 April 1994; *Khan v Canada*, No 15/1994, UN Doc CAT/C/13/D/15/1994, 15 November 1994; *Alan v Switzerland*, No 21/1995, UN Doc CAT/C/16/D/21/1995, 8 May 1996; *Aemei v Switzerland*, No 34/1995, UN Doc CAT/C/18/D/34/1995, 9 May 1997.

[2] CAT, 'General Comment No 4 on the Implementation of Article 3 of the Convention in the context of article 22' (2018) UN Doc CAT/C/GC/4 replacing General Comment No 1 (1998) on the principle of non-refoulement.

[3] As of 31 March 2017, approximately 83% of all individual complaints decided by the CAT Committee related to Article 3 CAT. See Appendix A.7B, Figure 1. See also CAT/C/GC/4 (n 2) para 7.

[4] Fifty-eight complaints were regarded as inadmissible, three as admissible.

[5] For the details on the share of admissibility decisions and decisions finding a violation/non-violation of Article 3 CAT see below Appendix A.7C, Figure 2.

[6] Main receiving States in relation to violations of Article 3 are Iran, Turkey, and Democratic Republic of the Congo (former Zaire). See below Appendix A.7D, Figure 3.

[7] See below Appendix A.7A, Table 1, Article 3 decisions broken down by State party (Host Country).

of the non-refoulement principle. Torture is one of the most serious human rights violations, and complicity or participation in torture, which includes sending a person to a country despite a risk of torture there, constitutes a severe violation of the Convention.

3 The principle of non-refoulement is absolute and affords protection to every person regardless of the threat he or she may pose to the national security of the sending country and regardless of whether he or she has committed serious crimes. No balancing of interests is permitted. In contrast to the Refugee Convention of 1951, Article 3 CAT guarantees an absolute right which is not subject to any exclusion or limitation clause. Thus persons who might, for instance, for national security reasons not be eligible for asylum are equally protected.

4 In contrast to the principle of non-refoulement as developed by the European Court of Human Rights (ECtHR) and the UN Human Rights Committee (HRC) on the basis of Article 3 ECHR and Article 7 CCPR, Article 3 CAT only applies to torture in the sense of Article 1 CAT, but, owing to the insistence of the US during the drafting, not to other forms of cruel, inhuman or degrading treatment. However, other ill-treatment, not amounting to torture, is not irrelevant in the context of Article 3: the infliction of other ill-treatment is an indication of a torture risk[8] and States parties should in their assessment of torture risk consider whether the risk of other ill-treatment 'could likely change so as to constitute torture'.[9] Apart from that, the Committee has in its State reporting procedure urged States parties not to return persons to situations where they might run the risk of torture *or* cruel, inhuman or degrading treatment or punishment.[10]

5 States parties must not send persons to States where the risk of torture emanates from non-State actors who enjoy impunity either because the State fails to exert due diligence or because the State is not or only partially in control of its territory.

6 When methods of corporal punishment or the methods of implementing a death penalty as per national laws in the receiving State reach a threshold where they amount to torture, States parties are prohibited from returning persons to States where they might receive sentences imposing such treatment.

7 Although the text of Article 3 only speaks of expulsion, refoulement, and extradition, this provision covers all forms of obligatory departure of a human being (aliens as well as citizens) from one jurisdiction to another, including forms of ordinary or extraordinary 'rendition', as practised in the fight against global terrorism. Even the transfer of a suspected terrorist from the US detention centre of Abu Ghraib to another detention centre in Iraq under the jurisdiction of the Iraqi Government must be assessed in relation to the non-refoulement principle. Similarly, the Committee cautions against requesting and accepting diplomatic assurances from States with a known record of torture. Diplomatic assurances do not absolve a sending State party from its obligations under Article 3, and from carrying out the risk assessment mandated by the non-refoulement principle.

8 In order to guarantee the principle of non-refoulement, Article 3 also demands preventive measures, in particular legislative, administrative, and judicial measures against possible violations.[11] Such measures include inter alia procedural rights of the person

[8] CAT/C/GC/4 (n 2) para 28. [9] ibid, para 16.

[10] See eg CAT, 'Concluding Observations: Jordan' (25 May 2010) UN Doc CAT/C/JOR/CO/2, para 23; CAT, 'Concluding Observations: Guinea' (2014) UN Doc CAT/C/GIN/CO/1, para 24.

[11] See CAT/C/GC/4 (n 2) para 18.

concerned,[12] referral of the person alleging previous torture to an independent medical examination free of charge, in accordance with the Istanbul Protocol; or training of relevant personnel.[13]

9 Article 3(1) contains an explicit prohibition of refoulement. It demands 'substantial grounds' for believing that a torture risk for the person facing deportation exists. Article 3(2) stipulates that the 'competent authorities' of States parties must thereby take 'all relevant considerations' into account. In the following, this article analyses the following distinct elements:

1. Forms of prohibited conduct ('expel, return ("refouler") or extradite') if substantial grounds exist that a torture risk exists upon return (see below, 3.2).
2. The meaning of 'a person' (see below, 3.3).
3. The meaning of 'to another State' (see below, 3.4).
4. The question of the particular treatment that the person would be subjected to in the case of expulsion, return or extradition to another State: Is the scope of Article 3 CAT limited to torture alone as defined in Article 1 CAT, or does the prohibition extend to cruel, inhuman or degrading treatment in accordance with Article 16 CAT? How does the Committee deal with cases in which the applicant risks being subjected to torture which is defined as a 'lawful sanction' by the receiving State? What about a risk of torture posed by non-governmental actors in the receiving State? (see below, 3.5).
5. The question as to the probability of the torture risk: what is the time of the risk assessment? How does the Committee interpret the phrase 'would be in danger of being subjected to torture'? What are the relevant factors for the risk assessment? What role does the human rights situation in the receiving State play? Are 'internal flight alternatives' or diplomatic assurances of relevance under Article 3? (see below, 3.6).
6. The standard of proof/evidence applied in assessing the risk of danger of torture: what is the standard of proof that can be reasonably applied? Who bears the burden of proof and when does the burden of proof shift? What is the procedure by domestic authorities and by the Committee? (see below, 3.7)

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

10 *IAPL Draft (15 January 1978)*[14]

Article IV

> The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture, and in particular to ensure that:

[12] eg the right to an individual assessment of a case, to be informed of the reasons why being subject of a deportation procedure and of the rights to appeal such decision; access to a lawyer, to free legal aid when necessary; procedure in a language the person understands, or with the assistance of interpreters and translators; right of appeal against a deportation order to an independent administrative and/or judicial body within a reasonable period of time and with suspensive effect. See CAT/C/GC/4 (n 2) para 18.

[13] eg effective training of officials dealing with persons under deportation procedures about Article 3; effective training of medical and other personnel in identifying and documenting signs of torture, taking into account the Istanbul Protocol. See CAT/C/GC/4 (n 2) para 18.

[14] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

(f) No person is expelled or extradited to a State where there are reasonable grounds to believe that that person may be in danger of being tortured.

11 *Original Swedish Draft (18 January 1978)*[15]

Article 4

No State Party may expel or extradite a person to a state where there are reasonable grounds to believe that he may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.

12 *Revised Swedish Draft (19 February 1979)*[16]

Article 3

No State Party shall expel, return ('*refouler*') or extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.

13 *USSR Draft (7 March 1979)*[17]

Article 3

1) No State Party shall expel or extradite a person to another State where substantial evidence indicates that he may be in danger of being subjected to torture.

2) The evidence referred to in the preceding paragraph of this Article includes above all situations characterized by flagrant and massive violations of human rights brought about when apartheid, racial discrimination or genocide, the suppression of national liberation movements, aggression or the occupation of foreign territory are made State policy.

3) The provisions of this Article shall not be invoked as grounds for the refusing to institute proceedings against persons who have committed crimes against peace or mankind, or war crimes as defined in the relevant international instruments.

2.2 Analysis of Working Group Discussions

14 In written comments on Article 4 of the original Swedish draft, *Austria* suggested that a further Article be included which would oblige States parties to re-examine existing extradition treaties already in force to determine whether they were in conformity with the provisions of Article 4. *Spain* raised the question as to what should be done in the situation where an extradition treaty exists with a State which is 'suspected' of practising or tolerating torture and is not a party to the Convention, 'since it would necessarily prevent mandatory extradition under the extradition treaty'.

15 *France* suggested that the Article be reworded to read: 'No State may in any way expel, turn back or extradite a person to a State where there are serious grounds for believing that he may be in danger of being subjected to torture.'

16 *Switzerland* suggested that the provisions relating to extradition be subject to special requirements based on the motives for the practice of torture, as well as the circumstances in which acts of torture are carried out. The Swiss representative expressed

[15] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[16] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

[17] E/CN.4/WG.1/WP.2.

the view that extradition would be 'inconceivable unless the requested State believes that the person extradited will be given a proper trial by a court affording guarantees of fair judgement and that he will be detained in humane conditions'. The representative stated that, frequently, recourse to torture occurs in situations of domestic turmoil, in which the fate of individuals becomes very uncertain, particularly as a result of the suspension of constitutional rights and freedoms and that since the aim of a future Convention was not to create new categories of victims but to ensure the equitable punishment of the perpetrators of acts of torture, steps should be taken to prevent the alleged offenders from being subjected to the rigours of summary justice as a result of extradition.[18]

17 The *UK* suggested that the criteria for extradition should be more precise and therefore proposed the words 'reasonable grounds to believe that he may be in danger of being' should be replaced by 'substantial grounds for believing that he would be . . .'.[19]

18 The 1979 Working Group further discussed Article 4 of the original Swedish draft without reaching any conclusions. Subsequently, the Swedish delegate presented a revised draft[20] of the provision, which then became Article 3.[21]

19 This article gave rise to considerable discussion, much of which was a reiteration of the written comments submitted by States (above). The idea of having a provision prohibiting expulsion and extradition in certain circumstances received wide, although not general, support.[22] *Switzerland*, considering that the aim of the Convention was not to create new categories of victims but to ensure the equitable punishment of the perpetrators of acts of torture, felt that steps should be taken to prevent the alleged offenders from being subjected to summary justice as a result of extradition and consequently favoured the retention of Article 3.[23] Regarding the question as to whether or not this provision would create problems in relation to already existing extradition treaties, *Austria* suggested the inclusion of another article stipulating that States parties should re-examine extradition treaties already in force to determine their conformity with this article. *Spain* considered problematic the specific case of existing extradition treaties with States suspected of practising torture but who were not States parties to the Convention, since the latter Convention would necessarily prevent mandatory extradition under such extradition treaties. The Working Group agreed that it would be preferable not to include an exception for such cases in the text of the article lest such a limitation be interpreted as encouraging extradition to countries where the person concerned would be subject to torture. It was therefore proposed that the following remark be included in the report of the Commission:

Some delegates indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by Article 3

[18] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, para 60.

[19] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1, para 8.

[20] E/CN.4/WG.1/WP.1 (n 16).

[21] J Herman Burgers and Hans 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) 49.

[22] ibid. [23] ibid 50.

of the Convention, in so far as that Article might not be compatible with obligations towards States not Party to the Convention under extradition treaties concluded before the date of the signature of the Convention.

20 In written comments based on the revised Swedish draft, while noting that the underlying objective of the Convention is to prevent torture, *Italy* pointed out that 'some of the provisions of the [revised Swedish] draft could conflict with [States parties'] bilateral undertakings, [...] particularly with regard to extradition, expulsion, and return' and that '[t]he Convention would [...] be applicable only between States parties and could not have a direct effect on agreements it made between those States and 'third' States which might conflict with it. In order to avoid the situation where a State party might find itself unable to observe the Convention without violating bilateral undertakings previously subscribed to, Italy proposed a new wording for Article 3 which, while providing for a number of specific undertakings by States acceding to the Convention, would make it possible to ensure the following:

(a) that undertakings arising from this Convention should be considered to take precedence, between Member States, over those arising from existing agreements that conflict with it;
(b) that States parties should not subscribe to new agreements conflicting with the Convention;
(c) that States parties should proceed to modify any agreements to which they subscribed before the Convention on Torture, if implementation of those agreements could entail a violation of the principles embodied in the Convention.[24]

21 The advisability of including the word return ('*refouler*') in the revised draft text gave rise to considerable discussion during the 1979 Working Group. Arguments in favour included the following: that there were strong humanitarian considerations for the inclusion of the word 'return' which broadened the protection of the persons concerned; and that the concept is also found in Article 33(1) of the 1951 Refugee Convention. Arguments against included the following: that the 1951 Convention covered a different subject area and besides was not broadly accepted; that the concept of 'return' might require a State to accept a mass influx of persons when it was not in a position to do so; and that disagreement over the concept of 'return' had led to failure in the drafting of the Convention on Territorial Asylum. It was therefore proposed that the term be deleted or that specific provisions be made in the Convention for States to attach a reservation to their acceptance of the Article.

22 A proposal by the *UK* to replace the phrase 'reasonable grounds to believe' that the person concerned might be in danger of being subjected to torture with 'substantial grounds for believing that he would be' in danger of being subjected to torture in order to make the criteria more precise was adopted in the revised Swedish draft. Other alternatives suggested were 'substantial evidence indicating' and 'substantial indications'. The view was expressed that some of the formulations proposed, such as the word 'grounds', were too vague. The term 'evidence' was also criticized as possibly too technical and lending itself to different interpretations in the various legal systems. The view was expressed that such problems were difficult to avoid and that the effective application of the provision would, in any event, depend upon the good faith of those concerned. It was

[24] Summary prepared by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.4, paras. 27–28.

pointed out that as the purpose of the provision was to afford the greatest possible protection against torture, the evidentiary requirement should not be too rigorous and should be kept to a minimum. It was further said that the burden of proof should not fall solely upon the person concerned.

23 Certain minor amendments were also proposed. It was agreed that the words 'to a State' should be added after the word 'person' in the revised draft. These words were already present in the French and Russian translations of the draft. It was proposed that the word 'where' should be replaced by 'as long as' or 'when' so as to take into account a lapse of time which had removed the danger of the person concerned being subjected to torture. At the same time, it was felt that the word 'where' was adequate to cover such situations.

24 A fundamental change was proposed by the *USSR* in 1979.[25] Paragraph 2 sought to develop and illustrate the concept of 'substantial evidence' by citing certain types of situations which arose as a result of State policy and which, in the view of the Soviet delegation, were most conducive to torture practices. Although the lists were not identical, this list was based broadly on those mentioned in GA Resolution 32/130.[26] It was not possible to make an exhaustive list of relevant situations. The term 'colonialism' was not included because it was encompassed in the broader reference to the 'suppression of national liberation movements'.

25 Other delegates could not accept the Soviet proposal.[27] Concern was expressed that the listing of specific situations might be misinterpreted to imply that there were other situations where torture could be tolerated. It was also said that the main purpose of the Article was to ensure a separate evaluation of the case of each individual, and that it was thus not helpful to refer to general situations. According to the USSR proposal, the aim of Article 3(3) was to ensure that this provision could not be invoked as a pretext for refusing to institute proceedings against persons who have committed the crimes specified. The paragraph would secure punishment for such criminals, but did not oblige States to extradite them to countries where they could be in danger of being subjected to torture.

26 While one delegation proposed that Article 3 be deleted, most delegations were in favour of retaining a provision on this subject.[28] However, since no agreement could be reached on the wording of the Article, discussion was suspended to allow further consideration and consultation.[29]

27 Discussions were resumed in the 1980 Working Group, still based on the revised Swedish draft. The USSR alternative text, which had been proposed in 1979, was reintroduced at the 1980 session. However, as the Soviet proposal caused problems of principle for a great many delegations, attempts were made to find a suitable compromise. In particular, the *International Commission of Jurists* made such an effort by proposing the following wording of Article 3(2):

For the purposes of determining whether there is such evidence all relevant considerations shall be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross violations of human rights, such as those resulting from a state policy of apartheid,

[25] Proposed by the USSR at the meeting of the Working Group on 7 March 1979: E/CN.4/WG.1/WP.2 (n 17). This text took into account comments made by other delegations. See above 2.1.

[26] GA Res 32/130 of of 16 December 1977. [27] Burgers and Danelius (n 21) 51.

[28] ibid.

[29] Report of the Working Group of the Commission on Human Rights (1979) UN Doc E/CN.4/L.1470.

racial discrimination or genocide, the suppression of national liberation movements or the occupation of foreign territory.[30]

28 At this point, the Working Group turned back to Article 3(1). It was agreed that the words 'substantial grounds' in the revised Swedish draft should be rendered in French '*motifs sérieux de croire*'. There was also debate over whether the word 'would' should replace 'may' which was considered too vague by several delegates. It would be translated '*estaría*' in the Spanish version.

29 Article 3(1) was thus adopted by consensus as follows with an additional remark in square brackets:

> No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. ['Some delegates indicated that their States might wish, at the time of signature or ratification of the convention or accession thereto, to declare that they did not consider themselves bound by Article 3 of the Convention, in so far as that Article might not be compatible with obligations towards States not party to the Convention under extradition treaties concluded before the date of signature of the Convention.']

30 There was disagreement as to whether a second sentence should be added to that rule. *Argentina* stated that its adherence to the consensus on the first sentence was conditional upon the Working Group's agreement to an additional sentence. The proposal was to add a subparagraph to paragraph 1 of the Article in order to ensure that States under an obligation to grant extradition in virtue of a treaty could not free themselves unilaterally from that obligation and 'thus imperil the very institution of extradition'. The proposal was as follows:

> If a State which otherwise would be obliged to extradite did not do so for the reasons mentioned, it shall take the necessary measures to bring the person, whose extradition it refuses to grant, to trial.[31]

31 This proposal created problems for many States that did not necessarily have criminal jurisdiction over the offences concerned. A person whose extradition to another country was refused because of a risk of torture could be suspected of having committed any kind of offence, and the offence would normally have been committed outside the territory of the requested State. In these circumstances, the requested State would often lack criminal jurisdiction, and many States would be unwilling to introduce criminal jurisdiction simply on the grounds that extradition had been refused. The proposal was supported by one delegate but other speakers stated that it would conflict with other national legislation and was liable to raise insoluble problems in some legal systems, including the absence of criminal jurisdiction, lack of evidence, and interference with prosecutorial discretion. The *Argentinian* proposal was considered to be based on a Latin American practice which was unknown in other parts of the world.[32] Such a clause meant that the practice followed by the Latin American countries in extradition matters should not in any way be affected by the provisions of the present Convention.

32 Attempts were made to find a compromise at this point. One delegate proposed the following text:

[30] HR/XXXVI/WG.10/WP.7.
[31] HR(XXXVI)/WG.10/WP.8/Add.1.
[32] Burgers and Danelius (n 21) 55.

A State Party which refuses extradition in the circumstances described in paragraph 1 shall, having regard to its national legislation, institute proceedings against the person whose extradition was refused.[33]

Another representative suggested that the words 'having regard to its national legislation' be replaced by the words 'if its national legislation so permits'.

33 *Sweden* put forward the following revised proposal:

A State Party which refuses extradition in the circumstances described in paragraph 1 shall consider, on the basis of its national law, whether to institute criminal proceedings in that State against the person whose extradition was refused.[34]

34 The *International Commission of Jurists* suggested the following wording:

If a State Party, which is under a treaty obligation to extradite a person to another State, refuses to do so in the circumstances described in paragraph 1, it shall, if its national legislation so permits, institute criminal proceedings against the person whose extradition it refuses.[35]

35 No agreement on this matter was reached in the Working Group in 1980. Several representatives then requested that the expression in the International Commission of Jurists' proposal, 'if its national legislation so permits', should be placed in square brackets. Others requested that the proposal be withdrawn altogether. Similarly, there was no agreement on whether there should be a specific remark in the Commission's report to the effect that some States might wish to make reservations so as not to be obliged to refuse extradition to States not party to the Convention where such extradition was required under already existing treaties.[36]

36 Discussions in the 1980 Working Group moved back to the *Soviet proposal on paragraph 2* which gave a number of examples in which there would be a risk of torture. Opinions were divided. One representative suggested that paragraph 2 should end with the words 'human rights' or that the last three lines, which seemed likely to raise problems, be placed in square brackets. A number of speakers suggested the deletion of the entire paragraph or at least those three lines which, in their view, would inject unnecessary political overtones into the Convention and would in practice restrict the scope of Article 3. Other representatives, however, said that the deletion of the last few lines of paragraph 2 was unjustified. In their view paragraph 2 should not only be retained in its entirety, but the words 'colonialism' and 'neo-colonialism' as used in GA Resolutions 32/130 and 34/46, should be included therein.

37 Several delegations opposed any references to UN General Assembly resolutions in the text of the Convention on the ground that it is not good legal practice to incorporate a non-binding General Assembly resolution in an international convention that imposes binding legal obligations upon States. They stated also that no list of State policies could ever be exhaustive or agreed upon by the Working Group. The *USA* declared that such a list of State policies would have to include religious persecution, denial of free speech, suppression of political dissent, and the free flow of information, and armed intervention in the affairs of sovereign States.

38 No agreement could be reached on this matter and discussion was deferred for further consideration. The Working Group agreed to put the whole of paragraph 2 in square

[33] HR/XXXV1/WG.10/WP.8/Add.2. [34] ibid. [35] HR/XXXV1/WG.10/WP.11.
[36] Burgers and Danelius (n 21) 55, 56.

brackets and to insert therein the proposed terms 'colonialism' and 'neo-colonialism' as follows:

[For the purpose of determining whether there is such evidence all relevant considerations shall be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross violations of human rights, such as those resulting from a State policy of apartheid, racial discrimination or genocide, colonialism or neo-colonialism, the suppression of national liberation movements or the occupation of foreign territory.][37]

39 Article 3 as adopted by the Working Group in 1980 read as follows:[38]

1) No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
   Remark: 'Some delegations indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by article 3 of the Convention, in so far as that article might not be compatible with obligations towards States not party to the Convention under extradition treaties concluded before the date of the signature of the Convention.
2) [For the purpose of determining whether there is such evidence all relevant considerations shall be taken into account, including where applicable, the existence in the State concerned of a consistent pattern of gross violations of human rights, such as those resulting from a State policy of apartheid, racial discrimination or genocide, colonialism or neo-colonialism, the suppression of national liberation movements or the occupation of foreign territory.]

40 During the 1981 Working Group no agreement could be reached on maintaining, changing or deleting Article 3(2). Article 3(2), which was in square brackets, contained an illustrative list of consistent and gross violations of human rights.

41 Some delegations stressed the importance they attached to the retention of the illustrative list of consistent gross violations of human rights, proposing that the square brackets be deleted. Others considered that the list should either be deleted or amplified by a reference to other types of violations. Some members favoured the deletion of paragraph 2 in its entirety, finding it to be superfluous. One delegation said that the existence of most of the conditions in the list did not, either logically, legally, or otherwise, constitute grounds to believe that a person would be in danger of being subjected to torture.

42 The discussion was concerned in particular with the retention of the expressions 'colonialism' and 'neo-colonialism'. It was decided to delete the square brackets around these words, on the understanding that the paragraph as a whole remained between brackets.

43 *Argentina* maintained its earlier position by proposing a footnote reading:

The Working Group agreed that a State Party which refuses extradition in the circumstances described in paragraph 1 shall, if its national legislation so permits, institute criminal proceedings against the person whose extradition it refuses.

[37] Report of the Working Group of the Commission on Human Rights on a Draft Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1980) UN Doc E/CN.4/1367.

[38] E/CN.4/1367 (n 37) Annex.

44 Several representatives raised the question of the legal effect of such a footnote in a document such as the Convention. It was suggested that it could more appropriately be included in the Working Group's report. In view of the difference of opinion, the author of the proposal requested that consideration of the matter be deferred to allow him to engage in consultations.

45 To bring the various language versions into line, the Group decided to replace the words '*preuves substantielles*', in paragraph 1 of the French text, by the words '*motifs sérieux de croire*', and the words '*de telles preuves*', in paragraph 2, by '*de tels motifs*'. In the English text of paragraph 2, the words 'there is such evidence' were replaced by the words 'there are such grounds' in order to bring the text into line with paragraph 1.

46 At the end of the 1981 Working Group deliberations the text of Article 3, as revised, read as follows:

Article 3

1) No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. *Remark*: Some delegations indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by article 3 of the Convention, in so far as that article might not be compatible with obligations towards States not party to the Convention under extradition treaties concluded before the date of the signature of the Convention.
2) [For the purpose of determining whether there are such grounds all relevant considerations shall be taken into account, including, where applicable, the existence in the State concerned of a consistent pattern of gross violations of human rights, such as those resulting from a State policy of apartheid, racial discrimination or genocide, colonialism or neo-colonialism, the suppression of national liberation movements or the occupation of foreign territory.][39]

47 Once again, no agreement could be reached in the 1982 Working Group. Regarding paragraph 2, some representatives felt that it was important to include in the Convention the proposed illustrative list of gross violations of human rights, which had several precedents in UN resolutions while others maintained that such a list was superfluous. It was again restated that some of the items on the list did not, whether legally or logically, constitute a basis for believing that an extradited person would be subjected to torture. One view was that, if the provisions were kept, references to other types of gross violations should be added. An alternative proposal was to keep the paragraph but to delete all words after 'gross violations of human rights'. The group decided provisionally to retain paragraph 2 between square brackets and to return to the question at a later stage.

48 During the 1983 session of the Working Group the observer for the United Nations High Commissioner for Refugees (UNHCR) made a statement in connection with the principle of *non-refoulement*. He pointed out that the application of this principle was not necessarily dependent on general characteristics of the situation in the State concerned but might also be required by considerations relating to the individual case. He felt that the present wording of the second paragraph did not emphasize sufficiently that the situation of the individual should be the ultimate determining factor. The Chairman-Rapporteur observed that the word 'including' in the proposed

[39] Report of the Working Group of the Commission on Human Rights on a Draft Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1981), UN Doc E/CN.4/L.1576, para 19.

second paragraph made it clear that, apart from the possible existence of consistent patterns of gross violations of human rights, other relevant considerations should be taken into account.

49 Several delegations favoured the deletion of the second paragraph as being superfluous and/or lending itself to abusive interpretations. In this context, some delegates also referred to the remarks made by the observer for the UNHCR. Other delegates, however, considered it important to keep the proposed illustrative list of gross violations of human rights which had, in their view, well-established precedents in UN resolutions. Some delegations, who opposed the deletion of paragraph 2, stated that they would favour deletion of Article 3 in its entirety. Reference was made to the statements of certain delegations during earlier sessions of the Working Group, indicating that their States, at the time of signature or ratification of the Convention or accession thereto, might wish to declare that they did not consider themselves bound by Article 3 CAT.

50 Various proposals were made for amending the proposed paragraph 2, including the ending of the paragraph with the words 'taken into account', or the deletion of all the words after 'gross violations of human rights'. One delegate suggested retaining paragraph 2 up to and including the word 'apartheid', in view of the extreme gravity of this crime against humanity which was recognized as such by the United Nations. Some members considered that, if the provisions of paragraph 2 were retained, references to other types of gross violations should be added, such as all forms of religious intolerance, denial of freedom of expression, and denial of the right to form and join trade unions. Another proposal was the insertion, at an appropriate place, of the words 'of a systematic practice of arbitrary arrest or detention'. Since no consensus could be reached on any of the above proposals, the Working Group decided that paragraph 2 should provisionally be retained between square brackets and that the matter should be reconsidered at a later stage.[40]

51 In the 1984 Working Group several delegations reiterated again the statement relating to Article 3(1) indicating that their States, at the time of signature or ratification of the Convention or accession thereto, might wish to declare that they did not consider themselves bound by Article 3 CAT. The delegation of *Uruguay* stated that it did not wish to oppose adoption of Article 3, but that it maintained its view that the inclusion of this article in the Convention was not advisable, since it might be misused by serious criminals to evade prosecution. The delegations of *Canada* and *Spain* expressed their disappointment with the fact that paragraph 1 of draft Article 3 referred only to torture and not to other acts of cruel, inhuman or degrading treatment or punishment.

52 The representative of *Senegal*, pointing out the possible connection between Articles 3 and 7, orally proposed the addition of a safeguard clause at the beginning of Article 3(1), which would read as follows:

> Without prejudice to the obligations incumbent on a State under Article 7 of the Convention …

53 Several speakers felt that such an addition was not necessary, because the obligations regarding extradition or prosecution under Article 7 would apply irrespective of any reference to that provision in Article 3. They also observed that Articles 3 and 7 aimed at different categories of persons (Article 3 at persons who might become victims

[40] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63.

of torture, Article 7 at persons who might have been involved themselves in the perpetration of torture.) In light of these comments the representative of *Senegal* did not insist on his proposal.

54 Regarding Article 3(2), various suggestions were made along similar lines to those made during previous discussions, such as deleting the paragraph entirely, retaining the paragraph but deleting the illustrative list, and maintaining the illustrative list but modifying its content. It was said that paragraph 2 might offer useful guidance to national courts which might otherwise give too narrow an interpretation of the first paragraph. The delegation of the *Federal Republic of Germany*, remarking that paragraph 2 seemed to concentrate on the situation in the State concerned rather than the specific risks of the persons involved, orally proposed adding the following sentence:

> It shall be decisive, however, that there are in the individual case substantial grounds to believe that the person to be expelled, returned or extradited would be in danger of being subjected to torture.

55 Several delegations felt that such an addition was not necessary given that the draft paragraph already specified that 'all relevant considerations' should be taken into account. At a later stage the German delegation announced that it would not insist on its proposal.

56 In order to reach consensus, the representatives of *India* and *Senegal* proposed that only the first part of paragraph 2 be retained but that the illustrative list, which many Western delegates took exception to, beginning with the words 'such as', be omitted. This proposal was generally acceptable to the Working Group. The *Soviet Union* drew attention to a difference in the English and Russian versions of the text of Article 3(2). The Russian text spoke of 'persistent gross and mass violations of human rights' whereas the English text spoke of 'a consistent pattern of gross violations of human rights'. While accepting the Indian proposal in principle, the Soviet representative suggested that the English text be brought into line with the Russian text.

57 Several opinions were expressed concerning the meaning of those terms in the practice of the United Nations. After informal consultations the representative of *India* proposed, as a compromise, to replace the present formula in all languages with the following: 'a consistent pattern of gross, flagrant or mass violations of human rights'.

58 Another problematic area for several speakers was the 'passive formulation' of Article 3(2) which, in their view, did not make it sufficiently clear by whom the relevant considerations should be taken into account. In light of this discussion, and based on the compromise proposal of the Indian delegation, the representative of the *UK* proposed a formulation according to which 'the competent authorities' should take these considerations into account:

> For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[41]

59 At the ninth meeting of the Group, the delegation of the *Federal Republic of Germany* stated that, in order to assist the Working Group in reaching a consensus on

[41] Suggestion with regard to paragraph 2, article 3 of the Draft Convention against Torture by the Delegation of the United Kingdom (1984) UN Doc E/CN.4/1984/WG.2/WP.4/Rev.1.

Article 3(2) it would not insist on its proposal for the addition of a new sentence at the end of that paragraph. The Working Group then adopted the text of the paragraph as contained in the proposal of the delegation of the UK. After the adoption of this paragraph the delegations of *China*, the *German Democratic Republic*, the *Soviet Union*, and the *USA* made explanatory statements for the record.[42]

60 The representative of the *German Democratic Republic* stated that it considered the final text, and especially the phrase 'consistent pattern of gross, flagrant or mass violations', not fully satisfactory and that his delegation would have preferred the original version of the paragraph or a formulation based on GA Resolution 32/130 which had been adopted by a vast majority of States. He stated that his delegation's final position on the subject would depend on the results of the debate on the remaining articles and he therefore reserved his right to revert to that question at a later stage.

61 The representative of the *Soviet Union* said that although he supported the compromise solution, he would have preferred the original version of the paragraph. He attributed great importance to the concept of 'mass violations of human rights'. In his understanding, the concept of a consistent pattern of human rights violations already implied that such violations occurred on a massive scale. Therefore, the word 'or' in the text was not to be interpreted as indicating opposition between the concept of 'gross' and that of 'mass' violations of human rights. The two concepts were complementary and should be read together.

62 The representative of the *USA* said that the language in the paragraph under consideration had been taken from ECOSOC Resolution 1503 (XLVIII) as well as from GA Resolution 32/130. Therefore, according to his delegation's interpretation, paragraph 2 included situations covered by ECOSOC Resolution 1503 (XLVIII).

63 The representative of *China* stated that although he had agreed to the final text in a spirit of compromise, he would have preferred the listing of examples in paragraph 2, such as a State policy of apartheid, racial discrimination, or genocide. The concept of 'mass violations of human rights' should in fact have been qualified by a mention of specific circumstances constituting such violations.[43]

64 The Summary Record of the Thirty-second meeting of the Working Group[44] documents a statement made by the representative of the *Federal Republic of Germany* to the effect that Article 3 of the draft significantly supplemented the general ban on torture by requiring States parties not to hand over a person by force to any State where he or she would be exposed to the objectively verifiable danger of being subjected to torture. The representative further stated that the current wording was unequivocal and would thwart any attempt to misuse that provision for purposes unrelated to the Convention, such as an endeavour to obtain an unjustified right of residence.

65 In the Summary Record of the Thirty-second meeting, in reference to Article 3(2), the *German Democratic Republic* drew attention to the fact that they would have preferred the original wording of draft Article 3(2) with its 'clear political references to apartheid, racial discrimination, genocide, colonialism, neo-colonialism, suppression of national liberation movements and occupation of foreign territory'.

[42] Burgers and Danelius (n 21) 93.
[43] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72.
[44] Summary Record of the thirty-second Meeting (1984) of the Commission on Human Rights UN Doc E/CN.4/1984/SR.32.

66 During the Thirty-third meeting the *USSR* also expressed a preference for the wording of the original text of Article 3, arguing that a decision not to extradite a person to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture ought to be taken on the basis of sufficiently precise criteria; similarly it would have preferred a somewhat more precise interpretation or definition of the expression 'a consistent pattern of violations of human rights' (apartheid, genocide, and so on).

67 *Bulgaria* reserved the right to express a final position with respect to Article 3, stating that it would have preferred the original version of Article 3(2) and adding that the phrase 'consistent pattern of gross, flagrant or mass violations of human rights' did not seem fully satisfactory. *Uruguay* expressed misgivings concerning Article 3. In the opinion of the delegation, the rules laid down in that draft article should be applicable to any offender, and not merely to torturers. However, in their view, the draft article gave the competent authorities discretionary powers of judgment, thus providing a loophole regardless of the type of crime. Several delegations had also referred to the possibility of making reservations concerning that draft article. The observer for *Norway,* while stating that his delegation fully supported the text as it stood, stated that he would have preferred that Article 3(1) refer not only to torture, but also to other forms of cruel, inhuman or degrading treatment or punishment.[45]

68 During the consideration by the plenary Commission in 1984, the Soviet representative argued that the text could be improved in respect of Article 3.[46] On 26 March 1984 the UN Secretary-General forwarded the 1984 Working Group report and summary records to the Governments of all States inviting written comments concerning the draft Convention.

69 In written comments *Burundi* noted that Article 3(1) referred only to torture, and not to other forms of cruel, inhuman or degrading treatment or punishment. *Cyprus* also stated that while it was not desirable to make amendments at this late stage, certain articles of the Convention, including Article 3, could be improved so as to cover other acts of cruel, inhuman or degrading treatment or punishment. *Yugoslavia* stated that the manner in which Article 3(1) was formulated could lead to paralysis of the institute of extradition as an important form of international legal assistance in criminal matters, noting that existing practices of international extradition treaties formulate this in a different way by saying that extradition shall be refused 'on other substantial grounds', referring thus, first and foremost, to reasons of personal safety of persons whose extradition is being requested, and to torture and other cruel, inhuman or degrading treatment of such persons.[47] *Yugoslavia* also suggested that paragraph 2 should be reviewed since it only 'paraphrased the provisions of paragraph 1 and should therefore be deleted'.

70 In written comments *Togo* endorsed the view that it might wish to declare at the time of signature or ratification of the Convention or accession thereto that it does not consider itself bound by Article 3 in so far as that article might not be compatible with obligations towards States not parties to the Convention under extradition treaties concluded before the date of the signature of the Convention.[48] *Thailand* noted that the

[45] Summary Record of the thirty-third Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.33.

[46] Report Commission on Human Rights at its fortieth Session (1984) UN Doc E/CN.4/1984/77.

[47] Report of the Secretary General (1984) UN Doc A/39/499/Add.1.

[48] Report of the Secretary-General (1984) UN Doc A/39/499.

prohibition against extradition may violate the existing commitment of States parties under particular extradition treaties to which they have been parties before, especially if the requesting State is not a party to this Convention.

71 On 10 December 1984, the plenary of the General Assembly adopted without a vote the draft resolution as submitted to it by the Third Committee.

3. Issues of Interpretation

3.1 The Absolute Nature of the Prohibition of Refoulement

72 Article 3 provides for an absolute protection against refoulement.[49] The prohibition of refoulement is a norm of customary international law[50] and according to some also a norm of *jus cogens*.[51]

73 Nobody can be excluded from this absolute protection against refoulement: persons who pose a threat to national security and/or have committed serious crimes and who might therefore not be eligible for asylum are equally protected.[52] Article 3 'affords absolute protection against torture to anyone in the territory of a State party, regardless of the person's character or the danger the person may pose to society'.[53] The Committee also made it clear that 'no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture'.[54] It explained that once a person 'alludes to a risk of torture … the State party can no longer cite domestic concerns as grounds for

[49] This is confirmed in CAT/C/GC/4 (n 2) para 9, the Committee's case law (see eg *Tapia Paez v Sweden*, No 39/1996, UN Doc CAT/C/18/D/39/1996, 19 January 1996, para 14.5; *Aemei v Switzerland*, No 34/1995 (n 1) para 9.8; *MBB v Sweden*, No 104/1998, UN Doc CAT/C/22/D/104/1998, 5 May 1999, para 6.4; *VXN and HN v Sweden*, Nos 130/1999 and 131/1999, UN Doc CAT/C/24/D/130&131/1999, 15 May 2000, para 13.4; *Adel Tebourski v France*, No 300/2006, UN Doc CAT/C/38/D/300/2006, 1 May 2007, para 8.3; *Bachan Singh Sogi v Canada*, No 297/2006, UN Doc CAT/C/39/D/297/2006, 16 November 2007, para 10.2; *Rouba Alhaj Ali v Morocco*, No 682/2015, UN Doc CAT/C/58/D/682/2015, 3 August 2016, para 8.9), as well in its State reporting procedure (see eg CAT, 'Concluding Observations: Kenya' (2009) UN Doc CAT/C/KEN/CO/1, para 16; CAT, 'Concluding Observations: Colombia' (2015) UN Doc CAT/C/COL/CO/5, para 15; CAT, 'Concluding Observations: France' (2010) UN Doc CAT/C/FRA/CO/4-6, para 17; CAT, 'Concluding Observations: Japan' (2013) UN Doc CAT/C/JPN/CO/2, para 9).

[50] See eg Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) 354; UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (1994).

[51] For authors arguing that it forms part of *jus cogens* see eg Jean Allain, 'The Jus cogens Nature of Non-Refoulement' (2001) 13 IJRL 533; Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) 46 NYIL 273 ('… it is ripe for recognition as a norm of jus cogens, due to its universal, non-derogatory character'); UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (2007) para 21; UNHCR 'Observations on the Draft Revision of the General Comment No 1' (2017) para 5. For authors arguing that it is not part of jus cogens see eg Aoife Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 IJRL 389–390; William A Schabas, 'Final Report of the Expert Workshop on Human Rights and International Co-operation in Counter-terrorism' (2007) 7, n 22 <http://www.osce.org/odihr/24170?download=true> accessed 1 February 2018.

[52] See eg *Khan v Canada*, No 15/1994 (n 1); *VXN and HN v Sweden*, Nos 130/1999 and 131/1999 (n 49) para 14.3; *Dadar v Canada*, No 258/2004, UN Doc CAT/C/35/D/258/2004, 23 November 2005, paras 4.4, 8.8.

[53] See *Mumin Nasirov v Kazakhstan*, No 475/2011, UN Doc CAT/C/52/D/475/2011, 14 May 2014, para 10.4. Similar *Adel Tebourski v France*, No 300/2006 (n 49) para 8.2.

[54] *Alexey Kalinichenko v Morocco*, No 428/2010, UN Doc CAT/C/47/D/428/2010, 25 November 2011, para 15.5.

failing in its obligation under the Convention to guarantee protection to anyone in its jurisdiction …'[55]

74 The absolute nature of the non-refoulement principle *rules out any balancing of interests* between the individual right not to be subjected to torture when being forcibly returned and public concerns, such as national security concerns. This is of utmost importance in expulsions, extraditions, and renditions of *terror suspects*.[56] In *Agiza v Sweden,* concerning an Egyptian citizen found guilty by an Egyptian court of belonging to a terrorist group, Sweden rejected his asylum request on national security grounds which led to the deportation on the same day by a CIA rendition flight. The Committee reiterated 'that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms'.[57]

75 Criminal proceedings against or convictions of a person are not a valid reason to disregard the non-refoulement principle. In this context, the Committee criticized the exclusion of persons with a criminal record from moratoria on the removal of rejected asylum seekers.[58] Similarly, indictments and criminal proceedings involving persons accused of religious extremism and terrorist activities cannot be taken to prevail over the rights enshrined in Article 3 CAT, even if the State party invokes regional security.[59]

76 In the same vein, *diplomatic assurances* cannot lift the obligation of States parties not to return persons to a country where they are at risk of torture.[60] The Committee stressed in its General Comment No 4 (2017) that diplomatic assurances 'should not be used as a loophole to undermine the principle of non-refoulement'[61] and in its case law that they 'cannot be used as a justification for failing to apply the principle of non-refoulement'.[62] In the State reporting procedure, the Committee requested States parties to '[r]efrain from the use of and reliance on diplomatic assurances, which should not be used to alter the absolute prohibition of non-refoulement'.[63]

77 The absolute nature of the principle of non-refoulement should be enshrined and spelled out in *national legislation.* National legal frameworks must provide for a process of independent review of removal orders and must not include exceptions to the principle allowing, for instance, the expulsion of refugees on the basis of national security.[64] The Committee recommended in its State reporting procedure that 'expulsion and refoulement of individuals should be decided after careful assessment of the risk of being tortured in each case and should be subject to appeal with suspensive effect'.[65]

[55] *Adel Tebourski v France,* No 300/2006 (n 49) para 8.3.

[56] See eg *Bachan Singh Sogi v Canada*, No 297/2006 (n 49) para 10.2.

[57] *Agiza v Sweden*, No 233/2003, UN Doc CAT/C/34/D/233/2003, 20 May 2005, para 13.8.

[58] *Kalonzo v Canada*, No 343/2008, UN Doc CAT/C/48/D/343/2008, 18 May 2012, para 9.5; similar *EL v Canada*, No 370/2009, UN Doc CAT/C/48/D/370/2009, 21 May 2012, para 8.3.

[59] See eg *Tursunov v Kazakhstan*, No 538/2013, UN Doc CAT/C/54/D/538/2013, 8 May 2015, para 9.7; *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010, UN Doc CAT/C/47/D/444/2010, 15 November 2011, para 13.7.

[60] See below 3.6.5.

[61] CAT/C/GC/4 (n 2) para 20.

[62] *Abichou v Germany*, No 430/2010, UN Doc CAT/C/50/D/430/2010, 21 May 2013, para 11.5.

[63] CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 16(f); see also CAT, 'Concluding Observations: Turkmenistan' (2011) UN Doc CAT/C/TKM/CO/1, para 23.

[64] See eg CAT/C/KEN/CO/1 (n 49) para 16; CAT, 'Concluding Observations: Canada' (2012) UN Doc CAT/C/CAN/CO/6; CAT, 'Concluding Observations: China' (2008) CAT/C/CHN/CO/4, para 37.

[65] CAT/C/KEN/CO/1 (n 49) para 16.

The Committee also criticized States parties for introducing concepts such as 'internal asylum' and 'safe countries of origin' in national law, which do not guarantee absolute protection against refoulement.[66]

78 In contrast to Article 3 CAT, the refoulement prohibition of the *Refugee Convention* in Article 33 (limited to refugees within the meaning of the Refugee Convention) is *not absolute:* The refoulement protection may 'not … be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'.[67] Apart from that, the Refugee Convention contains provisions which allow the exclusion from refugee status. Article 1(F) Refugee Convention excludes groups of persons which 'are to be considered undeserving of international protection as refugees' per se from its personal scope of application.[68] The Committee stressed in cases in which authorities had refused asylum applications by invoking the exclusion clause of Article 1(F) Refugee Convention that 'the non-refoulement principle in article 3 of the Convention is absolute even if, after an evaluation under the 1951 Convention relating to the Status of Refugees, a refugee is excluded under article 1 F (c) of the latter Convention'.[69]

3.2 Forms of Prohibited Conduct

79 Article 3(1) stipulates that '[n]o State Party shall expel, return ('refouler') or extradite a person to another State …' if a torture risk exists. This provision covers any form of obligatory departure to another State. It 'is intended to cover all measures by which a person is physically transferred to another State'.[70] In General Comment No 4 (2017) the Committee deals with the question whether also measures not physically transferring but indirectly forcing a person to go to another State are covered by Article 3. It states that

> States parties should not adopt dissuasive measures or policies … which would compel persons in need of protection under Article 3 … to return to their country of origin in spite of their personal risk of being subjected there to torture and other cruel, inhuman or degrading treatment or punishment.[71]

80 Other international human rights treaties use similar terminology: Article 33(1) Refugee Convention uses the terms 'expel or return ('*refouler*')'. Article 13 CCPR, which protects aliens against arbitrary expulsion, only refers to 'expulsion'. The HRC interprets the latter provision as encompassing every form of 'obligatory departure' of aliens,

[66] CAT/C/FRA/CO/4-6 (n 49). [67] Geneva Refugee Convention, art 33(2).

[68] Andreas Zimmermann and Philipp Wennholz, 'Article 1F' in A Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) para 1.

[69] See eg *Mumin Nasirov v Kazakhstan,* No 475/2011 (n 53); *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59). Similar: *Tapia Paez v Sweden*, No 39/1996 (n 49); *MBB v Sweden*, No 104/1998 (n 49) para 6.4.

[70] Burgers and Danelius (n 21) 126.

[71] CAT/C/GC/4 (n 2) para 14. It mentions as examples of dissuasive measures 'detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolong them, or cutting funds for assistance programs to asylum seekers'.

including extradition, even though the drafters intended a more narrow scope of application excluding extradition.[72]

81 In light of the *travaux préparatoires* and the practice of the Committee, it becomes apparent that Article 3 similarly protects any person against any form of 'obligatory departure' to another State. The original Swedish draft of Article 3, as well as the IAPL draft, spoke of 'expulsion and extradition'. On the suggestion of France, however, the word 'return' ('*refouler*') was added at an early stage of the drafting in the Working Group in order to broaden the protection of the persons concerned. This should 'make the provision more complete and with article 33 of the Refugee Convention as an obvious source of inspiration'.[73]

3.2.1 Meaning of 'expel' and 'return' ('refouler')

82 The term '*expulsion*' describes the obligatory departure of aliens from the territory of the returning State in its interest, that is for reasons of public order, national security, and so on. As far as this is still permitted under contemporary international law, the expulsion of nationals as a form of punishment is called 'exile'.[74] Expulsion in the context of Article 33(1) Refugee Convention refers to 'a State's unilateral act of ordering a person to leave its territory and prohibiting his or her entry to the territory for the duration of this measures, and, if necessary, of forcefully removing him or her'.[75]

83 The word '*return*' also includes the practice of sending aliens back at the border before having entered the territory of the returning State. In the context of Article 33(1) Refugee Convention, however, the notion 'return' includes 'any measure constituting safe expulsion, which forces a refugee who is already on the territory of the returning State to leave the territory'.[76] According to *Kälin et al*, the term 'refouler' 'refers to a notion in French and Belgian administrative law which in turn refers to measures bringing a person back to the frontier of a neighbouring State, indicating that return has to be understood in a broad sense'.[77] It does not matter '[w]hether the return measure is provided for in national law or is merely a factual remove'.[78]

84 In the context of Article 33(1) Refugee Convention, the term '*deportation*' is sometimes used by domestic laws referring to the factual act of moving a person by force to another country, that is the implementation of a legal order to leave a country (expulsion order) if the person does not follow it voluntarily.[79]

85 General Comment No 4 (2017) uses the notion '*deportation*' for inter alia 'expulsion, extradition, forcible return, forcible transfer, rendition, rejection at the frontier, pushback operations (including at sea) of a person or group of individuals from a State party to another State'.[80] From its jurisprudence it appears that the Committee

[72] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 291ff (*CCPR Commentary*).

[73] Burgers and Danelius (n 21) 126.

[74] On the right to enter one's own country see Nowak, *CCPR Commentary* (n 72) 282ff.

[75] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33, Para 1' in A Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) para 93.

[76] ibid, para 95. [77] ibid. [78] ibid. [79] ibid, para 93.

[80] CAT/C/GC/4 (n 2) para 4. Similar the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, para 38, which uses the notion 'deportation' 'for any removal of persons from the jurisdiction of a State without their genuine, fully informed and valid consent, including expulsions, extraditions, forcible returns, forcible transfers, renditions, rejections at the frontier, pushbacks and any other similar acts'.

uses the notions 'deportation',[81] 'return',[82] 'expulsion',[83] 'removal',[84] or 'forced removal'[85] interchangeably.

3.2.2 Non-admission

86 The Committee has clarified that *non-admission* to a country may also engage the responsibility of the State party under Article 3 if it would force the person to a country where he or she faces a torture risk. If a person is under the actual control of a State—even if not within the State's territory—for example in border situations, the State party must protect him or her from refoulement.[86] General Comment No 4 (2017) uses therefore the notion of 'deportation' also for 'rejection at the frontier' or 'pushback operations (including at sea) of a person or group of individuals from a State party to another State'.[87] It also stipulates that a State party must apply the principle of non-refoulement not only 'in any territory under its jurisdiction' but also 'any area under its control or authority' or 'on board a ship or aircraft registered in the State party …'.[88]

87 Migration policies, in particular of countries of the Global North, increasingly aim at preventing persons from arriving at their borders by intercepting them on their route or even hindering them from leaving their country of origin.[89] Such measures often take place far away from a State's legal borders but undermine the protection against refoulement.[90] The Committee has dealt with the applicability of the principle of non-refoulement in the context of *interception*[91] in its admissibility decision *JHA v Spain*.

[81] See eg *JI v Sweden*, No 616/2014, UN Doc CAT/C/58/D/616/2014, 12 August 2016, para 8.2; *SS v Canada*, No 581/2014, UN Doc CAT/C/59/D/581/2014, 30 November 2016, para 7.2

[82] See eg *RK v Australia*, No 609/2014, UN Doc CAT/C/58/D/609/2014, 11 August 2016, para 8.2; *KV v Australia,* No 600/2014, UN Doc CAT/C/58/D/600/2014, 11 August 2016, para 7.2; *GR v Australia,* No 605/2014, UN Doc CAT/C/57/D/605/2014, 13 May 2016, para 9.2; *MF v Switzerland,* No 658/2015, UN Doc CAT/C/59/D/658/2015, 15 November 2016, para 7.2; *RO v Sweden,* No 644/2014, CAT/C/59/D/644/2014, 18 November 2016, para 8.2; *MB et al v Denmark*, No 634/2014, UN Doc CAT/C/59/D/634/2014, 25 November 2016, para 9.2.

[83] See eg *YS v Australia*, No 633/2014, UN Doc CAT/C/59/D/633/2014, 15 November 2016, para 7.2; *KN v Australia*, No 649/2015, UN Doc CAT/C/59/D/649/2015, 23 November 2016, para 7.2; *PA v Netherlands*, No 611/2014, UN Doc CAT/C/57/D/611/2014, 2 May 2016, para 8.2; *JK v Canada*, No 562/2013, UN Doc CAT/C/56/D/562/2013, 23 November 2015, para 10.2.

[84] See eg *NS v Canada*, No 582/2014, UN Doc CAT/C/59/D/582/2014, 1 December 2016, para 9.2; *MC v Netherlands,* No 569/2013, UN Doc CAT/C/56/D/569/2013, 30 November 2015, para 8.2.

[85] See eg *ES v Australia*, No 652/2015, UN Doc CAT/C/59/D/652/2015, 6 December 2016, para 9.2; *LP v Australia*, No 666/2015, UN Doc CAT/C/59/D/666/2015, 1 December 2016, para 8.2; *DM v Australia*, No 595/2014, UN Doc CAT/C/58/D/595/2014, 8 August 2016, para 9.2; *T v Australia,* No 599/2014, UN Doc CAT/C/58/D/599/2014, 3 August 2016, para 8.2; *MN v Australia*, No 608/2014, UN Doc CAT/C/58/D/608/2014, 2 August 2016, para 7.2; 'forcible removal': *A v Canada*, No 583/2014, UN Doc CAT/C/57/D/583/2014, 9 May 2016, para 8; *JN v Denmark*, No 628/2014, UN Doc CAT/C/57/D/628/2014, 13 May 2016, para 7.2.

[86] See also Walter Suntinger, 'The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?' (1995) 49 AJPIL 210.

[87] CAT/C/GC/4 (n 2) para 4. [88] CAT/C/GC/4 (n 2) para 10.

[89] Compare also A/HRC/37/50, in particular paras 51–59 (a distinction is made between 'direct arrival prevention ("pushbacks" & border closures)' and 'departure prevention/indirect arrival prevention ("pullbacks")').

[90] See Eman Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, vol 115 (Brill Nijhoff 2016). See also Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011). See also A/HRC/37/50, para 44 ('While the prohibition of refoulement is clear and straightforward as a matter of law, several practices introduced by States as part of recent migration policies point towards a deliberate erosion of good faith compliance with this cornerstone protection against torture and ill-treatment.')

[91] See UNHCR EXCOM, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a comprehensive approach' (2000) UN Doc No EC/50/SC/CRP.17.

In this case, Spanish authorities had rescued more than 360 persons from Asia and Africa from a capsized cargo vessel in international waters. The Spanish and Mauritanian Governments allowed the passengers to disembark in Mauritania where they were detained until they decided to repatriate or apply for asylum. Spain had argued that the applicant lacked competence to represent the alleged victims since the incidents 'occurred outside Spanish territory'. The Committee, however, referring to its General Comment No 2,[92] stressed that a State party's jurisdiction 'must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention' and that this interpretation of the concept of jurisdiction was applicable in respect of all provisions of the Convention, including Article 22 CAT. It reasoned that 'the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process' that took place in Mauritania.[93] The Committee stressed that 'the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention' in Mauritania.[94] However, it found the complaint to be inadmissible due to the lack of *locus standi*.[95]

88 The Committee has criticized in its State reporting procedure the denial of entry at the border[96] and in particular policies of migration control such as interception measures[97] or offshore processing of asylum claims.[98] With regard to Australia, for instance, it criticized

> policies and practices … applied in relation to persons who, irregularly, attempt to arrive or arrive in the State party, in particular the policy of intercepting and turning back boats, without due consideration of the State party's obligations under article 3 of the Convention.[99]

The Committee recommended to adopt measures to ensure that the State party 'effectively meets its non-refoulement obligations … in particular with regard to all asylum seekers and other persons in need of international protection who attempt to arrive or arrive in the State party, regardless of the mode and date of arrival'.[100] It also stressed that *offshore processing* as practiced by Australia[101] 'does not release a State party from obligations under CAT, including prompt, thorough and individual examination of the applicability of article 3 in each case and redress and rehabilitation when appropriate'.[102] Persons would be also under the effective control of the State party (and consequently enjoy the same protection from torture and other forms of ill-treatment under CAT), when they are 'transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice'.[103]

[92] CAT, 'Convention against Torture and other cruel, inhuman or degrading treatment or punishment. General Comment No 2' (2008) UN Doc CAT/C/GC/2, para 16.

[93] *JHA v Spain*, No 323/2007, UN Doc CAT/C/41/D/323/2007, 10 November 2008, para 8.2.

[94] ibid. [95] ibid, para 8.3. On the *locus standi* see below Art 22, 3.7.4.

[96] CAT, 'Concluding Observations: Norway' (1993) UN Doc A/48/44, para 68; CAT, 'Concluding Observations: France' (1998) UN Doc A/53/44, para 147.

[97] See eg CAT, 'Concluding Observations: Thailand' (2014) UN Doc CAT/C/THA/CO/1.

[98] CAT, 'Concluding Observations: Australia' (2014) UN Doc CAT/C/AUS/CO/4-5.

[99] ibid, para 15. [100] ibid.

[101] Australia had the policy of transferring asylum seekers to regional processing centers located in Papua New Guinea and Nauru for the processing of their claims, despite reports on the harsh conditions in those centers, which in combination with the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering. The Concluding Observations referred to mandatory detention, including for children, overcrowding, inadequate healthcare, and even allegations of sexual abuse and ill-treatment.

[102] CAT/C/AUS/CO/4-5 (n 98) para 17. [103] ibid.

89 On a regional level, the ECtHR stressed in its landmark decision *Hirsi Jamaa and Others v Italy* that *Italy* violated inter alia the principle of non-refoulement by intercepting and returning to *Libya* in 2009 a group of Somalis and Eritreans on the high seas without examining their individual cases.[104] This important decision provides guidance to European States and the European Union on their policies and practices relating to border control and interception.

3.2.3 Meaning of 'extradite'

90 Extradition is a process by which one State hands over a person accused or convicted in the jurisdiction of another State to that State, usually at the request of the latter, for the purpose of criminal justice, that is for bringing him or her to trial or for serving a criminal sentence.[105] Thus while extraditions are in the interest of the requesting State, expulsions, returns or renditions are carried out in the interest of the expelling State for certain purposes (such as national security).

91 Extraditions are normally governed by bilateral or multilateral treaties, which may give rise to conflicting obligations regarding the non-refoulement provisions of the CAT. As *Burger/Danelius* argue, there is a potential conflict only if the extradition treaty was concluded before the State party ratified the CAT, whilst an extradition treaty concluded by a State already party to the CAT cannot be taken to involve obligations which contradict Convention obligations.[106] The rule of *lex posterior derogate legi priori* applies, however, only when both treaties include the same States parties, which again raises an issue if the receiving State in an extradition is not party to the CAT.

92 The prohibition of torture, however, must be regarded as a *jus cogens* norm which overrides other obligations of contracting parties. It can therefore be argued that the non-refoulement principle must prevail over any obligation of a State party to extradite a person to another State where he/she faces a risk of torture.[107]

93 General Comment No 4 stipulates in this context that States parties to the CAT considering the conclusion of or adherence to an extradition treaty 'should ensure that there is no conflict' between such a treaty and the CAT and 'include in the notification of adherence to the extradition treaty the clause that, in case of conflict, the Convention will prevail'.[108] If the extradition treaty was concluded already before the ratification of the CAT (with a non-State party) the former 'should be applied in accordance with the principle of non-refoulement'.[109] In this case, States parties are also requested 'to inform the Committee about any possible conflict' between its obligations under CAT and under an extradition treaty from the beginning of the individual complaint procedure. The Committee will then 'try to give priority to the consideration of that communication before the time limit for the obligatory extradition is reached'.[110]

94 Whether the extradition leads to the extradited person being sentenced or not, is not relevant for the non-refoulement obligations of States parties. In *Abichou v Germany*,

[104] *Hirsi Jamaa et al v Italy* [GC] App no 27765/09 (ECtHR, 23 February 2012).

[105] See also below Art 8, § 13. [106] Burgers and Danelius (n 21) 126.

[107] C Wolfram Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention Against Torture* (Intersentia 2009) 30: according to the jurisprudence of the ECtHR, States Parties are obliged to ensure the absolute nature of the non-refoulement principle in all removal procedures, including extraditions, regardless of their legal basis: see *Babar Ahmad and others v the United Kingdom*, App nos 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09 (ECtHR, 10 April 2012).

[108] See CAT/C/GC/4 (n 2) para 25. [109] ibid para 23. [110] ibid para 24.

the applicant had already been extradited to the receiving State Tunisia, was acquitted in a trial there and released without being tortured or otherwise ill-treated. The Committee nevertheless found a violation of Article 3 as the risk was real at the time of extradition, and ordered the forum State to pay compensation to the applicant.[111]

95 Extradition proceedings must satisfy minimum fair trial requirements. They do not exempt States parties from carrying out individualized risk assessments pursuant to Article 3 CAT in each specific case.[112]

96 The Committee has also pointed out in the State reporting procedure that extraditions to countries where a risk of torture exists is not permissible. It asked States parties to amend their legal framework in this regard and to provide information on the measures taken to ensure that such extraditions did not take place.[113]

3.2.4 Rendition

97 Article 3 also covers informal transfers such as *renditions* used in the context of the so-called War on Terror since 9/11.[114] The USA, in the 'war against terror', has introduced a new category of 'obligatory departure', known as ordinary or extraordinary 'rendition' of suspected terrorists. The notion 'ordinary rendition' is usually used for the forcible abduction and removal of a suspect, by military or intelligence agents, from the territory of another State for the purpose of bringing him or her to justice.[115] 'Extraordinary rendition' is described to 'usually involve … a person who is not formally charged with any crime by the country conducting the abduction. Instead, the person is seized abroad and transported to a third country.'[116] It is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals. It involves the State-sponsored abduction of a person in one country, with or without the cooperation of the Government of that country, and the subsequent transfer of that person to another country for detention and interrogation[117] and 'appears to be a practice in which perpetrators attempt to avoid legal and moral constraints by denying their involvement in the abuses'.[118] 'Extraordinary renditions', as practised by the US after 11 September 2001 for the purpose of moving suspected terrorists to other countries in order to subject them to harsher interrogation methods away from external scrutiny,[119] clearly violate the *non-refoulement* principle in Article 3.[120]

[111] *Abichou v Germany*, No 430/2010 (n 62).

[112] See eg *X v Russian Federation*, No 542/2013, UN Doc CAT/C/54/D/542/2013, 8 May 2015, paras 11.7, 11.8; *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59), para 13; *Tursunov v Kazakhstan*, No 538/2013 (n 59) para 9.7.

[113] See eg CAT, 'Concluding Observations: Armenia' (2012) CAT/C/ARM/CO/3, para 24; CAT, 'Concluding Observations: Belgium' (2014) UN Doc CAT/C/BEL/CO/3, para 22; CAT/C/THA/CO/1 (n 97) para 20; CAT, 'Concluding Observations: Morocco' (2011) UN Doc CAT/C/MAR/CO/4, para 9; CAT, 'Concluding Observations: Tajikistan' (2013) UN Doc CAT/C/TJK/CO/2, para 18.

[114] See also CAT/C/GC/4 (n 2) para 4.

[115] For the definition see European Commission for Democracy Through Law (Venice Commission), 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners' (adopted 17–18 March 2006) Opinion no 363/2005, CDL(2006)077.

[116] David Weissbrodt and Amy Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 HHRJ 125.

[117] ibid. [118] ibid.

[119] eg in Guantánamo Bay (Cuba), Abu Ghraib (Iraq), Bagram Air Base (Afghanistan), and similar US detention centres abroad.

[120] See Venice Commission (n 9); Weissbrodt and Bergquist (n 116); Dick Marty, Rapporteur, Council of Europe Committee on Legal Affairs and Human Rights, '*Alleged Secret Detentions and Unlawful Inter-State*

The contribution of European countries by for instance 'turning a blind eye' to extraordinary renditions across their territory and airspace or secret detention sites on their territory was found by the ECHR to violate Article 3 in numerous cases[121] and has been criticized not only by the European Parliament[122] and the Council of Europe Parliamentary Assembly,[123] but also by the CAT Committee (see below §§ 98–99).

98 The Committee has dealt with an extraordinary rendition in its individual complaints case *Agiza v Sweden*. It held that a State party violates Article 3 CAT if it cooperates in extraordinary rendition by arresting a person and extrajudicially handing him or her over to agents of a foreign State. Mr. Agiza, an Egyptian national, had applied for asylum in Sweden after having been sentenced in Egypt *in absentia* for terrorism charges linked to Islamic fundamentalism. On return he would have been executed. In 2001, after his asylum application had been rejected on security grounds, he was transferred to the airport, handed over to special agents (hooded, strip-searched, hands and feet bound), brought to Egypt on a private airplane owned by a US company and frequently used by the US Government, and allegedly severely tortured in Egypt. The Committee stressed that the Swedish authorities knew or should have known that at the time of removal there

Transfers of Detainees involving Council of Europe Member States' (12 June 2006); and, 'Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report' (explanatory memorandum of 7 June 2007); Giovanni Claudio Fava, Rapporteur, EU Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 'Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners' (26 January 2007) Doc A6–9999/2007. See also the joint report of five UN special procedures on the 'Situation of detainees at Guantánamo Bay' to the UN Commission on Human Rights of 27 February 2006 (E/CN4/2006/120); SRT (Nowak), 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2005) UN Doc A/60/316; CAT, 'Concluding Observations: USA' (2006) UN Doc CAT/C/USA/CO/2. See also Manfred Nowak, 'Extraordinary Renditions, Diplomatic Assurances and the Principle of Non-Refoulement' in Maurice Voyame et al (eds), *International Law, Conflict, and Development: The Emergence of a Holistic Approach in International Affairs* (Brill 2010); Human Rights Watch, 'Still at Risk: Diplomatic Assurances No Safeguard Against Torture' (2005) 17(4D) <https://www.hrw.org/sites/default/files/reports/eca0405.pdf> accessed 5 Novemner 2017; Robert M Chesney, 'Leaving Guantánamo: The Law of International Detainee Transfers' (2006) 40(3) University of Richmond Law Review 657.

[121] In its judgment *El-Masri* (2012) a German national of Lebanese origin claimed that he had been a victim of a secret 'rendition' operation bringing him from Macedonia to Afghanistan. He put forward that he was arrested, held in isolation, questioned and ill-treated in a Skopje hotel for twenty-three days, then transferred to CIA agents who brought him to a secret detention facility in Afghanistan, where he was further ill-treated for more than four months. The Court found a violation of Art 3 ECHR on account of the inhuman and degrading treatment subjected in the Skopje hotel, his treatment at Skopje Airport, which amounted to torture, and on account of his transfer into the custody of the US authorities, thus exposing him to the risk of further treatment contrary to Art 3 ECHR. The Court also found a violation of Art 3 ECHR on account of the failure of FYROM to carry out an effective investigation into the applicant's allegations of ill-treatment: *El-Masri v the Former Yugoslav Republic of Macedonia* [GC] App no 39630/09 (ECtHR, 13 December 2012). Since *El-Masri*, the Court delivered also the landmark judgments *Al Nashiri v Poland*, App no 28761/11 (ECtHR, 24 July 2014); *Husayn (Abu Zubaydah) v Poland*, App no 7511/13 (ECtHR, 24 July 2014) (the Court held that Poland was complicit in 'CIA rendition, secret detention and interrogation operations on its territory' and that Poland had exposed them to a torture risk by enabling the CIA to detain the applicants), and *Nasr and Ghali v Italy*, App no 44883/09 (ECtHR, 23 February 2016). For more on reparations for the victims of the 'War on Terror' see below Art 14, 3.2.6.

[122] European Parliament 'Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners' (11 September 2012) 2013 C 353 E/01, para 43.

[123] See also Dick Marty, Council of Europe Committee on Legal Affairs and Human Rights, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report' (11 June 2007) Doc 11302 rev, Summary 'The Committee on Legal Affairs and Human Rights now considers it factually established that secret detention centres operated by the Central Intelligence Agency (CIA) have existed for some years in Poland and Romania, though not ruling out the possibility that secret CIA detentions may also have occurred in other Council of Europe member states').

was consistent and widespread use of torture by Egyptian authorities against detainees, in particular if held for political and security reasons; that its own security intelligence service thought that the applicant was involved in terrorist activities, was a threat to its national security, and of interest to intelligence services of the US and Egypt. The Committee concluded that the expulsion violated Article 3.[124]

99 In several Concluding Observations, the Committee criticized alleged *cooperation* of States parties *in extraordinary rendition programmes*, such as serving as departure or destination points, allowing rendition flights to use airports and airspace, but also the inadequate response with regard to the investigation of such allegations.[125] In this context, the Committee made clear that a State party 'should ensure that no one who is at any time under its control becomes the object of an "extraordinary rendition" ' and that 'the transfer, refoulement, detention or interrogation of persons under such circumstances is in itself a violation of the Convention'.[126] It further recommended States parties to conduct effective, impartial, and transparent investigations on alleged involvement in rendition programmes by an independent body,[127] to prosecute and punish responsible officials and to make the outcome public,[128] to inform the public,[129] to take all necessary measures to prevent the future incidents of such situations,[130] or to ensure compensation for victims.[131] In the context of cases of the ECtHR on the CIA rendition and secret detention against Poland, the Committee also recommended to cooperate with the Court.[132]

3.3 Meaning of 'a Person'

100 The protection of Article 3 applies to any person, that is every human being,[133] regardless of any status, such as nationality, citizenship, or residence status. There is *no limitation on the personal scope* of Article 3. General Comment No 4 (2017) stipulates in this context that a State party must apply the principle of non-refoulement

> [. . .] to any person, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law.[134]

101 Article 33 of the Refugee Convention, in contrast, only applies to refugees and asylum seekers, and Article 13 CCPR, concerned with expulsions, applies only to all aliens lawfully in the territory of the host State. While Article 33(2) of the Refugee

[124] *Agiza v Sweden*, No 233/2003 (n 57) para 13.4.

[125] See eg CAT, 'Concluding Observations: Ireland' (2011) UN Doc CAT/C/IRL/CO/1; CAT, 'Concluding Observations: Portugal' (2013) UN Doc CAT/C/PRT/CO/5-6.

[126] CAT/C/MAR/CO/4 (n 113) para 11. Similar eg CAT/C/PRT/CO/5-6 (n 125) or CAT, 'Concluding Observations: Jordan' (2016) UN Doc CAT/C/JOR/CO/3, para 14.

[127] See eg CAT/C/JOR/CO/2 (n 10) para 23. Similar CAT/C/JOR/CO/3 (n 125); CAT, 'Concluding Observations: Poland' (2013) UN Doc CAT/C/POL/CO/5-6, para 10; CAT, 'Concluding Observations: Lithuania' (2014) UN Doc CAT/C/LTU/CO/3, para 16; CAT, 'Concluding Observations: Syria' (2010) UN Doc CAT/C/SYR/CO/1.

[128] See eg CAT, 'Concluding Observations: Denmark' (2016) UN Doc CAT/C/DNK/CO/6-7; CAT, 'Concluding Observations: Germany' (2011) UN Doc CAT/C/DEU/CO/5.

[129] See eg CAT/C/POL/CO/5-6 (n 127) para 10; CAT/C/LTU/CO/3 (n 127) para 16.

[130] See eg CAT/C/DEU/CO/5 (n 128).

[131] See eg CAT/C/KEN/CO/1 (n 49); CAT/C/JOR/CO/3 (n 125) 4.

[132] CAT/C/POL/CO/5-6 (n 127) para 10.

[133] Although the term 'person', as distinct from 'individual', usually also includes legal persons, the prohibition of refoulement, by its very nature, only applies to natural persons.

[134] CAT/C/GC/4 (n 2) para 10.

Convention excludes the protection of persons regarded as a danger to the security of the host country and those convicted of a particularly serious crime, Article 3 CAT does not contain any similar limitation clause.[135] No balancing of interests of society at large and the interests of the individual concerned is permitted.[136]

3.4 Meaning of 'to Another State'

102 While earlier drafts did not contain any reference to the destination of the expulsion, extradition, or return, or used the term 'a State', the expression 'another State' was first introduced in March 1979 by the proposal of the USSR, which is also the basis for the additional requirement of an existence of a consistent pattern of gross, flagrant, or mass violations of human rights in that State according to Article 3(2). At that time, certain delegations, including Austria and Italy, still maintained the position that the prohibition of refoulement should only apply among States parties as it could create problems in relation to already existing extradition treaties with States not parties to the CAT.

103 It follows from the *travaux préparatoires* and the practice of the Committee that the term 'another State' goes beyond States parties to the Convention and applies to all States in the world where the person concerned faces a real risk of torture. The obligation of Article 3 is indeed seen to be 'especially important as to the transfer of a person to a State which is not a Party to the Convention, since such a State … may not have made any internationally binding undertaking to suppress torture in its territory'.[137]

104 The Committee has specified in its General Comment No 4 (2017) that the phrase 'another State' refers to the State to which the individual is being expelled, returned, or extradited as well as to a State 'where he/she may subsequently face deportation to a third State in which there are substantial grounds for believing that he/she would be in danger of being subjected to torture'.[138]

105 The use of the notion 'State' (instead of, eg, 'territory') suggests that only territories under the sovereign control of a State come within the scope of Article 3 CAT. However, according to Wouters 'removing a person to a territory which is not governed by a sovereign State' would also fall within the scope of Article 3 since this would be 'in accordance with the object and purpose of Article 3 and would be in line with the idea that even in the absence of a State authority torture can exist'.[139]

106 In the context of the global fight against terrorism, the Committee stressed in its State reporting procedure that the Convention protection extends to all territories under the jurisdiction of a State party including all areas under the de facto *effective control* of the State party's authorities[140] such as the US detention facility Guantánamo Bay on Cuba. This is also reflected in General Comment No 4 (2017) which states that a State party must apply the principle of non-refoulement not only 'in any territory under its jurisdiction' but also 'any area under its control or authority' or 'on board a ship or aircraft registered in the State party …'.[141] Furthermore, the General Comment also expressly

[135] See above Art 2. [136] See above 3.1. [137] Burgers and Danelius (n 21) 127.

[138] CAT/C/GC/4 (n 2) para 12. In General Comment No 1 (which was replaced by General Comment No 4) para 2, the Committee defined the phrase 'another State' as referring to 'the State to which the individual is being expelled, returned or extradited as well as to any State to which the author may subsequently be expelled, returned or extradited'.

[139] Wouters (n 107) 505–06.

[140] See CAT/C/USA/CO/2 (n 120) para 20. See also CAT, 'Concluding Observations: UK' (2004) UN Doc CAT/C/CR/33/3.

[141] CAT/C/GC/4 (n 2) para 10.

refers to 'rendition' or 'forcible transfer … of a person or group of individuals from a State party to another State'.[142]

107 The Committee has confirmed that the principle of non-refoulement also applies to *transfers* of suspected terrorist by States parties from its detention facilities abroad to any other State, even if the transfers take place within the same third State, for example the transfer by the UK from a UK detention facility in Afghanistan or Iraq to another detention facility in the same country, which is under the control of local authorities.[143] In this case Iraq or Afghanistan would be 'another State' in relation to a UK detention facility in Iraq or Afghanistan. The Committee has stressed several times that it is its 'constant view' that Article 3 CAT and the non-refoulement obligation 'apply to a State party's military forces, wherever situated, where they exercise effective control, de jure or de facto, over an individual' and that '[w]ith regard to the possible transfer of detainees within a State party's effective custody to the custody of any other State, the State party should ensure that it complies fully with article 3 … in all circumstances'.[144] Interpreting the term 'another State' as referring to *any transfer of a person from one State jurisdiction to another* can be seen also to be in line with the purpose of the absolute prohibition of refoulement.

108 The Committee has dealt in its State reporting procedure also with the applicability of the principle of non-refoulement to *transfers of persons between different contingents of multinational forces* such as the transfer of prisoners from the Danish contingent of the International Security Assistance Force (ISAF) in *Afghanistan* to allied forces during a joint military operation in 2002, 'in circumstances where allegations later emerged of ill-treatment while the men were in allied forces' custody'.[145] The Committee noted that its 'constant view', according to which Article 3 CAT applies extraterritorially where States' military forces exercise effective control over individuals, would 'remain[.] so even if the State party's forces are subject to operational command of another State' so that 'the transfer of a detainee from its custody to the authority of another State is impermissible when the transferring State was or should have been aware of a real risk of torture'.[146] This means that a State party which participates in multinational forces has to assess whether the transfer of a person to the forces of the USA would expose the person to a risk of torture and 'consider that the US refuses extraterritorial application of the CAT' so that 'the CAT does not protect persons transferred to the US forces'. Thus, given that Article 3 CAT prohibits indirect refoulement, a State that participates in multinational forces must not transfer detainees from its contingent's effective control to that of another State's contingent where the detainee faces a risk of second transfer to a third State.[147] The Committee's criticism and recommendations also related to the investigation of circumstances of the transfer of prisoners by States parties to the custody of other States' forces in military operations abroad, for example in the context of the Danish participation in the wars in Iraq and Afghanistan.[148]

[142] ibid, para 4.

[143] See CAT/C/CR/33/3 (n 140) para 5(e). See also CAT, 'Concluding Observations: UK' (2013) UN Doc CAT/C/GBR/CO/5, paras 9, 19; CAT/C/CAN/CO/6 (n 64) para 11.

[144] See CAT/C/CR/33/3 (n 140) paras 4 (b), 4(d), 5 (e), and 5 (f) and CAT/C/USA/CO/2 (n 102) paras 20 and 21. See also CAT/C/GBR/CO/5 (n 143); CAT, 'Concluding Observations: Norway' (2008) UN Doc CAT/C/NOR/CO/5, para 7.

[145] CAT, 'Concluding Observations: Denmark' (2007) UN Doc CAT/C/DNK/CO/5, para 12.

[146] ibid, para 13. [147] Hamdan (n 90) 143. [148] CAT/C/DNK/CO/6-7 (n 128) para 18.

3.4.1 Indirect Refoulement

109 In General Comment No 4 (2017), the Committee defines 'another State' also as a State 'where he/she may subsequently face deportation to a third State in which there are substantial grounds for believing that he/she would be in danger of being subjected to torture'[149] (see above, § 104). The latter aspect is sometimes referred to as '*indirect refoulement*'[150] or '*chain refoulement*'.

110 In its case law, the Committee stated that the State party should refrain also from expelling the applicant 'to any other country where he runs a real risk of being expelled or returned' to his or her country of origin.[151] It also stressed that 'a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned or … a third country where it is foreseeable that he subsequently may be expelled'.[152] The Committee usually first conducts a full test regarding the existence of a real risk in the country of origin and only if substantial grounds for believing that a torture risk exists, it makes a full assessment of the risk of subsequent removal by a third State, that is whether indirect refoulement would violate Article 3.[153] Wouters argues that '[w]hat remains unclear is the level of risk involved in this assessment of the subsequent removal by the third country to the country of origin'.[154]

3.4.2 'Safe third States'

111 The receiving State is usually the country of origin, that is the State of citizenship[155] or habitual residence including the State which has granted refugee status.[156] If a State party wishes to send a person to a State other than his or her State of origin or residence, it must ensure that this State can be considered a 'safe third State', that is a State where the person is not at risk of being subjected to torture or of being expelled to another State, in which a real risk of torture exists.

112 In *Tebourski v France* the applicant requested not to be returned to his country of origin Tunisia since he feared being retried for the same offences for which he had already been convicted and punished. Even though asylum authorities believed that he 'could have had reason to fear that he would be retried for the same offences for which he had already been convicted and punished, should he return to his country',[157] the asylum request was turned down and the State party established Tunisia as the receiving State. The Committee noted that the State party had thereby 'failed to take account of the universally

[149] CAT/C/GC/4 (n 2) para 12. [150] See also Wouters (n 107); Hamdan (n 90).

[151] *Mutombo v Switzerland*, No 13/1993 (n 1) para 10. See also *Korban v Sweden*, No 88/1997, UN Doc CAT/C/21/D/88/1997, 16 November 1998, para 7; *Tala v Sweden*, No 43/1996, UN Doc CAT/C/17/D/43/1996, 15 November 1996, para 11; *Aemei v Switzerland*, No 34/1995 (n 1) para 10; *Orhan Ayas v Sweden*, No 97/1997, UN Doc CAT/C/21/D/97/1997, 12 November 1998, para 7; *AS v Sweden*, No 149/1999, UN Doc CAT/C/25/D/149/1999, 24 November 2000, para 9; *RD et al v Switzerland*, No 558/2013, UN Doc CAT/C/57/D/558/2013, 13 May 2016, para 12.

[152] *ZT v Australia*, No 153/2000, UN Doc CAT/C/31/D/153/2000, 11 November 2003, para 6.4.

[153] See eg *Korban v Sweden*, No 88/1997 (n 151); see also *ZT v Australia*, No 153/2000 (n 152); *RD et al v Switzerland*, No 558/2013 (n 151) paras 9.4, 12.

[154] Wouters (n 107) 510. He refers to the *Korban* case (n 151) which would imply that a State party should have a high level of certainty that no subsequent removal by the third country to the country of origin will take place. The assessment in this case, however, was based on general information, mainly from the UNHCR (ie, no personal risk was assessed), and the question whether or not the third country is a State party to CAT and whether or not it has accepted the individual complaint procedure seemed to be of relevance.

[155] See eg *MX v Switzerland*, No 311/2007, UN Doc CAT/C/40/D/311/2007, 7 May 2008.

[156] See eg *ECB v Switzerland*, No 369/2008, UN Doc CAT/C/46/D/369/2008, 26 May 2011, para 10.10.

[157] See *Adel Tebourski v France*, No 300/2006 (n 49) para 2.5.

accepted practice in such cases, whereby an alternative solution is sought with the agreement of the individual concerned and the assistance of the Office of the [UNHCR] and a third country willing to receive the individual who fears for his safety.'[158]

113 States parties should assess whether the third State's asylum procedures afford sufficient guarantees to avoid the asylum seeker's secondary removal, directly or indirectly, to his or her country of origin, contrary to Article 3. The Committee criticized in its Concluding Observations 'preventive expulsion' to a 'safe third country' if not all asylum seekers had the opportunity to apply for asylum in the third State and thus leaving them without sufficient safeguards against refoulement.[159] It also criticized if in practice the safe third country rule was almost automatically applied—and not after an assessment on a case-by-case basis. States parties should ensure that asylum procedures foresee a substantive review of applications respecting the principle of non-refoulement, irrespective of whether the country of destination is considered safe. Safeguards and remedies should exist in forced return procedures in order to guarantee that no person in need of international protection is returned to a country where he or she is in danger of being subjected to 'acts of torture or cruel, inhuman or degrading treatment, conditions or punishment or to chain refoulement'.[160]

114 States parties should ensure sufficient protection from refoulement when implementing *multilateral or bilateral agreements*. In its Concluding Observations the Committee criticized that asylum seekers whose first application was found inadmissible according to the Dublin II Regulation were in case of repeat application excluded from de facto protection against removal and not afforded an effective remedy[161] or that the lodging of an appeal did not have suspensive effect.[162] It also criticized that the suspension of returns under the Dublin II Regulation to Greece due to difficult reception conditions might be terminated prior to the amelioration of the reception conditions.[163]

3.5 Meaning of 'Torture'

3.5.1 Applicability of Article 3 to Cruel, Inhuman and Degrading Treatment

115 The wording of Article 3 suggests that this provision only applies to situations defined in Article 1 CAT. In its case law, the Committee has expressly stated that the scope of Article 3 CAT is limited to torture and does not extend to cruel, inhuman or degrading treatment encompassed in Article 16.[164]

116 The original Swedish draft wished to protect persons against the danger of being subjected to 'torture or other cruel, inhuman or degrading treatment or punishment'.[165] This was in line with the jurisprudence of the HRC and regional human rights treaty monitoring bodies derived from the absolute prohibition of torture, cruel, inhuman or

[158] ibid, para 8.5.

[159] CAT, 'Concluding Observations: Liechtenstein' (2010) UN Doc CAT/C/LIE/CO/3, para 15.

[160] CAT, 'Concluding Observations: Serbia' (2015) UN Doc CAT/C/SRB/CO/2, para 15. On whether Art 3 applies to other ill-treatment, see below 3.5.1.

[161] CAT, 'Concluding Observations: Austria' (2010) UN Doc CAT/C/AUT/CO/4-5, para 13.

[162] CAT/C/DEU/CO/5 (n 128); see also CAT/C/IRL/CO/1 (n 125).

[163] CAT/C/DEU/CO/5 (n 128).

[164] See eg *TM v Sweden*, No 228/2003, UN Doc CAT/C/31/D/228/2003, 18 November 2003, para 6.2; *BS v Canada,* No 166/2000, UN Doc CAT/C/27/D/166/2000, 14 November 2001, para 7.4.

[165] United Nations Economic and Social Council, (n 37).

degrading treatment or punishment.[166] The IAPL draft and the revised Swedish draft restricted the protection of refoulement, however, to torture. Although various States, including Canada, Spain, Norway, and Cyprus, during various stages of the drafting process expressed their firm conviction that all forms of ill-treatment prohibited by Article 7 CCPR and Article 16 CAT should be covered by the non-refoulement principle, the majority of States, above all the USA, insisted on a more narrow scope of application restricted to torture in the strict sense.[167]

117 General Comment No 1 (1998)—now replaced by General Comment No 4 (see below §§ 118–19)—stipulated that 'Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention'.[168] Starting with *BS v Canada* in 2001,[169] in its jurisprudence the Committee consistently found Article 3 to be applicable to torture only. Whilst in *BS v Canada* the distinction between torture and other forms of ill-treatment became the compelling argument only at merits stage, other cases were ruled out already at the admissibility stage, when the complaint related to other forms of ill-treatment only and thus did not reach the threshold of torture required for the application of Article 3.[170] However, in General Comment No 2 (2008) the Committee cautioned that '[i]n practice, the definitional threshold between ill-treatment and torture is often not clear'[171] and that '[e]xperience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment'.[172]

118 General Comment No 4 (2017) reiterates that the non-refoulement obligation in Article 3 relates to the risk of torture only.[173] It also notes that 'Article 3 … should be without prejudice to Article 16 (2) of the Convention, in particular where a person to be removed would enjoy additional protection, under international instruments or national law, not to be deported to a State where he/she would face a risk of cruel, inhuman or degrading treatment or punishment'.[174]

119 General Comment No 4 furthermore clarifies that other ill-treatment, not amounting to torture, is not irrelevant in the context of Article 3: first, other ill-treatment may change and become torture. In this regard, General Comment No 4 states that:

> States parties should consider whether forms of cruel, inhuman or degrading treatment or punishment that a person facing deportation is at risk of experiencing could likely change so as to constitute torture before making an assessment on each case relating to the principle of 'non-refoulement'.[175]

The argument that the exact characteristics of a future treatment cannot be known to the extent as to determine whether they fulfil all elements of torture is used also by the ECtHR.[176] General Comment No 4 explains that 'severe pain or suffering cannot always be objectively assessed' and that

[166] See Nowak, *CCPR Commentary* (n 72) 185ff. [167] E/CN.4/1367 (n 37).
[168] CAT, 'General comment No 1 on the implementatin of the article 3 of the Convention in the context of article 22' (1998) UN Doc A/53/44, Annex IX, para 1.
[169] *BS v Canada*, No 166/2000 (n 164) para 7.4.
[170] See eg *MV v Netherlands*, No 201/2002, UN Doc CAT/C/30/D/201/2002, 2 May 2003, para 6.2.
[171] CAT/C/GC/2 (n 92) para 3. [172] ibid. [173] CAT/C/GC/4 (n 2) para 11.
[174] ibid, para 26. [175] ibid, para 16.
[176] See *Babar Ahmad and others v the United Kingdom*, ECtHR (n 107) paras 170–71.

[i]t depends on the negative physical and/or mental repercussions that the infliction of violent or abusive acts has on each individual, taking into account all relevant circumstances of each case, including the nature of the treatment, the sex, age and state of health and vulnerability of the victim or any other status or factors.[177]

Secondly, the infliction of other ill-treatment is an indication of a torture risk. General Comment No 4 stipulates that:

the infliction of cruel, inhuman or degrading treatments or punishments, whether or not amounting to torture, to which an individual or his/her family were exposed in their State of origin or would be exposed in the State to which he/she is being deported, constitutes an indication that the person is in danger of being subjected to torture if he/she is deported to one of those States. Such indication should be taken into account by States parties as a basic element justifying the application of the principle of 'non refoulement'.[178]

Thirdly, General Comment No 4 stresses that States parties should not adopt 'dissuasive measures or policies … which would compel persons in need of protection under Article 3 … to return to their country of origin' despite of their personal risk of torture 'and other cruel, inhuman or degrading treatment or punishment'.[179]

120 With similar bearings in mind, in its Concluding Observations, the Committee usually recommends States parties to ensure full protection from refoulement beyond the scope of Article 3 and to ensure that no person in need of protection is returned to a country where he/she is in danger of being subjected to acts of torture or CIDT.[180]

121 It can be concluded, therefore, that whilst Article 3 only applies to torture in the strict meaning of Article 1, States parties must exert caution when returning persons to a situation where they would be in danger of being subjected to any form of ill-treatment.

3.5.2 Lawful Sanctions

122 The question whether the lawful sanctions clause in Article 1, which defines the prohibition of torture as excluding the 'pain or suffering arising only from, inherent in or incidental to lawful sanctions', has a bearing on the prohibition of refoulement has been answered by the Committee in both its case-law and Concluding Observations, albeit not in unequivocal terms.[181]

123 *Detention* alone falls clearly outside the scope of Article 3, as observed by the Committee in decisions on individual complaints: '… the mere risk of being arrested and tried is not sufficient to conclude that there is also a risk of being subjected to torture'.[182]

[177] CAT/C/GC/4 (n 2) para 17. [178] ibid, para 28; compare also para 29.

[179] ibid, para 14; it mentions as examples of dissuasive measures 'detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolong them, or cutting funds for assistance programs to asylum seekers'.

[180] See eg CAT/C/SRB/CO/2 (n 160) para 15; see also CAT, 'Concluding Observations: The Philippines' (2016) UN Doc CAT/C/PHL/CO/3, para 14; CAT, 'Concluding Observations: USA' (2014) UN Doc CAT/C/USA/CO/3-5, para 16; CAT, 'Concluding Observations: Cameroon' (2010) UN Doc CAT/C/CMR/CO/4, para 28; CAT, 'Concluding Observations: France' (2010), para 18; 'Concluding Observations: Greece' (2012) CAT/C/GRC/CO/5-6, para 19. In the Concluding Observations on Armenia, however, only reference to torture is made: CAT, 'Concluding Observations: Armenia' (2012) (n 114) para 24. See also SRT (Mendez), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57, para 33, where the SRT on his part noted that 'States are prohibited from returning anyone to a situation where there are substantial grounds to believe that the person may be subject to torture or ill-treatment.'

[181] For more details on the lawful sanction clause see Art 1, 3.3.

[182] *AA v Switzerland*, No 268/2005, UN Doc CAT/C/38/D/268/2005, 1 May 2007, para 8.5; see also *LJR v Australia*, No 316/2007, UN Doc CAT/C/41/D/316/2007, 10 November 2008, para 7.

Whilst the Committee routinely takes note of reports on prison conditions in the receiving States, there is no instance where it determined in decisions on individual complaints that *prison conditions* alone may give rise of an issue under Article 3.[183] In its State reporting procedure, the Committee has, however, indicated that detention conditions can amount to torture where '[s]uch conditions of detention were described by the Special Rapporteur as constituting additional punishments which can only be qualified as torture as defined in article 1 of the Convention …'.[184]

3.5.3 Corporal and Capital Punishment

124 International case law relating to the non-refoulement principle under Article 3 ECHR and Article 7 CCPR developed first in relation to capital punishment cases (the death row phenomenon[185] and methods of execution[186]), which were considered as amounting to cruel, inhuman or degrading treatment, but not to torture. In later cases, the HRC extended the principle of non-refoulement to the right to life in Article 6 CCPR.[187]

125 The preamble of CAT relates to the prohibition of torture as stipulated by Article 7 CCPR which includes corporal punishment. The lawful sanctions clause in Article 1 CAT, however, gives considerable leeway to national legislations. The Committee encourages—but does not request—some States to abolish the death penalty and corporal punishment.[188]

126 The jurisprudence of the Committee implies that the method of carrying out a death penalty can amount to torture. In the case *AS v Sweden* the Committee considered the return of a woman to Iran where she had been sentenced to death by stoning for adultery. It observed that although the punishment was lawful in Iran, Sweden must not return the applicant to Iran or to any other country where she could be returned to Iran.[189] The Committee here, as in other cases, does not question the legality of the death penalty as such, nor did it enter into any discussion whether stoning amounts to torture or only to cruel, inhuman or degrading treatment. It also did not discuss whether this sentence to corporal and capital punishment could perhaps fall under the 'lawful sanctions' clause in Article 1(1) CAT.[190] In other words, the Committee seemingly considered it beyond any doubt that stoning amounts to torture and is, therefore, covered by the non-refoulement principle in Article. Similarly, in *Rouba Alhaj Ali v Morocco*, the Committee considered the risk of the complainant's husband to be subjected to corporal punishment upon extradition to Saudi Arabia, without further qualification of this punishment, to be as such sufficient to warrant non-refoulement.[191] It can be inferred that Article 3 CAT applies to

[183] See eg *LJR v Australia*, No 316/2007 (n 182); *AA v Switzerland*, No 268/2005 (n 182); *MF v Sweden*, No 326/2007, UN Doc CAT/C/41/D/326/2007, 14 November 2008.

[184] CAT, 'Concluding Observations: Mongolia' (2010) UN Doc CAT/C/MNG/CO/1, para 16.

[185] See *Soering v The United Kingdom* ECtHR, 7 July 1989 11 EHRR 439.

[186] See *Charles Chitat Ng v Canada* [1994] HRC No 469/1991.

[187] *Judge v Canada*, No 829/1998, UN Doc CCPR/C/78/D/829/1998, 13 August 2003, para 10.4.

[188] CAT, 'Concluding Observations: Saudi Arabia' (2016) CAT/C/SAU/CO/2, para 43; CAT, 'Concluding Observations: Yemen' (2010) UN Doc CAT/C/YEM/CO/2/Rev.1, para 21; CAT, 'Concluding Observations: Ghana' UN Doc CAT/C/GHA/CO/1, para 12; CAT/C/USA/CO/3-5 (n 180) para 25; CAT, 'Concluding Observations: Iraq' (2015) UN Doc CAT/C/IRQ/CO/1, para 20.

[189] *AS v Sweden*, No 149/1999 (n 151).

[190] See above 3.5.2.

[191] *Rouba Alhaj Ali v Morocco,* No 682/2015 (n 49) para 8.8.

all forms of capital and corporal punishment that must be considered torture in the sense of Article 1 CAT.

127 Notwithstanding the applicability of Article 3 to torture only, in its General Comment No 4 the Committee urged States to take into account when considering the removal of a person to another State, certain human rights situations in receiving countries which constitute an indication of a risk of torture, including potential sentences of corporal punishment which amount to torture *or* CIDT[192] and including where the death penalty is considered a form of torture *or* CIDT by the sending State.[193] In the same vein, States parties are requested to consider whether 'circumstances and the methods of execution of the death penalty and the prolonged period and conditions of the person sentenced to death in death row detention' could amount to torture or CIDT.[194] Thus whilst Article 3 only relates to torture, the Committee here draws the attention of States to the fact that situations constituting either torture or CIDT must be taken as indicators of the torture risk a person to be returned faces.

128 Furthermore, according to the Committee's case law, an applicant should not be returned to a State where the death penalty is applied for offences that do not meet international standards for most serious offenses and is applied without due process.[195,196]

3.5.4 Torture Perpetrated by Non-State Actors

129 Threats of torture at the hands of non-State actors without the consent or acquiescence of the Government usually fall outside the scope of Article 3 CAT since the States parties' obligation to refrain from refoulement is directly linked to the definition of torture in Article 1. The Committee confirms that 'an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention'.[197]

130 General Comment No 4 clarifies in this context that torture perpetrated by non-State actors falls outside the scope of Article 3 only if the receiving State is de facto in control of the territory in question: States parties should not deport persons to another State

> where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups which are unlawfully exercising actions that inflict severe pain or suffering for purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control or whose acts it is unable to prevent nor to counter their impunity.[198]

[192] CAT/C/GC/4 (n 2) para 29(f). [193] ibid, para 29(k). [194] ibid, para 29(l).

[195] See eg in *Abed Azizi v Switzerland*, No 492/2012, UN Doc CAT/C/53/D/492/2012, 27 November 2014, para 8.5; *KN et al v Switzerland*, No 481/2011, UN Doc CAT/C/52/D/481/2011, 19 May 2014, para 7.6; see also *LJR v Australia*, No 316/2007 (n 182) para 6.2, where the Committee found diplomatic assurances issued by the recipient country the USA to be a sufficient guarantee against the imposition of a death penalty sentence.

[196] The ECtHR, similar to the CAT Committee, clarified that refoulement was strictly prohibited if there was a risk that a person to be transferred would be subjected to an unfair trial that could lead to a death sentence: 'the mere possibility of the imposition of capital punishment together with the prospect of an unfair trial … is sufficient in the Court's view to conclude that such situation generates for the applicant a sufficient anguish and mental suffering to fall within the ambit of Article 3 of the Convention.' See *Koktysh v Ukraine*, App no 43707/07 (ECtHR, 10 December 2009) paras 62–64.

[197] *GRB v Sweden*, No 83/1997, UN Doc CAT/C/20/D/83/1997, 15 May 1998, para 6.5.

[198] CAT/C/GC/4 (n 2) para 30.

131 Therefore, in the case of 'failed States' or other situations where the State has lost control over its territory, acts by groups exercising quasi-governmental authority can fall within the definition of Article 1 CAT and thus call for the application of Article 3 CAT. This was the case in *Elmi v Australia*[199] where non-governmental factions exercised certain prerogatives that were comparable to those normally exercised by legitimate Governments and, accordingly, the members of those factions could fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in Article 1 CAT.[200] Three years after the *Elmi* decision, the Committee noted in *HMHI v Australia* that the central Government had regained its authority and that therefore the acts of the same non-governmental entities now fall outside the scope of Article 3.[201]

132 Not only in the exceptional situations of 'failed States' has the Committee accepted claims under Article 3 involving the risk of torture by non-State actors, but also in cases where the State failed to exercise due diligence in preventing and stopping abuses by private actors.[202] This approach is also reflected in the Committee's decisions on cases of victims of gender-based violence. In *Njamba and Balikosa v Sweden* (2010)[203] and the later cases *EKW v Finland*[204] and *Bakatu-Bia v Sweden*,[205] the Committee referred to UN reports finding that violence against women in the DRC was rampant in the east of the country and also widespread in other parts of the country. It found, referring to General Comment No 2, that—even though it was largely perpetrated by non-State actors—the failure of the State to exercise due diligence to intervene resulted in the applicants being at the risk of torture in the event of a return to the DRC.

133 It can therefore be concluded that Article 3 CAT applies not only in cases where there are substantial grounds for believing that the person would run a risk of being tortured by an official, but also when there is a risk of torture by non-State actors when the State fails to apply due diligence to intervene, or when the State is incapable of intervening because it has lost control over the territory to which the applicant is to be returned.

134 The jurisprudence of the ECtHR similarly stipulates that a person must not be returned to a State which is either unwilling or unable to afford protection, even if the danger emanates from non-State actors.[206]

[199] *Elmi v Australia*, No 120/1998, UN Doc CAT/C/22/D/120/1998, 14 May 1999, para 6.5.

[200] ibid.

[201] *HMHI v Australia*, No 177/2001, UN Doc CAT/C/28/D/177/2001, 1 May 2002, para 6.4.

[202] See *Sathurusinghe Jagath Dewage v Australia*, No 387/2009, UN Doc CAT/C/51/D/387/2009, 14 November 2013, para 10.9, the Committee rejected the State party's claim that torture by the LTTE in Sri Lanka would fall outside the scope of Art 3 and referred to General Comment No 2 and the implication of a failure on the part of a State party to exercise due diligence to intervene and stop the abuses. In *MF v Sweden*, however, involving a complainant who had been tortured in the past by members of the nationalist BNP party in Bangladesh, the Committee insisted that pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of Art 3; see also *MF v Sweden*, No 326/2007 (n 183) para 7.5.

[203] *Njamba and Balikosa v Sweden*, No 322/2007, UN Doc CAT/C/44/D/322/2007, 14 May 2010.

[204] *EKW v Finland*, No 490/2012, UN Doc CAT/C/54/D/490/2012, 4 May 2015.

[205] *Bakatu-Bia v Sweden*, No 379/2009, UN Doc CAT/C/46/D/379/2009, 3 June 2011.

[206] See eg *Mahmut Kaya v Turkey,* App no 22535/93 (ECtHR, 28 March 2000) para 115.

3.6 Probability of the Torture Risk (Risk Assessment)

135 The phrase 'would be in danger of being subjected to torture' in Article 3(1) CAT relates to the question of the level of probability of the torture risk. The level of risk was described by the Committee in its General Comment No 1—now replaced by General Comment No 4—as '*go[ing] beyond mere theory or suspicion*, however, the risk does *not* have to meet the test of being *highly probable*'.[207] The applicant had to establish that 'such danger is personal and present'.[208] In its case law, the Committee usually referred to its General Comment No 1 and sometimes added that the applicant had to face a foreseeable, real and personal risk of being tortured.[209] General Comment No 4 (2017) stipulates that '[t]he Committee's practice has been to determine that "substantial grounds" exist whenever the risk of torture is "foreseeable, personal, present and real" '.[210]

136 In its jurisprudence, the Committee does not always use a consistent formulation. The Committee referred in its first decision on the merits regarding Article 3 in *Mutombo v Switzerland* to circumstances which would have the 'foreseeable and necessary consequence' of exposing the author to torture.[211] After this case, the Committee has not referred to the term 'necessary' anymore.[212] It used later on for instance the 'foreseeable consequence of exposing him to a real [and personal] risk' (brackets added) of being arrested and tortured[213] which became in turn a 'foreseeable, real [and personal] risk' (brackets added).[214] Shortly after this case, in 1998, General Comment No 1 on the implementation of Article 3 was published and this concept was further elaborated as stated above.[215] Since then the Committee has clarified in its case law that the risk needs to be *personal, foreseeable, real, and present*.[216] General Comment No 4 (2017) stipulates that

[207] A/53/44, Annex IX (n 168) para 6, emphasis added by the author. See also eg, in *Falcon Ríos v Canada*, No 133/1999, UN Doc CAT/C/33/D/133/1999, 23 November 2004; *Dadar v Canada*, No 258/2004 (n 52); *EA v Switzerland*, No 28/1995, UN Doc CAT/C/19/D/28/1995, 10 November 1997; *Haydin v Sweden*, No 101/1997, UN Doc CAT/C/21/D/101/1997, 20 November 1998; *CT and KM v Sweden*, No 279/2005, UN Doc CAT/C/37/D/279/2005, 17 November 2006; *El Rgeig v Switzerland*, No 280/2005, UN Doc CAT/C/37/D/280/2005, 15 November 2006; *RK v Australia*, No 609/2014 (n 82).

[208] A/53/44, Annex IX (n 168) para 7.

[209] See eg *Jean Patrick Iya v Switzerland*, No 299/2006, UN Doc CAT/C/39/D/299/2006, 16 November 2007; *Bachan Singh Sogi v Canada*, No 297/2006 (n 49); *Munir Aytulun and Lilav Guclu v Sweden,* No 373/2009, UN Doc CAT/C/45/D/373/2009, 19 November 2010 (Turkey); *Mükerrem Güclü v Sweden*, No 349/2008, UN Doc CAT/C/45/D/349/2008, 11 November 2010; *MX v Switzerland*, No 311/2007 (n 155); *RK v Australia*, No 609/2014 (n 82).

[210] CAT/C/GC/4 (n 2) para 11.

[211] *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.4.

[212] See also Wouters (n 107) 460.

[213] *Aemei v Switzerland*, No 34/1995 (n 1).

[214] *EA v Switzerland*, No 28/1995 (n 207).

[215] See *Haydin v Sweden*, No 101/1997 (n 207), where it was recalled that, for the purposes of Art 3 CAT 'the individual concerned must face a foreseeable, real and personal risk' of being tortured in the country to which he is returned, the Committee pointed out that 'the requirement of necessity and predictability should be interpreted in light of its general comment on the implementation of article 3', para 6. This concept was frequently recalled in the subsequent jurisprudence of the Committee.

[216] See eg *Aemei v Switzerland*, No 34/1995 (n 1) para 9.5; *SMR and MMR v Sweden*, No 103/1998, UN Doc CAT/C/22/D/103/1998, 5 May 1999, para 9.7; *Karoui v Sweden*, No 185/2001, UN Doc CAT/C/28/D/185/2001, 8 May 2002, para 8; *AR v Netherlands*, No 203/2002, UN Doc CAT/C/31/D/203/2002, 14 November 2003, para 7.3; *Dadar v Canada*, No 258/2004 (n 52); *TA v Sweden,* No 226/2003, UN Doc CAT/C/34/D/226/2003, 6 May 2005; *Mehdi Zare v Sweden*, No 256/2004, UN Doc CAT/C/36/D/256/2004, 12 May 2006, para 9.3; *EVI v Sweden,* No 296/2006, UN Doc CAT/C/38/D/296/2006, 1 May 2007; *ERK and YK v Sweden*, Nos 270 & 271/2005, UN Doc CAT/C/38/D/270&271/2005, 30 April 2007; *AA et al v Switzerland,* No 285/2006, para 7.6; *EJ et al v Sweden*, No 306/2006, UN Doc CAT/C/41/D/306/2006, 14 November 2008; *MF v Sweden*, No 326/2007 (n 183); *MM et al v Sweden*, No 332/2007, UN Doc CAT/C/41/D/332/2007, 11 November 2008; *RK et al v Sweden*, No 309/2006, UN Doc CAT/C/40/D/309/2006, 16 May 2008; *ZK v Sweden*, No 301/2006, UN Doc CAT/C/40/D/301/2006, 9 May 2008;

the Committee will 'consider the risk of torture as foreseeable, personal, present and real when the existence of credible facts relating to the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of his/her deportation'.[217] In the academic literature it has been criticized that the Committee has in its practice sometimes used different levels of risk.[218]

137 In contrast to the refugee definition of the Refugee Convention, the risk element of Article 3 CAT is an *objective element* so that the subjective fear of an individual that he or she will be tortured is not taken into account. As detailed below, the existence of a risk is determined by personal elements and the general situation in the receiving country. Apart from that, also credibility of the complaint and the applicant, plausibility, and evidence, but also for instance the availability of an internal protection alternative play a role.

3.6.1 Time of Risk Assessment

138 The time of risk assessment as per practice of the Committee is the time when it prepares its decisions on an individual complaint. It is not the time when the complaint was submitted, nor the time the State party made its assessment of the case in question.[219] The situation in the receiving country can have changed in the meantime, increasing or decreasing the risk for the applicant. Also, new information with significance for the risk assessment may have come to light meanwhile.

X v Australia, No 324/2007, UN Doc CAT/C/42/D/324/2007, 30 April 2009; *AM v France*, No 302/2006, UN Doc CAT/C/44/D/302/2006, 5 May 2010; *AMA v Switzerland*, No 344/2008, UN Doc CAT/C/45/D/344/2008, 12 November 2010; *Said Amini v Denmark*, No 339/2008, UN Doc CAT/C/45/D/339/2008, 15 November 2010; *CM v Switzerland*, No 355/2008, UN Doc CAT/C/44/D/355/2008, 14 May 2010; *Njamba and Balikosa v Sweden*, No 322/2007 (n 203) para 9.4; *NS v Switzerland*, No 356/2008, UN Doc CAT/C/44/D/356/2008, 6 May 2010; *Bakatu-Bia v Sweden*, No 379/2009 (n 205); *ECB v Switzerland*, No 369/2008 (n 156); *EL v Switzerland*, No 351/2008, UN Doc CAT/C/47/D/351/2008, 15 November 2011; *Hamid Reza Eftekhary v Norway*, No 312/2007, UN Doc CAT/C/47/D/312/2007, 25 November 2011*; EL v Canada*, No 370/2009 (n 58); *Abolghasem Faragollah et al v Switzerland*, No 381/2009, UN Doc CAT/C/47/D/381/2009, 21 November 2011; *Fuad Jahani v Switzerland,* No 357/2008, UN Doc CAT/C/46/D/357/2008, 23 May 2011*; Alexey Kalinichenko v Morocco*, No 428/2010 (n 54); *MSG et al v Switzerland*, No 352/2008, UN Doc CAT/C/46/D/352/2008, 30 May 2011; *RT-N v Switzerland*, No 350/2008, UN Doc CAT/C/46/D/350/2008, 3 June 2011, para 8.4; *Ktiti v Morocco*, No 419/2010, UN Doc CAT/C/46/D/419/2010, 26 May 2011*; SM et al v Sweden*, No 374/2009, UN Doc CAT/C/47/D/374/2009, 21 November 2011; *AAM v Sweden,* No 413/2010, UN Doc CAT/C/48/D/413/2010, 23 May 2012*; Toirjon Abdussamatov et al v Kazakhstan,* No 444/2010 (n 59)*; ET v Switzerland,* No 393/2009, UN Doc CAT/C/48/D/393/2009, 23 May 2012; *Combey Brice Magloire Gbadjavi v Switzerland*, No 396/2009, UN Doc CAT/C/48/D/396/2009, 1 June 2012; *Kalonzo v Canada*, No 343/2008 (n 58); *MDT v Switzerland*, No 382/2009, UN Doc CAT/C/48/D/382/2009, 14 May 2012; *MZA v Sweden*, No 424/2010, UN Doc CAT/C/48/D/424/2010, 22 May 2012; *MAMA et al v Sweden*, No 391/2009, UN Doc CAT/C/48/D/391/2009, 23 May 2012; *NTW v Switzerland*, No 414/2010, UN Doc CAT/C/48/D/414/2010, 16 May 2012; *JLL v Switzerland*, No 364/2008, UN Doc CAT/C/48/D/364/2008, 18 May 2012*; SM v Switzerland*, No 406/2009, UN Doc CAT/C/49/D/406/2009, 23 November 2012; *YZS v Australia*, No 417/2010, UN Doc CAT/C/49/D/417/2010, 23 November 2012; *Abichou v Germany*, No 430/2010 (n 62) para 11.3; *FK v Denmark*, No 580/2014, UN Doc CAT/C/56/D/580/2014, 23 November 2015, para 7.2; *JI v Sweden*, No 616/2014 (n 81) para 8.3.

[217] CAT/C/GC/4 (n 2) para 45.

[218] Wouters criticized for instance that in *El Rgeig v Switzerland*, No 280/2005 (n 207) the Committee stated 'that the State party has not presented to it sufficiently convincing arguments to demonstrate a complete absence of risk' (para 7.4) and that 'this latter formulation can imply the adoption of a lower level of risk': see Wouters (n 107) 460; see also Fanny De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (Brill 2016) 245.

[219] See eg *HMHI v Australia*, No 177/2001 (n 201); see also *Attia v Sweden*, No 199/2002, UN Doc CAT/C/31/D/199/2002, 17 November 2003.

139 Since the time span between the decision of a national authority and of the Committee can be quite long,[220] and an applicant may have been returned at the time of the Committee's consideration of the complaint (be it in the absence of or in disregard of interim measures), the question arises as to how to interpret a situation where significant *new facts* have emerged meanwhile.

140 The Committee uses *events subsequent to the removal* of an applicant to either corroborate or refute the information upon which the domestic authorities of the State party based their risk assessment. Thus, the Committee takes decisions 'in the light of the information that was known, or ought to have been known, to the State party's authorities *at the time* of the removal. Subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of removal.'[221] The crucial point here is the interpretation of the '*constructive knowledge*' a State party's authorities should have had at the time of decision-making about the return of a person, which is ultimately an assessment of the quality of the risk assessment of the State party. From the cases discussed below we see that the Committee itself struggled sometimes with the gap between actual knowledge and the constructive knowledge it should have had when considering individual complaints.

141 In earlier cases the Committee's approach was different—it took events subsequent to a return as evidence for a violation or non-violation of Article 3: In *TPS v Canada,* the applicant was removed to India despite interim measures of the Committee.[222] A period of two years had elapsed between his return to India and the consideration of his case by the Committee. The Committee found no violation of Article 3 CAT arguing that the fact that the applicant had lived in the receiving State for two years without being subjected to torture showed that it was unlikely that he was still at risk.[223] Also for instance in the case *GK v Switzerland*, in which the Committee found no violation of Article 3, the Committee noted that it had not received information on torture or other forms of ill-treatment perpetrated on the applicant—who was sought for her affiliation with ETA—during her *incommunicado* detention upon extradition to *Spain*. In light of the fact that the Committee had noted that *incommunicado* detention increases the risk of torture, and had, in the State reporting procedure, received information about cases of torture and other ill-treatment by security organs and police in Spain,[224] its views in this case do not appear to be conclusive.

[220] See eg in *Njamba and Balikosa v Sweden*, No 322/2007 (n 203) from 2007 (national decision) to 2010 (Committee's views).

[221] *Agiza v Sweden*, No 233/2003 (n 57) para 13.2. See also *Brada v France*, No 195/2002, UN Doc CAT/C/34/D/195/2002, 17 May 2005, para 13.1. Similar: *Adel Tebourski v France*, No 300/2006 (n 49) para 8.1.

[222] Canada argued that the presence of a convicted terrorist was contrary to public interest. The applicant was an Indian Sikh militant who had served a prison sentence in Pakistan for his involvement in the hijacking of a plane and who feared that he would be subjected to torture by Indian security organs.

[223] *TPS v Canada*, No 99/1997, UN Doc CAT/C/24/D/99/1997, 16 May 1999, paras 15.4–15.5. In a dissenting opinion, however, Committee member Guibril Camara criticized that: '[t]he fact that in this case the author was not subsequently subjected to torture has no bearing on whether the State party violated the Convention in expelling him. The question of whether the risk—in this case, of acts of torture—actually materializes is of relevance only to any reparation or damages sought by the victim or by other persons entitled to claim … The competence of the Committee against Torture should also be exercised in the interests of prevention. In cases relating to Art 3, it would surely be unreasonable to wait for a violation to occur before taking note of it.' See also paras 16.2–16.4.

[224] *GK v Switzerland*, No 219/2002, UN Doc CAT/C/30/D/219/2002, 7 May 2003, para 6.3.

142 In its landmark decision *Agiza v Sweden* (2005)[225] the Committee changed its approach and stopped using subsequent events as evidence for a (non-)violation of Article 3. Mr. Agiza, an Egyptian national, was detained in 1982 in connection with the assassination of former Egyptian President Sadat, allegedly tortured in detention and later tried in absentia and sentenced to twenty-five years imprisonment for belonging to the terrorist organization Al-Jihad. He sought asylum in Sweden together with his family in 2000. In 2001, the Government of Sweden rejected the asylum application of Mr. Agiza and his wife on account of security concerns. Mr. Agiza was deported the same day by a privately chartered CIA rendition aircraft to Cairo. The deportation of his wife, Mrs Attia, was ordered to take place as soon as possible, but she evaded police custody and remained with the children in *Sweden*. In order to comply with the principle of non-refoulement, the Swedish Government had, before executing the expulsion of Mr. Agiza, requested and received diplomatic assurances from the Egyptian authorities to the effect that Mr. Agiza and his family would be treated in accordance with international law upon return to Egypt. A month after his deportation (in January 2002), the Swedish ambassador to Egypt visited Mr. Agiza in pre-trial detention and—as it later came to light—received information about the torture Mr. Agiza was subjected to. This information, contained in a confidential Swedish Government memorandum, was, however, omitted from the monitoring report that the Swedish Government made available to the public.[226]

Mr. Agiza's wife, Mrs Attia, in her complaint to the Committee, argued that given the family relationship she would risk torture upon return and that her husband showed physical signs of ill-treatment and reported having been tortured.[227] In November 2003, the Committee decided the case of *Attia v Sweden* on the basis of all information made available to it at that time.[228] The Committee argued that Article 3 was not violated since family ties were not a sufficient ground for a claim under Article 3 CAT; since diplomatic assurances were provided by Egypt being monitored by the Swedish ambassador;[229] and since the applicant's husband 'medical care and conditions of detention were reported to be adequate'.[230]

In June 2003, Mr. Agiza submitted a complaint to the Committee alleging that his removal to Egypt had violated Article 3 CAT. He based his complaint both 'on what was known at the time the complainant was expelled, as viewed in the light of subsequent events' and argued that he 'was in fact subjected to torture after his return'.[231] During the proceedings on his case, in 2004, the Committee received a report of the Swedish ambassador on his first monitoring visit to Mr. Agiza in January 2002 contradicting the information the Swedish Government had submitted to the Committee in the proceedings of his wife, Ms Attia. The Ambassador's report contained information of Mr. Agiza reporting torture in detention in Egypt.[232] In its landmark decision of 20 May 2005, the

[225] *Agiza v Sweden*, No 233/2003 (n 57).

[226] Human Rights Watch (n 120) 379. As revealed later, the chief legal adviser to the Swedish Ministry of Foreign Affairs had argued in December 2004 that the reasons for not communicating the torture allegations to United Nations human rights bodies were to avoid exposing the detainee to an even greater risk, and to not endanger diplomatic relations with Egypt: Human Rights Watch (n 120) 65.

[227] *Attia v Sweden*, No 199/2002 (n 219) para 7.1. [228] ibid, para 12.1.

[229] ibid, para 12.3. [230] ibid. [231] *Agiza v Sweden*, No 233/2003 (n 57) para 3.2.

[232] The report further contained information of Mr. Agiza reporting ill-treatment during his apprehension in Sweden and during the rendition flight conducted by US security personnel. The Swedish Government also provided the conclusions of the investigations of the Parliamentary Ombudsman into the circumstances of deportation from Sweden to Cairo which showed that the Swedish Security Police had lost control of the

CAT Committee observed that the question whether or not Article 3 CAT was violated by removing Mr. Agiza to Egypt

must be decided in the light of the information that was known, or ought to have been known, to the State party's authorities *at the time* of the removal. Subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of removal.[233]

The Committee noted that the State party knew or should have known that torture in Egypt was widespread, that the risk for detainees held for political and security reasons was particularly high, and that the State party was aware of the interest of the intelligence service of the USA and Egypt in the applicant.[234] The Committee further noted that the facts emerging in the *Agiza* case also had a bearing on the *Attia* case. It recalls that it relied on the diplomatic assurances in that case and that at the time of its decision it did not have the evidence at hand which later emerged in the *Agiza* case, such as the torture allegations contained in the Ambassador's report.[235] Of course the Committee, just as the State party, knew or should have known that torture in Egypt was widespread, particularly against detainees held for security reasons.[236]

143 In decisions subsequent to the *Agiza* case, the Committee adhered to its assessment of actual and constructive knowledge a State party should have had at the time of expulsion.[237] In *Abichou v Germany* (2013), for example, the Committee did not make its assessment of the quality of the risk assessment carried out by national authorities dependent on subsequent events. It stated that the fact that the torture risk did ultimately not materialize upon extradition 'cannot be justifiably used to call into question or minimize, retrospectively, the existence of such a risk at the time of his extradition'.[238]

144 To sum up, the Committee has in most cases not considered events subsequent to removal anymore as an element in its assessment of whether Article 3 was violated or not. Instead, it used information on subsequent events for the assessment what the State party actually knew or should have known at the time of removal.

3.6.2 Relevant Factors for the Risk Assessment

3.6.2.1 Objective and Subjective Test: General Human Rights Situation in Receiving State and Individual Situation

145 According to Article 3(2), domestic authorities 'shall take into account all relevant considerations' when determining whether there are substantial grounds for believing that a torture risk exists. The phrase 'all relevant considerations' goes back to the

situation at Bromma airport and that Mr. Agiza had been subjected to inhuman and degrading treatment by CIA personnel on Swedish territory and during the rendition flight.

[233] *Agiza v Sweden*, No 233/2003 (n 57) para 13.2; see also *Adel Tebourski v France*, No 300/2006 (n 49) para 8.1.

[234] *Agiza v Sweden*, No 233/2003 (n 57) para 13.4.

[235] Other information the Committee noted it did not have at the time of the decision of the *Attia* case was the ill-treatment of Mr. Agiza on the territory of the State party by foreign intelligence agents and the acquiescence of the State party's security organs; information on the involvement of the US intelligence service in the rendition flight. It also stated that at the time of the decision it had only limited information on the cooperation of States in renditions and torture abroad.

[236] The Committee in the *Agiza* case also found a breach of Art 22 since the State party had not disclosed all information relevant and necessary for the Committee to appropriately assess the complaint.

[237] See eg *Brada v France*, No 195/2002 (n 221) para 13.1; *Bachan Singh Sogi v Canada*, No 297/2006 (n 49) para 10.8.

[238] *Abichou v Germany*, No 430/2010 (n 62) para 11.7.

compromise proposal of the International Commission of Jurists in 1980.[239] The proposal laid out that a consistent pattern of gross human rights violations is not the only decisive factor that should be taken into account in the respective risk assessment. If such a consistent pattern exists, and above all a systematic practice of torture has been identified in a particular country, the burden of proof is on the State party to show that the particular individual concerned is not in danger of being subjected to torture if returned.

146 It has become routine practice of the Committee to remind States parties in its decisions on individual complaints of the dual considerations essential to an adequate risk assessment, namely not only with regard to the general human rights situation but first and foremost also to the specific circumstances of the individual.[240] Therefore, 'all relevant considerations' include the general human rights situation in the receiving State, the particular circumstances of the individual, and, as per practice of the Committee, also other factors, such as whether or not the receiving State is party to the Convention with the applicant having the legal possibility of applying to the Committee for protection or not,[241] and whether the State party has made the declaration under Article 22 CAT accepting the individual complaints procedure.[242]

147 General Comment No 4 (2017) stipulates categories of 'information', which 'while not exhaustive, would be pertinent' in the risk assessment.[243] Similar to General Comment No 1 (1998),[244] General Comment No 4 mentions the *human rights situation in the receiving State*;[245] *past torture or other ill-treatment* in the recent past,[246] as well as independent *evidence* to support such a claim;[247] *activities making the individual particularly vulnerable to torture risk*;[248] or the *credibility of the applicant.*[249] In addition to categories mentioned already in the General Comment of 1998, General Comment No 4 states also new categories, such as information on whether the applicant had access to all legal and/

[239] HR/XXXVI/WG.10/WP.7 (n 30).

[240] See eg *Munir Aytulun and Lilav Guclu v Sweden*, No 373/2009 (n 209) para 7.3; see also eg *Elmi v Australia*, No 120/1998 (n 199).

[241] See eg *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.6 (Zaire was not a party to the Convention, meaning that, in the event of expulsion, the applicant would 'no longer hav[e] the legal possibility of applying to the Committee for protection'); *Singh Khalsa et al v Switzerland*, No 336/2008, UN Doc CAT/C/46/D/336/2008, 26 May 2011, para 11.7; *Abed Azizi v Switzerland*, No 492/2012 (n 195) para 8.8; *Asghar Tahmuresi v Switzerland*, No 489/2012, UN Doc CAT/C/53/D/489/2012, 26 November 2014, para 7.7; *Khan v Canada,* No 15/1994 (n 1) para 12.5; *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) para 9.6.

[242] See eg *Korban v Sweden*, No 88/1997 (n 151) para 7; *SC v Denmark*, No 143/1999, UN Doc CAT/C/24/D/143/1999, 10 May 2000, para 6.5; *EJVM v Sweden*, No 213/2002, UN Doc CAT/C/31/D/213/2002, 14 November 2003, para 8.4. However, in the case of *Alan v Switzerland* the fact that Turkey was a State party to the Convention and had made the declaration under Art 22, was not considered to 'constitute a sufficient guarantee for the author's security'. The Committee explained—referring to its findings of its inquiry under Art 20 CAT—that 'practice of torture is still systematic in Turkey' and that 'the main aim and purpose of the Convention is to prevent torture, not to redress torture once it has occurred'. See *Alan v Switzerland*, No 21/1995 (n 1) para 11.5.

[243] CAT/C/GC/4 (n 2) para 49. [244] A/53/44, Annex IX (n 168) para 8.

[245] CAT/C/GC/4 (n 2) para 49(a) ('evidence of a consistent pattern of gross, flagrant or mass violations of human rights'). For details see below 3.6.2.2.

[246] CAT/C/GC/4 (n 2) para 49(b). For details see below 3.6.2.3.

[247] CAT/C/GC/4 (n 2) para 49(c). For details see below 3.7.1.2.

[248] CAT/C/GC/4 (n 2) para 49(f): whether the applicant 'engaged in political or other activities within or outside the State concerned which would appear to make him/her vulnerable to the risk of being subjected to torture …'. For details see below 3.6.2.4.

[249] CAT/C/GC/4 (n 2) para 49(h)(i). See also Wouters who distinguishes between 'personal elements of substance', 'general elements of substance', 'personal elements of credibility' and 'general elements of credibility'. Wouters (n 107) 463–64. For details on credibility assessment see below 3.7.1.1.

or administrative guarantees and safeguards, in particular, to an independent medical examination to assess claims of previous torture or other ill-treatment;[250] information on threat of or exposure to reprisals or other forms of sanctions amounting to ill-treatment in connection with the individual complaint;[251] information on whether the applicant would upon return be 'at risk of further deportation to another State where he/she would face the risk of being subjected to torture'.[252]

148 In the context of Article 3(2), the Committee states in its General Comment No 4 that 'the infliction of cruel, inhuman or degrading treatments or punishments, whether or not amounting to torture' to which a person or family was exposed or would be exposed is an indication of a torture risk, which 'should be taken into account by States parties as a basic element justifying the application of the principle of "non refoulement" '.[253] The Committee also mentions examples of human rights situations[254] 'which may constitute an indication of a risk of torture' to which States parties 'should give consideration in their decisions on removal' and 'take them into account when applying the principle of "non-refoulement" '.[255]

149 In its first Article 3 case decided on the merits and in which the Committee found a violation, in *Mutombo v Switzerland,* the Committee developed a particular formula for this double test which it has followed with slight modifications in subsequent decisions:

> The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances.[256]

[250] CAT/C/GC/4 (n 2) para 49(d). [251] ibid, para 49(e). [252] ibid, para 49(g).

[253] ibid, para 28.

[254] The Committee mentions as examples previous arbitrary arrest without a warrant and/or the denial of fundamental guarantees for a detainee in police custody (including access to a lawyer free of charge when necessary for his/her defence; access to an independent specialized medical entity to certify his/her allegations of having been subjected to torture; access to an independent judicial institution); victim of brutality or excessive use of force by public officials based on any form of discrimination; victim of violence including gender based/sexual violence, in public or in private, or gender-based persecution, genital mutilation, amounting to torture without intervention of the competent authorities for the protection of the victim; judgement by a judicial system which does not guarantee the right to a fair trial; previous detention in conditions amounting to ill-treatment; sentences of corporal punishment amounting to ill-treatment; crimes of genocide, crimes against humanity or war crimes; denial of right to life, including exposure to extrajudicial killings or enforced disappearance, or death penalty is in force and considered as a form of ill-treatment by the deporting State party; circumstances and methods of execution of death penalty and the prolonged period and conditions in death row detention could amount to ill-treatment; risk of being subjected to slavery and forced labor or trafficking in human beings; violation of fundamental child rights creating irreparable harm, such as recruitment as a combatant participating in hostilities or for providing sexual services.

[255] ibid, para 29.

[256] *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.3. See also Suntinger (n 86) 115. For subsequent decisions see eg *Singh Khalsa et al v Switzerland*, No 336/2008 (n 241); *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216); *TD v Switzerland*, No 375/2009, UN Doc CAT/C/46/D/375/2009; *Kalonzo v Canada*, No 343/2008 (n 58).

Modifications in the wording of the 'Mutombo formula' are for instance 'runs a personal risk',[257] 'personally … in danger'[258] or 'personally at a foreseeable and real risk'[259] (instead of 'personally at risk');[260] 'additional grounds must be adduced to show that the individual concerned would be personally at risk'[261] (instead of 'additional grounds must exist that indicate that …');[262] 'conversely'[263] (instead of 'similarly').

150 In the absence of a pattern of gross human rights violations in the receiving State, an individual can still be at risk due to his or her *personal circumstances*, such as belonging to a specific group[264] or having a specific profile.[265] Even if the political situation in a country has improved, this does not rule out that a person, due to political affiliation, ethnicity, or otherwise, continues to be at risk.[266] Conversely, even in cases where such

[257] See eg *ERK and YK v Sweden*, Nos 270 & 271/2005 (n 216); *Jean Patrick Iya v Switzerland*, No 299/2006 (n 209); *Njamba and Balikosa v Sweden*, No 322/2007 (n 203). Similar: *EVI v Sweden*, No 296/2006 (n 216); *CARM et al v Canada*, No 298/2006, UN Doc CAT/C/38/D/298/2006; *TA v Sweden*, No 303/2006, UN Doc CAT/C/39/D/303/2006, 22 November 2007; *JAMO v Canada*, No 293/2006, UN Doc CAT/C/40/D/293/2006, 9 May 2008; *MX v Switzerland*, No 311/2007 (n 155); *ZK v Sweden*, No 301/2006 (n 216); *RK et al v Sweden*, No 309/2006 (n 216); *EJ et al v Sweden,* No 306/2006 (n 216); *MF v Sweden*, No 326/2007 (n 183); *MM et al v Sweden*, No 332/2007 (n 216); *X v Australia,* No 324/2007 (n 216); *AM v France*, No 302/2006 (n 216); *CM v Switzerland*, No 355/2008 (n 216); *NS v Switzerland*, No 356/2008 (n 216); *AMA v Switzerland*, No 344/2008 (n 216); *TI v Canada*, No 333/2007, UN Doc CAT/C/45/D/333/2007, 15 November 2010; *Said Amini v Denmark*, No 339/2008 (n 216); *ECB v Switzerland*, No 369/2008 (n 156); *MSG et al v Switzerland*, No 352/2008 (n 216); *EL v Switzerland*, No 351/2008 (n 216); *Ktiti v Morocco*, No 419/2010 (n 216); *Nirmal Singh v Canada*, No 319/2007, UN Doc CAT/C/46/D/319/2007, 30 May 2011; *Alexey Kalinichenko v Morocco*, No 428/2010 (n 54); *Uttam Mondal v Sweden*, No 338/2008, UN Doc CAT/C/46/D/338/2008, 23 May 2011; *Bakatu-Bia v Sweden*, No 379/2009 (n 205); *Tony Chahin v Sweden*, No 310/2007, UN Doc CAT/C/46/D/310/2007, 30 May 2011; *Régent Boily v Canada*, No 327/2007, UN Doc CAT/C/47/D/327/2007, 14 November 2011; *SM et al v Sweden*, No 374/2009 (n 216); *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59); *MAMA et al v Sweden*, No 391/2009 (n 216); *MDT v Switzerland*, No 382/2009 (n 216); *MZA v Sweden*, No 424/2010 (n 216); *AAM v Sweden*, No 413/2010 (n 216).

[258] See eg *JLL v Switzerland*, No 364/2008 (n 216); *SM v Switzerland*, No 406/2009 (n 216); *NTW v Switzerland*, No 414/2010 (n 216); *RK v Australia*, No 609/2014 (n 82).

[259] See eg *SM v Switzerland,* No 406/2009 (n 216); *NTW v Switzerland*, No 414/2010 (n 216); *RG et al v Sweden*, No 586/2014, UN Doc CAT/C/56/D/586/2014, 25 November 2015; *RK v Australia*, No 609/2014 (n 82); *YS v Australia*, No 633/2014 (n 83); *KN v Australia*, No 649/2015 (n 83); *ES v Australia*, No 652/2015 (n 85); *LP v Australia*, No 666/2015 (n 85); *KV v Australia*, No 600/2014 (n 82); *DM v Australia*, No 595/2014 (n 85); *T v Australia*, No 599/2014 (n 85); *MN v Australia*, No 608/2014 (n 85); *GR v Australia*, No 605/2014 (n 82). Similar: *ET v Switzerland*, No 393/2009 (n 216); *YZS v Australia*, No 417/2010 (n 216).

[260] See eg *Mükerrem Güclü v Sweden*, No 349/2008 (n 209).

[261] See eg *Jean Patrick Iya v Switzerland*, No 299/2006 (n 209); *Njamba and Balikosa v Sweden,* No 322/2007 (n 203); *RG et al v Sweden*, No 586/2014 (n 259); *RK v Australia*, No 609/2014 (n 82); *YS v Australia,* No 633/2014 (n 83); *KN v Australia*, No 649/2015 (n 83); *ES v Australia*, No 652/2015 (n 85); *LP v Australia*, No 666/2015 (n 85); *KV v Australia*, No 600/2014 (n 82); *T v Australia*, No 599/2014 (n 85); *MN v Australia*, No 608/2014 (n 85); *GR v Australia*, No 605/2014 (n 82). Similar: *TA v Sweden*, No 303/2006 (n 257); *AA v Switzerland*, No 268/2005 (n 182); *LJR v Australia*, No 316/2007 (n 182); *ZK v Sweden*, No 301/2006 (n 216); *Said Amini v Denmark*, No 339/2008 (n 216); *Alexey Kalinichenko v Morocco*, No 428/2010 (n 54); *EL v Canada*, No 370/2009 (n 58); *JLL v Switzerland*, No 364/2008 (n 216); *FB v Netherlands*, No 613/2014, UN Doc CAT/C/56/D/613/2014, 20 November 2015.

[262] See eg *Ktiti v Morocco*, No 419/2010 (n 216).

[263] See eg *Jean Patrick Iya v Switzerland*, No 299/2006 (n 209); *AA v Switzerland*, No 268/2005 (n 182); *ZK v Sweden*, No 301/2006 (n 216); *Njamba and Balikosa v Sweden*, No 322/2007 (n 203). Similar: *LJR v Australia*, No 316/2007 (n 182); *Said Amini v Denmark*, No 339/2008 (n 216); *Alexey Kalinichenko v Morocco*, No 428/2010 (n 54); *RK v Australia*, No 609/2014 (n 82); *ES v Australia*, No 652/2015 (n 85); *LP v Australia*, No 666/2015 (n 85); *KV v Australia*, No 600/2014 (n 82); *T v Australia*, No 599/2014 (n 85); *MN v Australia*, No 608/2014 (n 85); *GR v Australia*, No 605/2014 (n 82).

[264] See eg *SM et al v Sweden*, No 374/2009 (n 216) (ethnic minority).

[265] See eg *Mükerrem Güclü v Sweden*, No 349/2008 (n 209) (political affiliation); *Haydin v Sweden*, No 101/1997 (n 207); *Arana v France*, No 63/1997, UN Doc CAT/C/23/D/63/1997, 9 November 1999 (links to ETA).

[266] See eg *CT and KM v Sweden*, No 279/2005 (n 207) (Rwandan applicants after the stabilization of the country).

a pattern is acknowledged to exist in a country or where the human rights situation is found to be difficult, additional grounds must be adduced to show that the individual concerned would be personally at risk.[267] Thus, according to the jurisprudence of the Committee, the general human rights situation in the receiving State can strengthen[268] or weaken[269] a claim of a personal risk but has so far been seldom sufficient by itself. However, there were exceptional cases in which a group as a whole was deemed to be targeted on such a scale that everyone belonging to that group could be considered to be at risk. For example, in the case *Njamba and Balikosa v Sweden* the Committee referred to the precarious human rights situation in the Democratic Republic of the Congo (DRC), in particular sexual violence against women (rape and gang rape committed by civilians and men with guns) including in areas not affected by armed conflict, so that the applicants' belonging to the high-risk group of women was sufficient to establish a real personal risk. The Committee concluded that the precarious human rights situation in DRC would make it impossible to identify particular areas which could be considered safe for the applicants in the 'current and evolving situation'.[270]

151 In other cases where the applicant had failed to demonstrate that personal grounds existed that he or she would be at risk of being subjected to torture if returned, the Committee did not even find it necessary to examine the human rights situation in the country.[271]

152 In some instances, the Committee did not determine the personal risk, in particular, it neither looked in detail into the general human rights situation nor in the individual circumstances. Instead it decided on the merits seemingly on the basis of a non-cooperative stance of the State party. For instance, in the case of *Tebourski v France* the Committee found a violation of Article 3 and merely referred to the conditions under which the applicant was expelled and the failure of the State party to demonstrate good faith by neglecting interim measures.[272] In a few cases, the Committee did

[267] See eg *Falcon Ríos v Canada*, No 133/1999 (n 207); *LP v Australia*, No 666/2015 (n 85) para 8.9; *T v Australia*, No 599/2014 (n 85) para 8.12. For other cases see eg *HMHI v Australia*, No 177/2001 (n 201) para 6.5 (Somalia); *RD v Switzerland*, No 426/2010, UN Doc CAT/C/51/D/426/2010, 8 November 2013, para 9.7 (Ethiopia); *RSM v Canada*, No 392/2009, UN Doc CAT/C/50/D/392/2009, 24 May 2013, para 7.4 ('worrying' human right situation in Togo); *MN v Australia*, No 608/2014 (n 85) (Sri Lanka); similar *T v Australia*, No 599/2014 (n 85) para 8.10.

[268] See eg *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.4. *Orhan Ayas v Sweden*, No 97/1997 (n 151) para 6: similar *Haydin v Sweden*, No 101/1997 (n 207) para 6.4; *Elmi v Australia*, No 120/1998 (n 199) paras 6.6, 6.8; *Falcon Ríos v Canada*, No 133/1999 (n 207) para 8.3; *CT and KM v Sweden*, No 279/2005 (n 207) para 7.7; *Jean Patrick Iya v Switzerland*, No 299/2006 (n 209) para 6.7; *Munir Aytulun and Lilav Guclu v Sweden*, No 373/2009 (n 209) para 7.3; *Nirmal Singh v Canada*, No 319/2007 (n 257) para 8.2; *Uttam Mondal v Sweden*, No 338/2008 (n 257) para 7.2; *Ktiti v Morocco*, No 419/2010 (n 216) para 8.5; *Fuad Jahani v Switzerland*, No 357/2008 (n 216) paras 9.4–9.5; *Hamid Reza Eftekhary v Norway*, No 312/2007 (n 216) paras 7.4, 7.7; *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) paras 9.4–9.5; *Tony Chahin v Sweden*, No 310/2007 (257) paras 7, 9.4, 9.5; *Mallikathevi Sivagnanaratnam v Denmark*, No 429/2010, UN Doc CAT/C/51/D/429/2010, 11 November 2013, para 10.3; *RG et al v Sweden*, No 586/2014 (n 259) para 8.7.

[269] See eg *IAO v Sweden*, No 65/1997, UN Doc CAT/C/20/D/65/1997, 6 May 1998, paras 14.3–14.5; *LMTD v Sweden*, No 164/2000, UN Doc CAT/C/28/D/164/2000, 15 May 2002, para 8.

[270] *Njamba and Balikosa v Sweden*, No 322/2007 (n 203) para 9.5. Similar: *Bakatu-Bia v Sweden*, No 379/2009 (n 205) paras 10.6–10.7.

[271] See eg *VNIM v Canada*, No 119/1998, UN Doc CAT/C/29/D/119/1998, 12 November 2002 (Honduras); *KM v Switzerland*, No 107/1998, UN Doc CAT/C/23/D/107/1998, 16 November 1999, para 6.7 (Turkey).

[272] *Adel Tebourski v France*, No 300/2006 (n 49) para 8.7. Similar: *Elif Pelit v Azerbaijan*, No 281/2005, UN Doc CAT/C/38/D/281/2005, 1 May 2007, para 11.

not clarify the actual level of risk to be faced by the applicant upon return (eg 'complete absence of risk').[273]

3.6.2.2 General Human Rights Situation in Receiving State

153 One of the elements to be taken into account in the risk assessment is according to General Comment No 4 (2017) the *general human rights situation* in the receiving State, in particular the 'evidence of a consistent pattern of gross, flagrant or mass violations of human rights' as referred to in Article 3(2) CAT.[274] These violations include:

'(a) widespread use of torture and impunity of its perpetrators; (b) harassment and violence against minority groups; (c) situations conducive to genocide; (d) widespread gender-based violence; (e) widespread use of sentencing and imprisonment of persons exercising fundamental freedoms; and (f) situations of international and non-international armed conflicts.'[275]

154 In the process of drafting the Convention, the Working Group of the Commission on Human Rights received a proposal of the delegation of the USSR at a meeting in 1979, which sought to define the type of human rights violations that would render a situation relevant to non-refoulement considerations. The text the USSR proposed required an applicant to provide 'substantial evidence' of being at risk of torture and linked the evidence required to

situations characterized by flagrant and massive violations of human rights brought about when apartheid, racial discrimination or genocide, the suppression of national liberation movements, aggression or the occupation of foreign territory are made State policy.[276]

The list of human rights violations was based broadly on those mentioned in GA Resolution 32/130 of 16 December 1977,[277] which at that time of the Cold War represented the approach of most Socialist and Southern States towards the international protection of human rights. Delegations of Western countries disagreed. The US delegation responded, for instance, by declaring that such a list of State policies would have to include religious persecution, denial of free speech, suppression of political dissent and the free flow of information.[278]

155 In 1980, the ICJ attempted to contribute to a compromise by replacing the term 'flagrant and massive violations of human rights' by 'a consistent pattern of gross violations of human rights',[279] a phrase borrowed from the confidential communication procedure under ECOSOC Resolution 1503 (XLVIII) of 1970.[280] But the reference to particular situations of gross human rights violations, such as apartheid, racial discrimination, or genocide remained in the ICJ draft. Since most Western States were not willing to accept any kind of illustrative list of human rights violations, India and Senegal in 1984 proposed to delete this list altogether. India also suggested to introduce, as a compromise, a new formula of 'a consistent pattern of gross, flagrant or mass

[273] See eg *El Rgeig v Switzerland*, No 280/2005 (n 207) para 7.4 (the Committee arrived at a violation of Art 3 arguing that '… the State party has not presented to it sufficiently convincing arguments to demonstrate a complete absence of risk' that the applicant would fact torture if returned to Libya); *Dadar v Canada*, No 258/2004 (n 52). See also Wouters (n 107) 474–75.

[274] CAT/C/GC/4 (n 2) para 49 (a). [275] ibid, para 43.

[276] E/CN.4/WG.1/WP.2. In E/CN.4/1367 (n 37) para 14.

[277] GA Res 32/130 of 16 December 1977. [278] E/CN.4/1367 (n 37) para 30.

[279] HR/XXXVI/WG.10/WP.7, mentioned in E/CN.4/1367 (n 37) para 15.

[280] 'Resolution 1503(XLVIII) of the Economic and Social Council: Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms'.

violations of human rights'.[281] Although many delegations had misgivings about these compromises, they were finally accepted by the Working Group, the Commission and the General Assembly.

156 In fact the words 'consistent pattern of gross' were taken from ECOSOC Resolution 1503 (XLVIII),[282] and 'flagrant or mass violations of human rights' were taken from GA Resolution 32/130[283] (as pointed out by the US delegation). In reality, the difference between both approaches is not as big as often assumed during the ideological human rights debates of the Cold War. After all, the breakthrough of the late 1960s which led to the end of the 'no power to take action doctrine' by ECOSOC, explicitly authorizing the Commission on Human Rights to examine gross and systematic human rights violations both in the public 1235 and the confidential 1503 procedures, could only be achieved because illustrative references to apartheid, racial discrimination, and colonialism were attached to the relevant resolutions.[284] But soon, ECOSOC Resolution 1235 (XLII) of 1967[285] became the legal basis for public discussions and examinations of gross and systematic violations of all human rights in all States of the world. The first so-called thematic mechanisms by the Commission on the basis of ECOSOC Resolution 1235 were established during the early 1980s: in 1980, the Working Group on Enforced or Involuntary Disappearances was established as the first thematic mechanism, followed by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 1982 and the Special Rapporteur on Torture in 1985.

157 The UN human rights protection system today knows several procedures of responding to the existence of a systematic pattern of gross human rights violations in a country. One is the public condemnation of the country by the Human Rights Council (previously the Commission on Human Rights)[286] or the General Assembly as well as the appointment of a country-specific Special Rapporteur, Special Representative, or similar independent expert of the Human Rights Council with the mandate to investigate the overall situation in the country. Another response is the confidential 1503 procedure to which a country can be subjected, with or without an independent expert appointed to investigate the situation.

158 The sources the Committee draws on to evaluate the situation in a country are manifold: it takes into account the reports of the Special Rapporteur on Torture[287] or other Special Rapporteurs,[288] decisions of other international or regional treaty monitoring bodies, such as the HRC[289] or the European[290] and Inter-American Human Rights System,[291] reports of the CPT[292] or the SPT. It also relies on assessments of the OHCHR[293]

[281] E/CN.4/1984/72 (n 43) para 19.

[282] 'Resolution 1503 (XLVIII) of the Economic and Social Council: Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms' (n 280), para 1.

[283] GA Res 32/130 (n 277), para 1(e).

[284] See Introduction above for these developments.

[285] 'Resolution 1235 (XLII) Adopted by the United Nations Economic and Social Council'.

[286] In June 2006, the former Commission on Human Rights (a sub-organ of ECOSOC) was replaced by the Human Rights Council (a sub-organ of the General Assembly): see GA Res 60/251.

[287] See eg CAT, 'Report on Nepal Adopted by the Committee Against Torture Under Article 20 of the Convention and Comments and Observations by the State Party' (2012) UN Doc A/67/44, Annex XIII, para 98.

[288] See eg the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, see *Singh Khalsa et al v Switzerland*, No 336/2008 (n 241) para 11.3.

[289] eg CAT, 'Concluding Observations: Kyrgyzstan' (2013) UN Doc CAT/C/KGZ/CO/2, para 23.

[290] See eg *EKW v Finland*, No 490/2012 (n 204) para 5.1.

[291] CAT, 'Concluding Observations: Colombia' (2010) CAT/C/COL/CO/4, para 15.

[292] See eg *Arana v France*, No 63/1997 (n 265) para 11.4.

[293] See eg A/67/44, Annex XIII (n 287) para 98.

and UN agencies such as UNHCR.[294] In the case of Iran, for example, the Committee based its assessment of the actual human rights situation on documents prepared by the OHCHR for the Universal Periodic Review (UPR), and statements of Special Procedure mandate holders of the Human Rights Council, as well as the HRC's Concluding Observations,[295] amongst others.[296] The reports of State authorities themselves and of diplomatic missions of States parties also play a role,[297] as well as of international NGOs such as Amnesty International,[298] and local human rights organizations.[299] The Committee's own mechanisms also generate information, such as the reporting mechanism under Article 19 and the inquiry mechanism under Article 20 CAT. In individual cases relating to the receiving States Turkey, Mexico, Peru, Egypt, and Sri Lanka, the Committee relied, inter alia, on its own findings in the respective inquiry proceedings under Article 20 CAT.[300]

159 In its first decision on the merits, in *Mutombo v Switzerland*, the Committee could already base its assessment on various established UN mechanisms. It referred to the country-specific Special Rapporteur in the assessment of the human rights situation in Zaire, as well as to reports of the Secretary-General, the Working Group on Enforced Disappearances, the Special Rapporteur on Summary Executions and the Special Rapporteur on Torture, all of which led to its conclusion 'that a consistent pattern of pattern of gross, flagrant or mass violations does exist in Zaire and that the situation may be deteriorating'.[301]

160 In evaluating if a situation in a country constitutes a consistent pattern of gross, flagrant, or mass violations of human rights, the Committee bases its assessment on evidence of practices of torture and other forms of prohibited inhuman treatment, including enforced disappearances and summary or arbitrary execution.[302]

161 In this regard the notion of 'systematic torture' under Article 20 on the inquiry procedure is particularly informative.[303] In 1992, at its first inquiry procedure under Article 20 of the Convention, the Committee defined systematic torture as follows:

> The Committee considers that torture is practiced systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of

[294] See eg *MS v Denmark*, No 571/2013, UN Doc CAT/C/55/D/571/2013, 10 August 2015.

[295] See eg *Hamid Reza Eftekhary v Norway*, No 312/2007 (n 216) para 7.6; *Combey Brice Magloire Ghadjavi v Switzerland*, No 396/2009 (n 216) para 7.7.

[296] See *Fuad Jahani v Switzerland*, No 357/2008 (n 216) para 9.4, footnote 23.

[297] See eg *NZS v Sweden*, No 277/2005, UN Doc CAT/C/37/D/277/2005, 22 November 2006.

[298] See eg *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.4.

[299] See eg A/67/44, Annex XIII (n 287); *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.4. In its inquiry under Art 20 of Nepal, the Committee took into account submissions of stakeholders and the UN to the universal periodic review of Nepal, as well as information provided by the OHCHR, and reports from the Nepal National Human Rights Commission and submissions from NGOs. In the case of the DRC, reports of the High Commissioner for Human Rights and reports of independent UN experts were looked into, and the report of the Independent Expert of the Commission on Human Rights on the situation of human rights in Somalia in the case of Somalia, and the report of the Special Representative of the Commission on Human Rights on the situation of human rights in Iran. In other cases the documents of inquiry procedures, such as in Mexico in 2001.

[300] See eg *Alan v Switzerland*, No 21/1995 (n 1), para 11.5; *Enrique Falcon Rios v Canada*, No 133/1999 (n 207) para 8.3; *Agiza v Sweden*, No 233/2003 (n 57) para 13.4; *US v Finland*, No 197/2002, UN Doc CAT/C/30/D/197/2002, 1 May 2003, para 7.7; *SS v Netherlands*, No 191/2001, UN Doc CAT/C/30/D/191/2001, 5 May 2003, para 6.3; *KK v Switzerland*, No 186/ 2001, UN Doc CAT/C/31/D/186/2001, 11 November 2003, para 6.3.

[301] *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.5.

[302] ibid.

[303] For more details see below Art 20, 3.1.

the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.[304]

162 A comparison between the ten Article 20 CAT inquiries that the Committee has undertaken so far further qualifies the key components of systematic torture as being the habitual, widespread, and deliberate use of torture (although not necessarily resulting from the direct intention of the Government) and inadequate legislation and prevention measures.[305]

163 The finding of the first type of evidence (*habitual, widespread, and deliberate use of torture in at least a considerable part of a country*) is usually based on the existence of a great number of allegations, which came from different sources that had proven to be reliable in connection with other activities of the Committee, eg in the case of Egypt in 1996,[306] or Peru in 2001.[307]

164 The second area of concern refers to *inadequate legislation and the lack of effective prevention measures*.[308] In particular, the Committee repeatedly advised States parties to institute access to counsel and free legal assistance to detainees, and prompt and independent investigations of torture allegations, to instruct local law enforcement agents on proper interrogation and investigation techniques.[309] For example, the Committee found that in Peru, 'torture is being used extensively in connection with the investigation of acts of terrorism and that those responsible are going unpunished'.[310] In the complaint of a politically active Togolese applicant, the Committee noted the lack of judicial inquiries into the serious human rights violations committed during and after presidential elections in 2005, and the climate of impunity this created, as well as the non-criminalization of torture in the national legislation.[311] In a complaint of a Turkish applicant, the Committee noted that despite legislative measures taken by the Government, the problem of impunity remained unsolved and questions as to the effectiveness of legal reform persisted.[312]

165 The Committee also refers to the systematic practice of torture in decisions on individual complaints. For instance, in the case of an Iranian applicant, the systematic practice of torture in Iran is noted along with the general human rights situation including violations of the right to freedom of expression and opinion, peaceful assembly and association, and the application of the death penalty.[313] In the case of an Uzbek applicant

[304] CAT, 'Report of the Committee Against Torture: Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey' (1993) UN Doc A/48/44/Add1, para 39.

[305] See below Art 20, 3.1.

[306] CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Egypt' (1996) UN Doc A/51/44.

[307] CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Peru' (2001) UN Doc A/56/44.

[308] A/67/44 (287) para 105.

[309] CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Sri Lanka' (2002) UN Doc A/57/44, para 136; CAT, 'Report on Mexico Produced by the Committee Under Article 20 of the Convention and Reply from the Government of Mexico' (2003) UN Doc CAT/C/75, para 219; A/48/44/Add.1 (n 304) para 44; A/51/44 (n 306) para 222.

[310] A/56/44 (n 307) para 3.

[311] *Combey Brice Magloire Gbadjavi v Switzerland*, No 396/2009 (n 216) para 7.7.

[312] *Mükerrem Güclü v Sweden*, No 349/2008 (n 209) para 6.6.

[313] *Abed Azizi v Switzerland*, No 492/2012 (n 195) para 8.5.

the Committee related to its finding in its Concluding Observations on Uzbekistan of routine use of torture and a consistent pattern of gross, flagrant, or mass human rights violations.[314]

166 The Committee frequently relies on evidence of practices which indicate that either the legal framework or policies in place are ineffective, for example when arbitrary detentions, lack of legal assistance to detainees, lack of effective investigations into torture allegations, and a lack of prosecutions of perpetrators undermine the prevention of torture.[315,316]

167 Similarly, the Committee has taken into account the general situation of chaos and the lack of a functioning Government (failed States) read together with the vulnerability of certain groups.[317] The Committee in the case of Somalia determined later cases differently as the political situation had changed and a functioning Government had taken over control.[318]

168 In cases where the Committee does not explicitly use the wording of Article 3(2) CAT, it does not necessarily mean that there does not exist a consistent pattern of gross, flagrant, or mass violations of human rights in the receiving State. The Committee has also used the wording of 'widespread violations of human rights'[319] in the case of Somalia, or 'an extremely worrisome' human rights situation[320] in Iran or, in earlier cases, 'serious human rights situation'[321] in Iran. It also spoke of a 'dire human rights situation'[322] and a 'precarious human rights situation'[323] (referring to the DRC), a poor human rights record and a generally unstable human rights situation in the case of Burundi,[324] a worrying human rights situation in Togo[325] and in Guinea.[326] In order to point out that the human rights situation in a country was serious, the Committee also expressed that it was 'deeply concerned'[327] or 'concerned'[328] (with reference to Ethiopia and Yemen), 'seriously concerned'[329] (with reference to Sri Lanka), or that a human rights situation remained a 'matter of concern in several aspects' (relating in particular to the Northern Caucasus

[314] *X v Russian Federation*, No 542/2013 (n 112) para 11.6.

[315] See eg *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.5; *VL v Switzerland*, No 262/2005, UN Doc CAT/C/37/D/262/2005, 20 November 2006, para 8.10.

[316] Internal armed conflicts are breeding grounds for such practices. In the case of El Salvador, the Committee in 2005 noted that, while there had been a consistent pattern of gross, flagrant or mass violations of human rights during the internal conflict in the country in the past, this could not be said to be the case any longer. The Committee explained that the general situation had changed since the peace accords came into effect in 1992 and referred to the fact that the former guerrilla group FMLN had won the majority in the 2003 parliamentary elections. See *MCMVF v Sweden*, No 237/2003, UN Doc CAT/C/35/D/237/2003, 14 November 2005, para 6.4.

[317] *Elmi v Australia*, No 120/1998 (n 199).

[318] See *HMHI v Australia*, No 177/2001 (n 201).

[319] *YHA v Australia*, No 162/2000, UN Doc CAT/C/27/D/162/2000, 23 November 2001, para 7.4.

[320] *Fuad Jahani v Switzerland*, No 357/2008 (n 216) para 9.4; *Hamid Reza Eftekhary v Norway*, No 312/2007 (n 216) para 7.4; *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) para 9.4.

[321] See eg *Tala v Sweden*, No 43/1996 (n 151) para 10.4; *Aemei v Switzerland*, No 34/1995 (n 1) para 9.9; *AF v Sweden*, No 89/1997, UN Doc CAT/C/20/D/89/1997, 8 May 1998, para 6.6.

[322] *JLL v Switzerland*, No 364/2008 (n 216) para 8.5.

[323] *MDT v Switzerland*, No 382/2009 (n 216) para 7.3.

[324] *AAM v Sweden*, No 413/2010 (n 216) para 9.5.

[325] *RSM v Canada*, No 392/2009 (n 267) para 7.4.

[326] *ABGAB v Switzerland*, No 440/2010, UN Doc CAT/C/54/D/440/2010, 4 May 2015, para 7.3.

[327] CAT, 'Concluding Observations: Ethiopia' (2011) UN Doc CAT/C/ETH/CO/1, para 10.

[328] *HK v Switzerland*, No 432/2012, UN Doc CAT/C/49/D/432/2010, 23 November 2012, para 7.6; *YBF et al v Switzerland*, No 467/2011, UN Doc CAT/C/50/D/467/2011, 31 May 2013, para 7.7.

[329] *Mallikathevi Sivagnanaratnam v Denmark*, No 429/2010 (n 268) para 10.3.

region of Russia,[330] and to Belarus[331]). The Committee regularly points out that the States parties themselves show awareness of recent developments in the receiving State (for instance that the State party in the case of an individual to be returned to Iran recognized 'that the human rights situation in Iran is worrisome on many levels'[332]), also with regard to deteriorations.[333] In the case of Syria, for example, the Committee recalled its concern about allegations of routine torture in its Concluding Observations on Syria in 2010 but noted that a year later, when issuing its decisions on an individual complaint that the human rights situation in Syria had seriously deteriorated.[334]

3.6.2.3 Past Torture or Other Ill-treatment

169 Another element to be taken into account in the personal risk assessment is according to General Comment No 4 whether 'the complainant [has] been tortured or ill-treated by or at the instigation of or with the consent or the acquiescence (tacit agreement) of a public official or other person acting in an official capacity in the past' and if yes, whether this was in the recent past.[335] Further, the Comment stipulates that it is also relevant whether there '[i]s … medical or psychological or other independent evidence to support a claim … that he/she has been tortured or ill-treated in the past' and whether 'the torture [has] had after-effects'.[336]

170 Past experiences of torture or other ill-treatment make a person particularly vulnerable to torture upon return. In several individual complaint cases the Committee—in arriving at a finding of a violation of Article 3 CAT—took past torture or other ill-treatment into account.[337] Still, they form only *one of the elements* to be taken into account in the risk assessment.[338] The lack of any past experiences of torture or other ill-treatment may undermine the existence of a personal risk.[339] The Committee has also stressed that

[330] See eg *Z v Sweden*, No 556/2013, UN Doc CAT/C/54/D/556/2013, 8 May 2015, para 8.5; *MA and MN v Sweden*, No 566/2013, UN Doc CAT/C/55/D/566/2013, 30 July 2015, para 8.5; *SK et al v Sweden*, No 550/2013, UN Doc CAT/C/54/D/550/2013, 8 May 2015, para 7.6; *AB v Sweden*, No 539/2013, UN Doc CAT/C/54/D/539/2013, 11 May 2015, para 7.6; *JI v Sweden*, No 616/2014 (n 81), para 8.5; *MB et al v Denmark*, No 634/2014 (n 82) para 9.7.

[331] *X, Y and Z v Sweden*, No 530/2012, UN Doc CAT/C/55/D/530/2012, 4 August 2015, para 8.6.

[332] See eg *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) para 9.4.

[333] See eg *Uttam Mondal v Sweden*, No 338/2008 (n 257) para 7.2.

[334] *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.4.

[335] CAT/C/GC/4 (n 2) para 49(b).

[336] ibid, para 49(c).

[337] See eg *Alan v Switzerland*, No 21/1995 (n 1) para 11.3; *Pauline Muzonzo Paku Kisoki v Sweden*, No 41/1996, UN Doc CAT/C/16/D/41/1996, 8 May 1996, para 9.3; *Tala v Sweden*, No 43/1996 (n 151) para 10.3; *AF v Sweden*, No 89/1997 (n 321) para 6.5; *Orhan Ayas v Sweden*, No 97/1997 (n 151) para 6.5; *A v Netherlands*, No 91/1997, UN Doc CAT/C/21/D/91/1997, 13 November 1998, para 6.7; *Haydin v Sweden*, No 101/1997 (n 207) para 6.6; *Karoui v Sweden*, No 185/2001 (n 216) para 10; *Falcon Ríos v Canada*, No 133/1999 (n 207) para 8.6; *TA v Sweden*, No 226/2003 (n 216) para 7.3; *Mostafa Dadar v Canada*, No 258/2004 (n 52) para 8.5; *CT and KM v Sweden*, No 279/2005 (n 207); *VL v Switzerland* (315), para 8.10; *Said Amini v Denmark*, No 339/2008 (n 216) para 9.8; *Nirmal Singh v Canada*, No 319/2007 (n 257) para 8.4; *Kalonzo v Canada*, No 343/2008 (n 58) para 9.7; *RG et al v Sweden*, No 586/2014 (n 259) para 8.7; *Uttam Mondal v Sweden*, No 338/2008 (n 257) para 7.5.

[338] See eg *MSH v Sweden*, No 235/2003, UN Doc CAT/C/35/D/235/2003, 14 November 2005, para 6.5; *AAC v Sweden* No 227/2003, UN Doc CAT/C/37/D/227/2003, 16 November 2006, para 8.3; *Singh Khalsa et al v Switzerland*, No 336/2008 (n 241) para 11.4; *Y v Switzerland*, No 431/2010, UN Doc CAT/C/50/D/431/2010, 21 May 2013, para 7.7; *X v Denmark*, No 458/2011, UN Doc CAT/C/53/D/458/2011, 28 November 2014, para 9.5; *EEE v Switzerland*, No 491/2012, UN Doc CAT/C/54/D/491/2012, 8 May 2015, para 7.5.

[339] See eg *AA v Switzerland*, No 268/2005 (n 182) para 8.4; *EL v Canada*, No 370/2009 (n 58), para 8.6; *MZA v Sweden*, No 424/2010 (n 216) para 8.4; *MB v Switzerland*, No 439/2010, UN Doc CAT/C/50/D/439/2010, 31 May 2013, para 7.7; *RS et al v Switzerland*, No 482/2011, UN Doc CAT/C/53/D/482/2011, 21 November 2014, para 8.4; *Z v Switzerland*, No. 545/2013, UN Doc CAT/C/56/D/545/2013, 25 November 2015, para 7.4.

even if the applicant was tortured or otherwise ill-treated in the past,[340] this does not necessarily mean that she or he is at the time of decision-making still at risk.[341] The relevant question would be whether the applicant '*currently* runs a risk of torture upon return'.[342] For this reason, the Committee sometimes leaves it open (or at least does not explicitly state) whether the applicant was actually tortured in the past.[343]

171 As stipulated in General Comment No 4, the Committee takes into account whether experiences of torture or other ill-treatment took place in the *recent past* (see above, § 169). In its case law, for instance, a lapse of time of six years or more between the last torture experience in the receiving country and the Committee's decision was considered to be not recent enough[344] while a lapse of time of four years was considered in some cases to be sufficiently recent,[345] in others not.[346] Torture taking place in the *distant past* can still be relevant in the risk assessment, for example if the general human rights situation is poor or if opposition activities continue to exist.[347]

172 The Committee takes also the *quality and quantity of past experiences* of torture or other ill-treatment into account. In particular, rape or other forms of *sexual abuse* are often considered in the Committee's case law.[348] Apart from that, the Committee

[340] See eg *SK et al v Sweden*, No 550/2013 (n 330) para 7.5; *X, Y and Z v Sweden,* No 530/2012 (n 331) para 8.6.

[341] See eg *SSS v* Canada, No 245/2004, UN Doc CAT/C/35/D/245/2004, 16 November 2005, para 8.4; *MM et al v Sweden*, No 332/2007 (n 216) para 7.5; *Mallikathevi Sivagnanaratnam v Denmark*, No 429/2010 (n 268) para 10.5; *X v Denmark*, No 458/2011 (n 338) para 9.5; *MS v Denmark*, No 571/2013 (n 294) para 7.7; *PSB and TK v Canada*, No 505/2012, UN Doc CAT/C/55/D/505/2012, 13 August 2015, para 8.6; *Z v Denmark*, No 555/2013, UN Doc CAT/C/55/D/555/2013, 10 August 2015, para 7.6; *NS v Canada*, No 582/2014 (n 84) para 9.7.

[342] See eg *MF v Sweden*, No 326/2007 (n 183) para 7.6; *MM et al v Sweden*, No 332/2007 (n 216) para 7.5; *GBM v Sweden*, No 435/2010, UN Doc CAT/C/49/D/435/2010, 14 November 2012, para 7.7; *Y v Switzerland*, No 431/2010 (n 338) para 7.7; *Mallikathevi Sivagnanaratnam v Denmark*, No 429/2010 (n 268) para 10.5; *PSB and TK v Canada*, No 505/2012 (n 341) para 8.6; *Z v Denmark*, No 555/2013 (n 341) para 7.6; *EEE v Switzerland*, No 491/2012 (n 338) para 7.5; Similar: *Nicmeddin Alp v Denmark*, No 466/2011, UN Doc CAT/C/52/D/466/2011, 14 May 2014, para 8.5; *X v Denmark*, No 458/2011 (n 338) para 9.5; *SK et al v Sweden*, No 550/2013 (n 330) para 7.5; *AB v Sweden*, No 539/2013 (n 330) para 7.6; *X, Y and Z v Sweden*, No 530/2012 (n 331), para 8.6; *MA and MN v Sweden*, No 566/2013 (n 330) para 8.5; *PA v Netherlands*, No 611/2014 (n 83) para 8.5; *SS v Canada*, No 581/2014 (n 81) para 7.5.

[343] See eg *RK et al v Sweden*, No 309/2006 (n 216) para 8.5; *AA et al v Switzerland* No 285/2006 (n 216) para 7.5; *ZK v Sweden*, No 301/2006 (n 216) para 8.4; *MM et al v Sweden*, No 332/2007 (n 216) para 7.5.

[344] Six years elapsed: see eg *SSS v* Canada, No 245/2004 (n 341) para 8.4; *NZS v Sweden*, No 277/2005 (n 297) para 8.5; *MF v Sweden*, No 326/2007 (n 183) para 7.6; *PSB and TK v Canada*, No 505/2012 (n 341) para 8.6; *MS v Denmark*, No 571/2013 (n 294) para 7.8. Seven years elapsed: see eg *SS v Netherlands*, No 191/2001 (n 300) para 6.6; *X v Denmark*, No 458/2011 (n 338) para 9.5. Nine years elapsed: see eg *SG v Netherlands*, No 135/1999, UN Doc CAT/C/32/D/135/1999, 12 May 2004, para 6.4; *X, Y and Z v Sweden*, No 530/2012 (n 331) para 8.8. Ten years elapsed: See eg *Z v Denmark*, No 555/2013 (n 341) para 7.6; *Mallikathevi Mallikathevi Sivagnanaratnam v Denmark*, No 429/2010 (n 268) para 10.5; *EEE v Switzerland*, No 491/2012 (n 338) para 7.5. Thirteen years elapsed: see eg *BSS v Canada*, No 183/2001, UN Doc CAT/C/32/D/183/2001, 12 May 2004, para 11.4. Fifteen years elapsed: see eg *HAD v Switzerland*, No 126/1999, UN Doc CAT/C/24/D/126/1999, 10 May 2000, para 8.6; *Y v Switzerland*, No 431/2010 (n 338) para 7.7. Seventeen years elapsed: see eg *KSY v Netherlands*, No 190/2001, UN Doc CAT/C/30/D/190/2001, 15 May 2003, para 7.2. At least twenty years elapsed: see eg *AR v Netherlands*, No 203/2002 (n 216) para 7.4; *Nicmeddin Alp v Denmark*, No 466/2011 (n 342) para 8.6.

[345] See eg *Khan v Canada*, No 15/1994 (n 1); *Jean Patrick Iya v Switzerland*, No 299/2006 (n 209).

[346] *TA v Sweden*, No 226/2003 (n 216) para 8.5.

[347] See eg *Dadar v Canada*, No 258/2004 (n 52) paras 8.6 and 8.7.

[348] See eg *CT and KM v Sweden*, No 279/2005 (n 207) para 7.5; *VL v Switzerland*, No 262/2005 (n 315) para 8.6.

also takes *after-effects* of such experiences such as post-traumatic stress[349] or physical ailments[350] into account when assessing the torture risk.[351]

3.6.2.4 Activities and Personal Factors Making the Individual Particularly Vulnerable to Torture Risk

173 Another element to be taken into account in the personal risk assessment is, according to General Comment No 4, the question whether the applicant 'engaged in political or other activities within or outside the State concerned which would appear to make him/her vulnerable to the risk of being subjected to torture were he/she to be expelled, returned or extradited to the State in question'.[352] General Comment No 4 further stipulates a non-exhaustive list of possible '[i]ndications of personal risk':

> (a) the complainant's ethnic background; (b) political affiliation or political activities of the complainant and/or his family members; (c) arrest warrant without guarantee of a fair treatment and trial; (d) sentence in absentia; (e) sexual orientation and gender identity; (f) desertion from the army or armed groups; (g) previous torture; (h) incommunicado detention or other form of arbitrary and illegal detention in the country of origin; (i) clandestine escape from the country of origin for threats of torture; (j) religious affiliation; (k) violations of the right to freedom of thought, conscience and religion … (l) risk of expulsion to a third country where the person may be in danger of being subjected to torture and (m) violence against women, including rape.[353]

174 *Political activities* including associated political affiliation,[354] in particular opposition activities, including in the country of refuge,[355] desertion from the army, conviction of anti-State crimes,[356] or internal exile[357] may increase the risk of torture. However, the mere risk of being interrogated or arrested and tried is not sufficient by itself for the Committee to conclude that there is also a torture risk.[358] The fact that the receiving State is *searching* for the applicant or has brought *criminal charges* against him or her are indications of a personal risk, in particular if politically motivated and without the guarantee of a fair treatment and trial.[359] Also a sentence in absentia or a

[349] See eg *El Rgeig v Switzerland*, No 280/2005 (n 207) para 7.4; *Kasombola Kolonzo v Canada*, No 343/2008, UN Doc CAT/C/48/D/343/2008,18 May 2012 para 9.6.

[350] See eg *TA v Sweden*, No 226/2003 (n 216) para 8.5.

[351] On evidence attesting past torture and other ill-treatment see below 3.7.1.2.

[352] CAT/C/GC/4 (n 2) para 49 (f). [353] ibid, para 45.

[354] See eg *A v Netherlands*, No 91/1997 (n 337) para 6.7; *Nirmal Singh v Canada*, No 319/2007 (n 257) para 8.5; *RK v Australia*, No 609/2014 (n 82) para 8.6 and *T v Australia*, No 599/2014 (n 85) para 8.11.

[355] eg *Jahani v Switzerland* (n 216) para 9.5. Similar: *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) para 9.5.

[356] See *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.6.

[357] *Alan v Switzerland*, No 21/1995 (n 1) para 11.3.

[358] See eg *PQL v Canada*, No 57/1996, UN Doc CAT/C/19/D/57/1996, 17 November 1997, para 10.5; *AA v Switzerland*, No 268/2005 (n 182) para 8.5; *CM v Switzerland*, No 355/2008 (n 216) para 10.9; *MAH and FH v Switzerland*, No 438/2010, UN Doc CAT/C/51/D/438/2010,7 November 2013, para 7.5; *Z v Switzerland* (n 339) para 7.4; *DM v Australia*, No 595/2014 (n 85) para 9.6.

[359] See eg *Nirmal Singh v Canada*, No 319/2007 (n 257) para 8.6. Cases in which the lack of an arrest warrant or criminal proceeding contributed to the finding that no violation of Art 3 was determined: See eg *ZK v Sweden*, No 301/2006 (n 216) para 8.5 (lack of evidence showing that he is currently being searched); *RK et al v Sweden*, No 309/2006 (n 216) para 8.4; *MM et al v Sweden*, No 332/2007 (n 216) para 7.6; *TD v Switzerland*, No 375/2009 (n 256) para 7.9; *HK v Switzerland*, No 432/2012 (n 328) para 7.5; *NTW v Switzerland*, No 414/2010 (n 216) para 7.4; *RA v Switzerland*, No 389/2009, UN Doc CAT/C/49/D/389/2009, 20 November 2012, para 9.5; *ET v Switzerland*, No 393/2009 (n 216) para 7.4; similar *SM v Switzerland*, No 406/2009 (n 216) para 7.5; *MAH and FH v Switzerland* (n 358) para 7.6; *Mallikathevi Mallikathevi Sivagnanaratnam v Denmark*, No 429/2010 (n 268) para 10.5; *RD v Switzerland*, No 426/2010 (n 267) para 9.7; *R.SM v Canada*, No 392/2009 (n 267) para 7.4; *Y v Switzerland* (n 338) para 7.7; *PSB and TK v Canada*, No 505/2012 (n 341)

disproportionate sentence may indicate that a personal risk exists.[360] Various aspects are important in the risk assessment, in particular the level of responsibility and engagement as well as the type and scale of activities.[361] Political leadership or membership in a political organization or party, in particular in an opposition party,[362] but also the mere commissioning of minor activities such as participating in demonstrations, or only sympathizing and distributing leaflets can be of relevance in the risk assessment. For the Committee it is of importance whether the applicant would attract the interest of the authorities of the receiving State upon return:[363] The 'decisive factor in assessing the risk of torture … is whether the person occupies a position of particular responsibility in a movement opposing the regime and thus poses a threat to it'.[364] The Committee assesses whether the profile of the applicant is sufficiently high or whether the activities were of such significance to attract the interests of the authorities and put them at risk of torture upon return.[365] In assessing whether the profile is sufficiently high, the Committee also takes into account whether criminal justice authorities were recently looking for the applicant or whether the applicant is well-known to authorities of the receiving State because of his or her political activities (including in the country of refuge).[366] However, under certain circumstances a low political profile may suffice for establishing a torture risk.[367]

175 Leaving the country of origin in a clandestine or illegal manner may increase the risk of torture.[368] The Committee regards the issuance of a passport and being in a position to leave the country freely as one of the indicators that no personal risk of torture exists.[369]

para 8.6; *MS v Denmark*, No 571/2013 (n 294) para 7.7; *X, Y and Z v Sweden*, No 530/2012 (n 331) para 8.11; *NS v Canada*, No 582/2014 (n 84), para 9.5.

[360] *Nicmeddin Alp v Denmark*, No 466/2011 (n 342) para 8.6.

[361] See eg *AAC v Sweden*, No 227/2003 (n 338) para 8.5; *EJ et al v Sweden*, No 306/2006 (n 216) para 8.6; *X, Y and Z v Sweden,* No 530/2012 (n 331) para 8.8.

[362] See eg *Khan v Canada,* No 15/1994 (n 1) para 12.4; *AF v Sweden,* No 89/1997 (n 321) para 6.5.

[363] See eg *MZA v Sweden*, No 424/2010 (n 216) para 8.5.

[364] See *TD v Switzerland*, No 375/2009 (n 256) para 7.8.

[365] Profile deemed to be sufficiently high: See eg *Nirmal Singh v Canada*, No 319/2007 (n 257) para 8.5; *Singh Khalsa et al v Switzerland*, No 336/2008 (n 241) para 11.5. Profile not deemed to be sufficiently high: See eg *ZK v Sweden*, No 301/2006 (n 216) para 8.5; *RK et al v Sweden*, No 309/2006 (n 216) para 8.4; *ECB v Switzerland*, No 369/2008 (n 156), paras 10.10, 10.12; *TD v Switzerland*, No 375/2009 (n 256) para 7.8; *NTW v Switzerland*, No 414/2010 (n 216) para 7.5; *ET v Switzerland*, No 393/2009 (n 216) para 7.5; *SM v Switzerland*, No 406/2009 (n 216) para 7.6; *MDT v Switzerland*, No 382/2009 (n 216) para 7.7; *HK v Switzerland*, No 432/2012 (n 328) paras 7.5 and 7.6; *Mallikathevi Sivagnanaratnam v Denmark*, No 429/2010 (n 268) para 10.6; *YBF et al v Switzerland*, No 467/2011, (n 328) para 7.6; *MB v Switzerland*, No 439/2010 (n 339) para 7.8; *MAH and FH v Switzerland* (n 358) para 7.5; *RD v Switzerland*, No 426/2010 (n 267) para 9.7; *RSM v Canada*, No 392/2009 (n 267) para 7.4; *X v Denmark*, No 458/2011 (n 338) para 9.6; *K v Australia*, No 591/2014, UN Doc CAT/C/56/D/591/2014, 25 November 2015, para 10.8; *NS v Canada*, No 582/2014 (n 84) para 9.5.

[366] See eg *Singh Khalsa et al v Switzerland*, No 336/2008 (n 241) para 11.5.

[367] See eg *Combey Brice Magloire Gbadjavi v Switzerland*, No 396/2009 (n 216) para 7.7 (members of the opposition with a low political profile may still be subjected to Government reprisals since those who fled Togo for Benin and Ghana were viewed with greater suspicion).

[368] See eg *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.4; *FFZ v Denmark*, No 180/2001, UN Doc CAT/C/28/D/180/2001, 30 April 2002, para 11; *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.5.

[369] See eg *GBM v Sweden*, No 435/2010 (n 342) para 7.8; *YZS v Australia*, No 417/2010 (n 216) para 7.6; *PSB and TK v Canada*, No 505/2012 (n 341) para 8.6; *RK v Australia*, No 609/2014 (n 82) para 8.7; *NS v Canada*, No 582/2014 (n 84) para 9.5.

176 Also *journalistic activities* may make the applicant particularly vulnerable to torture risk, in particular if they draw the attention of the authorities of the receiving State to the applicant.[370]

177 Not only political activities within[371] the country of origin but also those committed subsequent to the flight, including in the country of refuge,[372] can be relevant in the context of Article 3.[373]

178 In its jurisprudence, the Committee has taken personal factors such as *ethnic background*;[374] *religion or religious affiliation*;[375] *family ties*,[376] or *sexual orientation*,[377] into account in assessing the torture risk upon return. For instance, the *ethnic origin* of an applicant, a person of Armenian origin living in Azerbaijan, combined with experiences of torture and other ill-treatment of the applicant and his family were sufficient for the Committee to arrive at a violation of Article 3 CAT. In this context, the Committee took information on the widespread hostile attitude on part of the general public towards ethnic Armenians and the risk of discrimination in daily life into account.[378]

179 In its jurisprudence, the Committee has also taken *gender* and in particular *violence against women*, including rape, into account. It arrived at a violation of Article 3 CAT mainly on account of the applicant's belonging to the group of women in a country with widespread violence against women (DRC).[379]

180 A claim under Article 3 CAT on account of *family relationship* by itself is normally not enough to establish a personal risk.[380] Additional elements such as political activity are deemed necessary. For instance, in *Paez v Sweden* the applicant came from a politically active family,[381] was a member of the Sendero Luminoso, and participated in a demonstration where he handed out leaflets and handmade bombs. The Committee took also into account that other family members were targeted.[382] In *Kalonzo v Canada*, the applicant was the son of a leader of the Union for Democracy and Social Progress in

[370] See eg *Hamid Reza Eftekhary v Norway*, No 312/2007 (n 216) paras 7.7, 7.9.

[371] See eg *Mutombo v Switzerland*, No 13/1993 (n 1), para 9.4. *Khan v Canada*, No 15/1994 (n 1) para 12.3.

[372] See eg *Pauline Muzonzo Paku Kisoki v Sweden*, No 41/1996 (n 337) para 9.4; *Aemei v Switzerland*, No 34/1995 (n 1) para 9.5; *X, Y and Z v Sweden*, No 61/1996, UN Doc CAT/C/20/D/61/1996, 6 May 1998, para 11.4; *Hamid Reza Eftekhary v Norway,* No 312/2007 (n 216) para 7.7; *Jahani v Switzerland* (n 216) para 9.10; *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) paras 9.5-9.6.

[373] See CAT/C/GC/4 (n 2) para 49 (f).

[374] See eg *Mutombo v Switzerland*, No 13/1993 (n 1), para 9.4. *Alan v Switzerland*, No 21/1995 (n 1) para 11.3. *Elmi v Australia*, No 120/1998 (n 199), para 6.8; *SM et al v Sweden*, No 374/2009 (n 216) para 9.6; *Kalonzo v Canada*, No 343/2008 (n 58) para 9.7 ('a Luba from Kasaï'); *MB v Switzerland*, No 439/2010 (n 339) para 7.7; *RK v Australia*, No 609/2014 (n 82) para 8.6 or *JN v Denmark,* No 628/2014 (n 85) para 7.9 (Tamil ethnicity).

[375] See eg *Uttam Mondal v Sweden*, No 338/2008 (n 257) para 7.7 (minority Hindu group); *Toirjon Abdussamatov et al v Kazakhstan,* No 444/2010 (n 59) para 13.8; *Khairullo Tursunov v Kazakhstan*, No 538/2013 (n 59) para 9.8; *Mumin Nasirov v Kazakhstan,* No 475/2011 (n 53) para 11.9.

[376] See below § 180.

[377] See eg *KSY v Netherlands*, No 190/2001 (n 344) paras 7.3 and 7.4; *Uttam Mondal v Sweden*, No 338/2008 (n 257) para 7.7; *EJVM v Sweden*, No 213/2002 (n 242) para 8.7; *JK v Canada*, No 562/2013 (n 83) para 10.5.

[378] *SM et al v Sweden*, No 374/2009 (n 216).

[379] See *Njamba and Balikosa v Sweden,* No 322/2007 (n 203) para 9.5; *Bakatu-Bia v Sweden*, No 379/2009 (n 205) paras 10.6-10.7; *EKW v Finland*, No 490/2012 (n 204) paras 9.6-9.7.

[380] See *Attia v Sweden*, No 199/2002 (n 219) para 12.3; see also eg *MV v Netherlands*, No 201/2002 (n 170) para 7.3.

[381] For another case in which the applicant came from a politically active family see *AF v Sweden*, No 89/1997 (n 321) paras 2.1 and 6.5.

[382] *Tapia Paez v Sweden*, No 39/1996 (n 49) para 14.3.

DRC, a Luba from Kasaï, and had already been the victim of violence during his detention.[383] In another case, the Committee stated that it was not unlikely that the applicant would still attract the interest of the Egyptian authorities due to his family relationship with the convicted murderer of President al-Sadat (even though the events took place a long time ago) but also because he had via internet, during his stay in his country of refuge, questioned whether the real murderers of President al-Sadat were convicted and punished.[384] Also *experiences of torture or other ill-treatment of family members* or the fact that family members are being *targeted by authorities* of the receiving State[385] (or the lack thereof)[386] have been taken into account by the Committee.

181 The Committee has also taken the *recognition as a refugee* in accordance with the Refugee Convention into account. In *Pelit v Azerbaijan*, the Committee noted that the applicant was recognized as a refugee in Germany given the risk of persecution upon return to *Turkey* and that her refugee status remained valid when *Azerbaijan* deported her to *Turkey*. The Committee, referring to EXCOM Conclusion No 12(f) of UNHCR '*On the extraterritorial effect of the determination of refugee status*', noted that '[t]he State party has not shown why this principle was not respected … in circumstances where the general situation of persons such as the complainant and the complainant's own past experiences raised real issues under article 3'.[387] This despite the fact that persecution is a broader concept than torture. The Committee has also referred in its case law to the recognition of other family members as refugees[388] or the recognition of other members of the same group as refugees.[389]

182 The Committee has also considered the *extent of publicity* an individual case has received[390] or the fact that the applicant has *published articles* in which his or her name and telephone number were mentioned.[391]

183 For a very long time, the membership to a particular group (which as a whole runs a substantial risk) has not been sufficient for the Committee to find a violation of Article 3 CAT: For instance, in *Elmi v Australia*, the Committee based the risk assessment mainly on the general human rights situation in Somalia, in particular Mogadishu, and the fact that the applicant was a member of a small clan threatened by armed factions of another clan. Still, important elements in finding a violation of Article 3 CAT were the fact that the applicant's family was targeted in the past as well as the wide publicity of the applicant's case.[392] In another case, the Committee agreed with the State party that 'the likelihood of torture of Tamils in Colombo who belong to a "high risk" group

[383] *Kalonzo v Canada*, No 343/2008 (n 58) para 9.7.

[384] *MAMA et al v Sweden*, No 391/2009 (n 216) para 9.6.

[385] See eg *Tapia Paez v Sweden*, No 39/1996 (n 49) para 14.3; *Elmi v Australia*, No 120/1998 (n 199) para 6.8.

[386] The Committee took into account that family members were not targeted: see eg *YS v* Switzerland, No 147/1999, UN Doc CAT/C/25/D/147/1999, 15 May 2001, para 6.6; *JAMO v Canada*, No 293/2006 (n 257) para 10.6; *NS v Switzerland*, No 356/2008 (n 216) para 7.4; *MB v Switzerland*, No 439/2010 (n 339) para 7.7; *Y v Switzerland*, No 431/2010 (n 338) para 7.7; *MN v Australia*, No 608/2014 (n 85) para 7.8; *DM v Australia*, No 595/2014 (n 85) para 9.5.

[387] *Elif Pelit v Azerbaijan*, No 281/2005 (n 272) para 11.

[388] See eg *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) para 9.5; *Tapia Paez v Sweden*, No 39/1996 (n 49) para 14.3.

[389] See eg *Fuad Jahani v Switzerland*, No 357/2008 (n 216) para 9.5.

[390] See eg *Elmi v Australia*, No 120/1998 (n 199) para 6.8.

[391] See eg *Fuad Jahani v Switzerland*, No 357/2008 (n 216) para 9.5; *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) para 9.5.

[392] See eg *Elmi v Australia*, No 120/1998 (n 199) paras 6.6–6.8.

is not so great that the group as a whole runs a substantial risk of being so exposed'.[393] However, more recently, the Committee came close to the recognition that a group as a whole, concretely women in the DRC, would be targeted on such a scale that everyone belonging to it could be considered to be at risk. The Committee referred to the widespread precarious human rights situation in DRC, in particular sexual violence against women (rape and gang rape committed by civilians and men with guns) including in areas not affected by armed conflict, so that the applicants' belonging to the group of women was sufficient to establish a real personal risk. The Committee concluded that this situation of widespread violence against women would make it impossible to identify particular areas, which could be considered safe for the applicants in the 'current and evolving situation'.[394]

3.6.3 Internal Flight Alternative

184 In the jurisprudence of the Committee the concept of internal flight alternatives[395] plays a role when the risk for the applicant might not be present in the whole territory of a State but only in certain regions. The internal flight alternative is the option of the individual to relocate to an area other than his/her former place of residence and lead a life free from torture there. A return of the individual to the country of origin where an internal flight alternative exists does, according to the decisions on individual cases brought before the Committee, not constitute a breach of Article 3 CAT.

185 From the case law of the Committee it can be deducted that the most important criterion for the determination of an available internal flight alternative is the *ability and willingness* of the receiving State to protect the individual against non-State perpetrators.[396] *When the risk emanates from non-State actors*, an internal flight alternative may be available to the persecuted individual as the reach of non-State actors will often not extend to the whole territory of the State, for example in cases where the State is, due to civil unrest, only in control of parts of the country.

186 The risk of torture by non-State actors was considered in both *Elmi v Australia*[397] and *HMHI v Australia* which concerned applicants to be returned to Somalia. In *HMHI v* Australia, unlike *Elmi*, the Committee found that a return would not violate Article 3 CAT. While the Committee still considered that there existed a consistent pattern of gross, flagrant, or mass violations of human rights in Somalia, it took note of the fact that the State party intended to return him through a UNHCR voluntary repatriation programme not to Mogadishu, but to an area of Somalia of his choice. The distinguishing feature between *HMHI v Australia* and *Elmi* was that Somalia was no longer a 'failed State' but had established in the interim a Transitional National Government which meant that

[393] *SS and SA v Netherlands*, No 142/1999, UN Doc CAT/C/26/D/142/1999, 11 May 2001, para 6.6. In more recent cases concerning Sri Lankans of Tamil ethnicity, the Committee noted that only those 'with a prior personal or familial connection to LTTE' may face a torture risk: see eg *RK v Australia*, No 609/2014 (n 82) para 8.6; *T v Australia*, No 599/2014 (n 85), para 8.11; *JN v Denmark*, No 628/2014 (n 85) para 7.9.

[394] *Njamba and Balikosa v Sweden*, No 322/2007 (n 203) para 9.5. Similar: *Bakatu-Bia v Sweden*, No 379/2009 (n 205) paras 10.6–10.7; *EKW v Finland*, No 490/2012 (n 204) paras 9.6–9.7.

[395] The concept of an internal flight alternative is not explicitly mentioned in the 1951 Refugee Convention but plays a role in refugee status determination procedures of States parties. See also UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention And/Or 1967 Protocol Relating to the Status of Refugees'.

[396] See above 3.5.4. [397] See above 3.5.4.

the risk of torture from non-governmental entities (as argued by the applicant) would now in Somalia commonly fall outside the scope of Article 3 CAT.[398]

187 By comparison, in the case *Salah Sheekh v Netherlands* the ECtHR found that the State party's intention to expel the applicant to a region in *Somalia* that it considered relatively safe would be a violation of the non-refoulement principle. The Court accepted that parts of Somalia, notably Somaliland and Puntland, could be considered safer than others, but only to individuals hailing from clans of those regions. The Court considered the responsibilities of the State sending someone to a particular region of a country as being the same as in the case of a removal to an intermediary country, and that for relying on an internal flight alternative certain guarantees have to be in place, namely that the person to be expelled must be able to travel to the area concerned and gain admittance and settle there.[399]

188 Thus, the ECtHR goes a step further in defining the obligations of the sending State than the Committee by including considerations of whether the internal flight alternative is practically, legally, and safely accessible, and whether the person concerned is able to settle there.[400]

189 When the *risk of torture emanates from State actors*, however, the CAT Committee takes into consideration whether these State actors have local leverage only, such as local police, or whether they operate nationwide and could therefore pose a risk to the person in the whole territory of the State. The Committee also takes into account the degree of interest these State actors could have in the individual.[401]

190 In *BSS v Canada,* a case involving a Sikh applicant from Punjab who was persecuted by Punjabi police but did not display a high political profile, the Committee acknowledged the applicant's risk of torture in Punjab given the evidence submitted including the continued harassment of his family. The Committee noted, however, that the applicant's claims and evidence only related to the risk he faced in Punjab. The Committee considered that the applicant failed to substantiate that he did not have the option of leading a life free from torture in other parts of *India* and concluded that 'the mere fact that he may not be able to return to his family and his home village does not as such amount to torture within the meaning of article 3'.[402]

191 In *SSS v Canada*, also involving a Sikh person politically active in Punjab, the Committee established more clearly that the political profile of an applicant can determine if the internal flight alternative is an option.[403] In *Singh Khalsa et al v Switzerland*—a case involving Sikh separatists who had hijacked a plane—the Committee found that a removal of the applicants to *India* would constitute a violation of Article 3. It based its view on following elements: the applicants were clearly known to the criminal justice authorities in India as Sikh militants; the authorities maintained an interest in them; persons with a similar profile had been arrested upon return at the airport in India and

[398] As Wouters, however, notes, there is no clear consideration of the Committee of whether the internal flight alternative is also accessible in practice, ie whether the applicant would in fact be accepted to the UNHCR relocation programme and whether a relocation would effectively be possible. As Wouters also notes, UNHCR relocation programmes are voluntary—the applicant, however, would be forced to join it. See Wouters (n 107) 559.

[399] *Salah Sheekh v The Netherlands*, App no 1948/04 (ECtHR, 11 January 2007) para 141.

[400] See Wouters (n 107) 557.

[401] See *Alan v Switzerland*, No 21/1995 (n 1) para 11.4; see also *Haydin v Sweden*, No 101/1997 (n 207).

[402] *BSS v Canada*, No 183/2001 (n 344) para 11.3.

[403] *SSS v Canada*, No 245/2004 (n 341) para 8.5.

detained and charged with various offences; according to reports of the SRT ill-treatment and torture in detention continued to be a problem in India, as well as impunity of perpetrators and lack of effective investigations into the acts. The State party had argued that the situation in Punjab—the region in the focus of the applicants' militancy—had improved but the Committee considered the applicants to be at risk of being tortured upon return regardless of whether they would move to other parts of India. This was because of their high profile and the continued interest of the authorities. Also consideration of the fact that India is not State party to CAT played a role.[404] Similarly, the Committee in *NS v Canada* stated that the removal to an area of a State where the person would not be exposed to torture, as he or she might be in other areas of the same State, 'is not an admissible option unless the Committee has received reliable information before the deportation that the State of return has taken effective measures able to guarantee full and sustainable protection of the rights of the person concerned'.[405]

192 General Comment No 4 considers an internal flight alternative[406] to be 'not reliable or effective'.[407] Furthermore, it stipulates that '[t]he notion of "local danger" does not provide for measurable criteria and is not sufficient to dissipate totally the personal danger of being tortured'.[408,409] The Committee—in 'assessing whether "substantial grounds" exist … considers that a receiving State should have demonstrated certain essential measures to prevent and prohibit torture throughout the entire territory under its jurisdiction, or control or authority'.[410]

[404] See *Singh Khalsa et al v Switzerland*, No 336/2008 (n 241); see also *Nirmal Singh v Canada*, No 319/2007 (n 257), where the Committee equally decided that the applicant, a Sikh priest and former local leader of the Akali Dal party, had a profile sufficiently high to put him at risk of torture anywhere in India if arrested, compounded by evidence of arrests of the applicant in different provinces and the continued interest of the authorities in him after his departure from the country; and *Chahal v UK*, App no 22414/93 (ECtHR, 01 September 1994).

[405] *NS v Canada*, No 582/2014 (n 84) para 9.6.

[406] The Committee defines an internal flight alternative as 'the deportation of a person or a victim of torture to an area of a State where he/she would not be exposed to torture unlike in other areas of the same State' see CAT/C/GC/4 (n 2) para 47.

[407] ibid.

[408] ibid, para 46 ('When assessing whether "substantial grounds" exist, the Committee will take into account the human rights situation … as a whole and not of a particular area of it. The State party is responsible for any territory under its jurisdiction, or control or authority …').

[409] The lack of clearly defined criteria of what constitutes a 'local danger' played a role in *Kalonzo v Canada*, No 343/2008 (n 58), for example, where the Committee, dismissing the State party's argument that the applicant could resettle in Kinshasa, did not consider the applicant to be safe in the DRC where he was to be deported to, due to three main factors: for being the son of a political leader, for being a Luba from Kasaï and because he had already previously experienced torture whilst in detention in Kinshasa. See *Kalonzo v Canada*, No 343/2008 (n 58) para 9.7. See also *Uttam Mondal v Sweden*, No 338/2008 (n 257) para 7.4. The ECtHR, in comparison, rejects an internal protection alternative to be accessible when it is State actors who pose a risk to the individual. In *Chahal v UK* a Sikh nationalist to be returned to India was considered to be at particular risk in Punjab but also not safe anywhere in India where, according to the SRT, torture in police custody was endemic. Similarly, in *Hilal v United Kingdom*, the applicant from Zanzibar was considered to be at risk also in mainland Tanzania as the police there was regarded as institutionally linked to the police in Zanzibar. See *Hilal v United Kingdom* App no 45276/99 (ECtHR, 6 March 2001) para 67; *Chahal v UK*, App no 22414/93, ECtHR (n 404) paras 103–05.

[410] CAT/C/GC/4 (n 2) para 48. It mentions as examples 'clear legislative provisions on the absolute prohibition of torture and its punishment with adequate penalties, measures to put an end to the impunity for acts of torture, violence and other illegal practices committed by public officials, the prosecution of public officials allegedly responsible for acts of torture and other ill-treatment and their punishment commensurate with the gravity of the crime committed when they are found guilty.'

3.6.4 Refoulement and Asylum Procedure

193 The personal scope of the Refugee Convention is narrower than the personal scope of Article 3 CAT. Article 1A(2) of the Refugee Convention defines a refugee as a person who has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion', is outside his or her country of origin and is 'unable or, owing to such fear … unwilling to avail himself of the protection of that country'. Still, there is a possible overlap between both categories: refugees who have been persecuted or fear persecution on any of the grounds mentioned above have often been subjected to torture. If the request for protection under the Refugee Convention is dismissed by domestic authorities of the country of refuge, Article 3 CAT may,

> [a]s a complementary protection mechanism … provide relief for those who are unable to demonstrate a link between torture (as a form of persecution) and one of the five 1951 Convention grounds; those overlooked as refugee due to narrow domestic interpretations of the Convention definition; and those expressly excluded from the Convention.[411]

Even though Article 3 CAT 'was not conceived as an alternative protection mechanism' it has 'spawned an extensive jurisprudence, both at the international and domestic levels'.[412] An example of domestic jurisprudence is Hong Kong case law, where the Refugee Convention does not apply and where courts—starting with the famous *Prabakar* judgment[413]—developed important jurisprudence on Article 3 CAT of relevance for asylum seekers.[414]

194 In contrast to the Refugee Convention, Article 3 CAT is absolute and does not allow any exceptions to the principle of non-refoulement.[415]

195 Governments sometimes argue that complaints regarding Article 3 CAT to the CAT Committee have been misused by asylum seekers.[416] The first cases of asylum seekers who had successfully invoked a violation of Article 3 CAT before the CAT Committee led to a significant increase in the number of Article 3 complaints.[417] Indeed, asylum seekers whose asylum requests are dismissed by domestic authorities often turn to international human rights treaty monitoring bodies, such as the CAT Committee, by invoking the *non-refoulement* principle. This can be explained as follows: first, there is a material overlap—despite the clear legal distinction—between proceedings relating to international protection under the Refugee Convention and *non-refoulement* proceedings under international human rights law, such as CAT.

[411] Goodwin-Gill and McAdam (n 50) 303f. [412] ibid, 301.

[413] Court of Final Appeal of the Hong Kong Special Administrative Region, *Secretary for Security v Sakthevel Prabakar*, FAVC 16 of 2003, 8 June 2004. See also High Court of the Hongo Kong Special Administrative Region Court of First Instance, *FB & Ors v Director of Immigration and Secretary for Security*, First Instance Judicial Review, HCAL 51/2007, 5 December 2008.

[414] See Kelley Loper, 'Human Rights, Non-refoulement and the Protection of Refugees in Hong Kong' (2010) 22 IJRL 404.

[415] See above 3.1.

[416] See eg *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.2; *Aemei v Switzerland*, No 34/1995 (n 1) para 9.6.

[417] See Suntinger (n 86) 115; Manfred Nowak, 'Committee against Torture and Prohibition of Refoulement', 14 NQHR 1996 435; Oldrich Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures' (1997) 9 IJRL 392, 407; Gorlick Brian, 'The Convention and Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 IJRL 479, 479.

Second, there is a lack of an international individual complaints procedure against domestic asylum decisions.[418]

196 In response to Governments arguing that the individual complaints procedure in relation to Article 3 CAT has been abused by asylum seekers, the Committee has made clear that the security of applicants and the prevention of torture (rather than redress) is of major importance:[419] in this regard, the Committee noted in its case law that it 'certainly does not take lightly concern on the part of the State party that article 3 of the Convention might be improperly invoked by asylum seekers' but that it 'is of the opinion that, even though there may be some remaining doubt as to the veracity of the facts adduced by the author … it must ensure that his security is not endangered'.[420] In order to do the latter, 'it is not necessary that all the facts invoked by the author should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable'.[421]

197 In order to delimit itself from refugee determination procedures, the Committee has made clear that 'its authority does not extend to a determination of whether or not the claimant is entitled to asylum under the national laws of a country, or can invoke the protection of the Geneva Convention relating to the Status of Refugees'.[422] It also stated that if the applicant's arguments are 'solely [based] on asylum and did not invoke the right protected by article 3 of the Convention'[423] the complaint is inadmissible under Article 22 CAT.[424] The Committee has also stressed in its case law that a finding of a violation of Article 3 CAT 'in no way affects the decision(s) of the competent national authorities concerning the granting or refusal of asylum' and 'has a declaratory character' only so that 'the State party is not required to modify its decision(s) concerning the granting of asylum'.[425]

198 The Committee has stated in its case law that while a State party does not have to modify its decision regarding the granting of asylum after the finding of a violation of Article 3 CAT, 'it does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of article 3 of the Convention'.[426] The Committee clarified that such solutions 'may be of a legal nature (eg decision to admit the applicant temporarily), but also of a political nature (eg action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him in its turn)'.[427] In a later decision the Committee noted that a 'temporary permit for medical treatment is not sufficient to fulfil the State party's obligations under article 3 of the Convention'.[428] Still, the Committee did not say which immigration status would be

[418] Even though UNHCR is entrusted by Art 35 of the Refugee Convention with the 'duty of supervising the application of the provisions of this Convention', no formal individual complaints can be lodged against the rejection of asylum requests by domestic authorities to the UNHCR or any other international monitoring body.

[419] *Alan v Switzerland*, No 21/1995 (n 1) para 11.5 ('main aim and purpose of the Convention is to prevent torture and not to redress it once it has occurred').

[420] *Aemei v Switzerland*, No 34/1995 (n 1) para 9.6. Similar: *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.2; *MPS v Australia*, No 138/1999, UN Doc CAT/C/28/D/138/1999, 30 April 2002, para 7.3.

[421] *Aemei v Switzerland*, No 34/1995 (n 1) para 9.6.

[422] *X v Spain*, No 23/1995, UN Doc CAT/C/15/D/23/1995, 15 November 1995, para 7.3.

[423] ibid, para 7.4.

[424] ibid, para 7.5. Similarly, in *X and Y v Netherlands*, No 31/1995, UN Doc CAT/C/15/D/31/1995, 20 November 1995, para 4.2.

[425] *Aemei v Switzerland*, No 34/1995 (n 1) para 11. [426] ibid. [427] ibid.

[428] *AD v Netherlands*, No 96/1997, UN Doc CAT/C/23/D/96/1997, 12 November 1999, para 7.3.

necessary to comply with Article 3 CAT. In general, the principle of non-refoulement in international human rights instruments has led to the introduction of protection status for individuals who benefit from this principle but who do not qualify for protection under the Refugee Convention. At EU level, for instance, subsidiary protection status was introduced in the so-called Qualification Directive.[429]

3.6.5 Diplomatic Assurances

199 In the context of the transfer of persons from one State to another, be it in the course of a deportation of an alien, an extradition of a suspect, or others, diplomatic assurances are agreements between the sending and the receiving State to guarantee that the transferee is 'treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law'.[430] According to General Comment No 4 the notion 'diplomatic assurances' 'refers to a formal commitment by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State and in accordance with international human rights standards'.[431]

200 Diplomatic assurances are a useful tool in extradition cases for the purpose of ensuring that the requested State will refrain from subjecting the person concerned to the death penalty. In relation to torture, the situation is different. First, often, the Minister for Foreign Affairs or other Government officials providing diplomatic assurances do not have the factual power over the security and intelligence forces to ensure that torture is not applied. Secondly, torture is usually surrounded by secrecy, which makes effective post-return monitoring difficult. Occasional visits by diplomatic personnel, NGOs, or trained prison inspectors, even if they take place on a daily basis, are no 'watertight' safeguard against torture. Finally, States which seek diplomatic assurances from countries known for their torture practices have a keen interest to expel, 'render', or return the persons concerned from their own territory and, therefore, are not that much interested in finding out the truth about what really happened to the person concerned.

201 The Committee does not categorically reject diplomatic assurances as a guarantee in extradition or deportation procedures. It has, however, consistently argued that diplomatic assurances do not absolve a sending State from carrying out the risk assessment mandated by the non-refoulement principle. In other words, *diplomatic assurances cannot be the only safeguard* relied upon when transferring a person to the authorities of another State: '… diplomatic assurances cannot be used as a justification for failing to apply the principle of non-refoulement as set forth in article 3 of the Convention.'[432] Similarly, the UN General Assembly agrees that 'diplomatic assurances, where used, do

[429] Council Directive 2004/83/EC of 29 April 2004 replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011. For an overview of the role of international human rights monitoring bodies in contributing to refugee protection through inclusive interpretation see María-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 RSQ 11-42.

[430] UNHCR, 'UNHCR Note on Diplomatic Assurances and International Refugee Protection', para 1.

[431] CAT/C/GC/4 (n 2) para 19.

[432] *Abichou v Germany*, No 430/2010 (n 62). See also 'Concluding Observations: Russian Federation' (2012) CAT/C/RUS/CO/5, para 17; 'Concluding Observations: Slovakia' (2015) CAT/C/SVK/CO/3, para 17(c).

not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement'.[433]

202 The Committee's stance is unequivocal in rejecting diplomatic assurances as a means of securing protection from States 'where there are substantial grounds for believing that a person would be at risk of torture or ill-treatment upon return to the State concerned …'.[434] Where a State has been found to violate international law by perpetrating torture, it certainly cannot be expected to respect bilateral agreement. The Committee repeatedly pointed out that in cases where the risk of torture is found to be manifest (where there are substantial grounds for believing that a person would be in danger of being subjected to torture), diplomatic assurances do not constitute a measure of protection.[435] Thus, where the receiving State displays a situation of flagrant human rights violations, and the applicant discharged his or her burden of proof that his/her personal risk is real and foreseeable, diplomatic assurances are not a reliable safeguard.[436]

203 General Comment No 4 stipulates that

> diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement … where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.[437]

204 States parties were consistently found to violate Article 3 CAT when they relied on diplomatic assurances without carrying out an individualized risk assessment and without setting up a monitoring mechanism of the implementation of the assurances, and when the serious interest of the State in the well-being of the transferred person was therefore not demonstrated.

205 In *Régent Boily v Canada*, the Committee noted that a request for diplomatic assurances is already an indication that there are doubts about the treatment of detainees in the recipient country (in the particular case, the applicant had already been tortured in the recipient country), and that such a request therefore means that the sending State is already alerted to a potentially high risk.[438]

206 Diplomatic assurances of a 'general, unspecific nature'[439] are insufficient and States which sought diplomatic assurances are obliged to carry out a follow-up to the situation of the person once the transfer has occurred.[440] The Committee criticized States

[433] UN General Assembly, 'Resolution adopted by the General Assembly [on the Report of the Third Committee (A/60/509/Add.1)]—Torture and other cruel, inhuman or degrading treatment or punishment', A/RES/60/148, 21 February 2006, para 8.

[434] See eg CAT, 'Concluding Observations: Albania' (2012) CAT/C/ALB/CO/2), para 19; CAT/C/ARM/CO/3 (n 113) para 24; CAT/C/MAR/CO/4 (n 113) para 9; CAT, CAT/C/SVK/CO/3 (n 432) para 17(c).

[435] *X v Kazakhstan*, No 554/2013, UN Doc CAT/C/55/D/554/2013, 3 August 2015; *Khairullo Tursunov v Kazakhstan*, No 538/2013 (n 59); *Alexey Kalinichenko v Morocco*, No 428/2010 (n 54); *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59).

[436] See eg CAT/C/BEL/CO/3 (n 113), para 22. See above 3.6.2.2 for a discussion on what constitutes a situation of flagrant human rights violations.

[437] CAT/C/GC/4 (n 2) para 20.

[438] *Régent Boily v Canada*, No 327/2007 (n 257) para 14.4. The HRC, in this context, noted in its Concluding Observations on the USA in 2006, that 'the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedure may be.' See HRC, 'Concluding Observations: USA' (2006) CCPR/C/USA/CO/3/Rev.1, para 16. See also *Elif Pelit v Azerbaijan*, No 281/2005 (n 272).

[439] *Alexey Kalinichenko v Morocco*, No 428/2010 (n 54) para 15.

[440] See eg CAT/C/RUS/CO/5 (n 432) para 17.

when the situation was not monitored, or when the monitoring fell short of being 'objective, impartial and sufficiently trustworthy',[441] also from the perspective of the returned person.[442] A well-designed monitoring system must be part and parcel of any diplomatic assurance agreement. In *Régent Boily v Canada*, the Committee notes in particular that monitoring must set in from the moment of handover of the person to the authorities of the receiving State.[443] In some cases where the Committee found States parties violating the non-refoulement principle by relying on diplomatic assurances only, it, instead of wholly rejecting seeking diplomatic assurances, requested them to review their system of diplomatic assurances.[444]

207 In order to be able to assess whether diplomatic assurances in a particular case are sufficiently detailed, effective, and reliable, the Committee has also insisted on being provided with the actual documents.[445] The Committee criticized in its State reporting procedure the lack of transparency in transfers of persons to other countries based on diplomatic assurances, and therefore repeatedly requested information on and numbers of transferred persons,[446] particularly so in the context of renditions.[447] In a quest to shed light on the extent and nature of extraordinary renditions in the aftermath of 9/11, the Committee requested a number of States to provide information on and numbers of diplomatic assurances received and which countries issued them in the context of the transfer of persons. The Committee advised States to not rely on diplomatic assurances from requesting States where there is a risk of torture because diplomatic assurances will not exempt them from being held responsible for possible breaches of Article 3 CAT and reiterated that 'those assurances cannot be an instrument to modify a determination of a possible violation of article 3 of the Convention'.[448]

208 Whether diplomatic assurances constitute binding legal obligations remains contested.[449] In the event of the receiving State breaching given assurances, the sending State will not only have limited legal means available to enforce compliance (they could consider State-initiated complaints under the CAT or the CCPR), but their motivation to seek adjudication will be limited for political reasons and because of the likeliness that they themselves will be found responsible for the person's fate by returning him/her in the first place.

209 Therefore, in cases of non-compliance with the diplomatic assurances provided, both the sending and the receiving State have little interest in bringing this to light. Consequences are rare, the *Arar* case[450] being one of the few examples where the torture

[441] *Khairullo Tursunov v Kazakhstan*, No 538/2013 (n 59) para 9.10. See also *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59), para 13.10.

[442] *Elif Pelit v Azerbaijan*, No 281/2005 (n 272).

[443] *Régent Boily v Canada*, No 327/2007 (n 257), para 14.5.

[444] ibid, para 15 (c). See also CAT/C/MAR/CO/4 (n 113) para 9.

[445] See eg *Elif Pelit v Azerbaijan*, No 281/2005 (n 272).

[446] See eg CAT/C/THA/CO/1 (n 97) para 20; CAT/C/RUS/CO/5 (n 432) para 17; CAT/C/ARM/CO/3 (n 113) para 24.

[447] CAT, 'Concluding Observations: Czech Republic' (2012) CAT/C/CZE/CO/4-5, para 8.

[448] ibid.

[449] For a discussion on this see Jeffrey G Johnston, 'The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11' 11 ICLR 1.

[450] Maher Arar, a dual Canadian-Syrian national, was apprehended by US authorities in September 2002 during a transit stop at JFK Airport in New York. He was flown by the CIA to Jordan, driven to Syria on the basis of diplomatic assurances provided by Syria to the USA, and released ten months later after having been interrogated and tortured by Syrian security officers. See Dennis R O'Connor, Commissioner, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: 'Report of the Events Relating

of the person upon return did make the sending State (the US) rethink their return policies.[451]

210 The Committee's criteria in assessing the *reliability of diplomatic assurances* as discussed above were not least refined after the occurrences in the cases of *Attia v Sweden* and *Agiza v Sweden*,[452] where it was only because of the activities of NGOs and the media that the true facts about the 'extraordinary rendition' of Mr. Agiza and his treatment by Egyptian security officers came to light. The two cases showed that genuine monitoring of diplomatic assurances in the best interest of the returned person is sometimes not in the interest of the sending State. The Committee had made its assessment in *Attia* based on the information available to it and was 'satisfied by the provision of guarantees against abusive treatment, which … are, at the present time, regularly monitored by the State party's authorities *in situ*'.[453] The Committee, however, did at that time not have access to certain documents withheld by the Swedish Government which would have revealed from the very beginning that Mr. Agiza was actually tortured and that the diplomatic assurances by *Egypt* were ineffective. It concluded in *Agiza* that '[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk'.[454]

211 It is worth noting that the Committee's scope of remedies in individual complaints cases where a State party was found to have violated Article 3 CAT includes not only consular visits and monitoring of the person's situation in detention,[455] but also a possible return of the person to the State party.[456]

212 The Committee's practice demonstrates that the value of diplomatic assurances must be weighed against the outcome of the risk assessment and assessed whether the assurances are sufficiently detailed and elaborate, whether their details have been disclosed or kept secret, and whether they include a post-return monitoring scheme.[457]

213 Some Council of Europe Member States supported the development of guidelines for diplomatic assurances,[458] but the Committee of Ministers in March 2006 decided to stop this exercise after strong criticism by NGOs, the UN Special Rapporteur on Torture, the Council of Europe Commissioner for Human Rights, and the European Committee for the Prevention of Torture.[459]

to Maher Arar: Analysis and Recommendation'. The report is available at the website of the Government of Canada at <http://publications.gc.ca/site/eng/295791/publication.html> accessed 4 August 2018. See also below Art 14, § 107.

[451] See Katherine R Hawkins, 'The Promises of Torturers: Diplomatic Assurances and the Legality of "rendition" ' (2006) 20 Geo Immigr LJ 213.

[452] See above 3.6.1. [453] *Attia v Sweden*, No 199/2002 (n 219) para 12.3.

[454] *Agiza v Sweden*, No 233/2003 (n 57) para 13.4. See also *Elif Pelit v Azerbaijan*, No 281/2005 (n 272) para 11. It should be noted that parallel findings were made by the HRC in *Mohammed Alzery v Sweden*, No 1416/2005, CCPR/C/88/D/1416/2005, 25 October 2006, para 11.4.

[455] See eg *X v Kazakhstan*, No 554/2013 (n 435); *Khairullo Tursunov v Kazakhstan*, No 538/2013 (n 59).

[456] *X v Kazakhstan*, No 554/2013 (n 435); *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59).

[457] The State should '… establish and apply well-defined procedures for eliciting diplomatic assurances, together with appropriate judicial oversight mechanisms and effective post-return monitoring arrangements for use in the event of refoulement': CAT/C/MAR/CO/4 (n 113) para 9.

[458] Commission on Human Rights, 'Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur on the Question of Torture, Manfred Nowak' (2005) E/CN.4/2006/6, para 16.

[459] See the submission of Amnesty International, Human Rights Watch and the International Commission of Jurists: '… both the sending state and the receiving state have fundamental disincentives to acknowledge that torture or other ill-treatment have occurred, since doing so would amount to an admission that they have violated a core principle of human rights law. As a result, both Governments share an interest in creating an

214 The question of the value of diplomatic assurances became particularly acute in the context of returns of terrorism suspects. In combating global terrorism after the events of 11 September 2001, the USA, European, and other States increasingly resorted to requesting States with a known record of torture to provide diplomatic assurances to the effect that suspected terrorists returned to these countries (for example Egypt, Syria, Jordan, Libya, Algeria) would not be subjected to torture upon return, a trend which the then High Commissioner for Human Rights qualified to have a 'corrosive effect' on the non-refoulement principle.[460]

215 Whilst the Committee does not receive individual complaints against the USA,[461] it expressed concern in the State reporting procedure about the practice of obtaining diplomatic assurances against torture in transfer proceedings of former Guantánamo detainees and remained 'disturbed by reports from non-governmental sources which indicate that some former Guantanamo Bay detainees have experienced abuse during post-release treatment'.[462]

216 Despite the growing evidence (such as in the cases of Maher Arar and Ahmed Agiza as discussed above) about the non-reliability of diplomatic assurances in relation to torture, the British Government, in reaction to the bombings in London on 7 July 2005, concluded three Memorandums of Understanding with Jordan, Libya, and Lebanon, and later also with Ethiopia to facilitate the return of terrorism suspects to these countries. They included diplomatic assurances relating to torture and other ill-treatment as well as the instalment of a post-return monitoring body in charge of overseeing the implementation of the assurances.[463] Although the return to Libya has stopped, the Committee in its Concluding Observations on the UK in 2013 still expressed concern about the country's reliance on diplomatic assurances when deporting foreign terrorism suspects to countries with a track record of widespread torture:

> The more widespread the practice of torture or other cruel, inhuman or degrading treatment, the less likely the possibility of the real risk of such treatment being avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. Therefore, the Committee considers

impression that the assurances are meaningful rather than verifying that they actually are': In: AI, 'Reject rather than Regulate: Call on Council of Europe Member States Not to Establish Minimum Standards for the Use of Diplomatic Assurances in Transfers to Risk of Torture and Other Ill-Treatment' (2005) 18.<https://www.amnesty.org/en/documents/ior61/025/2005/en/> accessed 3 December 2017.

[460] Louise Arbour, 'Non Exceptions to the Ban on Torture' *International Herald Tribune* (5 December 2005).

[461] The USA did not make a declaration under Art 22 CAT.

[462] CAT/C/USA/CO/3-5 (n 180) para 16.

[463] See Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation, signed 10 August 2005; Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Co-operation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland concerning the provision of assurances in respect of persons subject to deportation, signed 18 October 2005; and Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic concerning the provision of assurances in respect of persons subject to deportation, signed 23 December 2005, Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Democratic Republic of Ethiopia concerning the provision of assurances in respect of persons subject to deportation, signed 12 December 2008. The MoUs are available at the website <https://www.gov.uk/government/collections/memoranda-of-understanding-on-deportations-with-assurances> accessed 24 March 2017.

that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention.[464]

217 In relation to the ECtHR, the *Othman (Abu Qatada) v the UK* case constitutes a defining moment in the Court's jurisprudence regarding the value of diplomatic assurances. Othman Abu Qatada, an Islamic cleric and national of Jordan, was granted asylum in the UK where he fled to after having been detained and tortured in Jordan. Abu Qatada was suspected of having been involved in a number of terrorist attacks, was wanted by several countries, and considered a security threat in the UK. His deportation to Jordan was carried out with the aim of trying him for offences for which he had already been convicted in absentia.[465] Prior to *Othman*, the ECtHR in *Saadi v UK* had emphasized the importance of the practical implementation of the particular assurances.[466] In *Othman*, the ECtHR noted that the CAT Committee diagnosed torture to be 'widespread and routine' in Jordan, but did not conclude therefrom that the general human rights situation precluded accepting diplomatic assurances in individual cases.[467] This judgment therefore stands opposed to the standing of the CAT Committee which has consistently emphasized that States are not to request diplomatic assurances from countries which are found to harbour systematic and widespread torture. Also, the weight afforded to bilateral agreements in the argument of the ECtHR clearly undermines the weight of the international human rights framework. Ultimately, the ECtHR analysed the given diplomatic assurances in the *Othman* case in political rather than legal terms, and concluded that given the good relationship between the UK and Jordan, the good faith in which the assurances were concluded, and their approval of the highest levels of Government,[468] compliance with those assurances was likely. This judgment stands apart from previous ones in which the ECtHR had ruled that diplomatic assurances provided no safeguard because of the systematic nature of torture in the countries concerned.[469]

218 In conclusion it can be stated that diplomatic assurances from States known for their practice of torture are unreliable and ineffective in the protection against torture and other forms of ill-treatment and should, therefore, not be resorted to by sending States, including in cases of suspected terrorists or persons considered a threat to national security.

3.7 Burden of Proof

219 According to Article 3(1) CAT an individual must not be expelled, returned, or extradited to another State where there are 'substantial grounds for believing' that there is a risk of torture. This standard of proof is 'an—interrelated—matter of credibility, plausibility and evidence'.[470]

220 On the initiative of the *UK*, the phrase 'substantial grounds for believing' was inserted to replace the phrase 'reasonable grounds to believe', as contained in the original Swedish draft and the IAPL draft.[471] The USSR draft of March 1979[472] as well as other

[464] CAT/C/GBR/CO/5 (n 143) para 18.
[465] *Othman (Abu Qatada) v the United Kingdom*, App no 8139/09 (ECtHR, 17 January 2012).
[466] *Saadi v United Kingdom* [GC] App no 13229/03 (ECtHR, 29 January 2008) para 187.
[467] *Othman (abu Qatada) v the United Kingdom*, App no 8139/09, ECtHR (n 465) para 194.
[468] ibid, para 195.
[469] See *Karimov v Russia*, App no 54219/08 (ECtHR, 29 July 2010); *Abdulazhon Isakov v Russia*, App no 14049/08 (ECtHR, 8 July 2010); *Yuldashev v Russia*, App no. 1248/09 (ECtHR, 8 July 2010).
[470] Wouters (n 107) 475. [471] See above 2.1. [472] E/CN.4/WG.1/WP.2 (n 17).

proposals sought to introduce the concept of 'substantial evidence', but it was pointed out that, as the purpose of the provision was to afford the greatest possible protection against torture, the evidentiary requirement should not be too rigorous and should be kept to a minimum. It was further said that the burden of proof should not fall solely upon the person concerned.

221 The burden of proof is shared by the applicant and the State party. While the applicant must start with the substantiation of the risk and submit sufficient details and evidence in support of his or her account of events as much as possible in order to shift the burden of proof,[473] the State party is responsible to respond.

3.7.1 Substantiation of the Risk by the Applicant

222 For a complaint to be declared *admissible*, according to General Comment No 4 (2017), the applicant is responsible for providing

> exhaustive arguments for his/her complaint of alleged violation of Article 3 … in such a way that, from the first impression (prima facie) or from subsequent submissions, if necessary, the Committee finds it relevant for consideration under article 22 … and fulfilling each of the requirements established under Rule 113 of the Committee's rules of procedure.[474]

In relation to admissibility, the Committee normally does not provide much explanation why information is sufficient,[475] stating only for instance that the applicant 'provided sufficient information to permit it to consider the case on the merits'[476] or that 'the arguments before it raise substantive issues which should be dealt with on the merits and not on admissibility considerations alone'.[477]

223 On the *merits*, the burden of proof is upon the applicant to present a factual basis for his or her position sufficient to require a response from the State party. According to General Comment No 4 (2017), the applicant has to present an 'arguable case—ie to submit circumstantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real',[478] eg by 'present[ing] evidence in support of his or her account of events'.[479] In the academic literature it was criticized that in some cases the Committee seemingly gave the applicant a more far-reaching responsibility to provide the necessary evidence ('arguable case') than was required in other cases.[480] For reversal of burden of proof see below 3.7.2.

[473] See eg *SPA v Canada*, No 282/2005, UN Doc CAT/C/37/D/282/2005, 7 November 2006, para 7.5.

[474] CAT/C/GC/4 (n 2) para 31. See Rule 113 (former Rule 107) (CAT/C/3/Rev.6); see also below Art 22 CAT.

[475] Different in eg *Said Amini v Denmark*, No 339/2008 (n 216) para 6.2 or *Tony Chahin v Sweden*, No 310/2007 (n 257) paras 8.3, 8.4; *LJR v Australia*, No 316/2007 (n 182).

[476] See eg *Munir Aytulun and Lilav Guclu v Sweden*, No 373/2009 (n 209) para 6.3. Similar *Mükerrem Güclü v Sweden*, No 349/2008 (n 209), para 5.3; *Nirmal Singh v Canada*, No 319/2007 (n 257) para 7.2.

[477] See eg *JAMO v Canada*, No 293/2006 (n 257) para 9.2; Similar is eg *ZK v Sweden*, No 301/2006 (n 216) para 7.4.

[478] CAT/C/GC/4 (n 2) para 38. The Committee 'consider[s] the risk of torture as foreseeable, personal, present and real when the existence of credible facts relating to the risk by itself … would affect the rights of the complainant under the Convention in case of his/her deportation': CAT/C/GC/4 (n 2) para 45.

[479] See eg *Mehdi Zare v Sweden*, No 256/2004 (n 216) para 9.5; *AH v Sweden*, No 265/2005, UN Doc CAT/C/37/D/265/2005, 16 November 2006, para 11.6.

[480] Wouters criticized that the Committee 'seemingly plac[ed] the burden of proof solely on the individual', since it considered that the applicant 'has not proven his claim', 'even though he had also provided a detailed account of the facts and a medical certificate indicating symptoms consistent with those of victims of torture. See Wouters (n 107) 484–487, referring to *SL v Sweden*, No 150/1999, UN Doc CAT/C/26/D/150/1999, 11 May 2001, para 6.4 or *FFZ v Denmark*, No 180/2001 (n 368) para 12.

224 In its jurisprudence, the Committee has stipulated that 'the *burden is generally on the complainant* to present an arguable case'[481] or that 'it is *normally for the complainant* to present an arguable case'.[482] In its former General Comment No 1 (1998) as well as its jurisprudence, the Committee stated that 'the risk of torture must be assessed on grounds that go beyond mere theory or suspicion' but that the risk 'does not have to meet the test of being highly probable'.[483] General Comment No 4, which replaces General Comment No 1, does not contain this phrase anymore.

225 Poor human rights conditions per se are not sufficient to establish a personal risk. However, they 'can alleviate the burden of proof considerably'.[484]

226 Even though the applicant must present an arguable case, this 'does not exempt the State party from making substantial efforts to determine whether there are grounds for believing that the complainant would be in danger of being subjected to torture if returned'.[485] Thus the State must sufficiently investigate whether there are substantial grounds for believing that a torture risk exists. In particular, even if the applicant does not provide sufficient documentary evidence to support his or her asylum application, the State party must not draw 'an adverse credibility conclusion without adequately exploring a fundamental aspect' of a claim (eg by not ordering a medical examination).[486]

3.7.1.1 Credibility and Plausibility of the Claim and Applicant

227 In the personal risk assessment information on the credibility of the applicant is to be taken into account. According to General Comment No 4 (2017) information on whether 'there [is] any evidence as to the credibility of the complainant' would be pertinent,

> [b]earing in mind the status of physical and psychological fragility encountered by the majority of complainants such as asylum seekers, former detainees, victims of torture or sexual violence etc., which is conducive to some inconsistencies and/or lapses of memory in their submissions.[487]

[481] See eg *Said Amini v Denmark*, No 339/2008 (n 216) (emphasis added by the author); *Régent Boily v Canada*, No 327/2007 (n 257); *JAMO v Canada*, No 293/2006 (n 257); *AA et al v Switzerland* No 285/2006 (n 216); *ECB v Switzerland*, No 369/2008 (n 156); *CM v Switzerland*, No 355/2008 (n 216); *AMA v Switzerland*, No 344/2008 (n 216). Similar: *AR v Netherlands*, No 203/2002 (n 216); *Dadar v Canada*, No 258/2004 (n 52); *FB v Netherlands*, No 613/2014 (n 261); *RG et al v Sweden*, No 586/2014 (n 259) para 8.3; *FK v Denmark*, No 580/2014 (n 216) para 7.3.

[482] See eg *SL v Sweden*, No 150/1999 (n 480) para 6.3 (emphasis added by the author); *X v Australia*, No 324/2007 (n 216); *AM v France*, No 302/2006 (n 216); *TD v Switzerland*, No 375/2009 (n 256) para 7.9; *CARM et al v Canada*, No 298/2006 (n 257) para 8.10; *MAK v Germany*, No 214/2002, UN Doc CAT/C/32/D/214/2002, 12 May 2004, para 13.5; *NB-M v Switzerland*, No 347/2008, UN Doc CAT/C/47/D/347/2008, 14 November 2011, para 9.9.

[483] See n 168, paras 6–7 (replaced by CAT/C/GC/4 (n 2)). See also eg *Said Amini v Denmark*, No 339/2008 (n 216); *Régent Boily v Canada*, No 327/2007 (n 257); *JAMO v Canada*, No 293/2006 (n 257); *AA et al v Switzerland*, No 285/2006 (n 216); *ECB v Switzerland*, No 369/2008 (n 156); *CM v Switzerland*, No 355/2008 (n 216); *AMA v Switzerland*, No 344/2008 (n 216); *RG et al v Sweden*, No 586/2014 (n 259); *S L v Sweden* (n 479); *X v Australia*, No 324/2007 (n 216); *AM v France*, No 302/2006 (n 216); *TD v Switzerland*, No 375/2009 (n 256); *CARM et al v Canada* (n 481); *EA v Switzerland*, No 28/1995 (n 207); *Haydin v Sweden*, No 101/1997 (n 207); *Falcon Ríos v Canada*, No 133/1999 (n 207); *Dadar v Canada*, No 258/2004 (n 52); *CT and KM v Sweden*, No 279/2005 (n 207); *El Rgeig v Switzerland*, No 280/2005 (n 207).

[484] See De Weck (n 218) 244, also 249.

[485] *KH v Denmark*, No 464/2011, UN Doc CAT/C/49/D/464/2011, 23 November 2012, para 8.8. See also eg *FK v Denmark*, No 580/2014 (n 216) para 7.6; *MB et al v Denmark*, No 634/2014 (n 82) para 9.7.

[486] *FK v Denmark*, No 580/2014 (n 485) para 7.6. Similar *MB et al v Denmark*, No 634/2014 (n 82) paras 9.6, 9.8.

[487] CAT/C/GC/4 (n 2) para 49 (h).

It further mentions that information on whether the applicant '[has] demonstrated a general veracity of his/her claims' is pertinent, '[t]aking into account some inconsistencies that may exist in the presentation of the facts'.[488]

228 In its case law, the Committee has specified that facts presented by the applicant relating to her or his individual situation must be sufficiently detailed,[489] consistent, and accurate,[490] as well as plausible in light of the general human rights situation. Another factor determining the credibility is the moment when facts and evidence are presented (as early as possible).[491]

229 Facts presented should be sufficiently substantiated, reliable, and verifiable. It is not necessary that all facts invoked by the applicant must be proved[492] but the Committee must consider them 'to be sufficiently substantiated and reliable'.[493] This can be seen against the background that the Committee must ensure that the applicant's security is not endangered[494]—demanding full proof would run counter this principle. In some cases, the Committee explicitly referred in this context to the difficult human rights situation in the receiving country.[495] Therefore, some doubts regarding the veracity of the facts may remain. The applicant should provide as much evidence as possible and explanations for missing details and evidence.[496] Once the applicant has provided 'sufficient reliable information' the burden of proof shifts to the State party.[497]

230 Contradictions and inaccuracies in the account or lies do not constitute an obstacle if they are not material, for example in light of the human rights situation in the receiving country,[498] and/or do not raise doubts about the general credibility and the veracity of the applicant's claims[499] or if they are clarified by subsequent explanations.[500] The Committee also explained that 'the principle of strict accuracy does not necessarily apply when the inconsistencies are of a material nature', in particular if 'the presentation

[488] ibid, para 49 (i).

[489] See eg *AS v Sweden*, No 149/1999 (n 151) para 8.6; *NB-M v Switzerland*, No 347/2008 (n 482) para 9.7; *ECB v Switzerland*, No 369/2008 (n 156), para 10.7; *MA and MN v Sweden*, No 566/2013 (n 330) para 8.6; *Z v Sweden*, No 556/2013 (n 330) paras 8.6 and 8.7; *X, Y and Z v Sweden*, No 530/2012 (n 331) para 8.7; *JI v Sweden*, No 616/2014 (n 81), para 8.6; *A v Canada*, No 583/2014 (n 85) para 7.4; *SS v Canada*, No 581/2014 (n 81) para 7.6.

[490] See eg *JAMO v Canada*, No 293/2006 (n 257) para 10.6; *AMA v Switzerland*, No 344/2008 (n 216) para 77; *RD v Switzerland*, No 426/2010 (n 267) para 9.7; *WGD v Canada*, No 520/2012, UN Doc CAT/C/53/D/520/2012, 26 November 2014, para 8.6; *K v Australia*, No 591/2014 (n 365) para 10.6; *X, Y and Z v Sweden*, No 530/2012 (n 331) para 8.7.

[491] See below § 233.

[492] See eg *HD v Switzerland*, No 112/1998, UN Doc CAT/C/22/D/112/1998, 30 April 1999, para 6.4. See also Burgers and Danelius (n 21) 127.

[493] See eg *MPS v Australia*, No 138/1999 (n 420) para 7.3. See also eg *AS v Sweden*, No 149/1999 (n 151); *AK v Australia*, No 148/1999, UN Doc CAT/C/32/D/148/1999, 5 May 2004, para 6.6.

[494] See eg *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.2. *Khan v Canada*, No 15/1994 (n 1) para 12.3. See also below 3.7.4.

[495] *Njamba and Balikosa v Sweden*, No 322/2007 (n 203) para 9.5; *Bakatu-Bia v Sweden*, No 379/2009 (n 205) para 10.7.

[496] See eg *AS v Sweden*, No 149/1999 (n 151).

[497] *Karoui v Sweden*, No 185/2001 (n 216) para 10.

[498] See eg *FB v Netherlands*, No 613/2014 (n 261) para 8.8.

[499] See eg *Alan v Switzerland*, No 21/1995 (n 1) para 11.3; *Pauline Muzonzo Paku Kisoki v Sweden*, No 41/1996 (n 337) para 9.3; *CT and KM v Sweden*, No 279/2005 (n 207) para 7.6.

[500] See eg *Karoui v Sweden*, No 185/2001 (n 216) para 10; *A v Netherlands*, No 91/1997 (n 337) para 6.5; *Ayas v Sweden* (n 151) para 6.5.

of facts by the author does not raise significant doubts as to the trustworthiness of the general veracity of his claims'.[501]

231 A factor taken into account in the Committee's case law is whether the authorities of the State party, which challenge the credibility of the applicant and/or claim, have made sufficient efforts to shed light on the facts of the case and have thoroughly evaluated the claim.[502] The Committee further assesses whether the applicant has responded with 'a persuasive argument that would allow the Committee to call into question the State party's conclusions in this respect',[503] in particular by arguing that the decision of the State party's authority was 'clearly arbitrary or amounted to a denial of justice'.[504]

232 In relation to contradictions and inconsistencies in the applicant's account, the Committee has stated several times in its jurisprudence that 'complete accuracy is seldom to be expected by victims of torture',[505] in particular in cases where the applicant can provide evidence that he or she is suffering from post-traumatic stress disorder as a consequence of past torture or can produce a medical report consistent with the allegations of torture.[506] The Committee has also noted that 'credibility should be assessed taking account of the vulnerable state of … mental health'.[507] In this regard also General Comment No 4 (2017) clarifies:

> Torture victims and other vulnerable persons frequently suffer from Post-Traumatic Stress Disorder (PTSD) which can result in a broad range of symptoms, including involuntary avoidance and dissociation. These symptoms may affect the ability of the person to disclose all relevant details or to relay a consistent story throughout the proceedings. In order to ensure that victims of torture or other vulnerable persons are afforded an effective remedy, States parties should refrain from following a standardized credibility assessment process to determine the validity of a non-refoulement claim. As regards potential factual contradictions and inconsistencies in the author's allegations, the States parties should appreciate that complete accuracy can seldom be expected from victims of torture.[508]

233 As a rule, facts and evidence should be presented *as early as possible*, if possible when lodging an asylum application.[509] If evidence or facts are presented at a later stage,

[501] *Haydin v Sweden*, No 101/1997 (n 207) para 6.7.

[502] See eg *AMA v Switzerland*, No 344/2008 (n 216) para 7.7; *Z v Sweden*, No 556/2013 (n 330) para 8.7; *SAP et al v Switzerland*, No 565/2013, UN Doc CAT/C/56/D/565/2013, 25 November 2015, para 75; *SK et al v Sweden*, No 550/2013 (n 330) para 7.10; *AB v Sweden*, No 539/2013 (n 330) paras 7.7-7.8; *KN v Australia*, No 649/2015 (n 83) paras 7.5, 7.7; *KV v Australia*, No 600/2014 (n 82) para 7.8; *GR v Australia*, No 605/2014 (n 82) para 9.9; *DM v Australia*, No 595/2014 (n 85) para 9.5; *LP v Australia*, No 666/2015 (n 85) paras 8.8, 8.11.

[503] See *NB-M v Switzerland*, No 347/2008 (n 482) para 9.6. See also *EL v Switzerland*, No 351/2008 (n 216) para 9.6; *AAM v Sweden*, No 413/2010 (n 216) paras 9.6–9.7.

[504] See eg *YS v Australia*, No 633/2014 (n 83) para 7.8; similar: *KV v Australia*, No 600/2014 (n 82) para 7.8; *KN v Australia*, No 649/2015 (n 83) para 7.7; *ES v Australia*, No 652/2015 (n 85) para 9.9; *GR v Australia*, No 605/2014 (n 82) para 9.9; *MN v Australia*, No 608/2014 (n 85) para 7.9.

[505] See eg *Alan v Switzerland*, No 21/1995 (n 1) para 11.3; *Tala v Sweden*, No 43/1996 (n 151) para 10.3; *Pauline Muzonzo Paku Kisoki v Sweden*, No 41/1996 (n 337); *Haydin v Sweden*, No 101/1997 (n 207) para 6.7; *Karoui v Sweden*, No 185/2001 (n 216) para 10; *CT and KM v Sweden*, No 279/2005 (n 207) para 7.6; *RG et al v Sweden*, No 586/2014 (n 259) para 8.6; *JK v Canada*, No 562/2013 (n 83) para 10.4; *MB et al v Denmark*, No 634/2014 (n 82) para 9.6; *RD et al v Switzerland*, No 558/2013 (n 151) para 9.4.

[506] See eg *Tala v Sweden*, No 43/1996 (n 151) para 10.3; *AF v Sweden*, No 89/1997 (n 321) para 6.5; *IAO v Sweden* (n 269) para 14.3; *Orhan Ayas v Sweden*, No 97/1997 (n 151) para 6.5; *Haydin v Sweden*, No 101/1997 (n 207) paras 6.6–6.7; *Falcon Ríos v Canada*, No 133/1999 (n 207) para 8.5. For details on medical evidence see below 3.7.1.2.

[507] *MF v Switzerland*, No 658/2015 (n 82) para 7.6.

[508] CAT/C/GC/4 (n 2) para 42.

[509] See eg *ZK v Sweden*, No 301/2006 (n 216) para 8.4; *NB-M v Switzerland*, No 347/2008 (n 482) para 9.6.

plausible explanations for the delay should be given.[510] New testimony submitted at a very late stage in the proceedings is treated by the Committee with 'utmost caution'.[511] However, the Committee has already noted that submitting some claims or corroborating evidence at a later stage 'is not uncommon for victims of torture'.[512] Also here the primary concern of the Committee is the safety of the individual.[513] In particular, in cases of sexual abuse, the Committee accepted the revealing of facts at a late stage in the asylum procedure and the accompanying explanations.[514]

3.7.1.2 Evidence in Support of the Claim

234 In order to show that substantial grounds for believing that the applicant would be in danger of being subjected to torture exist, evidence can be submitted. In particular evidence relating to the issues as mentioned in General Comment No 4 (2017), para 49, is of relevance, that is relating to past experiences of torture and other ill-treatment (medical, psychological, and other evidence),[515] relating to the credibility of the claim and the applicant[516] or relating to the general human rights situation in the receiving country.[517] Full proof that a risk exists is not required (see above, 3.7.1.1).

235 Any relevant document can be submitted—no limitations regarding the sources exist.[518] Neither are there any guidelines concerning the reliability of the sources.[519] General Comment No 4 stipulates that '[t]he Committee's assessment will be primarily based on the information provided by or on behalf of the complainant and by the State party concerned' but that the Committee 'will also consult United Nations sources of information as well as any other sources that the Committee considers reliable'.[520] However, the submission of forged documents may undermine the credibility of the claim.[521] The Committee has in its case law taken into account different forms of documentation as relevant evidence to support a claim, for example identity papers, evidence that the applicant is sought (or in danger of being sought) by the authorities of the receiving State (for example arrest warrants),[522] judgments of authorities of the receiving State,[523] medical reports supporting alleged experiences of past torture or other forms of ill-treatment (see below, §§ 236f), or letters of support.[524]

236 *Medical evidence* from independent experts such as doctors, psychologists, or psychiatrists plays an important role in the Committee's jurisprudence to corroborate accounts

[510] See eg *HBH et al v Switzerland*, No 192/2001, CAT/C/30/D/192/2001, 29 April 2003, para 6.8; *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.5; *ABGAB v Switzerland*, No 440/2010 (n 326) para 7.4.

[511] See eg *AS v Sweden*, No 149/1999 (n 151) para 8.4.

[512] See eg *Khan v Canada*, No 15/1994 (n 1) para 12.3.

[513] ibid. See above 3.7.1.1 and below 3.7.4.

[514] See eg *VL v Switzerland*, No 262/2005 (n 315).

[515] CAT/C/GC/4 (n 2) para 49 (c): 'medical or psychological or other independent evidence to support a claim by the complainant that he/she has been tortured or ill-treated in the past.'

[516] ibid, para 49 (h), (i).

[517] ibid, para 49 (a).

[518] CAT/C/GC/4 (n 2) para 49, makes clear that '[a]ll pertinent information may be introduced by both parties to explain the relevance of their submissions …'.

[519] Also the Rules of Procedure do not contain any restrictions, compare eg Rule 63 on 'Submission of information, documentation and written statements' or r 118 ('Findings of the Committee; decisions on the merits') of the Committee's Rules of Procedure.

[520] CAT/C/GC/4 (n 2) para 44.

[521] See eg *MBB v Sweden*, No 104/1998 (n 49) para 6.6.

[522] See eg *RSM v Canada*, No 392/2009 (n 267) para 7.4.

[523] See eg *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.5.

[524] See eg *Karoui v Sweden*, No 185/2001 (n 216) para 10.

of past torture or other ill-treatment.[525] The lack of medical evidence can be of disadvantage to the applicant in the risk assessment.[526] Such evidence should be objective and conclusive about the causal link between physical or mental injuries and past experiences of torture.[527] Thus medical evidence should indicate whether injuries are consistent with alleged torture or other ill-treatment,[528] for example forensic medical reports or psychiatric reports which confirm that it is likely that the applicant was subjected to torture or other ill-treatment in the past. Even if medical reports fail to specify when and where torture took place, they may provide grounds which go beyond mere theory or suspicion for believing that torture took place in the recent past.[529] In some cases, however, it seems not clear whether the Committee has taken medical evidence submitted by the applicant into account.[530]

237 In some cases applicants argued that the State party had failed to carry out an independent medical assessment of the alleged torture or other ill-treatment. For the Committee it was of relevance whether the applicant had sufficient opportunity during the domestic proceedings to request such assessment.[531] Regarding the question whether domestic authorities are obliged to carry out a medical assessment, the Committee's jurisprudence seems not always clear: The Committee accepted in some cases that domestic authorities did not consider it necessary to order a medical examination if they had thoroughly assessed the claim as well as evidence and found it to lack credibility.[532] In other cases the Committee criticized when the State party's domestic proceedings found the claim not credible without ordering a medical examination if it concerned a fundamental aspect of the claim.[533] The Committee was also critical of domestic authorities when they did not initiate further examinations if the applicant had already submitted 'unequivocal medical reports'.[534] In this context, General Comment No 4 clearly stipulates that in the domestic proceedings

> an examination by a qualified medical doctor, including as requested by the complainant to prove the torture that he/she has suffered, should always be ensured, regardless of the authorities' assessment on the credibility of the allegation, so that the authorities deciding on a given case of deportation are able to complete the assessment of the risk of torture on the basis of the result of the medical and psychological examinations, without any reasonable doubt.[535]

The Committee also considered in its jurisprudence whether the applicant's request for a medical examination was formulated only at a very late stage,[536] and whether a medical

[525] *Combey Brice Magloire Gbadjavi v Switzerland*, No 396/2009 (n 216) para 7.8; *RD et al v Switzerland*, No 558/2013 (n 151) para 9.4.

[526] See eg *NS v Switzerland*, No 356/2008 (n 216) para 7.4; *RA v Switzerland*, No 389/2009 (n 359) para 9.5; *YBF et al v Switzerland*, No 467/2011 (n 328) para 7.5; *RSM v Canada*, No 392/2009 (n 267) para 7.4; *SK et al v Sweden*, No 550/2013 (n 330) para 7.8.

[527] See eg *El Rgeig v Switzerland*, No 280/2005 (n 207) para 7.4; *ZK v Sweden*, No 301/2006 (n 216) para 8.4; *Uttam Mondal v Sweden*, No 338/2008 (n 257) para 7.6; *K v Australia*, No 591/2014 (n 365) para 10.6.

[528] See eg *Said Amini v Denmark*, No 339/2008 (n 216) para 9.8; *AM v France*, No 302/2006 (n 216), para 13.5; *Nirmal Singh v Canada*, No 319/2007 (n 257), para 8.4; *SM et al v Sweden*, No 374/2009 (n 216) para 9.7; *Kalonzo v Canada*, No 343/2008 (n 58) para 9.6.

[529] See eg *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.5.

[530] See eg *SL v Sweden*, No 150/1999 (n 480) paras 3.2 and 6.4; *FFZ v Denmark*, No 180/2001 (n 368) paras 2.12 and 11.

[531] See eg *EEE v Switzerland*, No 491/2012 (n 338) para 7.5.

[532] See eg *Nicmeddin Alp v Denmark*, No 466/2011 (n 342) para 8.4.

[533] See eg *MB et al v Denmark*, No 634/2014 (n 82) para 9.6.

[534] *MC v Netherlands*, No 569/2013 (n 84) para 8.6.

[535] CAT/C/GC/4 (n 2) para 41.

[536] See eg *Nicmeddin Alp v Denmark*, No 466/2011 (n 342) para 8.4.

assessment is still useful after a long time has elapsed between the alleged torture and the request for medical examination.[537] The Committee has criticized late submission of medical evidence if this was not accompanied by sound explanations.[538]

3.7.2 Shift of Burden of Proof to the State Party

238 While the applicant must submit sufficient details and collect and present evidence in support of his or her account of events as much as possible, the State party must present evidence and verify information submitted by the applicant. An active role for the State party follows from the wording of Article 3[539] as well as the object and purpose of the Convention, in particular the preventive character of the refoulement prohibition.[540] The Committee stressed in its jurisprudence that

> although it is for the complainant to establish a prima facie case for an asylum request, it does not exempt the State party from making substantial efforts to determine whether there are grounds for believing that the complainant would be in danger of being subjected to torture if returned.[541]

239 If the applicant presents an arguable case with verifiable information, the burden of proof shifts to the State party.[542] The latter must make sufficient efforts to determine whether there are substantial grounds for believing that the applicant would be in danger of being subjected to torture.[543] It is not necessary that all the facts invoked by the applicant are proved. It is enough that the Committee should consider them to be sufficiently substantiated and reliable.[544] In this context, General Comment No 4 stipulates that

> the burden of proof is upon the author of the communication who has to present an arguable case—ie to submit circumstantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. However, when the complainant is in a situation where he/she cannot elaborate on his/her case, for instance, when the complainant has demonstrated that he/she has no possibility of obtaining documentation relating to his/her allegation of torture or is deprived of his/her liberty, the burden of proof is reversed and it is up to the State party concerned to investigate the allegations and verify the information on which the communication is based.[545]

240 In general, where the human rights situation in a State is poor and the personal characteristics of the applicant suggest that he or she might be more likely to suffer torture, the risk of being subjected to torture is assumed by the Committee and the onus shifts to the State party.[546]

[537] ibid, 8.4.

[538] See eg *GBM v Sweden*, No 435/2010 (n 342) para 7.9; *Tony Chahin v Sweden*, No 310/2007 (n 257) para 9.5.

[539] Suntinger (n 86) 203-226, 220.

[540] See eg *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.2; *Khan v Canada*, No 15/1994 (n 1) para 12.3; *Aemei v Switzerland*, No 34/1995 (n 1) para 9.6; *MPS v Australia*, No 138/1999 (n 420) para 7.3.

[541] See eg *FK v Denmark*, No 580/2014 (n 216) para 7.6.

[542] See eg *Karoui v Sweden*, No 185/2001 (n 216) para 10; *AS v Sweden*, No 149/1999 (n 151) para 8.6; *SPA v Canada*, No 282/2005 (n 473) para 7.5; *JK v Canada*, No 562/2013 (n 83) para 10.4.

[543] See eg *AS v Sweden*, No 149/1999 (n 151) para 8.6.

[544] See above § 229.

[545] CAT/C/GC/4 (n 2) para 38, referring to *SPA v Canada*, No 282/2005 (n 473) para 7.5; *JK v Canada*, No 562/2013 (n 83) para 10.4.

[546] See above 3.7.1. See also De Weck (n 218) 244, who argues that poor human rights conditions 'can alleviate the burden of proof considerably'.

3.7.3 Procedure by Domestic Authorities

241 According to Article 3(2), in order determine whether substantial grounds exist, the 'competent authorities shall take into account all relevant considerations …'. The phrase 'competent authorities' was inserted in the text of Article 3(2) in 1984 on the initiative of the delegation of the *UK* to improve earlier drafts and make clear who must take relevant considerations into account.[547] 'Competent authorities' refers to those administrative or judicial bodies of the State party that take decisions about the expulsion, extradition, return, or deportation of a person to another State, and the authorities involved in seeking and monitoring diplomatic assurances. All these bodies, from the administrative decision of first instance rendered by an asylum, immigration, or police authority up to the final administrative or judicial decision of authorizing the date and means of transfer of a person, must take all relevant considerations into account when assessing the possible risk of torture in the receiving State. Due to the serious consequences of such an assessment, it should preferably be taken by a judicial body, or at least administrative decisions should be subject to full judicial review.

242 The Committee has—given its function as 'a monitoring body created by the States parties themselves with declaratory powers only'—repeatedly emphasized in individual complaints cases and in its General Comment No 4 that it gives 'considerable weight' to the 'findings of fact made by organs of the State party concerned'.[548] This does not apply when such findings are 'arbitrary or otherwise unreasonable'[549] or the evaluation of the State party amounts to a 'denial of justice'.[550] After the burden of proof has shifted to the State party, it is the responsibility of its domestic authorities to gather relevant information and evidence and to carry out a proper risk assessment while guaranteeing procedural safeguards. After all, the authorities of the host State are often in a better position to collect evidence and to take all information available into account than a person who just escaped torture in his or her home country. If such risk assessment is made in a well-informed, transparent and reasonable manner, the Committee usually accepts such findings.

243 General Comment No 4 contains detailed information on the required procedure by domestic authorities. The State party is responsible 'at the national level, to assess, through administrative and/or judicial procedures, whether there are substantial grounds for believing' that the applicant 'faces a foreseeable, present, personal and real risk of being subjected to torture' upon return.[551] In this procedure, the State party should provide 'fundamental guarantees and safeguards', in particular 'if the person is deprived of his/her liberty' or 'in a particularly vulnerable situation'.[552] Such *guarantees and safeguards*

[547] E/CN.4/1984/WG.2/WP.4/Rev.1 (n 41).

[548] CAT/C/GC/4 (n 2) para 50. See also eg *Brada v France*, No 195/2002 (n 221) para 13.2; *TD v Switzerland* (n 359) para 7.7; *Nicmeddin Alp v Denmark*, No 466/2011 (n 342) para 8.3; *FK v Denmark*, No 580/2014 (n 216) para 7.3; *YS v Australia*, No 633/2014 (n 83), para 7.4; *KN v Australia*, No 649/2015 (n 83) para 7.4; *ES v Australia*, No 652/2015 (n 85), para 9.4; *DM v Australia*, No 595/2014 (n 85), para 9.4. Similar CAT/C/60/R.2, para 54.

[549] See eg *SS and SA v Netherlands*, No 142/1999 (n 393) para 6.6; *AK v Australia*, No 148/1999 (n 493) para 6.4; *NS v Canada*, No 582/2014 (n 84), para 9.5.

[550] See eg *Falcon Ríos v Canada*, No 133/1999 (n 207) para 8.5. See also *Ktiti v Morocco*, No 419/2010 (n 216) para 8.7; *Rouba Alhaj Ali v Morocco*, No 682/2015 (n 49) para 8.7.

[551] CAT/C/GC/4 (n 2) para 39.

[552] ibid, para 40. The Committee mentions as examples for persons in a vulnerable situation asylum seekers, unaccompanied minors, women subjected to violence or persons with disabilities.

should include linguistic, legal, medical, social and, when necessary, financial assistance as well as the right to a recourse against a decision of deportation within a reasonable timeframe for a person in a precarious and stressful situation and with the suspensive effect of the enforcement of the deportation order.[553]

The General Comment further stipulates that 'an examination by a qualified medical doctor, including as requested by the complainant to prove the torture that he/she has suffered, should always be ensured, regardless of the authorities' assessment on the credibility of the allegation'.[554] General Comment No 4 also stipulates that '[e]ach case should be individually, impartially and independently examined by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards'.[555]

244 The Committee has also made clear that—while giving 'considerable weight' to findings of fact made by organs of States parties—it 'is not bound' by them. It stresses that it 'will make a free assessment of the information available … taking into account all the circumstances relevant to each case'.[556] The Committee stressed its *own powers of free assessment of the facts* in its jurisprudence in particular in view of tightening of asylum and immigration laws, speeding up procedures, and often providing for only superficial taking of evidence by domestic authorities, but also in the context of the global fight against terrorism.[557]

3.7.4 Procedure by the Committee

245 In order to ensure the overarching principle of *not endangering the security of the applicant*, the Committee repeatedly stressed that 'it is not necessary that all the facts invoked by the author should be proved; it is sufficient that the Committee should consider them to be *sufficiently substantiated and reliable*'.[558] In this context, the General Comment No 4 stipulates that '[t]he principle of the benefit of the doubt, as a preventive measure against irreparable harm, will also be taken into account by the Committee in adopting decisions on individual communications, where the principle is relevant'.[559]

246 For determining whether a State party actually violates Article 3, the Committee must carry out its *own risk assessment* on the basis of all information made available by both parties as well as other information relating to the general situation in the country where the applicant is in danger of being returned or actually has already been returned.

[553] ibid, para 41. [554] ibid.

[555] CAT/C/GC/4 (n 2) para 13. It mentions 'notably the guarantee of a prompt and transparent process, a review of the deportation decision and of a suspensive effect of the appeal'; the person concerned should be informed of the intended deportation in a timely manner; '[c]ollective deportation, without an objective examination of the individual cases in regard to personal risk, should be considered as a violation of the principle of "non-refoulement" '.

[556] CAT/C/GC/4 (n 2) para 50. See also eg *MPS v Australia*, No 138/1999 (n 420) para 7.3; *Dadar v Canada*, No 258/2004 (n 52) para 8.8; *Adel Tebourski v France*, No 300/2006 (n 49) para 8.4; *ECB v Switzerland*, No 369/2008 (n 156) para 10.5; *Nirmal Singh v Canada*, No 319/2007 (n 257) para 8.3; *EL v Canada*, No 370/2009 (n 58) para 8.4; *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59) para 13.9; *RG et al v Sweden*, No 586/2014 (n 259) para 8.3; *X v Kazakhstan*, No 554/2013 (n 435) para 12.7; *YS v Australia*, No 633/2014 (n 83) para 7.4; *KN v Australia*, No 649/2015 (n 83) para 7.4; *JN v Denmark*, No 628/2014 (n 85) para 7.7. Similar: *ES v Australia*, No 652/2015 (n 85) para 9.4; *DM v Australia*, No 595/2014 (n 85) para 9.4.

[557] See eg *Bachan Singh Sogi v Canada*, No 297/2006 (n 49) para 10.3.

[558] See eg *Aemei v Switzerland*, No 34/1995 (n 1) para 9.6. See also *MPS v Australia*, No 138/1999 (n 420) para 7.3. See also above 3.7.1.1.

[559] CAT/C/GC/4 (n 2) para 51.

The Committee repeatedly has stressed its *own powers of free assessment of the facts* (see above, § 244).

247 First the Committee considers whether the applicant has established an arguable case and substantiated the real, present, and personal risk of being subjected to torture on grounds that go beyond mere theory or suspicion. Secondly, if such an arguable case has been presented by the applicant, it considers whether the authorities of the State party have carried out a proper investigation of the facts and a respective risk assessment,[560] taking into account both the objective human rights situation in the country concerned and the subjective reasons of the applicant to fear torture upon return.[561] Finally, the Committee must conduct its *own risk assessment* in relation to the *time when the domestic authorities decided* to expel, extradite, or return the applicant. In order to determine what the State party knew or should have known at the time of the relevant decision, the Committee also takes into account facts and events that occurred after this decision, including information from the applicant after his or her forcible removal.[562]

248 In its own risk assessment, the Committee gives *most weight to allegations* by the applicant that are *not disputed by the State party*. Where the State party disputes certain claims of the applicant, this must be backed up by sound explanations. The more efforts the domestic authorities have made to establish the relevant evidence and to take all available information fully into account, the more importance the Committee attaches to the findings and risk assessment of domestic authorities.[563] It was not enough, for example, for the State party to argue that the claims of the applicant had been insufficient as to warrant a medical examination without supplying the Committee with reasons as to why this had been the case.[564]

249 The Committee also takes other objective information into account in determining whether or not the State party has violated Article 3.[565] As evidence relating to the situation in the country of origin, the Committee uses in its jurisprudence different sources,[566] in particular information from the UN human rights protection system, such as mechanisms established under the Convention against Torture, in particular its own Concluding Observations[567] or information from its inquiry mechanism under Article 20 CAT;[568] information from other UN treaty bodies such as the HRC,[569] information from mandate holders of the special procedures of the Human Rights Council,[570]

[560] See eg *YS v Australia*, No 633/2014 (n 83) para 7.8; *T v Australia*, No 599/2014 (n 85) para 8.14.

[561] See above 3.6.2.1. [562] See above 3.6.1. [563] See also above 3.7.1.1.

[564] See eg *A v Netherlands*, No 91/1997 (n 337) para 6.6.

[565] See eg *AS v Sweden*, No 149/1999 (n 151) para 8.7. See also above 3.7.1.2.

[566] See above 3.6.2.2.

[567] See eg *Cecilia Rosana Núñez Chipana v Venezuela*, No 110/1998, UN Doc CAT/C/21/D/110/1998, 10 November 1998, para 6.4 (Peru); *Arana v France*, No 63/1997 (n 265) para 11.4 (Spain); *Karoui v Sweden*, No 185/2001 (n 216) para 9 (Tunisia); *GK v Switzerland*, No 219/2002 (n 224) para 6.3 (Spain); *Jean Patrick Iya v Switzerland*, No 299/2006 (n 209) para 6.7; *Tony Chahin v Sweden*, No 310/2007 (n 257), para 9.4 (Syria); *Combey Brice Magloire Gbadjavi v Switzerland*, No 396/2009 (n 216) para 7.7 (Togo); *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59) para 13.7 (Uzbekistan).

[568] See eg *Alan v Switzerland*, No 21/1995 (n 1) para 11.5; *US v Finland*, No 197/2002 (n 300) para 7.7; *SS v Netherlands*, No 191/2001 (n 300) para 6.3; *KK v Switzerland*, No 186/2001 (n 300), para 6.3; *AI v Switzerland*, No 182/2001, UN Doc CAT/C/32/D/182/2001, 12 May 2004, para 6.3.

[569] See eg *Arana v France*, No 63/1997 (n 265) para 11.4 (Spain); *Jean Patrick Iya v Switzerland*, No 299/2006 (n 209), para 6.7 (DRC); *Hamid Reza Eftekhary v Norway*, No 312/2007 (n 216) para 7.5 (Iran); *Combey Brice Magloire Gbadjavi v Switzerland*, No 396/2009 (n 216) para 7.7 (Togo).

[570] See eg *Mutombo v Switzerland*, No 13/1993 (n 1) para 9.5 (Special Rapporteur on extrajudicial, summary and arbitrary executions, Special Rapporteur on the question of torture, Working Group on enforced and voluntary disappearances); *Tala v Sweden*, No 43/1996 (n 151) para 10.4; *Aemei v Switzerland*, No 34/1995

or information provided by UNHCR.[571] It sometimes also refers to information from regional human rights systems, such as reports of the CPT, but also to documents from non-governmental organizations.[572] The Committee sometimes only states that it is aware of the human rights situation in the receiving State without specifying its sources.[573]

250 The objective and subjective test (see above, 3.6.2.1) leads to the practice that the more serious the general human rights situation in the receiving State concerned appears, the more the burden of proof shifts to the State party (see above, 3.7.2). However, if the general situation appears not that poor, then the onus remains on the applicant to prove why he or she is personally in danger of being subjected to torture upon return. This leads to the significance of Article 3(2) CAT for the risk assessment of both the State party and the Committee.

3.8 Interim Measures under Article 3 CAT

251 In the majority of cases concerning Article 3, States have respected the interim measures requested by the Committee. When States parties return the person disregarding the Committee's interim measures, the subsequent examination of the individual case by the Committee usually results in a finding of a violation of Articles 3 and 22.[574] Fewer are the cases where a violation of Article 22 CAT did not entail also a violation of Article 3 CAT.[575] In the case *Elif Petit v Azerbaijan*, where the State party had disregarded the imposed interim measures, expelled the applicant, thereby rendering the Committee's final decision on the merits 'futile and devoid of object',[576] the violation of Article 22 CAT had a bearing on the findings regarding Article 3 CAT:

> In these circumstances, and given that the State party had extradited the complainant notwithstanding that it had initially agreed to comply with the Committee's request for interim measures, the Committee considers that the manner in which the State party handled the complainant's case amounts to a breach of her rights under article 3 of the Convention.[577]

(n 1) para 9.9; *X, Y and Z v Sweden*, No 61/1996 (n 372) para 11.5 (Special Rapporteur of the Commission of Human Rights); *ALN v Switzerland*, No 90/1997, para 8.6 (report by the Secretary-General on the United Nations Observer Mission in Angola); *Elmi v Australia*, No 120/1998 (n 199) para 6.6 (Independent Expert on the situation of human rights in Somalia); *AF v Sweden*, No 89/1997 (n 321) para 6.6; *AS v Sweden*, No 149/1999 (n 151) para 8.7 (Special Representative on the situation of human rights in Iran); *Njamba and Balikosa v Sweden*, No 322/2007 (n 203); *Bakatu-Bia v Sweden*, No 379/2009 (n 205) para 10.6; *Jahani v Switzerland* (n 216) para 9.4; *Hamid Reza Eftekhary v Norway*, No 312/2007 (n 216) para 7.4, *Abolghasem Faragollah et al v Switzerland*, No 381/2009 (n 216) para 9.4; *Tony Chahin v Sweden*, No 310/2007 (n 257), para 9.4.

[571] See eg *Pauline Muzonzo Paku Kisoki v Sweden*, No 41/1996 (n 337) para 9.5; *X, Y and Z v Sweden*, No 61/1996 (n 372) para 11.5; *Korban v Sweden*, No 88/1997 (n 151) para 6.5; *Haydin v Sweden*, No 101/1997 (n 207) para 6.4.

[572] See eg *Arana v France*, No 63/1997 (n 265) (some unspecified NGO); *AS AS v Sweden*, No 149/1999 (n 151) para 8.7; *HBH et al v Switzerland* (n 510) para 6.9 (Amnesty International); *SS v Netherlands*, No 191/2001 (n 300) para 6.3, footnote 8 (Amnesty International); *Tony Chahin v Sweden*, No 310/2007 (n 257), para 9.4 (Amnesty International); *Combey Brice Magloire Gbadjavi v Switzerland*, No 396/2009 (n 216) para 7.7 (Swiss Refugee Council).

[573] See eg *Khan v Canada*, No 15/1994 (n 1) para 12.3; *Ayas v Sweden* (n 151) para 6.4; *Karoui v Sweden*, No 185/2001 (n 216) para 9; *KK v Switzerland* (n 300) para 6.3.

[574] See eg *Régent Boily v Canada*, No 327/2007 (n 257) paras 1.2–1.4; *Adel Tebourski v France*, No 300/2006 (n 49); *Agiza v Sweden*, No 233/2003 (n 57); *Brada v France*, No 195/2002 (n 221); *Bachan Singh Sogi v Canada*, No 297/2006 (n 49); *X v Kazakhstan*, No 554/2013 (n 435); *X v Russian Federation*, No 542/2013 (n 112). On interim measures see also Art 22, 3.10.

[575] See eg *PSB and TK v Canada*, No 505/2012 (n 341); *RS et al v Switzerland*, No 482/2011 (n 339).

[576] *Elif Pelit v Azerbaijan*, No 281/2005 (n 272) para 10.2.

[577] ibid, para 11.

252 When the State party confronts the Committee with a fait accompli by returning a person despite interim measures, the Committee may ask States parties to grant the applicants a remedy for the breach including compensation,[578] to provide information on the whereabouts of applicants, and to take measures to ensure their wellbeing.[579] The redress can also include a return of the applicant to the sending State,[580] and rehabilitation measures should his/her return have resulted in ill-treatment as in *Régent Boily v Canada.*[581] In the latter, the Committee has, for example, also requested a review of its system of requesting diplomatic assurances.[582]

MARGIT AMMER AND ANDREA SCHUECHNER

[578] See eg *Alexey Kalinichenko v Morocco*, No 428/2010 (n 54) para 17.
[579] See eg *Khairullo Tursunov v Kazakhstan*, No 538/2013 (n 59).
[580] See eg *Toirjon Abdussamatov et al v Kazakhstan*, No 444/2010 (n 59).
[581] *Régent Boily v Canada*, No 327/2007 (n 257) para 15(b).
[582] ibid, para 15(c).

Article 4

Obligation to Criminalize Torture

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

1. Introduction 176
2. Travaux Préparatoires 177
2.1 Chronology of Draft Texts 177
2.2 Analysis of Working Group Discussions 178
3. Issues of Interpretation 179
3.1 Applicability of Article 4 to Cruel, Inhuman and Degrading Treatment 179
3.2 Criminalized Acts under Article 4 181
3.2.1 Meaning of 'all acts of torture' 181
3.2.2 Meaning of 'attempt, complicity and participation' 181
3.3 Criminalization of Torture under National Law 182
3.3.1 Inclusion of a Separate Offence 182
3.3.2 Inclusion of a Definition of Torture 184
3.4 Meaning of 'punishable by appropriate penalties' 186
3.5 Exclusion of any Immunity, Justification, and Excuse 188
3.6 Statute of Limitations 190
3.7 Can a Violation of Article 4 be Invoked in the Individual Complaint Procedure? 190

1. Introduction

1 The object and purpose of the Convention is to make the struggle against torture and cruel, inhuman or degrading treatment more effective by establishing State obligations to prevent torture and other forms of ill-treatment, and to assist victims, as well as to punish the perpetrators of torture. Article 4 is the central norm in relation to the objective of fighting impunity as one of the root causes of the widespread practice of torture worldwide. It requires States parties to make torture, but not other forms of ill-treatment, an offence under their domestic criminal laws with appropriate penalties taking into account the grave nature of the crime of torture. The term 'torture' must be interpreted in accordance with the definition in Article 1, which means that not only the act of torture but also the attempt, instigation, incitement, superior order and instruction, consent and acquiescence, concealment, and other forms of complicity and participation, must be criminalized. Although not a strict legal requirement, it is advisable that States parties fully incorporate the definition of Article 1, without the sentence on 'lawful sanctions', into their domestic criminal code.

2 The fact-finding missions of the UN Special Rapporteur on Torture, Manfred Nowak, have shown that perpetrators 'if held accountable at all, were predominantly punished with disciplinary sanctions and light or suspended prison sentences. The forms of discipline do not normally go beyond demotion, delayed promotion or pay freeze'.[1] According to the practice of the CAT Committee in the State reporting procedure, only a prison sentence of at least a few years can be considered as an appropriate penalty which takes the grave nature of torture into account. Victims of torture can also invoke Article 4 in the individual complaints procedure under Article 22. In a landmark decision against Spain, the CAT Committee ruled that pardoning civil guards, who had been found guilty of torture by an independent court, violated the victim's rights under Article 4(2).[2]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Declaration (9 December 1975)*[3]

Article 7

Each State Party shall ensure that all acts of torture as defined in article 1 are offenses under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.

4 *IAPL Draft (15 January 1978)*[4]

Article IV

The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture, and in particular to ensure that:

(a) any act of torture is punishable under its laws as a grave crime;

(b) persons believed to be responsible for acts of torture are prosecuted and when found guilty, punished and disciplined in accordance with their laws;

Article VIII

No prosecution or punishment of torture shall be barred by the application of a period of limitation of lesser duration than that applicable to the most serious offense in the laws of the contracting Parties.

5 *Original Swedish Draft (18 January 1978)*[5]

Article 7

(1) Each State Party shall ensure that all acts of torture as defined in article 1 are offenses under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.

[1] SRT (Nowak) 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2010) UN Doc A/HRC/13/39, para 47; see also Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016) 85.

[2] *Guridi v Spain*, No 212/2002, UN Doc CAT/C/34/D/212/2002, 17 May 2005; see also below § 49.

[3] GA Res 3452 (XXX) of 9 December 1975.

[4] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[5] Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285 (cited also: Original Swedish Draft).

(2) Each State Party undertakes to make the offenses referred to in paragraph 1 of this article punishable by severe penalties.

6 *Revised Swedish Draft (19 February 1979)*[6]

Article 4

(1) Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

(2) Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature.

2.2 Analysis of Working Group Discussions

7 Commenting on Article 7 of the original draft version of the Swedish text, *Spain* observed that, in regard 'acts of participation', reference should be made not only to accomplices but also to accessories after the fact. Additionally, the word '*incitación*' (incitement) could be replaced by the term used in Article 3 of the Spanish Criminal Code, namely '*proposición o provocación*' (proposal or provocation). In paragraph 2 of the same article, the expression '*penas severas*' should be replaced by the more technical term '*penas graves*'.

8 *France* suggested that, in paragraph 1, the word '*délits*' (offence) should be replaced by the word '*infractions*' (infraction) and the word '*incitation*' (incitement) should be replaced by '*provocation*' (provocation). France also suggested that paragraph 2 could be made into a separate article and, as far as the concept of 'cruel, inhuman or degrading treatment or punishment' is maintained in the Convention, such treatment or punishment should also be considered as an offence punishable by severe penalties.[7]

9 In written comments, the UK Government suggested that the words 'as defined in Article 1' be deleted, reasoning that it was unnecessary to refer to the definition already given in Article 1 which applies throughout the draft. The UK delegation also suggested that paragraph 2 be deleted and replaced with 'Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature'. The *United Kingdom* pointed to a precedent for this formula in Article 2(2) of the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[8] These points were taken into account in the revised Swedish draft which contains the wording as it appears in the final text of the Convention.

10 As regards the concepts of '*complicity or participation in torture*' in Article 4(1) of the revised Swedish draft, doubts were expressed whether, in the legislation of all

[6] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1 (Cited also as Revised Swedish Draft).

[7] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314 (cited also: United States Draft).

[8] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1. See the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (1973), annexed to UNGA Res. 3166 (XVIII) of 14 December 1973. 1035 UNTS 167.

countries, these terms would cover those persons who were accessories to the crime of torture after it had occurred or who had in some way concealed acts of torture. One representative proposed the addition of the word '*encumbrimiento*' (concealment) in Spanish. Some speakers felt that in the legal systems of their countries the term 'complicity' already covered the concept of 'concealment'.

11 The Working Group agreed to include, in brackets, an explanatory footnote for Article 4(1) on this matter,[9] and adopted by consensus the following version of Article 4:

(1) Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
(2) Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature.

Subsequently, one delegate reserved his position on Article 4 because of his concern that the word 'complicity' was not broad enough to cover the notion of 'accessory after the fact' under his country's domestic law.[10]

12 Bulgaria expressed its support for the provisions in Article 4.[11]

13 At the fifty-sixth meeting, the *USSR* unsuccessfully introduced amendments[12] to the draft resolution regarding Article 4(1) which suggested that the words 'irrespective of the reason, purposes and motives for which they were committed' be added after 'all acts of torture'.[13]

3. Issues of Interpretation

3.1 Applicability of Article 4 to Cruel, Inhuman and Degrading Treatment

14 During the drafting of the Convention, some States parties maintained that severe penalties in domestic law should not only criminalize torture but also other forms of ill-treatment.[14] However, the majority of States parties were of the opinion that a State obligation to criminalize such behaviour should only apply to *torture in the narrow sense*.[15]

15 In contrast, in its General Comment No 2, the CAT Committee states that 'Articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment'.[16] In line with this, the CAT Committee extended in some concluding observations the scope of Article 4, concluding that provisions that make the imposition of other forms

[9] The footnote read: 'the term "complicity" includes "encubrimiento de la tortura."' In the Spanish text: [Add at the end of paragraph 1: 'o encubrimiento de la tortura']. In the French text: [Add a foot-note reading: le term 'complicité' comprend 'encubrimiento' dans le texte espagnol'].

[10] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367.

[11] Summary Record of the thirty-third Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.33, para 26.

[12] A/C.3/39/L.63 and 64.

[13] Report of the Third Committee, thirty-ninth Session (1984) UN Doc A/39/708.

[14] E/CN.4/1314 (n 7).

[15] See in details below Art 16 §§ 13–18.

[16] CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 6.

of ill-treatment punishable must also be included in national criminal laws.[17] Following this interpretation of Article 4 would result in a significantly broader obligation of the States parties.

16 Although the CAT Committee in the context of the State reporting procedure occasionally criticized States parties for not including other forms of ill-treatment in their criminal laws, this has been recorded only on a limited number of occasions.[18] In fact, both the formulation of Article 4(1) and the *travaux préparatoires* indicate that the obligation to criminalize does not apply to other forms of ill-treatment.[19] One argument being the difficulty to find a definition of cruel, inhuman and degrading treatment or punishment, also because the Convention does not provide for a definition.[20]

17 Further, the State obligations under Article 16 require States parties to 'prevent' other forms of ill-treatment not amounting to torture. In that regard, Articles 4 to 9—being mainly of repressive nature—stand separate from the key preventive Articles 10 to 13. Notwithstanding the fact that the use of criminal law, of course, also has a preventive effect,[21] the main objective of Article 4 remains primarily to criminalize acts of torture and prosecute perpetrators. Accordingly, States parties are not obliged to make the offence of cruel, inhuman and degrading treatment a crime in domestic law. Thus, no further State obligations evoke from Article 4 than to criminalize torture. This does not exclude that general customary international law or other (regional) treaties might require States parties to criminalize other forms of ill-treatment as well.[22]

[17] eg CAT/C/SR.287, para 28; 'provisions that criminalize and penalize acts of torture and other cruel, inhuman or degrading treatment or punishment': CAT, 'Concluding Observations: Congo' (2015) UN Doc CAT/C/COG/CO/1, para 8; less explicitly in CAT, 'Concluding Observations: Armenia' (2012) UN Doc CAT/C/ARM/CO/3, para 10.

[18] See eg CAT/C/SR.287, para 2; CAT, 'Concluding Observations: Ukraine' (2014) UN Doc CAT/C/UKR/CO/6, para 134; CAT, 'Concluding Observations: Sweden' (2002) UN Doc CAT/C/CR/28/6, para 7(a); CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 7(a); CAT, 'Concluding Observations: Congo' (2015) UN Doc CAT/C/COG/CO/1, para 8; CAT/C/ARM/CO/3 (n 17) para 10; see also Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 340 ff.

[19] See also Nigel Rodley and Matt Pollard, 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) 2 EHRLR 115, 118.

[20] Commission on Human Rights—Economic and Social Council, 'Report on the 36th session (4 February–14 March 1980)' (1989) UN E/CN.4/1408; see also below Art 16, §§ 5–12.

[21] See Francesca Laguardia, 'Deterring Torture: The Preventive Power of Criminal Law and its Promise for Inhabiting State Abuses' (2017) 39 HRQ 189, 189ff.

[22] Rodley and Pollard (n 19) 118; the inclusion of the obligation to criminalize also other forms of ill-treatment is not without precedence on the international level: thus, article 7 ICCPR requires States to penalize not only torture but also equally other forms of ill-treatment: UN Human Rights Committee (HRC), CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para 13; also, while the ECHR, unlike the UNCAT, does not explicitly includes an obligation to criminalize torture, this obligation arises from the other obligations as the duty to protect against torture and other forms of ill-treatment as well as to investigate cases where any form ill-treatment may have occurred. As, also the ECtHR finds violations of Article 3 ECHR without distinguishing between torture and other forms of ill-treatment, an obligation should be seen in enacting legislation covering not only torture but also other forms of ill-treatment: Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), *Torture in International Law: A Guide to Jurisprudence* (APT and CEJIL 2008) 68 ff; more explicitly Article 6 IACPPT states that '[t]he States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction'. Similarly, the African Commission has reaffirmed the States' obligation to 'prosecute and punish private actors who commit abuses', and has thereby created the obligation to criminalize equally torture and other forms of ill-treatment: APT and CEJIL, *Torture in International Law* (n 22) 133.

3.2 Criminalized Acts under Article 4

3.2.1 Meaning of 'all acts of torture'

18 The obligation of States parties to criminalize torture is based on Article 7 of the 1975 Declaration, which was reproduced literally in Article 7(1) of the original Swedish draft.[23] On the initiative of the UK delegation, the words 'as defined in Article 1' were deleted from Article 4 (1), since it was clear that the definition of torture in Article 1 applied throughout the Convention. In other words, at least—*all acts of torture* as defined in Article 1 has to be criminalized under the Convention.[24]

19 Further, certain *omissions* may also be classified as torture. Although there is no explicit reference in the *travaux préparatoires* and the Convention refers to the term 'acts', it would contradict the Convention's overall aim to exclude all omissions amid the presence of all other elements that constitute torture. It would not be consistent to exclude omissions, which can also amount to severe pain or suffering of the victim. Thus, arguably at least some omissions must fall within the scope of Article 1 and must be criminalized according to Article 4.[25] Respectively, the CAT Committee states in its General Comment No 3 that the Convention does not only require criminalizing an act but also an omission '*as long as it is deliberately meant for inflicting the victim with severe mental or physical suffering*'.[26]

3.2.2 Meaning of 'attempt, complicity and participation'

20 According to the text of the Convention, for establishing criminal responsibility under Article 4, an act of torture does not need to be committed, because an *attempt* to commit torture should also be criminalized.[27] For example, if law enforcement officers refuse to follow a respective order by a superior and do not apply torture methods, the superior officer is nevertheless guilty of an attempt to commit torture and should be punished accordingly.[28]

21 The second sentence of Article 4(1) was only slightly amended from the Original Swedish draft by deleting the word 'incitement' which still seems to be covered by the broader terms 'complicity or participation'. Further, the Working Group wished to ensure, by adding a footnote to its draft of Article 4(1), that the term 'complicity' also includes the concept of 'concealment' after torture has been committed.[29] Although the Convention does not expressly link the wording of Article 1 with the terms 'complicity' or 'participation' in Article 4, Article 4(1) is closely related to the definition of torture

[23] See above ch (travaux) 2 §§ 3 and 5 of Art 4.

[24] See Art 1; 3.1; Amnesty International (AI), *Combating Torture and Other Ill-treatment: A Manual for Action* (AI 2016) 266.

[25] See Art 1 §§ 22 and 65 ff; see also Rodley and Pollard (n 19) 120; Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 14 ff.

[26] CAT, 'General Comment No 3 on the Implementation of Article 14 by States Parties' (2012) UN Doc CAT/C/GC/3, paras 3, 23, and 37.

[27] CAT, 'Concluding Observations: Cameroon' (2010) UN Doc CAT/C/CMR/CO/4, para 10; CAT 'Concluding Observations: Gabon' (2013) UN Doc CAT/C/GAB/CO/1, paras 7–8; CAT, 'Concluding Observations: El Salvador' (2009) UN Doc CAT/C/SLV/CO/2, para 10.

[28] See also the well-known case of the deputy director of the Frankfurt police, who ordered the application of torture for the purpose of extracting information from a kidnapper on the whereabouts of a kidnapped child: see Judgment against Wolfgang Daschner of 20 December 2004 of the twenty-seventh penal chamber, Landgericht (court) Frankfurt am Main, NJW 2005, 692. Ingelse (n 18) 340.

[29] See above ch (travaux) 2 § 11 of Art 4.

in Article 1(1), which includes instigation, consent and acquiescence. In other words, as the term 'all acts of torture' must be read in accordance with the definition in Article 1 throughout the Convention, the terms 'complicity or participation' in Article 4 must be interpreted to include incitement, instigation, superior orders or instructions, (tacit) consent,[30] acquiescence and concealment.[31] The CAT Committee in the State reporting procedure also confirmed this broad interpretation.[32]

22 Thus, the Convention obliges States parties not only to criminalize the direct perpetrator of torture—committed or attempted—but also those who are directly or indirectly involved. Accordingly, for example, individuals involved in the chain of commands by inciting, instigating, instructing, acquiescing, participating or being complicit in a way corresponding with Article 1 either before, during, or after the act of torture are equally criminally liable under Article 4. Thus, officials who order or instruct others to carry out torture must be made criminally responsible by national law.[33] *Superior officials* are also guilty of complicity (acquiescence) in torture if they knew or should have known that torture is practised by personnel under their command and failed to act to prevent or stop it.[34] Any involvement of doctors, even if only to ensure that the victim does not die or suffer physical injuries, is punishable as a form of participation.[35]

23 Additionally, States parties are obliged to criminalize acts relating to *cover-up* or *concealment*, at the very least, positive acts taken with the intention of concealing an act of torture or leaving it unpunished.[36] According to the CAT Committee, even those who knowingly fail to report acts of torture can be held criminally culpable.[37] Therefore, certain intentional omissions aimed at concealing torture may also be covered by 'complicity or participation'.[38]

3.3 Criminalization of Torture under National Law

3.3.1 Inclusion of a Separate Offence

24 Article 4(1) requires every State party to 'ensure that all acts of torture are offenses under its criminal law'. According to *Burgers* and *Danelius*, Article 4 does not require 'that there must be a separate offense corresponding to torture under [A]rticle 1 of the Convention'.[39] *Burgers and Danelius* were of the opinion that each State party was free to decide whether to deal with torture as a separate offence or to include acts of torture in one or more wider categories of offences. However, they insisted that 'whatever solution is adopted, the criminal law must cover all cases falling within the definition in [A]rticle 1 of the Convention'.[40] This interpretation has given rise to much confusion, and many States parties argued that torture was in any way included in their traditional offences, such as ill-treatment or infliction of bodily harm[41] but also amongst others, such

[30] eg CAT, 'Concluding Observations: Azerbaijan' (2003) UN Doc CAT/C/CR/30/1, para 5(b); see also J Herman Burgers and Hans 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) 130.

[31] Burgers and Danelius (n 30) 130.

[32] eg CAT/C/CR/30/1 (n 30) para 5(b); see also Ingelse (n 18) 340 with further references; Burgers and Danelius (n 30) 130.

[33] eg CAT/C/SR.93, para 42; CAT/C/SR.247, para 16.

[34] CAT/C/GC/2 (n 16) para 26.

[35] See eg CAT/C/SR.77, para 28; CAT/C/SR.105, para 5.

[36] Rodley and Pollard (n 19) 123.

[37] CAT, 'Concluding Observations: Macedonia' (2015) UN Doc CAT/C/MKD/CO/3, paras 15–16.

[38] Rodley and Pollard (n 19) 123.

[39] Burgers and Danelius (n 30) 129.

[40] ibid.

[41] eg CAT, 'Concluding Observations: Burkina Faso' (2014) UN Doc CAT/C/BFA/1, para 8; CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 9.

as assault,[42] rape,[43] arbitrary acts,[44] or the abuse of power and excess of authority or official power.[45]

25 However, the inclusion of a separate offence eases the adherence with States parties' further obligations under the Convention, for example, to give effect to the specific jurisdiction under Articles 5 and 7.[46] Otherwise, States parties are inevitably confronted with the problem of the legal classification of a crime over which they need to establish jurisdiction,[47] and on the grounds of which they can institute prosecutions of persons who have perpetrated torture elsewhere.[48] Moreover, although acts that could be characterized as torture are punishable under various articles of the national Criminal Code, the absence of a single definition of the crime of torture as a separate criminal offence may cause a legal *vacuum,* possibly leaving some acts amounting to torture uncovered and subsequently unpunished.[49]

26 Over time, the CAT Committee made clear in its concluding observations that Article 4 required the inclusion of torture as an offence in accordance with the definition in Article 1.[50] Furthermore, the CAT Committee has also recommended that the crime of torture should constitute a separate offence in the domestic legislation and not just an aggravating circumstance for the determination of a sentence.[51] It reiterated that by a separate definition and a separate offence of torture in accordance with the Convention and distinguishing it clearly from other crimes, 'States parties would directly advance the Convention's overarching aim of preventing and punishing torture'.[52] Following General Comment 2, '[n]aming and defining this crime will promote the Convention's aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture'.[53]

27 Further, for Article 4 to have its full effect, the CAT Committee considers that specific measures must still be taken at the national level, even if a State allows for the direct effect of provisions of international law ('monist systems').[54] As the Convention in the context of Article 4 is not considered as self-executing,[55] the direct applicability of the

[42] eg CAT, 'Concluding Observations: Belarus' (2011) UN Doc CAT/C/BLR/4, para 16.

[43] eg CAT, 'Concluding Observations: Kenya' (2013) UN Doc CAT/C/KEN/CO/2, paras 6 and 7; CAT, 'Concluding Observations: Sweden' (2014) UN Doc CAT/C/SWE/CO/6-7, para 6.

[44] eg CAT, 'Concluding Observations: Albania' (2012) UN Doc CAT/C/ALB/CO/2, para 8.

[45] eg CAT/C/KAZ/CO/3 (n 41) para 9.

[46] Rodley and Pollard (n 19) para 118.

[47] See below Art 5.

[48] CAT/C/SR.122, para 23; CAT/C/SR.123, para 26; CAT/C/SR.247, para 29; CAT/C/SR.249, paras 32, 42; CAT/C/SR.251, para 8; CAT/C/SR.253, para 4; CAT, 'Report of the Committee Against Torture' (1991) UN Doc A/46/46, para 163; CAT, 'Report of the Committee Against Torture' (1992) UN Doc A/47/44, para 167.

[49] CAT, 'Concluding Observations: Cuba' (2012) UN Doc CAT/C/CUB/CO/2, para 7; CAT, 'Concluding Observations: Lithuania' (2014) UN Doc CAT/C/LTU/CO/3, para 9; CAT, 'Concluding Observations: Switzerland' (2015) UN Doc CAT/C/CHE/CO/7, para 7.

[50] eg CAT/C/SR.268, para 2; CAT, 'Concluding Observations: Bulgaria' (2011) UN Doc CAT/C/BGR/CO/4-5, para 8; CAT, 'Concluding Observations: Djibouti' (2012) UN Doc CAT/C/DJI/CO/1, para 8; CAT, 'Concluding Observations: Russian Federation' (2012) UN Doc CAT/C/RUS/CO/5, para 7; see also SRT (Van Boven), 'Report of the Special Rapporteur on the Question of Torture submitted in accordance with Commission Resolution 2002/38' (2002) UN Doc E/CN.4/2003/68, para 26.

[51] eg CAT, 'Concluding Observations: Denmark' (2016) UN Doc CAT/C/DNK/CO/6-7, paras 10, 11; CAT/C/KAZ/CO/3 (n 41) para 9.

[52] CAT/C/DJI/CO/1 (n 50) para 8; see also CAT/C/GC/2 (n 16) para 11.

[53] CAT/C/GC/2 (n 16) para 11.

[54] APT and CEJIL, *Torture in International Law* (n 22) 18; CAT, 'Initial Report submitted by the Government of Switzerland' (1989) UN Doc CAT/C/5/Add.17.

[55] CAT/C/SR.63, para 33; CAT/C/SR.64, para 27.

Convention in a State party alone is not sufficient to ensure the obligations under Article 4. Accordingly, the offence of torture as defined in the Convention must be linked to a national provision, which imposes an appropriate punishment.

28 Besides, the CAT Committee noted in its conclusions that if the State party's domestic law itself does not explicitly reflect this prohibition, nor does it impose criminal sanctions the requirements under Article 4 are not met even if other (treaty) obligations expressly prohibit torture and other forms of ill-treatment. The CAT Committee considered that express incorporation in the State party's domestic law of the crime of torture is necessary to 'signify the cardinal importance of this prohibition' and ensure compliance with the obligations under the Convention.[56] The CAT Committee has also emphasized that a very general prohibition of torture—be it in the Constitution or any other particular national law, without specifically naming and criminalizing the offence of torture—is not corresponding to Article 4.[57] In addition, the sole inclusion of relevant articles of other international treaties into national legislation may not comply with the requirements of Article 4(1) if it does not adequately criminalize torture in general criminal law according to Article 1.[58]

29 States parties should further ensure the criminalization of torture, in respect to cover their entire territory. In this regard, the CAT Committee expressed concerns relating to the lack of congruity between the offence of torture in domestic law and the requirements under Article 4.[59]

3.3.2 Inclusion of a Definition of Torture

30 States parties must ensure that all forms of torture as defined under Article 1 are punishable offences under national law.[60] Given this connection between Articles 1 and 4, it is difficult to separate the discussions on the inclusion of the offence of torture in national criminal law from the debate of including a definition of torture in national legislation. For this reason, many of the CAT Committee's concluding observations and comments relevant to Article 1 apply similarly to the obligations under Article 4. Article 4 does not explicitly require that the definition of torture in Article 1 is reproduced *verbatim* in national criminal law. Rather, States parties must make all forms of torture punishable in national legislation.[61] Therefore, the definition must cover at a minimum—but can be broader as well—all acts of torture covered in Article 1.[62]

31 However, practice shows that it is difficult, if not impossible, to cover all the different aspects included in the definition of torture under Article 1 without explicitly

[56] eg for Shari'a law see CAT, 'Conclusions and Recommendations of the Committee against Torture: Saudi Arabia' (2002) CAT/C/CR/28/5, para 4(a).

[57] eg CAT/C/COG/CO/1 (n 18) para 8; CAT, 'Concluding Observations: Sierra Leone' (2014) UN Doc CAT/C/SLE/CO/1, para 8.

[58] Codification of amongst others, crimes of torture in the context of genocide, war crimes or crimes against humanity: CAT, 'Concluding Observations: Germany' (2011) UN Doc CAT/C/DEU/CO/1, para 9.

[59] CAT, 'Concluding Observations: Bosnia and Herzegovina' (2011) UN Doc CAT/C/BIH/CO/1, para 9.

[60] CAT, 'Concluding Observations: Austria' (2016) UN Doc CAT/C/AUT/CO/3, para 6; CAT/C/CR/28/6 (n 18) para 8; CAT, 'Concluding Observations: Qatar (2013) UN Doc CAT/C/QAT/CO/1, para 10; CAT, 'Report of the Committee Against Torture Twenty-Seventh Session (12–23 November 2001) Twenty-Eighth Session (29 April-17 May 2002)' (2002) UN Doc A/57/44, paras 34–35.

[61] cf Ingelse (n 18) 222; eg CAT, 'Concluding Observations: Belgium' (2003) UN Doc CAT/C/CR/30/6, para 6; CAT, 'Concluding Observations: Bolivia' (2013) UN Doc CAT/C/BOL/CO/2, para 8; CAT/C/BGR/CO/4-5 (n 50) para 8; see above Art 1, 3.1.

[62] Rodley and Pollard (n 19) 120.

incorporating a proper definition in national criminal code.[63] The CAT Committee highlighted that the lack of a definition of torture in national criminal code could lead to confusion and adversely affect the compliance by the States parties with their obligations to prevent and prohibit torture under the Convention.[64] Also because 'serious discrepancies between the [C]onvention's definition and that incorporated into domestic law create actual or potential loopholes for impunity'.[65] While the inclusion of the definition in Article 1 would enhance the clarity and predictability in the criminal law,[66] a partial inclusion or incompleteness of the definition of torture and its criminalization may thus result in impunity for acts of torture. Moreover, a lack of codification or a not proper definition of the crime of torture in national criminal law benefits too lenient penalties.[67] Hence, according to the CAT Committee, criminal laws do not comply with Article 1 if they overlook or partially restrict the definition of torture. Thus far, the CAT Committee has criticized States parties, on the one hand, for a non-adequate inclusion of the purpose or reason element of the crime.[68] On the other, for a non-adequate inclusion of the scope of application—either due to the limited scope of[69] or delineation between[70]

[63] SRT (Nowak) 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2010) UN Doc A/65/273, para 37.

[64] eg CAT, 'Concluding Observations: France' (2006), UN Doc CAT/C/FRA/CO/3, para 5.

[65] CAT/C/GC/2 (n 16) para 9.

[66] eg CAT, 'Report of the Committee Against Torture' (1997) UN Doc A/52/44, para 235.

[67] A/65/273 (n 63) para 49.

[68] On the non-inclusion of the use of torture for purposes other than extracting confessions see eg CAT, 'Concluding Observations: China' (2016) UN Doc CAT/C/CHN/CO/5, paras 7–9; on the non-inclusion of the use of torture for the purpose of intimidating or coercing the victim or a third party see eg CAT/C/SLV/CO/2 (n 27) para 10; CAT, 'Concluding Observations: Honduras' (2009) UN Doc CAT/C/HND/CO/1, paras 7–8; CAT, 'Concluding Observations: Russian Federation' (2007) UN Doc CAT/C/RUS/CO/4, para 1; on the lack of any specific mentioning of acts of torture carried out in order to intimidate, to coerce or to obtain information or a confession from a person other than the person who was tortured: eg CAT, 'Concluding Observations: Uruguay' (2014) UN Doc CAT/C/URY/CO/3, para 7; on the non-inclusion of discrimination as a motive of torture: eg CAT/C/SLV/CO/2 (n 27) para 10; CAT, 'Concluding Observations: Peru' (2013) UN Doc CAT/C/PER/CO/5-6, para 7; no explicit reference to discrimination in the definition of torture: eg CAT, 'Concluding Observations: Portugal' (2013) UN Doc CAT/C/PRT/CO/5-6, para 7; restriction to acts based on some specific forms of discrimination instead of referring to any form of discrimination: eg CAT, 'Concluding Observations: Norway' (2012) UN Doc CAT/C/NOR/CO/6-7, para 7; non-inclusion of any of the purposes of Article 1 in the definition and instead limiting the intention solely to the impairing the victim's ability to make decisions or freely expressing his or her will: eg CAT, 'Concluding Observations: Macao, China' (2016) UN Doc CAT/C/CHN-MAC/CO/5, para 14.

[69] eg non-inclusion of crimes committed by public officials: CAT/C/ARM/CO/3 (n 17) paras 8–10; non-inclusion of all public officials and persons acting in an official capacity for the crime of extracting of confessions under torture or the use of violence to obtain a witness statement; restriction of the crime of beating or ill-treating detainees to the actions of officers of an institution of confinement or of other detainees at the instigation of those officers: CAT/C/CHN/CO/5 (n 68) paras 7–9; restriction of the scope to public officials excluding other persons acting in an official capacity: Kyrgyzstan, CAT, 'Concluding Observations: Kyrgyzstan' (2013) UN Doc CAT/C/KGZ/CO/2, para 10; restriction of the scope to the actions of law enforcement officials excluding other persons acting in an official capacity: Uzbekistan, CAT, 'Concluding Observations: Uzbekistan' (2013) UN Doc CAT/C/UZB/CO/4, para 10; restriction of the scope to persons protected under international humanitarian law: Lithuania, CAT/C/LTU/CO/3 (n 49) paras 7–9.

[70] Acts of torture by law enforcement personnel qualified as merely 'arbitrary acts' resulting in those acts being treated as less serious criminal offences: eg CAT, 'Concluding Observations: Republic of Korea' (2006, 2017) UN Doc CAT/C/KOR/CO/2, para 5; CAT, 'Concluding Observations: Albania' (2005) UN Doc CAT/C/CR/34/ALB, paras 7(b) and 8(b); separate sentencing structure for military personnel, which often meant lighter sentences: eg CAT/C/SR.141, para 66; CAT, 'Concluding Observations: France' (2010) UN Doc CAT/C/FRA/CO/3, para 5.

potential perpetrators or the exclusion of some conducts,[71] modalities of involvement in the crime,[72] and/or the stage of accomplishing the crime of torture[73] (attempt).[74] After initial hesitation, the CAT Committee has increasingly urged States parties to include an explicit definition of torture in their national criminal legislation that is in 'strict conformity' with the Convention.[75]

32 In light of the above, full incorporation of a definition of torture is advisable in order to avoid difficult problems of interpretation and implementation. This conclusion does not apply to the 'lawful sanctions' clause in the last sentence of Article 1(1).

3.4 Meaning of 'Punishable by appropriate penalties'

33 During the drafting of the Convention, the words 'punishable by severe penalties'[76] were replaced by 'appropriate penalties which take into account their grave nature'.[77] This formulation is taken *verbatim* from Article 2(2) of the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973[78] and Article 2 of the International Convention Against the Taking of Hostages of

[71] eg Restriction to the manner of infliction of physical abuse: CAT/C/CHN/CO/5 (n 68) paras 7–9; CAT, 'Concluding Observations: Estonia' (2013) UN Doc CAT/C/EST/CO/5, paras 7–8; CAT/C/GAB/CO/1 (n 27) paras 7–8; restriction to acts which cause severe pain, excluding suffering, thus acts that are not violent per se, but nevertheless inflict suffering: Sri Lanka, CAT, 'Concluding Observations: Sri Lanka' (2011) UN Doc CAT/C/LKA/CO/3-4, para 25; restricting the definition of torture to case when the victims are in the custody of a public official: CAT, 'Concluding Observations: Venezuela' (2014) UN Doc CAT/C/VEN/CO/3-4, para 7; limitation of acts of psychological torture to 'prolonged mental harm' instead of acts that cause severe mental suffering, irrespective of their prolongation or its duration: CAT, 'Concluding Observations: United States' (2014) UN Doc CAT/C/USA/CO/2, para 13; restriction of criminalized acts to murder committed by means of acts of torture or accompanied by acts of cruelty and to torture committed in the course of unlawful arrest or abduction: CAT, 'Concluding Observations: Monaco' (2004) UN Doc CAT/C/CR/32/1, para 7(d).

[72] eg Non-criminalization of acts which constitute complicity or participation in torture: CAT/C/GAB/CO/1 (n 27) paras 7–8; restriction of punishment to individuals who order or carry out acts of torture, without extending the scope to other complicities: CAT, 'Concluding Observations: Jordan' (2016) UN Doc CAT/C/JOR/CO/3, paras 9–10; non-Inclusion of complicity or explicit or tacit consent on the part of law enforcement or security personnel or any other person acting in an official capacity as modalities of involvement in the crime: CAT, 'Concluding Observations: Morocco' (2011) UN Doc CAT/C/MAR/CO/4, para 5; non-inclusion of pain or suffering inflicted at the instigation or with the consent or acquiescence of a public official or another person acting in an official capacity as torture: CAT/C/VEN/CO/3-4 (n 71) para 7; non-criminalization of acts, which constitute complicity or participation in torture: CAT/C/GAB/CO/1 (n 27) paras 7–8; non-criminalization of torture inflicted at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity: CAT/C/HND/CO/1 (n 68) paras 7–8; CAT/C/RUS/CO/4 (n 68) para 1; see also CAT/C/GC/2 (n 16) paras 7 and 17.

[73] eg Non-criminalization of attempts to commit torture: CAT/C/GAB/CO/1 (n 27) paras 7–8; CAT/C/SLV/CO/2 (n 27) para 10.

[74] eg CAT, 'Concluding Observations: Andorra' (2013) UN Doc CAT/C/AND/CO/1, para 6; CAT/C/MKD/CO/3 (n 37) paras 15–16; CAT, 'Concluding Observations: Mexico' CAT/C/MEX/CO/5-6, para 8; CAT, 'Concluding Observations: Montenegro' (2014) UN Doc CAT/C/MNE/CO/2, para 6; CAT, 'Concluding Observations: Nicaragua' (2009) UN Doc CAT/C/NIC/CO/1, para 10.

[75] eg CAT, 'Report of the Committee Against Torture' (1998) UN Doc A/53/44, para 144; CAT/C/BLR/4 (n 42) para 16; CAT/C/BGR/CO/4-5 (n 50) para 8; CAT/C/COG/CO/1 (n 18) para 8; CAT/C/CUB/CO/2 (n 49) para 7; CAT, 'Concluding Observations: Czech Republic' (2012) UN Doc CAT/C/CZE/CO/4-5, para 7; CAT/C/DJI/CO/1 (n 50) para 8; CAT/C/GAB/CO/1 (n 27) paras 7–8; CAT/C/SLE/CO/1 (n 57) para 8; see also Rodley and Pollard (n 19), 119 for further references.

[76] The wording was taken from Art 2 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, 860 UNTS 105, 10 ILM 133 (1971) and Art 3 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971, 974 UNTS 177, 10 ILM 1151 (1971).

[77] See above travaux 2 §§ 5 and 6.

[78] 1035 UNTS 167, 13 ILM 41 (1974).

1979.[79] In fact, there is no significant difference between 'severe penalties' and 'appropriate penalties which take into account [the] grave nature' of the offences punishable under Article 4.

34 Apart from literal interpretation of Article 4(2), neither the provisions of the Convention nor the jurisprudence of the CAT Committee defines a specific penalty and type or extent of sentence appropriate to and commensurate with the grave nature of the crime of torture. In the reporting procedure, the CAT Committee also did not arrive at a clear determination of what would constitute an appropriate punishment.[80] The provision of Article 4(2) makes clear that torture is one of the most severe human rights violations that requires a punishment severe enough to have a deterrent effect.[81] This means that torture should not be a misdemeanour,[82] but a crime similar to the 'most serious offenses under the domestic legal system'.[83] This is confirmed by the practice of the CAT Committee that held that torture should also receive the heaviest punishment.[84]

35 In this regard, after a careful examination of the CAT Committee's concluding observations and the opinions of individual members, *Ingelse* concluded that a 'custodial sentence of between six and twenty years' would best correspond to the CAT Committee's interpretation of the requirements of Article 4(2).[85] Since then, there have been numerous concluding observations in line with this conclusion without further defining the 'appropriate penalties' that take into account the grave nature of the act. Thus, contradicting the State obligations under Article 4(2) are fines,[86] conditional sentences or probation[87] as well as penalties that do not take not into account the grave nature of the crime of torture.[88] In turn, from a human rights perspective life imprisonment, corporal or capital punishment also do not constitute an appropriate penalty.

36 Moreover, a very broad margin of discretion on the penalty for the crime of torture is not in accordance with Article 4(2), even if the maximum penalty corresponds to the standards set forth by the practice of the CAT Committee. The CAT Committee has

[79] 1316 UNTS 205, 18 ILM 1456 (1979). [80] A/65/273 (n 63) para 40.

[81] eg CAT, 'Concluding Observations: South Africa' (2006) UN Doc CAT/C/ZAF/CO/1, para 13; CAT, 'Concluding Observations: Tajikistan' (2011) UN Doc CAT/C/TJK/CO/1, para 5.

[82] eg CAT/C/JOR/CO/3 (n 72) paras 9–10.

[83] cf Burgers and Danelius (n 30) 129; CAT/C/SR.34, paras 25 and 63; CAT/C/SR.145, para 3; CAT/C/SR.158, para 14; See also discrepancy between the penalties for trafficking in human beings of up to fifteen years' imprisonment compared to up to five for the crime of torture: CAT/C/EST/CO/5 (n 71) paras 7–8; penalties for other crimes such as drug trafficking are higher than for crimes of torture: CAT, 'Concluding Observations: Mauritius' (2011) UN Doc CAT/C/MUS/CO/3, paras 8–9.

[84] Ingelse (n 18) 342. [85] ibid.

[86] eg CAT/C/KEN/CO/2 (n 43) paras 6–7; CAT/C/SLE/CO/1 (n 57) para 8.

[87] eg CAT/C/KAZ/CO/3 (n 41) para 9.

[88] eg an imprisonment not exceeding twelve months for the crime of torture has been deemed as insufficient: CAT/C/KEN/CO/2 (n 43) paras 6–7; a minimum of three years' and up to seven years' imprisonment under aggravating circumstances are not sufficient: CAT/C/ARM/CO/3 (n 17) para 10; an imprisonment of two to six years for aggravating circumstances and one to three years without is insufficient: CAT, 'Concluding Observations: Spain' (2015) UN Doc CAT/C/ESP/CO/6-7, paras 8–9; one-year imprisonment was not commensurate with the gravity of the crime in a case where soldiers inflicted serious injuries to the complainant causing the victim's death ('Baha Mousa'): CAT, 'Concluding Observations: Great Britain and Northern Ireland' (2013) UN Doc CAT/C/GBR/CO/5, paras 3 and 17; an imprisonment of two to five years for the offence of torture and five to ten years under aggravating circumstances is not sufficient: Madagascar, CAT, 'Concluding Observations: Madagascar' (2011) UN Doc CAT/C/MDG/CO/1, paras 6–7; a maximum fine of 150.00 rupees and an imprisonment for a term not exceeding ten years for the offence of torture was considered as unsatisfactory: CAT/C/MUS/CO/3 (n 83) paras 8–9; an imprisonment of five years or less for first-time offenders of torture is insufficient: CAT, 'Concluding Observations: Tajikistan' (2013) UN Doc CAT/C/TJK/CO/2, para 6.

stated that a penalty in the Criminal Code of the State Party of one to ten years' imprisonment for the basic crime of torture allowing the judge to impose a minimum sentence of one year is insufficient.[89] In other words, the sentence for the crime of torture must also correspond at the minimum penalty provided by law to the requirements in Article 4(2).[90]

37 Further, it has to be stated that the consequences of torture should not be decisive for the sentence. The intention to torture itself is the injustice that must be convicted. Additional aggravating circumstances as for example the permanent disability or death of a victim should not influence the severity of the sentence, because the intention of torturing also holds the possibility of lasting physical and mental effects and cannot be excluded based on the very nature of the act of torture. Subsequently, the appropriate sentence has to target the injustice element of torture itself adequately.[91]

3.5 Exclusion of any Immunity, Justification, and Excuse

38 The prohibition of torture is an absolute and non-derogable right. Thus, according to Article 2 neither exceptional circumstances, such as state of war, internal political emergency or any other public emergency or order from a superior officer or public authority may be invoked as a justification of torture.[92] Hence, the inclusion of a definition of the crime of torture with corresponding penalties in accordance with Article 4 in itself is not sufficient to effectively prevent and punish the acts corresponding to Article 1. It further requires the absence of limitations or defences such as 'necessity' or superior orders in law and practice.

39 The Convention does not permit any exceptions from the prohibition or the criminalization of the crime of torture due to a defence of immunity, justifications, or excuses.[93] Nevertheless, the tendency of granting amnesty for or pardoning torturers has been identified in numerous cases.[94] As the CAT Committee reiterated in different occasions, such a practice not only violates the absolute and inexcusable character of torture, but it also undermines the level of culpability and the degree of punishment that the grave nature of the crime necessitates imposing. Accordingly, any national law that grants amnesty, immunity, or pardon for perpetrators of torture—be it on traditional, religious, or other grounds—would undoubtedly violate the State's obligation under Article 4 and the absolute prohibition doctrine as stated in Article 2.[95]

40 The aim of the Convention to punish perpetrators of torture together with the absolute nature of the prohibition of torture implies that granting *immunities and amnesties*,[96] for example to police, prosecutors, or military officials,[97] contradicts the obligations under Article 4.[98] Therefore, immunity should not hinder the investigation of alleged acts

[89] CAT, 'Concluding Observations: Austria' (2016) UN Doc CAT/C/AUT/CO/6, para 10.

[90] CAT/C/EST/CO/5 (para 71) paras 7–8.

[91] Manfred Nowak and Anna Zenz, 'Der Straftatbestand der Folter in Österreich aus völkerrechtlicher Sicht' in Robert Kert and Andrea Lehner (eds), *Vielfalt des Strafrechts im internationalen Kontext—Festschrift für Frank Höpfel zum 65.Geburtstag* (NWV 2018) 498.

[92] See above Art 2, §§ 57–59 [93] Rodley and Pollard (n 19) 126.

[94] eg CAT, Eighteenth Session, Summary Record of the 297th Meeting (1997) UN Doc CAT/C/SR.297/Add.1, para 6 ff; Rodley and Pollard (n 19) 125.

[95] CAT/C/GC/2 (n 16) para 5. [96] See above Art 2, § 63.

[97] Acts of torture committed by military personnel do not constitute an offence: CAT, 'Concluding Observations: Burundi' (2014) UN Doc CAT/C/BDI/CO/2, para 9.

[98] CAT/C/MKD/CO/3 (n 37) paras 15–16. See also Rodley and Pollard (n 19) 126.

of torture and States parties should ensure that all persons can be held criminally liable for these acts. In addition, as *Burns* has strongly emphasized, general amnesties 'by their very nature' violate Article 4.[99] In this sense, States parties must ensure that amnesty laws exclude the offence of torture.[100]

41 By similar reasoning as for immunity and amnesty, the *pardoning* of perpetrators of torture precludes or indicates the breach of obligations under Article 4(2). In the landmark case of *Guridi v Spain*, the CAT Committee reiterated the importance of punishing perpetrators of acts of torture with penalties in accordance with the nature and gravity of the offence. It considered that 'in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment'.[101]

42 Further, Article 2(3) leaves no open question in relation to the justification of torture due to *superior orders* and unequivocally prohibits superior orders as a defence for criminal responsibility. Hence, the State practice to provide amnesty or immunity to officials or military personnel under 'due obedience' laws does not comply with Article 4.[102] During the drafting process, the proposal to include the qualification to consider superior orders a ground for *mitigation* of punishment—if justifiable—was rejected. However, since then, it has been argued that a reduced sentence due to a superior order cannot be excluded.[103] This approach is arguable only while recognizing that mitigation can exclusively be applied if the perpetrator of torture has already been found guilty.[104] Even then, the mitigation cannot contravene the obligations under Article 4(2) and thus, the penalties must still reflect the grave nature of the crime committed. Otherwise, the requirement of appropriate penalties, which take into account the grave nature of the crimes committed, are not met. Thus, the obedience to superior orders cannot constitute a justification or an excuse and the impact of mitigating circumstance on the sentence has to be limited in accordance with Article 4(2).[105]

43 In conclusion, amnesties, immunities, pardons, and other justifications or excuses are violating the obligations under Article 4 even where it has been granted to resolve armed conflicts or to engage in transitions. The same goes for state of emergency amid the amount of threat.[106] In accordance, the CAT Committee has recommended the abandonment of laws and practices that hinder the investigation and if appropriate the

[99] Peter Burns and Sean McBurney, 'Impunity and the United Nations Convention against Torture: A Shadow Play without an Ending' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives in the Punishment of Transnational Human Rights Litigation* (Hart 2001) 275–88, 286.

[100] See eg *Hugo Rodriguez v Uruguay*, No 322/1988, UN Doc CCPR/C/51/D/322/1988, 19 July 1994, paras 12.3 and 12.4; CAT/C/ARM/CO/3 (n 17) para 10; CAT, 'Concluding Observations: Chile' (2004) UN Doc CAT/C/CR/32/5, para 7(b); CAT, 'Concluding Observations: Bahrain' (2005) UN Doc CAT/CO/34/BHR, para 6(d); CAT, 'Concluding Observations: Cambodia' (2004) UN Doc CAT/C/CR/31/7, para 6; Uzbekistan, CAT/C/UZB/CO/4 (n 69) para 10.

[101] *Guridi v Spain*, No 212/2002 (n 2) para 6.7, for the facts see below § 49; CAT, 'Report of the Committee Against Torture' (1993) UN Doc A/48/44, paras 98 and 107.

[102] See eg Monaco, CAT/C/CR/32/1 (n 71) paras 4(b), 5(b); CAT, 'Concluding Observations: Morocco' (2011) UN Doc CAT/C/CR/31/2, paras 5(a), 6(b); CAT, 'Concluding Observations: Columbia' (2004) UN Doc CAT/C/CR/31/1, paras 3(a)(b); Rodley and Pollard (n 19) 127.

[103] See in detail Art 2 §§ 72–73. [104] See Art 2(3).

[105] Burgers and Danelius (n 30) 124; Rodley and Pollard (n 19) 127.

[106] eg Belgium, CAT/C/CR/30/6 (n 61) paras 5(b), 7(b); Ingelse (n 18) 342–44; Rodley and Pollard (n 19) 126. See also Art 2, 3.3.

punishment of perpetrators of torture. All public officials and persons acting in an official capacity who engage in conducts that constitute torture must be charged accordingly.[107]

3.6 Statute of Limitations

44 A statute of limitation by domestic law prevents the practical realization of the absolute prohibition of torture, the proper investigation, prosecution, and punishment of this non-derogable prohibition and ultimately results in impunity for the perpetrators.[108] While *Rodley and Pollard* do not entirely exclude the possibility for a statute of limitations if such a period at least reflects the exceptional seriousness of the crime and ranks amongst the longest foreseen by national law, the CAT Committee has insisted in numerous cases that no acts amounting to torture should be subject to any statute of limitations.[109] In consideration of its effects, a statute of limitations on a crime of torture would hinder the overall aim of the Convention.[110] Accordingly, no time bar should deter the application of criminal law to all acts of torture.[111]

45 Further, the exclusion of the statute of limitation only to cases where torture becomes an integral element of a crime of humanity[112] or only when it is committed against specific groups (eg, against persons protected under international humanitarian law)[113] does not comply with the Convention. Moreover, a statute of limitations for specific aspects of acts of torture corresponding to Article 1, including attempts to commit torture or an act committed by any person, which constitutes complicity or participation in torture likewise contradict Article 4. This means that the rule on the statute of limitation has to be excluded for all acts of torture. The application of a statute of limitations is at complete odds with the obligations under Article 4. This is true, regardless of the longer or shorter period fixed by the law as a statute of limitation.[114]

3.7 Can a Violation of Article 4 be Invoked in the Individual Complaint Procedure?

46 The Convention contains various State obligations aimed at preventing torture and punishing the perpetrators of torture. From the text of these provisions, it is not always clear whether they also provide subjective rights, which victims of torture can invoke in an individual complaints procedure. This question is particularly difficult to answer in relation to the obligation of States parties to punish perpetrators, because human rights

[107] SRT (Rodley), 'Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1999), UN Doc A/54/426, para 4; CAT/C/ARM/CO/3 (n 17) para 10; CAT/C/UZB/CO/4 (n 69) para 10.

[108] eg CAT, 'Concluding Observations: Columbia' (2015) UN Doc CAT/C/COL/CO/5, para 7; CAT, 'Concluding Observations: Latvia' (2013) UN Doc CAT/C/LVACO/3-5, paras 7–8.

[109] eg CAT/C/BGR/CO/4-5 (n 50) para 8; CAT/C/BLR/4 (n 42) para 16; CAT/C/COL/CO/5 (n 108) para 7; CAT, 'Concluding Observations: Finland' (2011) UN Doc CAT/C/FIN/CO/5-6, para 7; CAT/C/JOR/CO/3 (n 72) paras 9-10; CAT/C/KGZ/CO/2 (n 69) para 10; CAT, 'Concluding Observations: Lichtenstein' (2016) UN Doc CAT/C/LIE/CO/4, paras 10–11; CAT/C/LTU/CO/3 (n 49) para 9; CAT/C/MDG/CO/1 (n 88) paras 6–7; CAT, 'Concluding Observations: Serbia' (2015) UN Doc CAT/C/SRB/CO/2, para 8; CAT, 'Concluding Observations: Slovenia' (2011) UN Doc CAT/C/SVN/CO/3, para 7; CAT, 'Concluding Observations: Sweden' (2008) UN Doc CAT/C/SWE/CO/5, para 9; CAT/C/SWE/CO/6-7 (n 43) para 6; Rodley and Pollard (n 19) 128.

[110] CAT/C/JOR/CO/3 (n 72) paras 9–10.

[111] APT and CEJIL, *Torture in International Law* (n 22) 19.

[112] eg CAT/C/MDG/CO/1 (n 88) paras 6–7; CAT/C/ESP/CO/6-7 (n 88) paras 8–9.

[113] CAT/C/LTU/CO/3 (n 49) para 9

[114] See also APT and CEJIL, *Torture in International Law* (n 22) 19.

law, in principle, does not recognize a subjective right of victims to have perpetrators of human rights violations punished by criminal law.[115]

47 Before the Convention entered into force, the CAT Committee, in *OR et al v Argentina* (also known as the '*Punto Final*' cases), noted that the enactment of the '*Punto Final*' and *Due Obedience Acts* only shortly before the entry into force of the Convention was 'incompatible with the spirit and purpose of the Convention'. It held in an *obiter dictum* that Argentina was 'morally bound to provide a remedy to victims of torture and to their dependants', which would be hindered by the enactment of the legislation.[116] In this context, it is also worth noting the earlier decision of the Human Rights Committee (HRC) in the case of *Hugo Rodriguez v Uruguay.* The case concerns a victim of torture under the former military regime, who submitted a complaint against the later civilian regime for having enacted a comprehensive amnesty law in 1986. In this case, the HRC noted with deep concern that the adoption of this law effectively excluded the possibility of investigations into past human rights abuses. The amnesty law thereby prevented the State party from discharging its responsibility to provide effective remedies to the victims of those violations. The HRC, consequently, found a violation of Article 7 CCPR, in conjunction with Article 2(3).[117]

48 After the entry into force of the Convention, in a number of individual complaints, the applicants claimed violations of various Articles of the Convention, including Article 4, on the grounds that the State party had failed to criminalize torture, to take any action to investigate their allegations of torture, and to bring the perpetrators to justice. Here, the CAT Committee did not rule on the claimed violation of Article 4 by stating that 'there are insufficient elements to make a finding on the alleged violation of other provisions of the Convention raised by the complainant at the time of adoption of this decision'.[118]

49 The CAT Committee found for the first time a *violation of Article 4(2)* in the landmark case of *Guridi v Spain*.[119] In this case, a Spanish court found three civil guards guilty of torture and sentenced each of them to imprisonment of four years, two months, and one day. The Supreme Court decided to reduce the prison sentences on the ground that the injuries suffered by the complainant had not required medical or surgical attention, but only first aid. Finally, the civil guards were granted pardon and were suspended from any form of public office for one month and one day. The CAT Committee ruled that pardoning civil guards, whom an independent court had found guilty of torture, violated the victim's rights under Article 4(2). It stated that, 'in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment'.[120] Although the decision lacks further reasoning, the broad interpretation of the victim status to invoke an individual complaint procedure by the CAT Committee has been an important development.

[115] Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009), 28 ff; See also below Art 22, 3.2.2.

[116] *OR et al v Argentina*, Nos 1/1988, 2/1988, and 3/1988, UN Doc CAT/C/WG/3/DR/1, 2, and 3/1988, 23 November 1989, para 9. The case was inadmissible *ratione temporis*.

[117] *Hugo Rodriguez v Uruguay*, HRC (n 100) paras 12.3 and 12.4; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR-Commentary* (2nd rev edn, NP Engel 2005) 66, 80.

[118] *Thabti v Tunisia*, No 187/2001, UN Doc CAT/C/31/D/187/2001, 14 November 2003, para 10.9; *Abdelli v Tunisia*, No 188/2001, UN Doc CAT/C/31/D/188/2001, 14 November 2002, para 10.9; *Ltaief v Tunisia*, No 189/2001, UN Doc CAT/C/31/D/189/2001, 14 November 2002, para 10.9.

[119] *Guridi v Spain*, No 212/2002 (n 2) para 6.7. [120] ibid.

50 Regardless of the fact that the CAT Committee has adopted only few decisions under Article 4—also because cases were declared inadmissible for lack of substantiation or being manifestly unfounded[121]—the case of *Guridi* has demonstrated that Article 4 can be invoked in the individual complaint procedure. In view of contemporary human rights theory,[122] the argument of the Spanish Government in the *Guridi* case that the interests of the victims were unaffected by the decisions of Government authorities in relation to perpetrators of gross violations of human rights, including torture, is no longer acceptable. It is beyond any doubt that victims of the crime of torture have a legal interest that those who tortured them are brought to justice. For many victims of torture, the punishment of the perpetrators constitutes a much more important form of reparation and justice than pecuniary compensation or any other relief.[123] Accordingly, Article 4, concerned with bringing the perpetrators to justice under criminal law, is linked to reparations in that it provides victims with a sense of satisfaction and justice. That is also why punishment of the perpetrator is explicitly provided for as a form of reparation in the *UN 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*.[124] In order to claim such reparation, the victim, therefore, must enjoy the remedy of submitting an individual complaint against the respective authority under domestic law[125] as well as against the State party before the CAT Committee.

51 Further, criminalization under Article 4 is a precondition for other obligations under the Convention to be invoked, for example for Articles 5 to 9 and also for Article 14. The official recognition of individuals having been subjected to torture as victims through domestic procedures is the prerequisite for the exercise of the right to remedy and reparations enshrined in Article 14. This is closely linked to the States parties' obligation to make acts of torture punishable as criminal offence under national criminal law as the failure to enact legislation in line with Article 4 'obstructs the victim's capacity to access and enjoy his or her rights guaranteed under [A]rticle 14'.[126]

52 These arguments apply to both paragraphs of Article 4. If the State party fails, to make torture a criminal offence at all, any victim of torture has the right to raise this

[121] eg *Kirsanov v Russian Federation*, [2014] CAT No 478/2011; *Thabti v Tunisia*, No 187/2001 (n 118) para 10.9; *Abdelli v Tunisia*, No 188/2001 (n 118) para 10.9; *Ltaief v Tunisia*, No 189/2001 (n 118) para 10.9.

[122] See eg Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill/Nijhoff 2003) 63 ff; GA, United Nations 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, Res 60/147 of 16 December 2005 (Boven/Bassiouni Guidelines). See also Manfred Nowak, 'The Right of Victims of Gross Human Rights Violations to Reparation' in Foons Coomans, Fred Grünfeld, Ingrid Westendorp and Jan Willems (eds), *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven* (Kluwer Law International 2000) 203–24; Manfred Nowak, 'The Right to Reparation of Victims of Gross Human Rights Violations' in George Ulrich and Louise Krabbe Boserup (eds), *Human Rights in Development Yearbook 2001: Reparations: Redressing Past Wrongs* (Kluwer Law International 2003) 275–84; Manfred Nowak, 'Reparation by the Human Rights Chamber for Bosnia and Herzegovina' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005).

[123] See eg Nowak, 'Reparation by the Human Rights Chamber for Bosnia and Herzegovina' (n 122) 245.

[124] Also known as the van Boven/Bassiouni Guidelines or van Boven/Bassiouni Principles.

[125] In *Guridi v Spain*, No 212/2002 (n 2) para 4.1, the Spanish Government in fact recognized that both the Supreme Court and the Court of Jurisdictional Disputes had held that a pardon may be subject to judicial review on the initiative of the victim. This argument seems to contradict its position in relation to the standing of the victim before the Committee.

[126] CAT/C/GC/3 (n 26) para 19.

violation of Article 4(1) by means of an individual complaint. If the criminal code of a State party does contain the crime of torture but the respective authorities fail to punish the perpetrators of an act of torture with appropriate penalties, the victim of such an act has the right to submit an individual complaint alleging a violation of Article 4(2) in accordance with Article 22.

NÓRA KATONA

Article 5

Types of Jurisdiction over the Offence of Torture

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

b) When the alleged offender is a national of that State;

c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

1. Introduction 195

2. Travaux Préparatoires 198

2.1 Chronology of Draft Texts 198

2.2 Analysis of Working Group Discussions 201

3. Issues of Interpretation 210

3.1 Article 5(1)(a): Territorial Jurisdiction 210

3.1.1 No Hierarchy between Different Grounds of Jurisdiction 210

3.1.2 Meaning of 'any territory under its jurisdiction' 211

3.1.3 Flag Principle 212

3.2 Article 5(1)(b): Active Nationality Principle 212

3.2.1 General Comment No 2 213

3.2.2 Change of Citizenship and Dual Citizenship 213

3.2.3 Torture by Non-Officials 214

3.3 Article 5(1)(c): Passive Nationality Principle 214

3.3.1 Facultative Nature of Jurisdiction under Passive Nationality Principle 214

3.3.1.1 Rosenmann v Spain (2002) 215

3.3.2 'Victim' 216

3.3.3 'Is a national of that State' 217

3.3.4 Change of Citizenship 218

3.3.4.1 Pinochet (France) 218

3.3.4.2 Habré case (ICJ) 218

3.4 Article 5(2): Universal Jurisdiction 219

3.4.1 Relation to Articles 6 and 7 219

3.4.2 Obligation to Establish Jurisdiction 220

3.4.2.1 Proceedings against Hissène Habré 220

3.4.2.1.1 Overview 220

3.4.2.1.2 The Habré case before the Committee against Torture—Guengueng et al v Senegal 223

3.4.2.1.3 The Habré case before the International Court of Justice—Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) 225
3.4.3 Presence Requirement 226
3.4.3.1 'Have reason to suspect' 226
3.4.3.2 'Any territory under its jurisdiction' 227
3.4.3.3 Irrelevance of purpose and duration of suspect's presence 227
3.4.3.4 Timing of Presence 229
3.4.3.4.1 Lack of Specification in Text of Article 5(2) 229
3.4.3.4.2 No Presence at Moment of Complaint Leads To Non-Prosecution 229
3.4.3.4.2.1 Bouterse Case (Netherlands) 229
3.4.3.4.2.2 'Affair Javor' (France) 231
3.4.3.4.3 Continuation of Prosecution in Cases When Suspect Absconds 232
3.4.3.4.3.1 Ely Ould Dah case (France) 232
3.4.3.4.3.2 'Congo Beach' case (France) 233
3.4.3.4.4 Permissibility of Investigation Despite Absence of Alleged Torturer 236
3.4.3.5 Universal Jurisdiction in absentia 236
3.4.3.5.1 Arrest Warrant Case (Belgium) 237
3.4.3.5.2 Habré Case 238
3.4.4 Competing Claims to Jurisdiction 239
3.4.4.1 No Legal Hierarchy 239
3.4.4.2 Hierarchy of Jurisdictions due to Practical Considerations 240
3.4.4.2.1 Guatemala Genocide Case (Spain) 240
3.4.4.2.2 Abu Ghraib Case (Germany) 241
3.4.5 Temporal Scope of Jurisdiction 242
3.4.5.1 OR, MM, and MS v Argentina 242
3.4.5.2 Bouterse Case (Netherlands) 243
3.4.5.1 Habré Case (ICJ) 244
3.4.5.2 Pinochet Case (UK) 244
3.4.5.2.1 House of Lords Decisions 245
3.4.5.3 Ely Ould Dah Case (France) 247
3.5 Article 5(3): Savings Clause 247
3.5.1 Pinochet (Spain) 247
3.5.2 Almatov Case (Germany) 248

1. Introduction[1]

1 While Article 4 requires States parties to enact the crime of torture as part of their domestic criminal law, Article 5 stipulates an obligation for States parties to establish their jurisdiction over the crime of torture in a comprehensive manner in order to avoid safe havens for perpetrators of torture. In addition to the territoriality and flag principle,

[1] The purpose of this chapter is to detail the obligations entailed in Article 5 CAT and to demonstrate them by presenting selected, prominent national and international jurisprudence. The chapter does not intend to provide an exhaustive review of the domestic implementations of Article 5 CAT. For a comprehensive survey of national universal jurisdiction cases see TRIAL International/FIDH/ECCHR/Redress/FIBGAR, 'Make Way For Justice #3. Universal Jurisdiction Annual Review 2017' (March 2017) <https://redress.org/publication/make-way-for-justice-3-universal-annual-review-2017/> accessed 2 July 2018.

as well as the active and passive nationality principle laid down in Article 5(1), Article 5(2), for the first time in a human rights treaty, establishes the obligation of States parties to establish universal jurisdiction in all cases where an alleged torturer is present in any territory under their jurisdiction. The provisions of Articles 6 to 9 are closely related to Article 5 and further define the various steps which States need to take in order to bring suspected torturers to justice.

2 First, States must take the necessary legislative measures to establish jurisdiction in their respective domestic criminal codes in accordance with the various principles laid down in Article 5. States only enjoy in respect to the passive nationality principle in Article 5(1)(c) the discretionary power to decide whether or not to establish it. With respect to the territoriality, flag, active nationality, and universal jurisdiction principles, the obligation of States parties to entrust their courts with full jurisdiction is unambiguous. As the Committee against Torture decided in the Habré case against Senegal, the failure of the legislative power to establish universal jurisdiction (or any other type of jurisdiction required in Article 5) constitutes a violation of Article 5.

3 Secondly, the administrative and judicial authorities of States parties must also take specific steps in order to bring suspected torturers to justice. Under the territoriality, flag, and nationality principles in Article 5(1), criminal investigations should be initiated as soon as the authorities of a State party have sufficient information to assume that an act of torture has been committed in any territory under its jurisdiction, on board a ship or aircraft registered in that State, by one of its nationals or against one of its nationals (if the domestic law provides for jurisdiction under the passive nationality principle). Such investigations need to be conducted even when the suspected torturer is not present in the territory of the respective State or when the identity of the torturer is not yet known to the authorities. For the territorial State, the obligation to conduct prompt and impartial investigations, either *ex officio* or on the basis of a complaint, is also underlined by Articles 12 and 13 CAT. If the suspected torturer is outside the territory of the State which had initiated criminal investigations, its authorities may request extradition from another State, where this person is present, in accordance with Article 8 CAT. For torture cases, the Convention may even be considered as the legal basis for such extradition procedures.

4 In contrast to the territoriality, flag and nationality principles, the obligation to exercise universal jurisdiction only arises if the alleged offender is present in any territory under the jurisdiction of a State party. This is, however, the only condition for

Accordingly, as of 2016, there have been twelve torture cases with proceedings under universal jurisdiction, out of which six were at the investigation stage (see TRIAL International et al, 69–70). For an in-depth analyses of national legislations and jurisprudence, particularly in relation to universal jurisdiction, see Cedric Ryngaert, 'Universal Criminal Jurisdiction over Torture: AState of Affairs' (2005) KU Leuven Faculty of Law, Institute for International Law, Working Paper No 66 (revised) <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP66e.pdf> accessed 12 December 2017; Karen Janina Berg, *Universal Criminal Jurisdiction as Mechanism and Part of the Global Struggle to Combat Impunity with Particular Regards to the Crime of Torture* (Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte, NWV, Neuer Wissenschaftlicher Verlag 2012); Luc Reydams, *Universal Jurisdiction:International and Municipal Legal Perspectives* (Oxford University Press 2003); Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008' (2009) 30 Mich J Int'l L 927.

exercising universal jurisdiction. Other conditions, such as an extradition request by a third State, have clearly been rejected during the drafting of Articles 5 to 9, as was confirmed by the CAT Committee in the Habré case.[2] In other words, if the authorities of a State party have reasonable grounds to believe that an act of torture has been committed by a person present on its territory (the so-called forum State), they have an obligation under Article 6 to take him or her into custody (or to take other measures to ensure his or her presence) and to make a preliminary inquiry into the facts. In addition, the forum State shall notify the territorial, flag, and/or national States of its actions and the outcome of its preliminary inquiry. If any of these States requests extradition, the forum State has the choice of either extraditing the suspected torturer or of prosecuting the person before its domestic criminal courts (*aut dedere aut judicare* in accordance with Article 7). If no State requests extradition within a reasonable time, the forum State has no choice but to prosecute the alleged offender. While other States parties have no obligation under the Convention to request extradition, as was confirmed by the Committee in the Roitman Rosenmann case[3] concerning the extradition of General Pinochet from the United Kingdom to Spain, all other States parties have an obligation under Article 9 to provide judicial assistance to the forum State by, for example, supplying all evidence at their disposal.

5 In practice, States parties are extremely reluctant to exercise universal jurisdiction in torture cases. Except for the case of Zardad[4] (in the United Kingdom), the few selected cases, in which the principle of universal jurisdiction under Article 5(2) was raised by the applicants, illustrate the attempts of States to avoid their respective responsibilities. As was illustrated by the cases of Al-Duri[5] (in respect of Austria) and Almatov[6] (in respect of Germany), the authorities usually fail even to arrest alleged perpetrators, thereby providing them with an opportunity to leave the country. The case of Ould Dah (in respect of France) shows that alternative measures to custody, such as judicial control orders, might fail to ensure the presence of suspected torturers. Even if the authorities of the forum State arrest a suspected torturer, extradition efforts might be undermined by reluctant Governments. In the case of General Pinochet, who was arrested by British authorities, the extradition request issued by a Spanish judge was not pursued by the Spanish Government with all the necessary vigour to secure his extradition to Spain. In the Habré case, the Government of Senegal even referred the case to the African Union and for a long time failed to enact the necessary legislative reforms to establish universal jurisdiction.

6 The Pinochet, Habré, and Bouterse cases illustrate that even former heads of State or Government are not immune from prosecution for acts of torture. But the International Court of Justice (ICJ), in Democratic Republic of Congo v Belgium,[7] upheld the immunity of an incumbent Minister of Foreign Affairs for alleged crimes against humanity and war crimes. Similar to diplomatic and consular agents, certain holders of high-ranking governmental office, such as heads of State or Government and Ministers of

[2] See below §§ 102–08. [3] See below §§ 75–78. [4] See below §§ 120–21.
[5] See below Art 6 §§ 35–36.
[6] See below § 180. For details regarding the Almatov case see below Art 6 §§ 31–33.
[7] See below §§ 145–47.

Foreign Affairs, enjoy full immunity from jurisdiction in other States, both criminal and civil. This so-called immunity *ratione personae* is based on the notion that such protection is necessary to ensure the efficient performance of certain functions on behalf of the respective State. In the same judgment, the ICJ, therefore, confirmed that after ceasing to hold the position qualifying them for jurisdictional immunity, such persons also lose the protection of immunity *ratione personae*. They might, however, still enjoy functional immunity for all acts performed in the exercise of an official capacity (so-called immunity *ratione materiae*).

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

7 *Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention, 16 December 1970)*[8]

Article 4

> 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:
>
> (a) when the offence is committed on board an aircraft registered in that State;
>
> (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
>
> (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.
>
> 2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

8 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Civil Aviation Convention, 23 September 1971)*[9]

Article 5

> 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:
>
> (a) when the offence is committed in the territory of that State;
>
> (b) when the offence is committed against or on board an aircraft registered in that State;

[8] Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (Hague Hijacking Convention).

[9] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177 (Montreal Convention).

(c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

9 *IAPL Draft (15 January 1978)*[10]

Article IX (Jurisdiction)

1. Jurisdiction for the prosecution and punishment of the international crime of torture shall vest in the following order in:

(a) the contracting Party in whose territory the act occurred;

(b) any contracting Party of which the accused is a national;

(c) any Contracting Party of which the victim is a national;

(d) any Contracting Party within whose territory the accused may be found.

2. Nothing in this Article shall be construed as affecting the jurisdiction of any competent international criminal court.

10 *Original Swedish Draft (18 January 1978)*[11]

Article 8

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 7 in the following cases:

(a) when the offences are committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State;

(c) when the victim is a national of that State.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 14 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

[10] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[11] Draft International Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

11 *Revised Swedish Draft (19 February 1979)*[12]

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction;

(b) When the alleged offender is a national of that State;

(c) [When the victim is a national of that State.]

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

12 *International Convention against the Taking of Hostages (New York Hostages Convention, 18 December 1979)*[13]

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:

(a) in its territory or on board a ship or aircraft registered in that State;

(b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;

(c) in order to compel that State to do or abstain from doing any act; or

(d) with respect to a hostage who is a national of that State, if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

13 *Brazilian Draft (1983)*[14]

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

[12] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

[13] International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostage Convention).

[14] E/CN.4/1983/WG.2/WP.12.

(c) When the victim is a national of that State if that State considers it appropriate.

(d) In the case referred to in article 6, under the conditions established in that article.

2. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

2.2 Analysis of Working Group Discussions

14 In response to an invitation of the Secretary-General to comment on the draft Swedish Convention, a number of Governments made general remarks in 1979 on the issue of jurisdiction over the offence of torture.

15 In written comments the United States firmly supported the creation of an obligation to prosecute or extradite as one of the most effective means of deterring torturers. In the opinion of the United States the fact that torture is an offence of special international concern meant that it should have broad jurisdictional bases in the same way as the international community had conferred broad jurisdictional bases in the Hijacking, Sabotage, and Protection of Diplomats Conventions. In brackets, the United States added that universal jurisdiction was appropriate since torture, like piracy, might well be considered an 'offence against the law of nations'. At the same time the United States objected to jurisdiction based on the nationality of the victim as an independent ground of jurisdiction and proposed the deletion of paragraph 1(c) of the original Swedish draft text. The opinion of the United States was that, although States would not be required to establish nationality of the victim as a basis for jurisdiction, such jurisdiction could be exercised under Article 8(3) of the original Swedish draft if in accordance with the internal law of the relevant State party.

16 The Portuguese Government noted that the provisions on universal jurisdiction could be regarded as contrary to Portuguese public order. Portugal went on to suggest that the last part of Article 8(2) of the Swedish draft should be drafted as follows: 'does not extradite him to another State Party which is competent under paragraph 1 of this article'. Portugal added that, while the competence provided for in Article 8 CAT did not coincide with the general rule governing the territorial scope of Portuguese criminal law (Article 53 of the Criminal Code), this would not be an obstacle to acceptance, since the rule establishes an exception in the case of a 'conflicting treaty'.

17 The USSR stated that it was necessary to conduct a careful study of the competence of the State with regard to crimes involving the use of torture and other cruel, inhuman or degrading treatment or punishment, since the legislation of many States excluded the possibility of recognizing the competence of a foreign State in respect of crimes committed within their territory, on grounds related to the nationality of the offender or of the victim.

18 France suggested that the wording 'to establish its jurisdiction' in Article 8 should be replaced by 'to establish its competence to deal with offences …'. France also suggested that it would be better to delete the reference to ships and aircraft in Article 8(1)(a) for the following reasons: that the proposed text was badly worded and would in any event have to be amended to read 'or on board an aircraft registered in that State or a ship flying the flag of that State'; that the wording did not cover all possible cases (continental shelf, etc.) and that it would therefore be better to keep to the single concept of 'territory', clarified, as necessary, by the legislation of each particular State. Concerning the

establishment of competence by States parties, France argued that only the cases referred to in paragraph 1 should be retained, in view of the difficulties involved in establishing the facts in the case referred to in paragraph 2.

19 The United Kingdom suggested that the phrase 'offences referred to in article 7' be deleted and replaced with 'offences of torture'. The United Kingdom considered that the ultimate effectiveness of the Convention as a whole would depend on the general soundness and acceptability of the enforcement provisions as reflected in Articles 8, 11, and 14 and on the emphasis they would give to the means by which persons accused of torture could be brought to justice. Further, the United Kingdom felt that in contrast with offences of a more obviously international character, such as hijacking and attacks on internationally protected persons, the exceptionally wide extraterritorial jurisdiction conferred by Article 8 in respect of torture went beyond what was practicable. The United Kingdom went on to clarify that, in the United Kingdom, the criminal law, the jurisdiction of the criminal courts and criminal procedure, were based upon offences having been committed, broadly speaking, within the United Kingdom and that there was a general and well-established requirement for evidence to be given orally to provide an opportunity for cross-examination. For practical as well as judicial reasons, therefore, the United Kingdom stated that they would find it difficult to breach this territorial principle and to accept even a limited degree of extraterritorial jurisdiction. The United Kingdom went on to say that since the prosecution of a person accused of torture is likely to be more successfully undertaken in the territory where the offences occurred and where the evidence is available, the emphasis in these articles should be placed on extradition rather than on prosecution and the principle of *aut dedere aut judicare* (the duty to extradite or prosecute in international law) should apply. Further, the United Kingdom stated that the extradition provisions could usefully be strengthened by the inclusion of an article along the lines of Article 8 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft which would require contracting States, inter alia, to include torture (as rigorously defined in a revised Article 1) as an extraditable offence in existing treaties and would provide the option of the Convention being a basis for extradition where no treaty exists between contracting States.

20 Morocco considered that Article 8(1)(c) was unclear and that it could give rise to tendentious applications and opened the question of the principle of the territoriality of penal legislation. It proposed the following wording for paragraph 1(c): 'When the victim is a national of that State and has been tortured (by a national of another State) on the territory of that State …'. Morocco was of the opinion that the extradition measures recommended in Article 14 of the original Swedish draft would only be possible where a member State had received in its territory a national of another member State who had previously committed an offence in his State of origin. Except in that case, the principle of the territoriality of penal legislation applies fully and the act of agreeing to extradite a national to another member State, on the ground that the victim is a national of that State, would be equivalent to a reversion to the humiliating practice of 'capitulations', linked to the worst memories of the colonial era. For these reasons, Morocco urged that Articles 8, 11, and 14 be revised and, since they were based on a single concept, should be condensed into two Articles.

21 There was no discussion on this topic in the 1979 Working Group in contrast to the 1980 Working Group where this issue was discussed in depth. The 1980 Working

Group had before it a copy of the revised Swedish text in which Article 5 corresponded to Article 8 of the original Swedish draft.[15]

22 While the Swedish proposal on universal jurisdiction was supported, in principle, by a considerable number of delegations including the United States, some delegations, in particular those of Australia, France, the Netherlands and the United Kingdom, had reservations, considering that universal jurisdiction over an offence such as torture would create problems under their domestic legal systems.

23 With regard to the proposed Article 5(1)(a) there was general agreement that territoriality should be a ground for jurisdiction with the only question being to what extent offences committed on board ships or aircraft or on the continental shelf should be assimilated to offences committed in the territory of the State, and how this should be reflected in the text of the Convention. France considered that it would be preferable to keep the single concept of 'territory', which could then be clarified as necessary. One delegate found the expression 'or on board aircraft or ships registered in that State', proposed as an addition by several delegations, 'somewhat unhappily phrased'. The delegation preferred the wording 'on board an aircraft registered in that State or a ship flying the flag of that State' whilst at the same time not opposing the consensus on the addition.

24 The text of Article 5(1)(a) was adopted as follows:

> Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board an aircraft or ship registered in that State.

25 Concerning Article 5(1)(b), a delegate proposed the replacement of the word 'national' by the phrase 'public official or employee of that State'. Most delegates stated that the term 'national' was a widely used concept in international law in connection with the establishment of jurisdiction, and that they preferred this basis of jurisdiction, as formulated in the New York Hostages Convention. At the same time several delegates drew attention to the provisions of Articles 1 and 4, noting that there was a need to cover those nationals who were not officials or employees but who committed acts of torture with the consent or acquiescence of public officials or other persons acting in an official capacity or who were charged with complicity or participation in torture and that therefore the proposed replacement would make the Convention less effective.

26 One representative suggested that the first wording of Article 5(1)(b) be retained and that the proposed phrase 'public official or employee of that State' be inserted between brackets after the word 'national'. Another delegate proposed that Article 5(1) should be redrafted to read as follows:

> Each State Party shall take such measures as may be necessary to prosecute persons who have committed the crimes mentioned in Article 4 of this Convention and who are in its territory and under its jurisdiction.

27 Greece suggested that Article 5(1)(b) be drafted as follows:

When the alleged offender belongs to one of the categories of individuals named under Article 1, paragraph 1 and is present in any territory under the jurisdiction of that State.

[15] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367.

Finally, the word 'national' in Article 5(1)(b) was placed in square brackets.

28 Several representatives requested the deletion of Article 5(1)(c) which, in their view, opened an unduly wide scope for repression and created difficulties for establishing proof. One delegate stated that he agreed to the retention of that paragraph—drawing attention to the existence of similar clauses in the Convention against the Taking of Hostages, as well as in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents—but with the addition of the words 'and the alleged offender is discovered in its territory'. Other speakers proposed to make this provision optional. No agreement was reached on whether paragraph 1(c) should be retained and, if so, how it should be worded. The Soviet Union proposed a more fundamental change, suggesting that the whole of paragraph 1 of Article 5 should be replaced with the following text: 'Each State Party shall take such measures as may be necessary to prosecute persons who are in its territory and under its jurisdiction.' Article 5(1)(c) was placed in square brackets.

29 Paragraph 2 of Article 5 caused particular difficulties for those delegations which were opposed to the idea of universal jurisdiction with regard to torture. The French delegate stated that he was in favour of the deletion of Article 5(2), which was likely to create difficulties when the facts were being established. If it was decided to retain that Article, he proposed that the words 'after receiving a request for extradition' should be added after the words 'and it does not extradite him'. This proposal was supported by several other delegates including the Netherlands. Italy, on the other hand, considered that it would be desirable to establish an order of precedence between the different grounds of jurisdiction and suggested the following wording:

> Each Member State shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 above in the following cases and according to the order of priority indicated below: (a), (b), (c)—as in the Swedish proposal, (d) when the accused is on its territory.

30 Several other representatives favoured retention of Article 5(2) as set forth in the revised Swedish draft. These delegates pointed out that either the omission of Article 5(2) or the proposed amendment could create a loophole in the Convention, thereby allowing potential safe havens for torturers. It was stated by one delegate that his basic concern about the inclusion of paragraph 2 was that it could, in certain circumstances, jeopardize the natural rights of an accused to a fair and impartial trial and could also create, in practice, serious international political tensions. Subsequently that delegate offered to withdraw his reservation in the interest of reaching a consensus.

31 Paragraph 3 did not give rise to any substantial discussion. While agreement had been reached on the text of paragraph 1(a), the Working Group agreed that discussion of paragraph (1)(b) and (c) as well as of paragraphs 2 and 3 should be suspended to allow further consideration and consultation.

32 During the 1981 Working Group,[16] Article 5(1)(b) and (c) were considered. It was decided by consensus that the square brackets enclosing the word 'national' in subparagraph b be removed. The Group decided by consensus to remove the square brackets enclosing subparagraph c and to add the words 'if that State considers it appropriate' at the end of the paragraph, thus adopting the wording of the Convention

[16] Report of the Working Group of the Commission on Human Rights (1981) UN Doc E/CN.4/L.1576.

Against the Taking of Hostages. This decision was made following considerable discussion during which several delegates stated that they had strong reservations about this wording.

33 Turning to Article 5(2) of the revised draft some members again suggested the deletion of the paragraph as they were either opposed to the principle of universal criminal jurisdiction or to the difficulties to which the provision could give rise when establishing the facts. Several delegations indicated that they had difficulties, in view of their legal systems, in accepting an unconditional clause on universal jurisdiction. One representative proposed that if the paragraph were to be retained, the phrase 'after having received a request for extradition' should be added after the words 'and it does not extradite him'. Some speakers considered that the paragraph should be retained. They referred to the fact that corresponding paragraphs already appeared in many other comparable conventions such as the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1973 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the 1979 New York Convention against Taking of Hostages, and they emphasized that universal jurisdiction was desirable in order not to provide torturers with any places of refuge.

34 The Netherlands delegation accepted universal jurisdiction in principle and no longer advocated making the exercise of such jurisdiction dependent on the rejection of a request for extradition. Instead, it tabled a formal proposal to make the exercise of universal jurisdiction dependent 'upon complaint by an interested party'. This proposal was only supported by Australia. Other Western delegations felt that this formula could give rise to loose interpretations and open up loopholes. The Brazilian delegation preferred to make universal jurisdiction conditional on the refusal of a request for extradition. Since no agreement could be reached, it was decided to retain the paragraph in brackets.

35 During informal consultations the following text was proposed:

> 2 Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any States mentioned in paragraph 1 of this article.
>
> (a) Without prejudice to the foregoing paragraphs, an alleged offender should normally be tried by the State in whose territory the offence is committed.

Amongst other problematic issues, the discussions were complicated by the fact that this question could be dealt with under Article 5 (on jurisdiction) or under Article 7 (on prosecution). While numerous formulations were discussed during this period, the Working Group, during its public meeting, felt that, since the informal proposal could not be discussed owing to lack of time, it should be examined in detail the following year.

36 Article 5(3) was adopted by consensus.

37 A certain evolution in the position of several delegations could be observed in the course of debate in the 1982 Working Group on Article 5(2).[17] France and the Netherlands explicitly supported the system proposed by Sweden while Australia remained the only Western country participating in the Working Group which did not

[17] E/CN.4/1983/L.40.

support the inclusion of universal jurisdiction in the convention. The Netherlands delegation withdrew its 1981 proposal to make the exercise of universal jurisdiction dependent on a complaint by any interested party. At the same time, Brazil repeated its plea for making the exercise of universal jurisdiction dependent on the refusal of a request for extradition, expressing concern that universal jurisdiction could be exploited for political reasons and could result in trials on the basis of spurious accusations and fabricated evidence. This proposal was not supported by the Argentinian or the Uruguayan delegations who remained firmly opposed to the idea of universal jurisdiction based upon the fact that they considered torture not to be a crime of an international nature. The Argentinian delegation argued that cases in which a torturer would leave his own State where he enjoyed impunity were highly hypothetical and the system proposed to deal with such cases could be a source of controversy between States. This would be due to the fact that the intention of a State to prosecute a case of torture on the basis of universal jurisdiction could be interpreted by the State where the crime had been committed as a demonstration of lack of trust in its judicial system, a violation of its sovereignty and even as an interference in its internal affairs. Advocating for the inclusion of universal jurisdiction in the Convention, the United States responded to the Argentinian delegation that such jurisdiction was intended primarily to deal with situations where torture is a State policy and, therefore, the State in question does not prosecute its officials who conduct torture. For the international community to leave enforcement of the Convention to such a State would be essentially a formula for doing nothing. Universal jurisdiction could be used against official torturers who travel to other States or against torturers fleeing from a change of Government in their State if, for legal reasons, extradition was not possible.

38 In light of the suggestions made above, the Chairman-Rapporteur consulted several delegations regarding the possibility of adapting the text of Article 7. A modified version of the Article was submitted to the Working Group which made clear that in the case of the exercise of universal jurisdiction the standards of evidence required for prosecution and conviction should in no way be less stringent than those which apply in the case of jurisdiction on a nationality or territorial basis. This proposal was intended to meet the concern of those who feared that the exercise of universal jurisdiction might lead to trials on the basis of spurious accusations inspired by political motives. The proposal implied that Article 5(2) and Article 6(4) of the Swedish draft would be maintained.

39 The Australian Government was prepared to accept this proposal whilst at the same time retaining its reservations. The Brazilian delegation was prepared to accept the proposal of the Chairman-Rapporteur whilst maintaining its position on Article 5(2) that the establishment of universal jurisdiction should be made conditional on the refusal of a request for extradition. Where such a clause could not be included in Article 5(2), Brazil would consider making a declaration or reservation to that effect when becoming a party to the Convention.

40 Several delegates, favourable to the proposal in general terms, suggested drafting changes and a revised version was therefore tabled and subsequently underwent further amendments during the discussion. The Soviet delegation now made it clear that it could support the text. Explicit support was also voiced by the delegation of Senegal. The delegations of Argentina and Uruguay maintained their opposition but found themselves isolated in their position against the inclusion of universal jurisdiction in the Convention.

41 The report of the Working Group states explicitly that most speakers had indicated that their Governments were prepared to support the inclusion of a system of universal

jurisdiction in the draft Convention and the revised version of Article 7 was reproduced, as it emerged finally from the discussion, in the first annex of the report. The report noted that all delegations who could accept the inclusion of universal jurisdiction in the draft Convention could support this text of Article 7, as well as the text of Article 5(2) and Article 6(4).

42 During the 1983 Working Group,[18] the system of universal jurisdiction included in draft Articles 5, 6, and 7 was again considered. The discussion indicated that there had been no fundamental change in positions compared with the 1982 session of the Working Group.

43 Most speakers, with the exception of the Argentinian and Uruguayan delegations, were in favour of the principle of universal jurisdiction, holding it to be essential in securing the effectiveness of the Convention and arguing that territorial jurisdiction would not suffice to punish torture effectively as a State policy under the definition of Article 1. Reference was made in this context to the arguments set out in the report of the 1982 Working Group.

44 Some delegations maintained their reservations to the proposed system of universal jurisdiction which in their view could not be harmonized with certain principles of their penal legislation and would give rise to difficulties with regard to the availability of evidence as well as in other aspects. Reference was made here to the arguments set out in the report of the 1982 Working Group. Other delegations, while attaching importance to the system of universal jurisdiction, expressed the view that it was necessary to avoid abuses so as to afford greater guarantees to a State whose national has been incriminated. In this connection, the delegation of Senegal proposed the insertion in Article 5 of a provision reading as follows:

> Each State Party shall likewise take such measure as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender, who has been prosecuted or convicted by the state in which the offence was committed, is present under its jurisdiction and that State does not extradite him by virtue of article 3, paragraph 1.

45 The representative of Brazil proposed, in a spirit of compromise, a modified system under which the principle of universal jurisdiction would apply under certain conditions and on a subsidiary basis, only if the States of territorial or national jurisdiction did not request extradition within a set period or if such a request were denied.

46 Some delegations agreed that such a system might constitute a sound basis for compromise. The French delegate, on the other hand, declared that his Government preferred to adhere as closely as possible to the formulations concerning universal jurisdiction used in a number of recent international conventions. The Working Group decided that the Brazilian proposal should be further studied at a later stage. A similar decision was made with regard to the Senegalese proposal.

47 The discussions in the 1984 Working Group[19] revealed that there had been an important change of position as compared to the 1983 Group. The inclusion of universal jurisdiction in the draft Convention was no longer opposed by any delegation.

48 The delegation of Argentina declared that the new Argentine Government supported universal jurisdiction as provided for in Articles 5, 6, and 7. The representative

[18] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63.
[19] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72.

of Uruguay stated that his delegation continued to have doubts from a juridical point of view but that it did not wish to stand in the way of consensus on the question. While the Chinese delegation was in favour of the inclusion of universal jurisdiction, it considered the current formulation of the draft articles not entirely satisfactory. The representative of Senegal withdrew his proposal made during the 1983 Working Group stating that the concern which had prompted it had been met to a great extent by the text of Article 7. The Australian delegation reiterated the position adopted in 1982 that Australia still had some doubts about the desirability or practicality of the universal jurisdiction provisions in the Convention but was committed to the early negotiation of as strong a convention as possible and had therefore joined the growing consensus in support of universal jurisdiction in the draft Convention. The Australian delegation further expressed its view that such a system must be complemented by effective implementation provisions in the final text. Many other speakers reiterated the view that universal jurisdiction was an essential element for the effectiveness of a Convention against Torture.

49 The delegation of Brazil made explanatory remarks with regard to its 1983 compromise text on universal jurisdiction. The Brazilian delegation had been concerned with certain practical problems that could arise from its implementation as provided for in draft Articles 5, 6 and 7 as they stood. It had advanced its formulations in the hope that they would make it easier for other delegations to accept the inclusion of universal jurisdiction in the draft Convention. However, it remained flexible and, if its proposals were not generally acceptable, would not insist on them, remaining ready to discuss a solution on the basis of other formulations, including the present draft Articles 5, 6, and 7.

50 Most speakers expressed their preference for the text of draft Articles 5, 6, and 7 as a basis for discussion. It was pointed out that the formulation concerning universal jurisdiction should be as close as possible to that used in earlier treaties, such as the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the International Convention against the Taking of Hostages. On the other hand, several speakers expressed an interest in exploring the possibility of achieving consensus by introducing in the present text the essence of certain elements borrowed from the Brazilian alternative proposals.

51 Some speakers considered that the Brazilian proposals had a legal drawback in that they would oblige a State to detain a person for a certain period during which that State had not established its jurisdiction over the case and extradition had not been requested. The delegation of Brazil pointed out that this problem could be solved by replacing the word 'establish' in Article 6(4) of the Brazilian proposal by the word 'exercise'. The Brazilian delegation further explained that while its alternative proposal was aimed at giving priority to the establishment of jurisdiction by States referred to in Article 5(1)(a), (b), and (c), it was not intended to create an automatic obligation for the requested State to extradite the alleged offender to those States, since extradition was a sovereign act to be decided in each case by the competent court of the requested State. Some speakers observed that it was both legally and politically proper to leave the State in which the offender was found such freedom to refuse extradition, because if extradition was requested by the State in which the acts of torture had taken place, it was doubtful whether the requesting State would really punish the offender.

52 At the end of the pre-sessional meetings all delegations except the Chinese delegation were prepared to accept the current texts of Articles 5, 6, and 7. The Chinese

delegation expressed the view that the proposal on universal jurisdiction made by the Brazilian delegation could be regarded as a basis for discussion and that it was in principle acceptable. In its understanding, the basic spirit of the Brazilian proposal was that the exercise of jurisdiction in accordance with Article 5(1)(a), (b), and (c) should have priority over the exercise of jurisdiction based exclusively on the presence of an alleged offender in the territory of a State party. Only if the State having primary jurisdiction did not wish to exercise it, should jurisdiction be exercised by the State where the offender was found. After the close of the pre-sessional meetings, informal consultations continued with the Chinese delegation, taking into account that most delegations were not prepared to accept an automatic obligation for the requested State to grant extradition requests by States having primary jurisdiction. At the final meeting of the Working Group in the second week of the Commission, the Chinese delegation announced that it could now in principle accept universal jurisdiction as set out in the draft Convention. The Group thereupon agreed to adopt the current text of Articles 5, 6, and 7, without prejudice to the reservations of certain delegations which would be reflected in the report.

53 The representative of the German Democratic Republic, while stating that his delegation was not opposed to the adoption of Articles 5, 6, and 7, drew attention to the fact that the subject matter of the draft Convention differed considerably from that of such instruments as the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation which contained similar provisions and to which the German Democratic Republic was a party. In particular the provisions contained in Article 5(1)(c) caused problems to his authorities and therefore his Government had chosen to reserve its final position with respect to that question and would take into account the outcome of the deliberations concerning other elements of the draft Convention.

54 In written comments France attached particular importance to Articles 5 to 7 concerning universal jurisdiction competence which in the opinion of France significantly enhances the Convention and would permit the attainment of its essential objective, ie, action to combat torture and to punish those who engage in it, regardless of the State party in which they are located. The Netherlands highlighted the issue of criminal proceedings in connection with acts of torture, attempts to commit torture and acts which constitute complicity or participation in torture as one of the important aspects in which the draft Convention goes beyond the 1975 Declaration. The most far-reaching of these provisions obliges States in whose territory a person suspected of such an offence is found, to submit the case to its competent authorities for the purpose of prosecution if it does not extradite him, even if the alleged offender is not its national and if the offence was committed abroad. The Norwegian Government highlighted the provisions on universal jurisdiction in the draft Convention as being of utmost importance. The Government of Tonga reserved its final position with respect to universal criminal jurisdiction. The US Government stated that it considered it of utmost importance that the draft Convention contains provisions which provide adequately for universal jurisdiction. In the opinion of the United States, the formulations contained in Articles 5, 6 and 7 were fully satisfactory representing the 'product of careful and thorough study of a complex matter and constituting the best compromise of varying points …', and the three articles achieved 'the

desired result of a workable, effective system of universal criminal jurisdiction'. Thailand stated that the underlying principle of Article 5 was already provided for by the Thai Penal Code. Regarding Articles 6 and 7, Thailand stated that it was a longstanding principle adopted by the Thai Criminal Procedure Code that, whenever it appears that any offence has been committed, the inquiry and prosecution regarding that case shall be undertaken without delay. They therefore welcomed the proposition under draft Article 6(3), specifying the requirement of notification regarding the assumption of court jurisdiction over the case between States parties concerned, as an appropriate co-operative measure. Venezuela suggested in their written comments that the use of the word 'jurisdicción' in Articles 5 to 7 of the draft should be clarified, so as to avoid difficulties of interpretation.

3. Issues of Interpretation

55 Article 5 requires States parties to the Convention to take measures as may be necessary to establish their jurisdiction in accordance with the territorial ((1)(a)), active nationality ((1)(b) and universal jurisdiction principle (para (2)). Furthermore, States can also, if considered appropriate, create jurisdiction in accordance to the passive nationality principle ((1)(c)). Importantly, the jurisdiction required under Article 5 pertains only to torture as laid out in Article 4 of the Convention, and not to other forms of ill-treatment.[20]

3.1 Article 5(1)(a): Territorial Jurisdiction

56 The territoriality principle constitutes the traditional ground for criminal jurisdiction under international law. Extraterritorial jurisdiction, therefore, is the exception. Territorial jurisdiction is derived from the principle of territorial sovereignty inherent in the notion of the territorial State. By virtue of this principle, every State can freely regulate and apply its own national criminal law within its sovereign territory to all persons, nationals, and aliens alike, who commit a criminal offence on its territory. It also means that aliens have a duty to obey the criminal law in the country they live in, reside or simply spend their vacation. Aliens cannot avoid criminal prosecution in accordance with the law of the country in which they are present by referring to the criminal law in their country of origin, where the incriminated behaviour might not constitute a criminal offence.

3.1.1 No Hierarchy between Different Grounds of Jurisdiction

57 During the drafting of the Convention, the territoriality principle was unsurprisingly the least controversial. The United Kingdom originally even argued that the Convention should only apply to the territoriality principle.[21] Article IX (1) of the IAPL draft proposed a certain order of priority with the territoriality principle at the top.[22] Article 8(1) of the original Swedish draft also mentioned the territoriality principle at the

[20] In its General Comment No 2, the CAT Committee states that it 'considers that articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment'. The authors of this commentary do not share this view. For a discussion see Arts 2, 4, and 16; see also CAT, 'General Comment No 2 on the implementation of article 2 by States parties' (2008) UN Doc CAT/C/GC/2 para 6.

[21] Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 191; see above § 19.

[22] See above § 9.

beginning, but without indicating a certain order of priority.[23] It suggested an obligation of States to establish their jurisdiction when the offence of torture is committed 'in the territory of that State or on board a ship or aircraft registered in that State'. Eventually though, the final wording of the Convention does not endorse any formal hierarchy between the different jurisdictional heads established under Article 5.[24]

3.1.2 Meaning of 'any territory under its jurisdiction'

58 Article 5(1)(a) requires States parties to establish jurisdiction over any offence stipulated in Article 4 which is committed on any territory under their jurisdiction or on board a ship or aircraft registered with them.

59 The formulation of 'any territory under [the State party's] jurisdiction' has to be understood in a broad sense and applies beyond the territorial State's land and sea territory as well as its air space. This reading has been already reflected in the *travaux préparatoires* of the Convention[25] and was further confirmed in the Committee's General Comment No 2 (2008).[26] In the latter, the Committee against Torture made it explicit that the wording 'any territory' as used in Article 5 'includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure *or* de facto effective control, in accordance with international law'.[27] The obligations arising from Article 5 therefore also cover the offences stipulated in Article 4 'during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State party exercises factual or effective control'.[28] To a limited extent, the obligation to establish jurisdiction also comprises maritime areas outside of the State party's territorial sea, such as oil-rigs or similar installations.[29]

60 This territorial scope of the Convention received particular attention in relation to the US military detention facility in Guantanamo Bay, Cuba and the debate on the territorial scope of the US obligations under the Convention against Torture. Irrespective of the facility's location outside of US territory, the US authorities are still required under the Convention to establish jurisdiction over crimes of torture committed in the facility due to the US's de facto control over the territory leased from Cuba. In its General Comment No 2, the Committee makes explicit reference to places of detention and underlines that 'the scope of "territory" under Article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention'.[30]

61 While the encompassing territorial scope of the Convention was challenged during the Bush administration,[31] the US eventually reviewed its position as reflected in its third to fifth periodic reports to the Committee. Accordingly, it acknowledges that

[23] See above § 10. [24] See also below § 152.

[25] See also J Herman Burgers and Hans 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) 131.

[26] CAT/C/GC/2 (n 20). [27] The Committee also refers to Arts 2, 11, 12, 13, and 16.

[28] CAT/C/GC/2 (n 20) para 16. [29] Burgers and Danelius (n 25) 131.

[30] CAT/C/GC/2 (n 20) para 16. While General Comment No 2 refers to places of detention only in relation to Art 2, its clarification implicitly also applies for the scope of territorial jurisdiction as required under Art 5(1)(a).

[31] See the judgment in US Supreme Court, *Rasul et al v Bush, President of the United States et al* [2004] 542 US 466; see also the report of five Special Procedures of the UN Commission on Human Rights on the 'Situation of detainees at Guantánamo Bay' (2006) UN Doc E/CN.4/2006/120 para 11.

the Convention applies to 'all places that the State party controls as a governmental authority', including 'the United States Naval Station at Guantanamo Bay, Cuba and over all proceedings conducted there, and with respect to US-registered ships and aircraft'.[32] Similarly, the obligation to establish jurisdiction over crimes of torture under the territorial heading also arises for those acts committed by US and UK troops in Iraq while exerting de facto control.

3.1.3 Flag Principle

62 In addition to the territorial notion of Article 5, Article 5(1)(a) explicitly also includes the flag principle. Thus, States parties are also required to extend their criminal jurisdiction regarding torture to conduct on board of ships or aircraft flying their flag regardless of the precise location where the crime is committed. If torture is, for example, committed on board an aircraft, which is registered in the United States, while flying through British airspace as part of an extra-ordinary rendition the US nevertheless has an obligation to establish jurisdiction over this act.

63 During the elaborations of the Convention, the introduction of the flag principle was not without debate. France suggested deleting the reference to ships or aircraft because the wording did not cover all possible cases, such as the continental shelf. According to France, it would therefore be better to keep to the single concept of 'territory', to be understood in the broad sense. This proposal was reflected in the revised Swedish draft, which referred to offences committed 'in any territory under its jurisdiction', without any reference to the flag principle.[33] However, as the flag principle must be distinguished from the territoriality principle, it was doubtful whether the wording in the revised Swedish draft also covered the obligation of the flag State to criminalize torture committed on board a ship or an aircraft registered in that State, as suggested by France. The Working Group, therefore, agreed already in 1980 on a final text which combines the broader concept of 'in any territory under its jurisdiction' with the explicit reference to offences committed 'on board a ship or aircraft registered in that State', taken from the original Swedish draft.

64 Importantly though, the obligations arising under the flag principle do not absolve other States parties from their obligation to establish jurisdiction under other heads, ie, the territorial or active nationality principle. Consequently, any CIA rendition flight crossing the airspace of another country, not only triggers the obligations of the USA under the flag principle but also eg those of the country whose airspace has been used under the territorial principle.[34]

3.2 Article 5(1)(b): Active Nationality Principle

65 Article 5(1)(b) stipulates the obligation to establish jurisdiction in accordance with the active nationality principle. States parties are required to include into their domestic legal framework criminal provisions covering the offences specified in Article 4 and suspected to have been perpetrated by their own nationals. Importantly, the jurisdiction to be established under Article 5(1)(b) is unrelated to the location where the offences under Article 4 were committed, and therefore also covers crimes committed abroad. Hence,

[32] CAT, 'Concluding Observations: USA' (2014) UN Doc CAT/C/USA/CO/3-5 para 10.
[33] See above § 11. [34] Boulesbaa (n 21) 188; see also Berg (n 1) 159.

jurisdiction in line with the active nationality principle provides for an extraterritorial application of the Convention.

3.2.1 General Comment No 2

66 As mentioned above, the Committee elaborates in its General Comment No 2 on the meaning of the term 'in any territory' and endorses a wide interpretation which exceeds the mere territorial boundaries of the State party and includes all areas 'over which a State exercises factual or effective control'[35]. Somewhat surprisingly, the Committee further notes in the same paragraph of the General Comment that it sees this wide interpretation of the notion of territoriality as 'reinforcing' the active nationality principle.[36] While the Committee provides no further explanations on the relation between the wide scope of the territoriality notion and the active nationality principle, it seems to suggest that the two concepts are at least in parts overlapping.

3.2.2 Change of Citizenship and Dual Citizenship

67 In accordance with the Convention's intent to avoid safe havens for torturers, one needs to interpret the term 'national' both as referring to the time of the offence as well as to the time of the prosecution. Should an alleged perpetrator of torture change his or her citizenship from State A to State B after having committed the crime, both State A and State B have the obligation to establish their jurisdiction under the active personality principle. Hence, a change of nationality after the act of torture was committed does not remove the obligation to exercise jurisdiction. The same holds true for cases of dual or multiple nationalities.[37]

68 As a consequence of the above interpretation, more than one State party may have jurisdiction over the same case under the active nationality principle. This, however, does not mean that all States parties have to exercise their jurisdiction in parallel. A multiple prosecution for the same offence would be in contravention of the *ne bis in idem* principle. The purpose of the permissive interpretation of the active nationality principle is to close safe havens and ensure that an alleged perpetrator does not evade justice by changing his or her nationality. The Convention does not provide any ranking in case of overlapping jurisdictions and does not provide any guidance as to which State should eventually exercise its jurisdiction, provided that the State in question is indeed able and willing to perform its obligations in accordance with the Convention. In practice, the decision which State will exercise its jurisdiction depends, next to extradition regulations, on practical considerations such as the availability of evidence or the whereabouts of witnesses which are crucial for an effective investigation and prosecution.

[35] CAT/C/GC/2 (n 20) para 16.

[36] 'The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction "when the alleged offender is a national of the State." The Committee considers that the scope of "territory" under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention': see CAT/C/GC/2 (n 20) para 16.

[37] See Burgers and Danelius (n 25) 132; Berg (n 1) 161–62. For a case in which a prosecution under the active nationality principle is not possible since the alleged torture changed his nationality *before* the alleged crime was committed see the Bouterse case below §§ 124–26.

3.2.3 Torture by Non-Officials

69 The question of the scope of Article 5(1)(b) *ratione personae* was discussed during the Convention's drafting process. In the Working Group it was proposed to replace the word 'national' by the phrase 'public official or employee of that State'.[38] Other delegates, however, drew attention to the provisions of Articles 1 and 4 and the need to cover those nationals who are not themselves public officials but who committed acts of torture with the consent or acquiescence of public officials. In 1981, the Working Group finally decided to keep the word 'national' as a widely used concept in international law in connection with criminal jurisdiction.[39] The final wording of Article 5(1)(b) fully corresponds to the original Swedish draft.

70 Hence, if private individuals commit torture at the instigation of or with the consent or acquiescence of a public official, the active nationality principle also applies to them, irrespective of the nationality of the public officials concerned. If, for example, a US citizen and employee of a private US security company committed an act of torture in Iraq with the acquiescence of a public official, the United States must exercise its jurisdiction over this act, irrespective of whether the public official was a US military officer or an Iraqi police officer.[40]

3.3 Article 5(1)(c): Passive Nationality Principle

71 Paragraph 1(c) of Article 5 provides States parties with the possibility to establish jurisdiction over torture offences under the passive nationality principle. Accordingly, the State party can include into its domestic legal framework provisions which provide for the prosecution of torture cases when the victim is a national of the State party. Similar to the active nationality principle in Article 5(1)(b), the jurisdiction to be established under Article 5(1)(c) provides for an extraterritorial application of the Convention and does not require the presence of the alleged perpetrator on the territory of the State party.

3.3.1 Facultative Nature of Jurisdiction under Passive Nationality Principle

72 Importantly, Article 5(1)(c) does not require, but merely offers the possibility for States parties to establish jurisdiction according to the passive nationality principle. This optional character of paragraph (1)(c) is stipulated by the wording 'if that State considers it appropriate'. As such, the paragraph is 'no more than a reminder that States might find it desirable'[41] to establish jurisdiction under the passive nationality principle.

73 Crucially, the formulation 'if that State considers it appropriate' refers only to the subparagraph 5(1)(c) and not to the entire sentence of 5(1).[42] While the Convention provides for the possibility to establish jurisdiction under the passive nationality principle,

[38] See above § 25.

[39] cf Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979, entered into force 8 February 1987) 1456 UNTS 124 Art 8(1)(b); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 Art 6(1)(b); the International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 ('Hostage Convention') Art 6(2)(e).

[40] See also the Concluding Observations on the initial report of the Holy See in which the Committee commends the establishment of jurisdiction over offences committed by 'public officials and citizens abroad': CAT, 'Concluding Observations: Holy See' (2014) UN Doc CAT/C/VAT/CO/1 para 5(a).

[41] Burgers and Danelius (n 25) 132.

[42] See also Berg (n 1) 163.

it stipulates an obligation under the territorial, flag, and active nationality principle in Article 5(1)(a) and (b).

74 The fact that Article 5(1)(c) leaves it at the discretion of the State party and does not feature an obligation similar to the provisions under Article 5(1)(a) and (b) is mainly attributable to the passive nationality principle's contested standing in international law when compared to the territorial or active nationality principle.[43] Although modelled after Article 6(2)(d) of the International Convention against the Taking of Hostages, the passive nationality principle's inclusion into the Convention against Torture was heavily criticized.[44] Therefore, the Working Group decided in 1981 to add the words 'if that State considers it appropriate'.[45]

3.3.1.1 *Rosenmann v Spain* **(2002)**

75 The non-obligatory nature of Article 5(1)(c) was at the centre of the deliberations of the Committee against Torture in the *Roitman Rosenmann v Spain* case in 2002, although the complaint referred only to violations of Articles 8, 9, 13, and 14 and was declared as inadmissible.[46] The complainant inter alia argued that the Spanish Foreign Ministry had violated Spain's obligation under the Convention by not adequately facilitating the exchange between the Spanish *Audiencia Nacional* and the British Home Office in the former's effort to prosecute Chilean General Pinochet who had been placed under detention in London in October 1998.[47] The Spanish judicial authority had filed an application for extradition of General Pinochet in order to try him for his role in crimes committed against Spanish citizens in Chile. However, after various appeals including to the House of Lords[48], the UK authorities ordered his release on medical grounds. Efforts by the *Audiencia Nacional* to appeal the UK's decision to release Pinochet were eventually scuppered by the Spanish Foreign Ministry's failure to deliver the pertaining appeal in a timely manner, what allowed Pinochet to return to Chile.

76 In its admissibility decision in the *Rosenmann case*, the Committee acknowledged that Spain's domestic legal framework provided for jurisdiction under Article 5(1)(c), but also argued that Articles 8 and 9 would not impose any obligation on the State party to seek an extradition or to file a pertaining appeal, if refused.[49] Importantly, 'in this connection, the Committee refers to article 5, paragraph 1(c)' and 'considers this provision to establish a discretionary faculty rather than a mandatory obligation to make, and insist upon an extradition request. Accordingly, the complaint falls *ratione materiae* outside the scope of the articles of the Convention invoked by the complainant.'[50]

77 With this reasoning, the Committee appears to interpret the discretionary nature of Article 5(1)(c) not only as covering the creation of the corresponding domestic

[43] cf Geoffrey R Watson, 'The Passive Personality Principle' (1993) 28 TJIL 1.

[44] The inclusion of the passive nationality principle in the 'Hostage Convention' was essentially the result of a compromise between those States which accepted the principle as a common basis for jurisdiction and those which have traditionally opposed its use. Those States which supported its inclusion argued that it would avoid a gap in the jurisdiction and that, in any event, a State whose national is held hostage has a strong enough interest in the offence to justify its assertion of jurisdiction. Opposing States asserted that the inclusion of this principle would only lead to problems of conflicting claims of jurisdiction; cf Joseph J Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Grotius 1990) 153.

[45] See above § 32; cf Burgers and Danelius (n 25) 132; Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 320.

[46] *Roitman Rosenmann v Spain*, No 176/2000, UN Doc CAT/C/28/D/176/2000, 30 April 2002.

[47] See below §§ 168–76. [48] See below § 175. [49] See below Arts 8 and 9.

[50] *Roitman Rosenmann v Spain*, No 176/2000 (n 46) para 6.7.

jurisdiction, but also as covering the legal framework's actual application. Hence, the Committee seems to suggest that the State party not only has the discretion to decide whether or not to establish jurisdiction in accordance with the passive nationality principle, but also to decide on a case by case basis whether the State party considers the investigation and prosecution of a specific suspected torturer 'as appropriate' even after jurisdiction according to the passive nationality principle has been already created. Furthermore, this discretion, as the reasoning of the Committee seems to suggest, not only includes the freedom to start, but also to stop already initiated proceedings. While one should be mindful that the Committee did not consider the complaint on its merits, the admissibility decision insinuates that the majority of the Committee saw the Spanish Foreign Ministry's unwillingness to forward the *Audienca Nacional*'s appeal in response to the UK's decision to release Pinochet on medical grounds as in conformity with the 'if that State party considers it appropriate' clause under Article 5(1)(c).

78 This rather far-reaching interpretation of the discretionary faculty of Article 5(1)(c) remained not without criticism and was taken up in an individual opinion by Committee member Mr. Guibril Camara. In it, Camara argued that 'it seems that the majority [of the Committee members] has confused, on the one hand, the possibility to assume a (usually legislative) norm of general application concerning investigation and prosecution of acts falling with article 5, paragraph 1 (c), with, on the other hand, the pursuit of each individual case …'. Consequently, '[t]he majority's view of the "discretion" in article 5 significantly weakens the likelihood that alleged offenders in cases of torture of extraterritorial nationals will be brought to justice, certainly as compared to the cases in article 5, paragraph 1 (a) and (b), where no such discretion applies.' Furthermore, even if the reading of the Committee's majority of the discretionary faculty of Article 5(1)(c) would be correct, it 'is more than questionable whether such an exercise of "discretion" by the executive [in the *Rosenmann case* the Spanish Foreign ministry as a branch of the Spanish Government] is consistent with the principles underlying the Convention …', also given the Committee's previously 'consistent preference' for judicial resolution of allegations of torture arising within a State party.[51]

3.3.2 'Victim'

79 In certain particularly serious cases of torture and enforced disappearance, the notion of victim can also include family members of the person who was tortured or disappeared.[52] Instructively for the notion of 'victim' as well as the application of the passive nationality principle, in March 2017, Spain's top-court in criminal matters, the *Audiencia Nacional*, agreed to investigate a complaint submitted by a Spanish woman, whose brother is alleged to have been abducted, tortured, and killed by the security forces of Syrian President Bashar al-Assad.[53] The case is among the first cases accepted by a European court in relation to crimes committed by the al-Assad regime and names eight

[51] ibid, individual opinion of Committee member Mr. Guibril Camara.

[52] See International Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED) Art 22; *Quinteros Almeida v Uruguay*, No 107/1981, UN Doc CCPR/C/19/D/107/1981, 15 October 1982.

[53] The Court concludes that the complaint contains acts amounting to crimes against humanity, war crimes, torture, and terrorism and enforced disappearance. However, only the latter two are part of the ordered investigation.

Syrian security officials as suspects, for who the Court requested the Syrian authorities to appoint legal representation.[54]

80 Irrespective of this recent example, in comparison with other forms of jurisdictions under Article 5, the passive nationality principle finds relatively little application. In practice, pertaining cases very often fall also under the mandatorily required universal jurisdiction under Article 5(2) which, however, requires the presence of the alleged perpetrator on the territory of the State party.

3.3.3 'Is a national of that State'

81 If established, jurisdiction under Article 5(1)(c) covers only offences referred to in Article 4 which were inflicted on citizens of the State party. Residents, visitors, or other persons present on the territory of the State party do not fall under the scope of the passive nationality principle as stipulated in the Convention.

82 A notable exception in this regard were the judicial developments in Spain in relation to the *Guatemala Genocide* case.[55] The case was based on complaints filed against eight Guatemalan military members, who were alleged to be responsible for genocide, torture, and other crimes during the civil war from 1962 to 1996. After a series of appeals, which mainly evolved around the question whether Spanish courts indeed had jurisdiction,[56] the Spanish Supreme Court (*Tribunal Supremo*) eventually held in 2003 that Spain had jurisdiction over the case, however—in line with the passive nationality principle—only in relation to acts against Spanish citizens. Guatemalan victims of the alleged crimes, for example Guatemalan Mayas, were excluded from resorting to Spanish courts since they would fall outside of the scope of the passive nationality principle and would also lack any 'legitimizing link' such as the presence of the alleged offenders on Spanish territory which would allow them to resort to universal jurisdiction in Spain.[57] Surprisingly though, in 2005, Spain's Constitutional Court (*Tribunal Constitutional*) overturned the exclusion of non-Spanish citizens from the case arguing that the right to effective constitutional protection would also include non-citizens. According to the Court, requiring a link such as the presence of the alleged perpetrator on Spanish territory or the Spanish citizenship of the alleged victims, would result in an unjustified restriction of the constitutional right to effective judicial protection' as guaranteed in the Constitution of Spain.[58]

[54] Consejo General del Poder Judicial/Comunicación Poder Judicial, 'La Audiencia Nacional investigará al régimen sirio por la desaparición del hermano de una ciudadana española' (27 March 2017).

[55] See also below § 157–58.

[56] The appeals mainly evolved around the issue whether Spanish courts have indeed jurisdiction over the case since in Spanish law the passive nationality principle is only subsidiary to the territoriality principle. Hence, Spanish jurisdiction was contingent on the lack of ability or will of the Guatemalan authorities to exercise their jurisdiction under the territoriality principle.

[57] The reasoning for the application of jurisdiction under the passive nationality principle is insofar surprising as the relevant Spanish law refers to the Convention against Torture which does not require but only offer jurisdiction under the passive nationality principle. The relevant law reads as 'The Spanish jurisdiction shall also be considered competent to deal with acts committed by Spaniards or foreigners outside of national territory that can be classified in accordance with Spanish criminal law such as the following crimes … g) and other crimes, that, pursuant to international treaties or conventions, *should* be persecuted in Spain': Ley Orgánica del Poder Judicial (LOPJ) Art 23.4 as of 25 February 2003; see also Berg (n 1) 193.

[58] Tribunal Constitutional (Spanish Constitutional Court), Guatemala Genocide Case, Judgement No 237/2005, 26 September 2005; see Art 24(1) of the Spanish Constitution.

3.3.4 Change of Citizenship

83 In the case of a change of nationality or dual nationality, the same permissive interpretation in accordance with the general purpose of the Convention can be applied as in relation to the active nationality principle. If, for example, a Chilean victim of torture under the Pinochet regime was granted asylum in Spain and acquired later Spanish citizenship, Spain is authorized, although not obliged, to establish its criminal jurisdiction over the case under the passive nationality principle.

3.3.4.1 Pinochet (France)

84 A case in point provides the attempted prosecution of General Pinochet by naturalized French citizens. Triggered by General Pinochet's arrival in the UK in 1998, the former Chilean citizens filed a complaint with a Paris court, in which they alleged to have suffered torture under Chile's military regime. Irrespective of the complainants being Chilean citizens at the time of the alleged crime, a French judge issued an arrest warrant based on the passive nationality principle as provided by the French Criminal Procedure Code.[59]

3.3.4.2 Habré case (ICJ)

85 The relation between the naturalization of alleged torture victims and the passive nationality principle was also raised in the ICJ's deliberation on the admissibility of the case Belgium v Senegal regarding the prosecution of former Chadian dictator Hissène Habré.[60] Belgium claimed in its submission admissibility of its complaint on the basis of its status as a State party to the Convention as well as due to its alleged 'special interest'. The latter, as Belgium argued, was derived from the passive nationality principle under the Convention under which naturalized Belgians, former Chadians, alleged to have suffered torture during Habré's dictatorship. Eventually, though, the ICJ did not consider Belgium's admissibility claim on the basis of the passive nationality principle, but was satisfied with Senegal's and Belgium's standing as States parties to the Convention and what the Court considered as entailing *erga omnes* obligations.[61] The decision of the Court's majority not to consider Belgium's claim due to a 'special interest' on the basis of the passive nationality principle did not remain without criticism, including the separate opinion of Judge Skotnikov[62] and the dissenting opinion of Judge Sur.[63]

[59] Since Pinochet was not present on French territory, the arrest warrant could not be based on universal jurisdiction over the crime of torture. See Brigitte Stern, 'Universality and Passive Personality Principles of Jurisdiction in French Law, In re Pinochet. French Tribunal de grande instance (Paris)' (1999) 93(3) AJIL 696. See also Berg (n 1) 179.

[60] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment, ICJ Reports 2012 422.

[61] ibid 70.

[62] 'The Court has a duty under its Statue to settle disputes—when it has jurisdiction to do so—unless there are circumstances preventing it from proceeding with the adjudication of a claim or a part of it. Senegal has contested Belgium's entitlement to exercise passive personal jurisdiction in the Mr. Habré case. Accordingly, when the Court discards, without explanation, a part of Belgium's claim by reducing its status in the present proceedings to that of any State party to the Convention against Torture, it fails in its duty': ibid 481 (Separate Opinion of Judge Skotnikov) para 8ff.

[63] According to Judge Sur the fact that the Belgian nationals (former citizens of Chad) acquired Belgian nationality several years after the facts, and thus relied on this naturalization vis-à-vis Senegal raised difficulties, since Senegal only recognizes Belgium's passive jurisdiction in respect of victims who possessed Belgian nationality at the time of the facts. Furthermore, Sur argues, 'under the Convention against Torture, the parties are not obliged to establish their passive criminal jurisdiction, meaning that the other parties are not obliged to recognize it, in particular when their own criminal law makes no provision for it. Accordingly, Belgium's request for extradition became inadmissible, as did its right to request that Senegal

3.4 Article 5(2): Universal Jurisdiction

86 Article 5(2) requires States parties to introduce into their legal framework provisions establishing jurisdiction over any torture offence stipulated in Article 4 where the alleged offender is present in any territory under its jurisdiction, irrespective where the alleged crime was committed and the perpetrator's or victim's nationality. This universal jurisdiction has to be exercised unless the State party decides to extradite the suspected torturer pursuant to Article 8 to any State with jurisdiction under the territorial and flag, active, or passive nationality principle.[64]

3.4.1 Relation to Articles 6 and 7

87 In general, Article 5 is closely related to Articles 6 and 7. While Article 5 requires to establish the jurisdiction for the investigation and potential prosecution of an alleged perpetrator, Article 6 and 7 detail the ensuing steps once the alleged perpetrator is under the State party's jurisdiction.

88 With regard to Article 5(2) as soon as an alleged torturer is present in any territory under a State party's jurisdiction, the Government is according to Article 6(1) under an obligation to ensure his or her presence by taking effective measures, eg by taking the person into custody. The criminal investigation authorities shall immediately make a preliminary inquiry into the facts in accordance with Article 6(2) and notify all States referred to in Article 5(1), above all the alleged torturer's home State and the territorial State, of the custody, investigations and its further intentions relating to the case and the possible exercise of universal jurisdiction in accordance with Article 6(3) and (4).[65] The territorial State, the home State of the suspected torturer and other States parties are required by Article 9 to provide judicial assistance, including the supply of all evidence at their disposal.

89 If any of the States parties with jurisdiction under the territoriality, active or passive nationality principle requests extradition according to Article 7, the relevant authorities of the State where the alleged torturer is present[66] must take a decision whether to extradite or to prosecute. If the State party opts for extradition, it must comply with the relevant provisions in Article 8, with the principle of non-refoulement in Article 3 and ensure, at the same time, that the State requesting extradition is not shielding the alleged torturer

exercise its criminal jurisdiction, since it no longer had a direct right to invoke it as an injured State.' Since the Court did eventually not render a decision on Belgium's admissibility claim under the passive nationality principle, the question of the validity of the argument remains unresolved. If one limits the analysis to the context of the Convention against Torture, it is, however, clear that Belgium can establish in its domestic legal framework jurisprudence over torture perpetrated against its citizens. This voluntary establishment of jurisdiction under the passive nationality principle is irrespective of whether other States do recognize it or when the alleged victims obtained their citizenship. Whether this established jurisdiction can be enforced extraterritorially by requesting the extradition of the alleged perpetrator, ie, Hissène Habré, has to be evaluated separately; see ibid 605 (Dissenting Opinion of Judge Ad Hoc Sur) para 21; see also ibid 481 (Separate Opinion of Judge Skotnikov); see also Mads Andenas and Thomas Weatherall, 'II. International Court of Justice: Questions relating to the obligation to extradite or prosecute (Belgium v Senegal) Judgement of 20 July 2012' (2013) 62 ICLQ 753, 766.

[64] See below Art 8. [65] See below Art 6, §§ 46–53.

[66] Note that the State party must make this decision irrespective under which jurisdiction it might prosecute the alleged perpetrator as long as the alleged perpetrator is present on its territory. Art 7(1) is not limited to the presence of a suspect who is held under universal jurisdiction according to Art 5(2) but also covers situations in which as suspect his present in a State party with jurisdiction under the territorial, active or passive nationality principle.

against proper criminal prosecution and punishment in accordance with the letter and spirit of Articles 4 and 5. If a State party opts for prosecution, it has to submit the case to its competent authorities which have to take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. Furthermore, they must ensure that the standards of evidence required for prosecution and conviction are not less stringent than those which are applied under territoriality or nationality jurisdictions, as stated explicitly in Article 7(2).[67] In other words, if the prosecuting authorities, after having carried out the necessary investigations, arrive at the conclusion that the information provided by the victims, by other States, inter-governmental or non-governmental organizations is not sufficient to justify a formal prosecution, they may, of course, close the proceedings. On the contrary, the suspect must be assisted in communicating with the nearest embassy or consulate of his or her home State, as provided for in Article 6(3)[68], and, by virtue of Article 7(3) 'shall be guaranteed fair treatment at all stages of the proceedings'.

3.4.2 Obligation to Establish Jurisdiction

90 The obligation to establish universal jurisdiction over torture as required under Article 5(2) is as compulsory as those pertaining to the territorial or active nationality principle. There is nothing in the Convention what would lend itself for an interpretation that the States parties' obligation to establish universal jurisdiction would be of a lower priority. Nevertheless, in its reporting procedure, the Committee had to repeatedly take issue with States parties failing to establish the required jurisdiction.[69]

3.4.2.1 Proceedings against Hissène Habré

3.4.2.1.1 Overview

91 The legal developments in relation to the investigation, prosecution, and eventual sentencing of former Chadian authoritarian leader Hissène Habré are particularly instructive when it comes to analysing the Convention against Torture's Articles 5, 6, and 7. The case adjudicated before national Senegalese courts, the Committee against Torture, the ICJ, the ECOWAS Court of Justice, and eventually before the for this purpose established Extraordinary African Chambers (EAC) sheds light on several pertaining issues, particularly on the obligation to establish the required jurisdiction under Article 5(2) and related, the duty to prosecute or extradite under Article 7.

92 Hissène Habré was Chad's president from 1982 to 1990. During his regime, approximately 40,000 political murders and systematic acts of torture were committed.[70]

[67] Art 7(2) reads as: 'These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.' See below Art 7, §§ 80–84.

[68] See below Art 6, § 46.

[69] See eg CAT, 'Concluding Observations: United Kingdom' (2013) UN Doc CAT/C/GBR/CO/5; CAT, 'Concluding Observations: Mozambique' (2013) UN Doc CAT/C/MOZ/CO/1; CAT, 'Concluding Observations: Sierra Leone' (2014) UN Doc CAT/C/SLE/CO/1; CAT, 'Concluding Observations: Congo' (2015) UN Doc CAT/C/COG/CO/1; CAT, 'Concluding Observations: Iraq' (2015) UN Doc CAT/C/IRQ/CO/1.

[70] See Commission of Inquiry, 'Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories' (7 May 1992) in Neil J Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 3, Laws, Rulings, and Reports, USIP Press Books 1995) 51–90.

After being ousted in a coup, Mr. Habré fled to Senegal where he was residing largely unaffected by his violent past. Eventually, in January 2000, seven Chadian nationals living in Chad filed a complaint with an examining magistrate in Senegal in which they alleged to have been tortured in Chad by agents of the Chadian State answerable directly to then President Habré. Consequently, in February 2000, the examining magistrate charged Hissène Habré with being an accomplice to acts of torture, placed him under house arrest and opened an inquiry against a person or persons unknown for crimes against humanity.

93 Still in February 2000, Mr. Habré applied to the Indictment Division of the Dakar Court of Appeal (*Cour d'appel de Dakar*) for the charge against him to be dismissed. The arguments brought forward were basically threefold: first, Senegal ratified the Convention against Torture in 1986, hence any conduct by Habré prior to Senegal becoming a State party was inadmissible *ratione temporis*. Second, since the Convention was argued to be not a self-executing treaty, and legislation implementing the Convention into the Senegalese legal framework was missing, Article 5 could not be invoked for any alleged crimes committed also after Senegal had become party to the Convention. Third, international customary law would be insufficient for the filing of a criminal complaint at a Senegalese court.[71]

94 On 4 July 2000, the Court of Appeal dismissed the charge against Hissène Habré and the related proceedings on the ground of lack of jurisdiction. According to the Court 'Senegalese courts cannot take cognizance of acts of torture committed by a foreigner outside Senegalese territory, regardless of the nationality of the victims: the wording of Article 669 of the Code of Criminal Procedure excludes any such jurisdiction.'[72] Remarkably, the Court of Appeal also held that 'the Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendments to Article 669 of the Code of Criminal Procedure by including therein the offence of torture, whereby it would bring itself into conformity with the objectives of the Convention.'[73]

95 Against this decision the Chadian complainants filed an appeal three days later with Senegal's Court of Cassation (*Cour de cassation*) and demanded the proceedings to be reopened, arguing that the ruling of the Court of Appeal was contrary to the Convention against Torture and that a domestic law could not be invoked to justify the failure to apply the Convention. The Senegalese Court of Cassation, however, confirmed the ruling of the Court of Appeal on 20 March 2001 stating, inter alia, that

> no procedural text confers on Senegalese courts a universal jurisdiction to prosecute and judge, if they are found on the territory of the Republic, presumed perpetrators of or accomplices in acts [of torture] … when these acts have been committed outside Senegal by foreigners; the presence of Hissène Habré cannot in itself justify the proceedings brought against him.[74]

In essence, Senegal's highest court brought the domestic proceedings against Mr. Habré to a close by arguing that the court lacked jurisdiction over the case. Although Senegal's constitution stipulated that international treaties are directly applicable,[75]

[71] Berg (n 1) 250; HRW, 'Chronology of the Habré Case' (27 April 2015) <https://www.hrw.org/news/2015/04/27/chronology-habre-case> accessed 2 Decemeber 2017.

[72] Cour d'appel de Dakar, Chambre d'accusation (Court of Appeal of Dakar), No 135, 4 July 2000; see Berg (n 1) 250.

[73] Cour d'appel de Dakar, No 135, 4 July 2000 (72); see ICJ Reports 2012 422 (n 60) para 76.

[74] *Suleymane Guengueng et al v Senegal*, No 181/2001, UN Doc CAT/C/36/D/181/2001, 17 May 2006 para 2.7.

[75] Art 79 of Senegal's constitution as of March 2001.

the Convention could not be applied since the Convention itself, so the reasoning, would require domestic implementation. But in absence of the required implantation, requiring an amendment of Article 669 of the Code of Criminal Procedure, no jurisdiction as required under Article 5(2) would be available.

96 Not directly connected to the proceedings in Senegal, on 19 September 2005, after four years of investigation, a Belgian judge issued an international arrest warrant for Hissène Habré, charging him with genocide, crimes against humanity, war crimes, torture, and serious violations of international humanitarian law.[76] The investigation had been triggered by a complaint filed by Chadian exiles who had acquired the Belgian citizenship. Accordingly, their complaint was based on the passive nationality principle as offered by Article 5(1)(c) in the Convention and provided by domestic Belgian law. The same day, Belgium issued an extradition request to Senegal citing, inter alia, the Convention against Torture. In response to the developments in Belgium, the Senegalese authorities arrested Hissène Habré on 15 November 2005. However, on 25 November 2005, the Indictment Division of the Dakar Court of Appeal stated that it lacked jurisdiction on the extradition request.[77]

97 On 26 November 2005, the Senegalese Minister of the Interior placed Hissène Habré 'at the disposal of the President of the African Union' and announced that Habré would be expelled to Nigeria within 48 hours. The following day already, however, the Senegalese Minister of Foreign Affairs stated that Mr. Habré would remain in Senegal and that, following a discussion between the Presidents of Senegal and Nigeria, it had been agreed that the case would be brought to the attention of the next Summit of Heads of State and Government of the African Union in January 2006.

98 On 24 January 2006, the African Union decided at its meeting in Khartoum 'to set up a Committee of Eminent African Jurists to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial' and to submit a report to its next session in July 2006.[78] This Committee eventually recommended the prosecution of Habré in Senegal.[79] Following the recommendation of the Committee of Eminent African Jurists, and also under the influence of the recent decision by the Committee against Torture in the case *Guengueng et al v Senegal*[80], the African Union decided at its July summit 'to consider the Hissène Habré case as falling within the competence of the African Union' and to 'mandate the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for a fair trial'.[81] In response, Senegalese President Wade accepted the African Union's decision, ordered Senegal's legal framework to be amended as to facilitate universal jurisdiction over the case of Hissène Habré, and required up-front funding for the trial.

99 In reaction to the outcome of the African Union summit, Habré filed in October 2006 an application with the Court of Justice of the Economic Community of West African States (ECOWAS) in which he claimed that his rights would be violated if proceedings against him were to be started. In its response, the ECOWAS Court ordered

[76] HRW (n 71). [77] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 74) para 2.10.

[78] Assembly of the African Union, 'Declaration on the Hissène Habré Case and the African Union' (24 January 2006).

[79] African Union 'Report of the Committee of Eminent African Jurists on the Case of Hissène Habré (2006).

[80] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 74); see below §§102–08.

[81] See ICJ Reports 2012 422 (n 60) para 107.

Senegal to comply with the principle of non-retroactivity in its endeavour to hold Habré accountable for the crimes committed between 1982 and 1990. Furthermore, and arguably more consequential, the ECOWAS Court concluded that Habré could only be tried before a 'special and ad hoc procedure of international character'.[82] Following the decision of the ECOWAS Court of Justice and the relentless campaigning of victims of the Habré regime, in January 2011, the African Union proposed a plan for the creation of 'extraordinary chambers' within the Senegalese justice system with judges to be appointed by the African Union. However, in May 2011, Senegal rejected the proposal of the African Union and ended negotiations on the creation of a court for the purpose of trying Habré.

100 A crucial turning point in the proceedings regarding Hissène Habré was reached in July 2012, when the ICJ ruled that 'Senegal must, without further delay submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him'.[83] As a consequence, Senegal and the African Union revived the plan for the creation of the Extraordinary African Chambers (EAC) within the Senegalese court system. One year later, on 2 July 2013, the EAC indicted Habré for war crimes, crimes against humanity, and torture and ordered his pre-trial detention. More than 1000 victims and relatives registered as civil parties.

101 Habré was convicted in the first instance on 30 May 2016.[84] Eventually, on 27 April 2017 the appeals chamber confirmed the convictions for war crimes, crimes against humanity, and torture and sentenced Hissène Habré to life imprisonment.[85]

3.4.2.1.2 The Habré case before the Committee against Torture—Guengueng et al v Senegal

102 In April 2001, as a response to the decision of the Senegalese Court of Cassation and the resulting blockage of any national avenues to hold Habré accountable, the Chadian complainants filed a complaint with the Committee against Torture under Article 22(3).[86] In their complaint, the applicants claimed to be victims of a violation by Senegal of Article 5(2) and Article 7 CAT. As for the alleged violation of Article 5(2), the complainants took particularly issue with the Court of Cassation's reasoning that the otherwise constitutionally guaranteed direct applicability of international treaties would not apply since the Convention against Torture requires legislative measures to implement the treaty. Furthermore, the complainants raised that Article 669 of the Code of Criminal Procedure—which enumerates the cases in which proceedings can be brought against foreigners in Senegal for acts committed abroad—has not been amended. On this basis, the Court of Cassation had argued, that 'the presence in Senegal of Hissène Habré cannot in itself justify the proceedings'.[87]

103 Before engaging in the merits, Senegal challenged the complaint's admissibility, arguing that the applicants lacked standing to submit a complaint under Article 22 since they were neither Senegalese nor residing in Senegal. This objection was, however,

[82] *Hissein Habre c Republique du Senegal* No ECW/CCJ/JUD/06/10 (ECOWAS Court of Justice, 18 November 2010).

[83] See below §§109–14.

[84] Chambre Africaine Extraordinaire d'Assises, *Ministère Public c. Hissein Habré*, Judgment of 30 May 2016.

[85] Chambre Africaine Extraordinaire d'Assises d'Appel, *Le Procureur Géneral c. Hissein Habré*, Judgment of 27 April 2017. However, the appeals chamber acquitted Habré of rape. It confirmed the total amount of reparations at 82 billion francs CFA (approx 125,000,000 Euro) and ordered a on purpose created trust fund to facilitate the execution of the reparation order.

[86] See above § 95.

[87] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 74) para 2.7.

dismissed by the Committee, which held that the question whether a complainant is effectively subject to the jurisdiction of the State party does not depend on his or her nationality. Since the complainants had sought to pursue their case within the Senegalese legal system, they had been under the State party's jurisdiction and hence their complaint was admissible.[88]

104 In response to the complainants alleged violation of Article 5(2), the Government of Senegal did not deny that it was lacking the jurisdiction required under Article 5(2), but argued that 'under the Convention a State party is not bound to meet its obligations within a specific time frame' and that 'Senegal is engaged in a very complex process that must take account of its status as a developing State and the ability of its judicial system to apply the rule of law'.[89] Hence, Senegal acknowledged its obligation to establish jurisdiction under Article 5(2), but argued that the required legal reforms would need time and therefore had not yet been implemented.

105 In response to the State party's argument that Senegal was cognizant of its obligation to establish jurisdiction under article 5(2), but confronted with a complex and lengthy implementation process, the complainants referred to Article 16 of the Vienna Convention on the Law of Treaties arguing that a State party is immediately bound by the obligation arising from an international treaty, from the moment the instrument of ratification is deposited.[90]. Furthermore, referring to Article 27 of the Vienna Convention, the complainants argued that Senegal was not in the position to invoke provisions of internal law as a justification for its failure to perform its treaty obligations.[91]

106 As a subsidiary argument, the complainants also contended that, even if one would accept that a State party was not immediately bound by its ratification of the Convention, Senegal violated Article 5(2) by not adopting the appropriate legislation within a reasonable time considering that fifteen years had passed since Senegal's ratification of the Convention in 1986. The complainants noted that the Committee had already reminded Senegal to introduce 'explicitly in its national legislation …' provisions which 'permit the State party to exercise universal jurisdiction as provided in article 5 et seq of the Convention …' when discussing Senegal's second periodic report in 1996.[92] In its response then, Senegal stated that it 'intended to honour its commitments, in the light of the Committee's conclusions and in view of the primacy of international law over internal law'.[93]

107 In May 2006, the Committee published its decision on the *Guengueng et al v Senegal* case. For the first time in an individual complaint, the Committee found a State party in violation of Article 5(2). Accordingly, Senegal failed to uphold its obligation to take such measures as may be necessary to establish its jurisdiction over such offences as stipulated in Article 4 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him or her pursuant to Article 7 to any of the States mentioned in Article 5(1).[94] The Committee further noted that the State party had not contested the fact that it had not taken 'such measures as may be necessary' in keeping with Article 5(2), and observed that also the Court of Cassation in 2001 itself considered

[88] ibid, paras 6.1–6.5; cf *HBA et al v Canada*, No 536/2013, UN Doc CAT/C/56/D/536/2013, 2 December 2015; see also below Art 6 § 45 and Art 22 §§ 32–34.
[89] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 74) paras 7.12, 7.14.
[90] ibid, para 8.2. [91] ibid, para 8.3.
[92] CAT, 'Report of the Committee against Torture' (1996) UN Doc A/51/44 (Supp), para 1114(a).
[93] CAT/C/SR.249, para 44.
[94] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 74) paras 8.2–8.9.

that the State party had not taken such measures. In its reasoning the Committee took up the subsidiary argument put forward by the complainants and based its finding of a violation of Article 5(2) on the consideration that 'the reasonable time frame within which the State party should have complied with its obligation has been considerably exceeded'.[95]

108 In addition to the violation of Article 5(2), the Committee also found Senegal to have breached its obligations under Article 7.[96] The Committee concluded that the 'State party was obliged to prosecute Hissène Habré for alleged acts of torture unless it could show that there was not sufficient evidence to prosecute, at least at the time when the complainants submitted their complaint in 2000'.[97] In addition, following Belgium's extradition request from September 2005, the Committee concluded 'that by refusing to comply with the extradition request the State party has *failed again* to perform its obligations under article 7 of the Convention'.[98]

3.4.2.1.3 The Habré case before the International Court of Justice—Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)

109 The obligation to establish jurisdiction under Article 5(2) and whether Senegal had violated it in the Habré case was also considered by the ICJ as part of Belgium's application to the Court in 2009, which was decided in 2012.[99]

110 Following the decision of the Committee against Torture in the *Guengueng et al* case[100] in 2006, Senegal undertook several legal reforms pertaining to its obligations under Article 5. These reforms included the extension of jurisdiction over torture and other crimes committed by foreign nationals outside of Senegal, irrespective of the victim's nationality.[101] Furthermore, a constitutional reform precluded the principle of non-retroactivity from the prosecution of crimes which were already crimes under international law at the time when they were committed.[102]

111 When Belgium filed in 2009 its application to the ICJ, the underlying dispute had been, by Belgium's own admission, already resolved due to Senegal's legal reforms in 2007 and 2008. Hence, 'any dispute that may have existed … had ended by the time the Application was filed', and the Court consequently—in absence of an ongoing dispute—lacked the jurisdiction to consider whether Senegal had violated its obligations under Article 5(2).[103] As a consequence of Senegal's legal reforms, the ICJ was not in the

[95] ibid, para 9.5. [96] ibid, para 9.7. See below Art 7 §§ 53, 54. [97] ibid, para 9.8.
[98] ibid, para 9.11. See below Art 7 § 63.
[99] Belgium alleged violations of Article 5(2), 6(2), and 7(1). [100] See above §§ 102–08.
[101] The amended Article 669 of the Code of Criminal Procedure read as follows: 'Any foreigner who, outside the territory of the Republic, has been accused of being the perpetrator of or accomplice to one of the crimes referred to in Articles 431-1 to 431-5 of the Penal Code … may be prosecuted and tried according to the provisions of Senegalese laws or laws applicable in Senegal, if he is under the jurisdiction of Senegal or if a victim is resident in the territory of the Republic of Senegal, or if the Government obtains his extradition.' Furthermore a new Article 664b was also incorporated into the Code of Criminal Procedure, according to which '[t]he national courts shall have jurisdiction over all criminal offences, punishable under Senegalese law, that are committed outside the territory of the Republic by a national or a foreigner, if the victim is of Senegalese nationality at the time the acts are committed': see ICJ Reports 2012 422 (n 60) para 28.
[102] ICJ Reports 2012 422 (n 60) para 31.
[103] ibid 48; the ICJ also dismissed Belgium's claim that Senegal was in violation of international customary law for not prosecuting Habré. The Court concluded to lack the required jurisdiction since none of the pertaining diplomatic correspondences between Belgium and Senegal referred to violations of customary international law, hence there was no dispute on which the ICJ could base its jurisdiction. The Court notes '[h]owever, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal

position to rule on the merits whether Senegal had indeed violated its obligation under Article 5(2) of the Convention.

112 However, while the ICJ was not in the position to directly consider the merits of Belgium's claim regarding Senegal's violation of Article 5(2), the Court did so implicitly when considering the merits of the violations under Article 6(2) and 7(1) which had been also alleged by Belgium. In this context, the Court asserted that the performance of the obligation to establish universal jurisdiction over the crime of torture under Article 5(2) is a necessary condition for enabling a preliminary inquiry under Article 6(2), and for submitting the case to the State party's competent authorities for the purpose of prosecution under Article 7(1).[104] Together, these obligations aim at enabling proceedings against the suspect, in the absence of extradition, and to achieve the objective and purpose of the Convention, which is to increase the effectiveness of the struggle against torture by avoiding impunity.[105] The interrelatedness between Articles 5, 6, and 7 and the belated establishment of jurisdiction under Article 5(2) in 2007 and 2008 not only deprived the relevant Senegalese courts in 2000 and 2001 of the required jurisdiction, but also 'necessarily affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention'.[106]

113 With regard to the timing of the implementation of the obligations under the Convention, the ICJ held that 'the obligation for the State to criminalize torture and to establish jurisdiction over it … has to be implemented by the State concerned as soon as it is bound by the Convention'.[107] Referring to Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, the ICJ held that Senegal cannot justify its breach of the obligation provided for in Article 7(1) of the Convention against Torture by invoking provisions of its internal law or the fact that it did not adopt the necessary legislation pursuant to Article 5(2) of that Convention until 2007.[108]

114 Overall, although the ICJ did not render any decision on the merits of the alleged violation of Article 5(2), the wording of its decision strongly implies to concur with the decision of the Committee against Torture in the *Guengueng et al* case that Senegal had been in violation of its obligation to establish jurisdiction under Article 5(2) until the legal reforms in 2007 and 2008. This non-performance of its obligation had further ramifications for Senegal's performance of its obligations under Articles 6(2) and 7 for which the ICJ eventually found Senegal to be in violation.[109]

3.4.3 Presence Requirement

3.4.3.1 'Have reason to suspect'

115 The only requirement for a State party to have jurisdiction over a torture case under Article 5(2) is the perpetrator's presence in any territory under the State party's jurisdiction. As soon as the authorities 'have reason to suspect'[110] that a person present in their territory may be responsible for acts subject to the obligation to extradite or prosecute, they are immediately obliged to start an investigation. At the latest, this point

problems': ibid para 54; see also Sangeeta Shah, 'Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (2013) 13 HRLR 351, 359.

[104] ICJ Reports 2012 422 (n 60) para 74. [105] See also Shah (n 103) 359.

[106] ICJ Reports 2012 422 (n 60) para 77. See also below Art 7 §§ 55–57.

[107] ICJ Reports 2012 422 (n 60), paras 75–77. [108] ibid, para 113. See also below Art 7 §§ 75–76.

[109] ICJ Reports 2012 422 (n 60), paras 79–88, 89–117. See below Arts 6 and 7.

[110] International Law Commission (ILC), 'Report of the International Law Commission' (2014) UN Doc A/69/10 139, ch VI, para 20.

is reached when the authorities receive a pertaining complaint.[111] However, this does not imply that the complainants have to provide conclusive evidence for the alleged perpetrator's guilt or for his or her precise whereabouts. It is incumbent on the competent authorities to establish these as part of their investigation.

3.4.3.2 'Any territory under its jurisdiction'

116 The broad formulation 'present in any territory under its jurisdiction' in Article 5(2) makes clear that the obligation to exercise universal jurisdiction also extends to territory under military occupation or similar de jure or de facto control. The formulation has to be read as permissive as in Article 2[112] or 5(1)[113] and interpreted in General Comment No 2.[114] It therefore extends beyond the State party's land and sea territory and includes all areas over which it exercises de jure or de facto effective control. States parties, like the United States or the United Kingdom at one point in Iraq and Afghanistan, which exercise de facto control over areas outside of their national territory are therefore also required to establish and exercise jurisdiction over alleged tortures who are present in these areas. This obligation arises even if neither the alleged perpetrator (Article 5(1)(b)) nor the alleged victim (Article 5(1)(c)) are nationals of the controlled territory (eg Afghanistan, Iraq) and the crime was committed outside of it (Article 5(1)(a)).

3.4.3.3 Irrelevance of purpose and duration of suspect's presence

117 For the purpose of Article 5(2), the questions why and for how long an alleged torturer has been present on the territory of a State party is irrelevant. He or she might reside in the forum State as in the Habré case (Senegal),[115] might come temporarily for the purpose of medical treatment, as in the cases of Pinochet (United Kingdom),[116] Almatov (Germany),[117] and al-Duri (Austria),[118] in the context of bilateral military co-operation, as in the case of Ould Dah (France),[119] for seeking asylum, as in the Zardad case (United Kingdom),[120] or for any other private or professional reason. Also an official invitation to attend a conference or a similar event, as in the *HBA et al v Canada* case,[121] does not relieve the authorities from their obligation to exercise universal jurisdiction. Similarly, there is also nothing in the Convention that would justify narrowing the scope of the presence requirement to the 'voluntary presence' of the alleged perpetrator on the State party's territory. Such a qualification would exclude the jurisdiction over those cases in which an alleged torturer is present in the forum State, for example due to his or her extradition in a criminal matter unrelated to torture. Nevertheless, although there is nothing in the Convention's text which would lend itself for an interpretation allowing a different treatment of different durations or purposes of presence, States parties repeatedly invoked an erroneous differentiation which risks torturers enjoying impunity.

118 The issue of the scope of the presence requirement was taken up by the Committee against Torture in its consideration of France's fourth to sixth periodic reports in April 2010. The Committee recognized the provision of universal jurisdiction under the French Criminal Procedure Code, but criticized that a pending bill which aimed at adopting French legislation to the Rome Statute would also result in a restriction of the presence requirement to 'normally resident' in France. Consequently, the prosecution of alleged

[111] ICJ Reports 2012 422 (n 60) paras 86, 88. [112] See above Art 2.
[113] See above §§ 58–61. [114] CAT/C/GC/2 (n 20). [115] See above § 91.
[116] See below § 168. [117] See below §180; Art 6 §§ 30–32. [118] See below Art 6.
[119] See below §130. [120] See below §120.
[121] *HBA et al v Canada*, No 536/2013 (n 88); see also below Art 6 and Art 22 §§ 32–34.

torturers, as in the case of Ely Ould Dah,[122] who are only temporarily present on French territory would no longer be possible. In the concluding observations the Committee therefore recommended that the 'normal residency' requirement be replaced by a provision simply demanding the presence in the territory under France's jurisdiction.[123]

119 Similarly, the Committee took issue in its concluding observations of Canada's sixth periodic report with the State party's practice of exercising universal jurisdiction. In particular, the Committee was critical of Canada's apparent policy under immigration procedures to remove or expel alleged perpetrators of torture from its territory rather than subjecting them to the criminal process as required under the Convention against Torture. According to reports submitted to the Committee, numerous foreign individuals who were accused of being responsible for torture, were not prosecuted in Canada, but expelled what resulted in the alleged torturers evading prosecution. Consequently, the Committee recommended Canada to exercise universal jurisdiction also over foreign perpetrators who are 'temporarily present' and requested the State party to 'ensure that the "no safe haven" policy prioritizes criminal or extradition proceedings over deportation and removal under immigration processes'.[124]

120 In stark contrast to the alleged Canadian practice of removing rather than investigating aliens who are suspected of torture is the UK's prosecution of Faryadi Sarwar Zardad. Zardad, an Afghan citizen, was a warlord and running a checkpoint between Jalalabad and Kabul from 1991 to 1996 at which travellers were frequently abducted and subjected to torture and other forms of ill-treatment. After moving to the UK in 1998 to seek asylum, his crimes came to light in the British media. Attorney General Lord Goldsmith announced that Britain had decided to try the case on the basis that Zardad's crimes were so 'merciless' and such 'an affront to justice' that they should be tried in any country.[125] Following the House of Lords' judgment in the Pinochet case[126] that torture is a crime of universal jurisdiction, the Court considered Zardad's crimes and decided them to be within the temporal jurisdiction of the Criminal Justice Act of 1988.[127] Since the United Kingdom was obliged under the Convention either to extradite or prosecute, and since no request for extradition had been received from the Afghan authorities or any other State party with jurisdiction over the case under Article 5(1), it fell to the United Kingdom to investigate the case and, if the test for prosecution was met, to prosecute Zardad. He was charged under Section 134 of the Criminal Justice Act which incorporates the Convention against Torture into British law.[128] Eventually in 2005, after a jury was not able to reach a verdict in a first trial,[129] Zardad was found guilty in a second trial

[122] See below § 130.

[123] CAT, 'Concluding Observations: France' (2010) UN Doc CAT/C/FRA/CO/4-6 para 19.

[124] CAT, 'Concluding Observations: Canada' (2012) UN Doc CAT/C/CAN/CO/6 para 14.

[125] 'UK Court Convicts Afghan Warlord of 'Heinous' Crimes' *The Guardian* (London, 18 July 2005).

[126] See below § 168–76.

[127] Subsequent to the UK ratification of the CAT, torture as an international crime was introduced in section 134 of the Criminal Justice Act in 1988, which states that a public official or person acting in an official capacity, whatever his or her nationality, commits the offence of torture if in the United Kingdom or elsewhere he or she intentionally inflicts severe pain or suffering on another person in the performance or purported performance of official duties.

[128] See also Kaleck (n 1) 941.

[129] Zardad was first brought to trial in 2004. One of the key legal challenges of the case was to show that, although Zardad did not necessarily administer torture himself, he was still responsible through the men he controlled at his military-style checkpoints. Relying on, inter alia, the decision of the CAT Committee in

of torture and of hostage taking between 1991 and 1996 and sentenced to twenty years of imprisonment. In February 2007, the Court dismissed Zardad's appeal.[130]

121 Zardad's prosecution was the first successful case under universal jurisdiction laws in the United Kingdom for torture committed abroad and occurred more than five years after the conclusion of the proceedings in relation to General Pinochet. The case is a compelling demonstration of the judicial as well as logistical challenges entailed in the exercise of universal jurisdiction, including the importance of mutual judicial assistance as stipulated in Article 9.[131]

3.4.3.4 Timing of Presence

3.4.3.4.1 Lack of Specification in Text of Article 5(2)

122 While it is clear that it is irrelevant for the scope of Article 5(2) why an alleged perpetrator is present on the State party's territory, the answer is less straightforward when it comes to the question when exactly the presence requirement has to be fulfilled. The wording of Article 5(2) refers only in general terms to 'cases where the alleged offender is present' and hence leaves it open at what stage of the proceedings (eg filing of the complaint, arrest, trial) the alleged offender actually has to be present. Drawing on the *travaux préparatoires* to clarify the issue in light of the drafters' discussion does also not yield any clarification since no pertaining deliberations are included. Furthermore, the Committee's concluding observations or its decisions on individual complaints do not conclusively clarify this aspect. Analysing national case law further reveals a heterogeneous practice with States parties demanding the presence requirement to be fulfilled at different stages of the proceedings.

3.4.3.4.2 No Presence at Moment of Complaint Leads To Non-Prosecution

123 Most commonly, States parties require the presence of the alleged torturer on the territory under their jurisdiction at the moment when the pertaining complaint is filed with their authorities. Should the alleged torturer not be present, States parties argue to lack jurisdiction in order to open an investigation.

3.4.3.4.2.1 Bouterse Case (Netherlands)

124 A case in point is the futile attempt to prosecute the former Suriname military ruler Lt. Col. Bouterse under universal jurisdiction in the Netherlands. The case concerned the fate of fifteen political opponents who were allegedly tortured and killed on Lt. Col. Bouterse's order in Suriname in December 1982 ('December killings'). Out of the fifteen victims, at least one was citizen of the Netherlands. In 1996, the relatives of the Dutch victim filed a complaint with the Dutch authorities demanding an investigation into the criminal responsibility of Mr. Bouterse. This initial request was rejected by the prosecutor and the plaintiffs appealed against this decision at Amsterdam's District Court

Elmi v Australia (UN Doc CAT/C/22/D/120/1998), the ICTY case of Furundzija, and the US case *of Kadic v Karadzic*, the first judgment of 7 April 2004 confirmed that although Zardad was not a de jure public official, he was to be treated as a public official on a de facto basis. However, after a week of deliberations, the jury did not arrive at a verdict and the judge decided to defer the case to a later date. On 8 June 2005, the retrial of the case against Zardad took place before the Old Bailey Criminal Court in London and the prosecutor announced new evidence that was not available to the first jury.

[130] *Regina v Faryadi Sarwar Zardad* [2005] High Court. No written judgment is available; *Regina v Faryadi Sarwar Zardad* [2007] EWCA Crim 279.

[131] See below Art 9 §§ 21–22.

(*Gerechtshof Amsterdam*).[132] After seeking external expert advice, the Court concluded in 2000 that the case should be prosecuted under universal jurisdiction on the basis of the Dutch Act Implementing the UN Torture Convention. The prosecution was considered permissible, inter alia, due to the low prospect of a meaningful prosecution in Suriname, the possibility of the 'retrospective' application of the Convention on crimes committed in 1982, and since 'the Court has found insufficient grounds in the report of the expert for the view that prosecution of Bouterse in this country [the Netherlands] would be impermissible under international (customary) law as long as he is not present in the Netherlands'.[133] In consequence, the Court ordered the Prosecutor to initiate a prosecution of Bouterse under what amounted to universal jurisdiction in absentia.

125 However, in 2001, the Dutch Supreme Court (*Hoge Raad*), following an appeal by the Procurator-General, overturned the much debated decision of the Appeals Court on several grounds, including that prosecutions on the basis of universal jurisdiction would be only possible 'when the suspect is present in the Netherlands at the time of his arrest'.[134] According to the Supreme Court, an extradition request addressed to the Suriname authorities and (hypothetical) subsequent extradition to the Netherlands would be not permissible to bring Bouterse under Dutch jurisdiction as foreseen in the Dutch Act Implementing the Convention Against Torture.[135]

126 Similar to the ruling in the Dutch Bouterse case, the Danish Public Prosecutor decided not to open an investigation into the alleged crimes of General Pinochet following a complaint submitted by Chilean exiles living in Denmark.[136] The complaint, filed in 1998 while Pinochet was under house arrest in the United Kingdom, sought to achieve Pinochet's extradition to Denmark and prosecution for his alleged responsibility for torture and other crimes. The Public Prosecutor justified the inadmissibility decision for the complaint by a lack of jurisdiction over the case due to the absence of the alleged offender on Danish territory. Furthermore, and similarly to the reasoning put forward in the Dutch Bouterse case, the Public Prosecutor argued that according to national law, the suspect must be on Danish territory, and hence an extradition of Pinochet from the United Kingdom to Denmark would bring Pinochet not under the relevant Danish

[132] See Gerechtshof Amsterdam (District Court of Amsterdam), *Wijngaarde et al v Bouterse*, LJN: AA8395, 20 November 2000. Initially the plaintiffs claimed that the Netherlands would have jurisdiction over the case under the active nationality principle since, in their view, Bouterse was a Dutch national as of 1982. However, this view was dismissed by the Public Prosecutor in Amsterdam who concluded that Bouterse had already lost his Dutch citizenship as of 1975 when joining the Suriname armed forces. With prosecution under the active nationality principle ruled out, and the passive nationality principle not provided for in the Dutch legal framework, the plaintiffs sought prosecution under universal jurisdiction. See Reydams, *Universal Jurisdiction* (n 1) 173.

[133] District Court of Amsterdam, Order of 20 November 2000 cited in Reydams, *Universal Jurisdiction* (n 1) 175.

[134] Hoge Raad (Supreme Court of the Netherlands), *Prosecutor-General of the Supreme Court v Desiré Bouterse*, LJN: AB1471, Judgment of 18 September 2001 para 8.5 cited in Reydams, *Universal Jurisdiction* (n 1) 178.

[135] *Prosecutor-General of the Supreme Court v Desiré Bouterse*, LJN: AB1471 (n 134) para 138. See Berg (n 1) 197–99, 218, 257, 393; Reydams, *Universal Jurisdiction* (n 1) 173–78, Ryngaert (n 1) 32; See also Liesbeth Zegveld, 'The Bouterse Case' (2001) 32 NYIL 97. While trials in absentia are in principle permissible under Dutch criminal law the voluntary presence of the accused has been defined as a precondition for investigations based on the universal jurisdiction principle. The stipulation of the presence requirement has been influenced by the Belgian experience. See Kaleck (n 1) 942–43. The Supreme Court, however, acknowledged the possibility of 'preparatory investigations' for the purpose of collecting evidence which would allow the suspect to be arrested once he is on the territory of the Netherlands.

[136] Berg (n 1) 189ff; Reydams, *Universal Jurisdiction* (n 1) 127.

jurisdiction. Otherwise, the Prosecutor argued, 'there would be no limit on Danish jurisdiction over crimes that are subject of an international convention'.[137] Similarly, efforts to prosecute Jorge Zorreguieta, Argentina's former minister of agriculture and member of its military junta, came to an end in 2001 when the Amsterdam Court ruled on a complaint alleging his responsibility for crimes against humanity and torture. Referring to the Dutch Supreme Court's decision in the Bouterse case, the Court dismissed the complaint as inadmissible due to the lack of presence of Zorreguieta in the Netherlands.[138]

3.4.3.4.2.2 'Affair Javor' (France)

127 A similar line of reasoning was also put forward by a French Court when deciding in the 'Affair Javor' that the case was inadmissible since the alleged perpetrators were not present on French territory at the time when the complaint was filed. In 1993, Elvir Javor and three other men submitted a complaint before the examining magistrate of Paris against an undisclosed person or persons, who they alleged had been responsible for acts of war crimes, crimes against humanity, genocide, and torture as part of the ethnic cleansing campaigns in Bosnia and Herzegovina in the early 1990s. The plaintiffs, who all fled from Bosnia and Herzegovina to France during the war, alleged to be victims of these acts. Although the accused named in the complaint were not present in France at the time of the filing of the complaint, an examining judge initially declared the complaint to be admissible on the basis of the Geneva Conventions as well as the Convention against Torture.[139] Following the appeal by the prosecutor to the Appeals Court (*Cour d'appel*), the case was however dismissed, with the Court arguing that universal jurisdiction as stipulated in Articles 689-1 and 689-2 of the French Criminal Procedure Code requires the presence of the alleged perpetrator on French territory. Hence, in the present case, France was lacking jurisdiction to consider the complaint. The inadmissibility decision was eventually also confirmed by the Court of Cassation (*Cour de cassation*) which argued that the mere presence of torture victims on French territory is not sufficient to commence investigations under French law. According to the ruling complaints may always be filed, however they do not trigger investigations or the opening of trials, if the suspect cannot be found on French territory.[140]

128 Similar to the denial of initiating a prosecution in the Javor case, the French authorities also denied having jurisdiction in relation to complaints filed against Jean Claude Duvalier, the former President of Haiti.[141] Duvalier was alleged to be responsible for the murder and torturing of tens of thousands of Haitians during his and his father's

[137] See Opinion of the Director of Public Prosecution of December 3, 1998, case no 555/98, at 29 cited after Reydams, *Universal Jurisdiction* (n 1) 129; see also Berg (n 1) 189–90.

[138] Ryngaert (n 1) 32; see also Berg (n 1) 188–89.

[139] See Berg (n 1), fn 548. The investigating magistrate however declined the requested jurisdiction on the basis of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted 26 November 1968, entered into force 11 November 1970) 754 UNTC 73; the Convention for the Prevention and the Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTC 271; the Statute of the International Military Tribunal at Nuremberg, annexed to the Treaty of London of 8 August 1945; see also Tribunal de Grande Instance de Paris (High Court of Paris), Order No 94 052 2002/7, 6 May 1994.

[140] Cour de cassation, Chambre criminelle (Court of Cassation of France), Rejet, No 95-81527, 26 March 1996; see Berg (n 1) 177; Jeanne Sulzer, 'Implementing the Principle of Universal Jurisdiction in France' in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer 2007) 130.

[141] See Kalinda, (complaint) Tribunale de grande instance de Paris (High Court of Paris) (filed 4 July 1994); Depaquier v Zigiranyirazo (complaint) Tribunale de grande instance de Paris (High Court of Paris) (filed 19 July 1994) and Order of 23 February 1995 as quoted in Amnesty International, *Universal Jurisdiction: The Duty to States to Enact and Enforce Legislation: Chapter 10: Torture: State Practice at the National Level: Country by Country Review* (Index number IOR 53/013/2001, 31 August 2001) 40; Berg (n 1) 177.

rule before fleeing to France in 1986. In 1999, four Haitians who alleged to have been imprisoned and tortured during Duvalier's rule and later moved to France, submitted a complaint with the Paris Prosecutor's Office in which they accused Duvalier of crimes against humanity. Eventually, the complaints were rejected, inter alia, on the grounds that Article 6891-1 of the French Code of Criminal Procedure, which provides for universal jurisdiction, requires the presence of the suspect on the French territory when the complaint is filed. Reportedly, the French Ministry of the Interior stated in December 1998 that it had lost track of Duvalier and that he had probably left French territory.[142]

3.4.3.4.3 Continuation of Prosecution in Cases When Suspect Absconds

129 There are also cases in which the alleged torturer was present in the State party's territory at one point after a complaint was filed, however, eventually succeeded to abscond. While it is clear that the State party had jurisdiction over the case under Article 5(2) as long as the suspect had been on its territory, the question arises whether States parties continue to have jurisdiction also after the suspect has left, or whether they require his or her return to their territory for a continuation of the proceedings.

3.4.3.4.3.1 Ely Ould Dah Case (France)

130 In 2002, the French Court of Cassation *(Court de cassation)* decided in the case Ely Ould Dah that the State party could continue to prosecute and eventually even try the suspect, after he had fled France following his release from police custody.[143]

131 Ely Ould Dah, a Mauritanian army commander, participated in a military training in France in 1999 when two Mauritanian exiles in France filed a complaint accusing him of torture allegedly perpetrated in 1990 and 1991. The fact that Mr. Ould Dah was not a resident, but merely visiting France as part of a military training is irrelevant for the scope of Article 5(2) and the related obligations under Article 6 and 7. According to Article 6(1), France exercised its jurisdiction over the case and took Mr. Ould Dah into custody after being satisfied by the examination of the available information regarding his alleged responsibility for torture. Following his appeal, Mr. Ould Dah was released on the basis of a *contrôle juridicaire* entailing the confiscation of his passport and house arrest. While Article 6(1) in principle provides States parties with the possibility to ensure the presence of the suspect with other legal and less intrusive means than custody, Ould Dah's release from custody resulted in his escape and return to Mauritania in April 2000.

132 While continuing to pursue Mr. Ould Dah's arrest and extradition, the French authorities also continued with his domestic prosecution and initiated trial proceedings on the basis of universal jurisdiction. Mr. Ould Dah's legal team challenged his prosecution, arguing that it would constitute a retroactive application of French law[144] as well

[142] For an overview of the proceedings against Duvalier following his voluntary return to Haiti in 2011 see TRIAL International, 'Jan-Claude Duvalier' (2016).

[143] Cour de Cassation, Chambre criminelle (Court of Cassation of France) No 02-85379, 23 October 2002; see Reydams, *Universal Jurisdiction* (n 1) 139; Ryngaert (n 1) 24, 50; Sulzer, 'Implementing the Principle of Universal Jurisdiction in France' (n 140) 127. See also FDH, Mauritanie—Affaire Ely Ould Dah (November 2005); see also below Art 6 § 33.

[144] The crimes were alleged to be committed in 1990 and 1991. France introduced only in 1994 substantive provisions into its domestic legal framework criminalizing torture (Art 222-1 Criminal Code). However, France had ratified CAT in 1986. Furthermore, Arts 689-1 and 689-2 of the Code of Criminal Procedure had already been introduced into the Code of Criminal Procedure in 1985 and provided French courts with jurisdiction to prosecute and try anyone in France who committed torture outside French territory. Article 689-2 refers explicitly to the definition in Art 1 of the Convention.

as a violation of the *non bis in idem* principle since Mauritania had previously passed an amnesty covering Mr. Ould Dah's alleged crimes.[145] In October 2002, the Court of Cassation (*Court de cassation*) confirmed the Appeals Court's reasoning, including the permissibility of the prosecution *ratione temporis* as well as its decision to consider itself not bound by the Mauritanian amnesty. Importantly, the Court of Cassation assigned the case to a lower court, the Assize Court of Nîmes (C*our d'assises*), in order to try Mr. Ould Dah in absentia.[146] Eventually, in 2005, Mr. Ould Dah received the maximum sentence of ten years of imprisonment. The case's judgment was the first time that a French court had applied universal jurisdiction without the accused being present during the trial. In the context of the case, the satisfaction of the presence requirement at the beginning of the proceedings, when Mr. Ould Dah was present in France, was sufficient for the French authorities to justify the continuation of the proceedings into the trial phase even after his flight to Mauritania. The continuous participation of Mr. Ould Dah's legal representatives in the proceedings also attenuated concerns regarding the permissibility of a criminal trial in absentia. Mr. Ould Dahl challenged his conviction before the European Court of Human Rights. His application was however declared inadmissible.[147]

3.4.3.4.3.2 'Congo Beach' Case (France)

133 Another French case which is instructive in relation to the timing of the presence requirement under universal jurisdiction is the so-called 'Congo Beach' case.[148] The case pertains to more than 350 young men who had fled from the Republic of Congo to the DRC and disappeared soon after their UN facilitated repatriation back to Congo at the river port, known as 'the Beach', in 1999.

134 More than ten years later, in December 2001, human rights organizations filed a criminal complaint at the *Tribunal de Grande Instance* of Paris in which they accused numerous high ranking Congolese officials, including Congo's Minister of Interior, to be criminally responsible for the men's enforced disappearance, torture, and crimes against humanity.[149] The complaint was based on Articles 689-1 and 689-2 of the Code of Criminal Procedure in relation to torture and Article 212-1 of the Criminal Code for Crimes against Humanity. Out of the alleged perpetrators, only one, Norbert Dabira, Inspector-General of the Congolese Armed Forces in 1990, was present in France at the time when the complaint was filed. Following his questioning by the French authorities, Dabira was placed under judicial examination, however, he was nevertheless able to return to Congo.

[145] Law No 93-23 of 14 June 1993 on amnesties grants members of the armed forces amnesties for violations committed between 1 January 1998 and 18 April 1992. See Loi no 93-23 du 14 juin 1993 portant Amnistie, Journal Officiel de la Republique Islamique de Mauritanie (15 June 1993) 369; see also Berg (n 1) 339.

[146] Cour de Cassation, Chambre criminelle (Court of Cassation of France) No 02-85379, 23 October 2002.

[147] *Ould Dah v France* App no 13113/03 (ECtHR, 17 March 2009).

[148] ICJ, 'Certain Criminal Proceedings in France (Republic of the Congo v France): Overview of the case'. See also Berg (n 1) 179–85; Ryngaert (n 1) 34.

[149] The complaint was filed by OCHD (Observatoire congolais des droits de l'homme), the association of relatives of victims and supported by the International Federation of Human Rights Leagues (FIDH) and the French Leauge of Human Rights. The alleged perpetrators included, but were not limited to, Denis Sassou Nguessou (President of the Republic of Congo), General Pierre Oba (Interior Minister), Norbert Dabira (Inspector-General of the Army), and Blaise Adoua (Commander of the Republican Guard) and any other individuals having Congolese nationality that the investigation might reveal. The case was transferred in February 2002 to the High Court of Meaux where Inspector-General Dabira owned a residence.

135 The developments in France caused the Republic of Congo to file an application with the ICJ in December 2002, in which it sought the annulment of the investigation and prosecution measures undertaken by the French authorities.[150] Congo accused France that by

> attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed by him in connection with the exercise of his powers for the maintenance of public order in his country …

it violated 'the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations … exercise its authority on the territory of another State'.[151]

136 In addition, Congo sought from the ICJ the indication of provisional measures 'for the immediate suspension of the proceedings conducted by the investigative judge' since these would cause irreparable prejudice regarding Congo's image and amicable relations.[152] In its June 2003 decision on C*ertain Criminal Proceedings in France (Republic of the Congo v France)*,[153] however, the ICJ found no risk of irreparable prejudice and therefore rejected Congo's request for a provisional measure. In the same decision, the ICJ also rejected Congo's allegation that France's unilateral assumption of universal jurisdiction would constitute a violation of a principle of international law.[154]

137 Following the ICJ's ruling on interim measures, the French Court issued in early 2004 an international arrest warrant against General Dabira. In April 2004, in a separate development in the case, the French authorities arrested the Congolese police chief Jean-Francois Ndengue who had also been named in the 2001 complaint, during a visit to Paris, charged him with crimes against humanity und took him into custody. Following an appeal by the prosecutor already on the next day—and what human rights organizations had described as the result of political interference[155]—the decision to arrest Ndengue was quashed by the Court of Appeals, his release was ordered and all investigatory acts were declared as annulled.

138 Furthermore, in November 2004, the Court of Appeals also annulled the proceedings in relation to all other suspects named in the 'Congo Beach' complaint of 2001, arguing that the complaint was 'too general' to provide the basis for the application of universal jurisdiction and that 'universal jurisdiction in absentia was not allowed under French law'.[156]

[150] *Certain Criminal Proceedings in France (Republic of the Congo v France)*, Application instituting proceedings, ICJ, 9 December 2002.

[151] *Certain Criminal Proceedings in France (Republic of the Congo v France*) (n 150) para 1.

[152] FIDH, 'The Beach Massacre before the International Court of Justice' (2003) <http://www.fidh.org/Article.php3?id_Article=2344> accessed 8 March 2006.

[153] C*ertain Criminal Proceedings in France (Republic of the Congo v France)*, Request for Indication of Provisional Measures, Order of 17 June 2003.

[154] After repeated extensions of time limits for the filling of written pleadings, replies, and rejoinders, and shortly before the date of the opening of the oral proceedings, Congo withdrew the case from the ICJ in November 2010. See *Certain Criminal Proceedings in France (Republic of the Congo v France*), Order of 16 November 2010, ICJ Reports 2010 635.

[155] See FIDH, 'Release of Jean François Ndengue—Paris: Complicity in Crimes against Humanity' (7 April 2004).

[156] Article 689-1 of the Code of Criminal Procedure reads as '(1) Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when

For the State to initiate any step, including investigations, the presence of the suspect in France would be a precondition.

139 This reading of the presence requirement by the Court of Appeals was appealed by human rights organizations which had originally submitted the complaint. About two years later, in January 2007, the Court of Cassation (*Cour de cassation*) lifted the entire decision of the Court of Appeals, assigned the case to a new court and ordered it to resume jurisdiction of the case, which lead to a reopening of the investigation.[157] Since then General Dabira made at least three requests with the Court of Cassation, the investigative judge at the Court of Meaux as well as the Paris Appeals Court[158] to end the proceedings against him, arguing that he should not be investigated for a case which has in his opinion already been conclusively settled in a previous trial in Brazzaville in 2004. These requests have however always been rejected.

140 Both French cases, the case against Ely Ould Dah as well as the so-called 'Congo Beach' case, demonstrate how proceedings under universal jurisdiction can continue even after a suspect, who was at one point present, is outside the State party's territory. As outlined above, different States parties answer differently the question when the presence requirement stipulated in the Convention's universal jurisdiction provision has to be fulfilled. While some States require the alleged perpetrator to be present from the outset of any proceedings and otherwise deny jurisdiction, ie, Netherlands (Bouterse case) or France ('Affair Javor', Duvalier case), others are satisfied with the suspect's presence as late as the start of the trial, ie, Spain (Pinochet case).[159] In the Ely Ould Dah case the authorities considered the suspect's presence at the moment of the initiation of the investigation as sufficient to put him on trial even after he had left the State party's territory. On the one hand, and from a pure prosecutorial point of view, the later the presence requirement has to be fulfilled the easier it becomes for the State party to initiate proceedings under universal jurisdiction and hence to pursue the objective to end impunity. Conditioning the initiation of an investigation on the presence of the alleged perpetrator, eg even if it is known in advance that the suspect is about to travel to the State party, can seem as unnecessarily restrictive and as hampering to those cases in which the alleged perpetrator is only briefly in the forum State. On the other hand, while the State party is in principle free to regulate the precise timing of the fulfilment of the presence requirement in its domestic legal framework, it has to do so within the boundaries provided by international fair trial standards.[160] States parties have to ensure that a permissive presence requirement does not result in a violation of the rights of the alleged offender. As an answer to this balancing act, Berg suggests, that

> it should be sufficient to establish the presence of the alleged offender in the course of the investigation, latest at trial. This reading would guarantee the rights of the alleged torturer and, at the same time, contribute to the very purpose of the Convention against Torture, namely to reduce safe havens for torturers and strengthen the prohibition of torture.[161]

French law is applicable under the provision of Book I of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence. (2) For the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10th December 1984, any person guilty of torture in the sense of Article 1 of the Convention may be prosecuted and tried in accordance with the provisions of Article 689-1.' See Berg (n 1) 184.

[157] Cour de Cassation, Chambre criminelle (Court of Cassation of France) No Q 04-87.245 FS-P+F+I, Judgment of 10 January 2007.

[158] In 2012 his case was transferred to the new Genocide and Crimes Against Humanity Unit at the Paris Court of High Instance (*Tribunal de Grande Instance de Paris*).

[159] See below § 168–76.

[160] See Berg (n 1) 214ff; see also Ryngaert (n 1).

[161] Berg (n 1) 232.

3.4.3.4.4 Permissibility of Investigation Despite Absence of Alleged Torturer

141 Some States parties to the Convention require the fulfilment of the presence requirement for universal jurisdiction only at a later stage of the proceedings. Accordingly, the filing of a complaint and the opening of formal proceedings including an investigation becomes possible despite the absence of the alleged perpetrator. The most prominent example in this regard is likely to be the Spanish case seeking the extradition of General Pinochet from the United Kingdom. Both, the initiation of an investigation as well as the arrest warrant of 1998 were possible under Spanish law despite the absence of Pinochet on Spanish territory. However, in order to start trial proceedings before a Spanish Court, Pinochet's extradition from the UK to Spain would have to be implemented.[162] Similarly, in the Bouterse case the Dutch Supreme Court concluded that Dutch courts would lack jurisdiction to prosecute the former Suriname leader as long as he is not present in the Netherlands. Remarkably though, the Supreme Court also acknowledged that the Dutch authorities were nevertheless entitled to start 'preparatory investigations' prior to this presence.[163]

3.4.3.5 Universal Jurisdiction in absentia

142 Under the Convention, Article 5(2) is the only form of jurisdiction requiring the presence of the alleged perpetrator on the territory of the State party. Neither the territoriality principle nor the different forms of the nationality principles under Article 5(1) stipulate such a condition. The presence requirement under Article 5(2) of the Convention provides for a form of universal jurisdiction which is distinct from what has sometimes been called 'super pure universal jurisdiction'.[164] Some States, eg Belgium prior to the legislative amendments in 2003,[165] established jurisdiction over torture offences even if the alleged perpetrator was not present in the State party's territory and no other link providing for a jurisdiction under the territoriality or nationality principle was available. Hence, the application of 'super pure' universal jurisdiction has to be distinguished from the above outlined instances in which a suspect was present at one point on the territory of a State party which started to exercise its jurisdiction under Article 5(2) and continued to do so even after the alleged torturer absconded.

143 While the purpose of Article 5(2) is to contribute to the elimination of safe havens for torturers, there is nothing in the Convention what would lend itself to a reading that States parties are under an obligation to establish a universal jurisdiction which does not require the presence of the alleged perpetrator, aside of the jurisdictions required under the territoriality and nationality principles. At the same time though, there is also nothing in the Convention which would bar States parties to establish in their internal legal framework other forms of jurisdictions which go beyond those required by the Convention. This is made clear by Article 5(3) which explicitly states that the Convention 'does not exclude *any* criminal jurisdiction exercised in accordance with internal law'.

144 In light of the extraterritorial application of national laws to cases without any link to the forum State, it is not surprising that universal jurisdiction in absentia has been repeatedly challenged, particularly by States whose officials had been investigated or prosecuted under this type of jurisdiction. Partly overlapping with the objections voiced towards the passive nationality principle, universal jurisdiction in absentia has been

[162] See below § 170; see also Berg (n 1) 203–05.
[163] See above § 124.
[164] Berg (n 1) 30.
[165] See below § 146.

frequently criticized as being incompatible with the equality and sovereignty of States and posing a challenge to the stability of international relations.

3.4.3.5.1 Arrest Warrant Case (Belgium)

145 The permissibility of universal jurisdiction without the presence of the alleged perpetrator ('universal jurisdiction in absentia') was initially also raised in the so-called 'Arrest Warrant Case ' before the ICJ in 2000.[166] At the centre of the dispute between the Democratic Republic of Congo (DRC) and Belgium was the permissibility under international law of an arrest warrant issued in 2000 by a Belgium investigative judge against the then incumbent Minister of Foreign Affairs of the DRC, Mr. Abdulaye Yerodia Ndombasi. In the arrest warrant the Minister was accused of grave breaches of the Geneva Conventions and crimes against humanity. The underlying Belgium law from 1993 provided for the prosecution of these crimes irrespective of the place of the crime, the presence, and the nationality of the alleged perpetrator and victim.[167] With the alleged crimes perpetrated in the DRC and the alleged perpetrator and victims with no links to Belgium, the DRC initially challenged the permissible extent of the arrest warrant under national universal jurisdiction. In addition, as a subsidiary argument, the DRC claimed absolute immunity from criminal prosecution for the State's incumbent Minister of Foreign Affairs. Belgium, on the other hand, defended its jurisdiction with references to international customary law and the Permanent Court of International Justice's ruling in the landmark Lotus case of 1927.[168]

146 Eventually though, since the DRC dropped the claim of excessive jurisdiction in its final submission to the Court, the ICJ limited its ruling to the question of immunity and missed 'a golden opportunity to cast light on a difficult and topical legal issue'.[169] The ICJ confirmed in its judgement in 2002 the DRC's claim to immunity for its Foreign Minister, but did not pronounce any judgment on the permissibility of universal jurisdiction in the absence of the alleged perpetrator under international law, nor on the permissibility of Belgium's legal basis for the arrest warrant.[170] In response to the ICJ's verdict on the Minister's immunity, Belgium withdrew the arrest warrant. Two years after the ICJ's judgment a Belgium pre-trial Appeals Court concluded that the arrest warrant against the DRC's officials was inadmissible even on domestic grounds since Belgian law would in fact have required the presence of the suspect due to requirements of domestic law.[171] This ruling further restricted the application of Belgium's universal jurisdiction

[166] For an overview of the case see ICJ, 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium): Overview of the case'. See also Berg (n 1) 225–30; Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 J Int'l Crim Just 589; Matthias Goldmann, 'Arrest Warrant Case (Democratic Republic of the Congo v Belgium)', *Max Planck Encyclopedia of Public International Law* (January 2009); MC Bassiouni, 'Universal Jurisdiction Unrevisited: The International Court of Justice Decision in Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)' (2002–2003) 12 Pal YIL 27; Reydams, *Universal Jurisdiction* (n 1) 116–17, 227–31.

[167] For an analysis of Belgium's overall first application of universal jurisdiction, dealing with crimes committed by Rwandans during the Rwandan genocide see also see Luc Reydams, 'Belgium's First Application of Universal Jurisdiction: The Butare Four Case' (2003) 1 J Int'l Crim Just 428.

[168] *The Case of the SS Lotus* (France v Turkey), Judgement, Permanent Court of International Justice, 7 September 1927.

[169] Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13 EJIL 4 856; see also Berg (n 1) 225.

[170] *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment, ICJ Reports 2002 3.

[171] See Reydams, *Universal Jurisdiction* (n 1) 116; see also Berg (n 1) 230.

under the War Crimes Act to cases, where the suspect has to be voluntarily present on Belgian territory.[172]

147 Notwithstanding the eventually reduced scope of the Court's decision, the judgment revealed diverging opinions among the ICJ's judges on the permissibility of universal jurisdiction in absentia. On the one hand, some of the judges tended to consider Belgium's legal framework providing for universal jurisdiction in absentia as incompatible with modern international law.[173] Allowing for universal jurisdiction in absentia, so parts of the underlying reasoning, would have far-reaching ramifications for the sovereignty of States, risks undermining the system of international relations and causing 'judicial chaos'.[174] On the other hand, some judges argued that 'there is … nothing in [the] case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law—that is, State practice—is neutral as to the exercise of universal jurisdiction'.[175] Hence, since there is nothing in international customary law that would constitute a prohibition, States are free to extend their criminal jurisdiction, even as far as universal jurisdiction in absentia.[176]

3.4.3.5.2 Habré Case

148 The permissibility of universal jurisdiction in the absence of the alleged perpetrator became also a critical issue in the context of attempts in Belgium to prosecute Hissène Habré for the crimes committed during his authoritarian rule in Chad.[177] In June 2002, a Belgian Appeals Court decided in a case dealing with the prosecution of Israel's Ariel Sharon[178] that Belgian universal jurisdiction[179] could only be invoked if the alleged perpetrator was present on the State's territory. In light of Habré's residence in Senegal, the pertaining investigation in Belgium came to a halt.

149 In February 2003, the Belgian Court of Cassation (*Cour de cassation)* dismissed the case against Sharon arguing that he would enjoy immunity from criminal prosecution due to his position as Prime Minister. However, the Court of Cassation also reversed the Appeals Court's previous ruling and concluded that Belgian law would provide for universal jurisdiction in absentia. Accordingly, the Court concluded that Belgian law would not require the presence of the accused on Belgian territory at the moment of the initiation of criminal proceedings in relation to genocide, crimes against humanity,

[172] Relating to this point it was criticiszd that '[t]he court based itself on a provision in the domestic code of penal procedure; it did not consider international law. As for the timing of the decision, it is bizarre for a country to issue an international arrest warrant and insist on its international legality before the ICJ, only to have a domestic court decide two years later that the warrant contravenes municipal law. The ruling also implies that the proceedings against Pinochet were ill-founded under domestic law': Reydams, *Universal Jurisdiction* (n 1), 116ff; see also Berg (n 1) fn 794.

[173] *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (n 170), Separate opinion of President Guillaume 35–46; Separate opinion of Judge Rezek 91–95.

[174] *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (n 170), Separate opinion of President Guillaume 35–46, para 15.

[175] *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (n 170) Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal 63–90, para 45.

[176] See Berg (n 1) 228. [177] See above §§ 85, 91ff

[178] Cour d'Appel de Bruxelles, Chambre des Mises en Accusation (Court of Appeals of Brussels), *Sharon and Yaron*, 26 June 2002. The case related to the attempted prosecution of Ariel Sharon, then Israel's Prime Minister, before a Belgian Court. Sharon was alleged to have responsible for the mass killings of Palestinian refugees in Sabra and Shatila refugee camps in 1982, while he was Israel's Minister of Defence.

[179] The domestic legislation in question was Belgium's 1993 law on the punishment of serious violations of international law as well as the pertaining amendment of 1999. See Reydams, *Universal Jurisdiction* (n 1) 117. For an overview of the legislative and judicial developments regarding universal jurisdiction in Belgium see also Kaleck (n 1) 932–36; HRW, 'Universal Jurisdiction in Europe: The State of the Art' (June 2006) 37–44.

grave breaches of the Geneva Conventions, and war crimes.[180] As a political backlash to these judicial developments and new complaints against US President Bush at Belgian courts looming, Belgian lawmakers undertook comprehensive reforms of the domestic legal framework, effectively ending universal jurisdiction in absentia, with the exception of a few cases under a transition clause. This clause allowed for the continuation of pending cases inter alia if a civil petitioner to a case had Belgian citizenship prior to the reform's entry into force. Since three plaintiffs in the Habré case had obtained Belgium citizenship, the Belgian authorities were able to resume their investigation.

150 Eventually, in September 2005, the Belgian investigative judge charged Habré with genocide, crimes against humanity, war crimes, torture and other serious violations of international humanitarian law, issued an international arrest warrant as well as an extradition request which was inter alia based on the Convention against Torture. The 2003 amendments to Belgium's legal framework, however, effectively meant that the Belgian prosecution of Hissène Habré was no longer a prosecution under universal jurisdiction, but under the passive nationality principle.

3.4.4 Competing Claims to Jurisdiction

151 The jurisdictions required under Article 5(1) and (2) are not mutually exclusive, but can be overlapping. If torture, for example, was perpetrated in State A and the alleged perpetrator flees to State B, both States have jurisdiction over the case. State A as the territorial State is required to have established jurisdiction under the territorial principle as stipulated under Article 5(1)(a). State B is required to have established universal jurisdiction under Article 5(2) covering the presence of the alleged perpetrator on its territory.

3.4.4.1 No Legal Hierarchy

152 Although there were suggestions during the drafting of the Convention that jurisdiction under the territoriality principle should have priority over other forms, the final text of the Convention does not endorse a formal ranking among the jurisdictions provided in Article 5.[181] Instructively, Article 7 of the 1970 Hague Hijacking Convention which provided the template for the formulation of Article 5 during the Torture Convention's drafting process does also not feature any ranking between the different types of jurisdiction.[182]

153 Hence, the State party, on whose territory the alleged perpetrator is present, is free to exercise its jurisdiction over the case, if it 'does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I'[183] of Article 5. Universal jurisdiction under Article 5(2) is not subsidiary to other forms of jurisdiction as provided in Article 5(1). The State where the alleged torturer is present is therefore under no legal obligation to extradite, but is obliged to prosecute unless it opts for extradition according to the principle '*aut detere aut judicare*' as stipulated in Article 7.

154 A precondition for extradition, however, is the presence of an extradition request by another State party with jurisdiction over the case under Article 5(1). If no State requests an extradition, the State has no legal alternative other than to investigate

[180] Antonio Cassese, 'The Belgian Court of Cassation v The International Court of Justice: The Sharon and Others Case' (2003) 1 JICJ 437; Cour de Cassation de Belgique (Court of Cassation of Belgium), HSA et al v SA et al (Decision related to the indictment of Ariel Sharon, Amons Yaron, and Others), No P.02.1139.F/2, Judgment of 12 February 2003; International Legal Materials, 42(3), 596–605.

[181] See also above § 57, See also below Art 8 § 15. [182] Boulesbaa (n 21) 233.

[183] Art 5(2) CAT.

thoroughly the allegations of torture and, if the evidence is considered to be sufficient, to prosecute the person concerned before its domestic criminal courts. Furthermore, should the forum State receive an extradition request, it still has to ensure that any extradition it may opt for does not contravene the very purpose of the Convention which is to make the fight against torture more effective and hold its perpetrators accountable. This concerns particularly the State party's obligation not to facilitate impunity by extraditing the suspect to a safe haven as well as its obligation to respect the non-refoulement principle as stipulated in Article 3 of the Convention.

155 If there are any indications that the State which requested extradition has done so for the purpose of shielding the alleged torturer against effective prosecution ('safe haven'), such an extradition request shall not be met and the alleged torturer shall, in the absence of other extradition requests, be prosecuted under the universal jurisdiction principle by the forum State. Similarly, should there be arguments leading to the conclusion that the State requesting extradition de facto does not dispose over a judicial system which is effectively able to conduct a prosecution in accordance with international criminal and human rights law, the forum State shall refrain from extraditing the alleged torturer to this State, but prosecute under its own universal jurisdiction or extradite—if requested—to another State which is not only willing but also capable to effectively exercise its jurisdiction under Article 5(1).

3.4.4.2 Hierarchy of Jurisdictions due to Practical Considerations

156 While there are no formal grounds in the Convention which would stipulate a ranking between the different heads of jurisdiction, practical considerations such as the availability of evidence, the location of witnesses, different language requirements, or financial considerations can speak against the exercise of universal jurisdiction in the forum State.

3.4.4.2.1 Guatemala Genocide Case (Spain)

157 The Spanish Guatemala genocide case is an instructive example when it comes to how States parties deal with the relation between the different heads of jurisdiction under Article 5.[184] The case concerned 10,000s of victims of the Guatemalan civil war from 1962 to 1996 in which particularly members of the indigenous Maya population were killed by forces belonging to or de facto operating under the command of the country's military regime. In December 1999, survivors and relatives of victims, including peace Nobel Laureate Rigoberta Menchú Tum, filed a pertaining complaint in Spain, accusing former members of the Guatemalan Government, including former President Efraín Ríos Montt, of genocide together with acts of torture, terrorism, and kidnapping.[185]

158 After an examining magistrate declared himself competent to investigate the case under universal jurisdiction, the Public Prosecutor filed an appeal which was partly upheld by the National Court (*Audienca Nacional*). Importantly, while the Convention against Torture does not stipulate any ranking between universal and other jurisdictional heads, it remains at the discretion of the State party's national legislator to introduce such a hierarchy with regard to its domestic application. Accordingly, Spain's universal

[184] See Amy Ross, 'The Ríos Montt Case and Universal Jurisdiction' (2016) 18 J Genocide Res 361; Berg (n 1) 190–97; Reydams, *Universal Jurisdiction* (n 1) 188–91; Ryngaert (n 1) 33.

[185] See Naomi Roht-Arriaza, 'The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction' in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer 2007) 117. See also Kaleck (n 1) 956.

jurisdiction (in absentia) would be 'subsidary' to the jurisdiction of the territorial state. Hence, only if the complainants could demonstrate that the territorial state, Guatemala, did not adequately prosecute the crime in question, Spain would be in the position to exercise universal jurisdiction. As long as this was not sufficiently 'accredited' by the complainants, the prosecution in Spain had to be stayed.[186] This decision by the National Court was further appealed at Spain's Supreme Court (*Tribunal Supremo*) which partly upheld the previous verdict in 2003. It confirmed the 'priority test' endorsed by the National Court and concluded also that universal jurisdiction could not be exercised 'without a legitimizing link with Spain, such as the presence of the offender in Spain'.[187] The Supreme Court, however, concluded that Spain has the competence to exercise jurisdiction for those cases whose victims were Spanish citizens and therewith allowed prosecution under the passive nationality principle.[188] Eventually, though, this differentiation between Spanish and non-Spanish victims was removed by Spain's Constitutional Court which concluded that the Spanish citizenship would not be required to enjoy the effective protection of the rights enshrined in the Spanish constitution.[189] In 2006, the Spanish authorities issued indictments as well as extradition requests to Guatemala.[190]

3.4.4.2.2 Abu Ghraib Case (Germany)

159 The hierarchy of jurisdictions was also a pertinent issue for the effort to initiate a prosecution under universal jurisdiction in Germany in relation to the abuse of prisoners in the US-run prison Abu Ghraib in Iraq.

160 In November 2004, then US Secretary of Defense Donald Rumsfeld, CIA director George Tenet, and others were subject of a complaint filed in Germany, in which they were accused of being responsible for the systematic torture of detainees in the Abu Ghraib prison in Iraq.[191] The German prosecutor classified the allegations as crimes against humanity and hence as violations of international humanitarian law as codified in the Code of Crimes against International Law (CCIAL, *Völkerstrafgesetzbuch*) and

[186] See Berg (n 1) 192.

[187] See Tribunal Supremo (Spanish Supreme Court), 'Guatemala Genocide Case', No 327/2003, Judgment of 25 February 2003.

[188] See also above § 82.

[189] Tribunal Constitucional (Constituional Court), No 237/2005, Judgment of 26 September 2005. See also Kaleck (n 1) 956; Naomi Roht-Arriaza, 'Guatemala Genocide Case, Judgment No STC 237/2005' (2006) 100 AJIL 207.

[190] The extradition request was eventually declared invalid by Guatemala's Constitutional Court. Following his election to Congress in 2007 and subsequently enjoying immunity it was only in 2012 that Ríos Montt was formally indicted by the Guatemalan authorities. After a protracted process with repeated delays and interruptions, Ríos Montt was convicted for genocide and crimes against humanity in May 2013 and sentenced to eighty years of imprisonment. Only a few days after this judgement, Guatemala's Constitutional Court suspended the proceedings and ordered the trial to restart from where it stood as of 19 April. Ríos Montt died on 1 April 2018. See Emi Maclean and Sophie Beaudoin, 'Eighteen Months After Initial Conviction, Historic Guatemalan Genocide Trial Reopens But Is Ultimately Suspended' (6 January 2015), Summary from Guatemala Trials before the National Courts of Guatemala; Emi MacLean, 'Guatemala's Constitutional Court Overturns Rios Montt Conviction and Sends Trial Back to 19 April' (21 May 2013), Summary from Guatemala Trials before the National Courts of Guatemala; Jo-Marie Burt and Paulo Estrada, 'The Guatemala Genocide Trial Resumes' (20 October 2017), Summary from Guatemala Trials before the National Courts of Guatemala.

[191] For an overview see ECCHR, 'Rumsfeld Torture Cases' <https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/rumsfeld.html> accessed 5 December 2017.

the German Code of Criminal Procedure.[192] In contrast to the German Criminal Code which would require the suspect's presence on German territory for the initiation of proceedings under universal jurisdiction, the CCAIL already allows for universal jurisdiction proceedings in cases in which the presence of the suspect can be expected.[193] While this more permissive presence requirement may increase the prospect of an investigation, the classification of the alleged torture cases as crimes against humanity implies a higher burden of proof, including the requirements of the crime to be widespread, systematic, and directed against civilians. Furthermore, and critically in the German Abu Ghraib case, the classification of torture crimes under the CCAIL also implied that universal jurisdiction became subsidiary to other heads of jurisdiction. Against this background, the German Federal Prosecutor was able to drop the case in February 2005, arguing that the US' jurisdiction under the territorial principle would have supremacy. Surprisingly, any potential reservations that leaving the case with the US authorities may result in impunity were not considered to be sufficiently substantiated in order to justify a prosecution in Germany.[194]

3.4.5 Temporal Scope of Jurisdiction

161 In general, the obligations entailed in the jurisdictions to be established under Article 5 arise with the State becoming a party to the Convention. Consequently, only those acts which were committed after the State has ratified or acceded to the Convention fall under the jurisdiction of the State. Crimes perpetrated prior to this date are outside of the Convention's scope *ratione temporis*. Notwithstanding this general rule, a considerable variety exists when it comes to States' practices with some States establishing domestic legislations, which provides for an application of the Convention to acts committed prior to its ratification or accession date. Furthermore, norms such as the prohibition of torture have existed already prior to the creation of the Convention as a part of customary international law. The temporal scope of these norms reaches beyond the date at which a State became party to the Convention and binds States irrespective of the Convention's temporal scope.

3.4.5.1 *OR, MM, and MS v Argentina*

162 In *OR, MM, and MS v Argentina*[195] the complainants to the Committee against Torture were Argentinian citizens residing in Argentina, writing on behalf of deceased relatives, also Argentinian citizens, allegedly tortured to death by Argentine military authorities in 1976. They claimed that the enactment of the 'Due Obedience Act' and the 'Finality Act' amounted to violations of the Convention.

163 The 'Due Obedience Act'[196] presumed (without admitting proof to the contrary) that those persons who held lower military ranks at the time when the crimes were

[192] Art 153 (f).

[193] Berg (n 1) 368; see also Andreas Fischer-Lescano, 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law' (2005) 6 GLJ 3 697.

[194] In November 2006, a second complaint was filed which raised in addition to the torture cases in the Abu Ghraib prison also those cases which were perpetrated in the military detention facility in Guantanamo bay. While the torture cases were this time classified as war crimes, and again not as torture, the German prosecutor again was able to drop the case due to the subsidiarity principle included in the prosecution of war crimes. See ECCR (n 191).

[195] *OR et al v Argentina*, Nos 1/1988, 2/1988, and 3/1988, UN Doc CAT/C/WG/3/DR/1, 2, and 3/1988, 23 November 1989.

[196] Act No 23,521 of 4 June 1987.

committed were acting under superior orders and therefore exempted from punishment. The immunity also covered superior military officers who did not act as commander-in chief, chief of zone, or chief of security police or penitentiary forces, provided that they did not themselves decide or that they did not participate in the elaboration of criminal orders. Although the victims named in the complaint were allegedly tortured to death prior to the entry into force of the Convention,[197] the authors nonetheless challenged the compatibility of the 'Due Obedience Act' with the Convention. They also challenged the compatibility of the provision of the 'Finality Act'[198] which established a deadline of sixty days for commencing new criminal investigations with regard to the 'dirty war' (*guerra sucia*) and which expired on 22 February 1987.

164 Despite being found inadmissible *ratione temporis* the Committee took the opportunity to emphasize in an *obiter dictum* that the obligation to take effective measures to prevent torture and to punish acts of torture existed as a general rule of international law[199] even prior to the entry into force of the Convention. In this context, the Committee observed that it would seem that the 'Due Obedience Act' pardoned the acts of torture that occurred during the 'dirty war' and that as a result, many persons who committed acts of torture remained unpunished. The Committee further observed that Argentina was 'morally bound'[200] to provide a remedy to the victims of torture and to their dependents, notwithstanding the fact that the acts of torture occurred before the Convention's entry into force under the responsibility of a de facto Government which was not the present Government of Argentina. Furthermore, the Committee deemed the legislation to be incompatible with the spirit and purpose of the Convention against Torture.

3.4.5.2 Bouterse Case (Netherlands)

165 The temporal scope of the Convention's application was also raised in the Bouterse case.[201] Since the crimes which Bouterse was alleged to have perpetrated took place in 1982 and hence preceded the Netherlands' ratification of the Convention against Torture in 1988, the proceedings were challenged *ratione temporis* and claimed to be a retroactive application of the Convention. In 2000, however, the Amsterdam District Court rejected an appeal requesting an end of the proceedings *ratione temporis*. It argued that the Convention of 1986 would be 'of a declaratory nature', which only confirmed what was already customary international law at the time when the alleged crimes were committed as far as the prohibition, punishment and description of torture as a crime against humanity are concerned.[202] Hence, the Court argued, a 'retrospective' application

[197] Argentina signed the Convention in 1985 and ratified it in 1986. The Convention entered into force on 26 June 1987.

[198] Act No 23,492 of 12 December 1986.

[199] The Committee referred to the Nuremberg principles, Art 5 UDHR, and Art 7 CCPR.

[200] *OR et al v Argentina*, Nos 1/1988, 2/1988, and 3/1988 (n 195) para 9.

[201] See above § 124; Reydams, *Universal Jurisdiction* (n 1) 176.

[202] See Gerechtshof Amsterdam (Amsterdam Court of Appeal), Bouterse case, Decision, Petition Nos R 97/163/12 Sv and R 97/176/12 Sv, 20 November 2000, para 8.2. The Court of Appeals explained that 'torture as a crime against humanity was already a crime in 1982 under customary international law, and that the offender can be held personally liable under criminal law'; that 'in 1982, it was probably not the case (any more) that a crime against humanity could also be committed only in time of war or armed conflict, not in time of peace'; that 'crimes against humanity are not subject to statutory limitation'; and that 'customary international law, as it stood in 1982, gave a state competence to exercise extraterritorial (universal) jurisdiction over a person accused of a crime against humanity when that person was not a national of the state'. Furthermore, the Court agreed with the court-appointed expert, John R Dugard of the University of Leiden, that the Act 'could be applied retrospectively to cover conduct that was illegal under Dutch law before 1989 but was not criminalised

of the Convention, which does not create new offences, for events which occurred prior to its ratification would be permissible. Consequently, the Amsterdam District Court did not dismiss the case *ratione temporis.*

166 Eventually, though in 2001, the Dutch Supreme Court overturned the previous appeals decision by arguing that the application of the Convention for crimes committed in 1982 constituted a violation of the legality principle as enshrined in the Dutch Constitution and the Criminal Code. As a result, the Supreme Court found that the Dutch Act implementing the Convention against Torture was not applicable to Bouterse's acts in 1982, since Article 16 of the Dutch Constitution prohibits retroactive application of the law. Hence, Dutch courts lacked jurisdiction over the case *ratione temporis*.[203]

3.4.5.1 Habré Case (ICJ)

167 In its 2012 decision in the Habré case, the ICJ elaborated on the temporal scope of Senegal's obligation under the Convention against Torture. Accordingly, Senegal, which had ratified the Convention in 1986, was only bound by the Convention's obligation from its entry into force in 1987 and hence only from thereon required to have established the different heads of jurisdictions stipulated in Article 5. Consequently, those crimes which were allegedly perpetrated under Habré's regime from 1982 to 1987 were outside of the temporal scope of the Convention and hence the pertaining allegations inadmissible for the ICJ. Nothing in the Convention obliged Senegal to establish jurisdictions in accordance with Article 5 which would cover the period prior to the treaty's entry into force.[204]

3.4.5.2 Pinochet Case (UK)

168 The ICJ's ruling in the Habré case also indirectly confirmed the decision of the House of Lords in the prominent 'Pinochet 3' decision in 1999. The case relating to former Chilean military ruler Augusto Pinochet and Spain's request to the United Kingdom for his extradition is certainly among the most prominent cases when it comes to the application of extraterritorial jurisdiction and highly pertinent for the delineation of the temporal scope of the Convention against Torture.[205]

169 Augusto Pinochet, who ruled Chile from the coup d'état in 1973 until 1990, travelled in 1998 to the United Kingdom in order to receive medical treatment. Based on investigations which had already been undertaken several years in advance, Spanish authorities issued an arrest warrant and demanded Pinochet to be extradited from the UK to Spain in order to put him on trial for his role in the killings of Spanish citizens

under the name of torture, such as assault or murder', because it was a retrospective statute that did not create new offences, but provided jurisdiction over a crime that was 'criminal according to the general principles of law recognized by the community of nations', within the meaning of Art 15(2) CCPR. See also Elies van Sliedregt and Nico Keijzer, 'Correspondents' Reports—The Netherlands (2000) 3 YBIHL 548; see also Berg (n 1) 245–49.

[203] Supreme Court of the Netherlands (Hoge Raad) (n 135).

[204] ICJ Reports 2012 422 (n 60) para 96ff.

[205] See also Antonio F Perez, 'The Perils of Pinochet: Problems for Transitional Justice and Supranational Governance Solution' (1999–2000) 28(2) DENJILP 190; Naomi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 NELR 311; Naomi Roht-Arriaza, 'The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction' in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer 2007) 113–24.

in Chile in the aftermath of the coup d'état. In response, Pinochet was put under house arrest in his London hospital in October 1998. However, for the extradition request to be approved, British law required reciprocity meaning that the crime of which Pinochet was accused in Spain would have to be also a crime in the UK. Since the Spanish authorities sought to exercise their jurisdiction under the passive nationality principle for the murder of Spanish citizens outside of Spain, and British law did not provide for an equivalent passive nationality jurisdiction, the requirement of double criminality was not met. Hence, extradition was deemed not to be permissible.[206]

170 In response to the blocked avenue to seek extradition on the basis of the passive nationality principle, the Spanish authorities issued on 18 October 1998 a second arrest warrant. This warrant was based on universal jurisdiction for the crimes of genocide, terrorism, abduction, and torture and intended to overcome the jurisdictional issues which previously hampered extradition. Issuing an arrest warrant under universal jurisdiction despite Pinochet's presence in the UK was possible for the Spanish authorities since domestic law only required the presence of the alleged perpetrator on Spain's territory with the start of the trial.[207]

171 As a reaction to the second arrest warrant and the pertaining extradition request, the British Crown Prosecution Service appealed to the House of Lords asking it to pronounce its views on essentially two issues, which would eventually decide whether Pinochet could be extradited to Spain or not.

3.4.5.2.1 House of Lords Decisions

172 The first issue concerned the question whether Pinochet was immune from prosecutions, and hence should not be extradited to Spain. The second issue was whether the crimes alleged in the Spanish arrest warrant were indeed extraditable offences under UK law.[208] As with the extradition request connected to the first arrest warrant, for the UK to extradite Pinochet to Spain it had to be established that the crimes alleged in the second arrest warrant were also crimes in the UK and hence fulfilled the requirement of 'double criminality'. The answer to the question was contingent on the temporal scope of the UK's obligation under the Convention against Torture.

173 Essentially, two lines of reasoning were put forward in order to decide on the temporal scope of the Convention. According to the first line of reasoning, double criminality was only given from 1988 onwards, when the UK became a State party to the Convention against Torture and passed its pertaining implementation law, the Criminal Justice Act. Since the Spanish arrest warrant concerned alleged crimes committed in the period from 1973 to 1990, those crimes committed prior to 1988 would fall outside of the temporal scope of the UK's obligation under the Convention. Only with the ratification of the Convention, the UK was under an obligation to establish jurisdiction in accordance with Article 5(2) over torture committed outside of its border, in this case Chile, by an alleged perpetrator who was present in the UK. Hence, only those alleged crimes committed in the period between 1988 and 1990 would satisfy the double criminality requirement and constitute extraditable offences.

[206] See Berg (n 1) 204. [207] See also above §141.

[208] A third issue, the question how far the amnesty law passed under Pinochet's rule was shielding Pinochet from prosecution was not considered by the House of Lords, but left for the Spanish authorities to deal with should the extradition be approved.

174 According to the second line of reasoning, in order to approve the Spanish extradition request, double criminality would have to be satisfied only at the moment when the request was put forward, hence in 1998. Since this was the case—both Spain and the UK were States parties to the Convention in 1998 and under the obligation to have universal jurisdiction over torture—double criminality for all alleged crimes was fulfilled and extradition would be permissible. This reasoning implied that the actual date of commission of the crime was irrelevant and that the Convention could also be applied to acts committed prior to the UK joining the Convention.

175 In what would become later known as the 'Pinochet 1' decision, the majority of the House of Lords decided in 1998 that the requirement of double criminality would have to be satisfied only at the date of the extradition request. Since this was the case, and the Lords also decided that Pinochet would not enjoy any immunity from prosecution, his extradition to Spain would be permissible.[209] Hence, in light of the decision of the House of Lords, the Home Office ordered in December 1998 the extradition proceedings to go ahead. However, before any extradition proceedings could be executed, the House of Lords' decision was challenged due to allegations of bias of one of the judgments' Lords and subsequently annulled by a decision which came to be known as 'Pinochet 2'.[210] Consequently, the matter had to be reconsidered.

176 Contrary to the outcome in the annulled 'Pinochet 1' decision, in March 1999 the Lords concluded in what would become known as 'Pinochet 3' that for the requirement of double criminality to be satisfied, the act under consideration would have to be a crime under UK law already at the date of its commission.[211] Consequently, since the UK's universal jurisdiction for torture was only established in 1988, those acts preceding the Convention's ratification were not extraditable crimes. Out of thirty-two crimes stated in the Spanish extradition request only one remained. Eventually though, in March 2000, the Home Office decided to order Pinochet's release on medical grounds. Following the Spanish Foreign Ministry's failure to forward in due time a pertaining appeal by the National Court (*Audiencia Nacional*)[212] to the British authorities, Pinochet returned to Chile and was never put on trial for any of the alleged crimes put forward in the Spanish extradition request. Remarkably, the members of the House's majority, although all arriving at the conclusion that double criminality is only given from 1988 onwards, put forward arguments which were considerably different from each other and hence did not endorse a consensus on why double criminality would be only given from 1988 onwards.[213]

[209] *Regina v Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division) and Regina v Evans and another and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)* [1998] UKHL.

[210] Lord Hoffman's position as Director and Chairperson of the Amnesty International Charity was considered to be incompatible with Lord Hoffman's role in deciding on the Pinochet's extradition with Amnesty International simultaneously campaigning for the latter's prosecution. See In Re Pinochet [1998] UKHL.

[211] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)* [1999] UKHL.

[212] See also *Roitman Rosenmann v Spain*, No 176/2000 (n 46).

[213] Furthermore, in its deliberations, the members of the House of Lords made no significant references to customary international law, but exclusively based their decision on domestic legislation, ie, the Criminal Justice Act implementing the Convention against Torture.

3.4.5.3 Ely Ould Dah Case (France)

177 In the French trial proceedings against Ely Ould Dah[214], the defendant's legal team challenged the legality of the case claiming a retroactive application of the 1994 law criminalizing torture in France to crimes which were allegedly committed by Mr. Ould Dah in 1990 and 1991. In 2001, the Court of Appeals (*Cour d'appel*) dismissed this objection arguing that since France had become a State party to the Convention against Torture in 1986 and treaty law being above domestic statute law, no retroactive application was given even if the substantive legislation was only incorporated at a later date into the French domestic legal framework. Furthermore, torture had been outlawed as an aggravating circumstance in French law prior to 1994.[215]

3.5 Article 5(3): Savings Clause

178 Article 5(3) stipulates that the Convention 'does not exclude any criminal jurisdiction exercised in accordance with internal law'. The formulation, which is based on the original Swedish draft, did not give rise to any substantial discussions and had already been adopted by consensus in the Working Group in 1981. While Article 5(1) and (2) oblige States parties to establish jurisdictions on the basis of the territoriality, nationality,[216] and universal jurisdiction principle in order to close safe havens for perpetrators, Article 5(3) provides the basis for States parties to incorporate other forms of jurisdictions which are not covered by the preceding paragraphs of Article 5 into their domestic legal frameworks. By implication, Article 5(3) also clarifies that paragraphs 1 and 2 should not be read as exhaustive and are therefore not meant to constrain States parties.[217] As such, the domestic legal framework may provide for jurisdiction which goes beyond the scope of Articles 5(1) and (2), eg by stipulating universal jurisdiction in absentia, but it may not limit the Convention's jurisdictional scope by introducing additional qualifying criteria, eg by requiring the 'normal residency' of an alleged torturer on the State party's territory.

3.5.1 Pinochet (Spain)

179 An example for a national jurisdiction going beyond the requirements of the Convention is Spain's domestic legal framework in the context of the Pinochet case. In October 1998, the Spanish authorities issued an arrest warrant under the universal jurisdiction principle, although the alleged perpetrator was not present on Spain's territory. Even if one would consider the Spanish law an aberration of Article 5(2)—and being within the margin of interpretation when it comes to the timing of the presence requirement—Article 5(3) clarifies that the Convention does not bar Spain from establishing such a form of jurisdiction, provided it is in conformity with other general principles of international law.[218]

[214] See also above § 130.

[215] Referring to the then effective Articles 309 and 303(2) of the French Criminal Code. See Cour d'appel de Montpellier (Court of Appeals of Montpellier), Ordonnance et mise en accusation devant la Cour d'Assises et de non-lieu partiel et Ordonnance de prise de corps, 25 May 2001. See also Berg (n 1) 200–02; Reydams, *Universal Jurisdiction* (n 1) 139–40.

[216] An exception to the obligatory nature of Article 5(1) and (2) is the 5(1)(c) which highlights the facultative nature of the establishment of jurisdiction on the basis of the passive nationality principle.

[217] See Burgers and Danelius (n 25) 133.

[218] See above § 170.

3.5.2 Almatov Case (Germany)

180 In the Almatov case,[219] the United Nations Special Rapporteur on Torture as well as numerous human rights NGOs appealed to the German authorities to initiate an investigation into the alleged criminal responsibility of the Uzbek Minister of Interior for the widespread practice of torture in the country's places of detention and the Andijan massacre. While Germany would be obliged to do so under the Convention if Almatov was present on Germany's territory, Germany's Code of Crimes against International Law (CCIAL, *Völkerstrafgesetzbuch*) would have also empowered the German authorities to initiate such an investigation even in the absence of Almatov, provided that the acts of torture were classified as crimes against humanity. While there is nothing in the Convention which obliges Germany to initiate such an investigation in absentia, Article 5(3) makes it clear that such an investigation in absentia is not in breach of the Convention.

ROLAND SCHMIDT

[219] See also below Art 6 §§ 30–32; Berg (n 1) 482; ECCHR, 'Criminal complaint against Zakir Almatov'; HRW, 'Germany: Almatov's Exit No Bar to Prosecution' (Brussels, 21 December 2005).

Article 6

Procedural Safeguards During the Preliminary Investigation Phase

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

1. Introduction 250

2. Travaux Préparatoires 250

2.1 Chronology of Draft Texts 250

2.2 Analysis of Working Group Discussions 252

3. Issues of Interpretation 253

3.1 Article 6(1): Obligation to Ensure the Presence of the Alleged Torturer 253

3.1.1 Examination of Information Available 253

3.1.1.1 *HBA et al v Canada* 254

3.1.2 Custody or Other Legal Measures to Ensure Presence 257

3.1.2.1 Almatov Case (Germany) 258

3.1.2.2 Ely Ould Dah Case (France) 259

3.1.2.3 Al-Duri Case (Austria) 260

3.1.3 'Only for such time as necessary' 261

3.2 Article 6(2): Obligation to Make a Preliminary Inquiry Into the Facts 261

3.2.1 The Habré Case before the ICJ-Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) 262

3.3 Article 6(3): Obligation to Assist in Communicating with Representative of the State 263

3.4 Article 6(4): Obligation to Notify Other States of the Measures Taken and Intended to Be Taken 264

3.4.1 Application to All Forms of Jurisdiction under Article 5 264

3.4.2 'Has taken a person into custody' 264

3.4.3 'Immediately notify' 265

3.4.4 'States referred to in Article 5(1)' 265

3.4.5 Duty to Promptly Report Findings of Preliminary Inquiry 265

1. Introduction[1]

1 Articles 6 to 9 are closely linked to the obligation of States parties under Article 5 to establish jurisdiction over the offence of torture in accordance with the territoriality, flag, nationality, and universal jurisdiction principles. Although Articles 6 to 9 are particularly relevant to universal jurisdiction, these provisions in principle apply to all types of jurisdiction laid down in Article 5.

2 Most of the procedural safeguards provided for in Article 6 are fairly self-evident. If the suspected torturer is present in the territory of the State which initiates criminal proceedings (the presence is a legal requirement only for exercising universal jurisdiction under the Convention against Torture), its authorities shall take him or her into custody or take other legal measures to ensure his or her presence. The cases of *Al-Duri*[2] and *Almatov*[3] illustrate that Governments are not always aware of their obligation to arrest any suspected torturer present in their territories or, for diplomatic or political reasons, choose not to take the measures required under international law. The *Ould Dah*[4] case shows that non-custodial measures may not be sufficient to ensure the presence of a suspected torturer.

3 After having taken the necessary measures to ensure the presence of the suspected torturer, the criminal investigation authorities shall make a preliminary inquiry into the facts, and report the findings of such an inquiry to other States which may be interested or obliged under the Convention to exercise jurisdiction, such as the territorial State or the States of which the suspected torturer or the torture victims are nationals. The suspected torturer shall also be granted the right to communicate with consular or diplomatic representatives of his or her State. The immediate obligation to notify other States parties of any custody and inquiries serves the purposes of protecting the rights of the accused as well as of facilitating possible extradition requests in accordance with Articles 7 and 8.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention 16 December 1970)*[5]

> Article 6
>
> 1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him

[1] For in depth analyses of national legislations and jurisprudence, particularly in relation to universal jurisdiction, see Cedric Ryngaert, 'Universal Criminal Jurisdiction over Torture: A State of Affairs' (2005) KU Leuven Faculty of Law, Institute for International Law, Working Paper No 66 (revised); Karen Janina Berg, *Universal Criminal Jurisdiction as Mechanism and Part of the Global Struggle to Combat Impunity with Particular Regards to the Crime of Torture* (Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte, NWV, Neuer Wissenschaftlicher Verlag 2012); Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003); Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008' (2009) 30 Mich J Int'l L 927; TRIAL International/FIDH/ECCHR/Redress/FIBGAR, 'Make Way For Justice #3. Universal Jurisdiction Annual Review 2017' (March 2017).

[2] See below §§ 35–36. [3] See below §§ 31–33. [4] See below §§ 34.

[5] Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (Hague Hijacking Convention).

into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State mentioned in Article 4, paragraph 1(c), the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

5 *United States Draft (19 December 1978)*[6]

1. Upon being satisfied that the circumstances so warrant, any State Party in whose territory an alleged offender under article 1 or article 2 is present shall take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition. Such measures shall be notified directly or through the Secretary-General of the United Nations to:

a) the States referred to in article 8(1)(a) and (b); and

b) all other States concerned.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

a) to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights, if he is a stateless person, which he requests and which is willing to protect his rights; and;

b) to be visited by a representative of that State.

3. The State Party in whose territory the alleged offender is present shall immediately make a preliminary inquiry into the facts and promptly report to the States specified in article 8(1)(a) and (b) these facts and whether it intends to exercise jurisdiction.

6 *Revised Swedish Draft (19 February 1979)*[7]

Article 6

1. Upon being satisfied that the circumstances so warrant, any State Party in whose jurisdiction a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may

[6] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, para 92.

[7] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States referred to in Article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction.

5. Any person regarding whom proceedings are being carried out in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.

2.2 Analysis of Working Group Discussions

7 Article 6 was inserted in the revised Swedish draft on the basis of a proposal by the United States and on informal consultations. It has no equivalent in the original Swedish draft.[8] In written comments on Article 14 of the original Swedish draft the United States had proposed a new article, based on similar articles in the Hijacking, Sabotage and Protection of Diplomats Conventions, designed to establish procedural safeguards during the preliminary investigation phase. Article 6 would require the apprehending State to notify other concerned States of the results of its preliminary investigation, and its intention regarding prosecution or extradition, as well as guaranteeing the accused the right to communicate with the State entitled to protect his or her rights.

8 During the 1980 Working Group several delegates pointed out that the word 'preliminary' used in Article 6(2) might give the impression that the actions described in paragraph 1 had been carried out without the necessary examination.[9] It was suggested that paragraph 2 should be incorporated into paragraph 1. Some delegates proposed the insertion of the words 'preliminary enquiry' into paragraph 1 and the substitution of the words 'further' or 'formal' for the word 'preliminary' in paragraph 2. It was agreed that the proposed phrase 'after an examination of information available to it' should be added after the word 'satisfied' in paragraph 1.

9 One view was that the phrase 'other measures', contained in paragraph 1, might be interpreted too widely. It was suggested that it be replaced by 'other legal measures'. Similarly in the French text, it was suggested that the word 'légales' be replaced by the word 'juridiques'.

10 One representative, referring to a similar paragraph in the New York Hostages Convention, proposed to extend the scope of paragraph 3 to stateless persons by adding the phrase 'or, if he is a stateless person, to the representative of the State where he usually resides' after the word 'national'.

11 It was decided that discussion on paragraph 4 would be suspended until after consideration of the question of jurisdiction in Articles 5 and 7 since there was no clear link

[8] See above § 5.

[9] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367.

between paragraph 4 dealing with notification to States having jurisdiction under Article 5(1) and Articles 5 and 7.

12 Article 6(1), (2), (3), and (5), as adopted by consensus by the Working Group, read as follows:

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary enquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.
4. [When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.]
5. Any person regarding whom proceedings are being carried out in connexion with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.

13 The 1981 Working Group examined paragraph 4.[10] No decision was taken because this paragraph was connected with the question of universal jurisdiction and certain members considered that Articles 5 and 7 should be adopted first. It was decided that paragraph 5 of Article 6 should be transferred to Article 7 when the remainder of Article 7 had been adopted.[11] The Working Group decided to retain Article 6 as drafted and to revert to it later.

14 In 1982 the Working Group again concluded that Article 6(4) should not be considered separately from Article 7.[12] At the conclusion of the discussion on Article 7, it was noted that those delegations which could support the provisions of Article 7 could accept paragraph 4 of Article 6. The decision of the previous year's Working Group to include paragraph 5 of Article 6 in Article 7 after adoption of that article as a whole was confirmed.

15 In 1984, the Working Group eventually achieved consensus on and adopted Article 6(4) as it stood.[13]

3. Issues of Interpretation

3.1 Article 6(1): Obligation to Ensure the Presence of the Alleged Torturer

3.1.1 Examination of Information Available

16 Article 6(1) stipulates that as soon as a State party's authorities have credible information that an alleged torturer is present in its territory, they shall take him or her

[10] Report of the Working Group of the Commission on Human Rights (1981) UN Doc E/CN.4/L.1576.
[11] See below Art 7 §§ 85–87. [12] E/CN.4/1983/L.40.
[13] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72.

into custody or take other legal measures to ensure his or her presence during the preliminary phase of the investigation, which might lead to formal criminal or extradition proceedings.

17 The obligation to ensure the presence of the alleged torturer arises only once the State party has been 'satisfied, after an examination of information available to it, that the circumstances so warrant'. This introductory phrase of Article 6(1) makes clear that States parties have a 'wide degree of freedom to assess whether or not the circumstances warrant such a measure',[14] including in their evaluation of the information submitted by eg victims, relatives, or non-governmental organizations.

18 While this discretion is meant to provide the necessary investigatory and prosecutorial flexibility required by the details of each individual case, it also risks being abused by States wishing to avoid their responsibility to exercise jurisdiction in accordance with Articles 5 and 7. By resorting to an excessive interpretation of Article 6(1) States might try to justify their decision not to investigate an alleged torturer, for example due to political considerations, by simply asserting that the information available was not credible or did not provide enough evidence to warrant an investigation. Although relevant for all jurisdictions stipulated in Article 5, the provision is particularly relevant for universal jurisdiction cases in which a few days or even only hours of delay may suffice for an alleged torturer to leave the country and hence enjoy impunity.

19 Against this background, it is important to emphasize that under Article 6(1) the information provided to the State party is merely required to raise the suspicion to a level that a further investigation by the competent authorities is warranted. The 'information available' to which Article 6(1) refers is not required to live up to any evidentiary standards as demanded in a criminal trial. Furthermore, when considering the available information at this stage, the State party is also not required to do so as part of a full-fledged investigation, but as part of an initial, critical analysis which is suitable to assess the allegation's credibility and decide whether there is enough suspicion that warrants further scrutiny. Hence, under Article 6(1) the State authorities are not yet tasked to decide whether to initiate a formal criminal investigation into the case and put the alleged perpetrator in pre-trial detention. The purpose of Article 6(1) is first and foremost to ensure, if the allegations have been considered sufficiently credible, that the alleged perpetrator cannot abscond while the authorities facilitate the initiation of a preliminary investigation as required under Article 6(2) at the end of which the authorities will decide whether or not to charge the alleged perpetrator.

3.1.1.1 *HBA et al v Canada*

20 Although eventually ruled inadmissible, the discretion of a State party regarding its obligations under Article 6(1) was at the core of the allegations raised in the case *HBA et al v Canada* before the Committee against Torture in 2013.[15] In 2011, the counsel of the four complainants sought to initiate the prosecution of former US President George W. Bush under universal jurisdiction at the occasion of his upcoming trip to Canada. The four men alleged to have been tortured in secret places of detention by or at the acquiescence

[14] J Herman Burgers and Hans 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) 134.

[15] *HBA et al v Canada*, No 536/2013, UN Doc CAT/C/56/D/536/2013, 2 December 2015; see below Art 22, § 33.

of US officials in the context of the so-called 'war on terror'. In anticipation of Mr. Bush's visit, the men's counsel submitted a comprehensive dossier to the Attorney General of Canada and called upon him to launch a criminal investigation into the role of the former President in authorizing and overseeing the US administration's torture programme. In the absence of any reply from the Attorney General,[16] the counsel attempted to initiate a private prosecution as provided under Canadian law. The responsible Justice of Peace, however, refused to receive the pertaining complaint on the grounds that Mr. Bush was at that point not yet present on Canadian territory. Eventually, two days later on 20 October 2011 and with Mr. Bush present in Canada, the counsel was able to submit the complaint seeking private prosecution. The Justice of Peace scheduled a hearing for January 2012 in order to verify the allegations, by which point Bush would already have left Canada. However, still on 20 October, the Attorney General of British Columbia used his authority to intervene in private prosecutions and directed a stay of the proceedings against Mr. Bush. The stay of the private prosecution was argued to be warranted since the required consent from the Attorney General of Canada was expected not to be granted. Consequently, Mr. Bush was able to visit Canada without ever being approached by the Canadian authorities in relation to the torture allegations.

21 Against this background, the complainants argued before the Committee that Canada had breached its obligations under Article 6(1) as well as Articles 5(2) and 7(1). Regarding Article 6(1), the complainants argued that Canada would have been required, following an examination of the information dossier provided to the authorities, to ensure the continuing presence of Mr. Bush and to initiate an investigation.[17] In response, Canada argued that the obligation under Article 6(1) to take measures to ensure the continuing presence of the alleged perpetrator is not absolute, and that there may be occasions when the circumstances do not warrant ensuring the presence for the purpose of criminal proceedings.[18] The decision not to arrest or to ensure the presence of Mr. Bush by non-custodial means was, according to the State party, within its investigative and prosecutorial discretion, which allows to not follow up on a complaint.[19]

[16] The counsel sent the letter to the Attorney General of Canada on 19 September, a month prior to the expected visit of Mr. Bush. The Attorney General's reply was dated with 7 November and merely acknowledged the receipt of the letter. Mr. Bush had left the country by then. See *HBA et al v Canada*, No 536/2013 (n 15) para 9.2.

[17] The complaint also raised violations of Arts 5(2) and 7(1): ibid, para 3.4.

[18] ibid, para 4.2.

[19] ibid, para 4.3. With a view to corroborate its decision, the State party asserted that no prosecution could go forward on the basis of the information package received by the complainant's counsel, since it did not meet the evidentiary burden required to lay charges or obtain a conviction. The State party also alleged that the timing and volume of the information provided to the Attorney General would not have permitted a thorough investigation within the few weeks prior to Bush's visit to Canada. Furthermore, according to the State party, the timing was also inadequate for the Attorney General to make a properly informed decision on the necessary consent in relation to the intended private prosecution (ibid, para 4.7.). With regard to its obligation to ensure the continuing presence of Mr. Bush, Canada argued that since the complainants' allegations referred to executive acts of a US president, pertaining evidence would be only available in the US. In the absence of a reasonable expectation to obtain assistance from the US authorities, however, the State party allegedly had no basis on which it could take Bush into custody. Hence, according to Canada, the detention of Bush for the purpose of Article 6 was not warranted (ibid, para 4.3.). The State party further submitted that the Royal Canadian Mounted Police did not conduct an investigation, since there would have been no realistic prospect in October 2011, that sufficient evidence to support a charge against Bush could have been assembled so as to justify detention (ibid, para 4.17.). It concluded that it neither possessed key evidentiary elements nor were it likely to obtain them. Hence, the State party argued, the Royal Canadian Mounted Police did not launch an investigation, and maintained that it was an entirely reasonable conclusion (ibid, para 4.18.). The State party further argued that any decision to detain an alleged perpetrator in transit through Canada would require a consideration of the results of a criminal investigation. Only if an investigation reveals reasonable and probable

22 Since the Committee against Torture ruled the case inadmissible as it would not fall within the scope of Article 22,[20] no authoritative decision on the merits of the case is available. Notwithstanding this caveat, the substantive arguments put forward by the State party warrant some critical remarks.[21] As correctly raised by Canada, Article 6(1) grants the State party some discretion when it comes to deciding whether to ensure the continuing presence of the alleged perpetrator on its territory. Obviously, this discretion has however its limits.

23 Article 6(1) states that a State party's decision whether to ensure the continuing presence of an alleged perpetrator must be preceded by an examination of the 'information available'. In relation to the information submitted by the complainants' counsel to the Attorney General about a month prior to the visit of Mr. Bush, the State party stated that the timing and volume of the submission would not have permitted a 'thorough investigation'.[22] Furthermore, the State party argued that

> [w]here an alleged perpetrator is in transit through a State or a temporary visitor rather than someone resident in the State, it is unlikely that the forum State will have undertaken an investigation in advance, *proprio motu*, in the hope or expectation that the alleged perpetrator might transit through or make a short visit.[23]

Consequently, the case *HBA et al v Canada* would be different than the Habré case in which the Committee found Senegal to have violated its obligation under Article 6(1).

24 Canada is correct when it refers to Nowak and McArthur (2008) who state that the decision not to initiate a prosecution does not amount to a violation of Article 7(1), if the competent authorities are of the view that there is insufficient evidence to obtain a conviction.[24] The State party, however, ignores that this discretion is premised on the competent authorities having already conducted an investigation which was implemented in such a way that it had indeed the potential to produce such evidence, if it exists. For an investigation to be possible, however, Canada would have been required under Article 6(1) to arrest or take other measures to ensure the presence of Mr. Bush. By the State party's own admission, however, such investigation has never taken place since it was considered that 'there was no realistic prospect [. . .] that sufficient evidence to support a charge against Mr. Bush could have been assembled so as to justify detention'.[25]

25 By taking the lack of a 'realistic prospect' as a foregone conclusion the State implicitly argues to have no further obligations under the Convention and hence does not violate it. Whether there was indeed no 'realistic prospect' to prosecute is questionable, since an investigation was never started, cooperation of the US authorities was never sought, and potential avenues which would not have required cooperation of the US were never

grounds to believe an offence has been committed the alleged perpetrator can be put under arrest. Should charges not be laid within twenty-four hours, detention cannot continue (ibid, para 4.17.).

[20] See below Art 22, § 33.

[21] See also the submissions of the complainants and their counsels to the CAT Committee: CCR/CCIJ, 'Hassan Bin Attash, Sami El-Hajj, Muhammed Khan Tumani, and Murat Kurnaz v Canada, Communication presented to the Committee against Torture, Pursuant to Article 22 of the Convention against Torture for Violation of Articles 5, 6 and 7 of the Convention' 14 November 2012; CCR/CCIJ, 'Re: CAT/536/2013, Hassan bin Attash et al, Communication against Canada, Reply to Supplemental Submission (Alleged Violation of Articles 5(2), 6 and 7 of the Convention against Torture)' 17 July 2014.

[22] See *HBA et al v Canada*, No 536/2013 (n 15) para 4.7. [23] ibid, para 4.16.

[24] ibid, para 4.18; see also Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press 2008) 361.

[25] *HBA et al v Canada, No. 536/2013* (n 15) para 4.17.

pursued. Furthermore, and somewhat circularly, the State party argues that it would require the results of an investigation in order to decide whether to ensure the presence of Bush, but at the same time acknowledges that no investigation was initiated since it was unlikely to obtain the cooperation of the US authorities.

26 The State party's claims suggest that it considered it as necessary to conduct a full and in-depth review of the dossier submitted by the counsel, before being in the position to decide whether to ensure the continuing presence of the former US President. This reading is misguided. While the State party obviously has to disregard unsubstantiated allegations, the information available at this stage does not have to conclusively prove the raised allegations, let alone live up to evidentiary standards as required in a criminal trial. The purpose of the examination required under Article 6(1) is to establish whether the raised allegations are credibly substantiated to such a level that the initiation of a formal criminal investigation is warranted.

27 The interpretation of Article 6(1) put forward by Canada in the *HBA et al v Canada* case would result in a considerable weakening of the Convention regarding its intent to close safe havens. This would be particularly the case when the suspected torturer is present only for a brief period on the territory under the jurisdiction of the State party. Put together, the limitation to initiate an investigation only from the moment when the alleged perpetrator is present, on the one hand, and the requirement of the availability of results of a thorough criminal investigation before being able to ensure the alleged perpetrator's presence, on the other hand, would de facto result in a 'blind spot' in the obligation to prosecute torturers. Cases, in which the alleged perpetrator is only briefly on the territory under the jurisdiction of the State party would become unlikely to be ever prosecuted.

3.1.2 Custody or Other Legal Measures to Ensure Presence

28 Since torture is a serious crime that, according to Article 4(2), shall be punishable by appropriate penalties which take into account its grave nature, the measures necessary to ensure the presence of the alleged torturer usually mean arrest and detention that is police custody up to a few days followed by pre-trial detention and/or detention pending deportation.

29 On the other hand, States should take into account that, by virtue of Article 9(3) CCPR, it 'shall not be the general rule that persons awaiting trial shall be detained in custody'. Article 6(1) CAT therefore also provides for the possibility to make use of 'other legal measures' to ensure the presence of the alleged torturer, including house arrest, release on bail, the confiscation of travel documents, an obligation to report regularly to the police, and similar restrictions on freedom of movement.[26] Whether or not custodial measures are necessary depends on the particular circumstances of the case, such as the likelihood that the suspected torturer might flee from the jurisdiction of the State,

[26] See Burgers and Danelius (n 14) 134; Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 327; see also Berg (n 1) 264. Similar provisions are also included in the Convention for the Suppression of Unlawful Seizure of Aircraft (n 5) Art 6; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177 (Montreal Convention) Art 6; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 Art 6; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into 3 June 1983) 1316 UNTS 205 Art 6.

abscond, or destroy evidence.[27] If the person is detained, he or she must enjoy all the rights of detained persons, above all *habeas corpus* rights.

30 The original US draft did not mention 'custody' but only the general obligation of States parties to 'take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition'.[28] The revised Swedish draft replaced this formulation by 'custody and other measures to ensure his presence' and deleted the explicit reference to the purpose of such measures. During the discussions in the Working Group, the word 'legal' was added before 'measures'. This means that States parties are expected to take the same measures as are provided for in their domestic law in the case of any ordinary offence of a serious nature. This principle is expressed in the last sentence of Article 6(1) and reaffirmed in Article 7(2) for the next phase of decision-making.

3.1.2.1 Almatov Case (Germany)

31 The visit of then Uzbek Minister of Interior Zokir Almatov to Germany and the failure of the German authorities to secure Almatov's presence is another instructive example for the challenges to ensure the implementation of Article 6.[29] Almatov visited Germany in late 2005 on the basis of a humanitarian visa in order to receive medical treatment. In December, eight Uzbeks living in Germany filed complaints with the German Federal Prosecutor in which they accused Almatov of being criminally responsible for torture and torture as a crime against humanity perpetrated in Uzbekistan's places of detention as well as for crimes against humanity in relation to the Andijan massacre.[30] The complaints were supported by Amnesty International and Human Rights Watch. Furthermore, the UN Special Rapporteur on Torture called upon the German authorities to initiate criminal proceedings against Almatov.[31] However, soon after reports about the complaints were published in the German news, Almatov left Germany without ever being questioned by the German authorities.

32 Under the Convention Germany has an obligation to exercise its jurisdiction under Article 5(2) and to ensure the presence of alleged torturers on its territory as required in

[27] On the interpretation of Art 9(3) CCPR see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 230ff.

[28] E/CN.4/1314 (n 6). See above § 5.

[29] For details on the case see Wolfgang Kaleck, 'German International Law in Practice: From Leipzig to Karlsruhe' in Wolfgang Kalek and others (eds), *International Prosecution of Human Rights Crimes* (Springer 2007) 109–10; see also above Art 5 § 180.

[30] See AI, 'Urgent Action in Focus: November 2005: Blood on the Streets: The Aftermath of the Killings in Andizhan' (1 November 2005) <https://www.amnesty.org/en/documents/act60/024/2005/en/> accessed 11 December 2017; HRW, '"Bullets Were Falling Like Rain". The Andijan Massacre, May 13, 2005' (6 June 2005) <https://www.hrw.org/report/2005/06/06/bullets-were-falling-rain/andijan-massacre-may-13-2005> accessed 11 December 2017; HRW, 'Burying the Truth: Uzbekistan Rewrites the Story of the Andijan Massacre' (September 2005) <https://www.hrw.org/reports/2005/uzbekistan0905/uzbekistan0905.pdf> accessed on 11 December 2017; AI, 'Uzbekistan: Lifting The Siege on the Truth about Andizhan' (19 September 2005) <https://www.amnesty.org/en/documents/eur62/021/2005/en/> accessed 11 December 2017; UNSRT (van Boven), 'Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted in accordance with Commission resolution 2002/38, Addendum Mission to Uzbekistan' (2003) UN Doc E/CN.4/2003/68/Add.2.

[31] See UNSRT (Nowak), 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum, Summary of information, including individual cases, transmitted to Governments and replies received' UN Doc A/HRC/4/33/Add.1 para 75; UNSRT, 'UN Special Rapporteur calls on Germany to put Uzbekistan's Minister of Interior on Trial for Crimes of Torture' (16 December 2005).

Article 6(1). Confronted with the question why it failed to do so in the case of Almatov, Germany submitted in its fifth periodic report to the Committee against Torture that

> [t]he German criminal prosecution authorities had become aware that Mr. Almatov was staying in Germany when a first complaint of an offence was brought against him on 5 December 2005. He had, however, already left Germany at that point. For that reason the Public Prosecutor General decided not to institute investigation proceedings against Mr. Almatov.[32]

33 Although Germany's failure to secure the presence of Mr. Almatov was never subject of a complaint to the Committee against Torture and the Committee did also not take up the issue when considering Germany's fifth periodic report, and hence no authoritative evaluation of the matter is available, a few critical remarks are in order. Article 6(1) obliges States parties to secure the presence of alleged torturers on their territory 'upon being satisfied, after an examination of information available to it …'. The wording 'information available to it' does not imply that either the presence of an alleged torturer on the State party's territory or the related incriminating information must be raised by complainants and submitted as a formal complaint for the State party's authorities being obliged to act. This would be an impermissible restrictive reading of Article 6(1).[33] Whenever the State party's authorities know about the presence of an alleged torturer they are obliged to act. In the case of Almatov, these requirements were—in all likelihood—fulfilled. The German authorities knew about Almatov's presence already prior to the complaint of 5 December since they issued him with a humanitarian visa on 14 November to facilitate his medical treatment. Furthermore, the German authorities must have also had sufficient information on Almatov's alleged role in the Andijan massacre as well as in the systematic abuse of persons held in Uzbekistan's places of detention since the visa was issued as an exception to an EU-wide travel ban imposed on persons considered to be responsible for the Andijan massacre.[34] Almatov was on top of this list and the German authorities had consulted with the EU Commission and Presidency prior to issuing the visa.[35] While it cannot be expected from a State party to check for every visa request whether the applicant is an alleged torturer, it seems reasonable to argue that in cases as high profile and well documented as the one of Almatov, the State party's authorities would be obliged to act on their own initiative.

3.1.2.2 Ely Ould Dah Case (France)

34 There can be cases in which the application of non-custodial measures to ensure the presence of the alleged torturer eventually turn out to be insufficient. In the French case of Ely Ould Dah,[36] the army commander was alleged to have committed acts of torture in 1990 and 1991 in a military camp in Mauritania. Triggered by a complaint of Mauritanian exiles living in France, Mr. Ould Dah was arrested by French authorities

[32] CAT, 'Fifth periodic report of States parties due in 2007: Germany' (2011) UN Doc CAT/C/DEU/5 para 47. The CAT Committee did not make any reference to the Almatov case in its Concluding Observations in 2001. See CAT, 'Concluding Observations: Germany' (2011) UN Doc CAT/C/DEU/CO/5. Similarly, in a news report dated 21 December 2005, the complainants' lawyer also confirmed that Almatov had already left Germany. See Deutsche Welle (DW), 'Uzbek Minister Leaves Germany After Probe Opens' (21 December 2005) <http://www.dw.com/en/uzbek-minister-leaves-germany-after-probe-opens/a-1829774> accessed 11 December 2017.

[33] See also above Art 5 § 116.

[34] Council of the European Union, 'Council Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan' (16 November 2005) OJ L 299, 72.

[35] See DW (n 32).

[36] See above Art 5 §§ 130–32.

in 1999 while undertaking training at a French army school, and taken into custody. Following an appeal with the French judicial authorities, Mr. Ould Dah was released and placed under judicial control, ie, under house arrest with his passport confiscated. However, these measures eventually proved insufficient to ensure his presence. In April 2000, Mr. Ould Dah absconded and returned to Mauritania, where he continued to serve in the national army. Irrespective of his flight, the French authorities continued to prosecute Mr. Ould Dah, with the participation of his legal representatives in the proceedings. Eventually, in July 2005 the Nîmes Assize Court (*Cour d'assises*) sentenced Mr. Ould Dah *in absentia* to the maximum penalty of ten years of imprisonment for having directly committed, ordered, and organized acts of torture. While welcoming the sentencing of Mr. Ould Dah, the Committee against Torture expressed regret of France's failure to have taken the necessary steps to keep Mr. Ould Dah in its territory, and to indeed ensure his presence for his trial, in conformity with its obligation under Article 6.[37]

3.1.2.3 Al-Duri Case (Austria)

35 A prominent and politically sensitive case highlighting a State party's failure to perform its obligations under Article 6 relates to the presence of Izzat Ibrahim Khalil Al-Duri[38] in Austria in 1999. Al-Duri, then Deputy Chair of the Revolutionary Council of Iraq and Deputy of Iraqi dictator Saddam Hussein, had travelled to Vienna for medical treatment. Based on evidence collected in an Austrian and a Swedish court, a Vienna city councillor submitted a complaint with the Public Prosecutor alleging that Al-Duri was criminally responsible for the torture of two Iraqis as well as other citizens. Furthermore, the Public Prosecutor was requested to 'arrange the arrest of the accused Izzat Ibrahim Khalil Al-Duri and to commence with the investigation of the facts of the case'.[39] Reportedly, the Public Prosecutor subsequently instituted investigations.

36 While the politically charged public discussion partly focused on the question, why a visa had been granted to Al-Duri in the first place, the Austrian Minister of Justice erroneously argued that Austria would not be in the position to prosecute under universal jurisdiction in the absence of an extradition request by another State. Eventually, Al-Duri, who had not been arrested during the prosecutor's investigations or subject to any other measures restricting his freedom of movement, was able to leave the country. Although the conduct of the Austrian authorities was never legally challenged, for example before

[37] CAT, 'Conclusions and Recommendations: France' (2006) UN Doc CAT/C/FRA/CO/3 para 14. Related, see also the Committee's concerns regarding the practice of some States parties to conclude bilateral treaties exempting nationals of some States from arrest as required under Article 6 and their subsequent transfer to the International Criminal Court as well as the insufficient cooperation with the ICTY, including the non-performance of the obligations entailed in Article 6(1). See CAT, 'Conclusions and recommendations: Togo' (2006) UN Doc CAT/C/TGO/CO/1 para 16; CAT, 'Conclusions and Recommendations: Georgia' (2006) UN Doc CAT/C/GEO/CO/3 para 14; CAT, 'Conclusions and Recommendations: Bosnia and Herzegovina' (2005) CAT/C/BIH/CO/1 para 10(e); CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Serbia and Montenegro' (2004) UN Doc A/59/44 paras 156–240.

[38] Also known as al-Doori.

[39] Peter Pilz, 'Case Report to the Public Prosecutor of Vienna concerning Izzat Ibrahim Khalil Al Doori' (13 August 1999) <https://www.legal-tools.org/doc/634994/pdf/> accessed 15 November 2017; see also AP Worldstream, 'Green Party Official Files Criminal Complaint against Ailing Iraqi Official' (AP World Stream, 16 August 1999); Der Standard, 'Schlögel verteidigt Visum aus 'humanitären Gründen—Grüne zeigen Saddam Husseins Stellvertreter an *(Schlögel defends visa on humanitarian grounds—Greens file complaint against Saddam Hussein's deputy)*' Der Standard (Vienna, 17 August 1999) 6; Manfred Nowak, 'Ministerielle Verwirrung (*Ministerial confusion)*' in *Falter* (Vienna, 25 August 1999) <https://www.falter.at/archiv/FALTER_199908251118005/ministerielle-verwirrungen> accessed 11 July 2018.

the Committee against Torture, there is little doubt that the Austrian authorities failed to perform their obligation under Article 6(1) to take Al-Duri into custody or take other legal measures to ensure his presence, as well as in the absence of an extradition request, to submit the case to the competent authorities for the purpose of prosecution in accordance with Article 7.

3.1.3 'Only for such time as necessary'

37 According to the last sentence of Article 6(1), the custody or other legal measures 'may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted'. This phrase, while intended to be a 'general indication',[40] which does not appear in the US draft and was inserted by the revised Swedish draft, is somewhat misleading. The word 'custody' and its restriction until the 'institution' of criminal or extradition proceedings might lead to the narrow literal interpretation of police custody, which should never last longer than a few days. The purpose of this provision goes, however, beyond this initial stage of the proceedings. Even after criminal or extradition proceedings have been instituted, the suspected torturer might be kept in detention, if the circumstances of the particular case require such a measure. Detention and other measures to ensure the presence of a suspected torturer during the criminal and/or extradition proceedings might be maintained until his or her conviction or deportation.[41]

3.2 Article 6(2): Obligation to Make a Preliminary Inquiry Into the Facts

38 Once the State party decided under Article 6(1) to ensure the presence of an alleged perpetrator, paragraph 2 obliges it to 'immediately make a preliminary inquiry into the facts'. Such criminal investigation is based on the information made available by victims and other sources as indicated in Article 6(1), but also requires active measures of evidence gathering, such as interrogation of the alleged torturer, taking of witness testimonies, inquiries on the spot, or searching for documentary evidence. If the alleged act of torture was committed on the territory of the investigating State, its authorities can apply all usual methods of criminal investigation. If the investigating State intends to exercise its jurisdiction on the basis of Article 5(1)(b), (c), or (2), it needs the cooperation of the territorial State and possibly also other States.[42] For this reason, Article 9 explicitly establishes an obligation of States parties to provide mutual judicial assistance.

39 The purpose of the preliminary inquiry in Article 6(2) is to enable the investigating State to decide whether to exercise jurisdiction by means of criminal prosecution or to extradite the alleged torturer to another State. The discussions of the words 'preliminary inquiry' during the 1980 Working Group, which led to the insertion of the phrase 'after

[40] Burger and Danelius (n 14) 134.

[41] See also CAT, 'Third Periodic Reports due in 1997. Addendum Ecuador' (2004) UN Doc CAT/C/39/Add.6 para 16; CAT, 'Report of the Committee against Torture' (1993) UN Doc A/48/44 para 142 (New Zealand) and para 237 (Belarus).

[42] The Committee congratulated the Netherlands on the early establishment of a special National War Criminals Investigation Team in 1999 to facilitate the investigation and prosecution of war crimes, including torture as specified in the Convention. See CAT, 'Report of the Committee against Torture twenty-third session (8–19 November 1999) and twenty-fourth session (1–19 May 2000)' (2000) UN Doc A/55/44 para 186(b).

an examination of information available to it' in Article 6(1) show that the inquiry in Article 6(2) goes already beyond the available information on the basis of which the State party has to decide whether it is warranted to ensure the presence of the alleged torturer. The preliminary inquiry under Article 6(2) has to include information actively gathered by the competent authorities. It does not end, as the last sentence of Article 6(1) might suggest, with the 'institution' of criminal or extradition proceedings, but with the decision whether to prosecute or to extradite the suspected torturer.

40 In those cases in which the alleged torturer is arrested on the basis of an international arrest warrant and the custodial State is requested to extradite, it is the requesting State which primarily makes an inquiry into the facts and provides the custodial State with the information necessary to justify extradition.[43] However, this does not absolve the custodial State from conducting his own investigation in order to verify whether the arrest warrant and extradition request are indeed sufficiently substantiated. Furthermore, as part of this investigation the custodial State has also to assure itself that the requesting State is indeed willing and able to prosecute the alleged torturer and that extradition is not facilitating impunity. Similarly, the custodial State is also required to seek information on whether an extradition to the requesting State would violate the non-refoulement principle. Should it turn out that this is the case the custodial State itself has to prosecute or, if present, extradite the alleged torturer to another State requesting extradition.

3.2.1 The Habré Case before the ICJ-Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)

41 The duty to immediately make a preliminary inquiry under Article 6(2) was also adjudicated in the Habré case before the International Court of Justice (ICJ).[44] In its judgement the Court elaborated on the nature as well as the timing of the investigation required under Article 6(2).

42 The Court submitted that the intention of the inquiry stipulated in Article 6(2) is to 'corroborate or not the suspicions regarding the person in question'.[45] While the 'choice of means for conducting the inquiry remains in the hands of the State',[46] the inquiry has to be conducted by the competent authorities which are tasked to draw up case files and collect facts and evidence, including witness statements. The obligation under Article 6(2) would have therefore required Senegal inter alia to actively seek evidence, including contacting Chadian authorities. However, no such steps were taken. The questioning of Mr. Habré by the investigative judge in 2000 in order to establish Habré's identity and to inform him of the accusations brought forward against him 'cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré.'[47]

[43] Burger and Danelius (n 14) 135; see also Berg (n 1) 219.

[44] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012 422. In the *Guengueng et al v Senegal* case before the CAT Committee which also dealt with the obligations of Senegal in relation to the Habré case, the complainants did not claim any violation under Art 6, but only in relation to Art 5 and Art 7. See *Suleymane Guengueng et al v Senegal*, No 181/ 2001, UN Doc CAT/C/36/D/181/2001, 17 May 2006. For an overview of the case see above Art 5 §§ 102–08 and below Art 7 §§ 50–51.

[45] ICJ Reports 2012 422 (n 44) para 83. [46] ibid, para 86. [47] ibid, para 85.

43 Instructively, the Court also elaborated on the required timing of an investigation under Article 6(2). In general, it held that 'steps must be taken as soon as the suspect is identified in the territory of the State'.[48] This requirement is an important difference to the State party's obligations under Article 12 and 13 which have to be performed irrespective of whether the suspect is present or known.[49] In the Habré case, the obligation to initiate a preliminary investigation arose 'immediately' as soon as the Senegal authorities had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. This point was reached 'at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré'.[50]

44 The Court's finding is insofar noteworthy as it concluded Senegal to be in violation of Article 6(2) irrespective of the performance of its obligation under Article 5(2). While the ICJ had not considered whether Senegal violated Article 5(2),[51] it is implicit in the Court's reasoning on Article 7 that Senegal had failed to establish the required jurisdiction under Article 5(2) until the legal amendments in 2007 and 2008.[52] Consequently, the Court's ruling implies that the absence of the required legal framework under Article 5(2), or any other required jurisdiction under Article 5, does not absolve the State party to perform its obligations under Article 6(2).

45 Senegal's breach of Article 6(2) continued also after 2008 when it eventually had amended its legal framework following the Committee against Torture's decision in the *Guengueng et al* case.[53] Although the required jurisdiction under Article 5 would have been available from then on, Senegal continued to fail initiating a preliminary inquiry, even after the submission of a further complaint to its authorities in 2008.[54]

3.3 Article 6(3): Obligation to Assist in Communicating with Representative of the State

46 Article 6(3) requires the State party to assist the alleged torturer to communicate with the nearest appropriate representative of the State of which he or she is a national, or, if a stateless person,[55] with the representative of the State where he or she usually resides. Importantly, it remains at the discretion of the detainee, whether he or she indeed wants to contact eg its local embassy or consulate. The State party is only obliged to assist, for example, by providing a phone and the relevant phone number, and cannot

[48] ibid, para 86.

[49] See below Arts 12 and 13; see also Ingelse (n 26) 335.

[50] ICJ Reports 2012 422 (n 44) paras 86 and 88.

[51] Since Senegal had introduced the legislation required under Article 5(2) in 2007 and 2008, there was no ongoing dispute between Belgium and Senegal on this matter which the ICJ could have taken up when considering Belgium's application of 2009. See ICJ Reports 2012 422 (n 44) para 48. See also above Art 5 §§ 112–14.

[52] See below Art 7 §§ 52–53.

[53] *Guengueng et al v Senegal* (n 44).

[54] See ICJ Reports 2012 422 (n 44) para 87. See also Sangeeta Shah, 'Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (2013) 13 HRLR 360ff. Furthermore, in 2010 Senegal confirmed before the ECOWAS Court of Justice that no proceedings against Mr. Habré would be ongoing or pending. The ICJ's decision that Senegal had violated its obligation under Art 6(2), however, did not remain without objections. In a separate opinion, Judge Yusuf criticized the decision of the majority for elevating the requirements pertaining to the preliminary inquiry under Article 6(2) to those of a full criminal investigation. See ICJ Rep 2012 422 (n 44) 559 (Separate Opinion of Judge Yusuf); ibid 571 (Dissenting Opinion of Judge Xue); ibid 605 (Dissenting Opinion of Judge ad hoc Sur).

[55] With the inclusion of stateless persons, Art 6(3) goes beyond Art 36 of the Vienna Convention on Consular Relations; see Burger and Danelius (n 14) 135.

invoke the alleged perpetrator's right under Article 6(3) against his or her will. This also means the custodial State cannot grant the authorities of the detainee's country of nationality or residence the right to communicate with the detainee, if he does not want so.[56] The US proposal to include into the Convention the explicit right to be visited by a representative of the State of nationality or residence did not find its way into Article 6(3). Nevertheless, this right derives from Article 36(1)(c) of the Vienna Convention on Consular Relations.[57]

3.4 Article 6(4): Obligation to Notify Other States of the Measures Taken and Intended to Be Taken

3.4.1 Application to All Forms of Jurisdiction under Article 5

47 Article 6(4) is addressed to all States parties which exercised their jurisdiction under Article 5 and hence not limited to universal jurisdiction cases. Although the article was kept in square brackets for several years during the drafting process because of its connection with the question of universal jurisdiction,[58] and irrespective of its reference to Article 5(1) in the first sentence, its systematic interpretation shows that Article 6(4) applies to all grounds of jurisdiction stipulated in Article 5. Hence, the safeguards of Article 6(4) are pertaining to cases in which the custodial State seeks to exercise universal jurisdiction as well as to cases in which a State seeks to exercise jurisdiction on the basis of the territorial, active or passive nationality principle.[59]

3.4.2 'Has taken a person into custody'

48 The wording of the first sentence of Article 6(4) refers only to those cases in which the alleged torturer was taken into custody under Article 6(1). This limitation, with its apparent exclusion of suspected torturers whose freedom of movement has been restricted with non-custodial measures, seems surprising. On the one hand, a potential explanation for this limitation could be that the first sentence was intended to provide an additional safeguard to persons held in custody by informing their State of nationality. Although Article 6(3) already facilitates suspects to communicate with their representatives, Article 6(4) contributes further safeguards by requiring the custodial State to inform the alleged torturer's country of origin (Article 5(1)(b)). However, it is not clear why a notification of States which may have no direct link with the alleged perpetrator (such as States with territorial or passive nationality jurisdiction) should be informed in order to safeguard the alleged torturer's rights. On the other hand, if the purpose of Article 6(4) is to inform other States with potential jurisdiction over the case so that they can make a decision on whether to request extradition or not, the exclusion of cases in which the presence of the

[56] See eg CAT, 'Fourth Periodic Report due in 2000: Mexico' (2005) UN Doc CAT/C/55/Add.12; CAT, 'Fourth Periodic Reports of States Parties due in 2003, Addendum, Guatemala' (2005) UN Doc CAT/C/74/Add.1; CAT, 'Third Periodic Reports due in 2003, Addendum, Georgia' (2005) UN Doc CAT/C/73/Add.14.

[57] '1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State … (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.' See Vienna Convention on Consular Relations (adopted 22 April 1963, entered into force 19 March 1967) 596 UNTS 261, Art 36(1)(c).

[58] See above § 13 and Burgers and Danelius (n 14) 73.

[59] See also ibid 135.

alleged perpetrator is ensured by non-custodial measures appears to constitute a gap. In practical terms, this gap however is likely to be marginal since securing the presence of the alleged torturer by non-custodial measures represents the exception rather than the norm. Considering the severity of the alleged crime as well as the danger of the alleged torturer absconding, custody will be in most cases the required choice.

3.4.3 'Immediately notify'

49 As stipulated in the first sentence of Article 6(4), the custodial State is obliged to notify States with jurisdiction under Article 5(1) 'immediately'. This is generally interpreted to mean within a few hours.[60]

3.4.4 'States referred to in Article 5(1)'

50 If the custodial State is identical with the territorial State, it only must notify other States if the alleged torturer and/or victims are nationals of another State. If the custodial State exercises jurisdiction based on the active nationality principle under Article 5(1)(b), it must notify the territorial State and possibly also States whose nationals were tortured by the person concerned. If the custodial State exercises jurisdiction based on the passive nationality principle under Article 5(1)(c), it must notify the territorial State and, if different, the State whose national the alleged torturer is. If the custodial State exercises universal jurisdiction, it must notify all States having jurisdiction pursuant to Article 5(1).

51 The obligation to notify States with jurisdiction under Article 5(1) is of 'a general character'[61] meaning it must be performed even if the custodial State has from the outset the intention to prosecute and not to extradite the alleged torturer.[62] Indirectly, this requirement also arises by the duty of the custodial State to contact as part of its investigation other States which may possess relevant information pertaining to the case. As required by Article 9(1), all States parties shall afford another the greatest measure of assistance in relation to criminal proceedings, including the supply of all available evidence.[63]

3.4.5 Duty to Promptly Report Findings of Preliminary Inquiry

52 The second sentence of Article 6(3) refers to the preliminary inquiry under Article 6(2). The custodial State which is normally tasked to conduct such an inquiry, must promptly report the findings of the inquiry to States with jurisdiction under Article 5(1). In such a report, the State shall also indicate whether it intends to exercise jurisdiction.

53 The word 'promptly' illustrates that such preliminary inquiries shall be conducted speedily, if possible within a few weeks. The length of criminal investigations depends on the complexity and the particular circumstances of each individual case. The purpose of this reporting obligation is again primarily to enable all States with a possible interest in prosecuting the alleged torturer to decide whether or not to request extradition.[64] Even if the custodial State indicates its intention to exercise jurisdiction, other States, above all the territorial State, might request the extradition of the person concerned. For the

[60] cf *Fox, Campbell and Hartley v The United Kingdom* App no 12244/86; 12245/86; 12383/86 (ECmHR, 30 August 1990) paras 40, 42; *Murray v The United Kingdom* [GC] App no 18731/9 (ECmHR, 27 August 1991) para 72; *Kerr v The United Kingdom* App no 44071/98 (ECtHR, 7 December 1999).

[61] Burgers and Danelius (n 14) 135. [62] See above Art 5. [63] See below Art 9.

[64] Burgers and Danelius (n 14) 136.

custodial State, such extradition request may be of assistance in its decision on prosecution or extradition as required by Article 7. Since Article 5 does not contain any hierarchy as to the different grounds of jurisdiction, it is finally up to the custodial State to decide whether to exercise jurisdiction and to prosecute the suspected torturer or to extradite him or her.

ROLAND SCHMIDT

Article 7

Aut Dedere aut Judicare

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

1. Introduction 268

2. Travaux Préparatoires 269

2.1 Chronology of Draft Texts 269

2.2 Analysis of Working Group Discussions 272

3. Issues of Interpretation 276

3.1 Obligation to Prosecute Combined with Authorization to Extradite 276

3.2 Article 7(1): Obligation of the Forum State to Proceed to Prosecution 278

3.2.1 'Submit the Case to its Competent Authorities for the Purpose of Prosecution' 278

3.2.1.1 Discretion of Authorities Whether to Prosecute or Not 278

3.2.1.1.1 Guengueng et al v Senegal (Habré case before the CAT Committee) 278

3.2.1.1.2 Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Habré case before the ICJ) 279

3.2.1.2 Prosecution Does Not Require Extradition Request 280

3.2.1.3 Obligation to Prosecute and Option to Extradite 280

3.2.1.3.1 Prosecution as an Obligation, Extradition an Option 280

3.2.1.3.2 Limitations to Option to Extradite 281

3.2.1.3.3 Failure to Prosecute Turns Option to Extradite Into an Obligation 282

3.2.1.3.4 Practical Order between Prosecution and Extradition 282

3.2.1.4 'Third alternative': Transfer to International Tribunals 283

3.2.1.5 Time for the Performance of Obligations under Article 7(1) 285

3.2.1.6 Temporal Scope of Obligation to Prosecute 287

3.3 Article 7(2): Procedural Safeguards in Case of Prosecution 289

3.4 Article 7(3): Right of the Alleged Torturer to Fair Treatment 290

1. Introduction[1]

1 The territorial, national, and flag States have an obligation, under Article 5(1), to start criminal investigations whenever their authorities have sufficient reasons to assume that an act of torture has been committed in any territory under their jurisdiction, on board a ship or aircraft registered under their flag, or by any of their nationals. If the domestic law of a State party also provides for jurisdiction in accordance with the passive nationality principle (Art 5(1)(c)), its authorities shall also initiate criminal investigations in all cases in which their citizens have been subjected to torture in another State.[2] Territorial States, in addition, have an obligation under Article 12, to ensure that their competent authorities proceed to a prompt and impartial *ex officio* investigation.[3]

2 While these obligations to start investigating apply irrespective of the presence of the suspected torturer, Articles 6 and 7 establish increased obligations for States parties in whose territory a suspected torturer is present (the so-called forum States).[4] They shall ensure the presence of such persons by effective custodial or non-custodial measures in accordance with Article 6, carry out preliminary inquiries into the facts, and notify other States parties of the custody and the findings of their investigations in order to facilitate possible extradition requests.

3 After having conducted these preliminary steps, the forum State has an obligation under Article 7(1) to submit the case to its competent authorities for the purpose of prosecution. In other words, the strongest obligation to avoid a safe haven for perpetrators of torture by bringing them to justice before their domestic courts applies to the forum State. This obligation derives from the mere fact that a suspected torturer is present, for whatever reason, in any territory under the jurisdiction of a State party.

4 The forum State may at the same time be the territorial, flag, or national State. But the obligation to prosecute a suspected torturer also applies if the forum State has no connection to the suspected torturer other than his or her presence in a territory under its jurisdiction.[5] If a suspected torturer is in the territory of a State party only for the purpose of medical treatment, as in the Pinochet, Al-Duri, and Almatov cases, for the purpose of professional training, as in the Ould Dah case, or as a person granted asylum, as in the Zardad case, the authorities of this State are under an obligation to exercise universal jurisdiction.[6]

[1] For a comprehensive survey of national universal jurisdiction cases see TRIAL International/FIDH/ECCHR/Redress/FIBGAR, 'Make Way For Justice #3. Universal Jurisdiction Annual Review 2017' (March 2017) <https://redress.org/wp-content/uploads/2017/03/Report_UJ_March-2017.pdf> accessed 3 December 2017. Accordingly, as of 2016, there have been twelve torture cases with proceedings under universal jurisdiction, out of which six were at the investigation stage (see TRIAL International et al, 69–70). For an in-depth analyses of national legislations and jurisprudence, particularly in relation to universal jurisdiction, see Cedric Ryngaert, 'Universal Criminal Jurisdiction over Torture: a State of Affairs' (2005) KU Leuven Faculty of Law, Institute for International Law, Working Paper No 66 (revised); Karen Janina Berg, *Universal Criminal Jurisdiction as Mechanism and Part of the Global Struggle to Combat Impunity with Particular Regards to the Crime of Torture* (Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte, NWV, Neuer Wissenschaftlicher Verlag 2012); Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003); Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008' (2009) 30 Mich J Int'l L 927.

[2] See above Art 5. [3] See below Art 12. [4] See above Art 5(2). [5] See below Art 5.

[6] See below Art 5 §§ 117–21.

5 The only possibility to avoid prosecution is extradition. The choice between prosecution and extradition (*aut dedere aut judicare*) applies, however, only if another State explicitly requests extradition. While prosecution constitutes an obligation for the forum State, no other State, ie, not even the territorial State, is under an obligation to request extradition. This principle has been confirmed by the Committee against Torture in the case of *Rosenmann v Spain* concerning the extradition of General Pinochet from the UK to Spain.[7] Similarly, the forum State is under no obligation to comply with any request for extradition. But it violates its obligation under Article 7 if it neither prosecutes nor extradites the suspected torturer, as the Committee has affirmed in the Habré case.[8]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

6 *Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention, 14 October 1971)*[9]

Article 7

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

7 *Original Swedish Draft (18 January 1978)*[10]

Article 11

> 1. Each State Party shall, except in the cases referred to in article 14, ensure that criminal proceedings are instituted in accordance with its national law against an alleged offender who is present in its territory, if its competent authorities establish that an act of torture as defined in article 1 appears to have been committed and if that State Party has jurisdiction over the offence in accordance with article 8.
>
> 2. Each State Party shall ensure that an alleged offender is subject to criminal, disciplinary or other appropriate proceedings, when an allegation of other forms of cruel, inhuman or degrading treatment or punishment within its jurisdiction is considered to be well founded.

Article 14

> Instead of instituting criminal proceedings in accordance with paragraph 1 of article 11, a State Party may, if requested, extradite the alleged offender to another State Party which has jurisdiction over the offence in accordance with article 8.

[7] See *Roitman Rosenmann v Spain*, No 176/2000, UN Doc CAT/C/28/D/176/2000, 30 April 2002. See also above Art 5 § 75–78.

[8] See *Suleymane Guengueng et al v Senegal*, No 181/2001, UN Doc CAT/C/36/D/181/2001, 17 May 2006.

[9] Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (Hague Hijacking Convention).

[10] Commission on Human Rights (CHR), 'Letter dated 18 January 1978 from the Permanent Mission of Sweden to the United Nations at Geneva addressed to the Division of Human Rights' (23 January 1978) UN Doc E/CN.4/1285.

8 *United States Draft (19 December 1978)*[11]

> The State Party in whose territory there is present a person who is alleged to have committed an offence under article 1 or article 2 shall, if it does not extradite him, submit the case to its competent authorities without exception whatsoever and without undue delay, for the purpose of prosecution through criminal proceedings in accordance with the laws of that State.
>
> Each State Party shall take such measures as may be necessary to assure that criminal, disciplinary or other appropriate proceedings are instituted in accordance with its national law if its competent authorities have a reasonable basis for belief that an act of cruel, inhuman or degrading treatment or punishment has been committed.

9 *Swiss Draft (19 December 1978)*[12]

> Other than in the case of extradition under article […] each State Party undertakes to ensure that criminal proceedings are instituted without exception and without undue delay, in accordance with its national law, against an alleged offender who is present in its territory, if its competent authorities establish that an act of torture as defined in article 1 appears to have been committed and if that State Party has jurisdiction over the offence in accordance with article […].

10 *United Kingdom Draft (19 December 1978)*[13]

> Each State Party, in the territory of which the alleged offender is found and which has jurisdiction over the offences in accordance with Article 8, shall, if it does not extradite him, be obliged, without exception whatsoever, to submit the case to the competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a serious nature under the law of that State.

11 *Revised Swedish Draft (19 February 1979)*[14]

> Article 7
>
> The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in any territory under its jurisdiction, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

12 *International Convention against the Taking of Hostages (New York Hostages Convention, 17 December 1979)*[15]

> Article 8(1)
>
> The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the

[11] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, paras 79, 80.

[12] ibid, para 82.

[13] Summary prepared by the Secretary-General in accordance with resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1, para 19.

[14] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

[15] International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205.

offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

13 *Netherlands Amended Text (1981)*[16]

1. The State Party in the territory of which a person alleged to have committed any offence referred to in Article 4 is found, shall, in the cases contemplated in Article 5, paragraph 1, if it does not extradite him, be obliged, without exception whatsoever, to submit the case to its competent authorities for the purpose of prosecution.

2. The State Party in the territory of which a person alleged to have committed any offence referred to in Article 4 is found, shall, in the cases contemplated in Article 5, paragraph 2, be obliged to submit the case to its competent authorities for the purpose of prosecution upon complaint by any interested party made in accordance with procedures set under the law of that State Party.

3. Any person regarding whom proceedings are being brought in connection with any offence set forth in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.

14 *Joint Brazilian/Swedish Draft (1981)*[17]

1. A State Party which has established its jurisdiction over an offence according to Article 5 shall, when the alleged offender is present in a territory under its jurisdiction, submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him.

2. These authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

3. Any person regarding whom proceedings are being brought in connection with any offence set forth in Article 4 shall be given all guarantees of fair proceedings.

4. The provisions of paragraph 1 are without prejudice to the right that any State Party having jurisdiction according to Article 5 may have to prosecute a person who is not present in a territory under its jurisdiction.

15 *Draft of the Chairman-Rapporteur (1982)*[18]

1. A State Party which has established its jurisdiction over an offence according to article 5 shall, when the alleged offender is present in a territory under its jurisdiction, submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him.

2. These authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences set forth in article 4 shall enjoy all guarantees of a fair and equitable trial.

[16] Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1981) UN Doc E/CN.4/L.1576, para 30.

[17] ibid, para 34.

[18] Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982) UN Doc E/CN.4/1982/L.40, para 29.

2.2 Analysis of Working Group Discussions

16 In written comments based on the 1978 original Swedish draft the United States indicated that in their view the Convention does not or should not express a preference for prosecution or extradition while at the same time noting the obligation of a State party to institute criminal proceedings against an alleged offender unless such an offender is extradited. The United States therefore submitted an alternative proposal.

17 The United States submitted a second text indicating that they could accept that, as in Article 11(2) of the Swedish draft, a State party should have an obligation to institute 'criminal, disciplinary or other appropriate proceedings' in alleged cases of cruel, inhuman or degrading treatment or punishment and that the broader range of permissible proceedings reflected the broader range of condemned behavior inherent in cruel, inhuman or degrading treatment or punishment as opposed to torture.

18 France, considering it essential to retain the principle of the advisability of instituting proceedings, proposed that the words 'ensure that criminal proceedings are instituted' in paragraph 1 of the original Swedish draft be replaced by the phrase 'submit the case to its competent authorities for the institution of criminal proceedings'. Switzerland proposed a formulation based on the view that paragraph 1 could be strengthened by requiring that proceedings be instituted without exception or undue delay.

19 The United States further suggested the addition of a new article in order to safeguard the rights of the accused: 'Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in this Convention shall be guaranteed fair treatment at all stages of the proceedings.' This wording was adopted at this stage as Article 6(5) of the revised Swedish draft.

20 The United Kingdom felt that the wording of Article 11(1) should be amended to reflect Article 7 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and to this end proposed an alternative text. After informal consultations, Sweden submitted its revised draft, in which the corresponding provision appeared in Article 7.

21 There was no discussion on this matter in the 1979 Working Group. In was suggested during the 1980 Working Group that Articles 7 and 5 be considered together because of the complementary nature of the two provisions.[19] One delegate queried whether Article 7 did not partly duplicate Article 5(1)(a). Other delegates, referring to previously adopted conventions such as Article 8(1) of the UN Convention against the Taking of Hostages, pointed out that there was a need for such an article. Article 8(1) of the 'New York Hostages Convention' was designed to ensure that all those who are accused of committing acts of hostage-taking are brought to justice. The obligation under Article 8(1) requires any party in whose territory an alleged offender is found to submit the case to its appropriate authorities for the purpose of prosecution, unless it decides instead to extradite him or her. This principle, *aut dedere aut judicare*, is considered one of the most important obligations of the Convention. During the drafting of the Convention it was considered not sufficient for a convention of this type to require parties to make the listed offences punishable under their domestic laws, nor was it sufficient to require them to establish jurisdiction over such offences. Rather, it was also essential to require States actually to deal with those persons who are accused of such offences.

22 During the drafting of the 'New York Hostages Convention', the delegations of the Netherlands and France had submitted proposals which would have conditioned a

[19] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367.

State's obligation *aut dedere aut judicare* upon it having received and denied a request for extradition from a State which is required under the Convention to establish primary jurisdiction over the offence. The representative of the Netherlands argued that it was unreasonable to oblige a State which has no connection with the offence, other than the offender's subsequent presence in the territory, to prosecute the offender. Although it was recognized that it seemed unfair to impose the obligation to prosecute upon a State that had nothing to do with a given case apart from the fact that the perpetrator was subsequently found in its territory, while other States with primary jurisdiction refrained from requesting extradition, it was conceded that it was better to increase rather than reduce the number of States having jurisdiction. Similarly, the purpose of Article 7 CAT is to ensure that no offender would have the opportunity to escape the consequences of his or her acts of torture. He or she would be extradited or prosecuted. The Working Group suspended its consideration of Article 7 until a later stage.

23 When it considered Article 7, the 1981 Working Group had before it an amendment submitted by the Netherlands.[20] In support of this amendment, some delegations said that in their view it brought out more clearly than the Swedish text an essential link with Article 5, while the terms of paragraph 2 allowed for more flexibility insofar as the modalities for applying the article were concerned. In their view, the main advantage of the Netherlands amendment was its qualification of the operation of universal jurisdiction by referring to complaint procedures. They also considered that paragraph 3 of the Netherlands amendment contained a timely reminder of a fundamental principle relating to the rights of the accused in criminal proceedings.

24 According to other speakers, the Netherlands amendment lacked the requisite clarity so far as some of its wording—in particular, the words 'upon complaint by any interested party'—was concerned, and could give rise to loose interpretation and open up loopholes. In the view of these members, Article 7 of the Swedish draft provided a better working basis.

25 The Working Group decided to adopt paragraph 3, amended in fine, of the Netherlands amendment as the last paragraph of Article 7:

> 3. Any person regarding whom proceedings are being brought in connection with any offence set forth in Article 4 shall enjoy all the guarantees of a fair and equitable trial.

26 Brazil and Sweden submitted a second revised version of draft Article 7. However, following a discussion which revealed, in particular, that there were reservations in regard to paragraph 4, the sponsors withdrew their proposal and the Working Group adjourned consideration of Article 7.

27 During informal consultations the following text was proposed:

> The State Party with jurisdiction over the territory in which a person alleged to have committed any offence referred to in Article 4 is found shall, if it does not extradite him, be obliged, in cases contemplated in Article 5, to submit the case to its competent authorities, which, for the purpose of prosecution, shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

28 In 1982 the Working Group continued its consideration of Article 7 of the revised Swedish draft.[21] The Group felt that Article 7 should be examined together with Article 5 as well as Article 6(4) in view of the close link between these provisions. The delegate of

[20] Report of the Working Group of the Commission on Human Rights (1981) UN Doc E/CN.4/L.1576.
[21] E/CN.4/1982/L.40 (n 18).

the Netherlands informed the group that the Dutch Government had decided to withdraw the amendment it had submitted in 1981 with regard to Article 7.

29 Several speakers considered that a system of universal or quasi-universal jurisdiction as envisaged in Articles 5 and 7 of the Swedish draft was indispensable in a Convention against Torture in order to ensure that there would be no 'safe havens' for torturers. Corresponding provisions had already been included in many other treaties for the suppression of crimes which the international community deemed unacceptable.[22]

30 Some delegates indicated that, although their Governments had previously expressed reservations concerning the inclusion of a system of universal jurisdiction in the proposed Convention against Torture, they were now prepared to accept it in order to facilitate agreement. However, several other delegations maintained their opposition to or reservations concerning the inclusion of a system of universal jurisdiction in the draft Convention. Difficulties of a practical kind were mentioned as regards the transfer of evidence from the country where the crime had been committed towards the State of arrest and trial under the universal jurisdiction clause. If the latter State would not extradite the alleged offender to the former State, this might lead to frictions which would turn illusory the holding of a fair trial against the defendant, since it would be impossible to obtain the necessary evidence. Misgivings were also expressed that the system of universal jurisdiction could be exploited for political reasons and that it could result in trials on the basis of spurious accusations and fabricated evidence.

31 The Argentinian delegation expressed the view that the system of universal jurisdiction was not the appropriate one to deal with a crime that is not international in its nature, like those dealt with in the conventions cited as precedents in the Working Group. This delegation stated that the primary objective of the Convention should be to ensure compliance with its norms by any State which does not punish acts of torture carried out by its public officials. According to this delegation, the establishment of universal jurisdiction would not contribute to this end, since such a system would only apply to the improbable case in which a torturer would leave his or her own State where he or she enjoyed impunity for the committed crimes, in order to travel to another State which, being a party to the Convention, might arrest and prosecute. The system that was proposed to face this highly hypothetical case could be a source of controversies between States. The intention of a State to prosecute a case of torture on the basis of universal jurisdiction could be interpreted by the State where the crime had been committed as a demonstration of a lack of trust in its own judicial system, a violation of its sovereignty, and even as an interference in its internal affairs.

32 The US delegation replied that universal jurisdiction was intended primarily to deal with situations where torture is a State policy and, therefore, the State in question does not, by definition, prosecute its officials who conduct torture. For the international community to leave enforcement of the Convention to such a State would essentially be a formula to do nothing. Therefore, in such cases, universal jurisdiction would be the most effective weapon against torture, which can be brought to bear. It could be utilized against state officials responsible for torture who travel to other States, a situation which is not at all hypothetical. It could also be used against torturers fleeing from a change of Government in their States if, for legal reasons, extradition to that State were not possible.

[22] eg 1971 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the 1979 New York Convention against the Taking of Hostages. Reference was also made to the Geneva Conventions of 1949.

33 Regarding due process and the adequacy of evidence, it was stated that the text of the draft Convention as a whole, including the Chair's proposed Article 7, made it clear that criminal prosecution would take place only when adequate evidence exists and it is possible to ensure fair treatment at all stages of the proceedings. In particular cases, such as when a torture victim is present on a State party's territory, it would be quite possible to meet these requirements.

34 During the discussion of Article 7, reference was also made to a revised version that had been submitted in 1981 by Brazil and Sweden but that subsequently had been withdrawn, as well as to a text proposed in 1981 during informal consultations which the Group had not been able to discuss owing to lack of time. The possibility was mentioned of redrafting Article 7, taking into account those alternative proposals and qualifying the exercise of universal jurisdiction in a manner, which could alleviate some of the concerns expressed by delegations, in particular regarding the risk of discrepancies as to the standards of evidence.

35 In light of these discussions, the Chairman-Rapporteur proposed a new text. A number of delegations supported this suggestion in general terms, considering that it was a constructive synthesis, which retained the substance of the original Swedish draft while making clear certain protections accorded to an accused. Some other delegates observed that the new proposal did not significantly reduce their difficulties concerning the acceptance of the principle of universal jurisdiction. During the debate arguments were reiterated that had been put forward in earlier discussions.

36 In the course of the discussions concerning the proposal of the Chairman-Rapporteur most speakers indicated that their Governments were prepared to support the inclusion of a system of universal jurisdiction in the draft Convention. In particular one delegation announced that its Government, although retaining its reservations concerning the advisability of including universal jurisdiction in the CAT, had now decided to accept this in the interests of facilitating progress towards agreement on a final text.

37 One other delegation stated that it could accept the proposed text for Article 7, depending on its understanding of Article 5, since it preferred to make the establishment of universal jurisdiction as envisaged in Article 5(2) dependent on the refusal of a request for extradition. The view was also expressed that paragraph 2 of Article 5 would be more acceptable if the provision specifying that the alleged offender should normally be tried by the State in whose territory the offence was committed be added to the paragraph. Nevertheless, some delegations made it clear that they could not accept the inclusion of a system of universal jurisdiction in the Convention.

38 Several speakers who supported the proposal of the Chairman-Rapporteur in general terms stated that in their view some drafting changes would be desirable. In particular, the text should be harmonized with the formulations already appearing in comparable treaties such as the Convention for the Suppression of Unlawful Seizure of Aircrafts. After consultations with these delegates, the Chairman-Rapporteur submitted a revised version of his proposal which was again discussed in the Working Group. This discussion led to further amendments of the text.

39 Article 7, as it emerged finally from the discussion, read as follows:

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

40 It was noted that all delegations who could accept the inclusion of universal jurisdiction in the draft Convention, could support this text. The same delegations could also support the text of Article 5(2), and of Article 6(4). With regard to Article 5(2), one delegation maintained its position that the establishment of jurisdiction in Article 5(2) should be made dependent upon the refusal of a request for extradition. Some delegations stated that they had not had enough time to study the above proposal.

41 During the 1983 Working Group representatives stated that the above text might constitute a good basis for compromise and deserved careful study. One delegation observed that its Government preferred to adhere as closely as possible to the formulations used in earlier treaties such as the Hague Convention for the Suppression of Unlawful Seizures of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. The Working Group decided that the Brazilian proposals should be reconsidered at a later stage.

42 The Working Group discussed at considerable length the system of universal jurisdiction included in Articles 5, 6, and 7 in the 1984 deliberations. The discussions indicated that there had been important changes as regards the 1983 session of the Group. The inclusion of universal jurisdiction was no longer opposed by any delegation. Article 7 was adopted without prejudice to the reservations of certain delegations which would be reflected in the report.

3. Issues of Interpretation

3.1 Obligation to Prosecute combined with Authorization to Extradite

43 Article 7 is closely linked to Articles 5 and 6.[23] Article 5 establishes an obligation of States parties to establish jurisdiction over the crime of torture on various grounds, including universal jurisdiction. Article 6 requires any State party, where an alleged torturer is present to ensure his or her presence, usually by means of arrest and detention, and to inform other relevant States for the purpose of enabling them, if they so wish, to make an extradition request. Article 7 establishes an obligation of the forum State to submit the case to its competent authorities for the purpose of prosecution, provided that it does not extradite the person concerned. In this relation, the International Court of Justice (ICJ) held in its judgement in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal*) regarding Hissène Habré that 'these obligations, taken as a whole, might be regarded as elements of a single conventional mechanism aimed at

[23] See above Art 5 and Art 6. See also Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 208ff.

preventing suspects from escaping the consequences of their criminal responsibility, if proven'.[24] The purpose of all these obligations is to enable proceedings against the suspect, in the absence of his or her extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts. It was against this backdrop that the ICJ ruled that Senegal violated its obligations under Article 6 and 7 due to its failure to establish without delay the jurisdiction required in Article 5(2). The lack of the necessary legal framework resulted in Senegal failing to initiate the preliminary inquiry as required by Article 6(2) and subsequently to put the case to the competent authorities for the purpose of prosecution as well as extradite Habré in accordance with Article 7.[25]

44 The basis for Article 7 of the Convention can be found in Article 7 of the 1970 Hague Hijacking Convention for the Suppression of Unlawful Seizure of Aircraft, which in turn is derived from the '*aut dedere aut judicare*' provisions contained in the Geneva Conventions.[26] Article 7 of the Hague Hijacking Convention requires '[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution'.

45 Since the 1970s the 'Hague formula' has become the dominant template for conventions aimed at the suppression of specific offences. Since then approximately three-quarters of the relevant conventions feature '*aut dedere aut judicare*' provisions following the logic of the 'Hague formula',[27] including the 1985 Inter-American Convention to Prevent and Punish Torture, the 1994 Inter-American Convention on Forced Disappearance of Persons, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, and the 1986 UN Convention against Torture.[28]

46 All these treaties have in common that the forum State has to submit the case of the alleged offender to a competent authority for the purpose of prosecution, if it does not extradite. This obligation is further combined with additional requirements demanding

> (a) to criminalize the relevant offense under its domestic laws; (b) to establish jurisdiction over the offence when there is a link to the crime or when the alleged offender is present on their territory and is not extradited; (c) to make provisions to ensure that the alleged offender is under custody and there is a preliminary enquiry; and (d) to treat the offence as extraditable.[29]

[24] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012 422 para 91.

[25] ibid paras 118–21; see above Art 5 §§ 121–28 and Art 6 §§ 47–51.

[26] Hague Hijacking Convention (n 9) Art 7; see International Law Commission (ILC), 'Report of the International Law Commission' (2014) UN Doc A/69/10 139, ch VI, para 10.

[27] ILC (n 26) para 13.

[28] Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67, Art 12; Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) OAS Treaty Series No 6, Art 6; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 Art 9(2).

[29] ILC, 'Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (aut dedere aut judicare)" ' (18 June 2010) UN Doc A/CN.4/630, para 109. The Secretary's survey finds in total four different types of 'aut dedere aut judicare' provisions in its study of multilateral treaties. While all types stipulate a duty to extradite or prosecute, they differ in key details, eg whether domestic prosecution is contingent on the reception of an extradition request.

47 The principle of '*aut dedere aut judicare*' as stipulated in Article 7 does not only relate to universal jurisdiction cases, but covers any case which falls under one of the jurisdictional heads stipulated in Article 5 of the Convention. Hence, States which have jurisdiction over a case under the territorial, flag, active, or passive nationality principle are not only obliged to submit it to its competent authorities for prosecution, but are also offered with the possibility to relieve themselves of this obligation by responding positively to an extradition request from another State party.

48 The only provision in Article 7 which applies exclusively to cases prosecuted under universal jurisdiction is the second sentence of Article 7(2) which requires that the standard of evidence for prosecution and conviction in these cases shall in no way be less stringent than those which apply to those cases which are prosecuted under the territorial, flag, active or passive nationality principle as stipulated in Article 5(1).

3.2 Article 7(1): Obligation of the Forum State to Proceed to Prosecution

3.2.1 'Submit the Case to its Competent Authorities for the Purpose of Prosecution'

49 Article 7(1) obliges States parties in the territory under whose jurisdiction an alleged torturer is found to submit the case to their competent authorities for the purpose of prosecution, unless they extradite the suspect to another State party with territorial, flag, or national jurisdiction. The formulation to 'submit the case to its competent authorities for the purpose of prosecution' in Article 7(1) is insofar relevant as it does not demand a prosecution in all circumstance, but leaves it at the discretion of the competent authorities to decide whether in light of the available evidence and other relevant circumstances to formally charge and prosecute the alleged torturer.[30] In this context the International Law Commission (ICL) concluded in its report on 'The obligation to extradite or prosecute (*aut dedere aut judicare*)' that the 'obligation to prosecute is actually an obligation to submit the case to the prosecuting authorities; it does not involve an obligation to initiate a prosecution'.[31]

3.2.1.1 Discretion of Authorities Whether to Prosecute or Not

3.2.1.1.1 Guengueng et al v Senegal (Habré case before the CAT Committee)

50 The case of Hissène Habré and his eventual prosecution under universal jurisdiction in Senegal, inter alia for torture committed during his authoritarian rule in Chad, provides an elucidating example for a State's obligation under Article 7 of the Convention. This is particular the case since the Committee against Torture as well as the ICJ considered Senegal's obligations under the Convention.[32]

51 In its 2007 decision on the case of *Guengueng et al v Senegal*, the Committee for the first time established a violation of the obligation to proceed to a prosecution under Article 7. The Committee held that the State party was obliged to prosecute Hissène Habré for alleged acts of torture unless it could show that there was not sufficient evidence

[30] JH 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) 138.

[31] ILC (n 26) para 21.

[32] See *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 8); ICJ Reports 2012 422 (n 24); see also above Art 5 § 91–114, Art 6 § 47–50.

to prosecute, at least at the time when the complainants submitted their complaint to the Senegalese authorities in January 2000. Yet with its decision of 20 March 2001, which was not subject to appeal, the Senegalese Court of Cassation (*Cour de cassation*) put an end to any possibility of prosecuting Hissène Habré in Senegal. Consequently, the Committee found that Senegal had 'not fulfilled its obligations under article 7 of the Convention'.[33] This landmark decision of the Committee used fairly strong language by explicitly speaking of an obligation to prosecute rather than an obligation merely to submit the case to the competent authorities.[34]

3.2.1.1.2 Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Habré case before the ICJ)

Similarly, the distinction between an 'unconditional' duty to prosecute and the duty to submit the case to the competent authorities was also taken up by the ICJ in its consideration of the Habré case. The ICJ's 2012 judgment was the Court's very first pronouncement on the obligation to extradite or prosecute.[35] In its analysis of Article 7(1) the ICJ drew on the Convention's *travaux préparatoires* and underlined its relation to the Hague Hijacking Convention. The Court concluded that the obligation to prosecute as formulated in Article 7(1) leaves it to the competent authorities to decide 'whether or not to initiate proceedings, thus respecting the independence of States parties' judicial system […] It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.'[36] 'The obligation to submit the case to the competent authorities […] may or may not result in the institutions of proceedings, in light of the evidence before them, relating to the charges against the suspect.'[37]

52 While it is hence at the discretion of the competent authorities to decide whether to initiate a prosecution against the alleged offender, they have to do so in light of the evidence before them and the relevant rules of criminal procedure.[38] As a counterbalance to the discretion conferred to the competent authorities, Article 7(2) obliges them to reach their pertaining decisions 'in the same manner as in the case of any ordinary offence of a serious nature under the law' of the forum State. In the cases referred to in Article 5(2) the standards of evidence required for prosecution and conviction shall in no way be less stringent than those that apply in the cases referred to in Article 5(1).[39]

[33] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 8) para 9.9. [34] See below § 58.

[35] Furthermore, the Habré case was only the second contentious case at the ICJ in which the defendant country was accused of being in breach of its obligation under a human rights convention. Mads Andenas and Thomas Weatherall, 'II. International Court of Justice: Questions relating to the obligation to extradite or prosecute (Belgium v Senegal) Judgement of 20 July 2012' (2013) 62 ICLQ 753. Similarly noteworthy, the Court confirmed for the first time the prohibition of torture as a jus cogens norm, held that former Heads of States are not immune from universal jurisdiction for grave breaches of international law, and concluded that States parties to the Convention had a legal obligation towards all other States parties (*erga omnes partes*) to comply with the Convention (ibid, paras 103–05).

[36] ibid, para 90. The ICJ's reasoning is consistent with the jurisprudence of the UN Human Rights Committee which concluded that an individual does not have the right to see another individual criminally prosecuted under the ICCPR, see eg *HCMA v The Netherlands,* No 213/1986, UN Doc CCPR/C/35/D/213/1986, 30 March 1989; Sangeeta Shah, 'Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (2013) 13 HRLR 361 fn56.

[37] ICJ Reports 2012 422 (n 24) para 94. [38] ibid, paras 90–95.

[39] See also *HBA et al v Canada*, No 536/2013, UN Doc CAT/C/56/D/536/2013, 2 December 2015; see above Art 6 §§ 20–35.

3.2.1.2 Prosecution Does Not Require Extradition Request

53 During the drafting of the Convention some States argued for the inclusion of a clause, requiring the existence of an extradition request for the forum State to become obliged to submit the case to its competent authorities for the purpose of prosecution, should it decide not to extradite. Making the duty to prosecute contingent on an extradition request was deemed by the proponents of this requirement as a precaution against what they considered an excessive use of universal jurisdiction. Eventually though, this requirement was not included and in line with the 'Hague formula' the State party's duty to submit the case to its competent authorities for the purpose of prosecution is neither contingent on the reception nor the rejection of an extradition request.[40] In its decision in the Habré case, the Committee against Torture explicitly stated that 'the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition'.[41] Similarly, and also in the Habré case, the ICJ held in its judgment that 'Article 7, paragraph1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior extradition request'.[42]

3.2.1.3 Obligation to Prosecute and Option to Extradite

3.2.1.3.1 Prosecution as an Obligation, Extradition an Option

54 Following the 'Hague formula' and as also confirmed by the ICJ in the Habré case, the duty to submit the case to the competent authorities for prosecution is an obligation under the Convention, 'the violation of which is a wrongful act engaging the responsibility of the State'.[43] The only avenue for the forum State to eschew this obligation is to extradite the suspect to a State party, which requests extradition.[44] Only if such an extradition request has been received, the forum State can choose between submitting the case to its own competent authorities for the purpose of prosecution, or replying favorably to the extradition request and transferring the suspect to the requesting State.[45] If no extradition request is received, the forum State has no other avenue available than to submit the case to its own competent authorities for prosecution.

55 Importantly, it remains at the discretion of the forum State whether it wants to domestically prosecute the case or extradite the alleged torturer. For example, a request for extradition by a State party having jurisdiction under Article 5(1) does not supersede the forum State's ability to prosecute under Article 5(2). Similarly, a State party intending to prosecute an alleged torturer under the (active or passive) nationality principle (5(1)(b) and (c)) is under no legal obligation to respond favorable to an extradition request from a State party having jurisdiction under the territoriality principle (Article 5(1)(a))

[40] See above eg §§ 22, 41.

[41] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 8) para 9.7.

[42] ICJ Reports 2012 422 (n 24) paras 90, 94.

[43] ibid, para 95: '… the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.'

[44] See also below §§ 61–64 on the 'third alternative' to transfer alleged torturers to international criminal tribunals for prosecution.

[45] The availability of the option to extradite is further premised on the non-violation of the non-refoulement principle according to Art 3 CAT. Furthermore, extradition is not an option if the State requesting extradition is neither able or willing to actually prosecute the alleged torturer. See below §§ 56–57.

(and vice versa). Such an obligation for extradition would only exist if an order of priority among the different grounds of jurisdiction in Article 5 had been established in the Convention. This is however not the case.[46]

3.2.1.3.2 Limitations to Option to Extradite

56 The option to extradite is, however, only available if extradition would be in accordance with international law. Even if an extradition request has been received, the option of extradition is de facto not available in cases which contravene the non-refoulement principle as stipulated in Article 3 CAT. Whenever there are 'substantial grounds for believing that [the alleged torturer] would be in danger of being subjected to torture' in the State seeking extradition, the forum State is under an obligation not to extradite.[47] In addition, States parties to the Covenant on Civil and Political Rights (CCPR) or regional human rights treaties would also have to take into account the prohibition to extradite to a State in which there is a substantial risk of being subjected to other forms of cruel, inhuman or degrading treatment or punishment.[48] In addition, under the ruling of the Human Rights Committee in *Judge v Canada*, a forum State that has abolished the death penalty would not be allowed to extradite a suspected torturer to a State where he or she would be in danger of being sentenced to death and/or executed.[49] Other limitations on extradition can be derived from the right of the accused to privacy and family life as stipulated in Article 17 CCPR,[50] from the right to a fair trial as stipulated in Article 14 CCPR and Article 7(3) CAT, from procedural safeguards contained in Article 13 CCPR, or from specific provisions restricting extradition in the respective bilateral and multilateral extradition treaties.

57 Should the extradition request originate from a State which actually may seek to protect the alleged torturer from prosecution rather than to prosecute him or her (for example, a State known for the systematic practice of torture seeks extradition of one of its officials who is alleged to have committed acts of torture by the forum State), the forum

[46] An Italian proposal to establish an order of priority among the different grounds of jurisdiction, with the territoriality principle at the top and universal jurisdiction at the bottom, was rejected. A similar proposal was made by the Chinese delegation during the final stage of drafting of Arts 5 and 7. See CHR, 'Draft convention on torture and other cruel, inhuman or degrading treatment or punishment: summary prepared by the Secretary-General in accordance with resolution 18 (XXXIV) of the Commission on Human Rights' (18 December 1978) UN Doc E/CN.4/1314/Add.4 and above Art 5 § 57. The reluctance of States to accept such binding obligations to extradite alleged torturers to another State can easily be explained by the far-reaching interference of such an obligation with State sovereignty; cf Boulesbaa (n 23) 218.

[47] The Committee against Torture highlighted at several instances that Art 7 has to be read in conjunction with the non-refoulement rule of Article 3. See CAT, 'Summary Record: Luxembourg' (1992) UN Doc CAT/C/SR.107, para 33; see also CAT, 'Summary Record of the Fourteenth Meeting' (1989) UN Doc CAT/C/SR.14 para 29; CAT, 'Summary Record of the Sixteenth Meeting' (1989) UN Doc CAT/C/SR.16, paras 13 and 48; CAT, 'Summary Record of the Seventeenth Meeting' (1989) UN Doc CAT/C/SR.17, para 25; CAT, Summary record of the first part (public) of the twenty-sixth meeting (1989) UN Doc CAT/C/SR.26, para 51; CAT, 'Summary Record of the Thirtieth Meeting' (1989) UN Doc CAT/C/SR.30, para 51; CAT, 'Summary Record of the Thirty-second Meeting' (1989) UN Doc CAT/C/SR.32, paras 15 and 19; CAT, 'Summary Record of the 122nd Meeting' (1992) UN Doc CAT/C/SR.122, para 23; see also Berg (n 1) 269 fn 966; see also above Art 3.

[48] cf Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 185ff. In its General Comment No 2, the CAT Committee states that it 'considers that articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment'. The authors of this commentary do not share this view. For a discussion see Arts 2, 4, and 16; see also CAT, 'General Comment No 2 on the implementation of article 2 by States parties' (2008) UN Doc CAT/C/GC/2, para 6.

[49] *Roger Judge v Canada* [2002] HRC No 829/1998; cf Nowak (n 48) 151ff.

[50] cf Nowak (n 48) 395ff.

State shall also not reply positively to the extradition request. In such a case, the latter shall submit the case to its own competent authorities for the purpose of prosecution, unless another State party with jurisdiction under Article 5(1) and a credible commitment to prosecute the suspect seeks his or her extradition. Similarly, should the extradition request be forwarded by a State which is credibly committed to prosecute the alleged perpetrator, but unlikely to dispose of the judicial and administrative capacity to effectively conduct the required prosecution, the forum State shall also refrain from extraditing.[51] Pursuing with extradition in these cases would run counter to the object and purpose of the Convention which is to end impunity for acts of torture and is hence no permissible option for the forum State.

3.2.1.3.3 Failure to Prosecute Turns Option to Extradite Into an Obligation

58 The rationale behind the '*aut dedere, aut judicare*' formula contained in Article 7 is to ensure that there are no safe havens for individuals responsible for acts of torture which would allow them to go unpunished. Crucially, this also implies that the failure to submit a case to the competent authorities for domestic prosecution results in the transformation of the option to extradite into an obligation to extradite (provided that an request has been received and extradition would be according to international law). In the seminal *Guengueng et al v Senegal* case, the CAT Committee had found Senegal to be in breach of its obligation to submit Hissène Habré to its competent authorities for prosecution. Importantly, in addition it concluded that by refusing to comply with the 2005 extradition request of Belgium, 'the State party has again failed to perform its obligations under article 7 of the Convention'.[52] This does not mean that the Committee found an obligation to extradite per se, but an obligation to take a decision in accordance with the principle *aut dedere aut judicare* in Article 7 aimed at bringing Hissène Habré to justice, either before Senegal's own courts or by extraditing him to Belgium. In other words, if the forum State, on the basis of its domestic laws, is not willing or not able to prosecute a suspected torturer, the choice between extradition and prosecution turns into a legal obligation to extradite, provided that such extradition is in accordance with international law.

3.2.1.3.4 Practical Order between Prosecution and Extradition

59 As stated above,[53] the Convention does not stipulate any hierarchy between the different forms of jurisdiction under Article 5. This also implies that there is no formal hierarchy between domestic prosecution and the option to extradite. The forum State is free to either prosecute or extradite. However, this does not mean that the forum State should not seriously consider any genuine extradition request from another State. Extradition as a form of mutual judicial assistance is usually regulated by bilateral or multilateral extradition treaties. In order to facilitate the extradition of suspected perpetrators of torture, Article 8 contains different provisions, including the assumption that torture is included as an extraditable offence in existing extradition treaties between States parties and that the Convention shall be considered as the legal basis for extradition in the absence of a respective extradition treaty.[54]

[51] The ILC refers to a 'State with the necessary jurisdiction and capability to prosecute the suspect': see ILC (n 26) para 17.

[52] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 8) para 9.11. In its judgement in the Habré case the ICJ did not explicitly address Belgium's request to declare that Senegal must extradite. Senegal was only ordered to take without further delay all necessary measures and submit the case for prosecution, unless it acceded to Belgium's extradition request. See ICJ Reports 2012 422 (n 24) paras 14(2)(a) and 121; see also below § 73.

[53] See above § 55. [54] See below Art 8.

60 From a practical point of view, there are several reasons why a prosecution in the territorial state might be preferable to a prosecution in the State with jurisdiction under Article 5(2). In most cases, prosecution in the territorial state can facilitate more effective investigations, among others, due to easier evidence collection and access to witnesses. Language barriers and different cultural norms might further complicate prosecution in the forum state. The overall administrative and financial burden is likely to be lower in cases in which prosecution takes place in the State where the crime was committed rather than in a State which might be far away from the actual *locus delicti*. Although Article 9 requires States 'to afford one another the greatest measure of assistance […] including the supply of all evidence at the disposal necessary for proceedings', this requirement may not fully offset the distinct challenges of prosecution by the forum State.[55]

3.2.1.4 'Third alternative': Transfer to International Tribunals

61 Traditionally, and as described above, the principle of *aut dedere aut judicare* has provided States with two alternatives: submitting the case to the State's competent authorities for the purpose of prosecution or extradition. With the creation of the International Criminal Court (ICC) and various international ad hoc criminal tribunals, new institutions have been emerging which may, however, offer States recourse to a 'third alternative': surrendering the suspect to a competent international or regional criminal court. This development was recognized by the ILC in its report on the obligation to extradite or prosecute[56], in which it highlights the pertaining innovation in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED). Article 11(1) CED explicitly provides for the obligation to prosecute or extradite and reads almost identical to Article 7(1) CAT. Importantly though, it additionally stipulates the State party's option to 'surrender [the suspect] to an international criminal tribunal whose jurisdiction it has recognized', if it wishes not to extradite him or her to another state or submit the case to its competent authorities for the purpose of contribution.[57]

62 With regard to CAT, the emergence of this 'third alternative' contributes to the overall purpose of Article 5(2) and Article 7(1), which is to close safe havens for torturers. Provided that the necessary safeguards for the suspect are in place, and that the proceedings ensure an effective prosecution, the surrender of a suspect to an international criminal court serves the same purpose and is an alternative equivalent to the extradition of a suspect to a state with jurisdiction under Article 5(1). Against this background it would be misleading to argue that the omission of the third alternative from the text of Article 7(1) in the Convention would bar States parties from using this avenue when aiming to

[55] In addition, prosecuting crimes at the place where they were committed may send an important signal to the society of the territorial State, particularly when dealing with torture perpetrated by a previous regime. If the domestic judicial mechanisms are trusted and are capable of conducting a fair and effective prosecution and trial, criminal proceedings can make important contributions to the dealing with the past. Conducting such trials at a possibly remote forum State may, however, result in a lack of connection between the proceedings and the victims, and risks diminishing the contribution of the trial.

[56] The ILC suggests 'that in light of the increasing significance of international criminal tribunals, new treaty provisions on the obligation to extradite or prosecute should include this third alternative, as should national legislation': see ILC (n 26) para 27–29.

[57] See International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2761 UNTS 3 (CED) Art 11(1): 'The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.'

bring suspected torturers to justice. While the teleological reading of the Convention favors the inclusion of international criminal courts into the scope of Article 7(1) because of its contribution to close safe havens, there is also nothing in the *travaux préparatoires* or the jurisprudence of the Committee against Torture[58] that would preclude such an inclusion. In all likelihood, the omission of international criminal courts as an option from Article 7(1) is due to the absence of such courts at the time when the draft of the Convention was discussed, and hence not considered by its drafters.

63 The interpretation favoring an inclusion of the third alternative is in fact already confirmed by practice of States parties surrendering suspects to the International Criminal Tribunal for the former Yugoslavia (ICTY).[59] Furthermore, and more recently in the Hissène Habré case, Senegal established the Extraordinary African Chambers (EAC), which are located in Senegal, but qualify as a hybrid court featuring domestic as well as international elements. Only a month after the ICJ had rendered its judgment in June 2012 and found Senegal in continuous breach of Article 7(1), Senegal and the African Union signed an agreement establishing the EAC for the purpose of prosecuting Hissène Habré.[60] The Chambers were mandated to conduct the investigation, prosecution as well as appeals stage, form part of the Senegalese Court system and comprise two Senegalese judges as well as one Burkinabe judge, who was appointed by the African Union. The EAC's proceedings were carried out under the Senegalese Code of Criminal Proceedings. It is for this reason that some do not consider the EAC as actually falling under the 'third alternative', but rather qualify as a form of prosecution by the competent domestic authorities. Accordingly, 'it is Senegal that will be prosecuting Habré, with some international assistance, and this will be in accordance with its mandate from the African Union as well as its obligation under CAT and in accordance with the judgment of the ICJ'.[61] With this kind of set-up the EAC resemble previous internationalized or hybrid courts such as the Extraordinary Chambers in the Court of Cambodia, the Special Court for Sierra Leone, or the Special Tribunal for Lebanon. But even if one were to consider the EAC as falling outside of the scope of domestic Senegalese realm, for example due to their prosecution of Habré 'on behalf of the African Union', and rather qualify them as a form of internationalized criminal tribunals, this would not amount to a breach of Senegal's obligation under the Convention. Regarding the scope of the obligation to prosecute, the ILC in its report on the obligation to prosecute or extradite refers directly to the—then already established—EAC and refers to them as an example for a 'third alternative'[62] and does not indicate any reservations towards them. Directly pertaining to the permissibility of the EAC under the Convention, ICJ's Judge Xue notes in her dissenting opinion to the Habré judgment, published prior to the establishment of the Chambers, that

> even if the AU ultimately decides to establish a special tribunal for the trial of Mr. Habré, Senegal's surrender to such a tribunal could not be regarded as a breach of its obligation under Article 7,

[58] See also the Committee's concerns regarding the insufficient cooperation of States parties with the ICTY. CAT, 'Conclusions and Recommendations: Bosnia and Herzegovina' (2005) CAT/C/BIH/CO/1, para 10(e); CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Serbia and Montenegro' (2004) UN Doc A/59/44, paras 156–240.

[59] cf Dusko Tadic was arrested in Germany and surrendered to the ICTY. *Tadic Case* (ICTY-94-1, Judgment of 26 January 2000).

[60] See Roland Adjovi, 'Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers' (2013) 52 ILM 1024.

[61] See Shah (n 36) 365–66.

[62] ILC (n 26) para 35.

paragraph 1, because such a tribunal is created precisely to fulfil the object and purpose of the Convention; neither the terms of the Convention nor the State practice in this regard prohibit such an option.[63]

64 Habré was indicted on 2 July 2013 before the EAC. The trial started in July 2015, in the course of which also the testimonies of 69 victims were heard. On 27 April 2017, the Appeals Chamber of the EAC eventually rendered its final judgment and found Hissène Habré guilty of crimes against humanity, war crimes, and torture, and sentenced him to life imprisonment. Victims of torture, among others, who had joined the trial as civil party were awarded a reparation of fifteen million FCFA (approx. 25,000 USD).[64]

3.2.1.5 Time for the Performance of Obligations under Article 7(1)

65 Under Article 7 the question may also arise how swiftly a State party has to submit a case to its competent authorities for the purpose of prosecution. While Article 6(2) requires the State party to 'immediately make a preliminary inquiry into the facts' the Convention does not provide any specific period within which the performance of the obligations under Article 7(1) is required.

66 In some cases, for example, in those which are particularly sensitive from a foreign policy perspective, the forum State might have a political preference for extradition in order to avoid domestic prosecution and the potentially entailed political fallout. The forum State might therefore be tempted to wait and hope to receive an extradition request to which it can respond favorably. The text of the Convention does not provide any explicit period of time for how long the forum State can wait to receive an extradition request and continue to postpone the initiation of its own prosecution. The forum State therefore has a certain discretion to decide at what stage it can conclude that no extradition request was received. This discretion, however, must be reasonable and cannot be used to excessively defer prosecution, under the pretext that the forum State would still wait for an extradition request. Such a deferral would be inconsistent with the general purpose of the Convention and amount to a breach of the forum State's obligation under Article 7(1).[65]

67 Instructively, Senegal argued in the Habré case both before the Committee against Torture as well as the ICJ that it was in principle committed to perform its obligations under the Convention, including Article 7.[66] However, due to legislative as well as financial challenges, Senegal argued, it had not yet been able to prosecute or extradite Habré. Hence, according to Senegal, the non-performance of its obligations under Article 7 were not to constitute a violation, but a delay of the Convention's implementation.

68 Before the Committee against Torture, Senegal argued that the Convention against Torture would be not self-executing and therefore requiring domestic implementation legislation.[67] This process would take time, given the complexity of the matter and Senegal's

[63] See ICJ Reports 2012 422 (n 24) 571, para 42 (Dissenting Opinion of Judge Xue); ILC (n 26) para 28; see also Shah (n 36) fn 81.

[64] Extraordinary African Appeals Chambers (Chambre Africaine Extraordinaire d'Assises d'Appel), *Le Procureur Géneral v Hissein Habré*, Judgment of 27 April 2017. The Appeals Chamber overturned a conviction in the first instance for rape.

[65] ICJ Reports 2012 422 (n 24) para 114. See also Burgers and Danelius (n 30), 137; Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 382; Berg (n 1) 269.

[66] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 8) paras 7.14–7.17; see ICJ Reports 2012 422 (n 24) para 109.

[67] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 8) para 7.11.

state capacity. Consequently, it would be wrong to conclude that Senegal would not apply Article 7. Due to the pending implementation of the required domestic legislation and in the absence of an extradition request in 2001 when the complaint had been submitted, the competent authorities were, according to Senegal, unable to initiate any prosecution. Consequently, 'the presence in Senegal of Hissène Habré cannot itself justify the proceedings brought against him'[68] and therefore Senegal would not breach its obligation under the Convention. Furthermore, following the extradition request from Belgium in 2005, the Dakar Court of Appeals argued that in the absence of the necessary jurisdiction, it would be unable to decide on Belgium's request.[69]

69 Rebuking Senegal's line of reasoning, the Committee against Torture made it clear in its decision that a State party cannot evoke the complexity of its own judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with the obligations under the Convention.[70] Hence, Senegal was obliged to prosecute Habré for alleged acts of torture unless it could show that there was not sufficient evidence to prosecute, at least at the time when the applicants submitted their complaint in Dakar in January 2000. With the Court of Cassation's judgment in 2001 this avenue was, however, closed.[71] Therefore, and irrespective of the time, which had passed since the submission of the complaint, the Committee decided that Senegal not only violated its obligations under Article 5(2) to establish the required jurisdiction, but also violated its obligation under Article 7 of the Convention to submit the case to its competent authorities for prosecution.[72]

70 Similarly, the ICJ considered in the Habré case the arguments brought forward by Senegal in order to justify why Habré had not been prosecuted or extradited. Senegal's suggestion that it had been embroiled in a lengthy and complex process of legal reform until 2007 in order to establish jurisdiction in conformity with Article 5(2) and that it had hence not been in the position to submit the case to its competent authorities as required under Article 7(1) was rejected by the Court. The ICJ argued that the failure to initiate proceedings under Article 7(1) cannot be justified with the lack of domestic legislation.[73] Referring to Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, the Court held that domestic law cannot be invoked to justify a non-performance of obligations undertaken in an international treaty such as those included in Article 7 CAT.[74]

[68] ibid, paras 2.7, 9.3. [69] ibid, para 9.4. [70] ibid, para 9.8. [71] See above § 51.

[72] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 8) para 9.9.

[73] Although the ICJ did not explicitly decide in its judgment on whether Senegal had been in breach of its obligation under Article 5 due to procedural reasons, its decision on Article 7(1) implied that Senegal was in breach of its obligations under Article 5 from 1987 until as late as 2007. See ICJ Reports 2012 422 (n 24) para 113. The Court declared Belgium's request to rule on Senegal's failure to implement legislation in line with Article 5 inadmissible since, by the time the application has been filed, Senegal had already reformed its legal framework and the dispute between Belgium and Senegal on this matter had ended. The presence of a dispute between the parties is a precondition for admissibility. See also Separate Opinion of Judge Cançado Trindade: '… The conduct of the State ought to be one which is conducive to compliance with the obligations of result (in the cas d'espèce, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered it impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly 'good conduct' of the State concerned': see ICJ Reports 2012 422 (n 24) 508, para 50 (Separate Opinion of Judge Cançado Trindade); see above Art 5, §§ 109ff.

[74] ICJ Reports 2012 422 (n 24) para 113.

71 Furthermore, the ICJ noted that although the Convention does not provide any specific time period within which the performance of the obligations under Article 7(1) is required, 'it is necessarily implicit in the text [of the Convention] that [the obligation] must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention',[75] with the latter aimed 'to make more effective the struggle against torture'.[76] From this the Court inferred, that proceedings should be undertaken 'without delay'.[77] Consequently, the Court concluded that Senegal had breached and remained in breach of its obligations under Article 7(1). Similar to the ruling of the Committee against Torture in *Guengueng et al v Senegal*, this breach was ruled to be distinct from Senegal's (non)performance of its obligations under Article 5(2), which the ICJ did not consider on procedural grounds. The ICJ concluded that Senegal was in violation of Article 7(1) before and after Senegal's legal reforms in 2005 by which it established the jurisdiction as required under Article 5(2).

72 Regarding the period after 2005, and on why no prosecution of Mr. Habré had been initiated despite the then available legal framework, Senegal maintained before the ICJ that it always had the intention to comply with its obligations under Article 7(1), however, that it was depending on financial assistance in order to initiate a trial as required by the African Union in its decision of 2006.[78] Furthermore, Senegal argued that the 2010 judgement of the ECOWAS Court of Justice demanded further major reforms of the domestic legal framework, which would require time and hence contribute to the delay in performing its obligations under the Convention.[79] However, both objections were rejected by the ICJ. It held that financial difficulties do not justify the failure to initiate proceedings against Hissène Habré, even if Senegal denies that financial difficulties were brought forward to circumvent its obligations under the Convention against Torture.[80] Furthermore, Senegal's duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice.[81]

73 Senegal was therefore ordered to take without further delay all necessary measures and submit the case for prosecution, unless it acceded to Belgium's extradition request.[82] However, the ICJ did in its judgment not expressly consider Belgium's request to declare that Senegal must extradite Habré 'to Belgium without further ado' should it not prosecute. It hence did not address the question whether Senegal had also violated a duty to extradite following its failure to prosecute.[83]

3.2.1.6 Temporal Scope of Obligation to Prosecute

74 When deliberating the Habré case, the ICJ also had to decide on the temporal scope of the duty to prosecute in the context of *aut dedere aut judicare*. Habré ruled Chad from 1982 to 1990 and Senegal ratified the Convention against Torture in 1986 and became

[75] ibid, para 115. [76] CAT, Preamble. [77] ICJ Reports 2012 422 (n 24) para 115.
[78] See ibid, paras 33, 109. [79] See also above Art 5 § 108.
[80] See ICJ Reports 2012 422 (n 24) para 112. [81] See ibid, para 111.
[82] See ibid, para 121. See ICJ Reports 2012 422 (n 24) para 14(2)(a); Andenas and Weatherall (n 35) 766;
[83] See the Separate Opinion of Judge Skotnikov, for whom the lack of a specific response to Belgium's demand for extradition is not due to the different nature of the duty to prosecute and the option to extradite, but due to the Court's consideration of Belgium's application on the basis of an *erga omnes partes* obligation rather than on the basis of Belgium as an injured party. According to Skotnikov the Court's decision not to pronounce on the question whether Belgium has a special interest in Senegal's compliance with the Convention led to the 'inevitable implication … that the issue of the validity of Belgium's request for extradition remains unresolved': see ICJ Reports 2012 422 (n 24) 481, para 8; see also ibid 559, paras 19–22 (Separate Opinion of Judge Yusuf).

subsequently party to it in 1987 when the treaty entered into force. Consequently, the question arose whether Senegal's obligation to prosecute under Article 7 would also comprise alleged crimes committed before 1986 or 1987.

75 In its pertaining deliberations on the temporal scope the Court highlighted the difference between the prohibition of torture and the obligation to prosecute. Importantly, and for the first time in its history, the Court held that the prohibition of torture is part of customary international law and has become a peremptory norm (*jus cogens*). This status finds its basis in the widespread international practice and on the *opinio juris* of States.[84]

76 In contrast, however, the Court sees the obligation to prosecute alleged torturers as required by Article 7 CAT only arising with the treaty's entry into force. Drawing on Article 28 of the Vienna Convention on the Law of Treaties,[85] which reflects customary law, the Court concluded that

> nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7, paragraph 1, of the Convention does not apply to such acts.[86]

77 Accordingly, Senegal was obliged only from the date of the Convention's entry into force (26 June 1987) onwards to establish the jurisdiction required by Article 5(2), to start a preliminary inquiry according to Article 6(2), and to submit the case to its authorities for prosecution or decide to extradite in accordance with Article 7(1). Those crimes which were allegedly committed by Hissène Habré from the beginning of his regime in 1982 until the entry into force of the Convention in 1987 fall outside of the temporal scope of the duty to prosecute under the Convention.[87]

78 The ICJ referred in its judgment to the Committee against Torture's decision in the case of *OR, MM and MS v Argentina*.[88] In it, the Committee had to decide on a complaint under Article 22 which was submitted by relatives of victims killed by Argentinian militaries in 1976. The Committee held that 'torture for the purpose of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention' and decided the complaint to be inadmissible *ratione temporis*.[89]

79 Importantly, though, while there is no obligation for the State party arising from the Convention regarding crimes committed before its entry into force, the ICJ also notes in its judgment 'that nothing in that instrument prevents it from doing so'.[90] This is noteworthy as it suggests that the ICJ has no objections regarding a retroactive application of the Convention against Torture. The Statue of the EAC, which were created in the wake

[84] See ICJ Reports 2012 422 (n 24) para 99.

[85] cf Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 Art 28: 'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of that treaty with respect to that party.'

[86] See ICJ Reports 2012 422 (n 24) para 100.

[87] See ibid, para 102. It is noteworthy that according to the ICJ's reasoning also acts committed between Senegal's ratification of the Convention on 21 August 1986 and the treaty's entry into force on 26 June 1987 fall outside of its temporal scope.

[88] ibid, para 101; see *OR et al v Argentina*, Nos 1/1988, 2/1988, and 3/1988, UN Doc CAT/C/WG/3/DR/1, 2, and 3/1988, 23 November 1989, para 7.5. See also above Art 5 §§ 162–64.

[89] Argentina ratified the Convention on 24 September 1986.

[90] See ICJ Reports 2012 422 (n 24) para 102.

of the ICJ judgment in the Habré case on the basis of an agreement between Senegal and the African Union, does provide jurisdiction for international crimes committed during the entire period of Hissène Habré's rule (1982 to 1990).[91] Hence, its temporal scope covers years which precede the temporal scope of the Convention.[92]

3.3 Article 7(2): Procedural Safeguards in Case of Prosecution

80 The rationale for the inclusion of Article 7(2) finds its origin in the discussions during the drafting process on the principle of universal jurisdiction as eventually stipulated in Article 5(2). Some States expressed their concern that universal jurisdiction would be prone to be abused for political reasons, could result in trials on the basis of spurious accusations, fabricated evidence, and lead to frictions between States.[93] The inclusion of procedural safeguards as entailed in Article 7(2) was meant to allay these fears and to eventually reach a consensus.

81 Once the forum State has decided not to extradite—either due to a preference for domestic prosecution or the absence of a valid extradition request—it has to submit the case to the 'competent authorities', for example to the prosecutor, in order for them to decide whether to investigate and prosecute the alleged torturer.[94] According to the first sentence of Article 7(2), this decision has to be taken 'in the same manner as in the case of any ordinary offence of a serious nature under the law of that State'. Hence, whenever the competent authorities of a State party are tasked to decide whether to initiate a prosecution in relation to torture, the 'normal procedures relating to serious offences as well as the normal standards of evidence shall be applied'.[95] This requirement arises irrespective under which ground of jurisdiction the case has been placed.

82 Initiating proceedings outside of the territorial State may frequently be confronted with a lack of evidence. The forum State shall also apply to the territorial or national State pursuant to Article 9(1) to supply all evidence at their disposal necessary for the proceedings. If these States are not able or willing to supply the necessary evidence, the forum State shall reconsider its decision to prosecute and choose, as far as possible, the option of extradition to these States. It may even delay the proceedings for a reasonable time in order to negotiate a proper solution with other State(s) concerned. If these efforts fail as well, the strict procedural standards of Article 7(2) might even require the forum State to stop the criminal proceedings and to release the suspected torturer.

83 The second sentence of Article 7(2) demands that 'the standards of evidence required for prosecution and conviction' in universal jurisdiction cases shall in no way be 'less stringent' than those which apply to cases prosecuted and tried under other grounds of jurisdiction stipulated in Article 5(1). The purpose is to safeguard against an unjustifiable 'lowering of the bar' allowing for an arbitrary, for example politically motivated, resort to universal jurisdiction. Although the principle of universal jurisdiction has been regarded as an essential element in making the Convention an effective instrument, it should not contribute to prosecutions and convictions on the basis of insufficient or inadequate evidence.[96]

[91] See Adjovi (n 60) 1028. [92] See above § 63. [93] See above § 32 and Art 5 §§ 37, 38.
[94] See above § 49. [95] Burgers and Danelius (n 30) 138.
[96] ibid.

84 While not explicitly stated it would be similarly impermissible to 'raise the bar' in universal jurisdiction cases and require standards of evidence which exceed those of cases under other grounds of jurisdiction. Raising the required standards of evidence to an unduly restrictive level could be taken by the forum State as a tempting escape route in cases in which no extradition request has been received but prosecution is considered not desirable for example due to the political sensitivity of the case. Such an application of more stringent requirements for universal jurisdiction would result in the decision not to prosecute and try suspected torturers, and hence also contribute to impunity and run counter to the purpose of the Convention. The failure of the competent authorities, for example the prosecutor, to perform his or her duties of bringing a torturer to justice may amount to a violation by the respective State party of its obligations under Article 4, as established by the Committee against Torture in the case of *Guridi v Spain*.[97]

3.4 Article 7(3): Right of the Alleged Torturer to Fair Treatment

85 Article 7(3) stipulates that any person regarding whom proceedings are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings. The provision to guarantee 'fair treatment at all stages of the proceedings' appeared initially as Article 6(5) in the revised Swedish draft, however, in 1981 the Working Group decided to move the paragraph to Article 7.

86 During the deliberations of the Working Group in 1981, the Netherlands proposed to specify and therefore to limit the scope of the Article to 'guarantees of a fair and equitable trial'.[98] However, this proposal was eventually not incorporated into the Swedish draft or the final version of Article 7(3) which explicitly requires fair treatment at 'all stages of the proceedings'. Hence, the obligation to guarantee fair treatment to a person regarding whom proceedings are brought in connection with the offences referred to in Article 4 arises already with the arrest or a less intrusive measure imposed in accordance with Article 6(1). The obligation of Article 7(3) continues through all stages of the criminal investigation up to the extradition proceedings and/or the criminal trial. During interrogation, the alleged torturer, of course, should not be subjected to any torture, cruel, inhuman or degrading treatment. During custody, he or she must enjoy the right to *habeas corpus* and other minimum rights of persons deprived of liberty as stipulated in Article 9 CCPR. During the extradition procedure, he or she has the right under Article 13 CCPR to submit reasons against such extradition and to enjoy all other procedural rights stipulated in bilateral or multilateral extradition treaties. In particular, he or she shall not be extradited to a country where there exists a serious risk of torture or ill-treatment. In deciding whether to extradite or prosecute, the forum State shall also take into account whether the accused will enjoy a fair trial in the State which requested his or her extradition. Finally, during the criminal trial, the suspected torturer must enjoy all the guarantees of a fair trial as stipulated in Article 14 CCPR.[99]

87 The obligation for a fair treatment as enshrined in Article 7(3) partly overlaps with the obligations stipulated in Article 12 and 13; however, there are important differences. Article 12 requires the State party to initiate *ex officio* a prompt and impartial

[97] *Kepa Urra Guridi v Spain*, No 212/2002, UN Doc CAT/C/34/D/212/2002, 17 May 2005;
[98] E/CN.4/L.1576 (n 16).
[99] cf CAT, 'Report of the Committee against Torture' (1993) UN Doc A/48/44, paras 230–60; CAT, 'Conclusions and Recommendations: Georgia' (2006) UN Doc CAT/C/GEO/CO/3.

investigation whenever there is a reasonable ground to believe that an act of torture has been committed.[100] In contrast to Article 7(3), this obligation includes cases where the identity and the whereabouts of the perpetrator is not known, but is limited to cases where the crime was perpetrated on the territory under the jurisdiction of the State party. Similarly, Article 13 stipulates the right to have complaints promptly and impartially investigated by the State party's competent authorities, but only in relation to cases were the crime was perpetrated on the territory under the jurisdiction of the State party.[101] The obligation to guarantee fair treatment under Article 7(3) goes beyond cases perpetrated on the territory under the State party's jurisdiction and covers all grounds of jurisdictions stipulated in Article 5.[102] Article 7(3) applies to 'any of the offences referred to in Article 4', including acts of torture, attempts to commit torture, and the complicity or participation in torture. Its scope is in no way contingent on the jurisdictional ground under which the proceedings are initiated.

ROLAND SCHMIDT

[100] See below Art 12. [101] See below Art 13. [102] Ingelse (n 65) 335; Berg (n 1) 271/fn 973.

Article 8

The Convention as a Basis for Extradition

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

1. Introduction	292
2. Travaux Préparatoires	293
2.1 Chronology of Draft Texts	293
2.2 Analysis of Working Group Discussions	295
3. Issues of Interpretation	296
3.1 Need for Removing Legal Obstacles to Extradition	296
3.2 Article 8(1): Obligation to Treat Torture as an Extraditable Offence in Extradition Treaties	298
3.2.1 Relevance for Already Existing Extradition Treaties	298
3.2.2 Relevance for Future Extradition Treaties	298
3.3 Article 8(2): Authorization to Consider the Convention as Legal Basis for Extradition	299
3.4 Article 8(3): Obligation to Recognize Torture as an Extraditable Offence in Domestic Law	300
3.5 Article 8(4): Presumption of Equality between the Principles of Territoriality and Nationality	301

1. Introduction

1 The purpose of the Convention of avoiding safe havens for torturers can best be achieved by a clear obligation of the forum State to prosecute any suspected perpetrator of torture present in any territory under its jurisdiction and by facilitating the possibility of extradition from the forum State to the territorial or national State.[1]

[1] See above Arts 5, 6, and 7.

Article 8 seeks to achieve the second aim by removing, as far as possible, legal obstacles to extradition. It establishes an obligation to treat torture as an extraditable offence in bilateral or multilateral extradition treaties between States parties and an obligation to recognize torture as an extraditable offence in domestic law. In addition, Article 8 authorizes States parties to consider the Convention as a legal basis for extradition and establishes a legal presumption of equality between the principles of territoriality and nationality.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention, 16 December 1970)*[2]

Article 8

1. The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, paragraph 1.

3 *IAPL Draft (15 January 1978)*[3]

Article X (Extradition)

1. Where a Contracting Party receives a request for extradition from a Contracting Party having prior or concurrent jurisdiction, it shall grant extradition of persons accused of torture in accordance with its laws and treaties in force and subject to the provisions of this Convention.

2. In the absence of a treaty of extradition with a requesting Contracting Party, the Contracting Parties undertake to extradite on the basis of this Convention.

3. Contracting Parties which do not make extradition conditional on the existence of a treaty shall recognize torture as an extraditable offence.

[2] Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (Hague Hijacking Convention).

[3] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

Article XII (Torture not a Political Offence)

For the purposes of this Convention, torture shall not be deemed a political offence

4 *Original Swedish Draft (18 January 1978)*[4]

Article 14

Instead of instituting criminal proceedings in accordance with paragraph 1 of Article 11, a State Party may, if requested, extradite the alleged offender to another State Party, which has jurisdiction over the offence in accordance with Article 8.

5 *United States Draft (19 December 1978)*[5]

1. To the extent that the offences set forth in articles 1 and 2 are not listed as extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, at its option, consider this Convention as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the procedural provisions and the other conditions of the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those offences as extraditable offences between themselves subject to the procedural provisions and the other conditions of the law of the requested State.

4. Each offence under article 1 or article 2 shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with articles 10, paragraph 1.

6 *Revised Swedish Draft (19 February 1979)*[6]

Article 8

1. The offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it [may] [shall] consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

[4] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[5] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, para 94.

[6] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

> 4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

2.2 Analysis of Working Group Discussions

7 Given that some States can only extradite a person on the basis of a treaty obligation to this effect, Sweden considered it desirable to make the Convention itself the basis for the extradition of suspected torturers. Provisions to this effect also appear in Article 8 of the 1971 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,[7] Article 8 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,[8] Article 8 of the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[9] and Article 10 of the 1979 New York Convention against the Taking of Hostages.[10]

8 In comments on specific articles Austria considered that Article 14 of the original Swedish draft and Article X(2) of the IAPL draft were complementary and might accordingly be combined. Austria also felt that the wording 'may [. . .] extradite' should be reconsidered and that in the case of an already existing extradition treaty an obligation to extradite should not be superseded by the optional possibility of extraditing as provided in Article 14. Austria was of the opinion that a more stringent obligation might be created, for example by replacing the word 'may' by 'shall' in that article.

9 The United States proposed that the 'prosecute or extradite' provision be modelled on the language used in the Protection of Diplomats Convention. France was of the opinion that 'if requested' should be replaced by the words 'at the request of another State Party', and that the words 'in accordance with its legislation' should be added after the word 'extradite'. With regard to extradition, the French delegation was of the opinion that the principle of non-extradition for political offences should be maintained and that Article 14 was acceptable because of its flexibility.

10 Switzerland feared that the motives for acts of torture might be such as to permit torturers to invoke the political nature of their actions as an argument against their extradition. It also feared that a State of refuge might be able, for the same reasons, to refuse the extradition of a person charged with torture. The Swiss Government therefore considered it advisable to include in the draft Convention a provision similar to that proposed by the IAPL in its Article XII, to the effect that acts of torture shall not be considered political offences, suggesting that this provision might be included in Article 14 in the form of an additional paragraph reading: 'For the purposes of this Convention, the acts defined in article [. . .] shall not be deemed to be offences of a political nature.'

[7] See n 2 above.

[8] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177 (Montreal Convention).

[9] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167.

[10] International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205.

11 Finally, the Swiss Government proposed that the provisions on extradition contained in the Swedish Government's draft should be supplemented and strengthened by an additional article which would essentially restate the rules set out in Article 8 of the Hague Convention for the Suppression of Unlawful Seizures of Aircraft, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Believing that it would be desirable to include an article establishing a legal basis under the Convention for treating torture as an extraditable offence and detailing the relationship between the Convention and present or future extradition treaties, the United States put forward a proposal analogous to the articles in the Hijacking, Sabotage, and Protection of Diplomats Conventions. After informal consultations and taking into account the proposal by the United States, Sweden submitted its revised draft.[11]

12 Concerning paragraph 2, there was a difference between delegations as to the choice of the wording 'may' or 'shall'. The Working Group therefore adopted the text proposed by Sweden, including the two alternatives in paragraph 2 which were left for further consideration at a later stage.[12] Although most delegations felt that the verb should read 'shall', some delegations, in particular the United Kingdom and the United States, maintained their position that the verb should read 'may'. The latter position prevailed in 1982.[13] In their commentary on the *travaux préparatoires*, Burgers and Danelius expressed a certain disappointment when they stated that 'it remains to be seen to what extent the States concerned will in effect accept the Convention as the basis of extradition'.[14]

3. Issues of Interpretation

3.1 Need for Removing Legal Obstacles to Extradition

13 Extradition is the obligatory departure of a person from one State to another, at the request of the latter State, for the purpose of bringing him or her to justice or of implementing a judgment, if the person concerned has already been sentenced and convicted. While expulsion is in the interests of the expelling State for certain purposes, such as national security, public order, the prevention of crime or illegal migration, extradition is in the interest of the requesting State and only for the purpose of criminal justice. Expulsion, extradition, and the involuntary return (refoulement) of a refugee or migrant to his or her country of origin are, in contrast to rendition and similar forms of illegal removal of aliens from one State to another, legal concepts which, if implemented in pursuance of a valid decision reached by a competent authority in accordance with domestic law and respecting the minimum guarantees against arbitrary removals established by international law, a lawful practice between States under international law. Such minimum guarantees include the prohibition of refoulement under Article 3 of the Convention,[15]

[11] See above § 6.

[12] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367, para 63.

[13] E/CN.4/1983/L.40, para 38.

[14] J Herman Burgers and Hans 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) 139.

[15] See above Art 3.

the protection of privacy and family life under Article 17 CCPR, the right to remain in one's own country under Article 12(4) CCPR, or the procedural rights of aliens to a hearing, an appeal, and proper representation under Article 13 CCPR. In addition to international human rights, refugee, and criminal law, the respective rights and obligations of the requesting and the requested State vis-à-vis each other and in relation to the individual concerned are regulated in various bilateral and multilateral extradition treaties.[16] The decision to expel or extradite an individual to another State is, however, regarded as an essential element of State sovereignty, and States are extremely reluctant to accept any legal obligations to expel or extradite.

14 The Convention is based on the desire to combat impunity for the crime of torture and to eliminate safe havens for torturers. This requires the obligation of all States parties to establish jurisdiction without loopholes as well as their obligation to mutual judicial assistance and willingness to extradite alleged torturers to other States with a more convincing jurisdiction. The main purpose of Article 8 is, therefore, to remove, as far as possible, any legal obstacles to extradition and to create the legal possibility for States parties to extradite alleged torturers to other States parties.[17] The Committee regularly noted with concern State parties' failure to enact legislation complying with these obligations under Article 8.[18]

15 The *travaux préparatoires* reveal two different legal approaches dominating the drafting process. One is represented by Article X of the IAPL draft, which contains an order of priority among various grounds of jurisdiction[19] and an obligation of States parties to extradite the alleged torturer to a State with a stronger jurisdiction. The other is expressed in Article 14 of the original Swedish draft which, rather than establishing a duty to extradite, gives priority to the duty of the State, where the alleged offender is present (the forum State), to prosecute and only provides the forum State with an alternative option, if requested, to extradite. Since this principle of *aut dedere aut judicare* had already been accepted and developed in a considerable number of anti-terrorism treaties and does not require any legal obligation to extradite, it finally prevailed over the first concept.[20]

16 The Austrian position[21] in the Working Group that both legal approaches are complementary and should, therefore, be combined, and which was later maintained as illustrated by the failure of the Austrian authorities to arrest Mr. Al-Duri in 1999,[22] overlooked the different philosophies behind these two approaches. The 'prosecution approach' seems more practical insofar as extradition involves a complex and lengthy procedure with many legal obstacles. On the other hand, the 'extradition approach' seems more practical as the territorial or national State usually has better access to

[16] See eg European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) ETS 24; Inter-American Convention on Extradition (adopted 25 February 1981, entered into force 28 March 1992) OASTS No 60. See also UN GA Res 45/116 of 14 December 1990 (Model Treaty on Extradition) Art 3(f) and its amendments according to UN GA Res 52/88 of 12 December 1997.

[17] cf Burgers and Danelius (n 14) 139.

[18] See eg CAT, 'Concluding Observations: Uganda' (2005) UN Doc CAT/C/CR/34/UGA para 5(d); CAT, 'Concluding Observations: Chile' (2004) UN Doc CAT/C/CR/32/5, para 6(f); CAT, 'Report of the Committee against Torture Twenty-seventh session (12–23 November 2001) Twenty-eighth session (29 April–17 May 2002)' (2002) UN Doc A/57/44, paras 59–67; CAT, 'Report of the Committee against Torture' (1996) UN Doc A/51/44, paras 66–83; CAT, 'Report of the Committee against Torture' (1993) UN Doc A/48/44, paras 50–62.

[19] See above § 3. [20] See also above Art 5 §§ 153–63. [21] See above § 8.

[22] See above Art 6 §§ 34, 35.

evidence than a State exercising jurisdiction under the universality or passive nationality principle. With respect to torture, experience shows, however, that the territorial or national State often has no political interest in prosecuting perpetrators of torture, since they acted in accordance with an explicit State policy or at least with the acquiescence of the Government.

17 The 'extradition approach' demands that all legal obstacles to effective extradition be removed. This can be seen from the attempts in Article X of the IAPL draft to make the Convention a proper legal basis for extradition and to establish the obligation of States parties to recognize torture as an extraditable offence. Article 14 of the original Swedish draft did not contain any similar provisions. Since the 'prosecution approach' of the Swedish draft also recognized the alternative of extradition, it was also essential that the Convention created, as far as possible, the legal possibility to extradite. However, as the majority of the Committee against Torture made clear in its admissibility decision on the case of *Rosenmann v Spain*, Article 8 does not impose any obligation on a State party to seek an extradition, or to insist on its procurement in the event of a refusal.[23]

3.2 Article 8(1): Obligation to Treat Torture as an Extraditable Offence in Extradition Treaties

18 Paragraph 1 of Article 8 corresponds almost literally to Article 8(1) of the Hague Hijacking Convention and deals with the relation between the Convention and any existing or future extradition treaties between States parties, whether bilateral or multilateral.

3.2.1 Relevance for Already Existing Extradition Treaties

19 With respect to already existing extradition treaties between States parties, the first sentence provides that the crime of torture shall be deemed to be included as an extraditable offence in such treaties. Article 8 can thus be regarded as an amendment to existing extradition treaties by adding torture to other extraditable offences, if it was not yet covered by the respective treaty. If a given extradition treaty contains a certain list of extraditable offences, the fact that torture is not included shall no longer constitute an obstacle to extradition between States which are parties to both the respective extradition treaty and the Convention. As amendments must be agreed to by all States parties, Article 8(1) has no effect on extradition treaties between States parties to the Convention and non-State parties. If a State which is not a party to the Convention requests from another State which is a party to the Convention, on the basis of their bilateral extradition treaty, which does not include torture as an extraditable offence, the extradition of an alleged torturer who is a national of the requesting State, the requested State must refuse the extradition for lack of a proper legal basis. As soon as the requesting State ratifies the Convention, the requested State is entitled to extradite the person concerned. With respect to multilateral extradition treaties, the relevant provisions must be read differently in relation to States parties and non-State parties.

3.2.2 Relevance for Future Extradition Treaties

20 With regard to future extradition treaties between States parties, the second sentence of Article 8(1) establishes the obligation explicitly to include the crime of torture as an

[23] *Roitman Rosenmann v Spain*, No 176/2000, UN Doc CAT/C/28/D/176/2000, 30 April 2002. See also above Art 5 § 75–78.

extraditable offence. This is a clear obligation of result in relation to bilateral treaties. For example, in 1997, the Committee congratulated Argentina on bilateral treaties on extradition and judicial assistance recently concluded by the State party which 'contained provisions consistent with Article 8 of the Convention'.[24] With respect to multilateral treaties, the question seems to be less clear. If such treaties are concluded by States parties to the Convention only, the obligation is the same as with respect to bilateral treaties. But if non-States parties to the Convention are parties to such treaties, the obligation of members to the Convention can only be interpreted as an obligation of conduct, ie as an obligation to make a particular effort to convince the others that torture should be included as an extraditable offence. Since the Torture Convention has already been ratified by more than 140 States from all world regions, the risk is fairly small that States parties would be in the minority when a new multilateral extradition treaty is drafted. In reality, most of the modern extradition treaties actually do contain torture as an extraditable offence.[25]

3.3 Article 8(2): Authorization to Consider the Convention as Legal Basis for Extradition

21 There are different legal traditions regarding extradition. Some States make extradition conditional on the existence of an extradition treaty with the requesting State. In order to avoid States parties to the Convention having to negotiate extradition treaties with all other States parties, the IAPL draft provided in Article X(2) that States parties undertake to extradite on the basis of this Convention. This proposal was taken up in the US draft which, however, changed this obligation into a mere authorization. The formulation that the State party 'may, at its option, consider this Convention as the legal basis for extradition […]' was taken from Article 8(2) of the Hague Hijacking Convention. In the Working Group, there was a difference of opinion whether to use the word 'may' or 'shall'.[26] While most delegations felt that the verb should read 'shall', the final wording of Article 8 retained the word 'may'.[27]

22 In practice, this difference is not as important as it may seem. Under the system of universal jurisdiction adopted under the Convention, States parties have no obligation to extradite.[28] If a State party which makes extradition conditional on the existence of a treaty receives from another State party with which it has no extradition treaty a request for extradition of an alleged torturer, it has the choice between prosecution and extradition in accordance with Article 7. If it prefers, for whatever reason, to extradite the person, it may consider Article 8(2) CAT as the legal basis. The word 'shall' would therefore not change much. Even if it was under the legal obligation to consider the Convention as a legal basis for the extradition, it could nevertheless refuse the extradition request and proceed with prosecution.

23 The last sentence of Article 8(2) confirms that extradition is, in principle, a matter of State sovereignty. Apart from the fact that the requested State has the choice whether or not to extradite, it also has the right to establish further conditions and regulate the

[24] CAT, 'Report of the Committee against Torture' (1998) UN Doc A/53/44, paras 52–69.
[25] See n 16 above.
[26] See above §§ 7–12; see also the criticism by Burgers and Danelius (n 14) 139.
[27] See above § 12.
[28] However, the inability or unwillingness by the forum State to prosecute turns the option to extradite into an obligation if an extradition request has been received. See above Art 7 § 63.

procedure to be applied in extradition cases. These rules must comply with the relevant conditions of international law, including the non-refoulement principle.

24 In its consideration of State reports, the Committee against Torture repeatedly took up the issue of extradition proceedings and encouraged States parties to introduce or simplify the provisions within national law regulating extradition.[29] In 2004, the Committee noted with appreciation New Zealand's adoption of the 1999 Extradition Act which reflected previous recommendations of the Committee[30] and provides for the extradition to non-Commonwealth countries without the basis of an extradition treaty.[31] Similarly, in 1993, members of the Committee wished to receive further information about the application of mutual judicial assistance between Canada and other States, especially with regard to the offence of torture, where no bilateral agreement existed. The representative indicated in response that Canada could cooperate with another country in accordance with those articles regardless of whether bilateral treaties on mutual legal assistance existed. As an example of how the procedure of mutual legal assistance was applied in practice, information was supplied on the assistance given by Canada at the request of Chile in connection with a torture-related prosecution there.[32]

3.4 Article 8(3): Obligation to Recognize Torture as an Extraditable Offence in Domestic Law

25 Those States parties which do not make extradition conditional on the existence of an extradition treaty can, in the absence of such a treaty, decide on the basis of their domestic legislation which type of offences they consider as extraditable. Article 8(3) establishes an obligation on States parties to include the crime of torture as an extraditable offence in domestic law, at least vis-à-vis other States parties. This obligation corresponds almost literally to Article 8(3) of the Hague Hijacking Convention and was introduced into the drafting of the Convention by Article X(3) of the IAPL draft and the US draft. However, the fact that torture must be recognized as an extraditable offence does not create any obligation on the forum State to extradite in a particular case. It remains free to decide whether or not to extradite an alleged torturer, whose extradition is requested by another State party, and to establish particular conditions for extradition as well as to regulate the extradition procedure. But a State party would violate Article 8(3) if it refuses the extradition of an alleged torturer on the ground that its domestic law does not recognize torture as an extraditable offence. In this regard, the Committee remarked critically in relation to Sierra Leone's initial State report that the State party's Extradition Act did not include as required under Article 8(3) the crimes stipulated in Article 4 of the Convention. Furthermore, Sierra Leone had not clarified whether it indeed invoked the Convention against Torture when conducting extradition to States with which it did not entertain an extradition treaty.[33]

[29] CAT, 'Conclusions and Recommendations: Benin' (2008) UN Doc CAT/C/BEN/CO/2, para, 11. See also CAT, 'Fourth Periodic Report: Russia' (2005) UN Doc CAT/C/55/Add.11; CAT, 'Third Periodic: Georgia' (2005) UN Doc CAT/C/73/Add.1.

[30] CAT, 'Summary Record of the Public Part of the 327th Meeting' (1998) UN Doc CAT/C/SR.327.

[31] CAT, 'Conclusions and Recommendations: New Zealand' (2004) UN Doc CAT/C/CR/32/411.

[32] A/48/44 (n 18) paras 284–310.

[33] CAT, 'Concluding Observations: Sierra Leone' (2014) UN Doc CAT/C/SLE/CO/1, para 22.

3.5 Article 8(4): Presumption of Equality between the Principles of Territoriality and Nationality

26 In some extradition treaties and domestic laws, a condition for extradition is that the offence has been committed in the territory of the requesting State. In other words, if the State of which the alleged perpetrator or the victim of torture is a national establishes jurisdiction in accordance with Article 5(1)(b) or (c) and requests from the territorial State or from a State party intending to exercise universal jurisdiction the extradition of the alleged offender, the requested State might have to refuse extradition because of such a territorial clause in its domestic law or an applicable extradition treaty. In order to remove this legal obstacle, Article 8(4) establishes the legal presumption that the offence of torture shall be treated as if it was committed in the territory of the State which exercises jurisdiction on the basis of the active or passive nationality principle.

27 This legal presumption is modelled on Article 8(4) of the Hague Hijacking Convention and was proposed for inclusion in the Convention by the US draft. Burgers and Danelius raise doubts as to whether this presumption also applies to the passive nationality principle in view of the fact that no State party is required to exercise jurisdiction in accordance with Article 5(1)(c). Overall, however, they conclude that Article 8(4) also applies to such cases.[34]

28 Again, one should stress that nothing in this paragraph requires the forum State to extradite a certain person suspected of having committed the crime of torture. As with the other provisions in Article 8, it is only intended to remove legal obstacles contained in domestic law or in extradition treaties and to provide the legal possibility to use extradition as a legal and practical alternative to prosecution.

ROLAND SCHMIDT

[34] See Burgers and Danelius (n 14) 140.

Article 9

Mutual Judicial Assistance

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

1. Introduction	302
2. Travaux Préparatoires	302
2.1 Chronology of Draft Texts	302
2.2 Analysis of Working Group Discussions	304
3. Issues of Interpretation	304
3.1 Obligation to Provide Judicial Assistance to the Forum State	304
3.2 Article 9(1): Provide Greatest Measure of Assistance	305
3.3 Article 9(2): Conformity with Treaties on Mutual Judicial Assistance	306

1. Introduction

1 Articles 4 to 9 aim at avoiding safe havens for torturers by requiring States parties to criminalize torture (Article 4) and to establish different types of jurisdiction for the criminal offence of torture, including universal jurisdiction on the basis of the principle *aut dedere aut judicare* (Articles 5(2) and 7), as well as by obliging the forum State, ie any State party on the territory of which a suspected torturer is present, to take him or her into custody, carry out a preliminary inquiry of the facts, and to proceed either to prosecution or extradition (Articles 6 and 7). These principle obligations are facilitated by removing legal obstacles to extradition (Article 8) and by requiring States parties to afford each other the greatest measure of mutual judicial assistance (Article 9). In particular, the State in which the act of torture has been committed (the territorial State) and the State of which the suspected torturer is a citizen (the national State) are under an obligation to provide the forum State with all the evidence needed to proceed with the prosecution.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention, 16 December 1970)*[1]

Article 10

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and

[1] Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (Hague Hijacking Convention).

other acts mentioned in Article 4. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

3 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Civil Aviation Convention, 23 September 1971)*[2]

Article 11

1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

4 *Original Swedish Draft (18 January 1978)*[3]

Article 15

1. States Parties shall afford one another the greatest measure of assistance in connection with proceedings referred to in article 11, including the supply of all evidence at their disposal necessary for the proceedings.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

5 *United States Draft (19 December 1978)*[4]

1. Each State Party shall, consistent with its own laws, afford the greatest measure of assistance in connection with proceedings brought under this Convention in any other State Party, including the supply of all evidence at its disposal necessary for the proceeding. The law of the State requested shall apply in all cases.

2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

6 *Revised Swedish Draft (19 February 1979)*[5]

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Article 4, including the supply of all evidence at their disposal necessary for the proceedings.

[2] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177 (Montreal Convention).

[3] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[4] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, para 96.

[5] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

> 2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

2.2 Analysis of Working Group Discussions

7 In written comments based on Article 15 of the original Swedish draft, the United States suggested specifying, as had been done in other international conventions, that when supplying evidence, the law of the State requested shall apply and proposed a redraft of the original Swedish draft.[6] The French delegation suggested that the phrase 'the greatest measure of assistance in connection with proceedings' be replaced by the phrase 'the greatest measure of assistance in all criminal proceedings' and that paragraph 2 of the Article should follow the lines of the relevant provisions of the Hague Hijacking Convention (Article 10(2)) and the Montreal Civil Aviation Convention (Article 11(2)). Accordingly, Article 15 of the original Swedish draft was reworded and became Article 9 of the revised Swedish draft. As a result of discussions in the Working Group in 1982,[7] paragraph 2 of Article 9 was redrafted, and the whole Article, in its modified form, was adopted by the Working Group.[8]

3. Issues of Interpretation

3.1 Obligation to Provide Judicial Assistance to the Forum State

8 The Convention is based on the principle that States parties shall establish jurisdiction to try alleged torturers present in their territories. If the forum State has no link to the territory where the crime of torture was committed or to the nationality of the perpetrator or the victim, it nevertheless has the duty to exercise universal jurisdiction.[9] The only alternative to prosecution is extradition to another State.[10] Although Article 8 is intended to remove, as far as possible, legal obstacles to extradition, the forum State can only avail itself of this alternative if another State makes an explicit extradition request and if extradition to this State is permissible under domestic and international law, and if it will actually lead to prosecution in the requesting State. Extradition to the territorial or national State would, for example, not be in accordance with the Convention in the case of a serious risk that the alleged offender would be subjected to torture, or, on the other hand, that the alleged offender would be shielded from prosecution.

9 Although all States parties to the Convention have an obligation to criminalize torture with appropriate penalties and to bring all perpetrators of torture to justice,[11] most States in which torture nevertheless occurs in practice have no strong interest in prosecuting their own officials. Here lies one of the main differences to most other crimes under international law, such as piracy or terrorist crimes. While pirates or terrorists are usually private individuals whose arrest, prosecution, or extradition is in the interests of Governments, torturers are usually public officials whose arrest, prosecution, or extradition is not in the

[6] E/CN.4/1314 (n 4) para 92. [7] E/CN.4/1983/L.40.

[8] See J Herman Burgers and Hans 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) 140–41.

[9] See above Art 5 §§ 86–176. [10] See above Art 7 §§ 54–60. [11] See above Art 4.

interest of their 'own' countries, be they the territorial or the national State. Consequently, the principle of universal jurisdiction or jurisdiction based on the passive nationality principle seems to be even more important in relation to the crime of torture than to most other crimes under international law. To eliminate safe havens for torturers would, therefore, require that States parties actively pursue their obligations under the passive nationality and universal jurisdiction principles and that they are willing to bring the perpetrators to justice before their own courts rather than to rely on the alternative of extradition.

10 Prosecution under these two principles requires, however, that the forum State is in a position to gather all relevant evidence, including witness testimonies and documentary evidence. Without the active judicial assistance of the territorial and/or the national State, the forum State would often not be able to carry out effectively criminal investigations necessary for the prosecution of the alleged offender. Similarly, during the criminal trial the courts in the forum State might still need the judicial assistance of the territorial or national State.

3.2 Article 9(1): Provide Greatest Measure of Assistance

11 Article 9(1), which is based on Article 15 of the original Swedish draft,[12] establishes an obligation on States parties to afford one another the greatest measure of assistance in connection with criminal proceedings against alleged torturers. Although Article 9 speaks about mutual ('one another') assistance, this obligation primarily applies to the territorial and the national State of the alleged torturer. These two States shall supply all evidence at their disposal necessary for the criminal proceedings to other States parties exercising universal jurisdiction or jurisdiction on the basis of the passive nationality principle. Since the territorial or the national State are often not particularly interested in such prosecution, there is more than a theoretical risk that such States parties would also violate their respective obligations under Article 9(1). But the States exercising jurisdiction and requesting judicial assistance from other States parties can invoke the obligation of Article 9 in relevant legal proceedings if such assistance is not provided.

12 In this regard, the Committee against Torture expressed serious concern regarding the 'draconian system of secrecy' surrounding 'high value detainees' held by the United States in the context of the so-called 'war on terror'. The regime applied to these detainees not only prevented access to effective remedies and reparations, but also hindered investigation into human rights violations by other States due the United States's failure to provide the mutual assistance demanded by Article 9. The Committee therefore called upon the State party to 'take effective steps to ensure the provision of mutual assistance in all matters of criminal procedure regarding the offence of torture and the related crimes of attempting to commit, complicity and participation in torture'.[13]

13 Similarly, the Committee took also issue with Vatican's reported failure to provide civil authorities with information pertaining to the investigations into allegations of sexual abuse of minors by clergy members. The Committee urged the State party to take effective steps to ensure the provision of information to civil authorities in cases where they are carrying out criminal investigations of violations of the Convention perpetrated by Catholic clergy or acquiesced to by them. The State party should ensure the

[12] E/CN.4/1285 (n 3); see above § 4.
[13] CAT, 'Concluding Observations: USA' (2014) UN Doc CAT/C/USA/CO/3-5, para 15.

procedures for requesting such cooperation are clear and well-known and that requests for cooperation are responded to promptly.[14]

14 In its concluding observation to Sierra Leone's first State report, the Committee took note of the State party's Extradition Act; however, it voiced concern that there are no provisions in the act which provide for mutual judicial assistance regarding crimes as stipulated in Article 4.[15]

15 However, as held in the inadmissibility decision by the Committee in the case of *Rosenmann v Spain*, Article 9 does not impose any obligation for a State party to seek an extradition or to insist on its procurement in the event of a refusal. The applicant had invoked that Spain's handling of the extradition proceedings regarding General Augusto Pinochet from the United Kingdom failed to meet the requirement of Article 9(1) of the Convention. The Committee concluded, inter alia, that while the Convention imposed an obligation to bring to trial a person, who is found on its territory and alleged to have committed torture, no obligation to seek an extradition can be deduced from Article 9 (and 8). The complaint was decided to be inadmissible.[16]

3.3 Article 9(2): Conformity with Treaties on Mutual Judicial Assistance

16 In the case where two States parties are at the same time parties to a treaty on mutual judicial assistance, such as the EU Convention on Mutual Assistance in Criminal Matters,[17] Article 9(2) contains a savings clause to the effect that the legal assistance provided under Article 9(1) shall be carried out in conformity with such a treaty. It is also clear that the judicial assistance provided must be in conformity with the domestic laws of the State which provides such assistance. If certain evidence, such as information extracted by torture, is inadmissible before the courts in the requested State, it must also not be made available to the requesting State by means of judicial assistance.[18]

17 Panama responded for instance in 1993 that mutual legal cooperation existed between Panama and other States regardless of whether a formal bilateral agreement was in place.[19] Canada indicated that it could cooperate with another country in accordance with Articles 8 and 9 regardless of whether bilateral treaties on mutual legal assistance existed. As an example of how the procedure of mutual legal assistance was applied in practice, information was provided on the assistance given by Canada at the request of Chile in 1993 in connection with a torture-related prosecution there.[20]

18 While Article 9(2) states that States parties shall carry out their obligations under Article 9 'in conformity with any treaties on mutual judicial assistance that may exist between them', such treaties may nevertheless not run counter the Convention's purpose of bringing persons responsible for acts stipulated in Article 4 to justice. In this regard, the Committee criticized Benin for its conclusion of an agreement with the United States

[14] CAT, 'Concluding Observations: Holy See' (2014) UN Doc CAT/C/VAT/CO/1, para 14.

[15] CAT, 'Concluding Observations: Sierra Leone' (2014) UN Doc CAT/C/SLE/CO/1, para 22.

[16] *Roitman Rosenmann v Spain*, No 176/2000, UN Doc CAT/C/28/D/176/2000, 30 April 2002. See also above Art 5 §§ 75–78.

[17] European Union Convention on Mutual Assistance in Criminal Matters (adopted on 29 May 2000) OJ C197/1.

[18] See also Burgers and Danelius (n 8) 141.

[19] CAT, 'Concluding Observations: Panama' (1993) UN Doc A/48/44, paras 311–41.

[20] CAT, 'Concluding Observations: Canada' (1993) UN Doc A/48/44, paras 284–310.

to the effect that US citizens present in Benin cannot be transferred to the International Criminal Court (ICC) when accused of war crimes or crimes against humanity. In its concluding observations to Benin's second State report, the Committee found such an agreement to be incompatible with Article 9 of the Convention.[21]

19 A 'best practice' case for the implementation of Article 9 is the cooperation between the United Kingdom, the United States, and Afghanistan leading to the conviction of former Afghan warlord Faryadi Sarwar Zardad on the basis of universal jurisdiction in the UK in 2005.[22] Zardad had been a warlord in Afghanistan, running a checkpoint between Jalalabad and Kabul, at which travellers were frequently abducted and subjected to torture and ill-treatment. In 1998 he arrived in the United Kingdom to seek asylum. After his crimes came to light in the British media, Attorney General Lord Goldsmith announced that Britain had decided to try the case on the basis that his crimes were so 'merciless' and such 'an affront to justice' that they should be tried in any country.[23] Afghanistan and the United Kingdom, being parties to the Convention, were bound by the obligations that flow from it, including Article 9. Given that the United Kingdom had an obligation under the Convention either to 'extradite or prosecute', and given that no request for extradition had been received from the Afghan authorities, it fell to the United Kingdom to investigate and, if the test for prosecution was met, to prosecute Zardad.

20 Although Afghanistan had not requested his extradition, Afghan authorities actively supported the investigation teams of the British Crown Prosecution Service travelling altogether nine times to Afghanistan. In addition, the United States provided security support. Investigators within the Anti-Terrorist branch of the Metropolitan Police coordinated the investigation from London while sending delegates from the Branch to Afghanistan. The responsibility for prosecution lay with two prosecutors within the Counter-Terrorism Department of the Crown Prosecution Service. The prosecution went to Afghanistan together with the police on three occasions to ensure that statements taken from witnesses were sufficiently detailed. The prosecution also travelled with investigators to gain an understanding of the living circumstances of the witnesses and victims in Afghanistan, in order to assess the challenges witnesses might face in court. Due to logistical and security challenges in locating witnesses, television and radio broadcasts were used to encourage witnesses to come forward. In the United Kingdom, cooperation between the police, Crown Prosecution Service, and the Home Office was necessary to facilitate the bringing of witnesses to testify. The Foreign and Commonwealth Office referred the investigators' initial request for assistance to relevant authorities in the Afghan Government, which subsequently contacted the British embassy in Kabul. From that time, all further requests for assistance were dealt with by the British embassy directly. In addition, British authorities cooperated with US military and diplomatic personnel because of the need to conduct investigations in an area of

[21] CAT, 'Concluding Observations: Benin' (2008) UN Doc CAT/C/BEN/CO/2, para 16.

[22] *Regina v Faryadi Sarwar Zardad* [2005] High Court, Judgment, 18 July 2005. No written judgment is available; see Crown Prosecution Service, 'The Counter Terrorism and Special Crime Division of the Crown Prosecution Service: Successfully concluded war crimes prosecutions since 2001—Faryadi Zardad'; see also *Regina v Faryadi Sarwar Zardad* [2007] EWCA Crim 279. See also above Art 5 §§ 120–21; Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008' (2009) 30 Mich J Int'l L 940.

[23] 'UK Court Convicts Afghan Warlord of "Heinous" Crimes' *The Guardian* (London, 18 July 2005) <https://www.theguardian.com/uk/2005/jul/18/afghanistan.world> accessed 24 November 2017.

Afghanistan under the effective control of US military forces. Prior to the investigation, the permission of the armed forces was obtained, and during the investigation in these areas protection was provided by US military personnel. While the prosecution against Zardad did not make use of Interpol, the police relied on Interpol contact points from the Netherlands and Denmark as both had experience of investigation of international crimes committed in Afghanistan. In total, the trial was estimated to have cost over £3 million.

ROLAND SCHMIDT

Article 10

Training of Personnel

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

1. Introduction	309
2. Travaux Préparatoires	311
2.1 Chronology of Draft Texts	311
2.2 Analysis of Working Group Discussions	312
3. Issues of Interpretation	312
3.1 Meaning of 'personnel' (Article 10(1))	312
3.2 Meaning of 'training', 'education and information' (Article 10(1))	313
3.3 Meaning of 'rules or instructions' (Article 10(2))	316
3.4 Can a Violation of Article 10 be Invoked in the Individual Complaint Procedure?	316

1. Introduction

1 While Articles 4 to 9 deal with the obligation of States parties to criminalize torture and to bring perpetrators of torture to justice before domestic courts, Articles 10 to 13 contain the most important provisions for the prevention of torture and other forms of ill-treatment. Criminal law, of course, also has a preventive effect, but the obligations of States to ensure that the relevant personnel receive proper training, that interrogation methods and prison rules are regularly reviewed in relation to international minimum standards for the treatment of detainees and prison conditions, that prison directors, chiefs of police, and military commanders *ex officio* investigate any complaint or suspicion of torture by officials under their command, are at the core of torture prevention. If all the rules contained in these four Articles were carefully applied by States parties, torture would no longer exist and States would not even have to resort to conducting criminal trials against perpetrators of torture or to providing rehabilitation measures for victims of torture. Scholars, Amnesty International (AI),[1] and other NGOs have developed comprehensive programmes and highly effective action plans for the prevention of torture which have found their way into the respective provisions of the CAT and OP.

[1] AI, 'Amnesty International's 12-Point Programme for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State' AI Index ACT 40/001/2005 (2005) <https://www.amnesty.org/download/Documents/80000/act400012005en.pdf> accessed 8 December 2017.

The fact that torture continues to be widely or even systematically practised in many States in the world is not due to a lack of knowledge or material resources, but only to a lack of political will and commitment.

2 Measures aimed at the prevention of torture necessarily contribute to the prevention of other forms of cruel, inhuman or degrading treatment or punishment. By virtue of Article 16, all obligations contained in Articles 10 to 13, therefore, equally apply to torture and other forms of ill treatment. Since both conducts are absolutely prohibited under international law and are difficult to distinguish in practice, it simply would not make sense to establish such a distinction for purely preventive obligations, such as the training of personnel, review of interrogation and prison rules, or the investigation of suspected cases of excessive use of force by police or prison staff.

3 In many countries, personnel involved in the custody, interrogation, or treatment of any individual subjected to any form of arrest, detention, or imprisonment are poorly educated, receive low salaries, and are not well respected in society. At the same time, there is a high expectation that the police should solve criminal cases quickly, if possible by producing a confession from the suspected criminal. Similarly, prison directors are expected to maintain discipline among detainees, prevent escapes and prison riots, and ensure proper rehabilitation of prisoners without adequate training, salaries, and staff. In order to deal effectively and at the same time in a manner respectful of human rights with situations of highly complex organized crime, States have an obligation to organize their security, law enforcement, and prison apparatus in a professional manner. Rather than reducing or privatizing their security personnel, States must ensure that the number and quality of their staff must correspond to the actual needs of fulfilling the human right to personal security, as laid down in Article 9 CCPR. To ensure that human beings can live in a society without the constant fear of being a target of violent crime is one of the most noble and fundamental human rights obligations of Governments. A high level of internal security depends on many factors, including social coherence and stability. But a security for personnel is a *conditio sine qua non* for ensuring the human right to personal security. The professionalism of the security apparatus depends on its technical equipment, the number of staff, their visibility, acceptance by the population at large, and their education and training.

4 *Human rights education* is as important for personnel as training in using firearms and other technical equipment. The absolute prohibition of torture and other forms of ill-treatment is one of the most important components of a proper human rights education. A criminal investigation police officer interrogating a person suspected of having committed a criminal offence must understand that using torture for extracting a quick confession is not only unethical and a serious violation of human rights, but also unprofessional as well as inefficient and counterproductive.[2] A proper training should convey a twofold message: first, that, in the long run, the use of torture and ill-treatment does not make us safer, but less safe, because it undermines, with the quasi-approval of the State, the most fundamental principle of how human beings should behave towards each other, namely the principle of human dignity; second, that non-coercive investigation mechanisms, such as the investigative interviewing methods, are proven to be more efficient, because they provide more accurate and reliable information, are more likely to stand the

[2] Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016); CTI, 'CTI Training Tools 1/2017: Investigative Interviewing for Criminal Cases' (2017) <https://cti2024.org/content/docs/CTI-Training_Tool_1-Final.pdf> accessed 8 December 2017.

admissibility test in a legal proceeding, and will ultimately increase the public's confidence in the law enforcement services.[3]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

5 *Declaration (9 December 1975)*[4]

Article 5

The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons.

6 *Original Swedish Draft (18 January 1978)*[5]

Article 5

1. Each State party shall ensure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment are fully included in the curricula of the training of law enforcement personnel and of other public officials as well as medical personnel who may be responsible for persons deprived of their liberty.

2. Each State party shall include this prohibition in the general rules or instructions issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of persons deprived of their liberty.

7 *United States Draft (19 December 1978)*[6]

Article 5

Each State Party shall ensure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment:

1. is fully included in the curricula of the training of medical personnel, law enforcement personnel, and other public officials who may be involved in the custody or treatment of persons deprived of their liberty and

2. is included in the instructions issued in regard to the duties of anyone who may be involved in the custody or treatment of persons deprived of their liberty.

8 *Revised Swedish Draft (19 February 1979)*[7]

Article 10

1. Each State party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel,

[3] See SRT (Mendez) 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/71/298; CTI (n 2).

[4] GA Res 3452 (XXX) of 9 December 1975.

[5] Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[6] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314.

[7] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

2.2 Analysis of Working Group Discussions

9 In written comments on Article 5 of the original Swedish draft, the *Spanish* delegation proposed that the word 'vocational' be inserted in Article 5(1) before the word 'training'. The *United States* submitted a separate proposal which corresponded with the Swedish draft and put more focus on the training of medical personnel. In the revised Swedish draft, the reference to cruel, inhuman or degrading treatment or punishment was deleted because the delegations had agreed to deal with this in a separate provision.[8] The final version also includes 'other persons', ie non-State personnel.

10 The *United Kingdom* was of the opinion that the word 'include' in Article 5(2) of the original Swedish draft be replaced by 'give effect to'.[9] However, the view was expressed that the existing wording was more effective.

11 Article 10 as redrafted was adopted by consensus by the Working Group in 1979.

3. Issues of Interpretation

3.1 Meaning of 'personnel' (Article 10(1))

12 The formulation of Article 10(2) and the *travaux préparatoires* clearly indicate that this State obligation applies to all persons who might come into contact with detainees. While Article 5 of the Declaration speaks of law enforcement personnel and 'other public officials who may be responsible for persons deprived of their liberty', Article 5 of the original Swedish draft added medical personnel. The revised Swedish draft further included the reference to 'civil or military' personnel as well as to persons involved in the interrogation of detainees. While all earlier drafts applied exclusively to public officials, the final wording of Article 10(1) goes beyond public officials in the narrow sense. It follows that States parties, such as the *United States*, which delegate the interrogation or custody of suspected criminals or terrorists to *private security companies*, shall ensure that such private security staff are also subject to proper training.[10] The list of persons mentioned in the final wording of Article 10(1) is of an illustrative and *non-exhaustive* nature,[11] and the reference to 'any form of arrest, detention or imprisonment' shows that all persons responsible in whatever manner or function for persons deprived of liberty shall be covered. Further, since Article 10, by virtue of the reference in Article 16, also applies to other forms of *ill-treatment outside detention*, the obligation to provide

[8] See Art 16 (1) CAT which explicitly refers to Art 10.

[9] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1.

[10] J Herman Burgers and Hans 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) 142, who refer in this respect to 'non-governmental personnel'.

[11] ibid 142; Lene Wendland, *A Handbook on State Obligations under the UN Convention against Torture* (APT, 2002) 50.

education on how to avoid cruel, inhuman or degrading treatment, for example when arresting a person, dispersing a public gathering, or quelling a riot, extends to all law enforcement personnel whether responsible for detainees or not.

13 Article 10 primarily applies to *all personnel authorized to use force*, i.e. police, security, intelligence, and other law enforcement personnel, whether civil or military, public or private, uniformed or without uniforms. Secondly, it applies to *all persons responsible for persons deprived of their liberty*, i.e. any civil, military, police, intelligence, medical, and other staff working in prisons, pre-trial detention centres, police lock-ups, psychiatric hospitals, detention centres for minors, drug addicts, aliens pending deportation, asylum seekers, or refugees, etc. In the reporting procedure, the CAT Committee attaches particular importance to the training of *doctors* and other *medical personnel* working in detention or interrogation centres, for example forensic experts, paramedical, and nursing personnel.[12] One reason is that doctors may be actively involved in torture practices. But even more important is the positive role which doctors can and actually should play in detecting cases of torture by means of thorough medical examinations of every person entering or leaving any place of detention. Finally, doctors and psychiatrists play a crucial role in torture rehabilitation centres.[13]

14 More in general, the Committee has extended the scope of application of Article 10 to any other *professionals involved in the documentation and investigation of allegations of torture and other forms of ill-treatment* to ensure that every case of ill-treatment is detected and the perpetrators duly punished. Hence, in addition to medical personnel, this includes for example judges, prosecutors, and lawyers, so as to facilitate its direct invocation before and its application by domestic courts,[14] but also other persons working with asylum seekers, refugees, and migrants,[15] and all personnel involved in the implementation of torture victims rehabilitation programmes.[16]

3.2 Meaning of 'training', 'education and information' (Article 10(1))

15 The training of personnel shall convey the message that torture and other forms of ill-treatment are absolutely prohibited under all circumstances, even in times of armed conflicts, organized crime, and terrorism. Secondly, the personnel must understand that torture constitutes a serious crime which will be punished with appropriate penalties and that an order from a superior officer or a public authority may never be invoked as

[12] Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 271, note 179; CAT, 'Concluding Observations: Czech Republic' (2012) UN Doc CAT/C/CZE/CO/4-5, para 18.

[13] eg CAT, 'Concluding Observations: Russia' (2012) UN Doc CAT/C/RUS/CO/5, para 10; CAT, 'Concluding Observations: The Philippines' (2016) UN Doc CAT/C/PHL/CO/3, para 36.

[14] eg CAT, 'Concluding Observations: Rwanda' (2012) UN Doc CAT/C/RWA/CO/1, para 8, but also CAT, 'Concluding Observations: Mongolia' (2011) UN Doc CAT/C/MNG/CO/1, para 14; CAT 'Concluding Observations: Burkina Faso' (2014) UN Doc CAT/C/BFA/CO/1, para 27; CAT, 'Concluding Observations: Burundi' (2014) UN Doc CAT/C/BDI/CO/2, para 14; CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 26.

[15] For reference on asylum seekers/asylum determination procedure: eg CAT, 'Concluding Observations: Germany' (2011) UN Doc CAT/C/DEU/CO/5, para 29(b); CAT, 'Concluding Observations: Albania' (2012) UN Doc CAT/C/ALB/CO/2, para 23(c); for references to migrants and refugees: CAT, 'Concluding Observations: Ireland' (2011) UN Doc CAT/C/IRL/CO/1, para 30; CAT, 'Concluding Observations: Poland' (2013) UN Doc CAT/C/POL/CO/5-6, para 17; CAT, 'Concluding Observations: Estonia' (2013) UN Doc CAT/C/EST/CO/5, para 16.

[16] CAT/C/PHL/CO/3 (n 13) para 36.

a justification of torture.[17] Thirdly, personnel shall be reminded of their duty to report every case of torture and ill-treatment, whether committed by a person of equal, higher, or lower rank or function, to a judge or other independent official entrusted with the task of carrying out a proper investigation and bringing the perpetrator to justice. Finally, all respective personnel shall be provided with relevant information, education, and practical training on how to prevent torture and ill-treatment.

16 As already stressed by *Burgers* and *Danelius*, 'this issue should not be treated with brevity or as a formality'.[18] Twenty years after their well-known *Handbook on the Convention against Torture* had been published, experience unfortunately tells us that training, if included at all in the education curricula of relevant personnel, is still treated in many States parties as a mere formality or as a 'soft issue' requiring less attention than the 'real police skills', such as the use of firearms or self-defence techniques. Much more effort is, therefore, needed to convey the message that torture and ill-treatment have no place in a professional police force or prison system and that non-coercive measures are in the long run more efficient. Such training should include more extensive information about the international efforts to combat torture, as laid down for example in the revised Standard Minimum Rules for the Treatment of Prisoners,[19] the 1979 Code of Conduct for Law Enforcement Officials,[20] the 1982 Principles of Medical Ethics,[21] the 1984 Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty,[22] the 1988 Body of Principles on Detention,[23] the 1990 Basic Principles on the Use of Force by Law Enforcement Officials,[24] the 1990 Basic Principles for the Treatment of Prisoners,[25] the 1990 Rules for the Protection of Juveniles deprived of their Liberty,[26] the 1992 Declaration on the Protection of all Persons from Enforced Disappearance,[27] and the 2000 Istanbul Protocol.[28]

17 When it comes to the *content of trainings*, a recurring recommendation of the Committee is that States parties should systematically train all relevant staff to identify and document signs/cases of torture and ill-treatment, as well as to refer such cases to competent investigative authorities in accordance with the *Istanbul Protocol*.[29] The Committee also stressed the need to provide specialized trainings and raise awareness on *gender-specific issues*, such as sexual violence against women, harmful traditional practices, and on the rights of lesbian, gay, bisexual, transgender, and intersex persons, including their rights to autonomy and physical and psychological integrity, [30] and on the treatment of other *vulnerable groups* at risk of ill-treatment, such as children, migrants, Travellers, Roma, and others.[31] The same goes for the need of specialized training on effective

[17] See above Art 2, 3.6. [18] Burgers and Danelius (n 10) 142.
[19] GA Res 70/175 of 17 December 2015. [20] GA Res 34/169 of 17 December 1979.
[21] GA Res 37/194 of 18 December 1982. [22] ECOSOC Res 1984/50.
[23] GA Res 43/173 of 9 December 1988.
[24] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[25] GA Res 45/111 of 14 December 1990. [26] GA Res 45/113 of 14 December 1990.
[27] GA Res 47/133 of 18 December 1992. [28] GA Res 55/89 of 22 February 2001.
[29] eg CAT, 'Concluding Observations: Cyprus' (2014) UN Doc CAT/C/CYP/CO/4, para 20(c).
[30] On violence against women see eg CAT, 'Concluding Observations: Djibouti' (2011) UN Doc CAT/C/COG/1, para 21; on the rights of LGBTI see eg CAT/C/DEU/CO/5 (n 15) para 20; CAT, 'Concluding Observations: China' (2016) UN Doc CAT/C/CHN/CO/5, para 55.
[31] eg CAT, 'Concluding Observations: Bulgaria' (2011) UN Doc CAT/C/BGR/CO/4-5, para 20 (b); CAT, 'Concluding Observations: Slovenia' (2011) UN Doc CAT/C/SVN/CO/3, para (20)(d); CAT, 'Concluding

prevention, investigation, prosecutions, and punishment of acts of *trafficking of human beings*.[32] More generally, the Committee has recommended States parties to additionally carry out public awareness campaigns, including through the media, on the prevention and prohibition of torture.[33]

18 Such proactive training must be included in the *regular education curricula* of law enforcement, interrogation, prison, and medical staff as well as in regular in-service training curricula. Normally, this has the advantage to make trainings more practically relevant.[34] If torture and other forms of ill-treatment seem to be practised regularly in a country or a specific unit, the respective training needs to be reviewed and intensified.[35] In general, such training courses should not only be provided by governmental agencies and police training academies, but also by relevant NGOs.[36] Trainings should be conducted on a *regular basis*.

19 Alongside with information on the relevant human rights norms, trainings *should also serve to professionalize the respective staff*. A comprehensive empirical study on the effectiveness of torture prevention measures showed that trainings particularly designed to enhance professional skills and capabilities of personnel and intended to practically assist officials to do their job better is considerably more effective than trainings simply providing general information about human rights standards, which on the contrary may be perceived as 'prescriptive and remote' by the relevant personnel, especially police officers.[37] For example, the same study shows that trainings on investigative interviewing skills play a key role in the reduction of confession-driven investigations and thus reduce the risk of torture and other forms of ill-treatment.[38]

20 In other words, it is important that trainings aiming at preventing torture and other forms of ill-treatment, as other human rights trainings, aim at the development of competencies at different levels, including knowledge (theory), skills, and attitudes (practice).[39]

21 Finally, it is important that *trainings are evaluated*. In this regard, the Committee has consistently emphasized that States parties should develop and implement a specific

Observations: Turkmenistan' (2011) UN Doc CAT/C/TKM/CO/1, para 24 (d); CAT/C/IRL/CO/1 (n 15) para 30 (e).

[32] See eg CAT/C/KAZ/CO/3 (n 14) para 21; CAT, 'Concluding Observations: Ukraine' (2014) UN Doc CAT/C/UKR/CO/6, para 15.

[33] eg CAT/C/BFA/CO/1 (n 14) para 27(c); CAT/C/CZE/CO/4-5 (n 12) para 16; CAT/C/KAZ/CO/3 (n 14) para 21; CAT, 'Concluding Observations: Lithuania' (2014) UN Doc CAT/C/LTU/CO/3, para 14(b); CAT, 'Concluding Observations: former Yugoslav Republic of Macedonia' (2015) UN Doc CAT/C/MKD/CO/3, para 18(c);

[34] Walter Suntinger, 'Police Training and International Human Rights Standards' in Ralf Alleweldt and Guido Fickenscher (eds), *The Police and International Human Rights* (Springer International 2018).

[35] Ingelse (n 12) 272. [36] Burgers and Danelius (n 10) 142.

[37] Carver and Handley (n 2) 98; see also Suntinger (n 34). [38] Carver and Handley (n 2) 99.

[39] In this regard see the GA Res No 66/137 of 19 December 2011 (Declaration on Human Rights Education and Trainings) which states that: 'Human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms. Human rights education contributes to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding, and by developing their attitudes.' On the importance of a combined approach of theory and practice in human rights training see also eg OSCE/ODHIR, *Guidelines on Human Rights Education for Law Enforcement Officials* (OSCE, 2012); FRA, *Fundamental Rights-based Police Training: A Manual for Police Trainers* (FRA, 2013) 14; Suntinger (n 34) with further references.

methodology to regularly evaluate the effectiveness and impact of such training and programmes in the reduction of cases of torture, violence, and ill-treatment.[40]

3.3 Meaning of 'rules or instructions' (Article 10(2))

21 In order to supplement and reinforce the obligation under paragraph 1, Article 10(2) requires States parties to include the prohibition of torture and other forms of ill-treatment in the rules or instructions issued in regard to the duties and functions of law enforcement, interrogation, prison, and medical staff. According to *Burgers* and *Danelius*, the authors of the Convention considered it essential that the prohibition of these practices should not be embodied only in general norms perhaps unfamiliar to many of the persons concerned, but that it should also form part of the specific rules and instructions given to those directly involved in the treatment of prisoners and detainees.[41]

22 Article 10(2) is based on Article 5 of the Declaration and Article 5 of the original Swedish draft which still included the word 'general' before 'rules or instructions'. It follows that the prohibition of torture and ill-treatment shall be included not only in the respective training manuals, but also in both the general codes of conduct of public officials, civil or military, and in specific interrogation rules or instructions to prison guards, intelligence officers, criminal investigation police, and similar personnel in charge of persons deprived of their liberty, regardless of their rank. The incorporation of this explicit prohibition, in accordance with relevant international codes of conduct, was expected 'to minimize the chances that individual police, prison or military personnel will commit such acts on their own initiative' and at the same time 'to make it highly difficult for the higher authorities to order, encourage or tolerate such practices'.[42] By referring to the general and specific rules and instructions, Article 10(2) provides a link between the obligation of States parties under Article 10(1) to ensure proper training and their duty under Article 11 systematically to review their interrogation and prison rules. The *travaux préparatoires* of Article 11 show that the words 'rules or instructions' were also included in Article 11 in order to harmonize the formulation of both provisions. Article 10(2) will, therefore, also be taken into account for the interpretation of the substantive meaning of Article 11.[43]

3.4 Can a Violation of Article 10 be Invoked in the Individual Complaint Procedure?

23 In addition, the question arises as to whether the failure of the State party to comply with Article 10 produces victims with the right to submit an individual complaint to hold the respective State party accountable. As explained in the commentary to Article 22, a victim is a person whose human rights have been violated by a State party. Consequently, the right to submit a complaint under Article 22 only refers to violations of CAT provisions that entail subjective rights of individuals.[44]

24 While the Committee has already found violations of other procedural articles, such as Article 11, no such conclusion has ever been reached for individual complaints

[40] See eg CAT/C/CYP/CO/4 (n 34) para 20(c); CAT, 'Conclusions and Recommendations: United States of America' (2006) UN Doc CAT/C/USA/CO/2, para 23.
[41] Burgers and Danelius (n 10) 142. [42] ibid 143. [43] See below Art 11 § 10.
[44] See also below Art 22, §§ 21–25.

invoking Article 10. However, given the very similar nature of the obligations provided by Article 10 and Article 11, the fact that the Committee has already accepted that Article 11 can be invoked before it in the individual complaint procedure and amount to a violation suggests that a similar conclusion could in principle be reached also for complaints concerning Article 10.

25 This view seems to be supported by the decision in *Keremedchiev v Bulgaria*, where even if not finding a violation, the Committee has nevertheless accepted to pronounce itself on the merit of the Article 10 claim.[45] In the end, it held that it was not in a position to make any findings because the complainant had failed to provide any arguments or information to substantiate such claims, but one could argue that already the fact that the complaint was not dismissed as inadmissible *ratione personae* for lack of legal standing of the victim shows that the Committee had accepted that the complainant was in principle entitled to lodge an individual application before it complaining of an Article 10 violation. In this case, the objection of an incompatibility *ratione personae* was also not raised by the respondent State party, who simply argued that the claim had not been substantiated by the complainant.[46]

26 Nevertheless, even if this conclusion is accepted, the exact scope of this State obligation will be difficult to define and several questions remain open. For example, it remains unclear whether the failure of a State party to include the prohibition of torture in the training of staff at a particular prison in clear violation of Article 10 could constitute a legitimate subject of complaint by every detainee of this prison or only by detainees who have been tortured; and whether the victim would have to prove that the lack of training was the decisive reason for his or her being subjected to torture.

GIULIANA MONINA

[45] *Kostadin Nikolov Keremedchiev v Bulgaria*, No 257/2004, UN Doc CAT/C/41/D/257/2004, 11 November 2008.

[46] ibid, para 7.3.

Article 11

Review of Detention and Interrogation Rules

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

1. Introduction 318
2. Travaux Préparatoires 319
2.1 Chronology of Draft Texts 319
2.2 Analysis of Working Group Discussions 319
3. Issues of Interpretation 320
3.1 Meaning of 'any case of torture' 320
3.2 Meaning of 'rules, instructions, methods and practices as well as arrangements' 320
3.3 Meaning of 'interrogations' and 'custody and treatment of persons deprived of liberty' 320
3.4 Meaning of 'any territory under its jurisdiction' 321
3.5 Meaning of 'systematic review' 321
3.5.1 Obligation to Oversee Any Form of Deprivation of Liberty 322
3.5.2 Standards of Review 323
3.5.2.1 Standards of Review relating to the Custody and Treatment of Persons Subjected To any form of Arrest, Detention, or Imprisonment 324
3.5.2.2 Standards of Review relating to Interrogations 333

1. Introduction

1 Although Article 11 only seems to establish the formal obligation to keep interrogation and detention rules under systematic review, this provision, which is closely linked to Articles 2(1), 10, and 16, constitutes one of the most important safeguards for the prevention of torture and other forms of ill-treatment. This was also recognized by the Human Rights Committee (HRC) which stated that 'keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention imprisonment is an effective means of preventing cases of torture and other forms of ill-treatment'.[1]

2 The CAT Committee interprets this provision as a guarantee for procedural and substantive minimum standards of interrogation and detention law and practices, as laid down in key human rights instruments. Article 11 is meant to further reinforce the general obligation of States parties under Article 2(1) and Article 16 to take effective

[1] HRC, 'General Comment No 20: Article 7 on the Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment' (1992), para 11.

measures to prevent torture and other forms of ill-treatment by a specific requirement to regularly review the conditions of detention, methods of interrogation and the treatment of detainees in general. In other words, Article 11 plays a key role in the practical implementation of the Convention obligations and by setting up a duty for States to review their rules and practices systematically aims at closing the gap between the law and practice.

3 In order to keep these standards under an effective and systematic review with a view to preventing any cases of torture and other forms of ill-treatment, States parties need to establish a system of regular and independent inspections of all places of detention, similar to those required for the NPM under the Optional Protocol which entered into force in June 2006.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *Original Swedish Draft (18 January 1978)*[2]

Article 6

> Each State Party shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

5 *United States Draft (19 December 1978)*[3]

Article 6

> Each State Party shall keep under systematic, periodic review interrogation practices, and arrangements for the custody and treatment of persons deprived of their liberty within its jurisdiction with a view towards preventing cases of torture or other cruel, inhuman or degrading treatment or punishment.

6 *Revised Swedish Draft (19 February 1979)*[4]

Article 11

> Each State Party shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

2.2 Analysis of Working Group Discussions

7 During the 1979 Working Group the issue was raised as to whether the phrase 'territory under its jurisdiction' included occupied territories. It was agreed that the phrase

[2] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285. Art 6 of this draft is identical with Art 6 of the 1975 Declaration.

[3] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314.

[4] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

had the same meaning as had earlier been agreed upon in connection with Article 2(1) of the revised draft.[5]

8 An opinion was also expressed that there were certain discrepancies between Articles 10 and 11 which would require in the future some additional drafting work. It was agreed that Article 11 should be amended to harmonize it with Article 10 by referring to 'interrogation rules, instructions, methods and practices'.[6]

3. Issues of Interpretation

3.1 Meaning of 'any case of torture'

9 The scope of application of Article 11 extends not only to torture but also to other forms of cruel, inhuman or degrading treatment or punishment.[7] As established by Article 16(1) 'the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment'.[8]

3.2 Meaning of 'rules, instructions, methods and practices as well as arrangements'

10 The wording of Article 11, which refers to 'rules, instructions, methods and practices' as well as 'arrangements', clearly suggests that this provision shall apply not only to any legislative or administrative rules and instructions, but also to methods and practices. To this extent, it is worth remembering that Article 11, which initially referred only to 'interrogation methods and practices', was finally extended by the Working Group also to 'interrogation rules and instruction' with a view to harmonize it with Article 10.[9] This means that States parties are not only required to review their written interrogation rules and instructions, but also their actual interrogation methods and practices. A similar conclusion can be reached in regard to the word 'arrangements' used with reference to custody and treatment of persons deprived of liberty.

3.3 Meaning of 'interrogations' and 'custody and treatment of persons deprived of liberty'

11 Article 11 covers rules and practices concerning *interrogations* but also the *custody and treatment of persons deprived of liberty*, ie those subjected to any form 'arrest, detention or imprisonment'. This concerns all contexts in which a person is deprived of his or her liberty, including detention facilities under the de facto control of a

[5] Report of the Working Group of the Commission on Human Rights (1979) UN Doc E/CN.4/L.1470, para 55.

[6] ibid, para 56, the previous version instead made explicit reference only to 'interrogation methods and practices …'.

[7] See Arts 1 and 16.

[8] cf Art 16 § 13 below; and J Herman Burgers and Hans 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) 143.

[9] E/CN.4/L.1470 (n 5) para 55; see also Art 10 § 22 above.

State, as well as in 'contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm'.[10] The Committee has applied Article 11 broadly, including for example in relation to police custody,[11] premises of the intelligence and security departments,[12] pre-trial detention,[13] administrative detention,[14] juvenile justice,[15] detention in psychiatric institutions,[16] and in social institutions.[17] This shows that the notion of 'deprivation of liberty' in Article 11 CAT can today be considered as corresponding to the definition of deprivation of liberty under Article 4 OP.[18]

3.4 Meaning of 'any territory under its jurisdiction'

12 As for the *territorial scope of application*, it was agreed during the drafting of the Convention that the phrase 'in any territory under its jurisdiction' had the same meaning as had earlier been agreed upon in connection with Article 2(1) of the revised draft. The reader is therefore referred to Article 2 CAT in this Commentary.[19]

3.5 Meaning of 'systematic review'

13 Under Articles 2(1) and 16(1), States parties shall take effective legislative, administrative, judicial, or other measures to prevent torture and other forms of ill-treatment. If the legislative or administrative rules and instructions for the conduct of interrogation and the treatment of detainees constitute an important way to prevent ill-treatment, the systematic review of such rules and practices is an essential step for the implementation and continual monitoring of these obligations.[20]

14 Yet the interplay between Articles 1, 2, 16, and 11 makes it at times difficult to define the exact scope of application of Article 11. For example, in all decisions on individual complaints finding a violation of Article 11, the Committee has equally found a separate breach of Article 2 (alone[21] or in conjunction with

[10] CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 15; CAT, 'Observations of the Committee Against Torture on the Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)' (2013) UN Doc CAT/C/51/4, para 6.

[11] eg *EN v Burundi* [2015] CAT No 578/2013, para 7.6; *X v Burundi* [2015] CAT No 553/2013, para 7.6.

[12] eg *Abdulrahman Kabura v Burundi* [2017] CAT No 549/2013, para 7.8; *Déogratias Niyonzima v Burundi* [2014] CAT No 514/2012.

[13] eg CAT, 'Concluding Observations: Honduras' (2009) UN Doc CAT/C/HND/CO/1, para 14; 'Concluding Observations: Cuba' (2012) UN Doc CAT/C/CUB/CO/2, para 11.

[14] eg CAT, 'Concluding Observations: Mexico' (2012) UN Doc CAT/C/MEX/CO/5-6, para 21; 'Concluding Observations: Netherlands' (2013) UN Doc CAT/C/NLD/CO/5-6, para 14; 'Concluding Observations: Israel' (2016) UN Doc CAT/C/ISR/CO/5, para 28.

[15] eg CAT, 'Concluding Observations: Norway' (2008) UN Doc CAT/C/NOR/CO/5, para 23; 'Concluding Observations: The Philippines' (2009) UN Doc CAT/C/PHL/CO/2, para 19.

[16] See eg CAT, 'Concluding Observations: Romania' (2015) UN Doc CAT/C/ROU/CO/2, para 14; CAT, 'Concluding Observations: Russia' (2012) UN Doc CAT/C/RUS/CO/5, para 22.

[17] CAT, 'Concluding Observations: Bulgaria' (2011) UN Doc CAT/C/BGR/CO/4-5, para 19.

[18] See below Art 4 OP.

[19] See E/CN.4/L.1470 (n 5) para 55 and above Art 2, §§ 53–56.

[20] See also Lene Wendland, *A Handbook on State Obligations under the UN Convention against Torture* (2002) 50; Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Kluwer Law International 2001) 247.

[21] *Taoufik Elaïba v Tunisia*, No 551/2013, UN Doc CAT/C/57/D/551/2013, 6 May 2016; *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011, UN Doc CAT/C/54/D/

Article 1[22]) or a violation of Article 11 together with Article 16.[23] On the contrary, the Committee has never found a violation of Article 11 without having first established a breach of Article 2 or Article 16.[24] Hence, although it has not stated this expressly, it seems that a violation of such provisions is a precondition for the finding of a violation of Article 11. A similar approach is taken in the reporting procedure.[25]

15 Although closely interconnected, the States obligations under Article 11 are additional to those established under Articles 2 and 16 and are meant to further reinforce the prevention of torture and other forms of ill-treatment. In other words, the use of the term 'systematic review' in Article 11 indicates that the obligations under Article 11 go beyond the adoption of a set of rules and practices. States parties, in fact, will not discharge their Convention obligations by simply adopting written rules and instructions, and establishing methods, practices, and arrangements to implement them, but will also have to make sure that such rules and practices are kept under systematic review.[26] This means that States parties must 'continually stay abreast of the actual situation'[27] and need to reform their rules and practices if they are not in line with the relevant standards.

3.5.1 Obligation to Oversee Any Form of Deprivation of Liberty

16 Concretely, one of the core element of this provision is that the State has the *obligation to oversee any form of deprivation of liberty of the individual* to prevent torture and other forms of ill-treatment. A combined reading of Articles 2, 16, and 11 has led the Committee to the conclusion that States parties are under an *obligation to establish a system of regular and independent monitoring and inspections of all places of detention*. The existence of this obligation is confirmed by the Committee's jurisprudence. In fact, when considering complaints invoking Article 11 the Committee has also taken into consideration whether a monitoring mechanism is in place.[28] For example, in *Kabura v Burundi* and *Niyonzima v Burundi* the Committee has found a violation of Article 16, read in conjunction with Article 11 CAT, in view of the 'manifest absence of any *mechanism for monitoring*'.[29] Similarly, in *Colmenarez and Sanchoz v Venezuela*, the Committee found a

456/2011, 15 May 2015; *Ali Aarrass v Morocco*, No 477/2011, UN Doc CAT/C/52/D/477/2011, 19 May 2014; *Djamila Bendib v Algeria*, No 376/2009, UN Doc CAT/C/51/D/376/2009, 8 November 2013.

[22] *EN v Burundi* No 578/2013 (n 11); *X v Burundi* No 553/2013 (n 11); *Patrice Gahungu v Burundi*, No 522/2012, UN Doc CAT/C/55/D/522/2012, 10 August 2015; *HB v Algeria*, No 494/2012, UN Doc CAT/C/55/D/494/2012, 6 August 2015; *Ntahiraja v Burundi*, No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015; *Déogratias Niyonzima v Burundi* No 514/2012 (n 12); *Nouar Abdelmalek v Algeria*, No 402/2009, UN Doc CAT/C/52/D/402/2009, 23 May 2014; *Boniface Ntikarahera v Burundi*, No 503/2012, UN Doc CAT/C/52/D/503/2012, 12 May 2014.

[23] *Abdulrahman Kabura v Burundi* No 549/2013 (n 12) para 7.8; *Déogratias Niyonzima v Burundi* No 514/2012 (n 12) para 3.4; *Boniface Ntikarahera v Burundi* No 503/2012 (n 22) para 6.6.

[24] See eg *Saadia Ali v Tunisia*, No 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008, para 15.6; *Kostadin Nikolov Keremedchiev v Bulgaria*, No 257/2004, UN Doc CAT/C/41/D/257/2004, 11 November 2008, para 9.5; *Ali Ben Salem v Tunisia*, No 269/2005, UN Doc CAT/C/39/D/269/2005, 7 November 2007, para 16.6.

[25] Amongst many others see eg CAT, 'Concluding Observations: Andorra' (2013) UN Doc CAT/C/AND/CO/1, paras 9, 19; CAT/C/BGR/CO/4-5 (n 17) paras 23, 24; CAT, 'Concluding Observations: Belarus' (2011) UN Doc CAT/C/BLR/CO/4, paras 6–8, 13; see also above Art 2 §§ 22ff.

[26] See also Burgers and Danelius (n 8) 143.

[27] Ingelse (n 20) 247; see also Burgers and Danelius (n 8) 143.

[28] *Abdulrahman Kabura v Burundi* No 549/2013 (n 12) para 7.8; *Déogratias Niyonzima v Burundi* No 514/2012 (n 12) para 8.8; *Boniface Ntikarahera v Burundi* No 503/2012 (n 22) para 6.6; *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela* No 456/2011 (n 21) para 6.7.

[29] *Abdulrahman Kabura v Burundi* No 549/2013 (n 12) para 7.8; *Déogratias Niyonzima v Burundi* No 514/2012 (n 12) para 8.8; *Boniface Ntikarahera v Burundi* No 503/2012 (n 22) para 6.6.

breach of Article 11 due to the absence of any measure aiming at reinforcing *independent procedures of inspection in prison*.[30] In doing so, the Committee has also, in certain instances, considered whether the absence of the monitoring mechanism had increased the risk for the person deprived of liberty of being subjected to acts of torture or other forms of ill-treatment;[31] and the fact that the State party had not produced any information in this respect.[32] Information provided by the State in this regard must be pertinent[33] and not of general nature.[34]

18 In its concluding observations, the Committee has further clarified that such systematic review requires the establishment of an effective monitoring and inspection of all places of detention through 'unrestricted', 'regular', and 'unannounced'[35] visits by independent national and international monitors in order to prevent torture and other forms ill-treatment.[36] Monitoring bodies should include non-governmental organizations.[37] Moreover, States parties should also follow up on the outcome of such monitoring process.[38]

19 The obligation to establish a system of regular and independent monitoring is further strengthened by the entry into force of the OP, which requires States parties to establish an independent national preventive mechanism (NPM) to carry out unannounced visits to all places of detention.[39] Since then, the Committee has often encouraged States parties to consider the possibility of ratifying the OP and urged them to establish a NPM which 'independently, effectively and regularly monitors and inspects all places of detention without prior notice, reports publicly on its findings, and raises with the authorities situations of detention conditions or conduct amounting to torture or other forms of ill-treatment'.[40]

3.5.2 Standards of Review

20 The second core element of Article 11 is that, especially since the 'systematic review' needs to be done 'with a view to preventing any cases of torture', this provision establishes important *procedural and substantive standards in relation to methods of interrogation, conditions of detention, and the treatment of persons deprived of liberty in general*.

[30] *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela* No 456/2011 (n 21) para 6.7; see also *Taoufik Elaïba v Tunisia* No 551/2013 (n 21) para 7.4.

[31] *Djamila Bendib v Algeria* No 376/2009 (n 21) para 6.4.

[32] *Abdulrahman Kabura v Burundi* No 549/2013 (n 12) para 7.8; *Déogratias Niyonzima v Burundi* No 514/2012 (n 12) para 8.8.

[33] *Taoufik Elaïba v Tunisia* No 551/2013 (n 21) para 7.4. [34] ibid para 7.4.

[35] CAT, 'Concluding Observations: Morocco' (2011) UN Doc CAT/C/MAR/CO/4, para 15.

[36] CAT, 'Concluding Observation: Croatia' (2014) UN Doc CAT/C/HRV/CO/4-5, para 10; CAT, 'Concluding Observations: Jordan' (2016) UN Doc CAT/C/JOR/CO/3, para 32; CAT, 'Concluding Observations: Japan' (2013) UN Doc CAT/C/JPN/CO/2, para 22. CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Lebanon' (2014) UN Doc A/69/44 Annex XIII; CAT/C/BLR/CO/4 (n 25) para 13; CAT, 'Concluding Observations: Burundi' (2014) UN Doc CAT/C/BDI/CO/2, para 19; CAT, 'Concluding Observations: Azerbaijan' (2016) UN Doc CAT/C/AZE/CO/4, para 23.

[37] CAT, 'Concluding Observations: Turkmenistan' (2011) UN Doc CAT/C/TKM/CO/1, para 14 (b).

[38] CAT, 'Concluding Observations: Thailand' (2014) UN Doc CAT/C/THA/CO/1, para 24; CAT, 'Concluding Observations: Yemen' (2010) UN Doc CAT/C/YEM/CO/2/Rev.1, para 10; CAT, 'Report on Nepal Adopted by the Committee Against Torture Under Article 20 of the Convention and Comments and Observations by the State Party' (2012) UN Doc A/67/44, para 110.

[39] See OP below.

[40] See eg CAT/C/THA/CO/1 (n 38) para 24 (d); CAT, 'Concluding Observations: China' (2016) UN Doc CAT/C/CHN/CO/5, para 29 (c); CAT, 'Concluding Observations: Venezuela' (2014) UN Doc CAT/C/VEN/CO/3-4, para 20. See also Art 2 §§ 40-41 and Art 16.

These minimum standards, deriving from the absolute prohibition of torture and, by virtue of Article 16, of other forms of cruel, inhuman or degrading treatment or punishment, as well as from the general obligation to prevent torture enshrined in Article 2, shall be reflected in the States' rules and practices concerning interrogations and detention.[41]

21 In this regard, the Committee has also repeatedly affirmed the importance of adhering to *international standards*, such as Articles 9 and 14 ICCPR but also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[42] the Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules),[43] as well as other UN Standards such as Minimum Rules for the Administration of Juvenile Justice (Beijing Rules),[44] for the Prevention of Juvenile Delinquency (Riyadh Guidelines),[45] for Non-custodial Measures (Tokyo Rules),[46] for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).[47] Based on such international standards, over time the Committee has developed a rich body of recommendations. Without being exhaustive, this article will provide an overview of these standards of review.

3.5.2.1 Standards of Review relating to the Custody and Treatment of Persons Subjected To any form of Arrest, Detention, or Imprisonment

22 In its *General Comment No 2* the Committee has acknowledged the relevance of a number of 'basic guarantees applicable to all persons deprived of liberty'.[48] Before analysing the Committee's recommendations on each of these safeguards, it should be remembered that fundamental legal safeguards from early stages of custody are considered as the key and most effective factors in the prevention of torture.[49] As torture and other

[41] See also Art 2, 3.1.2; and Art 16, 3.3.

[42] CAT, 'Concluding Observations: Belgium' (2014) UN Doc CAT/C/BEL/CO/3, para 11; CAT, 'Concluding Observations: Bolivia' (2013) UN Doc CAT/C/BOL/CO/2, para 9.

[43] GA Res 70/175 of 17 December 2015 (the Mandela Rules). The first Standard Minimum Rules for the Treatment of Prisoners were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council in its resolution 663 C (XXIV) of 31 July 1957, and extended by the Council by its resolution 2076 (LXII) of 13 May 1977; the revision phase of the Mandela Rules started in 2010 with the GA Res 65/230 of 21 December 2010, paras 48–49, which called for the establishment of an Open-ended Intergovernmental Expert Group (IEG) and ended with the GA Res 70/175 of 17 December 2015. See also CAT, 'Concluding Observations: Guatemala' (2006) UN Doc CAT/C/GTM/CO/4, para 18; CAT, 'Concluding Observations: Togo' (2006) UN Doc CAT/C/TGO/CO/1, para 18(b); CAT, 'Conclusions Observations: Democratic Republic of the Congo' (2006) UN Doc CAT/C/DRC/CO/1; para 11; CAT, 'Report of the Committee against Torture Twenty-fifth session (13–24 November 2000) Twenty-sixth session (30 April–18 May 2001)' (2001) UN Doc A/56/44, para 95(c).

[44] GA Res 40/33 of 1985. [45] GA Res 45/112 of 14 December 1990.

[46] GA Res 45/110 of 14 December 1990. [47] GA Res 65/229 of 21 December 2010.

[48] CAT/C/GC/2 (n 10) para 13. Such guarantees include inter alia maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment; see also above Art 2, 3.1.2.

[49] See amongst others Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd edn OUP 2009) 450; ICJ, 'Law and the Prevention of Torture' (1973) 11 The Review 23; AI, '12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State' (2005); Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016) 67; see also SRT (Mendez) 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2016) UN Doc A/71/298, para 60; CTI, 'UNCAT Implementation tool 2/2017: Safeguards in the First Hours of Police Detention' (2017). See

forms of ill-treatment are likely to occur during the first hours of deprivation of liberty or interrogation, all key fundamental legal safeguards are to be granted *from the very outset of a person's deprivation of liberty.* In fact, for the Committee 'it is precisely while they cannot communicate with their families and lawyers that suspects are most vulnerable to torture'.[50] Legal safeguards should then remain guaranteed *throughout all stages of proceedings and all moments of deprivation of liberty*.[51]

23 It is similarly worth noting that a precondition for the application of all safeguards that will be mentioned below is that *all unofficial places of detention or interrogation* are outlawed and no-one is detained in *secret or unofficial facilities* under the de facto control of the State party. According to the Committee, in fact, unofficial places of detention should be closed, as detaining individuals in such facilities is per se a breach of the Convention.[52] As also put by the ECtHR 'unacknowledged detention of an individual is a "complete negation" of the guarantees against the deprivation of liberty and security of the person'.[53]

25 The Committee has also called upon States parties *to review their detention regime with a view to abolishing incommunicado detention*,[54] referred to as 'a practice that is conducive to torture and enforced disappearances'.[55] Although it has never given a detailed definition of incommunicado detention,[56] the Committee seems to understand incommunicado detention as the practice of denying the persons deprived of liberty contacts with the outside world, including with his/her lawyer, doctors, family members, or other third persons. All persons held incommunicado should be released or charged and given a fair trial in accordance with due process.[57]

26 With regard to specific safeguards, the Committee considered that persons deprived of their liberty should be *fully informed* of the charges against them and about their rights in a language they understand, and receive language assistance such as translation and interpretation.[58]

27 Another key legal safeguard for persons deprived of liberty is the right to *promptly contact a family member or any other person of their choice* to notify them of the circumstances of their arrest and the place where they are being held, and their appearance before a judge.[59] In this regard, the Committee has recommended that any official that fails to allow notification of relatives promptly should be disciplined or sanctioned.[60]

also CPT, 'CPT Standards: Developments Concerning CPT Standards in Respect of Police Custody' (2002) CPT/Inf(2002)15, para 40, and above Art 2, 3.1.2.2.

[50] *Ali Aarrass v Morocco* No 477/2011 (n 21) para 10.3.

[51] CAT/C/51/4 (n 10) para 48.

[52] CAT, 'Concluding Observations: Iraq' (2015) UN Doc CAT/C/IRQ/CO/1, para 16 (a); CAT, 'Concluding Observations in the Absence of Its Initial Report: Guinea' (2014) UN Doc CAT/C/GIN/CO/1, para 15 (a); CAT, 'Concluding Observations: Sri Lanka' (2011) UN Doc CAT/C/LKA/CO/3-4, para 8; CAT/C/MAR/CO/4 (n 35) para 14; CAT, 'Concluding Observations: Saudi Arabia' (2016) UN Doc CAT/C/SAU/CO/2, para 33 (c); CAT, 'Concluding Observations: United States of America' (2006) UN Doc CAT/C/USA/CO/2, para 11 (a); CAT/C/CHN/CO/5 (n 40) para 42 (a).

[53] *Çakıcı v Turkey* App no 23657/94 (ECtHR, 8 July 1999) para 104.

[54] CAT, 'Concluding Observations: Spain' (2015) UN Doc CAT/C/ESP/CO/6, para 10; CAT/C/IRQ/CO/1 (n 52) para 15. On incommunicado detention see also Art 16 § 36.

[55] See eg CAT, 'Concluding Observations: Mauritania' (2013) UN Doc CAT/C/MRT/CO/1, para 11.

[56] Rodley and Pollard (n 49) 460.

[57] CAT/C/YEM/CO/2/Rev.1 (n 38) para 12.

[58] CAT, 'Concluding Observations: Albania' (2012) UN Doc CAT/C/ALB/CO/2, para 13; CAT/C/BLR/CO/4 (n 25) para 6; CAT, 'Concluding Observations: Portugal' (2013) UN Doc CAT/C/PRT/CO/5-6, para 8; CAT/C/SAU/CO/2 (n 52) para 14.

[59] See CAT, 'Report on Mexico Produced by the Committee Under Article 20 of the Convention and Reply from the Government of Mexico' (2003) UN Doc CAT/C/75, para 220 (e); CAT/C/CHN/CO/5 (n 40) paras 12–13; CAT/C/MAR/CO/4 (n 35) para 7; CAT/C/CUB/CO/2 (n 13) para 8.

[60] CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 12.

28 The Committee has similarly stressed the *right to remain silent*[61] and the importance of *prompt access to a qualified and independent lawyer*.[62] Despite not expressly defining what *prompt* access means,[63] the Committee has specified that access should be promptly given from the moment of deprivation of liberty and especially during the interrogation, investigation, and questioning process.[64] It condemned the practices of certain States to postpone access to a lawyer for up to six days[65] or a maximum of seventy-two hours in cases involving terrorism or organized crime,[66] arguing that this puts suspects held in custody at greater risk of torture. The Committee also noted that the right to be assisted by a lawyer must be funded at the State's expense, if necessary.[67] In this respect an independent free legal aid system for detainees should be established and rigorously adhered to.[68] Moreover, in line with the revised Mandela Rules now recognizing the right to legal representation 'in any legal matter',[69] the Committee recommended to guarantee access to legal representation and legal aid to all persons deprived of liberty, including during first instance administrative level of the asylum process.[70] It also highlighted that interpretation needs to be granted, when necessary.[71] States must also ensure the full confidentiality of client–lawyer meetings as well as communications via telephone and correspondence.[72] Appropriate premises should be made available where interviews between the accused and their counsel can take place within sight (but not within earshot) of a police officer or official of the establishment concerned.[73]

29 Equally important is the right to have *immediate access to a qualified and independent medical doctor*.[74] In its concluding observations to *Liechtenstein*, the Committee indicated that all persons arriving in a penitentiary institution should be examined by an

[61] eg CAT/C/IRQ/CO/1 (n 52) para 14.

[62] CAT/C/51/4 (n 10) para 48; see also 'Basic Principles on the Role of Lawyers' adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

[63] See also SRT (van Boven) 'Report of the Special Rapporteur on Torture' (2002) UN Doc E/CN.4/2003/68, para 26(g), where he recommended to ensure access to legal counsel within twenty-four hours.

[64] CAT/C/51/4 (n 10) para 49; CAT/C/BEL/CO/3 (n 42) para 66; CAT/C/NLD/CO/5-6 (n 14) para 10.

[65] *Ali Aarrass v Morocco* No 477/2011 (n 21) para 10.3.

[66] CAT, 'Concluding Observation: France' (2016) UN Doc CAT/C/FRA/CO/7, paras 10–11.

[67] eg A/56/44 (n 45) paras 120, 97(g); CAT, 'Concluding Observations: Senegal' (2013) UN Doc CAT/C/SEN/CO/3, para 10; CAT, 'Concluding Observations: Sierra Leone' (2014) UN Doc CAT/C/SLE/CO/1, para 11; CAT/C/BGR/CO/4-5 (n 17) para 9; CAT, 'Concluding Observations: Mozambique' (2013) UN Doc CAT/C/MOZ/CO/1, para 8. For cases on shortage of defence lawyers see CAT, 'Concluding Observations: Kenya' (2013) UN Doc CAT/C/KEN/CO/2, para 25; CAT, 'Concluding Observations: Cambodia' (2011) UN Doc CAT/C/KHM/CO/2, para 14.

[68] CAT 'Concluding Observations: Bulgaria' (2004) UN Doc CAT/C/CR/32/6, para 6(d). This seems in line with what established by the latest international standards on legal aid, namely the Mandela Rules (n 43) Rule 61; and GA Res 67/187 of 20 December 2012 (Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems).

[69] Mandela Rules (n 43) Rule 61; on the access to legal representation under the Mandela Rules see also Andrea Huber, 'Chapter 3: Contact with the Outside World' in University of Essex—Human Rights Centre and PRI, *Essex Paper 3: Initial Guidance on the Interpretation and Implementation of the Nelson Mandela Rules* (2017) 7.

[70] eg CAT, 'Concluding Observations: Cyprus' (2014) UN Doc CAT/C/CYP/CO/4, para 14; CAT, 'Concluding Observations: Austria' (2016) UN Doc CAT/C/AUT/CO/6, para 16; CAT, 'Concluding Observations: Montenegro' (2014) UN Doc CAT/C/MNE/CO/2, para 8.

[71] CAT, 'Concluding Observations: Ukraine' (2014) UN Doc CAT/C/UKR/CO/6, para 17.

[72] CAT, 'Concluding Observations: Poland' (2013) UN Doc CAT/C/POL/CO/5-6, para 8; CAT/C/JOR/CO/3 (n 36) para 17; CAT/C/CHN/CO/5 (n 40) para 13.

[73] CAT, 'Report of the Committee against Torture—Addendum' (1993) UN Doc A/48/44/Add.1, para 48.

[74] eg CAT/C/JOR/CO/3 (n 36) para 18; CAT/C/AND/CO/1 (n 25) para 8; CAT, 'Concluding Observations: Azerbaijan' (2009) UN Doc CAT/C/AZE/CO/3, para 11.

independent medical doctor within 24 hours of arrival. [75,76] Patient–doctor confidentiality during such medical examinations should be granted, and police officers should not be present during medical examinations of persons in police custody. This is in order to guarantee the confidentiality of medical information, save under exceptional and justifiable circumstances (ie, risk of physical aggression).[77] Access to a doctor must not only be guaranteed immediately following arrest,[78] but additionally at regular intervals thereafter and in particular before release.[79]

30 Further the Committee noted that any person deprived of liberty should *be brought before a judge as soon as possible* following the arrest and not later than forty-eight hours.[80] Concerns were shown about certain national legislation allowing that this period be delayed in relation to persons accused of security-related offences or under a state of emergency.[81] This long time frame is excessive and may leave room for acts of torture by the security forces.

31 In line with what is provided by other international instruments,[82] all persons deprived of liberty have the *right to have their detention recorded in a register*.[83] States parties have to take appropriate measures to establish a standardized, computerized, and centralized officials registers in which arrests are 'immediately and scrupulously recorded'.[84] Registers must be kept at all stages of deprivation of liberty.[85] In particular, officials register should include the exact date, time, and place of detention of all persons deprived of their liberty. Most importantly 'the time of de facto apprehension is accurately recorded to ensure that the first unrecorded hours of unacknowledged detention between the arrest and delivery to a police station cannot be used by law enforcement officials to obtain confessions by means of torture'.[86] In other words, registration is to be done promptly after the moment of apprehension and not only upon formal arrest or charging.[87] The prisoner's file management should be kept regularly up to date.[88] As a minimum, registers

[75] See CAT, 'Concluding Observations: Liechtenstein' (2010) UN Doc CAT/C/LIE/CO/3, para 17 where the Committee indicated that all persons arriving in a penitentiary institution should be examined by an independent medical doctor within twenty-four hours of arrival.

[76] A/56/44 (n 45) paras 144–93, 25.

[77] CAT, 'Concluding Observations: Austria' (2005) UN Doc CAT/C/AUT/CO/3, para 13.

[78] The Committee explicitly stated that the systematic medical examination of detainees must be provided within twenty-four hours of the admission to prison in CAT, 'Conclusions Observations: Albania' (2005) UN Doc CAT/C/CR/34/ALB, para 8.

[79] CAT/C/DRC/CO/1 (n 45) para 7; CAT, 'Concluding Observations: Israel' (2001) UN Doc CAT/C/XXVII/Concl.5, para 9.

[80] In some concluding observations, the Committee has indicated that the time limit to bring a person deprived of his/her liberty before a judge should be twenty-four hours: see CAT/C/75 (n 59) para 220 (b); CAT/C/ISR/CO/5 (n 14) para 16.

[81] See eg CAT/C/ISR/CO/5 (n 14) para 16, where the maximum period referred to by the Committee in case of security related persons was ninety-two hours; and CAT/C/75 (n 59) para 25 where the time limit was thirty days.

[82] GA Res 43/173 of 9 December 1988, Principles 12 and 23; Mandela Rules (n 43) Rules 6–10; Andrea Huber, 'Chapter 2: Prison Management' in University of Essex—Human Rights Centre and PRI, *Essex Paper 3: Initial Guidance on the Interpretation and Implementation of the Nelson Mandela Rules* (2017) 8.

[83] CAT/C/51/4 (n 10) para 52; see also CAT/C/LKA/CO/3-4 (n 52) para 12. Including persons detained in institutions run by the Intelligence and Security Department, CAT, 'Concluding Observations: Algeria' (2008) UN Doc CAT/C/DZA/CO/3, para 5.

[84] CAT/C/BEL/CO/3 (n 42) para 20.

[85] CAT, 'Concluding Observations: The Philippines' (2016) UN Doc CAT/C/PHL/CO/3, para 11.

[86] CAT/C/KAZ/CO/3 (n 60) para 59.

[87] CAT/C/LKA/CO/3-4 (n 52) para 12; 'Concluding Observations: Tajikistan' (2013) UN Doc CAT/C/TJK/CO/2, para 8.

[88] CAT, 'Concluding Observations: Cameroon' (2010) UN Doc CAT/C/CMR/CO/4, para 11.

should contain 'information on the identity of the detainee, date, time and place of the detention, the identity of the authority that detained the person, grounds for the detention, date and time of admission to the detention facility, state of health of the detainee upon admission and any changes thereto, time and place of interrogations, with names of all interrogators present, as well as the date and time of release or transfer to another detention facility'. [89] Registers should document the use of restraints, including the reasons for use, duration of use, and particular method of restraint used,[90] and contain information on interrogations.[91] Registers should be accessible by lawyers and relatives of those detained.[92] As detailed below, recording of interrogations should take the form of audio-videotaping of interrogations. The Committee has further recommended States to 'carry out monitoring and inspections on a systematic basis in order to ensure fulfilment of the obligation to duly record the information regarding each arrest that is outlined in the Body of Principles'.[93] All obligations concerning the prisoners file management needs to respect the principle of non-discrimination.[94]

32 The Committee has also set specific standards of review with regard to the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, eg relating to the *conditions of detention* and, in particular, *disciplinary sanctions and other restrictions*. With this regard, both the HRC and the CAT Committee referred to the *Standard Minimum Rules for the Treatment of Prisoners* as the most important non-binding standard relevant for the interpretation of Article 10 CCPR and Article 11 CAT.[95] The revision of the Mandela Rules, concluded in December 2015, further consolidated them as a key reference point.[96] During such revision, the Committee submitted general observations on the Rules,[97] thereby clarifying its position on some crucial aspects concerning Article 11 and complementing its previous jurisprudence and practice.

33 Lack of ventilation, poor sanitary conditions, repeated measures of prolonged isolation, holding suspects incommunicado, frequent transfers from one prison to another, the mixing of women and men, juveniles and adults, convicted prisoners and pre-trial detainees could lead to inhuman or degrading treatment in violation of Article 10 CCPR and/or Articles 16 and 11 CAT.[98] If the issue of *detention conditions* is examined in details under Article 16 in this Commentary, for the purpose of this Article it is particularly interesting to illustrate it in its relation with Article 11. As mentioned above, the Committee has in certain instances found a violation of Article 16 in conjunction with Article 11.[99] In these decisions, a reference was made to overcrowding and size of cells; access to light, food, or water; access to a medical doctor; and more generally to 'insanitary conditions'. More generally, in all cases the Committee found the State to be responsible under Article 11 due to the absence of a monitoring mechanism.

[89] CAT/C/51/4 (n 10) para 52; CAT/C/BEL/CO/3 (n 42) para 12.
[90] CAT, 'Concluding Observations: Estonia' (2013) UN Doc CAT/C/57/D/551/2013, para 19.
[91] CAT/C/SAU/CO/2 (n 52) paras 44–45. [92] CAT/C/BLR/CO/4 (n 25) para 7.
[93] CAT/C/BOL/CO/2 (n 42) para 9 (b). [94] CAT/C/51/4 (n 10) para 10.
[95] On the revised Mandela Rules see University of Essex—Human Rights Centre and PRI, *Essex Paper 3: Initial Guidance on the Interpretation and Implementation of the Nelson Mandela Rules* (2017); Ingelse (n 20) 273.
[96] See University of Essex—Human Rights Centre and PRI (n 95). [97] CAT/C/51/4 (n 10).
[98] For more detailed standards of minimum conditions of detention in relation to Articles 7 and 10 CCPR see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) (*CCPR Commentary*) 157–92, 241–54. See also Arts 1 and 16.
[99] *Abdulrahman Kabura v Burundi* No 549/2013 (n 12) para 7.8; *Déogratias Niyonzima v Burundi* No 514/2012 (n 12); *Boniface Ntikarahera v Burundi* No 503/2012 (n 22).

34 In the reporting procedure, in order to reduce the prison population and avoid overcrowding, the Committee stressed the need to increase the use of *non-custodial measures* in conformity with the Tokyo Rules,[100] and urged States to reduce the use and the length of *pre-trial detention*. To this extent, it has recommended to accelerate proceedings and ensure that pre-trial detention is regulated clearly and is subject to judicial supervision, as well as that redress and compensation are provided to victims of unjustified prolonged pre-trial detention.[101]

35 The Committee has also addressed other issues, eg the *separation of different groups of detainees*. Unlike other international instruments, the Convention does not expressly provide for it.[102] Yet, departing from the obligation to review policies and procedures for the custody and treatment of detainees, it has consistently recommended States to ensure a strict separation of men and women, remand and convicted prisoners,[103] as well as—in all circumstances—persons under eighteen years of age and adults.[104] In addition, with a view to prevent sexual violence in detention detainees should be guarded by officers of the same gender.[105] Separating the different categories of prisoners makes it easier for the State authorities to meet the detainees' needs, protect their human dignity, and more generally prevent torture and other forms of ill-treatment, sexual violence, or harassment.[106]

36 *Restrictions or disciplinary sanctions* should never amount to torture or other forms of ill treatment.[107] They are nevertheless permitted under certain limited conditions, ie if imposed in line with the principles of legality, proportionality, and necessity.

37 With regard to *body searches*,[108] the Committee has recommended that searches to both visitors and detained persons should be duly regulated[109] and conducted only when strictly necessary and proportionate to the intended objective by trained personnel. Searches should be conducted in private, and in a way that is the least intrusive and most respectful of the individual dignity and integrity. Whenever possible, States should use alternatives, such as electronic detection scanning methods. Similarly, the Committee recommended States Parties to ensure strict supervision, and training of the personnel conducting the searches. In practice, a key factor taken into account by the Committee when considering searches seems to be the frequency. Often concerns was expressed by the

[100] See eg CAT, 'Concluding Observations: Armenia' (2016) UN Doc CAT/C/ARM/CO/4, para 30.

[101] CAT/C/PHL/CO/3 (n 89) para 14.

[102] With the general aim of prisons to ensure the rehabilitation and re-socialization of convicted prisoners, Article 10 CCPR requires the separation of convicted and pre-trial detainees, juveniles and adult prisoners, as well as men and women. On this point see also Nowak, *CCPR Commentary* (n 98) 241; see also Rodley and Pollard (n 49) 421.

[103] CAT/C/GIN/CO/1 (n 52) para 14; CAT/C/TGO/CO/1 (n 45) para 19. See also CAT, 'Concluding Observations: Bosnia and Herzegovina' (2005) UN Doc CAT/C/BIH/CO/1, para 14; CAT/C/DRC/CO/1 (n 45) para 11.

[104] See eg CAT/C/CR/32/2 (n 72) para 6(e).

[105] CAT, 'Concluding Observations: Cambodia' (2011) UN Doc CAT /C/KHM/CO/2, para 19; CAT/C/TGO/CO/1 (n 45) para 22; the revised Mandela Rules further provide for the separation between persons imprisons for debt and other civil prisoners see r 11 (c).

[106] CAT/C/51/4 (n 10) para 13.

[107] For a definition of restrictions and sanctions see revised Mandela Rules, referring to: prolonged and indefinite solitary confinement, the placement of a prisoner in a dark or constantly lit cell, corporal punishment or the reduction of a prisoner's diet or drinking water, collective punishment, instruments of restraint, as well as family contacts. See Mandela Rules (n 43) r 43; A/56/44 (n 45) paras 144–93, 42.

[108] CAT/C/51/4 (n 10) para 31; see also Mandela Rules (n 43) Rules 50–53.

[109] On the requirement of legality see also Mandela Rules (n 43) r 47, which limits the use of restraints to two circumstances, namely as a precaution against escape during a transfer, and to prevent a prisoner from injuring him/herself or others or from damaging property.

Committee for the 'frequent', 'systematic', 'widespread', 'routine' use of body searches.[110] Similarly, in relation to *France*, the Committee showed concerns for the 'intrusive and humiliating nature' of body searches, especially internal, and regretted that the procedures regulating the frequency and methods of searches in prisons and detention centres were determined by the prison authorities themselves.[111]

38 The Committee has consistently urged States Parties to review interrogation and detention rules to ensure that *solitary confinement*[112] is applied only in exceptional circumstances as a last resort measure and for the shortest time possible.[113] Indefinite solitary confinement is considered prohibited, as it is the practice of renewing the measure with the imposition of subsequent periods of solitary confinement.[114] In this regard, it is useful to also refer to the revised Mandela Rules, which define it as the 'confinement of a prisoner for 22 hours or more a day without meaningful human contact', and prolonged solitary confinement for 'period in excess of 15 consecutive days'.[115] The Committee further expressed concerns for Prison Rules imposing solitary confinement on 'vague grounds',[116] and recommended to establish 'clear and specific criteria' for decisions on isolation.[117] In contrast, it recommended States to consider the findings of the SRT Mendez who urged States to prohibit the imposition of solitary confinement as a form of punishment, either as a part of a judicially imposed sentence or a disciplinary measure.[118] Offences committed by a detainee requiring more severe sanctions should, in fact, be addressed within the criminal law system.[119] In line with other international standards,[120] in the Committee's view, solitary confinement should not be applied for certain categories of detainees, including for example asylum seekers,[121] persons with intellectual or psychosocial disabilities, pregnant women, women with infants and breastfeeding mothers,[122]

[110] CAT/C/FRA/CO/4-6 (n 104) para 27; CAT/C/FRA/CO/7 (n 66) para 28; CAT/C/AND/CO/1 (n 25) para 18; CAT/C/BEL/CO/3 (n 42) para 16.

[111] CAT/C/FRA/CO/4-6 (n 104) para 28; on body searches see also *Khider v France* App no 39364/05 (ECtHR, 09 July 2009); *Frérot v France* App no 70204/01 (ECtHR, 12 June 2007).

[112] For the view of the Committee on Rule 32 of the Mandela Rules on solitary confinement see CAT/C/51/4 (n 10) para 32; see also SRT (Nowak) 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2008) UN Doc A/63/175, including its Annex 'The Istanbul Statement on the Use and Effects of Solitary Confinement'; SRT (Mendez), 'Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc A/66/268 (n 121); and Andrea Huber, 'Chapter 5: Restrictions, Discipline and Sanctions', in University of Essex - Human Rights Centre and PRI, Essex Paper 3: *Initial Guidance on the Interpretation and Implementation of the Nelson Mandela Rules* (2017) 10, focusing more in general on the provisions of the Mandela Rules.

[113] On the maximum duration of solitary confinement see CAT/C/BGR/CO/4-5 (n 17) para 24, where the Committee expressed concerns for legislation allowing the application of solitary confinement as a disciplinary measure for up to fourteen days, and for up to two months for the purpose of prevention of escape, violation of life, or deaths of other persons and other crimes.

[114] CAT/C/51/4 (n 10) paras 32 and 33; CAT/C/PRT/CO/5-6 (n 58) para 12; and CAT, 'Concluding Observations: Hong Kong, China' (2016) UN Doc CAT/C/CHN-HKG/CO/5, para 18, where the Committee expressed concerns on Prison Rules allowing solitary confinement for a maximum of seventy-two hours renewable form unlimited further periods of one months.

[115] Mandela Rules (n 43) r 44.

[116] CAT/C/CHN-HKG/CO/5 (n 114) para 18, in this case the Prison Rules referred to 'the maintenance of good order or discipline or in the interests of a prisoner'.

[117] CAT/C/PRT/CO/5-6 (n 58) para 12.

[118] CAT/C/BGR/CO/4-5 (n 17) para 24.

[119] CAT/C/51/4 (n 10) para 33.

[120] Mandela Rules (n 43) r 45; on women see the Bangkok Rules (n 48) r 22; on juvenile see Beijing Rules (n 44) Rule 67.

[121] CAT/C/BGR/CO/4-5 (n 17) para 24.

[122] CAT/C/CHN-HKG/CO/5 (n 114).

and juveniles.[123] Solitary confinement should be equally prohibited for life-sentenced prisoners or prisoners sentenced to death, and for pre-trial detainees.[124] In any event, if imposed, States Parties should ensure strict supervision and judicial review.[125] This, for example, includes that the detainee's physical and mental condition is regularly monitored by qualified medical personnel throughout the period of solitary confinement, and that such medical records are made accessible to the detainees and their legal counsel.[126] The Committee has equally urged States to increase the level of psychologically meaningful social contact for detainees while in solitary confinement.[127] As to the layout of places of detention, the Committee in November 1993 called on Turkish authorities to demolish immediately and systematically all the solitary confinement cells known as 'coffins' which in themselves were found to constitute a form of torture. These cells measure approximately sixty to eighty centimetres, have no light and inadequate ventilation, and the inmate can only stand or crouch.[128]

39 In its observations on the revision of the Mandela Rules, the Committee has similarly stated to reject *other disciplinary punishments*, including severe punishment on prisoners serving life sentences, such as routine *handcuffing* when outside cells, and *segregation*.[129]

40 *Restraints measures*, too, should be strictly regulated and applied only in exceptional circumstances, as a last resort, and for the shortest possible time.[130] This means that no systematic or excessively frequent use of restraints is permitted.[131] To be lawful, they must respect the principles of legality, necessity, and proportionality. They should be regulated in line with international standards,[132] and be used only when less intrusive alternative measures have failed.[133] In practice, the Committee has often expressed its concerns for the use of certain instruments of restraints in prison settings. It has, for example, recommended abolishing the routine handcuffing of prisoners serving life sentencing;[134] and the minimization of the use of physical restraints with a view to abandoning it.[135] Recommendations were also made regarding the use of restraints in the context of arrest,[136] interrogation,[137] pre-trial detention,[138] forced returns,[139] and in the context of psychiatric facilities.[140] In this last regard, the Committee expressed concerns on the 'use of restraint and forced administration of intrusive and irreversive treatments such as neuroleptic drugs'.[141]

[123] CAT/C/AUT/CO/6 (n 70) para 27.
[124] CAT/C/51/4 (n 10) para 33; see also Mandela Rules (n 43) r 45(2).
[125] CAT/C/CYP/CO/4 (n 70) para 15.
[126] CAT/C/PRT/CO/5-6 (n 58) para 12; CAT/C/JPN/CO/2 (n 36) para 14; for further guidance on the role of health-care personnel in the imposition of solitary confinement see Mandela Rules (n 43) r 46.
[127] CAT/C/51/4 (n 10) para 34. [128] ibid, para 52.
[129] CAT/C/51/4 (n 10) para 39; on handcuffing see also CAT, 'Concluding Observations: Latvia' (2013) UN Doc CAT/C/LVA/CO/3-5, para 21.
[130] CAT/C/BGR/CO/4-5 (n 17) para 19 (d); CAT, 'Concluding Observations Germany' (2011) UN Doc. CAT/C/DEU/CO/5, para 16.
[131] CAT/C/57/D/551/2013 (n 90) para 29 (b).
[132] CAT/C/51/4 (n 10) para 36; see in particular Mandela Rules (n 43) rr 47–49.
[133] CAT, 'Concluding Observations: Macao, China' (2016) UN Doc CAT/C/CHN-MAC/CO/5, para 21.
[134] CAT/C/LVA/CO/3-5 (n 129) para 21.
[135] CAT/C/DEU/CO/5 (n 130) para 16; see also CAT/C/51/4 (n 10) para 37, where the Committee indicates its position on immobilization.
[136] CAT/C/NOR/CO/5 (n 15) para 19. [137] CAT/C/ISR/CO/5 (n 14) para 31 (b).
[138] CAT, 'Concluding Observation: Sweden' (2008) UN Doc CAT/C/SWE/CO/5, para 8.
[139] CAT/C/NLD/CO/5-6 (n 14) para 18. [140] CAT/C/57/D/551/2013 (n 90) para 29.
[141] CAT/C/BGR/CO/4-5 (n 17) para 19 (a).

41 The Committee has also put forward recommendations on the *use of force*. In contexts concerning deprivation of liberty, the Committee noted that use of force should be in line with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. States should further ensure that law enforcement officers receive training on the absolute prohibition of torture and more specifically on the Basic Principles.[142] More specific recommendations were given by the Committee on the use of *electrical discharge weapon*. In this regard, it was clarified that their use should be limited to extreme situations, where there is an immediate threat to life or risk of serious injury, as a substitute of lethal weapons (eg firearms).[143] Electrical discharge weapons should not be included in the regular equipment of custodial staff in prisons or any other place of deprivation of liberty,[144] and stringent and detailed instructions should be provided to law enforcement personnel authorized to use electric discharge weapons.[145] Hence, according to the Committee their use is to be permitted only in strict compliance with principles of legality, necessity, and proportionality. The Committee has further clarified the need of close monitoring and supervision through recording, mandatory reporting, and review of each use.[146] Moreover, all complaints of violations with regard to restraints should be promptly, effectively, and independently investigated and the persons responsible held to account (see also Article 12, below).[147]

42 The Committee seems to distinguish electrically discharged weapons from *direct contact body-worn electric shock devices*. For example, in its 2000 observation to the *United States* the Committee urged the State to the abolition of 'electro-shock stun belts and restraint chairs as methods of restraining those in custody',[148] as 'their use almost invariably leads to breaches of article 16 of the Convention'.[149] In its subsequent concluding observations to *Macao*, however, pronouncing itself on the use of contact body-worn electric shock devices during transfers, the Committee expressed the view that 'body-worn electric shock devices should be subject to the principle of necessity and proportionality …'.[150]

43 Invoking Article 11, the Committee also made recommendations *on personnel, including medical staff*.[151] Besides reinforcing training programmes specifically concerning the prevention of torture and other forms of ill-treatment, for the analyses of which the reader is remanded to Article 10 above, the Committee has recommended to increase the number of qualified personnel also in order to prevent incidents, such as death in custody and suicides, as well as inter-prisoner violence.[152] Moreover, it further recommended that all penitentiary personnel, as well as special forces, be equipped with visible identification badges at all times to ensure the protection of inmates from acts in violation of the Convention.[153]

[142] See eg CAT/C/KEN/CO/2 (n 67) para 9; CAT/C/BEL/CO/3 (n 42).

[143] CAT/C/NLD/CO/5-6 (n 14) para 27; CAT/C/POL/CO/5-6 (n 72) para 15; CAT, 'Concluding Observations: United States of America' (2014) UN Doc CAT/C/USA/CO/3-5, para 27.

[144] CAT/C/NLD/CO/5 (n 13) para 27. [145] CAT/C/51/4 (n 10) para 38.

[146] CAT/C/POL/CO/5-6 (n 72) 15; CAT/C/USA/CO/3-5 (n 143) para 27.

[147] CAT/C/LVA/CO/3-5 (n 129) para 21 (b).

[148] CAT, 'Concluding Observations: United States of America' (2000) UN Doc A/55/44, para 180(c).

[149] ibid; see also Huber, 'Chapter 5' (n 112) 18.

[150] CAT/C/CHN-MAC/CO/5 (n 133) para 21. [151] CAT/C/ROU/CO/2 (n 16) para 13.

[152] *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela* No 456/2011 (n 21) para 3.4; see also CAT/C/UKR/CO/6 (n 71) para 19; CAT/C/BGR/CO/4-5 (n 17) para 23.

[153] CAT, 'Conclusions and Recommendations: Georgia' (2006) UN Doc CAT/C/GEO/CO/3, para 16; CAT, 'Conclusions and Recommendations: Italy' (2007) UN Doc CAT/C/ITA/CO/4, para 18.

3.5.2.2 Standards of Review relating to Interrogations

44 As noticed in the previous paragraphs, the fundamental legal safeguards mentioned above are to be granted from the very outset of custody, and thus also in the context of interrogations. When referring to interrogations, the Committee further specified that recording of interrogations should take the form of *audio-videotaping of interrogations*. This form of recording was defined by the Committee as a 'new' and 'effective' method of prevention of torture and other forms of ill-treatment.[154] In the reporting procedure, the Committee has consistently recommended States Parties make audio-video recording a mandatory, standard, and systematic procedure,[155] and provide the necessary resources to that end.[156] Audio-video recording should be conducted in all places where torture and other forms of ill-treatment are likely to occur, including detention facilities, police stations, and cells, except in cases where it might violate the right to privacy or a detainee's right to confidential consultation with their lawyer or doctor.[157] It must apply to all persons questioned, regardless of the type of crime they are accused of.[158] In this last regard, the Committee specified that the recording should apply also to persons accused of security-related offences.[159] The interrogation must be recorded in its entirety, and the police should be held accountable for withholding, deleting, or manipulating records of interrogations.[160] The audio view system should be independent and effective with no institutional or hierarchical links with investigators.[161] Audio-visual footage should be kept in secure facilities for a period sufficient for it to be used as evidence, and made available[162] to all competent judicial authorities,[163] to detainees, their lawyers and family members, [164] and others as appropriate.[165] In order to guarantee the protection of detainees during interrogation, the Committee also recommended the general separation between the authorities responsible for detention, on the one hand, and investigation on the other.[166]

46 In its concluding observations, the Committee has further specified that *interrogation methods contrary to the provisions of the Convention* are to be prohibited and never used by States parties under any circumstances.[167] While condemning the use of 'confusing interrogation rules' and techniques defined in vague and general terms,[168] the Committee urged States parties to rescind all interrogation techniques that constitute torture or cruel, inhuman or degrading treatment or punishment in all places of detention under its de

[154] CAT/C/GC/2 (n 10) paras 13–14.

[155] CAT/C/CHN/CO/5 (n 40) para 34; CAT, 'Concluding Observations: Liechtenstein' (2016) UN Doc CAT/C/LIE/CO/4, para 12.

[156] CAT, 'Concluding Observations: Qatar' (2013) UN Doc CAT/C/QAT/CO/2, para 10; CAT, 'Concluding Observations: Armenia' (2017) CAT/C/ARM/CO/4, para 12.

[157] CAT/C/ESP/CO/6 (n 54) para 11.

[158] CAT, 'Concluding Observations: France' (2010) UN Doc CAT/C/FRA/CO/4-6, para 16.

[159] CAT/C/ISR/CO/5 (n 14) para 18 and 24.

[160] CAT/C/CHN/CO/5 (n 40) para 34.

[161] ibid, para 35.

[162] CAT, 'Concluding Observations: Honduras' (2016) UN Doc CAT/C/HND/CO/2, para 12.

[163] CAT/C/MRT/CO/1 (n 55) para 11.

[164] CAT/C/ESP/CO/6 (n 54) para 11; CAT/C/JOR/CO/3 (n 36) para 24; CAT/C/ARM/CO/4 (n 100) para 12.

[165] CAT, 'Concluding Observations: Kyrgyzstan' (2013) UN Doc CAT/C/KGZ/CO/2, para 9.

[166] CAT, 'Report of the Committee Against Torture' (1993) UN Doc A/48/44, para 427.

[167] CAT/C/USA/CO/3-5 (n 143) para 11 and 17; CAT/C/ISR/CO/5 (n 14) para 31.

[168] CAT/C/USA/CO/2 (n 52) para 24; CAT/C/ISR/CO/5 (n 14) para 30; see also WGAD Chairperson-Rapporteur (Zerrougui) et al, 'Situation of detainees at Guantánamo Bay' (2006) UN Doc E/CN.4/2006/120, para 46.

facto effective control, including sleep deprivation;[169] sensory deprivation,[170] stress positions,[171] sexual humiliation, 'waterboarding', 'short shackling', using dogs to induce fear that constitutes torture or cruel, inhuman or degrading treatment or punishment in all places of detention under its de facto effective control,[172] as well as for the exposure to sudden temperature changes.[173] The use of a *blindfold* during questioning should also be expressly prohibited.[174] Similarly, the Committee has shown concerns for the practice of holding suspects in separation—in conditions of isolation resembling those of solitary confinement—during significantly longer periods for interrogation purposes.[175] In this regard, serious concerns were expressed about the interrogation techniques used by Israel[176] and more recently by the US against suspected terrorists within the CIA's secret detention and interrogation programme.[177] Similar findings and recommendations had been issued in 2006 by five independent Special Procedures of the UN Commission on Human Rights[178] and the Human Rights Committee.[179]

47 Finally, the Committee has urged States to 'improve *methods of criminal investigation* to end practices whereby confessions are relied on as the primary and central element of proof in criminal prosecution, in some cases in the absence of any other evidence'.[180] As put by the SRT Mendez, 'the principal safeguard against mistreatment during questioning is the interviewing methodology itself'.[181] The position of the Committee on this point mirrors the current debate on interviewing methods in the literature and other UN and regional mechanism,[182] suggesting that—together with the due process and

[169] CAT/C/USA/CO/3-5 (n 143) paras 11, 17, where the Committee also refers to the 'physical separation technique'.

[170] ibid, where the Committee also refers to the 'field expedient separation technique'.

[171] CAT/C/ISR/CO/5 (n 14) para 30.

[172] CAT/C/USA/CO/2 (n 52) para 24.

[173] CAT/C/CUB/CO/2 (n 13) para 22.

[174] ibid, para 48.

[175] CAT/C/ISR/CO/5 (n 14) para 24; CAT/C/CUB/CO/2 (n 13) para 22; on the use of solitary confinement and other forms of isolation with a view to obtaining a confession in questioning see also SRT (Mendez) A/71/298 (n 49) para 46; SRT (Mendez) A/66/268 (n 112) paras 44 and 60.

[176] CAT/C/XXVII/Concl.5 (n 79) paras 52–53; CAT, 'Concluding Observations: Israel' (2009) UN Doc CAT/C/ISR/CO/4, para 19; CAT/C/ISR/CO/5 (n 14) paras 30–31.

[177] On the CIA interrogation programme see also US Senate Select Committee on Intelligence, 'Committee Study of the Central Intelligence Agency's Detention and Interrogation Program' (2014).

[178] E/CN.4/2006/120 (n 168).

[179] HRC, 'Concluding Observations: USA' (2006) UN Doc CCPR/C/USA/CO/3/Rev.1, para 13; SRT (Mendez) A/71/298 (n 49) para 45.

[180] CAT, 'Concluding Observations: Lithuania' (2014) UN Doc CAT/C/LTU/CO/3, para 22; CAT/C/KAZ/CO/3 (n 60) para 23; CAT, 'Concluding Observations: Syria' (2010) UN Doc CAT/C/SYR/CO/1, para 33; CAT, 'Concluding Observations: Moldova' (2010) UN Doc CAT/C/MDA/CO/2, para 21; CAT, 'Concluding Observations: Chad' (2009) UN Doc CAT/C/TCD/CO/1, para 29; CAT, 'Concluding Observations: Uzbekistan' (2013) UN Doc CAT/C/UZB/CO/4, para 16; CAT/C/UKR/CO/6 (n 71) para 22 (b).

[181] SRT (Mendez) A/71/298 (n 49) para 45.

[182] Human Rights Council Res 31/31 of 24 Match 2016. In the literature see Mary Schollum, 'Investigative Interviewing: The Literature' (New Zealand Office of the Commissioner of Police, 2005) <https://www.police.govt.nz/sites/default/files/publications/investigative-interviewing-literature-2005.pdf> accessed 8 Decemeber 2017; Karl Roberts, 'Police Interviewing of Criminal Suspects: A Historical Perspective' (2012) Internet Journal of Criminology; Carver and Handley (n 49); High-Value Detainee Interrogation Group (HIG), 'Interrogation: A Review of the Science' (2016) <https://www.fbi.gov/file-repository/hig-report-interrogation-a-review-of-the-science-september-2016.pdf/view> accessed 11 December 2017; HIG, 'Interrogation Best Practices' (2016) <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view> accessed 11 December 2017; College of Policing (UK), 'Investigative Interviewing' (2016); Asbjørn Rachlew, 'From Interrogating to Interviewing Suspects of Terror: Towards a New Mindset' (2017) <https://goo.gl/7Hk9gn> accessed 13 December 2017; CTI, 'CTI Training Tools 1/2017: Investigative Interviewing for Criminal Cases' (2017) <https://cti2024.org/content/docs/CTI-Training_Tool_1-Final.pdf> accessed 8 December 2017; among international and regional bodies see SRT (Mendez) A/71/298 (n 49); CPT (n 50).

procedural safeguards mentioned above—the existence of a non-accusatorial and non-confession driven systems of investigation is a key element for the prevention of torture and other forms of ill-treatment during interrogations. Similar recommendations were put forward by the SRT Mendez, who after extensive consultations with experts, published a report encouraging States to adopt an investigative interviewing model on the example of the PEACE model of England and Wales and the ICC.[183] To this extent, Mendez also called for the development of a *universal protocol* for investigative interviews model designed on 'non-coercive, ethically sound, evidence based, research-based and empirically founded' interviews and based on the principle of presumption of innocence. Such type of questioning should aim to gather 'accurate and reliable information in order to discover the truth' through, for example, systematic preparation, empathetic rapport-building, open-ended questions, active listening, strategic probing, and disclosure of potential evidence.[184] Adequate and regular *training* for law enforcement and other personnel involved in the questioning of persons in modern criminal investigation techniques and equipment is critical in the implementation of such methodology and, ultimately, in the eradication of the perception that torture, other forms of ill-treatment and coercion are the best ways to obtain confessions or other information.[185] The protocol also aims at promoting *minimum standards and procedural safeguards* designed to prevent improper interviewing practices in different investigative contexts.[186]

GIULIANA MONINA

[183] The PEACE model of interviewing was adopted in 1992 in England and Wales. It comprises five steps including: preparation and planning; engage and explain; account; closure; and evaluation. Initially developed for criminal investigations, models of investigative interviewing can provide positive guidance for the protocol and be applied in a wide range of investigative contexts, including during intelligence and military operations. Such a model was then adopted by other jurisdiction, for example the ICC. For more information see SRT (Mendez) A/71/298 (n 49) para 47; CTI, Training Tools 1/2017 (n 182).

[184] See also SRT (Mendez) A/71/298 (n 49) para 47.

[185] On trainings see also ibid para 56 and also Art 10 above.

[186] SRT (Mendez) A/71/298 (n 49) para 60, where there is a reference to judicial control, information on rights, right to access to counsel, right to remain silent, additional safeguards for vulnerable persons, recording, medical examination. See also above 3.5.2.1.

Article 12

Ex Officio Investigations

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

1. Introduction	336
2. Travaux Préparatoires	339
2.1 Chronology of Draft Texts	339
2.2 Analysis of Working Group Discussions	340
3. Issues of Interpretation	340
3.1 Meaning of 'reasonable ground to believe'	341
3.1.1 Obligation to Proceed to an Investigation *Ex Officio*	341
3.1.2 Origin and Level of Suspicion Required	342
3.2 Meaning of 'prompt investigation'	345
3.3 Meaning of 'competent authorities'	347
3.4 Meaning of 'impartial investigation'	348
3.4.1 Conduct of the Investigation	349
3.4.2 Investigation Mechanism	353

1. Introduction

1 Widespread impunity is one of the root causes for the continuation of torture and ill-treatment.[1] Although many States have aligned their legal framework to international standards by enacting new anti-torture laws, these have often not been used in practice. The implementation gap between law and practice has reportedly even increased over the last decades.[2] The exception is where the law requires the investigation by fully

[1] SRT (Rodley) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1999) UN Doc A/54/426, para 48: 'impunity continues to be the principal cause of the perpetuation and encouragement of human rights violations and, in particular, torture'; SRT (Nowak) 'Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention' (2010) UN Doc A/HRC/13/39/Add.5, para 132; see also Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016) 19; James Ross, 'Black Letter Abuse: The US Legal Response to Torture since 9/11' (2007) 89 International Review of the Red Cross 561. See also Richard Carver, 'Zimbabwe: Drawing a Line through the Past' (1993) 37 Journal of African Law 69; Leigh A Payne and Francesca Lessa (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012); Aideen Gilmore, 'Wilton Park Conference Report on Strategies for Tackling Torture and Improving Prevention' (Strategies for tackling torture and improving prevention, West Sussex, 30 March–1 April 2015).

[2] Carver and Handley (n 1) 55ff.

independent bodies—of which there are however only very few examples worldwide.[3] Thus, impunity remains a widespread problem.

2 In the 2010 Global Study on the Phenomenon of Torture and other forms of Ill-treatment, the then UNSRT Manfred Nowak has described the magnitude of impunity in most countries visited as 'close to total' and as 'one of the most disappointing findings' of his tenure.[4] He identified a 'don't ask, don't tell' approach among law enforcement officials regarding suspects who show signs of torture thereby ignoring the obligation to initiate *ex officio* obligations.[5] Allegations of torture are all too often not taken seriously in a general mistrust of (suspected) criminals.[6] Where investigations are carried out, this is often not done in an effective manner. The key problem appears to be that most investigations are carried out by the same authorities who are accused of committing such acts or that have close links to the suspects, usually the police. The strong feelings of loyalty and solidarity among police officers pose a serious conflict of interest for the investigators.[7] The lack of impartiality often extends to prosecutors and judges, who are more likely to side with law enforcement officials than alleged 'criminals' or 'terrorists', resulting in a considerable reluctance to bring charges.[8]

3 Combating impunity is one of the most important objectives of the CAT.[9] It obliges states to criminalize torture (Article 4), to establish (universal) jurisdiction over the crime (Articles 5 to 9), and thereby to ensure that there is no 'safe haven' for torturers. Moreover, victims of torture need to have the effective possibility to complain about torture without having to fear reprisals and have their case promptly and impartially investigated by competent authorities (Article 13).

4 Article 12 reinforces the investigative duty by shifting the responsibility of initiating an investigation to the State. It does not depend on a complaint but the competent authorities need to proceed 'wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction'. This obligation to institute investigations *ex officio* is very important as victims of torture and other forms of ill-treatment often have no access to complaints mechanisms or fail to complain due to fear of reprisals and a lack of trust in the mechanisms. Therefore, during the discussions of both provisions, the Working Group in 1980 reversed the order contained in the Declaration and the original Swedish draft to start with the obligation now contained in article 12 on the ground that 'the prevention and punishment of acts of torture were primarily the responsibility of the Government of States parties and not that of the victim, who may not be in a position to make complaints'.[10]

5 Although the reasoning for the reversal of Articles 12 and 13 in the Working Group refers to 'prevention and punishment', one needs to distinguish the investigation required by these two provisions from the criminal investigation and prosecution

[3] Carver and Handley (n 1) 83ff. Mentioning as examples of independent bodies Georgia, Hungary, Norway, the UK, South Africa, and Tunisia.

[4] SRT (Nowak) A/HRC/13/39/Add.5 (n 1) para 133.

[5] SRT (Nowak) A/HRC/13/39/Add.5 (n 1) para 139; SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/65/273, para 54.

[6] SRT (Nowak) A/HRC/13/39/Add.5 (n 1) para 150.

[7] SRT (Nowak) A/65/273 (n 5) para 56.

[8] Carver and Handley (n 1) 85.

[9] SRT (Nowak) A/HRC/13/39/Add.5 (n 1) para 134.

[10] See chapter 2 herein below.

foreseen in Articles 6(2) and 7. Articles 5 to 9 require States parties to establish different types of jurisdiction with the aim of avoiding safe havens for individuals responsible for torture practices and, as soon as such individuals are present on their territory, to arrest them for the purpose of either prosecution or extradition. The obligation to bring individual perpetrators to justice only applies to torture, not to cruel, inhuman or degrading treatment.[11]

6 Articles 12 and 13, on the other hand, are not part of the criminal jurisdiction provisions in the Convention, but of those establishing effective measures for the prevention of torture as well as other forms of ill-treatment.[12] The obligation to investigate is not triggered by the fact that a suspected torturer is on the territory of a State party, but by the suspicion of the competent authorities of a State party that an act of torture or cruel, inhuman or degrading treatment might have been committed in any territory under its jurisdiction.[13] The duty to investigate is explicitly applicable to torture and other forms of ill-treatment (Article 16 (1)). However, in its practice, the Committee does not always make a clear distinction between Articles 12 and 13 as well as between these two preventive provisions and the requirement of criminal investigations under Articles 5 to 9.[14]

7 The effective investigation of torture and other forms of ill-treatment has numerous purposes as spelt out in the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Principles) that have been endorsed by the Committee against Torture and other human rights bodies:[15] clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families; identification of measures needed to prevent recurrence; facilitation of prosecution, and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible, and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.[16]

[11] See below Art 16, §§ 16–18.

[12] Arts 10 to 13 are the only provisions explicitly mentioned in Art 16(1).

[13] Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 335: 'One important difference with the investigation obligation of article 6 par. 2 is that the investigation under articles 12 and 13 must take place irrespective of whether the suspect is known or present.' See also above Art 2 (1) §§ 53–56 on the notion of jurisdiction.

[14] CAT, 'Concluding Observations: Indonesia' (2008) UN Doc CAT/C/IDN/CO/2, para 10; CAT, 'Report of the Committee against Torture Twenty-Fifth session (13–24 November 2000) Twenty-Sixth session (30 April–18 May 2001)' (2001) UN Doc A/56/44, para 124.

[15] CAT, 'General Comment No 3 on the Implementation of Article 14 by States Parties' (2012) UN Doc CAT/C/GC/3, paras 18, 25; HRC, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Rehabilitation of Torture Victims' (2013) UN Doc A/HRC/22/L11/Rev1; SRT (Méndez) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc A/69/387.

[16] GA Res 55/89 of 22 February 2001 (Torture and other cruel, inhuman or degrading treatment or punishment) and see annex: GA Res 55/89 of 4 December 2000 (Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) paras 6–7; GA Res 30/3452 of 9 December 1975 (Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

7 *Declaration (9 December 1975)*[17]

Article 9

Wherever there is reasonable ground to believe that an act of torture as defined in article 1 has been committed, the competent authorities of the State concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint.

8 *IAPL Draft (15 January 1978)*[18]

Article IV

The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture, and in particular, to ensure that:

(c) all complaints of torture or any circumstances which give reasonable grounds to believe that torture has been committed shall be investigated speedily and effectively and that complainants shall not be exposed to any sanction by reason of their complaints, unless they have been shown to have been made falsely and maliciously.

9 *Original Swedish Draft (18 January 1978)*[19]

Article 10

Each State Party shall ensure that, even if there has been no formal complaint, its competent authorities proceed to an impartial, speedy and effective investigation, wherever there is reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed within its jurisdiction.

10 *United States Draft (19 December 1978)*[20]

Combining Articles 9 & 10

If there is reasonable basis for belief that an act of torture or other cruel, inhuman or degrading treatment or punishment has been or is being committed within a State Party's jurisdiction, its competent authorities shall initiate and carry out an impartial, speedy and effective investigation.

[17] GA Res 3452 (XXX) of 9 December 1975 (Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

[18] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[19] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[20] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314.

11 *Revised Swedish Draft (19 February 1979)*[21]

Article 13

> Each State Party shall ensure that, even if there has been no formal complaint, its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

2.2 Analysis of Working Group Discussions

12 In written comments on Article 10 of the original Swedish draft, France suggested that the words 'reasonable ground' ('de bonnes raisons') be replaced by 'serious grounds' ('des raisons sérieuses').[22]

13 The United States explicitly voiced the opinion that it would be appropriate that the obligation to conduct a speedy, impartial, and effective investigation apply both to acts of torture and cruel, inhuman or degrading treatment or punishment if there is reasonable basis for belief that an offence has been committed.[23]

14 The United Kingdom proposed that the word 'jurisdiction' be deleted from the last line of Article 10 and replaced with 'territory'.[24]

15 During the discussion in the 1980 Working Group it was suggested that Articles 12 and 13 be reversed. The rationale of the representative who made this proposal was that the prevention and punishment of acts of torture were primarily the responsibility of the Governments of States parties and not that of the victim, who may not be in a position to make complaints. The Working Group agreed to this proposal. It further decided to delete the phrase 'even if there has been no formal complaint' contained in Article 13.[25]

16 In response to the question on the scope of the phrase 'territory under its jurisdiction', it was said that it was intended to cover, inter alia, territories still under colonial rule and occupied territories.

3. Issues of Interpretation

17 The duty to conduct prompt and impartial investigations is of crucial importance in the fight against torture and other forms of ill-treatment. Therefore Committee has recommended 'the setting up of a specific legal framework, to eliminate impunity for perpetrators of acts of torture and ill-treatment by ensuring that all allegations are investigated promptly, effectively and impartially',[26] notably the inclusion of the obligation in legislation such as the criminal procedure code.[27] The UNSRT has equally recommended enshrining the fundamental principles of investigation in legislation[28] and

[21] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

[22] E/CN.4/1314 (n 20). [23] ibid.

[24] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1.

[25] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367.

[26] CAT, 'Concluding Observations: Kenya' (2009) UN Doc CAT/C/KEN/CO/1, para 23.

[27] CAT, 'Concluding Observations: Chad' (2009) UN Doc CAT/C/TCD/CO/1, para 21—recommending: 'the Code of Criminal Procedure to include clear provisions on the obligation of the competent authorities to systematically launch objective and impartial investigations, without consultation and without first receiving a complaint from the victim'.

[28] SRT (Méndez) A/69/387 (n 15) para 66.

that there 'should be protocols and guidelines for the prison administration about co-operating with the authorities by not obstructing the investigation and by collecting and preserving evidence'. The CPT emphasized that 'the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment.'[29]

18 At the same time the Committee has criticized the frequently substantial gap between the legal framework and its practical implementation with many countries without any or no meaningful record of investigations, prosecution, and sentencing of torture despite widespread reports and numerous complaints of torture.[30] Therefore a legal framework is clearly not enough: the relevant authorities also need to be sensitized about the obligations incumbent upon them[31] and practical measures need to be taken to ensure effective investigations—most importantly by creating an independent investigation mechanism.[32] A continuous point of criticism is the lack of data provided by States on the number of complaints, investigations, prosecutions, and sentences for torture. This makes it very difficult for the CAT Committee to assess whether the State party is effectively implementing the duty to investigate.

3.1 Meaning of 'reasonable ground to believe'

19 A head of a police station or a pre-trial detention centre does not have to wait until a detainee comes to his or her office and lodges a formal complaint of torture. Article 9 of the Declaration and the different drafts of Article 12 CAT required States to proceed promptly to an impartial investigation 'even if there has been no formal complaint'. This phrase was only omitted after the order of Articles 12 and 13 had been reversed with the aim of underlining that investigations should normally start *ex officio* and not on the basis of a formal complaint.[33]

3.1.1 Obligation to Proceed to an Investigation Ex Officio

20 The obligation to proceed to an investigation *ex officio*[34] in Article 12 shifts the responsibility to initiate an investigation from the victim to the State authorities most directly involved. It does not need a complaint and evidently even less so proof by the alleged victim that he or she has been subjected to torture. This is of vital importance since torture and other forms of ill-treatment usually take place behind closed doors without any outside witnesses, and the survivors are often too afraid to complain officially about such practices. The obligation extends to other forms of ill-treatment as explicitly stated

[29] CPT, 14th General Report (2004) CPT/Inf (2004) 28, para 27.

[30] CAT, 'Concluding Observations: Kyrgyzstan' (2013) UN Doc CAT/C/KGZ/CO/2, paras 5, 6; the Committee echoed the same view in the recent third report of the State party elucidating its assertion on the fact that, despite adoption of national legislation criminalizing torture, impunity for acts of torture continues to prevail, as illustrated by the fact that although the number of cases of torture reported to the Commission on Human Rights of the Philippines has risen since the adoption of the Act, only one person has been convicted to date in 2016, more than six years since the Act was adopted. (CAT, 'Concluding Observations: Philippines' (2016) UN Doc CAT/C/PHL/CO/3, para 7); CAT, 'Concluding Observations: Qatar' (2013) UN Doc CAT/C/QAT/CO/2, para 14; CAT, 'Concluding Observations: Georgia' (2006) UN Doc CAT/C/GEO/CO/3, para 12.

[31] CPT, 14th General Report (n 29) para 28. [32] See 3.3.2 below. [33] See above § 15

[34] *Blanco Abad v Spain*, No 59/1996, UN Doc CAT/C/20/D/59/1996, 14 May 1998, para 8.2. In *Thabti v Tunisia*, No 187/2001, UN Doc CAT/C/31/D/187/2001, 14 November 2003, the Committee confirmed its earlier jurisprudence and noted that Article 12 places an obligation on the authorities to 'proceed automatically' to a prompt and impartial investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, 'no special importance being attached to the grounds for suspicion'.

in Article 16, para 1. Consequently, legally requiring a formal request as a precondition for opening an inquiry and the initiation of judicial investigation proceedings constitutes a violation of Article 12 CAT.[35]

21 The Committee repeatedly stressed that once there is a reasonable ground to believe that torture or ill-treatment have been committed the decision on whether to conduct an investigation is not discretionary.[36] It found a system that leaves the option of not ordering an investigation or not prosecuting the perpetrators of acts of torture and other forms of ill-treatment involving law enforcement officers to be in contravention of Article 12.[37] It also rejected the requirement of prior ministerial authorization for investigating law enforcement officials.[38] The Council of Europe Guidelines on Effective Investigation of Ill-treatment additionally prescribe that the decision to discontinue or not an investigation should only be taken by 'an independent, competent authority upon thorough and prompt consideration of all the relevant facts' and 'should be subject to appropriate scrutiny and challengeable by means of a public and adversarial judicial review process' in order to ensure the mandatory nature of investigations.[39] The Committee has also continuously criticized amnesty laws and stressed that waivers of prosecution and statutes of limitations do not apply under any circumstance to the crime of torture.[40]

3.1.2 Origin and Level of Suspicion Required

22 The origin of the suspicion to be considered is interpreted broadly by the CAT Committee. In the leading case *Blanco Abad v Spain* the Committee found that the authorities have a duty to investigate 'wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion'.[41] This is confirmed in the Istanbul Principles, passed by the General Assembly in 2000, stating that the investigative duty is triggered 'if there are other indications that torture or ill-treatment might have occurred'[42] as well as in ECHR case law, CPT reports, and the CoE Guidelines.[43]

23 Most evidently a suspicion arises where a person shows signs of abuse. If a person arrives healthy at a police station and leaves the same police station a short time later with

[35] CAT, 'Concluding Observations: Gabon' (2013) UN Doc CAT/C/GAB/CO/1, para 22.

[36] See eg CAT/C/SR.145, para 10 and CAT/C/SR.168, para 40; CAT, 'Concluding Observations: France' (2006) UN Doc CAT/C/FRA/CO/3, para 20; CAT, 'Concluding Observations: France' (2010) UN Doc CAT/C/FRA/CO/4-6, para 31; see also CAT, 'Concluding Observations: Luxembourg' (2015) UN Doc CAT/C/LUX/CO/6-7, para 15; CAT, 'Concluding Observations: New Zealand' (2009) UN Doc CAT/C/NZL/CO/5, paras 10, 11; CAT, 'Concluding Observations: Benin' (2008) UN Doc CAT/C/BEN/CO/2, para 8.

[37] CAT/C/FRA/CO/3 (n 36) para 20; see also CAT/C/LUX/CO/6-7 (n 36), para 16—in which the Committee expresses concerns 'about the Public Prosecutor's discretion to decide whether to prosecute perpetrators of acts of torture and ill-treatment involving law enforcement officers or even order an investigation'; CAT, 'Concluding Observations: New Zealand' (2015) UN Doc CAT/C/NZL/CO/6, paras 10, 13.

[38] CAT, 'Concluding Observations: Cameroon' (2010) UN Doc CAT/C/CMR/CO/4, para 20 'prior authorization from the Ministry of Defence is required to prosecute gendarmes and military personnel for offences committed in military barracks or while on active duty'; CAT, 'Concluding Observations: Turkey' (2011) CAT/C/TUR/CO/3, para 8 regarding highest level officials.

[39] Eric Svanidze, *Effective Investigation of Ill-treatment: Guidelines on European Standards* (2nd edn, CoE 2014) 42.

[40] CAT, 'Concluding Observations: Algeria' (2008) UN Doc CAT/C/DZA/CO/3, para 11; CAT, 'Concluding Observations: Yugoslav Republic of Macedonia' (2015) UN Doc CAT/C/MKD/CO/3, para 16.

[41] *Blanco Abad v Spain*, No 59/1996 (n 34) para 8.2.

[42] GA Res 55/89 (n 16) para 2.

[43] CPT, 14th General Report (n 29) para 27; *Bati and Others v Turkey* App no 33097/96 and 57834/00 (ECtHR, 3 June 2004) para 100; *Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* App no 71156/01 (ECtHR, 3 May 2007) para 97; Svanidze (n 39) 38.

certain bruises or injuries, this is a 'reasonable ground' to believe that an act of torture or cruel, inhuman or degrading treatment has been committed.[44] This also goes for injuries that have occurred otherwise in the control of the state, eg during arrest. This has been confirmed in the case *FK v Denmark* where the complainant had cut himself resisting arrest and maintained that the treatment of the authorities amounted to ill-treatment. The Committee considered that in light of the fact that the circumstances of the incident and the intensity of the force used were disputed, the police could not accept 'face value the explanation that the complainant had hurt himself' and remained under the duty to initiate a prompt investigation.[45] Consequently, whether the injuries were self-inflicted, the result of a legitimate use of force by the respective police officers or the result of ill-treatment needs to be established by a prompt and impartial investigation before an independent body.

24 It is however not necessary that the survivor displays signs of abuse. In the case *Blanco Abad v Spain* the Committee found a violation of Article 12 on the ground that the High Court had not started an investigation despite having before it five reports of a forensic physician which noted that the applicant had 'complained of having been subjected to ill-treatment consisting of insults, threats and blows, of having been kept hooded for many hours and of having been forced to remain naked, although she displayed no signs of violence.' The Committee considered that these elements should have sufficed for the instigation of an investigation.[46] The UNSRT has repeated that demanding evidence of torture rising to the level of 'proof' (ie beyond a reasonable doubt) should not be necessary to establish the duty to investigate. Demanding visible or recognizable marks is problematic in countries where independent medical examinations are lacking and gives authorities the possibility to escape accountability by delaying an examination.[47] Moreover, torture and ill-treatmnet often leave no visible marks.[48] At the same time the Committee found in the case *AA v Denmark* that a general allegation that the detention as such—due to the vulnerability of the detainee as former victim of torture—amounts to a violation of the Convention is not sufficient as in that case 'no reasonable purpose would have been served by such investigation'.[49]

25 The sources of information providing a 'reasonable ground' can be manifold. Efficient procedural safeguards are not only among the most effective means of preventing torture[50] but the prompt notification of family members, access to a lawyer and an independent medical examination also provide for important means to detect torture and other forms of ill-treatment of a detainee and bring it to the attention of the competent investigation mechanism. Moreover, the examination before a judge within forty-eight hours after arrest, usually the first opportunity for victims to complain about their treatment, is an important opportunity to detect ill-treatment of detainees. The Committee has held that judges should inquire explicitly about the treatment received and should

[44] In that case burden of proof shifts to the police officers responsible for the detention and interrogation. See SRT (Méndez) A/69/387 (n 15) para 28; see also *Ribitsch v Austria* App no 18896/91 (ECtHR, 4 December 1995).

[45] *FK v Denmark*, No 580/2014, UN Doc CAT/C/56/D/580/2014, 23 November 2015, para 7.7.

[46] *Blanco Abad v Spain*, No 59/1996 (n 34) para 8.3.

[47] SRT (Méndez) A/69/387 (n 15).

[48] See *Favela Nova v Brazil* (IACtHR, 16 February 2017) para 249 stating that 'the absence of physical signs does not imply that no abuse has occurred, since these acts of violence against people often leave no permanent marks or scars'.

[49] *AA v Denmark*, No 412/2010, UN Doc CAT/C/49/D/412/2010, 13 November 2012, para 76.

[50] See below and Carver and Handley (n 1).

ask questions to check that all statements to the prosecutor were made freely and without any form of coercion. In case of an allegation the judge should record the allegation in writing, immediately order a forensic medical examination, and take all necessary steps to ensure the allegation is fully investigated.[51]

26 Of particular importance for the detection of possible ill-treatment is a thorough and independent medical examination of every detainee when arriving at a particular detention facility, when leaving this facility, and at any other time, in particular at his or her own request. Any physician examining a person detained or being released should question him or her specifically about torture and other forms of ill-treatment, take the answer into account in conducting the medical examination, and include both the question and answer in the medical report.[52] It is of crucial importance that the examination is impartial which is why the Committee considers that the procedure for the medical examination of persons in police custody should be completely separate from the police element and the doctor independent of the police authorities.[53] By means of a medical examination any sign of ill-treatment can be immediately detected and documented, making it possible to determine from which period it emanates, eg arrest, police detention, prison, etc. Moreover, it is often difficult and painful for a torture victim to talk about the traumatic experience and it is necessary to create conditions where the victim feels safe from reprisals and trustful that his or her allegations are taken seriously. An independent and competent doctor may be the best person to inquire about possible ill-treatment and gain the trust of the detainee.[54] When a medical doctor detects ill-treatment, it is important that it is immediately reported. Therefore, the Committee considered that the obligation of confidentiality should not trump the need to report torture and other forms of ill-treatment and recommended establishing a reporting obligation for medical professionals.[55]

27 Detecting possible signs of torture and other forms of ill-treatment is however not always easy and requires knowledge about the methods employed in such situations (eg during interrogations) and its consequences, as well as investigative capacities. The lack of professional capacities of medical doctors and other professionals in contact with detainees and torture survivors constitute a problem in many countries.[56] Therefore, the Committee regularly emphasizes the importance of applying the 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading

[51] A/56/44 (n 14) para 169; the Committee noted, in relation to Serbia and Montenegro, that under art 12, prosecutors and judges are obligated to investigate allegations of torture whenever they come to their attention, whether or not the victim has filed a formal complaint. In particular, every investigating judge, on learning from a detainee's statement that he or she has been subjected to torture, should initiate promptly an effective investigation into the matter. Investigations should be prompt, impartial, and effective: CAT, 'Report of the Committee against Torture Thirty-First Session (10-21 November 2003) Thirty-Second Session (3–21 May 2004)' (2004) UN Doc A/59/44, para 213(j); CAT, 'Report on Mexico produced by the Committee Under Article 20 of the Convention, and Reply from the Government of Mexico' (2003) UN Doc CAT/C/75, para 220 (d); CPT, 12th General Report [CPT/Inf (2002) 15], para 45; Camille Giffard, *The Torture Reporting Handbook: How to Document and Respond to Allegations of Torture within the International System for the Protection of Human Rights* (Human Rights Centre 2000) Part II—Documenting Allegations.

[52] A/56/44 (n 14) para 169; SRT (Méndez) A/69/387 (n 15) para 69(a).

[53] CAT/C/75 (n 51) para 220 (d).

[54] See also the facts in *Blanco Abad v Spain*, No 59/1996 (n 34); see above § 24.

[55] CAT, 'Concluding Observations: Denmark' (2016) UN Doc CAT/C/DNK/CO/6-7, para 38.

[56] Carver and Handley (n 1) 74.

Treatment or Punishment' (Istanbul Protocol), recommending it for the training of law enforcement officials, judges, prosecutors, forensic doctors, and medical personnel in dealing with detainees.[57]

28 Another very important way to find out whether and to what extent torture and other forms of ill-treatment are practised is to establish 'a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty' as stipulated in Article 1 OPCAT. An effective and independent National Preventive Mechanism (NPM)—established in line with Article 17 OPCAT—which regularly carries out unannounced visits to every place of detention and conducts private interviews with detainees—can detect possible cases of torture and other forms of ill-treatment and refer it to an independent authority competent to proceed to a prompt and impartial investigation.[58] A Government genuinely interested in fighting impunity and investigating all suspicions of torture should also open up its detention facilities to unannounced visits by international mechanisms such as the UN Subcommittee on Prevention (SPT), the UNSRT, or competent international or domestic NGOs.

29 In practice, reporting by non-governmental organizations receiving complaints, information, and providing assistance to victims and relatives play an important role in detecting and documenting ill-treatment. This was explicitly acknowledged by the Committee in the case *Khaled Ben M'Barek v Tunisia* where it specifically considered reports of international NGOs alleging that the applicant died as a result of torture in detention as providing reasonable grounds to initiate an investigation.[59] Consequently, supporting an active civil society that can work without interference increases the effectiveness of the duty to investigate.

3.2 Meaning of 'prompt investigation'

30 In the case of a *suspicion of torture or ill-treatment*, a prompt investigation is of particular importance 'both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.'[60] This naturally extends to other forms of evidence than physical traces as shown in the case *Alexander Gerasimov v Kazakhstan* where the Committee criticized that the results of the scientific examination of the clothes of the complainant and alleged perpetrators were compromised as it was carried out more than three months after the alleged torture and after they had been washed.[61] Moreover, a prompt response to a suspicion by the authorities is essential for maintaining public confidence in the State's adherence to the rule of law and its clear rejection of torture and other forms of ill-treatment.[62]

[57] See eg CAT, 'Concluding Observations: Jordan' (2016) UN Doc CAT/C/JOR/CO/3, para 41; CAT, 'Concluding Observations: Spain' (2016) UN Doc CAT/C/ESP/CO/6, para 23; CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 26; see below (n 81) for further information on the Istanbul Protocol.

[58] See below Arts 17 to 23 OP for the requirements and functioning of effective NPMs.

[59] *Khaled Ben M'Barek v Tunisia*, No 60/1996, UN Doc CAT/C/23/D/60/1996, 10 November 1999, para 11.4.

[60] *Blanco Abad v Spain*, No 59/1996 (n 34) para 8.2.

[61] *Gerasimov v Kazakhstan*, No 433/2010, UN Doc CAT/C/48/D/433/2010, 24 May 2012, para 12.5.

[62] See the statements of the ECHR in that regard, *Indelicato v Italy* App no 31143/96 (ECtHR, 18 October 2001) para 37; *Özgür Kılıç v Turkey* App no 42591/98 (ECtHR, 24 September 2002); *Bati and Others v Turkey*, ECtHR (n 43) para 136; *Amine Güzel v Turkey* App no 41844/09 (ECtHR, 17 September 2013) para 39.

31 In most cases in which the Committee found a violation of Article 12, no investigations had been carried out at all or only after long periods ranging from several months to many years.[63] In some cases the Committee found a violation although the State authorities claimed that the investigation was still ongoing, because it had provided no evidence helping the Committee 'to ascertain what progress has been made, to judge how effective the procedure might be or to explain the reasons for such a delay'.[64] The Committee expressly rejected the argument that the lack of progress is due to lack of co-operation of the complainant residing outside the country.[65]

32 In order for an investigation to be *prompt and effective*, it must be initiated immediately or without any delay,[66] within hours or, at the most, few days after the suspicion of torture or ill-treatment has arisen. This is confirmed by the case *Blanco Abad v Spain* in which a delay of two weeks was held to constitute a violation of Article 12. The case concerned the ill-treatment of the complainant by officers of the Guardia Civil between 29 January and 2 February 1992, where she had been kept incommunicado under anti-terrorist legislation.[67] Signs of her ill-treatment were noticed by a doctor at a Women's Penitentiary Centre who had examined her upon arrival on 3 February 1992. The prison director, in complying with the relevant obligations under Articles 12 and 13, immediately brought the physician's report to the attention of the competent judge. The Committee observed that 'when, on 3 February, the physician of the penitentiary centre noted bruises and contusions on the author's body, this fact was brought to the attention of the judicial authorities. However, the competent judge did not take up the matter until 17, and February the Court initiated preliminary proceedings only on 21 February.'[68] The UNSRT has even recommended that all suspicions and allegations of

[63] *Boniface Ntikarahera v Burundi*, No 503/2012, UN Doc CAT/C/52/D/503/2012, 12 May 2014 (no investigation after four years); *Qani Halimi-Nedzibi v Austria*, No 8/1991, UN Doc CAT/C/11/D/8/1991, 18 November 1993, para 13.5 (delay of fifteen months); *Khaled Ben M'Barek v Tunisia*, No 60/1996 (n 59) (delay over ten months); *Rasim Bairamov v Kazakhstan*, No 497/2012, UN Doc CAT/C/52/D/497/2012, 14 May 2014; *Nouar Abdelmalek v Algeria*, No 402/2009, UN Doc CAT/C/52/D/402/2009, 23 May 2014, para 11.7 (delay over twelve years); *Djamila Bendib v Algeria*, No 376/2009, UN Doc CAT/C/51/D/376/2009, 8 November 2013, para 6.6 (delay over six years); *Saadia Ali v Tunisia*, No 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008, para 15.7 (delay of twenty-three months); para 16.7 (delay of seven years); *Dmytro Slyusar v Ukraine*, No 353/2008, UN Doc CAT/C/47/D/353/2008, 14 November 2011, para 9.2 (no investigation after over eight years); *HB v Algeria*, No 494/2012, UN Doc CAT/C/55/D/494/2012, 6 August 2015, para 6.7 (no investigation after more than five years).

[64] *Patrice Gahungu v Burundi*, No 522/2012, UN Doc CAT/C/55/D/522/2012, 10 August 2015 (investigation not concluded after three years); see also: *X v Burundi*, No 553/2013, UN Doc CAT/C/55/D/553/2013, 10 August 2015, para 7.7 (investigation not concluded after two years); *EN v Burundi*, No 578/2013, UN Doc CAT/C/56/D/578/2013, 25 November 2015, para 7.7. (investigation not concluded after three years); *Saidi Ntahiraja v Burundi*, No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015, para 7.10 [French]; *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012, UN Doc CAT/C/55/D/500/2012, 4 August 2015, para 17.8 (delay of three years); *Ali Aarrass v Morocco*, No 477/2011, UN Doc CAT/C/52/D/477/2011, 19 May 2014, para 10.5; *Ali Ben Salem v Tunisia*, No 269/2005, UN Doc CAT/C/39/D/269/2005, 7 November 2007, para 16.7 (delay over seven years); *Ennaâma Asfari v Morocco*, No 606/2014, UN Doc CAT/C/59/D/606/2014, 15 November 2016, para 13.4 (delay over six years).

[65] *Déogratias Niyonzima v Burundi*, No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014, para 8.4.

[66] This corresponds also to the meaning of 'promptly' in arts 9 and 14 CCPR: see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) (*CCPR Commentary*) 210–40, 302–57; similarly the IACtHR states that 'once the state authorities have knowledge of an act that could constitute torture, they must initiate *ex officio* and without delay, an investigation': *Maldonado Vargas y otros v Chile* (IACtHR, 2 September 2015) para 76.

[67] *Blanco Abad v Spain*, No 59/1996 (n 34); see above 3.2.

[68] ibid, para 8.4.

torture and other ill-treatment should be investigated and documented within twenty-four hours.[69]

33 An investigation must not only be initiated promptly but should also be carried out and concluded as expeditiously as possible.[70] In this regard, the Committee has criticized countries where serious accusations 'remain at the protracted investigation stage'[71] and 'judicial procedures remain excessively long and drawn out'.[72] In the same manner the ECtHR has not only considered the starting of the investigation but whether different investigative measures, eg taking of statements or the forensic medical examination were taken belatedly.[73]

3.3 Meaning of 'competent authorities'

34 While criminal investigations must necessarily lead to a decision by an independent and impartial tribunal within the meaning of Article 14 CCPR,[74] Article 12 CAT only requires a prompt and impartial investigation by a 'competent authority'. Apart from the courts, this can also be undertaken by national human rights institutions, ombuds-institutions, detention monitoring commissions, public prosecutors, administrative agencies, and even police chiefs and prison directors, who have a genuine interest in preventing torture and other forms of ill-treatment within their respective detention facilities.

35 The Committee recommends to establish national human rights institutions (NHRI) to carry out investigations.[75] Although the Paris Principles do not specifically prescribe that NHRIs should have the mandate to receive and investigate complaints,[76] the Committee has noted with concern where the mandate 'does not empower it to investigate action taken by the Prosecutor's office'.[77] At the same time the Committee also expressed concern where 'cases of torture continue to be investigated only by administrative, disciplinary or military, rather than criminal jurisdictions.'[78]

36 In order to be effective any genuine investigating body must be entrusted with full investigative powers, such as summoning witnesses, interrogating the accused officials, inspecting official documents, and carrying out forensic examinations, if necessary also after the exhumation of the mortal remains of an alleged victim of torture.[79] Thus, the Committee expressed concern where investigative mechanisms are restricted in their investigative powers, eg when the prosecution service and enforcement judges have difficulties accessing prisons.[80] This is confirmed by the Istanbul Principles stating that 'the

[69] See SRT (Méndez) A/69/387 (n 15) para 68(a).

[70] See *Blanco Abad v Spain*, No 59/1996 (n 34), where the Committee found the that the investigation taking ten months, with gaps of between one and three months between statements on forensic evidence reports was unacceptably delayed; see also SRT (Méndez) A/69/387 (n 15) para 24.

[71] CAT, 'Concluding Observations: El Salvador' (2009) UN Doc CAT/C/SLV/CO/2, para 12.

[72] CAT, 'Concluding Observations: Senegal' (2013) UN Doc CAT/C/SEN/CO/3, para 11.

[73] See eg *Mikheyev v Russia* App no 77617/01 (ECtHR, 26 January 2006) paras 109, 133, 114; *Timurtaş v Turkey* App no 23531/94 (ECtHR, 13 June 2000) para 89; and *Tekin v Turkey* App no 22496/93 (ECtHR, 9 June 1998) para 67.

[74] cf Nowak, *CCPR Commentary* (n 66) 302–57.

[75] cf A/56/44 (n 14) para 46(c).

[76] GA Res 48/134 of 20 December 1993 (National Institutions for the promotion and protection of human rights).

[77] CAT, 'Concluding Observations: Kazakhstan' (2008) UN Doc CAT/C/KAZ/CO/2, para 23.

[78] CAT, 'Concluding Observations: Colombia' (2010) CAT/C/COL/CO/4, para 12.

[79] ibid.

[80] CAT, 'Concluding Observations: Honduras' (2016) UN Doc CAT/C/HND/CO/2 (2016), para 27; also the ECtHR deemed provisions preventing investigations against particular groups of law enforcement officials unacceptable also *Hugh Jordan v the UK* App no 24746/94 (ECtHR, 4 May 2001) paras 125–30.

investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry' including the necessary budgetary and technical resources, the authority to summon alleged perpetrators and any witness and to demand the production of evidence.[81] Thus, no legal or practical obstacles should impede investigations,[82] such as not disclosing the identity of members of special and rapid intervention forces[83] or the wearing of masks by police or prison offices or blindfolding detainees making identification of perpetrators impossible.[84]A promising practice in that regard is the Police Ombudsman of Northern Ireland that is provided with the same type of powers as police officers, eg to carry out searches, seize equipment, and if necessary arrest police officers.[85] Moreover the ability to 'freeze a crime scene' once there is a suspicion of police malpractice—as granted to the Independent Commission of Investigations in Jamaica—can be very useful to avoid that potentially responsible law enforcement officials tamper with evidence.[86]

37 It is of course also important that the competent authorities have the professional capacities to carry out effective investigations. This may be particularly challenging when it comes to independent external oversight bodies—such as NHRIs—that are composed of civilians rather than former investigators belonging to the state. Therefore, it is important that the investigators receive the adequate training in investigation, eg investigation planning, collecting evidence and investigative interviewing, evaluation of facts, reporting, etc.[87]

3.4 Meaning of 'impartial investigation'

38 Impartiality is considered as the key requirement of the investigation process.[88] As Burgers and Danelius state 'any investigation which proceeds from the assumption that no such acts have occurred, or in which there is a desire to protect the suspected officials, cannot be considered effective'.[89]

39 Article 12 does not require an investigation by an independent body, much less by a judicial body. This is confirmed by the Committee's case-law where it only finds a violation on the basis of the conduct of the investigation (how it was carried out) but not merely because of a lack of independence of the investigative body from the authorities

[81] OHCHR, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol')* (United Nations 2004) HR/P/PT/8/Rev.1 Annex 1: Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, principle 3 (a).

[82] As explicitly stated in Svanidze (n 39) 4.4.2, 55ff.

[83] CPT, 'Report on the visit to Albania carried out by the CPT from 13 to 18 July 2003' (2006) CPT/Inf (2006) 22, para 44.

[84] CPT, 14th General Report (n 29) para 34.

[85] See Police Ombudsman for Northern Ireland <https://policeombudsman.org>.

[86] The mandate to 'take charge and preserve the scene of any incident' Independent Commission of Investigations Act (INDECOM Act) 2010, para 4 (2)(d).

[87] For a useful overview on human rights investigations see eg APF, *Undertaking Effective Investigations: A Guide for National Human Rights Institutions* (APF 2015); Dermot Groome, *The Handbook of Human Rights Investigation: A Comprehensive Guide to the Investigation and Documentation of Violent Human Rights Abuses* (2nd rev edn, Create Space Independent Publishing Platform 2011).

[88] See IRCT, *Action against Torture: A Practical Guide to the Istanbul Protocol—For Lawyers* (2nd edn, IRCT 2007) 24.

[89] Herman Burgers and Hans 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) 145.

suspected of torture or other forms of ill-treatment (by whom it is carried out). For example, in the case *NZ v Kazakhstan* the Committee expressed concern that the preliminary examination of complaints of torture and other forms of ill-treatment by police officers was undertaken by an entity under the same chain of command as the regular police force (Department of Internal Security—DIA) but did not find a violation due to lack of evidence that the investigation was not carried out in an impartial manner.[90] The ECtHR has taken a very similar approach to the requirement of independence of investigations. Instead of making an abstract assessment of the independence of the investigative body it examines it 'in its entirety' looking at its potential conflicts of interest, hierarchical relationships with potential suspects, and the specific conduct.[91] This means that even where statutory independence is missing, an investigation can be sufficiently independent, although it will require a stricter scrutiny of the exact conduct of the investigation.[92] At the same time, the Committee regularly criticizes the lack of independence of investigation mechanisms in its Concluding Observations. In the following the requirement of impartiality will be anlayzed both as to the conduct of the investigation as well as the set-up of an investigation mechanim.

3.4.1 Conduct of the Investigation

40 The Committee interprets the notion of impartiality broadly and demands the investigation to be 'effective'[93] and 'thorough',[94] as well as 'aimed at determining the nature of the reported events, the circumstances surrounding them and the identity of whoever may have participated in them.'[95]

41 For that purpose it is important that the investigation not only considers the testimony of the alleged perpetrators but also the complainants or their relatives' statements and medical evidence.[96] In this sense, the Committee found a violation in the case *Rasim Bairamov v Kazakhstan*, where the investigative body relied on the testimony of the alleged perpetrators but the complainant was never questioned regarding his ill-treatment and no medical examination was carried out. Similarly, the Committee found a violation in the case *Oleg Evloev v Kazakhstan* because the investigation relied too heavily on the testimony of the alleged perpetrators, attaching little weight on the complainants or relatives' statements and on the uncontested medical evidence documenting the injuries.[97] In the case *NZ v Kazakhstan* the investigation also relied heavily on the testimony of the police officers, but involved also the questioning of other participants in the events as well as the medical personnel who first examined the alleged victims.[98] Moreover, the investigation by the Department of Internal Security was followed by the prosecutor's office that several times revoked its closing and returned it for additional investigation. Therefore,

[90] *NZ v Kazakhstan*, No 495/2012, UN Doc CAT/C/53/D/495/2012, 28 November 2014, para 13.5.
[91] *Mustafa Tunç and Fecire Tunç v Turkey* App no 24014/05 (ECtHR, 14 April 2015) para 222.
[92] ibid, paras 223, 224, 254. [93] See eg *Gerasimov v Kazakhstan*, No 433/2010 (n 61) para 12.7.
[94] *Ristic v Yugoslavia*, No 113/1998, UN Doc C AT/C/26/D/113/1998, 11 May 2001, para 9.6.
[95] *Fatou Sonko v Spain*, No 368/2008, UN Doc CAT/C/47/D/368/2008, 25 November 2011, para 10.7; *Besim Osmani v Republic of Serbia*, No 261/2005, UN Doc CAT/C/42/D/261/2005, 8 May 2009, para 10.7; see also *Blanco Abad v Spain*, No 59/1996 (n 34) para 8.8.
[96] *Oleg Evloev v Kazakhstan*, No 441/2010, UN Doc CAT/C/51/D/441/2010, 5 November 2013, para 9.5; *Rasim Bairamov v Kazakhstan*, No 497/2012 (n 63) para 8.7; *Gerasimov v Kazakhstan*, No 433/2010 (n 61) para 12.5.
[97] *Oleg Evloev v Kazakhstan*, No 441/2010 (n 96) para 9.5.
[98] *NZ v Kazakhstan*, No 495/2012 (n 90) para 13.4.

the Committee found that the complainant failed to substantiate that the investigation was not efficient and impartial.[99] An impartial investigation naturally also requires that it is free from any discrimination on gender, race, social origin, or any other grounds.[100]

42 An effective and thorough investigation needs to include some minimum investigatory steps such as the questioning of the complainant about ill-treatment, a forensic-medical investigation, and the summoning of certain witnesses.[101] The Committee found that a mere 'inspection' of a penitentiary institution can clearly not be considered an effective investigation in the sense of Article 12 CAT.[102] The lack of thoroughness was particularly criticized in regard to the US inquiries into torture allegations overseas. It its Concluding Observations to the US State report the Committee noted with concern that 'some former CIA detainees, who had been held in United States custody abroad, were never interviewed during the investigations, which casts doubts as to whether that high-profile inquiry was properly conducted.'[103] On the other hand, where the decision to dismiss a complaint was based on a variety of sources, from medical reports and statements of detainees and witnesses who had no apparent conflict of interest, the Committee did not conclude that the investigation lacked impartiality.[104]

43 In the case *M'Barek v Tunisia* regarding a person allegedly tortured to death, the Committee criticized that the examining magistrate failed to make use of other important investigations customarily conducted in such matters. It specifically noted that the magistrate could have checked the records of the detention centres for the presence of the complainant and witnesses, in reference to the duty to keep detention records in Principle 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; sought to identify and examine the accused officials, and arrange a confrontation between them, the witnesses, and the complainant; ordered an exhumation of the victim (if possible in the presence of external experts) in view of the major disparities between the findings of forensic officials.[105] The Committee held that the magistrate in 'failing to investigate more thoroughly, committed a breach of the duty of impartiality imposed on him by his obligation to give equal weight to both accusation and defence during his investigation'.[106]

44 Similar considerations were made in the case of *Ristic v Yugoslavia*, which concerned allegations about an act of torture by the police that resulted in the death of the victim. The Committee pointed to various inconsistencies between the official autopsy report and a report of two forensic experts made at the request of the parents of the victim, as well as between statements of the three police officers accused of having tortured the victim, and to the fact that the doctor who had carried out the official autopsy

[99] ibid, para 13.5.

[100] See CAT, 'Concluding Observations: Guatemala' (2006) UN Doc CAT/C/GTM/CO/4, para 16.

[101] *Rasim Bairamov v Kazakhstan*, No 497/2012 (n 63) para 8.7; *Kostadin Nikolov Keremedchiev v Bulgaria*, No 257/2004, UN Doc CAT/C/41/D/257/2004, 11 November 2008, para 9.4.

[102] See *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011, UN Doc CAT/C/54/D/456/2011, 15 May 2015, para 6.8.

[103] CAT, 'Concluding Observations: USA' (2014) UN Doc CAT/C/USA/CO/3-5.

[104] *Mariano Eduardo Haro v Argentina*, No 366/2008, UN Doc CAT/C/52/D/366/2008, 23 May 2014, para 9.4.

[105] *Khaled Ben M'Barek v Tunisia*, No 60/1996 (n 59) para 11.9; similarly in the case *Ristic v Yugoslavia*, No 113/1998 (n 94) para 9.6, the Committee held that 'A proper investigation would indeed have entailed an exhumation and a new autopsy, which would have allowed the cause of death to be established with a satisfactory degree of certainty'.

[106] *Khaled Ben M'Barek v Tunisia*, No 60/1996 (n 59), para 11.10.

admitted that he was not a specialist in forensic medicine. Noting the above elements, the Committee concluded that 'the investigation that was conducted by the State party's authorities was neither effective nor thorough. A proper investigation would indeed have entailed an exhumation and a new autopsy, which would in turn have allowed the cause of death to be medically established with a satisfactory degree of certainty.'[107]

45 A forensic medical examination is of particular importance for a thorough investigation. An important factor for the low conviction rate of perpetrators of torture and other forms of ill-treatment is the lack of evidence, particular medical evidence.[108] Consequently, the allegation of the survivor stands against the statement of the alleged perpetrator who is unlikely to confess and the colleagues unlikely to testify against him or her. Therefore, in its General Comment 3 to Article 14 the Committee stated that an investigation in the sense of Article 12 CAT 'should include as a standard measure an independent physical and psychological forensic examination as provided for in the Istanbul Protocol.'[109] Also the UNSRT has emphasized the importance of systematically evaluating evidence by independent and impartial forensic services.[110] It is important that such medical examination is conducted promptly, by an independent professional and in conformity with the professional standards established in the Istanbul Protocol.[111] The forensic examination should take place 'outside the place of detention and the contents of the medical report should not be made known to the personnel responsible for police custody. In addition, persons in police custody should be able to request that a medical certificate be prepared by a doctor of their choice in any circumstances, and it should be possible for this certificate to be produced as evidence before the courts.'[112] The Committee has however emphasized that forensic medical reports alone are 'often insufficient and need to be compared with other sources of information' to determine whether torture has taken place.[113]

46 The Istanbul Protocol published in 1999 was developed jointly by forensic scientists, physicians, psychologists, human rights monitors, and lawyers from all over the world. It contains principles for the effective investigation and documentation of torture (Istanbul Principles) that have been endorsed by the General Assembly as well as the UN Human Rights Commission and Council.[114] The Istanbul Protocol 'intended to serve as international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body'.[115] It includes sections on the legal investigation

[107] *Ristic v Yugoslavia*, No 113/1998 (n 94) para 9.6. See above 3.2.

[108] Carver and Handley (n 1) 85–86.

[109] CAT/C/GC/3 (n 15) para 25.

[110] See SRT (Méndez) A/69/387 (n 15) para 37.

[111] See the criticism in the case *Ali Aarrass v Morocco*, No 477/2011 (n 64) para 10.4, where the Committee 'takes note' that the examination by a forensic doctor took place only a year after the alleged torture, that the complainants request for an examination by doctors from an independent institution were denied, and the reports produced were not in conformity with the professional standards established in the Istanbul Protocol.

[112] CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey' (1993) UN Doc A/48/44/Add.1, para 27; the latter point was also addressed in the Concluding Observations to Turkey where the Committee has expressed concerns that 'independent medical documentation of torture are not entered into evidence in court rooms and that judges and prosecutors only accept reports by the Ministry of Justice's Forensic Medicine Institute': see CAT/C/TUR/CO/3 (n 38) para 8.

[113] *Blanco Abad v Spain*, No 59/1996 (n 34) para 8.8.

[114] GA Res 55/89 (n 16) and Commission on Human Rights Res 2000/43 of 20 April 2000 (Torture and other cruel, inhuman or degrading treatment or punishment) both adopted without a vote.

[115] Istanbul Protocol (n 81) 1.

of torture; holding interviews; collecting of physical and psychological evidence. Today, it is the widely recognized standard for investigations, cited by national and international courts, used for preparing medical reports, and in trainings of medical and legal professionals worldwide.[116]

47 Further guidance on what is required from a 'thorough' investigation can be found in the jurisprudence of the ECtHR,[117] the IACtHR,[118] reports of the CPT,[119] and most specifically the Council of Europe guidelines that even provide a 'typical inventory of required investigative measures' such as detailed and exhaustive statements of alleged victims obtained with an appropriate degree of sensitivity; appropriate questioning and, where necessary, the use of identfication parades and other special investigative measures designed to identify those responsible; confidential and accurate medical (preferably forensic) physical and psychological examinations of alleged victims (carried out by independent and adequately trained personnel); other medical evidence; appropriate witness statements, possibly including statements of other detainees, custodial staff , members of the public, law enforcement officers, and other officials; examination of the scene for material evidence, including implements used in ill-treatment, fingerprints, body fluids, and fibres that should involve the use of forensic and other specialists able to secure and examine the evidence; and examination of custody records, decisions, case files, and other documentation related to the relevant incident.[120]

48 It is important that all the evidence is 'assessed in a thorough, consistent and objective manner'.[121] Therefore the existence of an independent judiciary is crucial. In several Concluding Observations to State reports the Committee expressed concern with alleged cases of ethnic bias and politically influenced judicial procedures,[122] and where the executive branch is responsible for the appointment, promotion, and dismissal of judges or otherwise influences the judiciary.[123] A consequence may be that allegations

[116] See Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice: Interview 8.1. The Role of Medical Documentation in Combating Torture: Istanbul Protocol* (Dr Önder Öskalipçi) (2nd edn, Cambridge University Press 2016) 366.

[117] The ECtHR has developed a general requirement of taking 'all reasonable steps' or making genuine efforts; see *Bati and Others v Turkey*, ECtHR (n 43) para 134: 'The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries. Any deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling foul of this standard.'

[118] In the case *Cabrera García and Montiel Flores v Mexico*, Series C No 220 (IACtHR, 26 November 2010) para 135, the Court affirmed that 'whenever there are signs that torture has taken place, the State must initiate, *ex officio* and immediately, an impartial, independent and thorough investigation that makes it possible to determine the nature and origin of the injuries observed'; recalled in the case of *Maldonado Vargas y otros v Chile* (n 66) para 76 that 'once the state authorities have knowledge of an act that could constitute torture, they must initiate *ex officio* and without delay, an investigation'.

[119] See in particular CPT, 14th General Report (n 29).

[120] Svanidze (n 39) 4.2.2; see also CoE, 'Eradicating Impunity for Serious Human Rights Violations: Guidelines and Reference Text' (2011) VI; see also CoE: Commissioner for Human Rights, 'Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints Against the Police' (2009) CommDH (2009) 4, para 67ff <https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-thomas-hammarberg-concern/16806daa54> accessed 3 December 2017.

[121] See Svanidze (n 39) 4.2.4, 51.

[122] CAT, 'Concluding Observations: Bosnia and Herzegovina' (2005) UN Doc CAT/C/BIH/CO/1, para 11.

[123] CAT, 'Concluding Observations: Armenia' (2012) CAT/C/ARM/CO/3, para 17; CAT, 'Concluding Observations: Tunisia' (2016) UN Doc CAT/C/TUN/CO/3, para 17; CAT, 'Concluding

of torture are not being transferred to the prosecutor or medical examinations are not ordered, impeding the initiation of investigation and prosecution of cases of torture and other forms of ill-treatment.[124]

49 Another key element of an impartial and effective investigation, although not specifically mentioned in Article 12, is the involvement of the victim.[125] The Committee criticized where the complainant was not promptly informed if and who investigated the complaint, at what stage the investigation was,[126] and where no information about the outcome of the investigation and the evidence made available to the authorities was provided.[127] In the case *Ali Aarrass v Morocco* the Committee noted that this effectively prevented the complainant from pursuing private prosecution and thus violates Article 12 CAT.[128] The CoE Guidelines also contain this requirement providing that victims not only be informed of the investigative process and decisions made but also be entitled to request specific steps to be taken and participate in investigative actions, where appropriate. Moreover, alleged victims should be provided with legal aid, if necessary, and given the opportunity to challenge actions and omissions of investigating authorities.[129]

50 In addition, the Committee also urges States parties to make the outcome of the investigation public.[130] Equally the Guidelines as well as the ECtHR and CPT require an element of public scrutiny of the investigation to secure accountability which may in particularly serious cases even require a public inquiry.[131] For that purpose the Committee has recommended the establishment of a centralized public register of complaints of torture and other forms of ill-treatment and of the results of the investigation, to ensure the guarantee of an impartial and open investigation.[132]

3.4.2 Investigation Mechanism

51 While investigations by police chiefs, prison directors, and public prosecutors are not necessarily excluded by Article 12, it is advisable not to entrust the investigation solely to persons who have close personal or professional links with the persons suspected of having committed torture or ill-treatment, or who may have an interest in protecting these persons or the particular unit to which they belong.[133] In this spirit the Committee

Observations: Turkmenistan' (2011) UN Doc CAT/C/TKM/CO/1, para 10; CAT, 'Concluding Observations: Yemen' (2010) UN Doc CAT/C/YEM/CO/2/Rev.1, para 17.

[124] See CAT/C/TUN/CO/3 (n 123) para 17; CAT/C/YEM/CO/2/Rev.1 (n 123) para 17.

[125] cf *Dzemajl et al v Yugoslavia*, No 161/2000, UN Doc CAT/C/29/D/161/2000, 21 November 2002, para 9.5; *Dimitrov v Serbia and Montenegro*, No 171/2000, UN Doc CAT/C/34/D/171/2000, 3 May 2005, para 7.2; *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000, UN Doc CAT/C/35/D/172/2000, 16 November 2005, para 7.3; *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002, UN Doc CAT/C/33/D/207/2002, 24 November 2004, para 5.4.

[126] *Oleg Evloev v Kazakhstan*, No 441/2010 (n 96) para 9.5; see also *Saadia Ali v Tunisia*, No 291/2006 (n 63) para 15.7.

[127] *Ali Aarrass v Morocco*, No 477/2011 (n 64) para 10.5.

[128] *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002 (n 125) para 5.4; see also *Dzemajl et al v Yugoslavia*, No 161/2000 (n 125) para 9.5; *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000 (n 125) para 7.3.

[129] Svanidze (n 39) 58.

[130] cf eg CAT/C/SR.245, para 37. See also Lene Wendland, 'A Handbook on State Obligations under the UN Convention against Torture' (APT 2002) 52 <https://www.apt.ch/content/files_res/A%20Handbook%20on%20State%20Obligations%20under%20the%20UN%20CAT.pdf> accessed 3 December 2017.

[131] See *Bati and Others v Turkey*, ECtHR (n 43) para 137; CPT, 14th General Report (n 29) para 36; Svanidze (n 39) 57.

[132] See A/56/44 (n 14) para 97(e).

[133] cf Burgers and Danelius (n 89) 145. See also Ingelse (n 13) 336.

did not find the absence of independent investigation mechanism to automatically constitute a violation[134] but criticizes countries where this is the case and recommends a fully 'independent mechanism' to carry out investigations in the sense of Article 12.[135]

52 Investigation mechanisms should be institutionally and functionally independent. The Committee recommends that investigations into torture and other forms of ill-treatment are carried out 'by independent bodies, with no institutional or hierarchical connection between the investigators and the alleged perpetrators among the police'.[136]

53 The Committee criticizes States where investigations are carried out by the regular police forces.[137] Thus, it has expressed particular concern about the lack of effective investigation 'due to the involvement of the Ministry of Interior Affairs in investigation of alleged violations by its subsidiary units, in contravention of a principle of impartiality'.[138] The State should ensure that 'investigations are never undertaken by personnel employed by the same ministry as the accused persons'.[139]

54 Where investigations are carried out by the prosecution offices, this has also been criticized by the Committee.[140] The prosecution plays and important role in supervising investigations into torture and other forms of ill-treatment carried out by the police. This can however become problematic where it is not ensured that prosecutors investigating the crime and the allegations made against police officials are different.[141] The Committee noted that 'the dual nature and responsibilities of the prosecution authorities for prosecution and oversight of the proper conduct of investigations are a major barrier to the impartial investigation' and recommended that investigations should not be carried out by any law enforcement agency but by an independent body.[142] The Committee recommended to the strengthen efficiency and independence of the prosecutor and 'ensure preservation of evidence until the arrival of the prosecutor'.[143] It noted that it is important that the Office of the Public Prosecutor is also institutionally separated from the authorities against which it will investigate, meaning it should for example not be placed within military facilities.[144] The personal independence of prosecutors is another important factor. A recent study comparing investigative bodies in Europe concluded that even where the police and prosecution are factually independent, their close institutional connection and feeling of collegiality diminish the impartiality of the investigation by prosecutors.[145]

55 The Committee therefore welcomes the creation of separate investigative units under the police or prosecution although frequently noting concerns when it comes to their practical functioning. In Sweden, a Department of Special Investigations, with

[134] *NZ v Kazakhstan*, No 495/2012 (n 90) para 13.5.

[135] CAT, 'Concluding Observations: Andorra' (2013) UN Doc CAT/C/AND/CO/1, para 10.

[136] CAT, 'Concluding Observations: Germany' (2011) UN Doc CAT/C/DEU/CO/5; CAT, 'Concluding Observations: Albania' (2012) UN Doc CAT/C/ALB/CO/2, para 21.

[137] CAT, 'Concluding Observations: Hungary' (2007) UN Doc CAT/C/HUN/CO/4, para 16(a).

[138] CAT/C/ALB/CO/2 (n 136) para 21.

[139] CAT/C/KAZ/CO/3 (n 57) para 8.

[140] 'However, the Committee is concerned that allegations of torture and ill-treatment and unlawful use of force by the police at the federal level continue to be investigated by the Public Prosecution Offices and the police acting under the supervision of the Public Prosecution Offices': CAT/C/DEU/CO/5 (n 136) para 19.

[141] CAT/C/ARM/CO/3 (n 123) para 12.

[142] CAT, 'Concluding Observations: Moldova' (2010) UN Doc CAT/C/MDA/CO/2, para 19

[143] CAT/C/TUR/CO/3 (n 38) para 8.

[144] CAT/C/COL/CO/4 (n 78) para 13.

[145] Hungarian Helsinki Committee (HHC), 'Investigation of Ill-treatment by the Police in Europe: Comparative Study of Seven EU Countries' (2017) 137–38. <https://www.europewithouttorture2017.com/wp-content/uploads/2017/05/english-investigating-torture.pdf> accessed 3 December 2017

autonomous standing, was created within the police at the national level, including seven regional investigation units.[146] Kazakhstan's establishment of a special prosecutor was welcomed although the Committee expressed concerns where reports indicate that in practice most allegations of torture and other forms of ill-treatment continue to be referred to the police/same department in which the alleged perpetrator is employed.[147] The Committee also welcomed the creation of an Investigate Commission in Russia that is separate from the Procuracy with a subdivision tasked with investigating alleged crimes committed by law enforcement officials. However, it criticized the lack of impartiality in practice based on the actions of its head as well as the insufficient resources to effectively carry out its function.[148]

56 A step further than separate departments or units are independent police complaints commissions or ombudsmen, entities completely independent and separate from the police mandated to receive complaints and carry out investigation *ex officio*.[149] These bodies differ in their mandate from full arrest and investigative powers to the mere right to make internal reports and recommendations, and their effectiveness has also been subject to criticism. For example, regarding Northern Ireland the Committee noted concern about 'inconsistencies in investigation processes' or regarding Ireland about the possibility to refer cases back to the Police Commissioner[150] as obstacles to effective investigations.

57 A particular concern regarding specialized investigation mechanisms arises about the personal independence of the investigators. For example, in its Concluding Observations to Belgium the Committee stated its concern 'by the fact that some of the investigators are former police officers, which may compromise their impartiality when they are required to conduct objective and effective investigations into allegations that acts of torture and ill-treatment have been committed by members of the police'.[151] Following, the Committee recommends independent mechanism to 'be composed of independent experts recruited from outside the police'.[152] Similarly, in its Concluding Observations to New Zealand, the Committee was concerned 'that the impartiality of the Independent Police Conduct Authority might be hampered by the inclusion of both current and former police officers'[153] Consequently, regarding Ireland the Committee welcomed that the members of the Police Ombudsman 'cannot be serving members or former members of the Garda Síochána'.[154] An independent comparative study mirrored these views and concluded that unless 'cathartic social circumstances prevail, the

[146] CAT, 'Concluding Observations: Sweden' (2014) UN Doc CAT/C/SWE/CO/6-7: 'The department is an independent organisation of the Swedish Police Authority. SU will have a preparedness organisation, which implies that investigations can be initiated 24/7. Such an organisation provides for fast response and investigations of high quality.'

[147] CAT/C/KAZ/CO/3 (n 57) para 8.

[148] CAT, 'Concluding Observations: Russian Federation' (2012) UN Doc CAT/C/RUS/CO/5, para 8.

[149] eg the Independent Office for Police Conduct (formerly the Independent Police Complaints Commission) for England and Wales, the Police Ombudsman for Northern Ireland, the Independent Police Complaints Board in Hungary, the Norwegian Bureau for the Investigation of Police Affairs, Committee P Belgium, Garda Síochána Ombudsman Commission in Ireland.

[150] CAT, 'Concluding Observations: Great Britain and Northern Ireland' (2013) UN Doc CAT/C/GBR/CO/5, para 23; CAT, 'Concluding Observations: Ireland' (2011) CAT/C/IRL/CO/1, para 19.

[151] CAT, 'Concluding Observations: Belgium' (2014) UN Doc CAT/C/BEL/CO/3, para 13; see also Luxembourg CAT/C/LUX/CO/6-7 (n 36) para 16.

[152] CAT/C/BEL/CO/3 (n 151) para 13.

[153] CAT/C/NZL/CO/6 (n 37) para 12.

[154] CAT/C/IRL/CO/1 (n 150) para 19.

employment of retired or seconded police officers is not a desirable solution for obvious loyalties may arise even if the persons investigating police violations come from different units.'[155]

58 The UNSRT has also continuously stated that the main obstacle to an effective and impartial investigation was the fact that the same institution is responsible for investigating and prosecuting ordinary crimes and those committed by members of the investigating and prosecuting institutions leading to a lack transparency and a conflict of interest.[156] Therefore the UNSRT recommended that '[a]llegations of torture and other ill-treatment should be investigated by an external investigative body, independent from those implicated in the allegation and with no institutional or hierarchical connection between the investigators and the alleged perpetrators'.[157] The most recent soft law instrument on the rights of detainees, UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) explicitly state that a prompt and impartial investigation shall be 'conducted by an independent national authority'.[158]

59 The Istanbul Principles affirm that investigators 'shall be independent of the suspected perpetrators'[159] and moreover provide that in cases where the existing investigative procedures are inadequate or where there is a pattern of widespread torture and other forms of ill-treatment, it may be useful to consider establishing a special independent Commission of Inquiry.[160] This may also complement investigations, especially where there is a lack of specific information, the capacities of the regular mechanisms are exhausted, and where a deeper understanding of the origin of the violations and ways to prevent them in the future is needed. The UNSRT has provided detailed guidance on the set-up of Commissions of Inquiries.[161]

60 It follows that in principle an investigation in order to be effective and impartial, should be entrusted to an independent external body without direct links to the unit in which the act of torture or ill-treatment allegedly took place. This is confirmed by the findings of a global study on the effectiveness of torture prevention measures concluding that only where the law requires the investigation by an independent body there is evidence that this has an impact on the incidence of torture.[162]

MORITZ BIRK

[155] HHC (n 145) 137.

[156] SRT (Mendez) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc A/68/295, para 64.

[157] ibid, para 64; see also SRT (Nowak) A/65/273 (n 5) para 56; SRT (Rodley), 'Report of the Special Rapporteur' (2001) UN Doc E/CN.4/2001/66, para 1310.

[158] GA Res 70/175 of 17 December 2015 (United Nations Standard Minimum Rules for the Treatment of Prisoners, cited also Mandela Rules) Mandela Rule 57(3).

[159] Istanbul Protocol: Principles (n 81) principle 2.

[160] Istanbul Protocol: Principles (n 81) para 5.

[161] SRT (Mendez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc A/HRC/19/61.

[162] Carver and Handley (n 1) 83.

Article 13

Right of Victims to Complain

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

1. Introduction	357
2. Travaux Préparatoires	359
2.1 Chronology of Draft Texts	359
2.2 Analysis of Working Group Discussions	360
3. Issues of Interpretation	361
3.1 Meaning of 'right to complain'	361
3.2 Meaning of 'promptly and impartially examined by competent authorities'	365
3.3 Meaning of 'protected against all ill-treatment or intimidation'	367

1. Introduction

1 While Article 12 requires States parties to carry out *ex officio* investigations whenever there is a suspicion of torture or other forms of ill-treatment, Article 13 requires such investigation in response to a complaint by the victim.[1] Such a duty presupposes, that every person alleging to be a victim of torture and ill-treatment enjoys an effective right to complain to a competent body without fear of reprisals. This in turn is only possible if the State party takes the necessary measures to protect both the complainant and witnesses against ill-treatment and intimidation as a consequence of such complaint or witness testimony. Whereas the right to complain and the obligation of an impartial examination of such complaints is already included in Article 8 of the 1975 Declaration, the special protection of the complainant was added by the Swedish draft. The additional protection of witnesses was inserted by the Working Group in 1980.[2]

2 Contrary to the obligation to conduct criminal investigations against alleged perpetrators present in the territory of a State party which only applies to torture in the narrow sense of Article 1, the prompt and thorough investigation duties under Articles 12 and 13 also apply to cruel, inhuman or degrading treatment or punishment by virtue of the express reference in Article 16(1).

[1] On the relationship between the investigation duties under Articles 12,13, and on the difference to the criminal investigation required by Articles 5 to 9, see above Art 12, §§ 3, 4.

[2] See below § 3.3.

3 The phrase 'in any territory under its jurisdiction' shall be interpreted in the same broad sense as in Article 2(1), 'to protect any person, citizen or non-citizen without discrimination subject to the jure or de facto control of a State party'.[3]

4 Article 13 constitutes the *basic remedy of torture victims*, and is aimed at having the *facts established* by a competent and independent authority. Depending on the facts of the case, a complaint may also lead to further action to bring the perpetrators to justice under criminal law (Articles 4 to 9). Moreover, a complaint is not only an important trigger for an investigation by the authorities but also an important chance for victims to express dissatisfaction and disapproval with their treatment and may thus contribute to the reestablishment of their sense of control and dignity.[4] It can be a crucial first step for a torture survivor to be provided with other forms of reparation under civil law or rehabilitation pursuant to Article 14. In that sense the right to complain is a measure of reparation in itself and the obligation part of the procedural aspect of the right to redress in article 14.[5] The interlink between Articles 12, 13, and 14 was also underlined by the Committee in its General Comment 3 to Article 14.[6]

5 In the jurisprudence of the Committee, decisions on Articles 12 and 13 usually go hand in hand. The Committee does not clearly differentiate between the two articles in a way to only apply Article 13 to cases where a complaint was made and Article 12 to cases in which an investigation was undertaken *ex officio*. Instead, in cases in which the State party failed to take appropriate action in response to a complaint, the Committee's mainly examines the case in the light of Article 12 while finding a violation of Article 13 without further reasoning[7] or simply stating that it 'presupposes that the authorities provide a satisfactory response to such a complaint by launching a prompt and impartial investigation.'[8]

6 Besides the CAT the right to complain is also explicitly mentioned in Article 8 of the Inter-America Convention to Prevent and Punish Torture. Moreover, the Human

[3] See CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 7; see also below Article 2, § 55.

[4] Redress, 'Taking Complaints of Torture Seriously: Rights of Victims and Responsibilities of Authorities' (2004) 7 <https://redress.org/wp-content/uploads/2018/01/Sept-TAKING-COMPLAINTS-OF-TORTURE-SERIOUSLY.pdf> accessed 3 Decemeber 2017.

[5] CAT, 'General Comment No 3 on the Implementation of Art. 14 by States Parties' (2012) UN Doc CAT/C/GC/3, para 5.

[6] ibid, para 23.

[7] *Abdelmalek v Algeria*, No 402/2009, UN Doc CAT/C/52/D/402/2009, 23 May 2014, para 11.7; *Kirsanov v Russian Federation*, No 478/2011, UN Doc CAT/C/52/D/478/2011, 14 May 2014, para 11.3; *HB v Algeria*, No 494/2012, UN Doc CAT/C/55/D/494/2012, 6 August 2015, para 6.7; *Haro v Argentina*, No 366/2008, UN Doc CAT/C/52/D/366/2008, 23 May 2014, para 9.4; *Evloev v Kazakhstan*, No 441/2010, UN Doc CAT/C/51/D/441/2010, 5 November 2013, para 9.6; *Bairamov v Kazakhstan*, No 497/2012, UN Doc CAT/C/52/D/497/2012, 14 May 2014, para 8.8; *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012, UN Doc CAT/C/55/D/500/2012, 4 August 2015, para 17.9; *Slyusar v Ukraine*, No 353/2008, UN Doc CAT/C/47/D/353/2008, 14 November 2011, para 9.3.

[8] See eg *Bendib v Algeria*, No 376/2009, UN Doc CAT/C/51/D/376/2009, 8 November 2013, para 6.6; *Aarrass v Morocco*, No 477/2011, UN Doc CAT/C/52/D/477/2011, 19 May 2014, para 10.6; *Ntikarahera v Burundi*, No 503/2012, UN Doc CAT/C/52/D/503/2012, 12 May 2014, para 6.4; *Niyonzima v Burundi*, No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014, para 8.5; *Gahungu v Burundi*, No 522/2012, UN Doc CAT/C/55/D/522/2012, 10 August 2015, para 7.8; *X v Burundi*, No 553/2013, UN Doc CAT/C/55/D/553/2013, 10 August 2015, para 7.7; *Ntahiraja v Burundi,* No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015, para 7.10; *EN v Burundi*, No 578/2013, UN Doc CAT/C/56/D/578/2013, 25 November 2015, para 7.7; *Elaïba v Tunisia,* No 551/2013, UN Doc CAT/C/57/D/551/2013, 6 May 2016, para 7.6; *LA v Algeria*, No 531/2012, UN Doc CAT/C/57/D/531/2012, 12 May 2016, para 8.6; *Kabura v Burundi*, No 549/2013, UN Doc CAT/C/59/D/549/2013, 11 November 2016, para 7.5.

Rights Committee and European Court of Human Rights have interpreted it as a procedural obligation of the prohibition of torture and ill-treatment[9] and it is repeated in numerous soft law documents.[10]

7 In practice, there are great challenges in the implementation of the right to complain. In many countries there are no clearly designated complaint mechanisms and where complaints mechanisms exist, they all too often lack independence and effectiveness. Moreover, detainees are not or insufficiently aware of the possibility to complain, have difficulties accessing complaints mechanisms (eg due to practical obstacles, inadequate legal proceedings, and the lack of effective legal aid), mistrust their effectiveness, or refrain from making complaints in fear of reprisals.[11] In resume of his six years as Special Rapporteur on Torture, Manfred Nowak stated that he 'can hardly think of any other safeguard where the legally required protection and the actual reality differ in such a glaring and devastating way.'[12]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

8 *Declaration (9 December 1975)*[13]

Article 8

> Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to, and to have his case impartially examined by, the competent authorities of the State concerned.

9 *IAPL Draft (15 January 1978)*[14]

Article IV

> The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture, and in particular, to ensure that:

[9] See HRC 'CCPR General Comment No 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or degrading Treatment or Punishment)' (1992) para 14; *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1997) para 98; *VC v Slovakia* App no 18968/07 (ECtHR, 8 November 2011) para 123.

[10] See GA, 'United Nations Standard Minimum Rules for the Treatment of Prisoners' as revised by Res 70/175 of 17 December 2015 (Mandela Rules) Rule 56; GA, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', Res 43/173 of 9 December 1988 (Body of Principles) Principle 33(1).

[11] See the observations made by the different international monitoring mechanisms: SRT (Nowak), 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/65/273, para 55; SPT, 'Report on the visit of the Subcommittee on Preventing of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine' (2016) UN Doc CAT/OP/UKR/1, para 53; CPT, Twenty-seventh General Report of the CPT' CPT/Inf(2018)4 (2018) paras 68, 69.

[12] SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention' (2010) UN Doc A/HRC/13/39/Add.5, para 113.

[13] GA Res 30/3452 of 9 December 1975.

[14] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

(c) all complaints of torture or any circumstances which give reasonable grounds to believe that torture has been committed shall be investigated speedily and effectively and that complainants shall not be exposed to any sanction by reason of their complaints, unless they have been shown to have been made falsely and maliciously.

10 *Original Swedish Draft (18 January 1978)*[15]

Article 9

Each State Party shall guarantee to any individual who alleges to have been subjected within its jurisdiction to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of its public officials, the right to complain to and to have his case impartially examined by its competent authorities without threat of further torture or other cruel, inhuman or degrading treatment or punishment.

11 *United States Draft (19 December 1978)*[16]

Combining Articles 9 & 10

If there is reasonable basis for belief that an act of torture or other cruel, inhuman or degrading treatment or punishment has been or is being committed within a State Party's jurisdiction, its competent authorities shall initiate and carry out an impartial, speedy and effective investigation.

12 *Revised Swedish Draft (19 February 1979)*[17]

Article 12

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant is protected against ill-treatment in consequence of his complaint.

2.2 Analysis of Working Group Discussions

13 In written comments on Article 9 of the original Swedish draft, *Austria* suggested that 'the right to an effective remedy before a national authority' replace the words 'the right to complain to'. It was further suggested by Austria, together with *Denmark*, that the words 'without threat of further torture or other cruel, inhuman or degrading treatment or punishment' be deleted, since, in the opinion of Denmark, they gave a false impression that forms of threat other than torture might be used. The *United States* proposed a new Article which would incorporate the concepts contained in Articles 9 and 10 (the right to complain).[18] The *United Kingdom* proposed that the word 'jurisdiction' be deleted and replaced by 'territory' and further that the words 'without threat of further torture or cruel, inhuman or degrading treatment or punishment' in line 5 be omitted.[19]

[15] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[16] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314.

[17] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

[18] E/CN.4/1314 (n 16)

[19] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1.

14 Article 9 was renumbered Article 12 in the revised Swedish draft. During the discussion in the 1980 Working Group it was suggested that *Articles 12 and 13 be reversed*. The rationale of the representative who made this proposal was that the prevention and punishment of acts of torture were primarily the responsibility of the Governments of States parties and not that of the victim, who may not be in a position to make complaints. The Working Group agreed to this proposal. It was pointed out by the same representative that it was necessary to ensure the protection not only of the complainant but also of any witnesses against ill-treatment in retaliation for the complaint made or testimony given. Several representatives suggested that this was necessary in order to encourage witnesses to put themselves at the disposal of the competent authorities. In this connection, one representative proposed that the words 'or intimidation', 'and witnesses', and 'or any evidence given' should be inserted in the last sentence of Article 12.[20]

15 In response to the question on the scope of the phrase '*territory under its jurisdiction*', it was said that it was intended to cover, inter alia, territories still under colonial rule and occupied territories.

3. Issues of Interpretation

3.1 Meaning of 'right to complain'

16 The text of Article 13 indicates that '*any individual who alleges*' that he or she has been subjected to torture or other forms of ill-treatment has an independent right to complain to a competent authority. This wording must be understood broadly, neither requiring a specific form, nor an expression of intent to initiate criminal proceedings.[21] The victim only needs to bring the matter to the attention of the authorities for the State to be under an obligation to investigate.[22] In the early case of *Parot v Spain*, the Committee noted that 'in principle, article 13 of the Convention does not require the formal submission of a complaint of torture. It is sufficient for torture only to have been alleged by the victim for the state to be under an obligation to promptly and impartially examine the allegation.'[23] This was confirmed in the case *Blanco Abad v. Spain* where the Committee stated that the 'Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention.'[24] This liberal interpretation, which clearly conforms to the

[20] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367.

[21] *Blanco Abad v Spain*, No 59/1996, UN Doc CAT/C/20/D/59/1996, 14 May 1998, para 8.6; *Ristic v Yugoslavia* [2001] CAT No 113/1998, paras 9.6–9.8; *Parot v Spain*, No 6/1990, UN Doc CAT/C/14/D/6/1990, 2 May 1995, para 10.4.

[22] *Blanco Abad v Spain*, No 59/1996, UN Doc CAT/C/20/D/59/1996, 14 May 1998, para 8.6.

[23] *Parot v Spain*, No 6/1990, UN Doc CAT/C/14/D/6/1990, 2 May 1995, para 3.2.

[24] *Blanco Abad v Spain*, No 59/1996 (n 21) para 8.6; see also *Parot v Spain*, No 6/1990 (n 21) para 10.4; *Ltaief v Tunisia*, No 189/2001, UN Doc CAT/C/31/D/189/2001, 14 November 2002, para 10.6; *Abdelli v Tunisia* [2003] CAT No 188/2001, para 10.6; *Dimitrov v Serbia and Montenegro*, No 171/2000, UN Doc CAT/C/34/D/171/2000, 3 May 2005, para 7.2; cf also OHCHR, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('Istanbul Protocol') (2004) HR/P/PT/8/Rev.1, Annex I, para 2.

object and purpose of this provision, was confirmed in later cases against *Tunisia*[25] and *Serbia and Montenegro*.[26]

17 Article 13 only speaks of a *right of an alleged victim* to bring forward a complaint ('any individual who alleges'). Contrary to that Article 22 explicitly states that complaints may be submitted 'on behalf of individuals' and the Rules of Procedure state that "[t]he complaint should be submitted by the individual himself/herself or by his/her relatives or designated representatives, or by others on behalf of an alleged victim when it appears that the victim is unable personally to submit the complaint'.[27] Also other international standards explicitly extend the right to submit a complaint to the legal counsel or members of the family whenever it cannot be exercised by the victim.[28] Although it appears that the Committee has not expressed itself on the issue, it is not reasonable to interpret the right to complain restrictively, limiting it to the person alleging to be a victim only. Otherwise it could be easily rendered ineffective.

18 It is not sufficient that the right is legally guaranteed, it must also be *accessible and effective* in practice. In the State reporting procedure, the Committee expressed concerns about *undue restrictions* of the right to complain, such as not accepting complaints directly from alleged victims but only upon referral by other mechanisms,[29] a statute of limitation of thirty-five days for complaining,[30] the imposition of strict criteria for the substantiation of complaints,[31] the lack of access to pen and papers in places of detention,[32] high fees charged by medical professionals to complete the complaint form, and the insistence that the form must first be filled out at the police station.[33] It also criticized situations when police officers using excessive force during demonstrations cannot be identified because they wear masks or do not carry identification badges.[34] Making a complaint should not impose unnecessary hardship on complainants and their relatives that prevents or discourages them from seeking redress, such as financial burden. States need to provide assistance and support to minimize any hardship.[35] Complaints forms need to be made available free of charge and States need to ensure that that the right of a complainant is not dependent on his or her economic situation.[36] In general, the right to lodge a complaint and the corresponding State obligation to carry out a prompt and impartial investigation should not be dependent on any discretion of State authorities.[37]

19 States must *provide the necessary procedures* for victims of torture and ill-treatment to exercise their right to complain in a non-bureaucratic manner without fear of reprisals.

[25] cf *Abdelli v Tunisia*, No 188/2001, UN Doc CAT/C/31/D/188/2001, 14 November 2002, para 10.6; *Ltaief v Tunisia*, No 189/2001 (n 24) para 10.6.

[26] cf *Dimitrov v Serbia and Montenegro,* No 171/2000 (n 24) para 7.2; see above § 3.2.

[27] CAT, Rules of Procedure CAT/C/3/Rev.6 (2014) Rule 113 (a).

[28] Mandela Rules (n 10) Rule 56(4); Body of Principles (n 10) Principle 33(1); UNGA, '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 revised by Res 60/147 of 16 December 2005, Annex I, para 8; CoE, Committee of Ministers, European Prison Rules (2006) para 70.3.

[29] Member of Parliament, the Prime Minister or the Children's Ombudsman, CAT, 'Conclusions and recommendations: France' (2006) CAT/C/FRA/CO/3, para 22.

[30] CAT, 'Conclusions and Recommendations: Nepal' (2007) UN Doc CAT/C/NPL/CO/2, para 28; cf also the *obiter dictum* in *OR, MM, and MS v Argentina* [1989] CAT No 1/1988, 2/1988, and 3/1988, para 9.

[31] CAT, 'Concluding Observations: Poland' (2013) UN Doc CAT/C/POL/CO/5-6, para 11.

[32] CAT, 'Concluding Observations: Tajikistan' (2013) UN Doc CAT/C/TJK/CO/2, para 14.

[33] CAT, 'Concluding Observations: Kenya' (2013) UN Doc CAT/C/KEN/CO/2, para 22.

[34] CAT, 'Concluding Observations: Moldova' (2010) UN Doc CAT/C/MDA/CO/2, para 16.

[35] CAT/C/GC/3 (n 5) para 29.

[36] CAT/C/KEN/CO/2 (n 33) para 22

[37] cf Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 367.

Particular measures need to be taken in relation to detainees. In places of detention, there should be the possibility to lodge both oral and written, ideally even anonymous, complaints. Internal mechanisms should be immediately accessible to detainees on a daily basis.[38] Complaints need to be responded to as quickly as possible and forwarded to the competent investigation body.[39] In principle, every person working in a detention facility has the obligation to forward a complaint to a competent authority. Unless a special procedure has been established to receive such complaints, this may be doctors who carry out medical examinations, prison chaplains, social workers, or resident prosecutors. In addition, every prisoner shall be allowed to make a request or complaint regarding his or her treatment, without censorship as to substance, to the central prison administration, specifically where a complaint is sensitive or not resolved.[40] The Committee noted that different internal and external inspection services of the police and prison administration competent to receive complaints may create a 'lack of clarity' when lodging a complaint.[41] Thus, it recommended that States establish a central mechanism specifically devoted to allegations of torture and other forms of ill-treatment.[42]

20 Detainees should also be *informed* about their right to complain about torture and ill-treatment and about the respective procedures available to them in a language they understand, including an oral explanation.[43] The Committee expressed concern where victims are not aware of complaints procedures beyond reporting to the police who may refuse to accept them.[44] Moreover, the information could be facilitated by numerous measures such as displaying posters in police stations and communal areas of places of detention, a section on complaints procedures in the establishment's house rules, information leaflets issued by complaints bodies, or information videos.[45] Effective procedural rights, such as prompt access to family members, counsel and a doctor of their choice, as well as the right to lodge a writ of *habeas corpus* to an independent judge further facilitate the exercise of the right to complain about torture and other forms of ill-treatment.[46]

21 The individual making a complain needs to be protected. Therefore *confidential access* to complaints mechanisms is important,[47] eg by means of installing complaints

[38] See also Mandela Rules (n 10) Rule 56(1); see also CPT, Twenty-seventh General Report (n 11) para 70.

[39] cf Herman Burgers and Hans 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) 145.

[40] See also Mandela Rules (n 10) Rule 56(2); CPT, Twenty-seventh General Report (n 11) para 70; for an overview of such bodies see Dirk Van Zyl Smit and Sonia Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press 2008) 308–10.

[41] CAT, 'Concluding Observations: Portugal' (2013) CAT/C/PRT/CO/5-6, para 10.

[42] CAT 'Observations of the Committee against Torture on the Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)' CAT/C/51/4, para 53; CAT 'Consideration of reports submitted by States parties under article 19 of the Convention: Djibouti' (2011) CAT/C/DJI/CO/1, para 15; CAT, 'Concluding Observations: Belgium' (2014) UN Doc CAT/C/BEL/CO/3, para 14.

[43] CAT/C/BEL/CO/3 (n 42) para 11.

[44] CAT, 'Consideration of reports submitted by States parties under article 19 of the Convention: Albania' (2012) CAT/C/ALB/CO/2, para 20.

[45] See CPT, Twenty-seventh General Report (n 11) para 79; CAT, 'Concluding Observations: The Netherlands' (2013) CAT/C/NLD/CO/5-6, para 22; CAT, 'Concluding Observations: Germany' (2011) UN Doc CAT/C/DEU/CO/5, para 18 a; CAT/C/ALB/CO/2 (n 44) para 20a; see SRT (Méndez), 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc A/68/295, para 79.

[46] See also CAT, 'Report of the Committee against Torture Twenty-fifth Session (13–24 November 2000) Twenty-sixth Session (30 April–18 May 2001)' UN Doc A/56/44, para 82(c).

[47] CAT/C/51/4 (n 41) para 54; See also GA, 'Body of Principles' (n 10) Principle 33(3) calling for confidentiality 'if so requested by the complainant'; Istanbul Protocol (n 23); GA, 'United Nations Rules for

boxes in appropriate areas. Complaints should only be accessed by persons who can ensure confidentiality and should not be filtered by staff who have control over detainees.[48] The prohibition of punishment and duty to protect from reprisals is especially important to ensure the accessibility of complaints mechanisms and is therefore explicitly mentioned in Article 13 (see below).[49] Complaints mechanisms must be *made known and accessible to the public and persons deprived of liberty through wide publication and display in all places of detention*.[50] Accessibility should be ensured by means such as telephone hotlines or confidential complaints boxes in detention facilities.[51] In Georgia, for example the Committee against Torture appreciated the existence of a twenty-four-hour hotline for torture-related complaints and stressed the importance of disseminating information about its availability.[52]

22 Victims should receive *adequate assistance* to bring forward complaints, notably professionally qualified legal advice and assistance.[53] Where they lack the necessary resources to make complaints, they should be provided with adequate legal aid and should be granted access to all relevant evidence or information concerning the acts of torture or ill-treatment.[54] In *Mounir Hammouche v Tunisia* the State refused to provide a copy of the autopsy report and denied access to the results of an investigation, both of which had been allegedly issued regarding the death of the torture victim. As an investigation was allegedly already under way, Tunisia has precluded the possibility of any criminal action to be brought by the family thus violating Article 13.[55]

23 *Specific measures* should be taken for persons in a situation of vulnerability, including those with limited communication abilities.[56] The complaints mechanisms should be appropriately adapted to be accessible to people with particular needs, such as juveniles and persons with psychosocial and/or learning disabilities. Appropriate measures include the possibility of being assisted by a person or body that can help them to understand and exercise their rights,[57] providing information in written, oral, easy-to read-formats, Braille, sign languages, displaying it prominently in all places of deprivation of liberty, and, with regards to indigent persons providing them with writing material, envelopes, and postage free of charge.[58] The positive measures should take into account gender aspects, ensuring that victims of sexual and gender-based violence are able to bring forward their complaints.[59]

24 The Committee encourages States to provide and to make publicly accessible *statistics* on the number of complaints, investigations, prosecutions, and the results of such proceedings of alleged perpetrators of acts of torture or ill-treatment within law

the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders', Res 65/229 of 21 December 2010 (Bangkok Rules) Rule 57(2), see also Rule 25(1); OPCAT, Art 21.

[48] See CPT, Twenty-seventh General Report (n 11) para 84

[49] See also Rec(2006)2 on the European Prison Rules (n 27) para 70.4.

[50] See CAT/C/NLD/CO/5-6 (n 44) para 22; CAT/C/DEU/CO/5 (n 44) para 18 a; CAT/C/ALB/CO/2 (n 43) para 20 a.

[51] CAT/C/51/4 (n 42) para 54.

[52] CAT, 'Conclusions and Observations: Georgia' (2006) UN Doc CAT/C/GEO/CO/3, para 8.

[53] GA Res 53/144 of 8 March 1999, Annex Art 9, para 3 lit.c; cf also Rec(2006)2 on the European Prison Rules (n 28) para 70.7.

[54] CAT/C/GC/3 (n 5) para 30.

[55] *Bendib v Algeria*, No 376/2009 (n 8) para 6.6.

[56] CAT/C/GC/3 (n 5) paras 23, 29; CAT/C/51/4 (n 42) para 54.

[57] CPT, Twenty-seventh General Report (n 11) para 83; CAT/C/GC/3 (n 5) para 23.

[58] SRT (Méndez) A/68/295 (n 45) para 79; CPT, Twenty-seventh General Report (n 11) para 82.

[59] CAT/C/GC/3 (n 5) para 33.

enforcement, police, military, and prison staff.[60] For that purpose it recommends setting up a centralized public register of all complaints launched, including information 'on the corresponding investigations, trials and criminal and/or disciplinary penalties imposed'[61] and on means of redress, including compensation and rehabilitation provided to the victims.[62] In some cases, the Committee also recommended that this information should specify details, such as the sex, age, ethnicity, and (alleged) crime of the complainant and/or which authority conducted the investigation following the complaint.[63] Such data collection has the purpose to assist in and facilitate the monitoring of the implementation of the Convention.[64]

3.2 Meaning of 'promptly and impartially examined by competent authorities'

25 While *ex officio* investigations under Article 12 depend on the existence of a 'reasonable ground to believe' that an act of torture or ill-treatment has been committed, the duty to investigate under Article 13 is triggered by the mere allegation by a victim.[65] This does, of course, not preclude the quick closure of such an investigation if it appears, on the basis of reliable facts, that the complaint is fabricated or clearly unfounded.[66] But, as a minimum, the competent authorities shall hear the complainant and enable a doctor to examine him or her.[67]

26 All complaints about torture shall be examined and investigated promptly and impartially by competent authorities. As mentioned above the Committee has rarely considered a violation of Article 13 separately from Article 12. Since the standards of investigations seem to be the same as under Article 12, reference may be made to the relevant chapters.[68] Equal to Article 12, Article 13 does not specify what is understood by '*competent authorities*'.[69] However, this should be understood broadly to include detention authorities, higher authorities, or where necessary authorities vested with reviewing or remedial powers.[70] The Committee emphasized that victims should have the possibility to access both internal mechanism as well as independent external mechanisms such as Ombudspersons, prison inspectors, independent police complaints bodies, special prosecutors or judges, administrative courts, and non-governmental organizations.[71]

[60] CAT, 'Consideration of reports submitted by States parties under article 19 of the Convention: Turkey' (2011) CAT/C/TUR/CO/3, para 18; CAT 'Consideration of reports submitted by States parties under article 19 of the Convention: Cuba' (2012) CAT/C/CUB/CO/2, para 16; CAT/C/DJI/CO/1 (n 42) para 15; CAT, 'Concluding Observations: Gabon'(2013) UN Doc CAT/C/GAB/CO/1, para 26; CAT 'Consideration of reports submitted by States parties under article 19 of the Convention: Mauritius' (2011) CAT/C/MUS/CO/3, para 21; CAT/C/ALB/CO/2 (n 44) para 28.

[61] See also CAT/C/51/4 (n 42) para 53; CAT 'Concluding Observations: Estonia' (2013) CAT/C/EST/CO/5, para 20; CAT 'Concluding Observations: Bolivia' (2013) CAT/C/BOL/CO/2, para 10; CAT/C/PRT/CO/5-6 (n 41) para 10.

[62] CAT/C/ALB/CO/2 (n 44) para 28.

[63] CAT/C/DJI/CO/1 (n 42) para 15; CAT/C/NLD/CO/5-6 (n 44) para 30.

[64] cf CAT/C/NLD/CO/5-6 (n 45) para 30.

[65] See Ingelse (n 37) 367 with references to the practice of the Committee.

[66] See Burgers and Danelius (n 39) 145.

[67] see also Ingelse (n 37) 367 and CAT/C/SR.203, para 38.

[68] See above Art 12,§§ 30ff.

[69] *Blanco Abad v Spain*, No 59/1996 (n 21) para 8.6.

[70] See GA, 'Body of Principles' (n 10) Principle 33(1).

[71] See eg CAT, 'Concluding Observations: Bosnia and Herzegovina' (2005) UN Doc CAT/C/BIH/CO/1, para 19; CAT, 'Concluding Observations: Kazakhstan' (2008) UN Doc CAT/C/KAZ/CO/2, para 23; Mandela Rules (n 10) Rule 56(2) and (3); see also Essex Paper 3: Initial Guidance on the Interpretation and

27 The former UNSRT Juan Méndez has criticized that in many States complaints mechanisms lack *independence and effectiveness* as they are not 'sufficiently detached from the authority alleged to have perpetrated the ill-treatment to be deemed impartial'.[72] Also Manfred Nowak at the end of his mandate as UNSRT concluded that 'most complaints mechanisms are marred by an "impenetrable wall of conflicting interests" and lack of independence.'[73] In the case *Slobodan and Ljiljana Nikolić v Serbia and Montenegro* the Committee found a violation of Article 13 due to the failure of the national courts to examine the case impartially. It argued that they based their decision to dismiss the complaint 'exclusively on evidence that had been challenged by the complainants and which, according to them, was flawed by numerous inconsistencies' without addressing these arguments.[74]

28 The Committee and UNSRT generally recommend the establishment of *independent complaints mechanisms*.[75] The Committee calls for the establishment and adequate financing of *National Human Rights Institutions* that handle complaints.[76] Their advantage is their accessibility and semi-formal character while their disadvantage is that they cannot hand down a binding and enforceable decision but merely a recommendation. Consequently, a recent comparative study found that they have little impact on the prevention of torture unless they are organically linked to judicial investigation and prosecution.[77] As independent human rights institutions such as Ombuds-institutions or monitoring commissions usually lack full powers of criminal investigations, former UNSRT Manfred Nowak has recommended the establishment of a truly independent 'police-police' as they may be in a better position to collect the necessary evidence.[78] Few countries have specialized police complaints commissions or ombudsmen, entities completely independent and separate from the police mandated to receive complaints and carry out investigation *ex officio*.[79]

28 If a complaint is rejected, reasons should be provided to the complainant and he or she should consequently have the *right to review* to an independent authority.[80] The

Implementation of the UN Nelson Mandela Rules 118; UNODC, *Handbook of Police Accountability, Oversight and Integrity* (United Nations 2011) 34.

[72] SRT (Méndez) A/68/295 (n 45) paras 76, 77.

[73] SRT (Nowak), A/HRC/13/39/Add.5 (n 12) para 122.

[74] *Slobodan Nikolic and Ljiljana Nikolic v Serbia and Montenegro*, No 174/2000, UN Doc CAT/C/35/D/174/2000, 24 November 2005, para 6.6.

[75] 'independent police complaint mechanism': 'Concluding Observations: Turkey' (2011) UN Doc CAT/C/TUR/CO/3 (n 60) para 8; 'fully resourced, effective, independent and accessible mechanism to investigate and facilitate the submission of complaints by victims and witnesses of torture and ill-treatment to public authorities': 'Concluding Observations: Tajikistan' (2013) UN Doc CAT/C/TJK/CO/2 (n 32) para 15; 'independent and impartial institution': 'Concluding Observations: Kenya' (2013) UN Doc CAT/C/KEN/CO/2 (n 33) para 22; CAT, 'Concluding Observations: Turkmenistan' (2011) UN Doc CAT/C/TKM/CO/1, para 11; CAT/C/51/4 (n 42) para 56.

[76] CAT/C/TKM/CO/1 (n 77) para 12; CAT, 'Concluding Observations: Slovenia' (2011) UN Doc CAT/C/SVN/CO/3, para 11.

[77] Carver, 88 ff; CPT, Twenty-seventh General Report (n 11) para 71.

[78] SRT (Nowak), A/HRC/13/39/Add.5, para 149 (n 12); for a more detailed discussion on investigation mechanisms see above Art 12 § 51.

[79] eg the Independent Office for Police Conduct (formerly the Independent Police Complaints Commission) for England and Wales, the Police Ombudsman for Northern Ireland, the Independent Police Complaints Board in Hungary, the Norwegian Bureau for the Investigation of Police Affairs, Committee P Belgium, Garda Síochána Ombudsman Commission in Ireland—see above Art 12 § 56.

[80] See Mandela Rules (n 10) Rule 56(3); GA, 'Body of Principles' (n 10) Principle 33(1); Rec(2006)2 on the European Prison Rules (n 28) para 70.3.

Committee stated that a lack of action on the part of the victim could not excuse failings by the State party in the investigation of accusations of torture.[81] Even less should a complainant's political activity impede the consideration of the complaint.[82]

29 The victim also has the *right to be informed of the outcome of the complaint* within an appropriate timeframe, whether an investigation was initiated and at what stage it stands.[83] In several cases the Committee found that Article 13 had been violated because the State did not inform the victims of the results of the investigation and this effectively prevented them from privately initiating a prosecution that the prosecuting authority representing the state has failed to pursue ('private prosecution').[84]

3.3 Meaning of 'protected against all ill-treatment or intimidation'

30 Since both victims and witnesses of an act of torture or ill-treatment are often afraid to complain and respectively provide evidence, the right to complain and the corresponding State obligation to investigate necessarily imply the obligation of States to *protect complainants and witnesses against such reprisals*. This is particularly important for *detainees*. The original Swedish draft had contained the phrase 'without threat of further torture or other cruel, inhuman or degrading treatment or punishment'. Despite the proposal by *Austria* and *Denmark* to delete this phrase, it was strengthened in the revised Swedish draft by a separate sentence requiring States parties to protect the complainant against 'ill-treatment in consequence of his complaint'. During the discussions in the Working Group in 1980 this sentence was further strengthened by also including the protection of witnesses against ill-treatment and intimidation.[85]

31 Many victims do not believe that making a complaint will have any effect or are afraid of suffering negative consequences. The fear of reprisals is one of the main reasons for the few complaints lodged in so many countries.[86] Effectively fighting against impunity presupposes a functioning criminal justice system. Victim and witness protection are an important element of such a system and thus a precondition for justice.[87]

32 The Committee has made clear that 'reprisals constitute a form of cruel treatment or punishment under article 16 of the Convention and may amount to torture in certain circumstances.'[88] Article 13 speaks of '*ill-treatment or intimidation*'. Thus, complainants

[81] *Blanco Abad v Spain*, No 59/1996 (n 21) para 8.7.

[82] *Thabti v Tunisia*, No 187/2001, UN Doc CAT/C/31/D/187/2001, 14 November 2003, para 7.3.

[83] *Salem v Tunisia*, No 269/2005, UN Doc CAT/C/39/D/269/2005, 7 November 2007, para 16.7; *Saadia Ali v Tunisia*, No 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008, para 15.7; *Evloev v Kazakhstan*, No 441/2010 (n 7) para 9.6; *Slyusar v Ukraine*, No 353/2008 (n 7) para 9.3; CoE, 'Eradicating Impunity for Serious Human Rights Violations: Guidelines and Reference Text' (2011) H/Inf (2011) 7, VII No 2.

[84] *Osmani v Republic of Serbia*, No 261/2005, UN Doc CAT/C/42/D/261/2005, 8 May 2009, para 10.7; *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002, UN Doc CAT/C/33/D/207/2002, 24 November 2004, para 5.4; *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000, UN Doc CAT/C/35/D/172/2000, 16 November 2005, para 7.3; *Dimitrov v Serbia and Montenegro*, No 171/2000 (n 24) para 7.2; *Dzemajl et al v Yugoslavia*, No 161/2000, UN Doc CAT/C/29/D/161/2000, 21 November 2002, para 9.5.

[85] See above § 2.

[86] See CAT, 'Concluding Observations: Cameroon' (2010) UN Doc CAT/C/CMR/CO/4, para 20; CAT, 'Concluding Observations: Congo' (2015) CAT/C/COG/CO/1, para 15.

[87] SR (de Greiff) 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence' (2014) UN Doc A/HRC/30/42, para 117.

[88] CAT, 'Guidelines on the receipt and handling of allegations of reprisals against individuals and organizations cooperating with the Committee against Torture under articles 13, 19, 20 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc CAT/C/55/2.

and victims also have to be protected from treatment falling below the threshold of ill-treatment. In the case *Ennâma Asfari v Morocco* the Committee found 'threats following the complaint filed' sufficient to constitute a violation of Article 13.[89] The Committee has moreover expressed concern that victims declined to file a complaint against the police out of fear of counter-complaints by the police or other forms of reprisals.[90]

33 In the case *Alexander Gerasimov v Kazakhstan* the Committee declared the State to have violated its obligation to protect the complainant from threats and attempts of bribery made by law enforcement to the complainant and his family during the investigations with the aim to withdraw his complaint. These included inter alia threatening to reopen an earlier investigation, to carry out a psychiatric evaluation to determine incapacity to perceive the circumstances relevant to the case, and threats of retaliation against the family. The Committee also took into account the UNSRT's report on the existence of a pattern and practice of intimidation in the country.[91]

34 Although Article 13 only speaks of victims and witnesses, the Committee has also raised concerns about *harassment and intimidation of other actors* such as journalists, lawyers, medical experts, and human rights defenders who report torture or ill-treatment.[92] In the case of *Ennâma Asfari v Morocco* the Committee noted that the arrest and expulsion of the complainant's lawyer constituted a violation of Article 13 due to his representation in connection with the denunciation of torture.[93] Equally in the case *Déogratias Niyonzima v Burundi*, the Committee found the threats to the complainant and his family as well as the arrest of his lawyer violated Article 13.[94]

35 *Reprisals for those who cooperate with the UN* on human rights has received increased attention over the last years and efforts to put an end to this are lead by the highest level in the UN.[95] In 2013, the Committee made a statement on reprisals and designated rapporteurs to follow up on any such allegations.[96] Further, in 2015, both the Committee and the SPT adopted guidelines on the receipt and handling of allegations of reprisals against individuals and organizations cooperating with them.[97] In the same year the chairs of ten UN treaty bodies met to condemn intimidation and reprisals against individuals and groups who cooperate with the expert committees and endorsed protection and prevention guidelines. The Guidelines against Intimidation or Reprisals (San José Guidelines) set out approaches and actions and preventive measures for the Treaty Body System.[98]

[89] *Asfari v Morocco*, No 606/2014, UN Doc CAT/C/59/D/606/2014, 15 November 2016, para 13.5.

[90] CAT/C/DEU/CO/5 (n 45) para 18.

[91] *Gerasimov v Kazakhstan*, No 433/2010, UN Doc CAT/C/48/D/433/2010, 24 May 2012, paras 5.4, 5.10, 8.8, 12.6.

[92] CAT/C/TJK/CO/2 (n 32) para 15; CAT/C/MDA/CO/2 (n 34) para 19 d.

[93] *Asfari v Morocco*, No 606/2014 (n 89) para 13.5.

[94] *Niyonzima v Burundi*, No 514/2012 (n 8) para 8.5.

[95] In October 2016, the Secretary General designated the Assistant Secretary-General for human rights to lead the efforts within the United Nations system to address acts of intimidation or reprisal against those who seek to cooperate, cooperate or have cooperated with the United Nations on human rights. See https://www.ohchr.org/EN/Issues/Reprisals/Pages/ReprisalsIndex.aspx accessed 3 December 2017.

[96] CAT, 'Statement of the Committee' (2013) UN Doc CAT/C/51/3.

[97] CAT/C/55/2 (n 96); UN Subcommittee on Prevention of Torture (SPT), Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate (2016) UN Doc CAT/OP/6/Rev.1.

[98] 'Guidelines against Intimidation or Reprisals' ('San José Guidelines') (2015) UN Doc HRI/MC/2015/6.

36 The Committee has regularly criticized the lack of victim and witness protection in law and practice and called for States to take adequate measures.[99] Article 13 requires that '*steps shall be taken*' by States parties to ensure victim and witness protection without further elaborating on what this means. Recommended steps are to suspend the suspected officials from duty and to ensure that they have no involvement in the investigation and no contact with the witnesses, the victim, or the victim's family, moving the person who made the complaint to a safe location, change of identity, providing on-site security, hotlines, and judicial orders of protection to prevent violence and harassment against complainants, witnesses, or close associates of such parties, or to assign special personnel to victims and witnesses and to arrange for regular examinations by doctors in places of detention.[100]

37 The Committee emphasized the importance of investigating all reports of intimidation of witnesses and setting up an *appropriate protective mechanism*.[101] The ICTY, ICTR, and ICC have developed extensive programmes for the protection of victims and witnesses that may be used as a model for States in order to protect victims and witnesses of torture.[102] For instance, according to Article 43(6) of the Rome Statute of the ICC:

> The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

MORITZ BIRK

[99] CAT, 'Report of the Committee against Torture Thirty-ninth Session (5–23 November 2007)' (2008) UN Doc A/63/44, paras 32 (10), 37(6) (d), 40(12).

[100] CAT/C/51/4 (n 42) para 55; CAT, 'Concluding Observations: Bosnia and Herzegovina' (2011) UN Doc CAT/C/BIH/CO/2-5, para 17; see also Istanbul Protocol (n 24) paras 80, 95; Mandela Rules (n 10) Rule 71(3); Redress, Report 'Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action' (2009) 30 ff; APT, 'Guide on Anti-Torture Legislation' (2016) 39; Burgers and Danelius (n 39) 146; Lena Wendland, 'A Handbook on State Obligations under the UN Convention against Torture' (APT 2002) 53 < https://www.apt.ch/content/files_res/A%20Handbook%20on%20State%20Obligations%20under%20the%20UN%20CAT.pdf > accessed 3 Decemeber 2017.

[101] CAT, 'Conclusions and Recommendations: Peru' (2006) UN Doc CAT/C/PER/CO/4, para 20; see also CAT, 'Conclusions and Recommendations: Sri Lanka' (2005) UN Doc CAT/C/LKA/CO/2, para 15; see also CAT/C/KEN/CO/2 (n 33) para 21; CAT, 'Concluding Observations: The Philippines' (2009) UN Doc CAT/C/PHL/CO/2, para 21.

[102] See eg ICTY, Statute of the Tribunal, Art 22; ICTY Rules of Procedure and Evidence, as amended 8 July 2015, Rules 69 and 75; see also ICTR, Rules of Procedure, Rule 34; ICC, Rome Statute, Art 43(6).

Article 14

Right of Torture Victims to Adequate Remedy and Reparation

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

1. Introduction 371

2. Travaux Préparatoires 371

2.1 Chronology of Draft Texts 371

2.2 Analysis of Working Group Discussions 372

2.3 Reservations, Declarations, and Understandings 377

3. Issues of Interpretation 378

3.1 Scope of Application 378

3.1.1 The Conceptual Evolution of the Terms 378

3.1.2 Personal Scope of Application 379

3.1.2.1 The Meaning of the Term 'Victim' 379

3.1.2.2 The Recognition of 'Indirect Victims' 381

3.1.2.3 Rights of Dependants in the Case of the Death of the Victim 384

3.1.3 Interpretation of the Savings Clause in Article 14(2) 385

3.1.4 Applicability of Article 14 to Cruel, Inhuman or Degrading Treatment or Punishment 386

3.2 Procedural Obligations 388

3.2.1 Recognition of Victim Status and Victim Participation in Proceedings 388

3.2.2 Investigation as Precondition for Other Forms of Reparation? 391

3.2.3 Obligation to Set Up a Specific Legal and Institutional Framework for Redress 394

3.2.4 Reparation Mechanisms in the Context of Transitional Justice Processes 398

3.2.5 Universal Civil Jurisdiction for Torture 399

3.2.6 Reparations for Victims of the 'War on Terror' 404

3.3 Substantive Obligations 405

3.3.1 Meaning of 'fair and adequate' Reparations 405

3.3.2 Restitution 407

3.3.3 Compensation 408

3.3.4 Rehabilitation 410

3.3.5 Satisfaction and the Right to Truth 412

3.3.6 Guarantees of Non-Repetition 414

3.3.7 Adequate Care, Protection, and First Aid Measures Pending Proceedings 415

1. Introduction

1 Article 14 aims at restoring victims' dignity and preventing the reoccurrence of acts in contravention of the Convention in the future through the provision of full redress. The right to a remedy and to reparations enshrined in Article 14 is closely interrelated with a number of other provisions of the Convention. Articles 4 to 9, concerned with bringing the perpetrators to justice under criminal law, are linked to reparations in that they provide victims with a sense of satisfaction and justice and contribute to protecting their right to know the truth. Equally, prompt, effective, and impartial investigations into allegations of torture as required by Article 12 constitute a basic remedy, as well as the impartial and effective complaints mechanisms required by Article 13. Full redress can only be obtained if the obligations under Articles 12 and 13 are met. Therefore, a failure of States parties to undertake prompt and impartial investigations whenever reasonable grounds exist that an act of torture or other forms of ill-treatment has been committed also violates Article 14.

2 Although Article 14 speaks of 'redress' and 'compensation', the contemporary terminology, as laid down in General Comment No 3 of 2012 and the *UN 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* refers to the right to redress as comprising the procedural notion of an effective remedy and the substantive notion of reparation.

3 When providing redress, States parties have to adopt a victim-centred, gender-sensitive, and non-discriminatory approach and ensure that victims can participate in judicial or administrative proceedings, and that the outcome of redress procedures is tailored to their specific needs. National legislations must comprise specific provisions on the right to redress for victims of torture and other forms of ill-treatment as well as accessible procedures and mechanisms that guarantee an effective implementation of this right. Full redress includes five forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The provision of financial compensation as sole measure is insufficient to meet States parties' obligations under Article 14. States parties must ensure as full rehabilitation as possible to torture victims, including medical and psychological care as well as legal and social services.

2. Traveaux Préparatoires

2.1 Chronology of Draft Texts

4 *Declaration (9 December 1975)*[1]

Article 11

> Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law.

[1] GA Res 30/3452 of 9 December 1975.

5 *IAPL Draft (15 January 1978)*[2]

Article IV

The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture, and in particular, to ensure that:

(e) any victim of torture is afforded adequate and proper redress and compensation;

6 *Original Swedish Draft (18 January 1978)*[3]

Article 12

Each State Party shall guarantee an enforceable right to compensation to the victim of an act of torture or other cruel, inhuman or degrading treatment or punishment committed by or at the instigation of its public officials. In the event of the death of the victim, his relatives or other successors shall be entitled to enforce this right to compensation.

7 *Revised Swedish Draft (19 February 1979)*[4]

Article 14

(1) Each State Party shall ensure that the victim of an act of torture has an enforceable right to compensation. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

(2) Nothing in this Article shall affect any other right to compensation which may exist under national law.

2.2 Analysis of Working Group Discussions

8 Commenting on Article 12 of the draft Swedish Convention,[5] *Austria* considered that the right to compensation should be 'as comprehensive as possible'[6]. According to the delegation, in the event of death of the victim an enforceable right of any relatives to compensation with respect to alimony should be limited to cases where the victim was legally obliged to pay such alimony; all other forms of claims for compensation—with the exception of those of a purely personal nature—should be open to his heirs as successors. The *United States* proposed that the text of Article 12 be redrafted as follows in order to clarify the group of people who may enforce the victim's right to compensation in the event of his death by substituting 'heirs, dependants, or successors' for 'relatives or other successors':

Each State Party shall take such measures as may be necessary to assure an enforceable right to compensation to the victim of an act of torture committed by or with the consent or acquiescence of its public officials. In the event of the death of the victim, his heirs, dependants or successors shall be entitled to enforce this right.

[2] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[3] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[4] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1, para 1.

[5] E/CN.4/1285 (n 3).

[6] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, para 18.

The United States further made clear that in their opinion the right to compensation should be limited to victims of torture.[7]

9 The *United Kingdom* suggested that the word 'relatives' should be replaced by the word 'dependants'.[8] *Barbados* thought that it should be specified whether the State, public official, or individual is liable to pay compensation.[9]

10 In the 1980 Working Group, discussions were held on the basis of the revised Swedish draft text.[10] Various suggestions were made to rephrase the first sentence of paragraph 1. In order to make it more precise, a representative proposed the insertion of the phrase 'in its legal system' after the word 'ensure'. Several representatives felt that in the special case of victims of acts of torture, there was a need to strengthen their right to compensation. They suggested that the phrase 'an enforceable right to compensation' should be replaced by the words 'an enforceable right to fair and adequate compensation'. According to some speakers, the experience of physicians had shown that there were deep physical and psychological *sequelae* to torture long after the acts had been perpetrated. One-time monetary compensation might not suffice to erase these *sequelae* and remedy the damage done. Most representatives agreed with the idea to add the words 'including the means for his rehabilitation' after the word 'compensation' in paragraph 1 of Article 14.

11 Several representatives stated that they had difficulties with the term 'rehabilitation', which they regarded as vague and ambivalent, as, in their view, this term might encompass a variety of meanings of a juridical, sociological, and medical nature. An alternative, suggested by one representative, was to add the words 'including medical measures required by his physical and mental state of health'. One delegate drew the attention of the Working Group to the term 'rehabilitation' as used in GA Resolution 34/154 on the International Year of Disabled Persons of 17 December 1979 and proposed that the word 'rehabilitation' should be interpreted in the way that it was understood in that resolution. Several delegates opposed any reference to GA Resolution 34/154 in the text of the Convention for the reason that it was not good legal practice to incorporate a non-binding resolution in an international treaty that imposes binding legal obligations upon States. The Group considered it necessary to put the term 'rehabilitation' in square brackets and to revert to it at a later stage of the discussion in order to reach a common understanding. Some representatives felt that there was a need to extend the scope of the provision concerning persons who, in the event of the death of the victim as a result of an act of torture, shall be entitled to compensation. Reference was made to the case of a friend or neighbour helping a tortured person and giving him financial assistance before he died. One delegate proposed that the words 'or any other person designated by national law' should be added after the word 'dependants'.

12 The Working Group agreed that paragraph 2 of Article 14 should be redrafted as follows: 'Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.'

[7] ibid.

[8] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1, para 4.

[9] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights' (1979) UN Doc E/CN.4/1314/Add.4.

[10] Report of the Working Group of the Commission on Human Rights (1980) UN Doc E/CN.4/1367, paras 13–14.

13 One delegate who, in the early discussions, had reserved his position on Article 14, subsequently withdrew his reservation. Therefore Article 14 as amended was adopted as follows:

1. Each State Party shall ensure in its legal system that the victim of an act of torture be redressed and have an enforceable right to fair and adequate compensation including the means for his [rehabilitation]. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.
2. Nothing in this Article shall affect any other right of the victim or other persons to compensation which may exist under national law.

14 It was proposed that a reference be made to Article 14 in the text of Article 16(1) with the effect of extending the scope of Article 14 to include compensation for victims not only of torture but also of cruel, inhuman or degrading treatment or punishment. The proposed text of Article 16(1) with a reference to Article 14 enclosed in square brackets appeared as follows:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not constitute torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles [3], 10, 11, 12,13, [14] and [15] shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.[11]

15 During the 1981 Working Group the discussion on Article 14 was mainly concerned with the word '*rehabilitation*' between square brackets. The Group decided to qualify that word by adopting the expression 'for as full rehabilitation as possible'. The Group also decided to place the words '*dans son système juridique*', in the French text, after the word '*garantit*'. In addition, a proposal by the *Netherlands* to insert the words 'committed in any territory under its jurisdiction' after the word 'torture' was adopted by the Group.[12] However, this phrase disappeared from the text and neither the *travaux* nor the commentary provide any insight as to why it was deleted.[13]

16 The Working Group adopted Article 14, as thus revised, by consensus; it now read as follows:

1. Each State Party shall ensure in its legal system that the victim of an act of torture committed in any territory under its jurisdiction be redressed and have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any other right of the victim or other persons to compensation which may exist under national law.

17 The *Indian* delegation asked that reference be made in the report to the reservation concerning Article 14 which it had entered the previous year.

[11] ibid, para 87; see also below Art 16, 3.2.

[12] J Herman Burgers and Hans 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) 17.

[13] See Kate Parlett, 'Universal Jurisdiction for Torture' (2007) 4 EHRLR 385–403.

18 Debate on the scope of the proposed Article 16 and in particular its reference to Article 14 continued in the 1981 Working Group. Some delegates were of the opinion that no reference should be made to Article 14. After discussion, the Working Group decided to retain the reference to Article 14, between square brackets. Article 16(1) and (2) was adopted.

19 The 1982 Working Group considered Article 14, provisionally agreed to in the previous year, and decided to retain it as it stood. One delegation asked that reference be made in the report to the reservation concerning Article 14 which it had entered at the two previous sessions.[14]

20 As regards the reference to Article 14 in Article 16(1) regarding compensation some speakers, referring to Article 11 of the Declaration, favoured a reference on the grounds that victims of cruel, inhuman or degrading treatment or punishment may have a legitimate claim to compensation. Other representatives did not feel that extension of the scope of their compensation laws to an ill-defined field to include all such treatments would be warranted. Since no consensus could be reached, the Group decided to revert to this question at a later stage.[15] No consensus was possible either at the 1983 Working Group.

21 It was not possible during the pre-sessional meetings to the 1984 Working Group to reach agreement on the question of including a reference to Article 14 in Article 16(1). Inclusion was firmly opposed by the delegations of the *United Kingdom* and the *United States*. Most non-Western delegations participating in the Working Group had no strong preference for including or excluding a reference to Article 14 in Article 16(1).[16] Several delegates expressed themselves in favour of including the reference to Article 14 in Article 16(1) while other speakers opposed the reference, fearing that the concept of cruel, inhuman or degrading treatment was too imprecise as a basis for an enforceable right to compensation and might lead to difficulties of interpretation and possible abuses. While one representative suggested that the Working Group might try again to agree on a definition of this concept, others, who were in favour of including the reference, expressed the opinion that a definition was not necessary and that each country would develop its own case law on this matter. *India* again asked that reference be made in the report to the general reservation concerning Article 14 which her delegation had entered at the previous session.

22 The representative of *Spain* proposed the inclusion of references to Articles 3, 14, and 15 in Article 16(1), in order for the mechanism of protection to be in harmony with the title of the Convention itself which included 'other cruel, inhuman or degrading treatment or punishment', arguing that if reference to these three Articles was not acceptable to the Working Group, then the second sentence of paragraph 1 should be deleted. One other representative also proposed the deletion of the second sentence. In light of the ensuing discussion and in view of the fact that some of these issues had been debated in the past, the representative of Spain, in a spirit of compromise, withdrew his proposal.

[14] Report of the Working Group of the Commission on Human Rights (1981) UN Doc E/CN.4/L.1576, para 44; Report of the Commission on Human Rights on its 36th Session (1980) UN Doc E/CN.4/1408, para 206.

[15] Report of the Working Group of the Commission on Human Rights (1982) UN Doc E/CN.4/1982/L.40.

[16] Burgers and Danelius (n 12) 95.

23 The representative of the *USSR*, in an effort to help overcome the difficulties that divided the Western delegations, suggested that the obligation of Article 14 would apply to cruel, inhuman or degrading treatment only in the event that such treatment caused its victims material damage and damage to the health of a person.[17] In other words, this obligation would not apply to 'moral damages'. After further consultations, the Chairman-Rapporteur noted that several delegations which had favoured the inclusion of a reference to Article 14 had now indicated that they would not insist on such a reference if it created an obstacle to reaching agreement on draft Article 16. At its eleventh meeting, the Working Group decided to adopt draft Article 16, limiting the reference in the first paragraph to 'Articles 10, 11, 12 and 13'.

24 The delegations of *Canada* and *Ireland* stated that they had not opposed the adoption of Article 16, but that they wished to see registered in the report that their Governments retained a strong preference for including a reference to Article 14 in this Article. In written comments the representative for Canada outlined that his delegation had made considerable concessions in the Working Group, 'particularly in the matter of compensation for victims of cruel or degrading treatment and that the very definition of torture did not seem to his delegation to go far enough'.[18]

25 The delegation of the *USSR*, drawing attention to the fact that Article 16 was the only provision referring to acts of cruel, inhuman or degrading treatment which did not amount to torture, expressed the view that the provision should have been presented in a more detailed way, with a more precise definition, so that the Article would have a stronger effect. To this end the delegation had proposed reproducing the provisions of other instruments which had binding force for States parties.[19] The delegation, considering it possible to adopt Article 16 without a reference to Article 14, stated that it would not insist on its proposal. However, it emphasized that, if in the course of the further consideration of Article 16 some delegations again raised the question of the necessity of including a reference to Article 14 in Article 16, it would return to its proposal.[20]

26 *Denmark*, referring to its contribution to the UN Voluntary Fund for Victims of Torture, stated that besides financial contributions, it was also necessary to provide medical and social assistance to victims of torture.[21]

27 In written comments *Tonga* reserved its final position with respect to States parties ensuring that the victims not only of torture but also of other acts of cruel, inhuman or degrading treatment or punishment obtain redress and have an enforceable right to fair and adequate compensation.[22]

[17] See proposal E/CN.4/1984/WG.2/WP.5: '1. In the second sentence of paragraph 1 of article 16, delete the words "and [14]"; 2. At the end of the paragraph, add the sentence: "The obligation contained in Article 14 shall apply with the substitution indicated above in the event that such treatment or punishment caused its victim material loss or loss of health"; 3. After the first paragraph, insert a new paragraph: "2. In the determination of acts referred to in paragraph 1 of this article, each State Party shall act in accordance with the relevant international agreements binding on it and its national law"; 4. Paragraph 2 of article 16 should be renumbered as paragraph 3.' Quoted in Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 42.

[18] Summary Record of the 32nd Meeting (1984) of the Commission on Human Rights UN Doc E/CN.4/1984/SR.32, para 14.

[19] Summary Record of the 33rd Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.33, para 11.

[20] E/CN.4/1984/72 (n 17) para 44.

[21] E/CN.4/1984/SR.33 (n 19) paras 53–54.

[22] Report of the Secretary-General (1984) UN Doc A/39/499, para 19.

2.3 Reservations, Declarations, and Understandings

28 Upon accession to the Convention, *Bangladesh* made the following declaration in relation to Article 14: 'The Government of the People's Republic of Bangladesh will apply article 14 para 1 in consonance with the existing laws and legislation in the country.'

29 The *New Zealand* Government sought to limit the scope of Article 14 by making a reservation granting sole discretion in awarding compensation to the Attorney-General: 'The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention Against Torture only at the discretion of the Attorney-General of New Zealand.'

30 Similarly, the *United States* made a reservation to Article 14 to limit the scope of its obligations under Article 14. The United States consented to the provisions of Article 14 subject to the understanding that a State party is obligated to provide a private right of action for damages only 'for those acts of torture committed in territory under the jurisdiction of that State Party'.[23]

31 With regard to the declaration made by *Bangladesh* to Article 14, Finland, France, Spain, and Sweden all formally objected to it on separate occasions in 1999. The Governments alleged that the contents of the declaration made by Bangladesh constituted a reservation as it purported to modify the obligations of Bangladesh under Article 14. Further, it was considered by France, Spain, and Sweden that the declaration of Bangladesh was incompatible with the object and purpose of the Convention, as the provisions relating to the right of victims of acts of torture to obtain redress and compensation were essential factors in the fulfilment of commitments made under the Convention. These objections did not preclude the entry into force of the Convention between Bangladesh and Finland, France, Spain, or Sweden. Rather, the Convention remains operative between the States without Bangladesh benefiting from these reservations.

32 The Secretary-General received communications from *Germany* and the *Netherlands* in the same year also concerning the declaration of Bangladesh. Both States noted that the declaration more accurately constitutes a reservation of a general nature which sought to limit the responsibilities of Bangladesh under Article 14. Both Germany and the Netherlands alleged that such a reservation raised doubts as to the full commitment of Bangladesh to the object and purpose of the Convention. Consequently, Germany and the Netherlands also objected to the declaration made by Bangladesh.

33 Upon ratification of the Convention on 14 March 2016, the Republic of *Fiji* made a reservation declaring that it recognized Article 14 'only to the extent that the right to award compensation to victims of an act of torture shall be subject to the determination of a Court of law'.

[23] 'US Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec S17486-01 (Daily Ed, Oct 27, 1990).' See also the 'Summary and Analysis of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in 'Message from the President of the United States transmitting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', 20 May 1988, 100th Congress, 2nd Session, Treaty Doc 100–20, para 13, according to which: 'The negotiating history of the Convention indicates that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in its territory, not for acts of torture occurring abroad. Article 14 was in fact adopted with express reference to 'the victim of an act of torture *committed in any territory under its jurisdiction*'. The italicized wording appears to have been deleted by mistake. This interpretation is confirmed by the absence of discussion of the issue, since the creation of a 'universal' right to sue would have been as controversial as was the creation of 'universal jurisdiction', if not more so.

3. Issues of Interpretation

3.1 Scope of Application

3.1.1 The Conceptual Evolution of the Terms

34 The meaning of the terms redress, compensation, and rehabilitation has considerably evolved in international law and practice with regard to victims of gross human rights violations in general and victims of torture in particular since the drafting time of the Convention. While Article 11 of the 1975 Declaration[24] and the IAPL draft[25] used the terms 'redress' and 'compensation', the original Swedish draft used only 'compensation'.[26] During the Working Group discussions, many delegations stressed that the right to compensation should be 'as comprehensive as possible'. In the course of the discussions, the right to 'fair and adequate' compensation was added, and since 'one-time monetary compensation might not suffice', it was agreed to add the words 'including the means for as full rehabilitation as possible'. The participants of the Working Group underlined that rehabilitation should be understood as to encompass various measures, including social and medical assistance.

35 In its practice up to 2005, the Committee followed the drafters' intention to expand the right of torture victims to an adequate remedy and reparations beyond monetary forms of compensation both in its State reporting and individual complaints procedures. In one of the leading cases in this respect, *Guridi v Spain*, the victim had been tortured by three members of the Spanish Civil Guard in 1992. Although a Spanish criminal court had in 1997 found all three of them guilty and sentenced them to more than four years imprisonment and to pay compensation of 500,000 pesetas to the complainant, they were later pardoned by the Government and the King. The Committee found a violation not only of Articles 2 and 4, but also of Article 14 in spite of the fact that the Civil Guards had paid the compensation to the victim. It justified this holding by considering that 'compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case'.[27]

36 While not explicitly referenced in its deliberations in the *Guridi* case, the terminology used by the Committee broadly reflects the concepts developed in the UN *Basic Principles,* which were adopted on 16 December 2005 by the General Assembly after many years of drafting in the Sub-Commission and in the Commission.[28] The *Basic Principles* have since been recognized as the general conceptual and legal framework for interpreting the right of victims of torture to an effective remedy and reparations. They lay out a comprehensive concept of 'reparation', which includes the five forms of

[24] GA Res 30/3452 (n 1). [25] E/CN.4/NGO/213 (n 2). [26] E/CN.4/1285 (n 3).

[27] *Kepa Urra Guridi v Spain*, No 212/2002, UN Doc CAT/C/34/D/212/2002, 17 May 2005, para 6.8.

[28] GA Res 60/147 of 16 December 2005 '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' (Basic Principles); see also Theo Van Boven, 'The United Nations 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' (2010) United Nations Audiovisual Library of International Law; Martin Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 NQHR 641.

reparation, namely restitution, compensation, rehabilitation, satisfaction as well as guarantees of non-repetition.

37 In 2012, when formulating General Comment No. 3 on the implementation of Article 14, the Committee seized the opportunity to elaborate on its contemporary understanding of the terms used in the Convention. It considered that the term 'redress' within the scope of Article 14 encompasses the procedural concept of an 'effective remedy' and the substantive concept of 'reparations'.[29] The Committee further recognized that the five forms of 'reparation' outlined in the *Basic Principles* serve as framework for determining the measures required under Article 14 to provide full and effective redress.[30] In relation to the procedural aspect of the term 'redress', General Comment No 3 specifies that in order to guarantee an effective remedy, States parties are under the obligation to enact specific legislation and establish effective and accessible mechanisms capable of determining and awarding redress for victims of torture or other forms of ill-treatment.[31]

38 The specific legal obligations arising from the substantive and procedural elements of the right to redress are examined further below. At this point, it can be noted that Article 14 protects torture victims' right to a procedural and a substantive claim for redress. The protection awarded to victims by the Convention follows thus the standards of international law and practice regarding the right of victims of serious human rights violations to an effective remedy and adequate reparation. This alignment has to be welcomed as Article 14, even though it uses different terminology, constitutes a specific manifestation of the right to an effective remedy laid down in Article 2(3) of the Covenant on Civil and Political Rights (CCPR) and similar provisions in regional human rights treaties.[32]

3.1.2 Personal Scope of Application

3.1.2.1 The Meaning of the Term 'victim'

39 The conceptual evolution of the terms used in Article 14 has also concerned the personal scope of application, namely the question of who is to be considered a 'victim'. With the adoption of General Comment No 3, the Committee has laid out a comprehensive definition of the term 'victim',[33] which is based on the definition contained in the *Basic Principles*.[34] According to the Committee, victims within the meaning of Article 14 are 'persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention.'[35]

40 An important aspect of this definition is the understanding that there are different types of harm or loss which can be inflicted through acts or omissions in violation of the Convention. As torture can leave both long-term physical injury and no physical traces at all, the recognition of the emotional and psychological dimension of suffering as part of the definition of victim is particularly relevant. Moreover, the inclusion of economic

[29] CAT, 'General Comment No 3 on the Implementation of Article 14 by States Parties' (2012) UN Doc CAT/C/GC/3, para 2. In the French translation of General Comment No 3 the terms 'recours utile' (procedural aspect) and 'reparation' (substantive aspect) are used.

[30] ibid, para 6. [31] ibid, para 30. [32] Art 13 ECHR; Art 25 IACHR.

[33] The legal term 'victim' is used by the Committee without prejudice to other terms, such as the term 'survivor' which may be preferable in specific contexts, see CAT/C/GC/3 (n 29) para 3.

[34] Basic Principles (n 28) Principle 8. [35] CAT/C/GC/3 (n 29) para 3.

loss and substantial impairments to the exercise of fundamental rights as particular types of harm takes into account the multiple long-term effects of torture and other forms of ill-treatment not only on the mental and physical health of the victim, but also on their social and professional life, their participation in society, and their capacities to earn a living. The consideration of the different types of harm or loss suffered by victims therefore corresponds with the broad reparative approach encompassed by the term redress as outlined above.[36]

41 The definition of the term 'victim' also recognizes that victims can suffer from different types of harm not only individually but also collectively. The notion of collective or group harm is particularly relevant in cases of serious or massive human rights violations that cause damages not only to the individual directly affected but to the community as a whole.[37] In such contexts, it is important to assess the harm suffered both on the individual and the collective level and ensure meaningful reparation that addresses the different dimensions of harm in an adequate way. In countries undergoing a transitional justice process, reparation policies and programmes are often designed to address collective dimensions of suffering and to reach out to large numbers of victims. While the Committee has recognized the added value of such reparation policies put in place by transitional justice mechanisms, it underlined that they cannot, however, replace the right of the individual victim to an effective judicial remedy, and to an individual assessment of the harm suffered in order to determine adequate reparation measures.[38] In the individual complaint procedure, the Committee has not yet had the occasion to consider the award of collective forms of reparations due to the fact that Article 22(1) CAT grants standing in the individual complaints procedure only to individuals but not to groups.[39]

42 The right to an effective remedy and redress under Article 14 does not only apply to victims of acts in violation of the Convention which can be directly imputed to a State authority or a person acting in official capacity. In line with General Comment No 2, the Committee confirms in General Comment No 3 that the State also bears responsibility for providing access to full and effective redress to victims of acts committed by non-State actors, where the State failed to exercise due diligence to prevent and investigate such acts, and prosecute and punish such non-State actors.[40]

[36] See § 36–38 above.

[37] cf REDRESS, 'Reaching for Justice: The Right to Reparation in the African Human Rights System' (2013) 76 <https://redress.org/wp-content/uploads/2017/12/1310reaching-for-justicefinal.pdf> accessed 1 November 2017.

[38] CAT/C/GC/3 (n 29) para 30. See below §§ 88–90.

[39] Regional Human Rights mechanisms, which provide standing in complaints procedures to individuals and groups of victims, have used the notion of collective reparations to different degrees in their jurisprudence, see eg *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* Comm Nos 279/03 and 296/05 (ACmHPR, 27 May 2009), where the African Commission on Human and Peoples' Rights (ACmHPR) requested *Sudan* to provide individual and collective reparation measures, including the rehabilitation of economic and social infrastructure, the creation of a National Reconciliation Forum as well as the equitable allocation of resources to address the long-term sources of conflict; see also *Plan de Sánchez Massacre v Guatemala,* Reparations, Series C No 116 (IACtHR, 19 November 2004), where the Inter-American Court of Human Rights (IACtHR) requested the Government of *Guatemala* to implement infrastructural measures to the benefit of the affected communities and establish a healthcare center with adequate personnel and conditions for the provision of medical and psychological care for victims.

[40] CAT/C/GC/3 (n 29) para 7; CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 18.

3.1.2.2 The Recognition of 'indirect victims'

43 At the time of the drafting, the notion of victim was limited to those persons directly subject to a violation of the Convention. An important conceptual evolution introduced by the Committee in General Comment No 3 is the broadening of the term 'victim' to include 'affected immediate family members or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization'.[41] The inclusion of both *direct* and *indirect* victims reflects the developments in international human rights jurisprudence and recognizes the effects that torture may have on family members and other third persons in a close relationship with the direct victim.[42]

44 The damages on family members and third persons with a close relationship to the direct victim as a result of acts of torture can take on different forms. In addition to the often traumatizing effects torture leaves not only on the direct victim but on his or her next of kin, family members and dependants may also suffer material and non-material damages when the long-term consequences of torture on the victim affect the social and economic situation of the entire family. In addition, the reactions and attitudes of the authorities vis-à-vis the next of kin of victims of torture, such as threats, denial of access to justice or withholding of information on the whereabouts of the victim, can increase their anguish and distress. This is particularly the case when the authorities fail to carry out effective investigation or otherwise obstruct the efforts of family members to know the truth about the fate of their loved ones.

45 When considering the Committee's broad concept of the victim in the context of Article 14, the question is whether 'indirect victims' can bring reparation claims only

[41] CAT/C/GC/3 (n 29) para 3. The Committee goes beyond the conditional formulation contained in the Basic Principles (Principle 8), which subjects the recognition of immediate family or dependants and other third persons as 'victim' to the conditions 'where appropriate' and 'in accordance with domestic law'. The Basic Principles therefore leave it up to States to consider in which situation an extension of the notion of 'victim' to other persons than the direct victim is envisaged and how the terms 'immediate family' and 'dependants' are defined.

[42] At the ECtHR, applications from close family members or next of kin claiming to be indirect victims of violations of the ECHR are accepted, depending inter alia on the proximity or degree of relationship between direct and indirect victim, the interest which the indirect victim has shown in the proceedings, the conduct of the authorities towards the indirect victim, and whether the indirect victim has witnessed the violation. See ECtHR, 'Practical Guide on Admissibility Criteria' (2014) 14–15 <http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 6 November 2017. The burden of proof on relatives claiming to be indirect victims and requesting recognition as injured party is higher as they have to demonstrate the existence of special factors giving rise to a high intensity of anguish and suffering, see eg *Çakici v Turkey* [GC] ECHR 1999-IV. The IACtHR has established that 'next of kin' of the direct victim who are presumed to have suffered damages amounting to violations of the IACHR as a consequence of the violations against the direct victim can be considered indirect victims. Next of kin are defined as 'immediate family, meaning the direct ascendants and descendants, siblings, spouses or permanent companions, or those identified by the Court' (Rules of Procedures of the IACtHR, Rule 2(16)). The Court has interpreted the concept of the next of kin in a flexible way (including eg grandparents or cousins with a special relationship to the direct victim) and has taken into account indigenous customary law when determining the nature of the relationship between direct and indirect victims, see Diana Contreras-Garduño and Julie Anne Fraser, 'The Identification of Victims before the Inter-American Court of Human Rights and the International Criminal Court and Its Impact on Participation and Reparation: A Domino Effect?' (2014) 7 IAEHR 174. The recognition as 'indirect victims' had an impact on the family members' access to reparation awards, particularly with regard to non-pecuniary damages, see Clara Sandoval-Villalba, 'The Concepts of "Injured Party" and "Victim" of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on Their Implications for Reparations' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill/Nijhoff 2009).

on behalf of the direct victim, or also in their own right with a view to the different types of harm and suffering they have endured. In the early *Punto Final* cases against *Argentina* submitted by relatives of Argentinian citizens, who were tortured to death by the Argentinian military authorities in 1976, the Committee declared the complaints inadmissible *ratione temporis*. It observed, however, in a well know *obiter dictum* that Argentina was 'morally bound to provide a remedy to victims of torture and to their dependants'.[43] In later cases, the Committee accepted standing of close family members to bring complaints on behalf of the victim, such as an elder brother of a Tunisian activist, who allegedly died after being tortured in police detention,[44] or the family members and dependants of a Nigerian refugee, who had died while being held in a Canadian immigration holding centre.[45]

46 In two later cases brought by the parents of the deceased victims, the complainants alleged violations of Article 14 both in relation to the direct victim and in relation to the denial of their own right to redress. In *Ristic v Yugoslavia*, the Committee accepted the communication of the father of the victim, found violations of Articles 12 and 13, but decided in relation to Article 14 that in the absence of proper criminal investigation, it was not possible to determine whether the rights to compensation of the alleged victim or his family had been violated.[46] In *Nikolic v Serbia and Montenegro*, the Committee accepted the communication of both parents of the victim, who had died in the course of an attempt of the police to arrest him. After having found violations of Articles 12 and 13, the Committee decided to postpone its consideration under Article 14 until receipt of the results of an impartial investigation of the circumstances of the death of the complainants' son.[47] In the *Nikolic* case, the complainants explicitly considered themselves as 'indirect victims' and referred in this respect to the ECtHR judgement in the disappearance case of *Kurt v Turkey*, where the Court had awarded compensation for the disappeared son's pain and suffering and the anguish and stress caused to the family of the victim.[48] Even though no violation was found in these two cases, the Committee did not in principle reject the compensation claims of the family members under Article 14 in relation to their own suffering.

47 Another question is whether family members can only raise claims to monetary compensation or also request other forms of reparation. This issue was explicitly addressed by the applicant in the case of *Djamila Bendib v Algeria* concerning the death of

[43] *OR et al v Argentina*, Nos 1/1988, 2/1988, and 3/1988, UN Doc CAT/C/WG/3/DR/1, 2, and 3/1988, 23 November 1989, para 9.

[44] The case of the victim Faisal Baraket, who had allegedly died at the hands of Tunisian authorities, was initially declared inadmissible as the author, a political refugee in France acting as representative of Amnesty International, had not submitted sufficient proof to act on behalf of the victim or his family, see *BM'B v Tunisia*, No 14/1994, UN Doc CAT/C/14/D/14/1994, 5 May 1994. When the author submitted another complaint on behalf of the victim and his family joined by a written authorization of the elder brother of the victim, the Committee declared the communication admissible, despite strong criticism by the Government of Tunisia: see *M'Barek v Tunisia*, No 60/1996, UN Doc CAT/C/23/D/60/1996, 10 November 1999.

[45] *EO Akhidenor et al v Canada*, No 67/1997, UN Doc CAT/C/21/D/67/1997, 17 November 1998. The case was declared inadmissible due to non-exhaustion of domestic remedies, including a pending compensation proceeding lodged by the complainants before Canadian civil courts.

[46] *Ristic v Yugoslavia*, No 113/1998, UN Doc C AT/C/26/D/113/1998, 11 May 2001, para 9.9.

[47] *Nikolić et al v Serbia and Montenegro* [2005] CAT No 174/2000, UN Doc CAT/C/35/D/174/2000, 24 November 2005, paras 8–9.

[48] ibid, with reference to the judgement of the ECtHR in *Kurt v Turkey* App no 15/1997/799/1002 (ECtHR, 25 May 1998).

the complainant's son while being held in pre-trial detention by a branch of the Algerian army's secret service.[49] In this case, the mother of the deceased victim gave a detailed account of the inaction of the prosecution services in response to several requests for initiating a criminal investigation into the circumstances of her son's death, whose body had shown physical signs of severe torture. She had attempted in vain to receive copies of an autopsy and access the results of an internal investigation that had allegedly been carried out by the authorities. Due to the lack of responsiveness by the authorities, the family was without possibility to pursue criminal actions. In relation to Article 14, the complainant argued that by depriving the victim's family of the opportunity to bring legal action under criminal law, the State party had deprived them of the possibility to obtain compensation.[50] In addition, she argued that the obligation of the State to provide reparations was not limited to the provision of monetary compensation for the harm suffered, but that measures guaranteeing the non-repetition of the acts in question should be considered an integral part of the right to redress. Referring to the jurisprudence of the ECtHR and Human Rights Committee, the complainant asserted that the failure to prosecute and punish those responsible for the death of her son constituted a violation of the right of the next of kin of the victim under Article 14.[51]

48 In its consideration of the merits, the Committee found a violation of Article 14 and referred to States parties' obligations under the comprehensive reparative concept to guarantee full redress for all types of harm suffered by providing inter alia compensation, restitution, and measures to guarantee non-repetition.[52] The Committee did not, however, explicitly distinguish in this respect whether the different types of reparation applied in relation to the victim or also to the complainant in her own right. Nevertheless, in the request for follow-up measures, the Committee not only urged the State party to initiate impartial investigation into the case and ensure that those responsible are brought to justice, but also to provide the family of the deceased with a copy of the autopsy and to ensure that the complainant receives comprehensive and effective reparation.[53] The Committee thus confirmed that other than monetary forms of reparation were in this case applicable to the mother of the deceased victim in her own right.

49 In the disappearance case of *Colmenarez and Sanchez v Venezuela*, the Committee accepted a complaint by the wife and the father of M Guerreo Larez, who had disappeared while serving a prison sentence in the Venezuelan General Penitentiary.[54] According to information received by the complainants through unofficial channels, the victim had been tortured, dismembered, and buried by other inmates. In addition to the issues raised by the complainants under Articles 2, 11, and 14, the Committee also considered the case in relation to Article 12 in light of the failure by the authorities to initiate prompt, effective, and impartial investigation almost six years after Mr. Guerrero Larez's disappearance. It also examined the complaint under Article 16 in relation to the treatment of the complainants by the authorities in their search to ascertain the whereabouts and fate of their husband and son and to obtain justice.[55] The Committee found a violation of

[49] *Djamila Bendib v Algeria*, No 376/2009, UN Doc CAT/C/51/D/376/2009, 8 November 2013.

[50] According to the complainant, Algerian law required the deferral of civil court judgments on material and immaterial damages until the final determination of the criminal action: ibid, para 3.7.

[51] ibid, para 3.7. [52] ibid, para 6.7. [53] ibid, para 8.

[54] *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011, UN Doc CAT/C/54/D/456/2011, 15 May 2015.

[55] ibid, paras 3.6–3.7.

Article 14 due to the lack of a prompt and impartial investigation, but did not differentiate between the State's obligation to provide redress to the victim and to the complainants respectively.[56] However, it considered that the anguish and distress caused by the enforced disappearance of Mr. Guerrero Larez to the complainants, the indifference of the authorities to their efforts to ascertain his fate, and the refusal to release the bodily remains amounted to a violation of Article 16 of the Convention in relation to the complainants.[57] As follow-up measures, the Committee requested the State party, inter alia, to 'grant compensation and the means for rehabilitation in accordance with the Convention to Mr. Guerrero Larez, if he is still alive, and compensation to the complainants'.[58]

50 While requesting that compensation be awarded to the complainants, the Committee did not mention other forms of reparation as it has done in the *Djamila Bendib* case.[59] A consistent development of the Committee's approach on the right to redress for indirect victims in line with the comprehensive reparative concept set out in General Comment No 3 should also encompass other measures in addition to monetary compensation. In particular, family members and other indirect victims should be granted redress in the form of measures to establish the truth, receive justice and satisfaction by means of a full criminal investigation capable of leading to the punishment of the perpetrators, as well as other measures aimed at the non-repetition of torture in the future. Family members and other indirect victims should also be provided with economic and social support schemes to address the impact the acts of torture had on the social environment of the victim.[60]

3.1.2.3 Rights of Dependants in the Case of the Death of the Victim

51 The broad notion of 'victim' developed by the Committee in General Comment No 3 has to be distinguished from the second sentence of Article 14(1), which stipulates that in the case of death of the victim, 'dependants' are entitled to compensation. While Article 11 of the 1975 Declaration and the IAPL draft only addressed the right of victims of torture to redress, the original Swedish draft already contained the right to compensation of the relatives or other successors in the case of death of the victim. Various States supported this approach.[61] The *Austrian* delegation proposed to limit the scope of the second sentence of Article 14(1) to compensation claims with respect to alimony in cases were the victim was legally obliged to pay such alimony. According to the delegation,

[56] ibid, para 6.9.

[57] ibid, para 6.10; the Committee's recognition that enforced disappearance constitutes not only a violation of the Convention in relation to the disappeared person, but may also constitute a form of torture or inhuman treatment in relation to the person's family is consistent with the jurisprudence of the Human Rights Committee (HRC) and regional courts, cf *Maria del Carmen Almeida de Quinteros v Uruguay*, No 107/1981 UN Doc CCPR/C/OP/2, 21 July 1983, paras 13–14; *Kurt v Turkey* (n 48); *Blake v Guatemala (merits)*, Series C No 48 (IACtHR, 24 January 1998) para 116; see also the Working Group on Enforced or Involuntary Disappearances, 'General Comment on the Right to the Truth in Relation to Enforced Disappearance' (2010) Report of the Working Group on Enforced or Involuntary Disappearances UN Doc A/HRC/16/48, para 4.

[58] *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011 (n 54) para 8.

[59] *Djamila Bendib v Algeria*, No 376/2009 (n 49).

[60] Compare the progressive jurisprudence of the IACtHR concerning reparation awards to indirect victims in *Cantoral Benavides v Peru*, Reparations and Costs, Series C No 88 (IACtHR, 3 December 2001) where the Court rewarded pecuniary and non-pecuniary damages to family members, satisfaction and guarantees of non-repetition (adaption of national legislation), and rehabilitation measures (university fellowship); see also *Aloeboetoe v Suriname*, Reparations and costs, Series C No 15 (IACtHR, 10 September 1993) where the Court requested that the Government should, inter alia, reopen the school and health centres in the area where the victims' families lived.

[61] See above §11.

all other forms or compensation in the event of the death of the victim should be open to his or her heirs as successors.[62] The *US* delegation preferred to substitute 'heirs, dependants, or successors' for 'relatives or other successors', but the agreement on the single word 'dependants' is based on a *UK* proposal.[63] During the Working Group's deliberations in 1980, some representatives felt that there was a need to extend the scope of this provision concerning persons who, in the event of the death of the victim as a result of an act of torture, shall be entitled to compensation.[64] One delegate proposed that the words 'or any other person designated by law' should be added after the word 'dependants'. Rather than accepting this proposal, the Working Group agreed that a separate paragraph would be added to Article 14 containing a general savings clause.

52 The term 'dependants' in the second sentence of Article 14(1) indicates that third persons, in particular children and others who were economically dependent on the victim at the time of his or her death and who may or may not be his or her legal successor, should be entitled to compensation.[65] This entitlement is based on the notion of a specific economic loss as direct result of the violation committed against the victim (and thus narrower than the qualification of indirect victim as discussed above). Regional jurisprudence has established some criteria for dependants to receive reparation in the form of compensation, such as the regularity of the financial contribution made by the victim to the dependant, whether the nature of the relationship allowed for the presumption that the payments would have continued and whether the contributions had been based on a financial need of the recipient.[66]

3.1.3 Interpretation of the Savings Clause in Article 14(2)

53 The savings clause was not included in Article 11 of the 1975 Declaration or in any of the drafts for Article 14. Its origin goes back to concerns of States in the Working Group relating to the second sentence of Article 14(1). In relation to the proposal of the *Austrian* delegation to limit the right of dependants to compensation to cases where the victim was legally obliged to pay alimony, the *Swedish* Government proposed in its revised draft a second paragraph reading as follows: 'Nothing in this Article shall affect any other right to compensation which may exist under national law'. The Working Group agreed that paragraph 2 of Article 14 should be redrafted in the way it was adopted afterwards.

54 It seems clear from the *travaux préparatoires* that the savings clause was meant to ensure that the specific right of the dependants of a torture victim does not in any way affect other economic claims of the heirs and other legal successors against the victim at the time of his or her death.[67] For example, those children who economically depend on their father at the time of his death may have a claim of alimony under domestic law against the heir or legal successor of their father. The main purpose of the savings clause in Article 14(2) is to ensure that no compensation claim under domestic law in relation to the death of the victim shall be affected by a more narrow interpretation of the second sentence in Article 14(1). One example was provided during the discussions in the Working Group.[68] If a friend, neighbour, or, we might add, a Torture Rehabilitation Centre, has provided

[62] E/CN.4/1314 (n 6) para 83. [63] ibid, para 84. [64] E/CN.4/1367 (n 10) para 79.

[65] The second sentence of Art 14(1) must be distinguished from the general right of close relatives to submit a complaint on behalf of victims who have died, who disappeared or who are not in a position to lodge a complaint on their own.

[66] cf *Aloeboetoe v Suriname*, Series C No 15 (n 60) paras 67–68.

[67] E/CN.4/1367 (n 10) para 74; see also above § 12. [68] ibid, para 79.

assistance to a torture victim, the fact that these persons or institutions do not fall under the term 'dependants' shall not, in any way, restrict their compensation claims against the perpetrator of torture or the respective State and its authorities. Another scope of application of the savings clause in Article 14(2) is the extraterritorial application of the right of torture victims to reparation which will be discussed below.

3.1.4 Applicability of Article 14 to Cruel, Inhuman or Degrading Treatment or Punishment

55 A key question of interpretation in relation to the scope of application of Article 14 is whether the right to a remedy and reparation in the framework of the Convention is limited to victims of torture or extends equally to victims of cruel, inhuman or degrading treatment and punishment (CIDT or other forms of ill-treatment).[69] This issue has been discussed controversially since the drafting of the Convention. A literal interpretation of the wording of the first paragraph suggests that Article 14 applies to victims of torture and their dependants exclusively. However, the wording of Article 14 has to be interpreted in light of Article 16, which stipulates States parties' obligation to prevent forms of ill-treatment other than torture within the meaning of Article 1. The second sentence of Article 16(1) explicitly lists Articles 10 to 13 as provisions likewise applying to acts of CIDT not amounting to torture, but does not refer to Article 14. However, the words 'in particular' introducing this list indicate that the enumeration of Articles 10 to 13 may not be exhaustive. The wording of Article 16 therefore leaves both possibilities open.

56 Also the *travaux préparatoires* are not conclusive as to which interpretation was intended by the drafters. Some States, above all the *United States*, made clear that in their opinion Article 14 should only apply to victims of torture. Other delegations, above all *Spain, Canada*, and *Ireland*, proposed that a reference be made to Article 14 in the text of Article 16(1). In fact, the draft text of Article 16(1) for some time had included an explicit reference to Articles 3, 14, and 15 in square brackets. But in 1984, the Working Group decided to delete the explicit reference to these three provisions, and at the same time to include the words 'in particular'. In other words, the drafters wished to leave this controversial question open for the Committee to decide.

57 The first case in which the Committee had to decide on the matter, *Dzemajl et al v Yugoslavia*, concerned the 1995 pogrom against a Roma settlement by some 200 ethnic Montenegrins, with the police watching without interfering.[70] The Committee found a violation of Article 16(1) by acquiescence and, in the absence of any serious investigation, also violations of Articles 12 and 13. Concerning the alleged violation of Article 14, the Committee came to the conclusion that the scope of application of Article 14 was limited to torture and did not apply to victims of other forms of ill-treatment. In its line of argument, it noted the lack of an explicit reference to Article 14 amongst the Articles enumerated in the first paragraph of Article 16. The Committee considered, however, that the positive obligation contained in the general obligation of States parties to prevent other forms of ill-treatment not amounting to torture (Article 16(1)) included the obligation to grant redress to the victims of such acts. It was therefore of the view that the State party had violated its obligations under Article 16 by failing to enable the complainants to obtain an effective remedy and reparation.[71]

[69] See also below Art 16, 3.2.
[70] *Hajrizi Dzemajl et al v Yugoslavia*, No 161/2000, UN Doc CAT/C/29/D/161/2000, 21 November 2002.
[71] ibid, para 9.6.

58 The Committee took a different view in General Comment No 2 of 2008, when it stated that the wording 'in particular' in Article 16 signals that this reference is not to be limited to those articles, but equally extends to other provisions of the Convention, including Article 14.[72] Four years later, however, in General Comment No 3, the Committee does not restate this line of argument, but simply mentions the applicability of the right to a remedy and reparations to all victims of torture *and* acts of cruel, inhuman and degrading treatment or punishment without specifying how it had arrived at this conclusion.[73]

59 This view is, however, not followed by the Committee in subsequent decisions in the individual complaints procedure as shown in the case of *Sergei Kirsanov v Russia*[74] of 2014. This case concerned a complaint on inhuman conditions of detention in a temporary confinement ward that amounted to a violation of Article 16.[75] Although the complainant in this case was granted compensation, the Committee noted that the award of a symbolic amount of monetary compensation by the civil court was insufficient as the civil court had no jurisdiction to impose any measures on the individuals responsible for the ill-treatment. According to the Committee, the State party had failed to observe its obligations under Article 16 of the Convention by failing to provide the complainant with redress and with fair and adequate compensation.[76] In this case, the Committee used its earlier line of argument (see the case of *Dzemajl et al v Yugoslavia*) by drawing on a violation of the positive obligation to prevent CIDT in the first sentence of Article 16, rather than following the reasoning set forth in the General Comments in favour of the applicability of Article 14 to other forms of ill-treatment below the threshold of torture.

60 Since the Convention as a whole is concerned with prevention, it is the purpose of the second sentence of Article 16(1), as *lex specialis*, to specify which of the other provisions also apply to CIDT. The reasoning of the Committee is, therefore, problematic as it turns this logic of Article 16 as *lex specialis* on its head. As the line of reasoning in General Comment No 2 shows, there are other arguments to arrive at the conclusion that the right to a remedy and reparation also applies to other forms of ill-treatment not amounting to torture. Starting from the text of Article 16, the words 'in particular' in the second sentence must be given their proper meaning. Looking again into the *travaux préparatoires,* it was clear that all the provisions relating to the criminal prosecution of the perpetrators of torture (Articles 4 to 9) would only apply to torture in the narrow sense of Article 1. Only the three provisions which were put in square brackets during the deliberations in the Working Group (Articles 3, 14, and 15) were considered controversial. Moreover, Article 14 can be considered as a special manifestation of Article 2(3) CCPR, which grants all victims of a violation of any of the rights contained in the Covenant, including the prohibition of torture *and* other forms of ill-treatment in Article 7 CCPR, a right to an effective domestic remedy. In light of the fundamental importance of Article 2(3) CCPR for the protection of human rights and its general application to all victims of human rights violations, it is more convincing to argue that victims of other forms of ill-treatment below the threshold of torture equally enjoy the right to a remedy and reparation under Article 14 of the Convention. The words 'in particular' in the second sentence of Article 16(1) should thus be interpreted so as to extending the applicability

[72] CAT/C/GC/2 (n 40) para 3. [73] CAT/C/GC/3 (n 29) para 1.
[74] *Sergei Kirsanov v Russian Federation*, No 478/2011, UN Doc CAT/C/52/D/478/2011, 14 May 2014.
[75] ibid. [76] ibid, para 11.

of other Articles than those explicitly enumerated to victims of CIDT, particularly where the protection thereby afforded is in accordance with established international law and practice.

61 It can therefore be concluded that the Committee, while consistently recognizing the right of victims of CIDT to a remedy and reparations, has used different lines of arguments to arrive at this conclusion. Inconsistencies remain between the Committee's approach adopted in the General Comments and the reasoning followed in the individual complaints procedure as to whether the right of victims of CIDT to a remedy and reparation is based on a positive obligation in Article 16(1) or on the expansion of the scope of application of Article 14 to other forms of ill-treatment. The State reporting procedure shows that in practice the Committee considers regularly whether States parties have fulfilled their obligations to provide full and effective redress under Article 14 both with regard to victims of torture *and* victims of other forms of ill-treatment.[77]

3.2 Procedural Obligations

3.2.1 Recognition of Victim Status and Victim Participation in Proceedings

62 The prerequisite for the exercise of the right to a remedy and reparations enshrined in Article 14 is the official recognition of individuals having been subjected to torture as victims through domestic procedures. This is closely linked to the States parties' obligation to make acts of torture punishable as a criminal offence under national criminal law in accordance with the definition contained in Article 1 of the Convention and the obligations stipulated in Article 4. As the Committee notes in General Comment No 3:

> The failure of States parties to enact legislation that clearly incorporates their obligations under the Convention and criminalizes torture and ill-treatment, and the resulting absences of torture and ill-treatment as criminal offences, obstructs the victim's capacity to access and enjoy his or her rights guaranteed under article 14.[78]

63 According to the Committee, the recognition of victim status should not be made dependent on whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.[79] Rather, redress procedures must be initiated *ex officio*, when there are reasonable grounds to believe that torture or other forms of ill-treatment has taken place, even in the absence of a complaint.[80] The responsible authorities should

[77] CAT, 'Concluding Observations: Czech Republic' (2012) UN Doc CAT/C/CZE/CO/4-5, para 12 (forced sterilization of Roma women); CAT, 'Concluding Observations: Austria' (2016) UN Doc CAT/C/AUT/CO/6 (in relation to unnecessary surgery and other medical treatment with lifelong consequences).

[78] CAT/C/GC/3 (n 29) para 19. In its concluding observations on the first periodic report of *Djibouti*, the Committee expressed concerns about the fact that it was difficult to provide any redress or fair compensation without a legal definition of torture; consequently, it requested the State party to strengthen its efforts to ensure redress for victims of torture and ill-treatment based on a clear definition of torture in line with Article 1 of the Convention, see CAT, 'Concluding Observations: Djibouti' (2011) UN Doc CAT/C/COG/1, para 18.

[79] CAT/C/GC/3 (n 29) para 3; see also CAT, 'Concluding Observations: Tajikistan' (2013) UN Doc CAT/C/TJK/CO/2, para 21, where the Committee requested the State party to 'provide all victims of torture or ill-treatment with redress, including fair and adequate compensation, and as full rehabilitation as possible regardless of whether perpetrators of such acts have been brought to justice'; see also CAT, 'Concluding Observations: Kenya' (2013) UN Doc CAT/C/KEN/CO/2, para 23.

[80] CAT/C/GC/3 (n 29) para 27; see also CAT, 'Concluding Observations: Albania' (2012) UN Doc CAT/C/ALB/CO/2, para 27, where the Committee criticized that despite the fact that Article 44 of the Albanian Constitution guaranteed compensation to persons who had suffered damages at the hand of State officials, in practice, victims of torture and ill-treatment by police officers had to resort to filing a civil suit for compensation.

therefore act on their own initiative (*proprio motu*) in order to identify potential victims where serious human rights violations are known to have occurred. For example, the Committee criticized the slowness of the proceedings and the limited results of investigations into political crimes known to have been committed during the communist era in *Romania*, which were not followed by the prompt identification of the victims and the provision of redress.[81]

64 In the State reporting procedure, the Committee has also emphasized the importance of the State affording official recognition to survivors of torture as victims. For example, in connection with the well-documented torture and other forms of ill-treatment that occurred during the 1992–95 conflict in the *former Yugoslavia*, the Committee expressed concerns regarding the State party's failure to recognize survivors of torture, including sexual violence, as victims of the conflict, 'a status which would enable them to obtain redress and exercise their right to fair and adequate compensation and rehabilitation'.[82] In its later Concluding Observations on *Bosnia*, the Committee also underlined the importance of enacting national legislation, which clearly defines the status and rights of victims.[83] However, legal provisions which subject the entitlement of victims to redress to the recognition of the offence by the perpetrator are considered by the Committee as violating Article 14.[84]

65 A fundamental aspect of the Committee's *victim-centred approach* to the right to remedy and reparation is the importance it attributes to victim participation in the redress process. As the Committee notes, 'the restoration of the dignity of the victim is the ultimate objective in the provision of redress'.[85] Therefore, procedural measures such as active involvement of victims in reparation proceedings should be designed so as to ensure that they contribute to restoring a sense of agency, autonomy, and respect in the victim. For example, active and meaningful participation of victims in the investigations and during the criminal proceedings can in itself constitute a form of rehabilitation and empowerment of victims and can contribute to a sense of justice.[86]

66 In the State reporting procedure, the Committee has emphasized the importance of allowing victims to participate in criminal proceedings as civil parties.[87] Victims, their

[81] CAT, 'Concluding Observations: Romania' (2015) UN Doc CAT/C/ROU/CO/2, para 19.

[82] CAT, 'Concluding Observations: Bosnia and Herzegovina' (2005) UN Doc CAT/C/BIH/CO/1, para 10(d) & (e).

[83] CAT, 'Concluding Observations: Bosnia' (2011) UN Doc CAT/C/BIH/CO/2-5, para 18.

[84] CAT, 'Concluding Observations: Rwanda' (2012) UN Doc CAT/C/RWA/CO/1, para 22.

[85] CAT/C/GC/3 (n 29) para 4.

[86] On the importance of victim participation in criminal proceedings see Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (Pablo de Greiff) (2014) UN Doc A/HRC/27/56, paras 92–98, who argues for more formalized ways of victim participation in the design of prosecutorial strategies; see also the procedures of the International Criminal Court, which guarantee victims' right to access and participation in the proceedings before the Court, cf International Criminal Court (ICC), 'Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court' <https://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> accessed 6 November 2017; on the European level, the EU Directive on Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime (DIRECTIVE 2012/29/EU of 25 October 2012, para 26 and Chapter III) contains detailed guidance on how to protect the right of victims during criminal proceedings and to ensure that they are treated in a respectful way.

[87] eg in relation to the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), where the Committee noted with satisfaction that victims of torture and other forms of ill-treatment could participate in the proceedings as civil parties: CAT, 'Concluding Observations: Cambodia' (2011) UN Doc CAT/C/KHM/CO/2, para 8.

families, and legal representatives should also be given the possibility of challenging the results of investigations.[88] For example, in relation to the reports about high numbers of extra-judicial executions of opponents of the Government of *Burundi* and the corroborated evidence on the existence of mass graves following the Government's repression of the 2015 protests against President Pierre Nkurunziza's candidature for a third term of office, the Committee requested the State party to ensure that victims' families and their legal representatives were allowed to participate in proceedings as civil parties.[89] It also considered that the family members of victims should be given the possibility to request the presence of a physician of their choice during the forensic examination and the autopsy after the exhumation of mass graves and that they be given a reasonable possibility of recovering the body after the investigation.[90]

67 The *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* affirms that judicial and administrative processes must be responsive to the needs of victims by, inter alia, informing victims of their role and the scope, timing, and progress of the proceedings and of the disposition of their cases, by allowing the views and concerns of victims to be presented and considered, and by providing assistance to victims throughout the legal process.[91] The CAT Committee equally underlines that procedures for victim participation need to take into account the specific vulnerability of victims and avoid re-victimization and renewed exposure to trauma or stigmatization through adequate protection of privacy and the provision of legal assistance and psychosocial support at all stages of the redress process.[92]

68 The Committee has put a particular emphasis on States parties' obligation to guarantee victim and witness protection against intimidation and retaliation due to their involvement in judicial proceedings.[93] For example, the Committee was concerned about the reported cases of intimidation against witnesses and of attempts at bribery by perpetrators in *Bosnia and Herzegovina*.[94] It requested the State party to ensure that witnesses and victims are effectively protected and to prevent perpetrators from exercising influence over protection mechanisms or otherwise pressuring or threatening victims to withdraw their testimony.[95] To this effect, it urged the Government of *Bosnia and Herzegovina* to ensure that the Department for Witness Protection of the State Investigation and Protection Agency respects the right to privacy of the survivors and provides witnesses

[88] CAT, 'Concluding Observations: Cyprus' (2014) UN Doc CAT/C/CYP/CO/4, para 21 (relatives of missing persons were not given the opportunity to challenge the acts or omissions of the investigating authorities in court).

[89] CAT, 'Concluding Observations on the Special Report of Burundi Requested under Article 19 (1)' (2016) UN Doc CAT/C/BDI/CO/2/Add.1, para 8.

[90] ibid, para 9.

[91] GA Res 40/34 of 29 November 1985 (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power) para 6.

[92] CAT/C/GC/3 (n 29) para 21; see also CAT, 'Concluding Observations: Turkmenistan' (2011) UN Doc CAT/C/TKM/CO/1, para 21.

[93] See eg CAT, 'Concluding Observations: China' (2016) UN Doc CAT/C/CHN/CO/5, para 54 d); CAT, 'Concluding Observations: Mauritania' (2013) UN Doc CAT/C/MRT/CO/1, para 19; CAT, 'Concluding Observations: Kyrgyzstan' (2013) UN Doc CAT/C/KGZ/CO/2, para 22. In the individual complaints procedure, the Committee frequently requests interim measures urging States parties to refrain from any threats or intimidation against complainants or their families in the context of their submission to the Committee, see eg *Déogratias Niyonzima v Burundi*, No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014.

[94] CAT/C/BIH/CO/2-5 (n 83) para 17; see also CAT, 'Concluding Observations: Sri Lanka' (2011) UN Doc CAT/C/LKA/CO/3-4, para 19.

[95] CAT/C/BIH/CO/2-5 (n 83) para 17; CAT/C/LKA/CO/3-4 (n 94) para 19.

at serious risk with long-term or permanent protection measures, including offering the option of changing their identity or relocating them.[96] According to the Committee, the Department should also give more attention to the psychological needs of witnesses in order to minimize possible re-traumatization and ensure that witnesses have appropriate means to travel to and from the court and providing escorts for their travel.[97]

69 Meaningful participation of victims in the design and implementation of the redress process is also important with regard to the substantive aspects of the right to a remedy and reparation, namely to ensure that reparation awards are fair and adequate by responding to victims needs in relation to the harm suffered.[98]

3.2.2 Investigation as Precondition for other Forms of Reparation?

70 One of the central questions of interpretation in relation to the procedural aspect of the right to a remedy and reparation is the relation of Article 14 to the obligations of States parties to undertake prompt, effective and impartial investigation into allegations of torture as required by Article 12 and to ensure that impartial and effective complaints mechanisms are established as required by Article 13. The Committee notes in this respect in General Comment No 3 that 'full redress cannot be obtained if the obligations under Articles 12 and 13 are not guaranteed'.[99] This statement must be interpreted both from a substantive and a procedural point of view.

71 As will be discussed in more detail below, effective criminal proceedings resulting in the prosecution and punishment of perpetrators and setting a clear signal against impunity are in themselves an important substantive element of reparation as they provide satisfaction and a sense of justice to victims and their families.[100] Moreover, effective and impartial complaints mechanisms capable of carrying out prompt and thorough investigations are a prerequisite for ensuring victims' right to know the truth. The full enjoyment of the substantive elements of the right to redress guaranteed under Article 14 therefore essentially hinges on States parties' fulfilment of their obligations under Articles 12 and 13.

72 From a procedural point of view, experience shows that in practice, the availability, accessibility and effectiveness of reparation proceedings depend in the majority of cases de facto on the effectiveness of the preceding (criminal) investigations. In other words, without prompt, thorough and impartial investigations, the right of victims to obtain full and effective redress remains mostly ineffective. The Committee has established this link between Articles 12, 13 and 14 early on in the individual complaints procedure. But its approach on whether to proceed automatically to a finding of a violation of Article 14 in the absence of effective investigation has been dependent on the circumstances of the case.

73 In the two complaints *Ristić v Yugoslavia* and *Nikolić v Serbia and Montenegro* brought by family members of victims who had died during police arrest, the Committee

[96] CAT/C/BIH/CO/2-5 (n 83) para 17(a). [97] ibid, para 17(b)(c).

[98] cf OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Reparations Programmes' (2008) HR/PUB/08/1 15–16; the Report of the Independent Expert to Update the Set of Principles and to Combat Impunity (Diane Orentlicher), 'Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity' (2005) UN Doc E/CN.4/2005/102/Add.1, Principle 32. On the importance of women's participation in reparation processes to ensure gender-sensitive reparations; cf Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences (Rashida Manjoo) (2010) Un Doc A/HRC/14/22, paras 29, 32.

[99] CAT/C/GC/3 (n 29) para 23. [100] See below §§ 128ff.

noted that the facts surrounding the circumstances of the death of the victims were contested as witness testimonies, autopsy reports and forensic examinations yielded contradictory results.[101] While it found violations of Articles 12 and 13, it concluded with respect to Article 14 that it was not possible to determine whether the right to redress of the alleged victims or their families had been violated in the absence of conclusive criminal investigations.[102] Along the same lines, the Committee dismissed the claims of the applicants under Article 14 due to 'insufficient elements to make a finding' in several of the early cases against *Tunisia* despite the conclusion that Articles 12 and 13 had been infringed by the State party.[103] While it seems logical in light of the Committee's subsidiary role to defer findings on Article 14 until the facts have been sufficiently clarified by domestic proceedings to determine whether or not the allegations were defamatory, this approach risks leaving the victims' right to redress at the discretion of the authorities' willingness to properly conduct investigations into torture allegations.

74 The risk of insurmountable obstacles to redress due to the inaction of the national authorities or failure to carry out prompt and effective investigations has been considered by the Committee in three early cases against *Serbia and Montenegro*. In these cases, the Committee consistently followed the argument of the complainants that the absence of criminal proceedings had deprived them of the possibility to file a civil law suit for compensation. Given the procedural impediments and the unreasonable delay in domestic proceedings faced by the applicants as a result of the inaction of the authorities, it found a violation of Article 14.[104]

75 In the individual complaints decided since 2005 the Committee has generally adopted the approach that the failure of States parties to proceed to prompt, thorough and impartial investigations whenever reasonable grounds exist that an act of torture has been committed automatically also entails a violation of Article 14.[105] For example, in a number of recent cases against *Burundi* in which the allegations of the complainants were corroborated by clear material evidence, such as medical certificates detailing the physical injuries obtained as a result of torture, the Committee followed the applicants' argument that the failure of the authorities to conduct an effective and impartial investigation violated Article 14.[106] Similarly, the Committee held in two cases against *Algeria*,

[101] See above § 46.

[102] *Ristić v Yugoslavia*, No 113/1998 (n 46) para 9.9; *Nikolić et al v Serbia and Montenegro*, No 174/2000 (n 47) paras 8–9, in the latter case the Committee formally postponed the finding on Art 14 until receipt of the 'results of an impartial investigation of the circumstances of the death of the complainant's son'.

[103] *Ltaief v Tunisia*, No 189/2001, UN Doc CAT/C/31/D/189/2001, 14 November 2002, para 10.8; *Abdelli v Tunisia*, No 188/2001, UN Doc CAT/C/31/D/188/2001, 14 November 2002, para 10.9; *Thabti v Tunisia*, No 187/2001, UN Doc CAT/C/31/D/187/2001, 14 November 2003, para 10.9; see also *M'Barek v Tunisia* No 60/1996 (n 44) para 11.3 ('documents furnished no proof').

[104] *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000, UN Doc CAT/C/35/D/172/2000, 16 November 2005; *Jovica Dimitrov v Serbia and Montenegro*, No 171/2000, UN Doc CAT/C/34/D/171/2000, 3 May 2005; *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002, UN Doc CAT/C/33/D/207/2002, 24 November 2004.

[105] *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012, UN Doc CAT/C/55/D/500/2012, 4 August 2015, para 17.10 (six years' delay in criminal investigations); *Dmytro Slyusar v Ukraine*, No 353/2008, UN Doc CAT/C/47/D/353/2008, 14 November 2011, para 9.3; *Saadia Ali v Tunisia*, No 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008, para 15.8 (length of time elapsed, no information on outcome of investigations); *Ali Ben Salem v Tunisia*, No 269/2005, UN Doc CAT/C/39/D/269/2005, 7 November 2007, para 16.8 (length of time elapsed, no information on outcome of investigations).

[106] *Abdulrahman Kabura v Burundi*, No 549/2013, UN Doc CAT/C/59/D/549/2013, 11 November 2016, para 7.6; *EN v Burundi*, No 578/2013, UN Doc CAT/C/56/D/578/2013, 25 November 2015, para 7.8; *X v Burundi*, No 553/2013, UN Doc CAT/C/55/D/553/2013, 10 August 2015, para 7.8; *Patrice Gahungu*

that in light of the lack of prompt and impartial investigations 'despite the complainant's numerous claims that he was tortured, which were corroborated by a medical certificate and photographs taken on the day after his release'[107] or rather 'despite marks showing on his face during his appearances in court'[108] the State party had also breached Article 14.[109] In some cases, the Committee also based its finding of a violation of Article 14 on the fact that in addition to the failure to carry out prompt and effective investigations, the State party had failed to provide any medical assistance and rehabilitation measures to the complainants, who continued to suffer from long-term physical and psychological consequences.[110]

76 From this case law, it can be concluded that where the complainant submits sufficient evidence to corroborate his or her allegation of torture, the finding of violations of Articles 12 and 13 usually leads the Committee to conclude that the complainant's right to redress has also been breached. In the inversion of the argument, where the Committee is of the opinion that the complainant has not submitted sufficient information to substantiate his or her claim, the Committee does not find a violation of Article 14 even if it concludes that the State party has failed to fulfil its obligations under Articles 12 and 13.[111]

77 In some States, victims are not only de facto, but also de jure barred from accessing civil proceedings pending the outcome of criminal prosecutions. The Committee has made it clear that in such cases any undue delays in criminal proceedings automatically constitute a violation of Article 14.[112] The reference cases in this respect concerned several complaints against *Kazakhstan.* The applicants in these cases were legally prevented from filing civil law suits for compensation since according to domestic Kazakh legislation, the right to compensation for victims of torture arose only after the conviction of those responsible by a criminal court.[113] The Committee considered that 'notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, civil proceedings and victims' claims for reparation should not be dependent on the conclusion of a criminal proceeding' and that 'compensation should not be delayed until establishment of criminal liability'.[114] It concluded that the delay of those criminal proceedings amounted to a breach of Article 14.[115] The Committee has also considered that other procedural

v Burundi, No 522/2012, UN Doc CAT/C/55/D/522/2012, 10 August 2015, para 7.9; *Saidi Ntahiraja v Burundi*, No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015, para 7.11; *Boniface Ntikarahera v Burundi*, No 503/2012, UN Doc CAT/C/52/D/503/2012, 12 May 2014, para 6.5.

[107] *HB v Algeria*, No 494/2012, UN Doc CAT/C/55/D/494/2012, 6 August 2015, para 6.8.

[108] *Nouar Abdelmalek v Algeria*, No 402/2009, UN Doc CAT/C/52/D/402/2009, 23 May 2014, para 11.8.

[109] Similarly in *Ennaâma Asfari v Morocco*, No 606/2014, UN Doc CAT/C/59/D/606/2014, 15 November 2016, para 13.6.

[110] *Taoufik Elaïba v Tunisia*, No 551/2013, UN Doc CAT/C/57/D/551/2013, 6 May 2016, para 7.7 (the victim suffered from bone fractures and physical pain, hearing impairments, and psychological consequences); *Déogratias Niyonzima v Burundi* No 514/2012 (n 93) para 19 (the victim suffered from persistent pain in the lumbar region and irreversible loss of his sense of smell eight years after the act of torture).

[111] See eg *Oskartz Gallastegi Sodupe v Spain*, No 453/2011, UN Doc CAT/C/48/D/453/2011, 23 May 2012, para 7.5.

[112] CAT/C/GC/3 (n 29) para 26.

[113] *Rasim Bairamov v Kazakhstan*, No 497/2012, UN Doc CAT/C/52/D/497/2012, 14 May 2014; *Oleg Evloev v Kazakhstan*, No 441/2010, UN Doc CAT/C/51/D/441/2010, 5 November 2013; *Alexander Gerasimov v Kazakhstan*, No 433/2010, UN Doc CAT/C/48/D/433/2010, 24 May 2012.

[114] *Rasim Bairamov v Kazakhstan*, No 497/2012 (n 113) para 8.9; *Oleg Evloev v Kazakhstan*, No 441/2010 (n 113) para 9.7; *Alexander Gerasimov v Kazakhstan*, No 433/2010 (n 113) para 12.8.

[115] ibid; similarly also *Djamila Bendib v Algeria*, No 376/2009 (n 49) para 6.7 (deferral of civil court judgment until the final determination of criminal action); see also the Committee's concern regarding Article 417

obstacles to conclusive investigation processes, such as settlements or agreements during the investigation process, amnesties and immunities also pose impermissible obstacles to the victims' right to redress.[116]

78 As a consequence, the Committee has clarified that States parties must put in place the necessary legal and institutional framework to ensure that the right to a remedy and reparation is effectively guaranteed *independently* of criminal remedies.

3.2.3 Obligation to Set Up a Specific Legal and Institutional Framework for Redress

79 Article 14 contains the obligation to set up a legislative, institutional, and political framework for the right to redress of victims of torture. According to the Committee, States parties must put in place *specific legislation*, which ensures that victims of torture and other forms of ill-treatment have access to effective remedies and are guaranteed the right to gain adequate and appropriate redress.[117] The legislation must provide the individual victim with an enforceable right to redress and must stipulate the procedural and institutional framework for its implementation.[118] While the Committee accepts administrative reparation programmes and the award of collective reparations, they cannot replace but only complement the existence of judicial remedies rendering effective the individual right to a remedy and reparation.[119] The legislative framework must also clearly reflect the acknowledgement by the State party that the reparative measures are provided or awarded *in relation* to violations of the Convention.[120]

80 In the State reporting procedure, States parties are frequently criticized for their failure to implement the procedural obligations under Article 14, particularly with regard to the absence of a specific legislative framework guaranteeing an effective right to remedy and reparation to victims of violations of the Convention.[121] In this respect, the Committee routinely notes that general provisions on the right to compensation for injuries in civil or criminal law are insufficient and emphasizes that Article 14 requires States parties to include in their national legislation an *explicit provision* on the right to redress for victims of torture and other forms of ill-treatment.[122] For example, the Committee was concerned that provisions for compensation in *Mongolia* law did not

of the Criminal Procedure Code of Kyrgyzstan, which postponed victims' right to obtain compensation from a civil court until a criminal court has convicted the perpetrator: CAT/C/KGZ/CO/2 (n 93) para 22.

[116] CAT/C/GC/3 (n 29) paras 41–42; see also CAT/C/MRT/CO/1 (n 93) para 19 (compensation of victims foreseen in Amnesty Act not considered an effective remedy); CAT, 'Concluding Observations: Guatemala' (2006) UN Doc CAT/C/GTM/CO/4, para 15 (Committee urges strict implementation of the National Reconciliation Act to exclude amnesties); CAT, 'Concluding Observations: Korea' (2006) UN Doc CAT/C/KOR/CO/2, para 17 (settlements during the investigation process for cases of gender-based violence deprive victims of access to immediate means of redress and protection).

[117] CAT/C/GC/3 (n 29) para 20. [118] ibid, para 38. [119] ibid, para 20.

[120] In the view of the Committee, development measures or humanitarian assistance cannot substitute adequate redress for victims of torture or ill-treatment, as they fail to reflect the 'clear acknowledgement' by the State party, ibid, para 37.

[121] See eg CAT, 'Concluding Observations in the Absence of Its Initial Report: Guinea' (2014) UN Doc CAT/C/GIN/CO/1, para 20; CAT, 'Concluding Observations: Togo' (2012) UN Doc CAT/C/TGO/CO/2, para 18; CAT/C/LKA/CO/3-4 (n 94) para 29.

[122] See eg CAT, 'Concluding Observations: Jordan' (2016) UN Doc CAT/C/JOR/CO/3, para 47; CAT/C/ROU/CO/2 (n 81) para 19; CAT, 'Concluding Observations: Lithuania' (2014) UN Doc CAT/C/LTU/CO/3, para 21; CAT, 'Concluding Observations: Ukraine' (2014) UN Doc CAT/C/UKR/CO/6, para 21; CAT, 'Concluding Observations: Kazakhstan' (2014) UN Doc CAT/C/KAZ/CO/3, para 22; CAT/C/TJK/CO/2 (n 79) para 21; CAT, 'Concluding Observations: Monaco' (2011) UN Doc CAT/C/MCO/CO/4-5, para 12.

specify torture and other forms of ill-treatment as a basis for compensation and requested the State party to review its legal framework accordingly.[123]

81 The specific legislative framework required by Article 14 must be in accordance with the comprehensive reparative concept outlined in General Comment No 3 and include all forms of reparation foreseen therein. For example, while acknowledging the possibility of victims of torture to receive compensation under civil procedures and the Victims of Offences Bill in *Kenya*, the Committee regretted the absence of a comprehensive legal framework, giving effect to all elements of the right to redress, including compensation and medical rehabilitation.[124] Along similar lines, the Committee criticized in relation to *Moldova* that domestic legislation focusing on the right of victims to compensation fell short of the full range of reparation measures, as it did not cover psychosocial treatment and rehabilitation.[125]

82 In addition to putting in place a comprehensive legislative framework, Article 14 requires the creation of *independent redress mechanisms* 'competent to render enforceable final decisions through a procedure established by law'.[126] According to the Committee, such mechanisms should include judicial remedies, irrespective of other available remedies.[127] It also considered that disciplinary or administrative procedures alone without access to judicial review are not sufficient.[128]

83 For redress mechanisms to be effective, information on the procedures to obtain redress should easily be available for all victims, including information on possibilities to obtain assistance and support before, during and after the redress process.[129] In relation to judicial remedies, the Committee considers that States parties should provide adequate legal aid to victims and ensure all other measures to enable victims' full participation in the proceedings, including guaranteeing ready access to all types of evidence.[130] Strict adherence to the principle of non-discrimination and specific measures to facilitate access to redress mechanisms for vulnerable groups are required to render Article 14 effective for all victims of torture.[131] In this respect, the Committee has noted that in many States parties, victims belonging to minority groups or groups made vulnerable by discrimination or marginalization face specific obstacles in obtaining redress.[132] The design of

[123] CAT, 'Concluding Observations: Mongolia' (2011) UN Doc CAT/C/MNG/CO/1, para 17.

[124] CAT/C/KEN/CO/2 (n 79) para 23; similarly in CAT, 'Concluding Observations: Russia' (2012) UN Doc CAT/C/RUS/CO/5, para 20; CAT, 'Concluding Observations: Sierra Leone' (2014) UN Doc CAT/C/SLE/CO/1, para 29.

[125] CAT, 'Concluding Observations: Moldova' (2010) UN Doc CAT/C/MDA/CO/2, para 20.

[126] CAT/C/GC/3 (n 29) para 24. [127] ibid, para 30.

[128] See the findings on Article 14 in the cases against Kazakhstan, *Rasim Bairamov v Kazakhstan*, No 497/2012 (n 113) para 8.9; *Oleg Evloev v Kazakhstan*, No 441/2010 (n 113) para 9.7; *Alexander Gerasimov v Kazakhstan*, No 433/2010 (n 113) para 12.8; see also CAT/C/GC/3 (n 29) para 26.

[129] CAT/C/GC/3 (n 29) para 29. [130] ibid, para 30; see also above § 65.

[131] ibid, para 32.

[132] See eg CAT, 'Concluding Observations: New Zealand' (2015) UN Doc CAT/C/NZL/CO/6, para 19 (in relation to prisoners' access to redress); CAT, 'Concluding Observations: USA' (2014) UN Doc CAT/C/USA/CO/3-5, paras 12 and 14 (in relation to victims of torture overseas and Guantanamo Bay detainees); CAT/C/LTU/CO/3 (n 122) paras 17, 23, and 25 (in relation to asylum seekers; persons who have been involuntarily hospitalized or received involuntary treatment; victims of hazing and ill-treatment in the army); CAT/C/MRT/CO/1 (n 93) para 21 (in relation to victims of contemporary forms of slavery); CAT, 'Concluding Observations: Qatar' (2013) UN Doc CAT/C/QAT/CO/2, para 24 (in relation to migrant workers and persons subject to trafficking); CAT/C/RUS/CO/5 (n 124) (in relation to victims of hazing and minorities subject to race and hate crimes in North Caucasus region); CAT, 'Concluding Observations: Bulgaria' (2011) UN Doc CAT/C/BGR/CO/4-5, para 29 (in relation to persons interned in centres and homes for persons with mental disabilities, including children); CAT, 'Concluding Observations: Germany' (2011) UN Doc CAT/C/DEU/CO/5, para 15 (in relation to victims of trafficking).

redress procedures and mechanisms must therefore be sensitive to the specific needs of persons belonging to such groups in order to avoid exclusion, re-victimization, or stigmatization.[133] Residence in a State party must not be made a requirement for accessing redress mechanisms.[134]

84 Redress mechanisms must also pay particular attention to gender-sensitive approaches and address the specific needs of child survivors of torture or other forms of ill-treatment. For example, procedural requirements and rules of evidence in relation to sexual or gender-based violence must be designed so as to afford equal weight to the testimony of women and girls, prevent the introduction of discriminatory evidence, and protect victims from re-victimization and stigmatization in order to encourage victims to testify and seek redress.[135] Judicial and non-judicial personnel should be specifically trained on gender-sensitive approaches and all personnel involved in the redress process should receive methodological training on how to prevent re-traumatization of victims.[136] In addition, positive measures should take into account the best interest of the child and ensure that the child's right to express his or her views freely is respected during the redress process.[137]

85 In addition to the issues discussed above, the Committee has identified a number of further *procedural obstacles* in its State reporting procedure that impede the full implementation of States parties' obligations under Article 14.[138] For example, it recalled that in light of the 'continued nature of the effects of torture' and the fact that for many victims 'passage of time does not attenuate the harm', redress procedures should not be subject to statutes of limitations.[139] The right of victims to an effective remedy and reparation should be effective regardless of the time elapsed since the act or omission in question and regardless of whether it is attributable to a former regime.[140] Other procedural barriers to redress identified by the Committee concern evidential burdens, such as high standards for proofing and quantifying damages or harm, even when victims are diagnosed with post-traumatic stress disorder,[141] as well as

[133] CAT/C/GC/3 (n 29) para 34; see also CAT/C/ALB/CO/2 (n 80) para 15.

[134] CAT, 'Concluding Observations: Chile' (2009) UN Doc CAT/C/CHL/CO/5, para 25 (in relation to the Chilean diaspora). See also below on the extraterritorial reach of Article 14 § 91ff.

[135] CAT/C/GC/3 (n 29) para 33. [136] ibid, paras 34–35.

[137] ibid, para 36; in the State reporting procedure, the Committee frequently examines the situation of victims of gender-based violence and violence against children in relation to the effectiveness of their right to a remedy and reparation, see eg CAT, 'Concluding Observations: Mozambique' (2013) UN Doc CAT/C/MOZ/CO/1, para 24 (in relation to abuse against girls in schools); CAT, 'Concluding Observations: Senegal' (2013) UN Doc CAT/C/SEN/CO/3, para 15 (in relation to talibé (students in Quran schools) who had been victims of violence and exploitation).

[138] See also the issues listed in CAT/C/GC/3 (n 29) para 38.

[139] CAT, 'Concluding Observations: Denmark' (2016) UN Doc CAT/C/DNK/CO/6-7, paras 16–17 (one-year statutes of limitations on civil claims subsequent to criminal convictions); CAT/C/CHN/CO/5 (n 93) para 57 (claims for redress against the State statute-barred within two years from the day the plaintiff knew or should have known of the damage); CAT, 'Concluding Observations: Serbia' (2015) UN Doc CAT/C/SRB/CO/2, para 13 (claims of redress statute-barred within five years of the event that led to injury or three years from the day of the plaintiff's knowledge of the damage); CAT/C/KEN/CO/2 (n 79) para 23 (one-year limitation for tort claims against Government officials); see also CAT, 'Concluding Observations: Japan' (2013) UN Doc CAT/C/JPN/CO/2, para 18.

[140] CAT/C/GC/3 (n 29) para 40; see also the well-known obiter dictum in *OR et al v Argentina*, Nos 1/1988, 2/1988, and 3/1988 (n 43) para 9, where the Committee urged the Argentinian authorities not to leave victims of the former military regime and their dependants without a remedy.

[141] CAT/C/SRB/CO/2 (n 139) para 13.

financial burdens, arbitrary refusals, and lengthy procedures or undue delays in awarding reparations.[142]

86 States that have adopted specific domestic legislation on the right to remedy and reparation for victims of torture often fail to effectively implement those provisions and ensure that redress mechanisms are fully functional.[143] In some cases, where reparation awards have been granted by national, regional, or international courts, the Committee notes with concern the lacking execution of these awards and recommends the putting in place of coordinated mechanisms for the execution of reparation judgments across borders.[144] A frequently raised concern in the Committee's concluding observations is the lack of sufficient resources, particularly with regard to the provision of holistic rehabilitation programmes, including medical and psychological assistance.[145] In this respect, the Committee underlines that States parties cannot invoke a lack of means to implement the rights under Article 14[146] and that victims' right to redress cannot be made dependent on the availability or retrieval of assets of perpetrators.[147] To ensure that the financial resources for the provision of the full range of redress measures are actually available to victims, the Committee has recommended the establishment of a national fund for torture victims.[148]

87 Finally, the Committee considers that States parties should put in place a comprehensive *monitoring system* 'to oversee, monitor, evaluate and report' on the functioning of domestic redress mechanisms and procedures and the availability of rehabilitation services to victims. In the context of the State reporting procedure, it has often regretted lacking, insufficient or partial information by States parties on the actual implementation of the full range of procedural and substantive obligations under Article 14.[149]

[142] CAT/C/KEN/CO/2 (n 79) para 23; CAT, 'Concluding Observations: The Philippines' (2009) UN Doc CAT/C/PHL/CO/2, para 22; CAT, 'Concluding Observations: Nepal' (2005) UN Doc CAT/C/NPL/CO/2, para 29.

[143] See eg CAT, 'Concluding Observations: Azerbaijan' (2016) UN Doc CAT/C/AZE/CO/4, para 38; CAT, 'Concluding Observations: Colombia' (2015) UN Doc. CAT/C/COL/CO/5, para 22; CAT, 'Concluding Observations: Thailand' (2014) UN Doc CAT/C/THA/CO/1, para 27; CAT, 'Concluding Observations: Burundi' (2014) UN Doc CAT/C/BDI/CO/2, para 18; CAT/C/MOZ/CO/1 (n 137) para 20; CAT, 'Concluding Observations: Uzbekistan' (2013) UN Doc CAT/C/UZB/CO/4, para 20; CAT/C/TKM/CO/1 (n 92) para 21.

[144] CAT/C/GC/3 (n 29) para 38; see also CAT, 'Concluding Observations: Greece' (2012) UN Doc CAT/C/GRC/CO/5-6, para 29 (in relation to the execution of reparation awarded by international supervisory organs and courts).

[145] See eg CAT/C/JOR/CO/3 (n 122) para 48; CAT/C/USA/CO/3-5 (n 132) para 29; CAT/C/KAZ/CO/3 (n 122) para 22; CAT/C/SLE/CO/1 (n 124) para 22; CAT/C/UKR/CO/6 (n 122) para 21; CAT/C/JPN/CO/2 (n 139) para 18; CAT, 'Concluding Observations: Kuwait' (2011) Un Doc CAT/C/KWT/CO/2, para 21.

[146] CAT/C/GC/3 (n 29) para 37.

[147] CAT, 'Report of the Committee Against Torture' (1997) UN Doc A/52/44, para 203.

[148] CAT/C/GC/3 (n 29) para 29; see also CAT, 'Concluding Observations: Cuba' (2012) UN Doc CAT/C/CUB/CO/2n para 24; CAT/C/MDA/CO/2 (n 125) para 20; CAT, 'Concluding Observations: El Salvador' (2009) UN Doc CAT/C/SLV/CO/2, para 15.

[149] For many others see CAT/C/SLE/CO/1 (n 124) para 29; CAT, 'Concluding Observations: Belgium' (2014) UN Doc CAT/C/BEL/CO/3, para 23; CAT/C/QAT/CO/2 (n 132) para 25; CAT, 'Concluding Observations: Gabon' (2013) UN Doc CAT/C/GAB/CO/1, para 23; CAT/C/TJK/CO/2 (n 79) para 21; CAT/C/RUS/CO/5 (n 124) para 20; CAT/C/KHM/CO/2 (n 87) para 26; CAT/C/LKA/CO/3-4 (n 94) para 29; CAT, 'Concluding Observations: Paraguay' (2011) UN Doc CAT/C/PRY/CO/4-6, para 25; CAT, 'Concluding Observations: Ethiopia' (2011) UN Doc CAT/C/ETH/CO/1, para 30; CAT, 'Concluding Observations: Belarus' (2011) UN Doc CAT/C/BLR/CO/4, para 24; CAT, 'Concluding Observations: Yemen' (2010) UN Doc CAT/C/YEM/CO/2/Rev.1, para 27; CAT, 'Concluding Observations: Syria' (2010) UN Doc CAT/C/SYR/CO/1, para 29.

In response, General Comment No 3 contains a detailed set of issues on which States parties are requested to provide statistical and other information, including, inter alia, information on existing or planned legislation and mechanisms to grant redress; legal aid and victim protection measures available; disaggregated data on complaints received, the number and type of reparation measures, including the amount of compensation granted and actually provided; the assistance measures and rehabilitation facilities available; as well as specific actions undertaken to ensure an effective right to redress for marginalized or vulnerable groups, including women and children.[150]

3.2.4 Reparation Mechanisms in the Context of Transitional Justice Processes

88 A number of States parties to the Convention have put in place national reparation programmes or other administrative reparation mechanisms in the context of transitional justice processes to provide redress to large groups of victims of human rights violations in the aftermath of dictatorships or civil war. While generally welcoming such initiatives, the Committee has raised concerns regarding the limited temporal, geographical, and material scope of such reparation programmes and their potential reverse impact on the individual victim's right to a remedy and reparations in accordance with Article 14.

89 For example, the Committee was concerned that the *Peruvian* Central Register of Victims registering victims of the internal armed conflict from 1980 to 2000 could be closed prematurely, potentially leaving some 28,000 outstanding files of victims outside the Economic Reparation Programme and criticized that the programme did not include post-conflict victims of torture.[151] Along similar lines, the Committee expressed concern about the initial temporal limitation of the Guatemalan National Reparations Programme and recommended the programme continue until all victims have received redress. Referring to reports that the mechanism prioritized financial compensation, *Guatemala* was also requested to ensure that all forms of reparation, whether individual or collective were fully implemented.[152] In respect of the Extraordinary Chambers in the Courts of *Cambodia*, on the other hand, the Committee found that the provision of moral and collective reparation was not sufficient and requested the State party to amend the Internal Rules of the Chambers in line with Article 14, in order to include, where appropriate, individual financial compensation.[153]

90 Another concern in relation to reparation programmes in the context of transitional justice processes is that their focus on truth, reconciliation, and closure may potentially contribute to impunity if not accompanied by criminal investigations and prosecutions of perpetrators. While commending the contribution of the *Moroccan* Equity and Reconciliation Commission for determining the truth with regard to the human rights violations that occurred between 1956 and 1999 and its contribution to national reconciliation, the Committee remained concerned as to the limited geographical scope of the Commission's mandate, which left out human rights violations committed in Western Sahara. It also added that the Commission's work may have led to

[150] See the list of reporting issues in CAT/C/GC/3 (n 29) para 46 a)-o); see also CAT, 'Concluding Observations: Netherlands' (2013) UN Doc CAT/C/NLD/CO/5-6, para 24; CAT, 'Concluding Observations: Portugal' (2013) UN Doc CAT/C/PRT/CO/5-6, para 16; CAT/C/RWA/CO/1 (n 84) para 22.

[151] CAT, 'Concluding Observations: Peru' (2013) UN Doc CAT/C/PER/CO/5-6, para 17; see also CAT/C/PRY/CO/4-6 (n 149) para 25.

[152] CAT, 'Concluding Observations: Guatemala' (2013) UN Doc CAT/C/GTM/CO/5-6, para 12.

[153] CAT/C/KHM/CO/2 (n 87) para 27.

de facto impunity of perpetrators since none of them had been prosecuted until its last examination of the situation in 2011.[154] Similarly, in relation to the Truth and Dignity Commission in *Tunisia,* the Committee recommended that complaints of torture received by the Commission are forwarded to an independent investigation authority once its mandate lapses, that perpetrators are brought to justice and that the right of victims to seek judicial remedies for redress should remain effective irrespective of the reparations provided by the Commission.[155]

3.2.5 Universal Civil Jurisdiction for Torture

91 Some provisions of the Convention explicitly apply only to torture which took place within the jurisdiction of the forum State (eg Articels 2(1), 5(1)(a), 11–13, 20(1)), which has been interpreted to imply that all other articles apply also extraterritorially.[156] One of the central questions of interpretation in relation to the obligations under Article 14 is whether it relates to redress for torture which took place within the jurisdiction of a forum State (the State where a case is heard) only, or whether it includes the right to redress also for victims of torture, which took place outside the forum State's territorial or personal jurisdiction.

92 The drafting history sheds little light on the question as to whether Article 14 allows for extraterritorial application. The original Swedish draft contained no express territorial limitation and there was no discussion on the issue in the 1980 Session of the Working Group. A proposal by the *Netherlands* to insert the words 'committed in any territory under its jurisdiction' after the word 'torture' in Article 14 was adopted by the Working Group in 1981 and remained in the draft during the 1982 meeting of the Group.[157] However, this phrase disappeared from the text and neither the *travaux* nor Burger and Danelius[158] provide any insight as to why it was deleted. On the one hand, it could be argued that the removal of the phrase, albeit undocumented, was intended to make clear that the revised version was not territorially limited.[159] On the other hand, it could be contended that the territorial limitation was so obvious that it did not need to be spelt out.

93 Prior to the adoption of the *Basic Principles* in April 2005, the Committee had remained silent when confronted with States' assertions that the provision of remedies and

[154] CAT, 'Concluding Observations: Morocco' (2011) UN Doc CAT/C/MAR/CO/4, para 29.

[155] CAT, 'Concluding Observations: Tunisia' (2016) UN Doc CAT/C/TUN/CO/3, para 38.

[156] Juan E Méndez, 'Brief of Professor Juan E Mendez, UN Special Rapporteur on Torture, as Amicus Curiae on Reargument in Support of Petitioners' in *Esther Kiobel et al v Royal Dutch Shell Petroleum Co et al* [2012] Supreme Court of the United States No 10-1491. See also Christopher Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007) 18(5) EJIL 921.

[157] Burgers and Danelius (n 12) 74. [158] ibid.

[159] According to Byrnes, States parties were unlikely to agree lightly to make their legal systems, including legal aid, rehabilitation facilities, and compensation funds, available to all, and an explicit statement to that effect would be expected if such an obligation were to be imposed. Furthermore, he argues that the presence of the savings clause in Article 14(2) 'would seem to suggest that, at most, the drafters did not wish to preclude States from adopting a universal approach to redress such as that found in the United States' Torture Victim Protection Act (TVPA)'. Byrnes points to the analysis of the provision which accompanied President Reagan's submission of the CAT to the US Senate in 1988 as well as the US understanding entered to Article 14 (which had received no objection from other States at the time) as strong evidence of the view that this was merely a mistaken omission: see Andrew Byrnes, 'Civil Remedies for Torture Committed Abroad: An Obligation under the Convention?' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001) 543.

rehabilitation to victims of extraterritorial torture remained a matter within their discretion.[160] Where States parties provided special rehabilitation services to non-national torture victims, the Committee commended such measures but did not insist on any duty deriving from Article 14 of forum States to provide such services.[161]

94 With the passing of General Comment No 3 in 2012, the Committee clarified that Article 14 contains an obligation of forum States to ensure that all victims of torture and other forms of ill-treatment have access to a remedy and obtain redress, and that this right is not limited to victims who were harmed in the territory of the State party or by nationals of the State party.[162] It noted that this was particularly important when a victim is unable to exercise the rights guaranteed under Article 14 in the territory where the violation took place.[163] The Committee also affirmed that redress should be made available to asylum seekers and refugees.[164]

95 This progressive interpretation of Article 14 is, however, not yet consistently reflected in the Committee's practice in individual complaints procedures. The only communication decided by the Committee, in which the applicant claimed protection under Article 14 by means of universal civil jurisdiction, is the case of *Z v Australia*. The complainant, an Australian citizen, was arrested and tortured in detention in *China* due to her adherence to the Falun Gong movement. The complainant filed a complaint against Chinese officials at Australian courts. The Supreme Court of New South Wales ruled that it lacked jurisdiction over the respondents, and the New South Wales Court of Appeal dismissed the appeal on the grounds that under the Foreign States Immunities Act of 1985, foreign Government officials enjoyed immunity from civil liability for torture. In her complaint to the Committee, the applicant argued that the State party had violated Article 14 of the Convention by failing to provide her with an enforceable right to redress and compensation for torture perpetrated against her in China, and that the application of Article 14 was not limited to acts of torture committed within a State party's territory. She further argued that the immunity provided by the Foreign States Immunities Act of 1985 was inconsistent with the obligations of the forum State under the Convention.[165] While referring to General Comment No 3, the Committee concluded that: '… in the specific circumstances of this case, the State party is unable to establish jurisdiction over

[160] Initial Report of the United States of America (2000) UN Doc CAT/C/28/Add.5, para 268; Second Periodic Report of New Zealand (1997) UN Doc CAT/C/29/Add.4, paras 35–40; Second Periodic Report of Germany (1997) UN Doc CAT/C/29/Add.2, para 39.

[161] Byrnes (n 159) 545. The Committee commended the US on the broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the US, but with an express reference to the savings clause in Article 14(2), see CAT, 'Report of the Committee Against Torture Forty-Third Session (2–20 November 2009) and the Forty-Fourth Session (26 April–14 May 2010)' (2010) UN Doc A/65/44, paras 175–80.

[162] CAT/C/GC/3 (n 29) para 22. [163] ibid.

[164] But consider eg in this respect the jurisprudence of the ECtHR in the case *Naït-Liman v Switzerland*, where the Court did not support an evolving principle of universal civil jurisdiction but upheld the stance Switzerland had taken in national proceedings: Abdennacer Nait-Liman, who had been granted asylum in Switzerland on account of, inter alia, torture experienced in his home country Tunisia, and had been awarded Swiss citizenship, filed a civil suit for compensation from the former Minister of the Interior and the Tunisian State for the damage he suffered. A criminal complaint had failed when the Minister left Switzerland just before the complaint could be followed up with. The Swiss authorities rejected the civil claim because of a lacking link to Switzerland. The ECtHR did not find that Switzerland had thereby violated Art 6 ECHR and ruled that the Swiss courts were entitled to reject the claim due to a lack of established links with Switzerland, albeit with a narrow vote of 4:3. See *Naït-Liman v Switzerland* App no 51357/07 (ECtHR, 21 June 2016).

[165] *Z v Australia*, No 511/2012, UN Doc CAT/C/53/D/511/2012, 26 November 2014, paras 3.1–3.3.

officials of another State for alleged acts committed outside the State party's territory'.[166] Hence, the Committee considered the complainant's claim to redress and compensation inadmissible. The Committee thus seems to accept States parties' discretion regarding the possibility to allow in its domestic legal framework for civil jurisdiction in relation to foreign State officials.

96 The Committee has followed the same approach in the State reporting procedure. Countries which have not incorporated into their legal system mechanisms that facilitate universal civil jurisdiction for torture have not been requested to do so, while some States whose legal framework comprises such mechanisms[167] have received recommendations as to the removal of obstacles to their effective usage. In its Concluding Observations on *Canada*, for example, the Committee recommended that the State party should consider amending the State Immunity Act to ensure access to redress for all victims of torture, wherever the acts of torture occurred and regardless of the nationality of the perpetrator or the victim.[168]

97 The *US* entered a reservation stating that it understood Article 14 to remain subject to territorial limits,[169] despite the fact that the US Alien Tort Claims Act of 1789 allows civil suits under domestic legislation for acts committed outside of US jurisdiction. In the landmark case of *Filártiga*,[170] the Alien Tort Claims Act was used to allow an alien to sue another alien for damages in a US court for injuries caused by violations in international law (the torture and murder of a young Paraguayan who was respectively the son and brother of the plaintiffs). The case was followed by the passing of the US Torture Victims Protection Act (TVPA) in 1991.[171] In the context of litigation against

[166] ibid, para 6.3.

[167] States which allow victims of human rights violations to pursue civil claims for extraterritorial acts independent of criminal procedures include Canada, the UK, and the Netherlands. Examples of court cases include *Ashraf Ahmed El-Hojouj v Harb Amer Derbal et al*, where a Dutch court awarded restitution of 1 M€ to a Palestinian torture victim who had, in a civil suit, sued Libyan officials for acts committed in Libya (see *District Court of The Hague, Ashraf Ahmed El-Hojouj v Harb Amer Derbal et al*, No 400882/HA ZA 11-2252, Judgment of 21 March 2012). See also the case *Kovač el al v Karadčic et al*, where the Tribunal de Grande Instance de Paris ordered the defendants Radovan Karadčic and Biljana Plavsic to pay compensation to a Bosnian family (Tribunal de Grande Instance de Paris (High Court of Paris), *Kovač et al v Karadžic et al*, No 05/10617, Judgment of 14 March 2011) both cases cited in Mendez (n 156) 33–34.

[168] CAT, 'Concluding Observations: Canada (2012) UN Doc. CAT/C/CAN.CO/6, para 15. The Committee's recommendation is a renewed reminder to the forum State of similar observations made subsequent to the 2004 decision in *Bouzari v Islamic Republic of Iran*, in which a Canadian court found that immunity was a bar to a civil suit for torture committed outside the State, see Court of Appeal for Ontario, *Bouzari v Islamic Republic of Iran*, OJ No 2800 Docket No C38295, Judgment of 30 June 2004.

[169] '… it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party': see 'US Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (n 23).

[170] Court of Appeal for the Second Circuit of the United States, *Filártiga v Peña-Irala* [1980] No 191 Docket 79-6090, Judgment of 30 June 1980.

[171] A victim wishing to sue under tort law in the United States faces the difficulty that the defendant must be present on the territory under its jurisdiction. The personal jurisdiction requirement can, however, be fulfilled with 'tag jurisdiction', ie the defendant's temporary presence in the US, or, for corporations, minimum contacts. See Paul Barker, 'Universal Civil Jurisdiction and the Extraterritorial Reach of the Alien Tort Statute: The Case of Kiobel before the United States Supreme Court' (2012) 20 U Miami Int'l & Comp L Rev 1. There are many other legal hurdles, even once jurisdiction is established. Donovan and Roberts point to a study according to which about 80% of human rights cases brought under the Alien Tort Claims Act and Torture Victims Protection Act were (in the last two decades of the twentieth century) dismissed on grounds such as *forum non conveniens*, act of State, sovereign immunity, and other similar bases, see K Lee Boyd, 'Universal Jurisdiction and Structural Reasonableness' (2004) 40 Tex Int'l LJ 1, 2, n 6; cited in Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100(1) AJIL 156.

corporations concomitant in the perpetration of grave human rights violations, the case *Kiobel v Shell*, however, evolved to be a setback for victims of torture seeking redress in US courts.[172] The Supreme Court of the United States in 2013 handed down its ruling that the Alien Tort Statute does not apply to conduct outside of the United States.[173]

98 Given that torture is equally heinous regardless of whether a civil or criminal remedy is in question, allowing universal criminal jurisdiction while denying universal civil jurisdiction is arguably rather illogical. Since forum States have the duty to investigate and prosecute perpetrators of torture of other countries in order to make them accountable for their crimes, it would seem unreasonable if they do not equally have a duty to ensure that the victims of these perpetrators, when present in their jurisdiction, can seek redress and reparation for the crimes committed.[174]

99 Establishing jurisdiction in cases involving universal civil jurisdiction is just the first hurdle: a particular obstacle that may then arise is the problem of *State immunity*. One of the rare domestic cases in which universal civil jurisdiction was accepted in spite of State immunity is the *Ferrini* case.[175] In that case, an Italian national filed a civil action in *Italy* against *Germany* for violations of customary international law on deportation and forced labour during World War II. The Italian Supreme Court found that Germany did not enjoy sovereign immunity for international crimes which are the subject of a peremptory norm[176] and found Mr. Ferrini was entitled to reparations from Germany. Numerous other Italian victims of Nazi war crimes followed suit. In 2012, however, the ICJ ruled that the *Ferrini* judgment had violated Germany's sovereignty and that Germany had legal immunity from jurisdiction by foreign States.[177]

100 Similar setbacks for the legal enforcement of reparation claims of victims are numerous. As we have seen in the case *Z v Australia*, the CAT Committee did not challenge the forum State's invocation of State immunity when dismissing the case.[178] In the of case *Al-Adsani v United Kingdom*, the complainant (who had dual citizenship of the UK and Kuwait and had been tortured in Kuwait by order of a Kuwaiti Sheikh in 1991) had sought compensation against the Sheikh and the State of Kuwait, but the British Court

[172] US Supreme Court, *Kiobel v Royal Dutch Petroleum Co*, 133 SCt 1659, Judgment of 17 April 2013. The Royal Dutch/Shell company was sued in US federal courts by, amongst others, Esther Kiobel, widow of a member of the Movement for the Survival of the Ogoni People (MOSOP). The lawsuit was brought under the Alien Tort Statute and alleged that Shell, through its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC), had been complicit in the commission of, inter alia, widespread and systematic torture committed by the then military Government of Nigeria by providing transportation and company property to be used by the Nigerian military and by thereby supporting their raids against the MOSOP, who led a protest movement against the environmental damage caused by oil extraction in the Ogoni region of Nigeria. The petitioners had later moved to the United States and had been granted political asylum.

[173] ibid 2.

[174] Manfred Nowak, 'Vom Weltstrafrecht Zum Weltzivilrecht Oder Vom Internationalen Strafgerichtshof Zum Internationalen Gerichtshof Für Menschenrechte? Überlegungen Am Beispiel Der Folterbekämpfung' in Buffard et al (eds), *International Law between Universalism and Fragmentation. Festschrift in Honor of Gerhard Hafner* (Koninklijke Brill NV 2008) 685.

[175] Corte di Cassazione Civile Sezioni Unite (Court of Cassation of Italy), *Ferrini v Federal Republic of Germany*, No 5044/2004 of 11 March 2004. See also Andrea Bianchi, 'Ferrini v Federal Republic of Germany' (2005) 99 AJIL 242.

[176] The Court was criticized by some commentators for not drawing a distinction between individual and State crimes. See Andrea Gattini, 'War Crimes and State Immunity in the Ferrini Decision' (2005) 3 JICJ 224, cited in Donovan and Roberts (n 171) 151.

[177] *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*), Judgment, ICJ Reports 2012 99.

[178] See above § 95.

of Appeal had decided to grant immunity to Kuwait on the basis that the circumstances of the case did not constitute an exception to the immunity principle under the terms of the State Immunity Act 1978 (UK). The ECtHR, where *Al-Adsani* initiated proceedings in 1997, rejected the alleged violation of Article 3 ECHR due to a lack of causal connections between the act of torture and acts or omissions of the UK, and also did not find a violation of Article 6(1) ECHR (access to court). The Court argued that it did not find it established 'that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State'.[179]

101 The question of immunity was also considered at some length by British courts in the case *Jones v Saudi Arabia* which was initiated by British nationals who had been imprisoned and subjected to torture in Saudi Arabia. Saudi Arabia denied the allegations and refused to open an investigation into the allegations of torture.[180] The case was adjudicated by the ECtHR in 2014 in *Jones and other v United Kingdom* with regard to the applicants' claim that their right of access to a court was unduly restricted by the judgment of the House of Lords upholding immunity of Saudi State officials. The ECtHR found no violation of Article 6(1) ECHR, arguing that the restriction of the right in the present case pursued a legitimate aim and observed the proportionality principle between means applied and objectives to be achieved.[181] Investigating whether a development in international jurisprudence was discernible concerning the existence of a torture exception to the doctrine of State immunity since its earlier judgment in *Al-Adsani*, the ECtHR considered, inter alia, the judgment of the ICJ on the *Jurisdictional Immunities of the State*,[182] which found that *jus cogens* norms such as the prohibition of torture do not overrule State immunity.[183] The ECtHR did not find the CAT to contain an obligation for States to exercise universal jurisdiction in civil cases[184] and, referring to, inter alia, *Canadian, Australian*, and *US American* case law, diagnosed a lack of international and national jurisprudence establishing a principle of universal civil jurisdiction for torture. It concluded that

> while there is in the Court's view some emerging support in favor of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the bulk of the authority is … to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead … State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity *ratione materiae* in such cases … International opinion on the question may be said to be beginning to evolve, as demonstrated recently by the discussions around the work of the ILC in the criminal sphere. This work is ongoing and further developments can be expected.[185]

102 Hence, while universal civil jurisdiction for torture remains contested terrain, the Committee has in General Comment No 3 considered that Article 14 is not limited

[179] *Al-Adsani v the United Kingdom* [GC] App no 35763/97 (ECtHR, 21 November 2001) para 66.

[180] *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* [2006] UKHL 26.

[181] *Jones and others v United Kingdom* App nos 34356/06 and 40528/06 (ECtHR, 14 January 2014) para 186.

[182] ICJ Reports 2012 99 (n 177).

[183] *Jones and others v United Kingdom* App nos 34356/06 and 40528/06 (n 181) para 198.

[184] 'The question whether that Convention has given rise to universal civil jurisdiction is … far from settled': ibid, para 208.

[185] ibid, para 213.

to territorial application and recommended that States parties ensure that all victims of torture and other forms of ill-treatment are able to access remedy and obtain redress. It is therefore desirable for States parties to adopt national legislation enabling civil universal jurisdiction. If States are serious in wanting to combat torture, State immunity should not be permitted to act as a shield.

103 The obligations of States parties enshrined in Article 14 relate to reparations for all victims of torture and other forms of ill-treatment. In particular, access to rehabilitation programmes should also be open to asylum seekers and refugees.[186]

3.2.6 Reparations for Victims of the 'War on Terror'

104 In the context of access to redress by victims of torture of the *US* global 'War on Terror' and the CIA Rendition, Detention, and Interrogation Program, the Committee with reference to the Guantanamo detainees demanded that '[t]he State party should ensure that all victims of torture are able to access a remedy and obtain redress, wherever acts of torture have occurred, and regardless of the nationality of the perpetrator or the victim'.[187] And it added further:

> While noting the State party's assertion that its legislation provides a wide range of civil remedies for seeking redress in cases of torture at the federal and state levels, the Committee regrets that the delegation only provided limited information about rehabilitation programmes for both domestic and third-country victims and the resources allocated to support such programmes.[188]

105 In the course of the State reporting procedure in 2014, Jens Modvig, the Committee's Rapporteur on the US, inquired with the US delegation how many *Guantanamo* victims of torture had obtained an effective remedy. The US delegation in their responses to the Committee had declared that 'The United States had also recognized that a time of war [and thus the law of war as *lex specialis*] did not suspend the operation of the Convention against Torture which continued to apply'.[189] However, representatives of the US Government also argued before the Committee that in their view, 'it would be anomalous under the law of war to provide individuals detained as enemy belligerents with a judicially enforceable individual right to a claim for monetary compensation against the detaining power for alleged unlawful conduct'.[190] Being an enemy belligerent (which many Guantanamo detainees turned out not to be) does of course not preclude a victim of torture to receive redress and reparation for this illegal conduct since the prohibition of torture is absolute.

106 Litigation in US courts has not proven successful, even after the publication of the SSCI report in 2014,[191] which acknowledged US responsibility for a global secret detention programme subjecting individuals to enforced disappearances, arbitrary detention, torture, and CIDT. However, other States who colluded in the US secret detention programme have provided remedies and reparations to torture victims following court

[186] CAT/C/GC/3 (n 29) para 15.
[187] CAT/C/USA/CO/3-5 (n 132) para 15.
[188] ibid, para 29.
[189] OHCHR, Committee against Torture considers report of the United States, News release (13 November 2014) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15290&LangID=E> accessed 4 November 2017.
[190] Sarah Cleveland, 'The United States and the Torture Convention, Part II: Armed Conflict' 3 <https://www.justsecurity.org/17581/united-states-torture-convention-armed-conflict/> accessed 19 January 2017.
[191] United States and Diane Feinstein, *The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (2014).

cases, views by UN mechanisms, or national inquiries. In 2012, the ECtHR, for example, awarded compensation in *Khaled El-Masri v Macedonia* for the extraordinary rendition, arbitrary detention, and torture suffered,[192] while the lawsuit *El Masri v Tenet* against the former CIA Director George Tenet was dismissed by US courts due to a cited national interest in preserving State secrets.[193]

107 In the prominent case of *Maher Arar* (a Canadian citizen who was detained whilst passing through JF Kennedy airport in New York from where he was transferred to Syria where he was tortured in detention), the Canadian Government, after an official inquiry into its role in the rendition of Maher Arar (an inquiry in which the United States did not cooperate),[194] offered an apology to the victim and a settlement of the victim's claim of $10.5 million. A similar move by the United States has to date not taken place. Litigation failed as *Arar v Ashcroft* was dismissed on national security and foreign policy grounds. In June 2010, the Supreme Court denied review of the case.[195]

108 The Committee demanded, with reference to torture committed overseas that the victims must be provided with effective remedies and redress, including fair and adequate compensation, and as full rehabilitation as possible, in accordance with the Committee's General Comment No 3.[196] It criticized the fact that the State secrecy provisions and immunities had a particular negative effect on detainees of Guantanamo and extraterritorial detention sites as 'the regime applied to these detainees prevents access to an effective remedy and reparations, and hinders investigations into human rights violations by other States …'.[197]

3.3 Substantive Obligations

3.3.1 Meaning of 'fair and adequate' Reparations

109 As has been mentioned above, the substantive scope of the right to redress comprises the five possible forms of reparation set out in the Basic Principles, which are restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. These together form the comprehensive reparative concept required under Article 14 to redress violations of the Convention.[198] While the Convention specifies that compensation must be 'fair and adequate', the Committee has further qualified this formulation by adding that reparation must also be effective, comprehensive, and proportionate to the gravity of the violation committed.[199]

[192] *El-Masri v the Former Yugoslav Republic of Macedonia* [GC] App no 39630/09 (ECtHR, 13 December 2012). Other cases before the ECtHR have been decided in favour of the victim or are still pending. The Governments of the UK, Sweden, and Italy have likewise compensated a number of CIA torture victims. See Global Justice Clinic, New York University School of Law, 'Reparation & Apology: State Responses to Secret Detention and Torture'. Submission to the Inter-American Commission on Human Rights Thematic Hearing on the Human Rights Situation of People Affected by the United States' Rendition, Detention, and Interrogation Program' (23 October 2015) 15.

[193] US Supreme Court, *Khaled El-Masri v the United States of America*, No 06-1613, Judgment of 2 March 2007.

[194] Dennis R O'Connor, *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Report of the Events Relating to Maher Arar: Analysis and Recommendations* (vol 3, Ottawa-Ontario: Privy Council 2006).

[195] See The Rendition Project's website <https://www.therenditionproject.org.uk/prisoners/arar.html> accessed 6 November 2017.

[196] CAT/C/USA/CO/3-5 (n 132) para 12 (c).

[197] ibid, para 15.

[198] CAT/C/GC/3 (n 29) para 2; see also above § 37.

[199] ibid, para 6.

110 Adopting a victim-centred approach is crucial in applying these criteria. What victims perceive as adequate reparation is different in each case and depends, inter alia, on the particular suffering, the social and cultural context, and on the individual sense of justice. Usually, victims of torture are not primarily interested in monetary compensation but in other means of reparation which are better suited to restore their dignity and humanity. Often, a full and impartial investigation of the truth and the recognition of the facts, together with an apology by the responsible individuals and authorities, and full social and health-related rehabilitation seem to provide more satisfaction to the victim than monetary compensation. The Committee therefore reminds States parties that redress measures must be tailored to the particular needs of the victim and take into consideration the specificities and circumstances of their particular case.[200]

111 The design of specific reparation measures for individual victims must give due regard to the situation and needs of persons belonging to groups made vulnerable such as LGBTI persons,[201] victims of human trafficking,[202] or migrant workers[203] amongst many others. For example, in determining the harm suffered by victims of torture or other forms of ill-treatment belonging to vulnerable groups, it is important to consider the potentially differential impact violations may have on these victims due to the higher risk of exposure to violence and discrimination as well as their specific social or identity related needs. The Committee also draws attention to the fact that procedures for quantifying damages can have a negative disparate effect on such victims due to the formal and informal obstacles they may face in accessing and keeping money.[204] In relation to the specific social or identity related needs that vulnerable or marginalized groups may have, the Committee considers that 'culturally sensitive collective reparation measures shall be available for groups with shared identity, such as minority groups, indigenous groups, and others'.[205]

112 Adopting a gender-sensitive approach to the determination of harm and the design of reparations is important to capture the gender-specific impact of torture and other forms of ill-treatment, including the social, cultural, and economic consequences of stigmatization and multiple victimizations. For example, the harm suffered as a consequence of rape or other forms of sexual violence is usually compounded with negative social consequences for the victims, such as stigmatization and ostracism with subsequent loss of status, the possibility to marry, or loss of access to communal resources.[206] The gender-sensitive formulation of reparation requires thus going beyond the assessment of physical and psychological harm and needs to take into account the specific social, economic, and cultural impact on the victims and their families. In addition, it has to be considered that different types of reparation may have a disparate effect on men and women, and that women may be disfavoured by certain forms of reparation in the context of discriminatory rules in relation to land ownership, inheritance, or property rights.

[200] ibid. [201] CAT/C/CHN/CO/5 (n 93) para 55.

[202] In the case of Senegal, where the Committee identified a continued situation of trafficking in persons, particularly for forced labor and sexual exploitation, the State party was requested to 'take effective measures to eliminate trafficking in persons and afford greater protection to victims. It should also devote more resources to prosecuting and punishing the perpetrators and providing legal, medical and psychological assistance to the victims': CAT/C/SEN/CO/3 (n 137) para 16; see also CAT/C/TJK/CO/2 (n 79) para 21.

[203] CAT, 'Concluding Observations: Qatar' (2006) UN Doc CAT/C/QAT/CO/1, para 24.

[204] CAT/C/GC/3 (n 29) para 39. [205] ibid, para 32. [206] A/HRC/14/22 (n 98) para 45.

113 Reparation must not only be tailored to the specific needs of the victim but also specific to the act of the violation, which must be acknowledged as such by the State party concerned. The Committee considers that general improvements of the human rights situation, development measures, or humanitarian assistance cannot be evoked by States parties as substitutes for redress measures to victims of torture or ill-treatment as they do not entail an express recognition of State responsibility for the violations of the Convention.[207] However, it has to be borne in mind that reparation is not a concept exclusively oriented towards remedying past violations. On the contrary, as the Committee notes, the concept of reparation carries an inherent preventive and deterrent effect in relation to the prevention of the recurrence of future violations.[208] This forward-looking element of reparations is particularly important to address the root causes of violations in contexts of structural inequalities and violence. As the UN Special Rapporteur on Violence against Women has noted, individual violations often feed into 'patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization'.[209] Such patterns have to be addressed by designing reparations in a way that they link the right to redress on the individual level with 'structural transformation'.[210]

3.3.2 Restitution

114 Restitution as a form of redress is aimed at restoring the victim to the original situation before the violation of the Convention was committed.[211] Since torture usually leaves indelible traces on the victim, *restitutio in integrum* (restoration of an injured party to the situation which would have prevailed had no injury been sustained) will in most cases not be possible.[212] The Committee acknowledges that '[i]n certain cases, the victim may consider that restitution is not possible due to the nature of the violation; however, the State shall provide the victim with full access to redress'.[213] In other words, where restitution is not deemed an acceptable form of reparation, other reparative measures must be provided. Depending on the circumstances, the re-establishment of the victim's situation prior to the violation can, however, be addressed partially by restoring the victim's living conditions. The Basic Principles lay down that restitutions includes inter alia 'restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property'.[214]

115 Restitution is particular problematic where it means returning the victim to a context where he or she is likely to suffer from re-victimization or where underlying patterns of discrimination prevent the victim from fully enjoying his or her rights. This is, for example, the case for victims of sexual and gender-based violence, for whom the restitution of identity, family life, and active participation in social and economic activities may require measures targeting the wider community and underlying cultural and structural patterns reinforcing stigmatization, ostracism, and exclusion.[215] The Committee has addressed this risk by recognizing that for restitution to be effective 'efforts should be made

[207] CAT/C/GC/3 (n 29) para 37. [208] ibid, para 6. [209] A/HRC/14/22 (n 98) para 24.
[210] ibid. [211] CAT/C/GC/3 (n 29) para 8; see also Basic Principles (n 28) para 19.
[212] The ICJ held that restitution is a form of reparation which might not be applicable in the case of grave human rights violations, eg in the case of genocide, see *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgement, ICJ Reports 2007 43.
[213] CAT/C/GC/3 (n 29) para 8. [214] Basic Principles (n 28) para 19.
[215] A/HRC/14/22 (n 98) paras 50–52.

to address any structural causes of the violation …'.[216] The transformative element that restitution requires in such contexts in order to address pre-existing structural inequalities is closely linked to the reparative measures guaranteeing non-repetition, which are discussed below.

116 In order to restore the life of the victim as much as possible to the situation that would have prevailed without the violation, the Inter-American Court of Human Rights (IACtHR) introduced the concept of a 'life plan' to the deliberations on adequate reparations. In *Cantoral Benavides v Peru*, the IACtHR awarded an education scholarship to the torture victim in order to restore his 'life plan' and his opportunity to learn a profession of his choosing. The Court did not explicitly define this as restitution measure but listed it under 'other forms of reparation'.[217] In the case of *Loayza Tamayo v Peru*, the IACtHR explained that the concept of a life plan 'is akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself'.[218] It therefore declared the claim seeking reparation for the loss of options that the wrongful acts caused to the victim as admissible and argued that '[t]he reparation is thus closer to what it should be in order to satisfy the exigencies of justice: complete redress of the wrongful injury. In other words, it more closely approximates the ideal of *restitutio in integrum*.'[219]

3.3.3 Compensation

117 Compensation is the most common form of reparation awarded to victims of human rights violations for financial claims in relation to the injuries incurred. While the original Swedish draft of the Convention only referred to the right to compensation, the Working Group discussed that one-time monetary payments were not sufficient to address the long-term physical and psychological consequences of torture and agreed to add the words 'including the means for as full rehabilitation as possible'. A literal interpretation of this formulation may suggest that Article 14 is exclusively concerned with monetary forms of reparation, including the (long-term) financial means to cover expenses for rehabilitation.

118 However, the Basic Principles situated compensation within the comprehensive reparative approach as one specific form of reparation relating to the economically assessable dimensions of (material and moral) damages, to be distinguished from other forms of reparation such as restitution, rehabilitation, satisfaction, and the guarantees of non-repetition.[220] In the same year of the adoption of the Basic Principles, the Committee considered in the case of *Guridi v Spain* that States parties' obligations under Article 14 encompassed more than monetary compensation.[221] Although the complainant in this case had been awarded financial compensation, the Committee found a violation of Article 14 in light of the fact that the perpetrators had been pardoned following their conviction to several years' imprisonment. It justified this holding by considering that 'compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as guarantees of non-repetition of the violations, always bearing in mind the circumstances of each case'.[222]

[216] CAT/C/GC/3 (n 29) para 8. [217] *Cantoral Benavides v Peru*, Series C No 88 (n 60) para 80.
[218] *Loayza Tamayo v Peru*, Reparations and Costs, Series C No 42 (IACtHR, 27 November 1998) para 148.
[219] ibid, para 151. [220] Basic Principles (n 28) para 20.
[221] *Kepa Urra Guridi v Spain*, No 212/2002 (n 27) para 6.8. [222] ibid.

119 Whereas in the *Guridi* case compensation was still used as an umbrella term, the Committee in later cases more clearly differentiated between the term compensation and other forms of reparation. The standard formula adopted by the Committee in the individual complaints procedure now reads as follows:

> The Committee recalls that article 14 not only recognizes the right to fair and adequate compensation but also requires States parties to ensure that the victim of an act of torture obtains redress … Such redress should cover all the harm suffered by the victim and encompass, among other measures, restitution, compensation and guarantees of non-repetition of the violations, taking into account the circumstances of the individual case.[223]

120 General Comment No 3 affirms that while compensation is a multilayered concept, which should cover any economically assessable damage resulting from torture or other forms of ill-treatment (pecuniary and non-pecuniary), the provision of monetary compensation alone is inadequate for a State party to comply with its obligations under Article 14.[224] According to the Committee, compensation for pecuniary and non-pecuniary damages should cover, inter alia, economic loss in relation to medical expenses already incurred as well as those for future medical or rehabilitative services needed; the award of pecuniary and non-pecuniary damage resulting from physical and mental harm; compensation of the loss of earnings and lost opportunities in employment and education due to disabilities as a result of the violation; and reimbursement of the costs of legal or specialized assistance or other costs incurred while claiming redress.[225] As indicated above, in order to render compensation awards adequate and effective, gender-specific aspects as well as particular obstacles faced by vulnerable and marginalized groups have to be taken into account.[226]

121 In the individual complaints procedure, the Committee has not specified the criteria for the quantification of amounts of monetary compensation it would consider 'fair and adequate', due to the fact that it does not itself proceed to an assessment of the harm suffered by applicants. However, in the case *Sergei Kirsanov v Russia*, the Committee criticized the amount awarded to the victim for moral damages (10,000 rubles) as merely symbolic.[227] The Committee also addressed this question in the State reporting procedure.[228] In relation to *Peru*'s transitional justice process, for example, the Committee criticized insufficient amounts of compensation and slow disbursement of economic reparations paid under the Comprehensive Reparation Plan.[229] In relation to the process in *Chile* in the context of the National Commission on Political Imprisonment and Torture, the Committee highlighted in particular that 'austere and symbolic' reparation is not the same as 'adequate and fair' reparation as set forth in Article 14.[230]

[223] *EN v Burundi*, No 578/2013 (n 106) para 7.8; see also *Saidi Ntahiraja v Burundi*, No 575/2013 (n 106) para 7.8; *HB v Algeria*, No 494/2012 (n 107) para 6.8.

[224] CAT/C/GC/3 (n 29) paras 9–10; in the State reporting procedure, the Committee has frequently criticized States parties' legal framework for failing to incorporate other than monetary compensation for victims of torture and ill-treatment, see eg CAT/C/RUS/CO/5 (n 124) para 20; CAT, 'Concluding Observations: Armenia' (2012) UN Doc CAT/C/ARM/CO/3, para 15.

[225] CAT/C/GC/3 (n 29) para 10. [226] See above §§ 111–112.

[227] *Sergei Kirsanov v Russian Federation*, No 478/2011 (n 74) para 11.4.

[228] eg the Committee urged Egypt to establish precise rules and standards to enable the victims of torture and ill-treatment to obtain full redress, while avoiding any insufficiently justified disparities in the compensation which is granted: see CAT, 'Concluding Observations: Egypt' (2002) UN Doc CAT/C/CR/29/4, para 6.

[229] CAT/C/PER/CO/5-6 (n 151) para 17.

[230] CAT 'Concluding Observations: Chile' (2004) UN Doc CAT/C/CR/32/5, para 6.

122 International and regional human rights bodies have developed different approaches to the assessment of pecuniary and non-pecuniary damages. The UN Human Rights Committee and the African Commission on Human and Peoples' Rights (ACmHPR) normally do not specify amounts of damages to be awarded to victims.[231] The ECtHR and the IACtHR have in their jurisprudence defined concrete amounts to be awarded to victims. The ECtHR is fairly strict in awarding only the sums for material damages that can be accounted for.[232] The IACtHR, on the other hand, does not necessarily make its estimate of the incurred costs dependent on documentary proof, but can make awards based on the principle of equity (an evaluation of the different factors of the individual situation of the victim to make an estimate of what would be a just amount).[233] Both courts have awarded compensation for loss of (past and future) earnings to direct and indirect victims, taking into account inter alia the victim's salary before the violation or alternatively the minimum wage in national law and the average life expectancy.[234] In addition, the Courts also award pecuniary damages for past and future costs in relation to specialized and continuous medical treatment needed by the victims, including affected family members.[235] The IACtHR's notion of harm to the victim's 'life plan'[236] also serves to assess losses or diminution of a person's prospect of self-development as a result of serious human rights violations,[237] which is used as a basis for assessing other than material damages such as lost educational opportunities[238].

3.3.4 Rehabilitation

123 As has been seen above, the entitlement to 'as full rehabilitation as possible' had been added as an essential element to the text of Article 14 during the drafting stage to ensure that remedies for long-term physical and mental consequences of torture were an integral part of the right to redress. The Committee defines rehabilitation as 'the restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment'.[239] It aims at restoring,

[231] An exception is the decision of the ACmHPR in the case of *Egyptian Initiative for Personal Rights and Interights v Egypt*, Comm No 323/2006 (ACmHPR, 12 October 2013) para 275 iv.

[232] Registry of the Court, 'European Court of Human Rights: Rules of Court' Rule 60. See also the Court's judgment in the case of *Salmanoğlu and Pollataş v Turkey*, where the Court did not accept the pecuniary damages claimed by two very young women who had been raped and ill-treated in detention due to lacking documents to substantiate the amount claimed, but awarded €10,000 as non-pecuniary damage for each victim on the basis of equity: see *Salmanoğlu and Pollataş v Turkey* App no 15828/03 (ECtHR, 17 March 2009) para 110.

[233] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2015) 328. See the judgment in the case of *Plan de Sánchez Massacre v Guatemala*, Reparation Judgement, where the Court found sufficient grounds for presuming the existence of damage and awarded U$ 5000 to each victim. See *Plan de Sánchez Massacre v Guatemala*, Reparations, Series C No 116 (n 39) para 74.

[234] For the ECtHR, see eg *Ipek v Turkey* App no 25760/94 (ECtHR, 17 February 2004) para 224; *Çakici v Turkey*, ECHR 1999-IV (n 42) para 127; for the IACtHR, see eg *Bámaca Velásquez v Guatemala,* Reparations and Costs, Series C No 91 (IACtHR, 22 February 2002) para 54; *Neira Alegría et al v Peru*, Reparations and Costs, Series C No 29 (IACtHR, 19 September 1996) 49–52.

[235] See eg *Mikheyev v Russia* App no 77617/01 (ECtHR, 26 January 2006) para 162; *Cantoral Benavides v Peru*, Series C No 88 (n 60) para 54, where the Court awarded different amounts of compensation for future medical costs to the victims (expenses related to physical and psychological harm suffered), that is to the torture victim himself, his twin brother (as he 'was very affected by the plight of his brother Luis Alberto, so much so that it is reasonable to assume that he, too, should receive medical and psychological treatment'), and the mother for health problems she incurred due to the situation of her son.

[236] See above § 116. [237] *Loayza Tamayo v Peru*, Series C No 42 (n 218) para 150.

[238] *Cantoral Benavides v Peru*, Series C No 88 (n 60) para 80.

[239] CAT/C/GC/3 (n 29) para 11.

as fully as possible, self-sufficiency, independence, physical, mental, social and vocational ability and full inclusion and participation in society of the individual concerned.[240] The Committee also clarified that the qualification 'as full as possible' does not relate to the availability of resources of States parties, but reflects the acknowledgment that the 'pervasive effect of torture' may prevent victims from ever fully recovering their dignity, health, and self-sufficiency.[241]

124 General Comment No 3 lays out the Committee's understanding of a 'long-term and integrated approach' to rehabilitation, which should include the assessment and evaluation of the victims' therapeutic and other needs in accordance with the Istanbul Protocol[242] and provide a wide range of interdisciplinary measures.[243] These measures need to combine medical, physical, and psychological rehabilitation but also extend to social, community, or family-based assistance oriented towards reintegration, as well as vocational training and other measures suitable to restore victims' full participation in society. The Committee puts particular emphasis on a holistic approach to rehabilitation, which strengthens the agency of victims throughout the rehabilitation process by ensuring their participation in the selection of service providers and focusing on positive factors such as the strength and resilience of the individual concerned.[244] Given the risk of re-traumatization, States parties should ensure that rehabilitation services must put a 'high priority' on establishing trust and confidence and to this end establish confidential procedures where necessary.[245]

125 In the State reporting procedure, the Committee has reminded States parties that referring victims to regular health services is not in compliance with the requirements of Article 14.[246] Instead, States parties must adopt specific legislation putting in place concrete mechanisms and programmes specialized on the particular needs of victims of torture and other forms of ill-treatment.[247] Access to these specialized rehabilitation mechanisms and programmes must be readily available to all victims of torture or other forms of ill-treatment as soon as possible following an assessment of their individual needs by qualified medical personnel.[248] The Committee thus insists that rehabilitation cannot be postponed or made dependent on the victim pursuing judicial or other remedies.[249]

126 In accordance with the principle of non-discrimination governing all forms of reparation, rehabilitation services must be non-discriminatory, gender-sensitive, and adapted to the victim's culture, personality, history, background, and language requirements.[250] Concerning violence and sexual abuse of girls in schools, for example, the Committee considered that *Mozambique* should provide access to health services specialized in family planning and the prevention and diagnosis of sexually transmitted diseases.[251] In relation to victims of torture and other forms of ill-treatment during the

[240] ibid. [241] ibid, para 12.

[242] OHCHR, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol')* (2004) HR/P/PT/8/Rev1.

[243] CAT/C/GC/3 (n 29) para 13. [244] ibid, paras 13, 15. [245] ibid, para 13.

[246] See eg CAT/C/CHN/CO/5 (n 93) para 58c).

[247] CAT/C/GC/3 (n 29) para 15; see also CAT/C/PER/CO/5-6 (n 151) para 18; CAT /C/KHM/CO/2 (n 87) para 26.

[248] See eg CAT/C/GC/3 (n 29) para 15; if necessary, access should also be provided to the family of the victim, cf SRT (Theo Van Boven), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2004) UN Doc A/59/324, para 51.

[249] CAT/C/GC/3 (n 29) para 15. [250] CAT/C/GC/3 (n 29) para 15.

[251] CAT/C/MOZ/CO/1 (n 137) para 24.

internal armed conflict from 1980 to 2000 in *Peru*, the Committee recommended 'the provision of such specialized services in individual cases as may be necessary regardless of geographical location, the socio-economic situation of victims, gender, and real or perceived affiliation with current or former opposition groups … '.[252] States parties must ensure accessibility of services to all victims, including vulnerable groups such as asylum seekers and refugees.[253]

127 While States parties can guarantee full access to appropriate rehabilitation programmes for torture victims through either State-owned services or the funding of private facilities and non-governmental organizations,[254] such services cannot be left to private actors and external funding only.[255] The Committee routinely requests in the State reporting procedures not only information on the establishment of rehabilitation services, but also the allocation of sufficient resources for their effective functioning,[256] and has in a few cases also given concrete recommendations as to the State funding of rehabilitation services of private providers.[257]

3.3.5 Satisfaction and the Right to Truth

128 The notion of satisfaction is based on the idea that victims can draw moral reparation and the restoration of a sense of justice from the acknowledgment of their suffering, the acceptance of responsibility by the State, the establishment of the truth (with regard to both the individual victim and his or her family and with regard to the general public), and the punishment of perpetrators. As has been discussed above in relation to the procedural obligations under Article 14, effective criminal investigations resulting in the prosecution and punishment of perpetrators can provide satisfaction and a sense of justice to victims and their families.[258] Satisfaction as a form of reparation is therefore closely linked to States parties' fulfilment of their obligations under Articles 12 and 13.[259]

129 In addition, General Comment No 3 proposes a number of measures as part of satisfaction to victims,[260] including inter alia full and public disclosure of the truth with due regard to victim and witness protection, the search for the whereabouts of victims in the case of disappearances, for the identities of the children abducted, and for the bodies of those killed. In relation to family members of deceased victims, States parties should provide assistance in the recovery, identification, and reburial of victims' bodies. The Committee also suggests symbolic measures, such as an official declaration or judicial

[252] CAT/C/PER/CO/5-6 (n 151) para 18(a). [253] CAT/C/GC/3 (n 29) para 15.

[254] ibid, para 15; see also CAT/C/CHN/CO/5 (n 93) para 58.

[255] See eg CAT/C/JPN/CO/2 (n 139) para 19(a); CAT/C/KGZ/CO/2 (n 93) para 22; CAT, 'Concluding Observations: Burkina Faso' (2013) UN Doc CAT/C/BFA/CO/1, para 18; CAT/C/COG/1 (n 78) para 22.

[256] See eg CAT/C/USA/CO/3-5 (n 132) para 29; CAT/C/JOR/CO/3 (n 122) para 48; CAT/C/JPN/CO/2 (n 139) para 18; CAT/C/SLE/CO/1 (n 124) para 29; CAT, 'Concluding Observations: Armenia' (2016) UN Doc CAT/C/ARM/CO/4, para 46.

[257] See eg the 'Concluding Observations on the Second Periodic Report of Kenya', where the Committee recommended that rehabilitation services should be covered under the National Hospital Insurance Fund: see CAT/C/KEN/CO/2 (n 79) para 23€. In the case of Venezuela, the Committee reminded the State party of the pivotal role State structures should play in the provision of rehabilitation services and requested that medical, psychological, and social services for torture victims should be affiliated with the State party's public health system: see CAT, 'Concluding Observations: Venezuela' (2014) UN Doc CAT/C/VEN/CO/3-4, para 21. In the case of Paraguay, the Committee had already in 1997 expressed concern that no rehabilitation programs existed in the country, and had to reiterate this concern in its Concluding Observations in 2011: see CAT/C/PRY/CO/4-6 (n 149) para 25.

[258] See above § 71. [259] CAT/C/GC/3 (n 29) para 16.

[260] ibid; see also Basic Principles (n 28) para 22.

decision restoring the dignity, the reputation, and the rights of the victim and of persons closely connected with the victim; public apologies, including acknowledgement of the facts and acceptance of responsibility, as well as commemorations and tributes to the victims.

130 The recognition by the Committee of the right to truth as part of the States parties' obligation to grant satisfaction to victims of torture and other forms of ill-treatment and their families constitutes a significant evolution as it complements the procedural obligation of States parties to investigate with an entitlement of victims and family members to the full disclosure of the facts. For example, in the *Djamila Bendib* case,[261] the mother of the deceased had attempted in vain to receive copies of an autopsy and access the results of an internal investigation that had allegedly been carried out by the authorities. In this case, the Committee requested the authorities 'to hand over to the complainant the victim's autopsy report and records of the preliminary investigation'.[262] Thus, the Committee frames the right to truth as essentially a procedural right in the context of the criminal procedure against the perpetrator, closely connected with the duty of the State to investigate.

131 The right of relatives of the disappeared to know the truth about what happened to their family member is firmly established in international and regional human rights jurisprudence and entails an important substantive element of reparation as the acknowledgment of the suffering endured by those close to the disappeared victim constitutes an essential precondition of healing.[263] In the ECtHR case *El Masri v the former Yugoslav Republic of Macedonia*,[264] Judges Tulkens, Spielmann, Sicilianos, and Keller declared in a joint concurring opinion that the Court should have acknowledged that in the absence of any effective remedies the applicant was denied the right to the truth, that is the right to an accurate account of his suffering and of the role of the perpetrators.[265] The Judges further stated:

> For those concerned—the victims' families and close friends—establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so. Ultimately, the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery.[266]

132 The right to truth encompasses more than disclosure of evidence of human rights violations to victims and their families. It also carries a collective dimension in relation to society as a whole: for facts and events of the past to become truth, they must be

[261] See above § 47. [262] *Djamila Bendib v Algeria*, No 376/2009 (n 49) para 8.

[263] The right to truth of victims and their relatives in the context of enforced disappearances is enshrined in the UN Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force 23 December 2010) and is recognized by, inter alia, the Inter-American Court of Human Rights, and the UN Human Rights Committee. See eg *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Series C No 219 (IACtHR, 24 November 2010) para 201; *Maria del Carmen Almeida de Quinteros v Uruguay* CCPR/C/OP/2 (n 57) para 14.

[264] German citizen Khaled El-Masri was seized by Macedonian authorities upon arrival in FYROM and held without charge for twenty-three days. Accusing him of being a member of Al-Qaida, the Macedonian authorities handed him over to a CIA rendition team who flew him to Kabul as part of the US 'Extraordinary Rendition' programme. In CIA detention, he was detained for four months and tortured.

[265] *El-Masri v the former Yugoslav Republic of Macedonia* App no 39630/09 (n 192), Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos, and Keller, para 1.

[266] ibid, para 6.

acknowledged as such by the community or society, and information about them must to that end be widely disseminated. For example, the Committee, when referring to *Japan*'s dealing with WWII military sexual slavery, demanded that the State party must publicly acknowledge legal responsibility for the crimes of sexual slavery, stop the repeated denial of the facts by State authorities and public figures, investigate and punish the perpetrators, and educate the public as preventive measure.[267] The Committee also recommended symbolic forms of satisfaction in relation to *El Salvador*, such as constructing a national monument bearing the names of all the victims, and to declare a national holiday in memory of the victims.[268]

3.3.6 Guarantees of Non-Repetition

133 Guarantees of non-repetition are the element of reparation which is the most concerned with a forward-looking preventive effect and to a lesser degree with remedying past violations.[269] In addition to States parties' obligations under other articles of the Convention to fight impunity and prevent torture and other forms of ill-treatment, the right to guarantees of non-repetition addresses underlying structural causes of violations in order to achieve longer term reforms and systemic change in the society as a whole.

134 General Comment No 3 lists a number of structural reform measures[270] States parties should undertake to combat impunity and prevent the repetition of torture or other forms of ill-treatment, including issuing instructions to public officials on the provisions of the Convention and ensuring civilian oversight of military and security forces. Judicial reforms with a view to strengthening abidance by international standards regarding independence, due process, fairness, and impartiality are equally listed, as are protection measures for human rights defenders and legal, health, and other professionals who assist torture victims. Other preventive measures mentioned include establishing systems for regular and independent monitoring of all places of detention, training for law enforcement officials and the security forces on human rights law, training on the Istanbul Protocol for health and legal professionals and law enforcement officials, and promotion of the observance of international standards and codes of conduct by public servants.

135 While the Basic Principles allude to social conflicts as being the breeding ground for large-scale human rights violations and stipulate that guarantees of non-repetition should include mechanisms for preventing and monitoring social conflicts and their resolution,[271] the Committee points out that guarantees of non-repetition 'offer an important potential for the transformation of social relations that may be the underlying causes of violence'.[272] Closely linked to the notion of satisfaction, the long-term and systemic perspective of guarantees of non-repetition goes beyond the symbolic level of

[267] CAT/C/JPN/CO/2 (n 139) para 18. [268] CAT/C/SLV/CO/2 (n 148) para 15.

[269] The International Law Commission Draft Articles on State Responsibility (2001) and the UN Set of principles for the protection and promotion of human rights through action to combat impunity (UN Doc E/CN.4/2005/102/Add.1, 8 February 2008) consider the obligation of the State to award reparation to the victims as distinct from the obligation to ensure cessation and non-repetition, while the Basic Principles (n 28) para 23 define guarantees of non-repetition to be part and parcel of the right to reparation: see Carla Ferstman, 'Reparation As Prevention: Considering the Law and Practice of Orders for Cessation and Guarantees of Non-Repetition in Torture Cases' (2010) 7 EHRR 27 21.

[270] CAT/C/GC/3 (n 29) para 18. [271] Basic Principles (n 28) para 23.

[272] CAT/C/GC/3 (n 29) para 18.

moral reparation to individual victims, families, or affected communities by addressing necessary legal, institutional, and social change to prevent future violations.

136 In the individual complaints procedure the Committee does usually not make detailed recommendations on the measures States parties must adopt to guarantee the non-repetition of violations of the Convention. In the case of *Ramiro Ramírez Martínez v Mexico*, however, it recommended specific legal reforms required to prevent torture and other forms of ill-treatment in the future.[273] More detailed recommendations on guarantees of non-repetition can be found in the State reporting procedure. In relation to *Mozambique*, for example, the Committee demanded the funding of prevention and protection programmes to eliminate violence and sexual abuse in schools, and awareness-raising and mandatory in-service training programmes on the subject for teaching staff.[274] Equally, in relation to gender-based violence, the Committee requested *Sierra Leone* to implement trainings for judges, prosecutors, police officers, forensic services, and healthcare providers on the strict application of the legislative framework with a gender-sensitive approach, and to extend awareness-raising campaigns on gender-based violence.[275] The transformative potential of guarantees of non-repetition has been particularly discussed in relation to gender-sensitive reparation programmes in a post-conflict context where they are considered to offer important entry points for addressing long-term legacies of gender violence and structural inequalities.[276]

3.3.7 Adequate Care, Protection, and First Aid Measures Pending Proceedings

137 The provision of full redress is usually a lengthy process, involving various judicial, administrative, medical, and social service providers. States parties must, however, also put mechanisms in place, which ensure the immediate medical and psychosocial care for victims, independently from the obligation to provide rehabilitation services and other forms of reparation.[277] With regard to victims of domestic violence, the Committee routinely urges States parties to ensure that victims should benefit from protection, including restraining orders, and have access to medical and legal services, including psychological counselling, and safe and adequately funded shelters.[278] For example, it observed in relation to *Senegal* that in addition to the provision of effective protection and immediate redress for victims of excision, the State party should ensure that its relevant Government programmes and action plans to combat gender violence and promote human rights include provisions on access to shelter, medical, and psychological assistance, and reintegration programmes for victims.[279] It also recommended to the Government of *Mongolia* to ensure that all women who are victims of violence have access to immediate means of redress and protection, including protecting orders, access to safe shelters, medical examination, and rehabilitation assistance.[280] In relation to

[273] The Committee requested the State party to '… repeal the provision of preventive custody (arraigo) from its legislation and … bring the Code of Military Justice fully in line with the decisions of the Inter-American Court of Human Rights to ensure that ordinary courts have sole jurisdiction over cases involving human rights violations …': see *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 105) para 19.

[274] CAT/C/MOZ/CO/1 (n 137) para 24.

[275] CAT/C/SLE/CO/1 (n 124) para 14.

[276] See A/HRC/14/22 (n 98) paras 62–64.

[277] CAT/C/GC/3 (n 29) para 16.

[278] See eg CAT/C/LTU/CO/3 (n 122) para 13; CAT/C/UKR/CO/6 (n 122) para 14; CAT, 'Concluding Observations: Poland' (2013) UN Doc CAT/C/POL/CO/5-6, para 22.

[279] CAT/C/SEN/CO/3 (n 137) para 14; see also CAT/C/MOZ/CO/1 (n 137) para 25 (in relation to harmful traditional practices).

[280] CAT/C/MNG/CO/1 (n 123) para 20.

victims of torture in *Iraq*, in particular women fleeing from violence in ISIL-controlled areas, the Committee requested the State party to ensure access to shelter, medical and psychological care, and rehabilitation and public services without discrimination on the basis of gender or other status.[281]

JOHANNA LOBER AND ANDREA SCHUECHNER

[281] CAT, 'Concluding Observations: Iraq' (2015) UN Doc CAT/C/IRQ/CO/1, para 13.

Article 15

Non-Admissibility of Evidence Obtained by Torture

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

1. Introduction	417
2. Travaux Préparatoires	419
2.1 Chronology of Draft Texts	419
2.2 Analysis of Working Group Discussions	420
2.3 Declarations and Reservations	420
3. Issues of Interpretation	421
3.1 Meaning of 'any statements obtained as a result of torture'	421
3.1.1 Type of Statements	421
3.1.2 Indirect Evidence	421
3.1.3 Statements made Before or After Torture	423
3.1.4 Exculpatory Evidence	424
3.1.5 Foreign Evidence	424
3.1.6 Closed Evidence	426
3.2 Meaning of 'any proceedings'	426
3.3 Meaning of 'established'	431
3.4 Applicability to Statements Obtained as a Result of Cruel, Inhuman and Degrading Treatment or Punishment	436
3.5 Exception to the Rule	438

1. Introduction

1 Article 15 is an important provision supplementing the absolute prohibition of torture. The rationales behind the exclusionary rule are manifold.[1] First of all, this provision is to protect the right to a fair trial. This reason applies primarily to criminal proceedings which must comply with certain standards of fairness, including the right not to be compelled to testify against oneself and the principle of equality of arms.[2] Consequently, the use of any confessions or witness statements extracted by torture in criminal proceedings

[1] J Herman Burgers and Hans 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) 148; Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Kluwer Law International 2001) 365; Aurélia Ernst, *The Transnational Use of Torture Evidence* (Herbert Utz Verlag 2015) 68.

[2] See Art 14(3)(e) and (g) CCPR; and Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) (*CCPR Commentary*) 341, 344.

constitutes a serious violation of the right to a fair trial.[3] However, the scope of Article 15 exceeds the rights of the accused in criminal proceedings and excludes any use of evidence obtained by torture in any proceedings, be they criminal, civil, or of administrative nature, judicial and non-judicial.[4] Information extracted by torture is usually considered inherently unreliable evidence in any legal proceedings, as torture victims are 'likely to say anything (true or not true) to end their sufferance', as for example stated by the ECCC Supreme Court Chamber.[5] The exclusionary rule equally aims at more generally protecting the principle of judicial integrity. Most importantly, Article 15 has a very important preventive effect as the inadmissibility of the evidence removes the incentive for law enforcement officials to use of torture, thereby contributing to the prevention of such practice.[6] This additional preventive reason, thus, goes beyond judicial proceedings and has a deterrent effect on law enforcement personnel and their use of such heinous practice.[7] The preventive nature of the exclusionary rule was also recalled by the UN General Assembly, which explicitly recognized that the 'adequate corroboration of statements, including confessions, used as evidence in any proceedings constitutes one safeguard for the prevention of torture and other cruel, inhuman or degrading treatment or punishment'.[8]

2 Although the exclusionary rule seems to be firmly established in most legal cultures,[9] the absolute prohibition of using evidence extracted by torture was recently put in question in the context of the so called 'was against terror', with States casting doubts on the applicability of the provision to torture evidence that had been extracted without the complicity of the national authorities[10] or setting up a very high—almost unrealistic—threshold for the standard of proof.[11]

3 Moreover, although the wording of Article 15 seems to be fairly straightforward and has not given rise to much discussion during the drafting history, a number of questions of interpretation have arisen, concerning namely the type of evidence to which the rule applies, the meaning of the words 'any proceedings', the burden of proof, the applicability of the rule to ill-treatment, as well as the exception contained in the last part of Article 15.

4 The Committee has often examined the exclusionary rule in its reporting, individual complaints, and inquiry procedures. In the individual complaint procedure it has thus

[3] See Art 14(3)(e) and (g) CCPR and HRC, 'General Comment No 32 on Article 14' (2007) UN Doc CCPR/C/GC/32, paras 6, 41; Art 6 ECHR; Art 8(3) ACHR; Art 7 ACHPR and ACmHPR, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003).

[4] See below 3.2.

[5] *Khieu Samphan and Nuon Chea* (ECCC Supreme Court, Case 002, Decision F26/12 of 31 December 2015) para 42; see also SRT (Mendez), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc A/HRC/25/60, para 21. In this regard, see also Art 69(7)(a) ICC Statute which states that 'Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence … '.

[6] Burgers and Danelius (n 1) 148. [7] Ernst (n 1) 101.

[8] GA Res 67/161 of 20 December 2012, para 16.

[9] eg Lord Bingham in *A and others v SSHD* [2005] UKHL 71 [52]: 'The English common law has regarded torture and its fruits with abhorrence for over 500 years … '.

[10] See eg *A and Others v SSHD* [2004] EWCA Civ 1123; [2005] UKHL 71 (n 9).

[11] See eg OLB Hamburg (German Higher Regional Court of Hamburg), *Mounir El-Motassadeq*, Decision of 14 June 2005, para 58 in Neue Juristische Wochenzeitschrift 2326; and OLB Hamburg (German Higher Regional Court of Hamburg), *Mounir El-Motassadeq*, No IV-1/04, Judgment of 19 August 2005 sentencing Mr. El-Motassadeq to seven years' imprisonment for membership of a terrorist organization.

far examined several individual complaints invoking Article 15. Though in its early decisions it had adopted a fairly restrictive approach and found only few violations, more recently its approach seems to have changed with the Committee finding breaches of Article 15 more often.[12] Nonetheless, despite clarifications on the applicability of the rule to extradition proceedings, the burden of proof, and what positive obligations arise from this provision, several questions of interpretation remain open. This has made some authors calling on the Committee to adopt a new general comment.[13] The article below will address the above mentioned issues of interpretation and provide an overview of the Committee's practice.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

5 *Declaration (9 December 1975)*[14]

Article 12

> Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment may not be invoked as evidence against the person concerned or against any other person in any proceedings.

6 *IAPL Draft (15 January 1978)*[15]

Article VII (Evidentiary effect)

> Any oral or written statement or confession obtained by means of torture or any other evidence derived therefrom shall have no legal effect whatever and shall not be invoked in any judicial or administrative proceedings, except against a person accused of obtaining it by torture.

7 *Original Swedish Draft (18 January 1978)*[16]

Article 13

> Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence against the person concerned or against any other person in any proceedings.

8 *United States Draft (19 December 1978)*[17]

> Each State Party shall take such measures as may be necessary to assure that any statement which is established to have been made as a result of torture shall not be invoked as evidence against any person in any proceedings except that it may be invoked in evidence against a person accused of having obtained such statement by torture.

[12] See below 3.3.

[13] APT, *Beware the Gift of Poison Fruit: Sharing Information with States That Torture* (APT 2012) <https://www.apt.ch/content/files_res/report-exclusionary-rule-workshop-en.pdf> accessed 11 December 2018.

[14] GA Res 3452 (XXX) of 9 December 1975.

[15] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[16] Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[17] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, para 22.

9 *Revised Swedish Draft (19 February 1979)*[18]

Article 15

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of obtaining that statement by torture.

2.2 Analysis of Working Group Discussions

10 In comments based on Article 13 of the original Swedish draft, *Austria* sought to substitute Article VII of the IAPL draft for Article 13 of the original Swedish draft, based on the reasoning that Article 13 could be interpreted in a manner which would prohibit the prosecution of a person accused of having inflicted torture. In the same manner, the *United States* proposed that the deterrent effect of the article prohibiting the use of evidence of statements obtained through torture be maximized by providing an exception (as in the IAPL draft) allowing such statements to be used against the alleged torturer.

11 Following on from this proposal, the *United Kingdom* suggested that the phrase 'except against a person accused of obtaining such statement by torture' be added at the end of Article 13 of the original Swedish draft.[19]

12 Referring to Article VII of the IAPL draft, *Morocco* noted that it was in step with Moroccan penal legislation:

> a confession is obviously only one of the many elements of conviction. It is a matter to be evaluated freely by the judge and it may fail to convince him (Article 288 of the Moroccan Code of Criminal Procedure.) Furthermore, a confession obtained lawfully merely supports scientific or material evidence or proof by witnesses. However, if a confession is obtained by torture, it should be rejected and will be without effect. Moreover, a police officer who uses torture during an interrogation will incur administrative and penal sanctions.

13 The 1980 Working Group had before it the revised Swedish draft text. One delegate drew the attention of the Working Group to Article 12 of the Declaration and stressed that there should be conformity between the meaning of the Declaration and Article 15 of the draft Convention. Nevertheless, the Working Group adopted Article 15 by consensus.

14 A reference to Article 15 was to be included in Article 16, but as various delegations could not reach agreement on the matter, the reference was dropped during the 1981 Working Group.[20]

2.3 Declarations and Reservations

15 None of the States Parties to the CAT have made any reservations relevant for the interpretation of Article 15. Only *Austria* declared that it 'regards article 15 as the legal basis for the inadmissibility provided for therein of the use of statements which are established to have been made as a result of torture'.[21]

[18] Revised Text of the Substantive Parts of the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1979) UN Doc E/CN.4/WG.1/WP.1.

[19] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights (1979) UN Doc E/CN.4/1314/Add.1.

[20] See also Arts 1 and 16.

[21] See below Appendix A4.

3. Issues of Interpretation

3.1 Meaning of 'any statements obtained as a result of torture'

3.1.1 Type of Statements

16 Article 15 refers to 'any statements obtained as a result of torture'. The initial wording of the IAPL Draft was more precise in this regard and clearly specified that the provision should apply to 'any oral or written statement or confession obtained by means of torture or any other evidence derived therefrom'. This phrasing was replaced with a more general 'any statements' in the 1978 Swedish Draft, then chosen by the Working Group as the main basis for its deliberations. No substantial discussion on this aspect of Article 15 is, however, reported in the summary records of the Working Group discussions.

17 The lack of any discussions on this point during the *travaux preparatoires* and the very broad phrasing of the provision seem to suggest that the wording '*any* statements' was meant to be as comprehensive as possible including *any type of statements*, regardless of their legal classification (confessions or any other type of information), form (oral or written) or author (defendant, co-defendant, or third party). This is also confirmed by the practice of the Committee, which has applied the provision to different types of statements regardless of their oral or written form,[22] as well as the fact they were given by co-defendants[23] or third parties.[24] Similar conclusions were drawn by the ECtHR.[25]

3.1.2 Indirect Evidence

18 It is discussed whether, in addition to 'statements', Article 15 also applies to any other type of evidence derived therefrom and if it covers only the direct or primary results of torture or also the so-called 'fruits of the poisonous tree', ie derivative or secondary evidence to which the coerced statements have led to.[26]

19 In the literature there seems to be no consensus on this issue.[27] The omission of an explicit reference to evidence derived from torture and the fact that the IAPL draft did indeed include a mention to 'any other evidence derived therefrom', which was however not reproduced in the subsequent drafts, seem to suggest that Article 15 does not apply to the fruits of the poisonous tree.[28] On the other hand, such an interpretation would undermine the preventive rationale of the provision. Making tainted secondary evidence

[22] *Oleg Evloev v Kazakhstan*, No 441/2010, UN Doc CAT/C/51/D/441/2010, 5 November 2013, paras 2.2, 9.8; *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012, UN Doc CAT/C/55/D/500/2012, 4 August 2015, para 17.11.

[23] *PE v France*, No 193/2001, UN Doc CAT/C/29/D/193/2001, 21 November 2002, para 10.

[24] CAT, 'Summary Record' (1992) CAT/C/SR111, para 44.

[25] See eg *Gäfgen v Germany* [GC] App no 22978/05 (ECtHR, 1 June 2010) para 74; *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR, 17 January 2012) para 266.

[26] Ernst (n 1) 134.

[27] For academic literature see Ernst (n 1) 136 with further references; see also *Gäfgen v Germany* App no 22978/05 ECtHR (n 25) para 69, where after an analysis on the practice of the States parties, the ECtHR found that there is no consensus on the issue; and *Khieu Samphan and Nuon Chea* (ECCC Trial Chamber, Case 002, Decision E350/8 of 5 February 2016) para 69, where the ECCC stated '[i]n the absence of consistent international jurisprudence, the Trial Chamber finds that an international standard concerning the use of evidence derived from torture has not yet been established'.

[28] Rosemary Pattenden, 'Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT' (2006) 10 International Journal of Evidence & Proof 1; Tobias Thienel, 'The Admission of Torture Statements into Evidence' in Simon M Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia* (TMC Asser Press 2016).

admissible would in fact represent a considerable incentive to use coercive methods of interrogation, as well as more generally put at risk the principles of fair trial and integrity of proceedings.

20 The Committee appears to support an extensive interpretation of Article 15. For example, in its Guidelines on initial reports the Committee explicitly requires States Parties to report on 'whether derivative evidence is admissible, if applicable in the State party's legal system',[29] thus implicitly considering that Article 15 extends to indirect evidence. The issue had been also addressed in a 1998 Concluding observations to Germany, where the Committee recommended 'that further legislative attention be paid to the strict enforcement of Article 15 of the Convention and that all evidence obtained directly or indirectly by torture be strictly prevented from reaching the cognizance of the deciding judges in all judicial proceedings'.[30] Similarly, in *GK v Switzerland* the Committee has taken into account evidence that had been found following a search conducted on the basis of the testimony extracted by torture (firearms and explosives),[31] thus backing the view that the word 'any statements' includes also other evidence.[32]

21 The same conclusion is reached by other international and regional human rights bodies. In its General Comment No 32, the HRC has clarified that Article 7 CCPR applies to 'statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14'.[33] The ECtHR held that 'incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value', thereby acknowledging the relevance of evidence other than statements.[34]

22 But even if one concluded that the rule applied also to derivative evidence, other questions of interpretation would arise, above all, if Article 15 imposes a blanket exclusion to all derivative evidence. Though the Committee has never pronounced itself on this issue, it shall be noted that in some legal traditions, the fruits of the poisonous tree doctrine applies with some limitations, and evidence that is discovered through an independent source by the police or which discovery was inevitable may be considered admissible in proceedings.[35]However, considering the particular seriousness of the violation and the absolute nature of the prohibition of torture, the ECtHR has taken a different approach when it comes to torture tainted evidence. For example, in contrast to evidence obtained in violation of other Convention's provisions, the ECtHR, attaching particular

[29] CAT, 'General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 19 of the Convention (2005) UN Doc CAT/C/4/Rev.3, para 24.

[30] CAT, 'Concluding Observations: Germany' (1998) UN Doc A/53/44, para 193; CAT/C/SR.250.

[31] *GK v Switzerland*, No 219/2002, UN Doc CAT/C/30/D/219/2002, 7 May 2003, paras 3.2, 6.9.

[32] In this sense see Pattenden (n 28) 5; Ernst (n 1) 133; contra Thienel, 'The Admission of Torture Statements' (n 28) 499 fn 49, who notes that 'the Committee appears to have been silent as to the author's fruit of the poisonous tree arguments'.

[33] CCPR/C/GC/32 (n 3) para 6.

[34] As 'other evidence'—to which the ECtHR refers as 'real evidence'—the ECtHR considered evidence (drugs) obtained through the forcible administration of medical substances (emetics) in order to remove the drugs from the applicant's stomach, and the discovery of a corpse secured through coerced statements. For the first example see *Jalloh v Germany* [GC] App no 54810/00 (ECtHR, 11 July 2006) para 105; for the second example see *Gäfgen v Germany* App no 22978/05 ECtHR (n 25) para 150.

[35] Ernst (n 1) 134; US Supreme Court, *Nix v Williams* [1984] 467 US 431; see also *Gäfgen v Germany* App no 22978/05 ECtHR (n 25) para 73 with further references.

considerations to the use in criminal proceedings of evidence obtained in violation of Article 3 ECHR, has concluded that evidence obtained as a result of torture—whether in the form of statements or real evidence—would always and automatically render unfair the whole criminal proceedings, regardless of the probative value of the evidence and irrespective of whether they had a decisive impact on the final conviction. For the ECtHR,

> [a]ny other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the Rochin case (see paragraph 50 above), to 'afford brutality the cloak of law'.[36]

23 A more restrictive stance is taken by the ECtHR only for what concerns real evidence obtained as a result of inhuman and degrading treatment, for which it has decided to leave open the question as to whether such evidence would render the trial automatically unfair, and decided to apply the standard test assessing the circumstances of the individual case instead.[37] This point has been further clarified by the ECtHR in *Gäfgen*, where the Court stated that 'the application of the fruit of the poisonous tree doctrine should be limited only to real evidence that has a causal link with the inhuman and degrading acts'.[38]

24 In light of the foregoing, it is preferable to interpret Article 15 as applying also to indirect evidence, especially in light of the preventive rationale of such provision. As put by the ECtHR, any other conclusion would only serve to legitimate indirectly the conduct which Article 15 CAT aims to prohibit, and represent an incentive for law enforcement personnel to use coercive methods and thus undermine its preventive scope.

3.1.3 Statements made Before or After Torture

25 Courts have been similarly asked to determine whether the concept of 'any statement obtained as a result of torture' covers statements surrounding the interrogation, ie statements made before or after torture. The legal question arising in such situations concerns the temporal scope of application of the exclusionary rule.[39]

26 The issue has so far never been addressed by the Committee, but it has been raised before national courts. For example, the German Federal Court of Justice which held that nothing in the wording of Article 15 CAT or in the States practice justifies an interpretation as extensive as to requiring a blank exclusion of the statements for the mere reason that they have been obtained before or after the infliction of torture. On the hand, statements made before or subsequently to the infliction of torture will have to be excluded if the torture already had or continued to have an impact on the individual at the time he/she made the incriminating statements.[40] In conclusion, the formulation 'as a result of torture' should not be limited to the moment when torture was inflicted but extends also

[36] *Jalloh v Germany* App no 54810/00 ECtHR (n 34) para 105; see also *Cabrera García and Montiel Flores v Mexico*, Series C No 220 (IACtHR, 26 November 2010) para 167; Supreme Court of Appeal of South Africa, *Bongani Mthembu v South Africa*, No 379/09, 10 April 2008.

[37] *Jalloh v Germany* App no 54810/00 ECtHR (n 34) para 107.

[38] *Gäfgen v Germany* App no 22978/05 ECtHR (n 25) paras 179–80, where the ECtHR found that the existence of a second confession given by the applicant at the trial and after instruction about his defence rights had broken 'the causal chain leading from the prohibited interrogation methods and the applicant's conviction and sentence'. See also the Jointly partial dissenting opinion of judges Rozakis, Tulkens, Jebens, Ziemele, Biancu, and Power.

[39] See also Ernst (n 1) 136.

[40] Bundesgerichshof (German Federal Court of Justice) No 1 StR 140/05, Judgment of 10 August 2005.

to statements preceding and made subsequently to the infliction of torture if the coercion has indeed affected those statements.

3.1.4 Exculpatory Evidence

27 The broad wording of Article 15 suggests that the provision covers all type of evidence, be they incriminating or exculpatory. Again, the Committee against Torture has not yet had the chance to pronounce itself on this issue. But the question as to whether Article 15 extends also to exculpatory evidence has recently emerged in a number of national and international cases and is discussed in literature. In particular, courts have been asked whether Article 15 also covers torture tainted evidence when used for defence purpose by the accused person; and whether the provision can be balanced against the right to a fair trial.

28 The issue was raised before the ECCC Trial Chamber in the case *Khieu and Nuon*.[41] There, the ECCC concluded that Article 15 bans also torture tainted evidence which it is asserted to be exculpatory arguing that '[t]he Accused should be permitted to adduce evidence that he asserts is exculpatory, but not at the expense of the integrity of the proceedings'.[42] In *Khieu and Nuon* the tainted exculpatory evidence was invoked by the alleged torturers themselves, the Khmer Rouge leaders. In such a situation, the decision taken by the ECCC Trial Chamber is to be supported, as the right to a fair trial is only one of the rationales beyond the exclusionary rule, which instead equally aims to guarantee the integrity of the judicial proceedings and to prevent torture.

29 Yet *Ernst* maintains that torture tainted exculpatory evidence may be exceptionally admitted, when the torture victim and the accused are the same person.[43] In that specific case, it is argued, admitting exculpatory evidence would have a 'restitutionary effect' which is in line with the right to a fair trial and the individual rights of the accused. With regard to the preventive aim and the principle of the integrity of proceedings—which at first sight seem to justify an absolute ban of tainted evidence—it is further argued that admitting tainted exculpatory evidence would not undermine but rather strengthen the preventive function of the provision. The fact that the only possible way in which tainted evidence can be used is in favour of the accused/torture victim would render tainted evidence useless in the eyes of law enforcement personnel.[44] In this sense, a German Court held that it would be difficult to conceive that in order to preserve his/her own dignity, the accused is not allowed to invoke illegally obtained evidence that may exculpate him.[45]

3.1.5 Foreign Evidence

30 The Convention does not explicitly mention whether Article 15 applies to foreign torture evidence, ie evidence obtained as a result of the acts of officials of a foreign State and without the complicity of the first State party's officials. Its broad wording, however, suggests that the provision should apply regardless of where the tainted evidence was

[41] *Khieu Samphan and Nuon Chea*, ECCC, E350/8 (n 27) paras 46–47. [42] ibid.
[43] Ernst (n 1) 110. [44] ibid 109.
[45] German Federal Court of Justice, StR 140/05 (n 40) para 3, where it stated: 'So könnte das Selbstgespräch auch ein gewichtiges Entlastungsindiz sein ('ich bin unschuldig, aber niemand glaubt mir') oder jedenfalls den Schuldumfang reduzieren (Nachweis der Voraussetzungen des § 213 1. Alt. StGB oder eines Affekts). Dem Angeklagten 'zum Schutze seiner Menschenwürde' zu verbieten, diese Information zum Inbegriff der Hauptverhandlung (§ 261 StPO) zu machen und damit jeder richterlichen Würdigung—auch bei der Anwendung des Zweifelssatzes—zu entziehen, erscheint schwerlich vorstellbar.' See also Pattenden (n 28) 6, fn 88.

obtained and by whom. Moreover, in practice, admitting foreign torture evidence would equally frustrate the rationales on which the rule is based. Torture evidence is in fact unreliable, unfair, and in violation of the principle of integrity of the procedure regardless of who has inflicted it or is complicit in its perpetration; and not applying Article 15 to foreign evidence would jeopardize its preventive function.

31 This view is supported by the practice of the Committee, which clarified that Article 15 'prohibits the use of evidence gained by torture wherever and by whomever obtained'.[46] Specifically, the Committee expressed concern about the interpretation of the exclusionary rule put forward by the Appeal Court of England and Wales in *A and Others*, which had decided not to apply the exclusionary rule to foreign evidence unless UK officials were found complicit.[47]

32 The SRT is of the same view stating that the provision 'applies no matter where in the world the torture was perpetrated and even if the State seeking to rely on the information had no previous involvement in or connection to the acts of torture'.[48]

33 Moreover, despite some initial resistance, today also domestic courts seem to accept that Article 15 equally applies to foreign evidence.[49] In the landmark case *A & Others v SSHD*, the Law Lords unanimously found that the rule cannot be understood 'to apply only where the state in whose jurisdiction the proceedings are held has inflicted or been complicit in the torture'.[50] The Lords agreed that the exclusionary rule shall apply to any proceedings within the UK regardless of the fact that the evidence had been obtained by torture inflicted by foreign officials without the involvement of the British authorities. In doing so, the unreliability of torture, the integrity of the proceedings, and the honour of English law were invoked.[51] It was also argued that if national courts, exercising universal jurisdiction, could try a foreign torturer for acts of torture committed abroad they should a fortiori also be able to receive evidence obtained by such torture.[52] A similar conclusion had been reached by the German Higher Regional Court of Hamburg in the *Mounir El-Motassadeq* case.[53] Though the main legal question in this decision concerned the probative value of the information provided by the US authorities—summaries of the statements made by three terrorist suspects during interrogation carried out by US authorities at unknown locations—the Court also acknowledged that Article 15 applies not only to torture conducted by German state organs, but also to torture conducted abroad by organs of another State.[54]

[46] CAT, 'Conclusions and Recommendations: UK' (2004) UN Doc CAT/C/CR/33/3, para 4.

[47] ibid; see also [2004] EWCA Civ 1123 (n 10) and also below § 33.

[48] SRT (Mendez) A/HRC/25/60 (n 5).

[49] eg *Mounir El-Motassadeq* Judgment No IV-1/04 (n 11).

[50] Lord Bingham in [2005] UKHL 71 (n 9) [35], [51]; and Lord Hope [113].

[51] ibid [91].

[52] ibid [35]. This judgment overruled the previous decisions of the Special Immigration Appeals Commission and the Court of Appeal, which had instead found that evidence that had, or might have been, procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but not legally inadmissible, despite the acknowledgment that the detainees had presented sufficient evidence to prove the potential use of torture in the gathering of the evidence: see SIAC Generic Judgment of October 2003 and [2004] EWCA Civ 1123 (n 10) [119], [266], [434]; [2005] UKHL 71 (n 9) [9]. See also the CAT Committee in CAT/C/CR/33/3 (n 46); Report of the Committee against Torture Thirty-First Session (10–21 November 2003) Thirty-Second Session (3–21 May 2004) (2004) UN Doc A/59/44, para 17; CPT, 'Report on the Visit to the United Kingdom Carried out by the CPT from 14 to 19 March 2004' (2005) CPT/Inf (2005) 10, para 31; and Brandie Gasper, 'Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention in the Era of Terrorism' (2005) 21 American University International Law Review 294.

[53] *Mounir El-Motassadeq* Decision of 14 June 2005 (n 11).

[54] ibid.

3.1.6 Closed Evidence

34 As reported by the SRT, in recent years there was an increasing trend in the use of secret evidence and closed material procedures. This significantly increases the risk that evidence obtained by torture or other ill-treatment is admitted. The Committee had the opportunity to pronounce itself on the issue in its 2013 Concluding observations to the UK. On this occasion, it recommended that the State should '[e]nsure that intelligence and other sensitive material be subject to possible disclosure if a court determines that it contains evidence of human rights violations such as torture or cruel, inhuman or degrading treatment'.[55]

3.2 Meaning of 'any proceedings'

35 Another key issue of interpretation concerns the type of proceedings the exclusionary rule applies to and, more in general, what is to be considered as a 'proceeding' under this Article. The IAPL draft explicitly referred to 'any judicial or administrative proceedings'.[56] Although this explanation was deleted in the final version of Article 15, nothing in the *travaux préparatoires* suggests that the scope of application of Article 15 was meant to be reduced only to certain types of proceedings.

36 The Committee has consistently confirmed this broad scope of application and in light of its practice there is no doubt that the provision applies to any proceedings *regardless of whether they are of criminal, civil or administrative nature*. This is supported by the fact that the Committee has explicitly acknowledged the application of the exclusionary rule in extradition proceedings. So far the Committee has decided on four such cases, and found a violation in one of them (*Ktiti v Morocco*).[57] In doing so, the Committee observed that

> the broad scope of the prohibition in article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence 'in any proceedings', is a function of the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction, including *extradition proceedings*, have been made as a result of torture.[58]

More recently, the Committee has acknowledged the application of Article 15 before military courts,[59] or proceedings in the framework of anti-terrorism legislation.[60] In certain cases the Committee also seemingly considered that Article 15 applies in any stage of the proceedings,[61] including the review stage,[62] and that the torture tainted evidence

[55] CAT, 'Concluding Observations: UK' (2013) UN Doc CAT/C/GBR/CO/5, para 12.

[56] See also above 2.1.

[57] *GK v Switzerland*, No 219/2002 (n 31) para 6.10; *Yousri Ktiti v Morocco*, No 419/2010, UN Doc CAT/C/46/D/419/2010, 26 May 2011; *PE v France* No 193/2001 (n 23); *RAY v Morocco*, No 525/2012, UN Doc CAT/C/52/D/525/2012, 16 May 2014.

[58] *GK v Switzerland*, No 219/2002 (n 31) para 6.10; see also [2005] UKHL 71 (n 9) para 35.

[59] *Ennaâma Asfari v Morocco*, No 606/2014, UN Doc CAT/C/59/D/606/2014, 15 November 2016, paras 3.4; 13.7; CAT, 'Concluding Observations: Israel' (2016) UN Doc CAT/C/ISR/CO/5, para 34.

[60] CAT, 'Concluding Observations: Ethiopia' (2011) UN Doc CAT/C/ETH/CO/1, para 31; CAT, 'Concluding Observations: Sri Lanka' (2011) UN Doc CAT/C/LKA/CO/3-4, para 11.

[61] CAT, 'Summary Record of the 247th Meeting' (1996) CAT/C/SR.247, para 40.

[62] *GK v Switzerland*, No 219/2002 (n 31) para 6.9; Tobias Thienel, 'Foreign Acts of Torture and the Admissibility of Evidence The Judgment of the House of Lords in A and Others v Secretary of State for the Home Department (No 2)' (2006) 4 JICJ 401, 406.

'should never be permitted to reach the cognizance of the judges deciding the case, in any legal procedure'.[63]

37 Yet, still today there is no uniform understanding of the word 'proceeding', and if this should be restricted only to court proceedings,[64] encompass any formal proceeding in which an administrative agency takes a decision, or even proceedings in the context of which the executive agencies adopt measure for operational purposes. In this regard, the practice of the Committee is not conclusive, as it has referred to proceedings as 'judicial proceeding' or 'court proceeding' but also to broader terms such as 'legal proceedings'[65] or 'any proceeding whatsoever'.[66]

38 One of the arguments against the extension of Article 15 to proceedings other than court ones is that to do so would not be compatible with the wording contained in the Russian version.[67] Whilst the English, French, and the Spanish versions include a wording broad enough to encompass both concepts ('any proceedings', 'une procédure'; 'ningùn procedimiento') the Russian one explicitly refers to court proceedings.[68] Being all equally authentic texts as provided by Article 33 CAT, *Thienel* has concluded that Article 15 refers only to court proceedings, as only such an interpretation can best reconcile all language versions of the treaty in line with Article 33(4) VCLT.[69] Yet, on the other side, considering that all other language versions are consistent among each other's and refer generally to proceedings, one should not exclude that the different wording of the Russian text may be attributed to inaccurate translation rather than a specific will of the drafters to restrict the scope of application of the provision to court proceedings. In addition, it could be argued that Article 33(4) VCLT's rule on 'the meaning that best reconciles the texts, having regard to the object and purpose of the treaty' applies only when the 'comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove'. This means *after* that the interpreter has unsuccessfully applied the general principles set out in Article 31 and 32 VCLT, on which basis it is required to interpret the contested provision in light of the object and purpose of the treaty.[70] Considering that the object and purpose of the Convention is to 'make more effective the struggle against torture and other forms of ill-treatment throughout the world',[71] and one of the rationales of Article 15 is to prevent torture, one could conclude that this provision should be interpreted more broadly.

39 In light of the above, another approach could be that the essential element defining the scope of application of Article 15 should rather be found in the formality of the proceedings, and the phrase 'evidence in any proceedings' should only refer to the assessment of evidence before a judicial or administrative authority acting in accordance with certain rules of taking evidence laid down in the respective (criminal, civil, or administrative) procedural code. This approach could also explain why the IAPL referred to 'any judicial

[63] CAT, 'Summary Record of the First Part of the 354th Meeting' (1998) CAT/C/SR/354, para 11; Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance, and Use of Information Obtained through Torture by Another State' (2005) 23 NQHR 349, 358.

[64] Burgers and Danelius (n 1); Ernst (n 1) 205.

[65] *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 22) para 17.11; CAT, 'Concluding Observations: Gabon' (2013) UN Doc CAT/C/GAB/CO/1, para 24.

[66] CAT, 'Concluding Observations: Mexico' (2012) UN Doc CAT/C/MEX/CO/5-6, para 15.

[67] Thienel, 'Foreign Acts' (n 62). [68] ibid. [69] ibid.

[70] Olivier Corten, *The Vienna Conventions on the Law of Treaties: A Commentary*, vol 1 (Oxford University Press 2011) 866.

[71] CAT, Preamble, para 7.

or administrative proceedings' explicitly making a reference to '*administrative proceedings*' in opposition to judicial proceedings.[72] This would include, for example, proceedings before military commissions,[73] immigration boards,[74] Ombudspersons,[75] as well as any formal procedure which leads to a decision of a court or an administrative authority/agency.[76]

40 There remains, however, the question as to whether the use of torture tainted evidence by executive agencies for operational purposes falls within the concept of 'formal procedure' and is thus equally prohibited by Article 15. Such a question has become increasingly relevant, especially in the context of the debate on the legitimacy of the use of torture or its tainted fruits for purposes of combating terrorism and in view of the increasingly central role played by intelligence agencies in this area.[77] A further layer of complexity is added by the growing cooperation among intelligence agencies around the world and the fact that certain States have shown a willingness to rely on foreign intelligence obtained through torture.[78] For instance, the UK Foreign and Commonwealth Office stated

> we cannot get all the intelligence we need from our own sources, because the terrorist groups we face are scattered around the world, and our resources are finite. So we must work with intelligence and security agencies overseas. Some of them share our standards and laws while others do not. But we cannot afford the luxury of only dealing with those that do. The intelligence we get from others saves British lives.[79]

Similarly the German Government argued that the use of foreign intelligence for operational purposes, such as for example to prevent a terrorist attack, is not prohibited by international law, and that the cooperation between various intelligence agencies in the global fight against terror would make it impossible to ascertain whether some of the information obtained may be the result of torture.[80] In Germany, an intensive debate arose about the legitimacy of using information

[72] Ernst (n 1) 209.

[73] Manfred Nowak, Moritz Birk and Tiphanie Crittin, 'The Obama Administration and Obligations Under the Convention Against Torture' (2011) 20 Transnat'l L & Contemp Probs 33.

[74] SRT (Mendez) A/HRC/25/60 (n 5) para 30.

[75] Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Emmerson) 'Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (2012) UN Doc A/67/396, paras 46–48.

[76] See also Pollard (n 63).

[77] International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' (2009) 69 <https://www.icj.org/wp-content/uploads/2012/04/Report-on-Terrorism-Counter-terrorism-and-Human-Rights-Eminent-Jurists-Panel-on-Terrorism-series-2009.pdf> accessed 3 December 2017. See also HRW, *'No Questions Asked' Intelligence Cooperation with Countries That Torture* (HRW 2010); APT, *Beware the Gift* (n 13).

[78] Cooperation among States is required by international law see Security Council Resolution 1373 (2001) adopted on 28 September 2001, para 3 (a) and (b); GA Res No 26/25 (XXV) of 24 October 1970.

[79] UK Foreign and Commonwealth Office, 'Annual Report on Human Rights 2009' (2010) 43.

[80] eg Statement by British Home Secretary Charles Clarke, *The Guardian* (London, 13 December 2005), in reference to the 8 December House of Lords ruling: 'they held that there is an "exclusionary" rule precluding the use of evidence obtained by torture. However, they held it was perfectly lawful for such information to be relied on operationally, and also by the home secretary in making executive decisions.' See also a statement made by German Minister of the Interior Wolfgang Schäuble in the Süddeutsche Zeitung, 16 December 2005: 'It would be completely irresponsible if we were to say that we don't use information where we cannot be sure that it was obtained in conditions that were wholly in line with the rule of law. We have to use such information.'

received by foreign intelligence agencies likely to use torture for the mere purpose of preventing terrorist acts.[81]

41 Though the Committee has not pronounced itself explicitly on this issue, it has referred to the use of intelligence for operational purposes several times. In its Concluding observation to Germany the Committee stated that '[t]he absence of information on whether the Government continues to rely on information from intelligence services of other countries, some of which may have been extracted through torture or ill-treatment, is of serious concern … ', and recommended to '[r]efrain from "automatic reliance" on the information from intelligence services of other countries, with the aim of preventing torture or ill-treatment in the context of forced confessions'.[82] Most recently, commenting on the practice of some States parties to adopt national guidelines for intelligence offices and service personnel,[83] the Committee has welcomed the publication of such guidance 'as an important step toward ensuring transparency and accountability in relation to the actions of its personnel operating overseas and their relationships with foreign intelligence services';[84] but criticized them in so far as they allow for the possibility of seeking assurances in situations where actions of foreign security and intelligence services pose a serious risk of torture or other ill-treatment[85] as well as relying upon information from foreign entities that is likely derived through ill-treatment in exceptional circumstances involving threats to public safety.

42 The question has also been addressed, at least to some extent, in the House of Lords' judgment *A and Others*, where the Law Lords had to rule on the applicability of the exclusionary rule to proceedings before the UK Special Immigration Appeals Commission (SIAC), as well as before the Secretary of State, and more in general by the 'executive arm of the state', such as secret services, the police, or other executive agencies.[86] While the Law Lords considered the SIAC as a judicial body and thus deemed the exclusionary rule applicable before it, they rejected that the rule could apply to the executive, thus considering it lawful for the Secretary of State to certify, arrest, search, and detain on the basis of torture evidence, and this despite the 'mismatch' between the material on the basis of which the Secretary of State (the executive) and the SIAC (the judicial body) were able to act upon.[87] For example, Lord *Nicholls* expressed the opinion that the Government cannot be expected to close its eyes to information at the price of endangering the lives of its citizens,[88] and Lord *Brown* even indicated that the executive branch is bound to make

[81] eg a statement made by the German Minister of the Interior, Wolfgang Schäuble, in *Spiegel* online, 16 December 2005. See also the opposite stance adopted by the President of the German Constitutional Court, Mr. Papier, in the Handelsblatt of 26 December 2005. In his interim report on 'Alleged secret places of detention in Council of Europe member states' to the Parliamentary Assembly of the Council of Europe of 22 January 2006, Rapporteur Dick Marty called Mr. Schäuble's statements 'at the very least highly debatable': CoE Doc AS/Jur (2006) 03, § 85.

[82] CAT, 'Concluding Observations: Germany' (2011) UN Doc CAT/C/DEU/CO/5, para 31.

[83] UK Government, 'Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees' (2010); Canada, Public Security Intelligence Service, Comprehensive Guidance on the Canadian Security Intelligence Service 2011. For a more detailed analysis see APT, *Beware the Gift* (n 13) 29, and on the Canadian system see also Craig Forcese, 'Touching Torture with a Ten Foot Pole: The Legality of Canada's Approach to National Security Information Sharing with Human Rights-Abusing States' (2014) 52 Osgoode Hall Law Journal 263.

[84] CAT/C/GBR/CO/5 (n 55) para 11. [85] ibid.

[86] [2005] UKHL 71 (n 9) in particular the following paras: [47] (Lord Bingham); [67]–[70] (Lord Nicholls); [92]–[96] (Lord Hoffmann); [132]–[137] (Lord Rodger); [149] (Lord Carswell); [162]–[171] (Lord Brown).

[87] ibid [46] (Lord Bingham); [92]–[93] (Lord Hoffmann). [88] ibid [69].

use of all such information, as it is under a duty to safeguard the State.[89] In this respect, in its concluding observations the Committee noticed that 'the State party should never rely on intelligence material obtained from third countries through the use of torture or other cruel, inhuman or degrading treatment'.[90]

43 Although States have a duty to protect all persons subject to their jurisdiction, the House of Lords' decision does not seem to take into account the preventive rationale of Article 15, thus having the potential to undermining the absolute prohibition of torture and creating a market for torture tainted information. Moreover, in practice, it is very difficult to separate the use of evidence for operational purposes from that in legal proceedings.[91] Hence, rather than excluding the application of Article 15 in view of the operational nature of the proceedings, it is believed that also in this case one would have to assess the formality of the proceedings. It would indeed be unreasonable to require the police to check the possible use of torture by foreign intelligence agencies before exercising their duty to prevent terrorist or other attacks and to protect the lives of human beings being endangered. Yet these preventive actions are not carried out in the *framework of any proceedings* envisaged in Article 15. As it was seen above, the application of Article 15 presupposes the assessment of evidence in a formal procedure which leads to a decision of the respective court or administrative agency. If the police receive information from a foreign intelligence service that a particular person is planning to commit a terrorist attack, they might detain the person even if they have reason to believe that the information may have been obtained by torture. On the contrary, a formal detention certificate—such as the one issued by the British Home Secretary under the Immigration and Asylum Part of the Anti-Terrorism, Crime, and Security Act 2001—is clearly an administrative decision arrived at in the course of formal administrative proceedings to which Article 15 CAT applies. Despite the fact that the December 2005 ruling of the House of Lords only applied to the judicial proceedings before the Special Immigration Appeals Commission and the Court of Appeal, it is beyond doubt that the standards developed by the House of Lords apply not only to the judicial bodies deciding on the lawfulness of deprivation of liberty in the second and third instance but also to the Home Secretary who issues the detention order in the first instance. In other words, if the Home Secretary bases his or her decision on foreign intelligence information which might have been extracted by torture, he or she must investigate by all appropriate means before issuing a formal detention certificate whether or not the respective statements are the result of torture.[92]

44 Most importantly, it shall be noted that even when such evidence does not fall within the scope of application of this provision because the level of formality requested by Article 15 is not met, cooperation with foreign States practising torture, for example, by receiving and using torture tainted intelligence for operational purposes may still be prohibited under Article 4 of the Convention as well as under international law, in that it may amount to complicity in torture.[93]

[89] ibid [161]. See also SRT (Nowak), Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2006) UN Doc A/61/259.

[90] CAT/C/GBR/CO/5 (n 55) para 25. [91] ICJ (n 77) 85.

[92] But see the distinction made by Lord Nicholls between the Home Secretary's executive discretion and the Commission's judicial function in [2005] UKHL 71 (n 9) [74], [75]. See also SRT (Nowak) A/61/259 (n 89).

[93] For more details on this aspect see Ernst (n 1) 193; SRT (Mendez) A/HRC/25/60 (n 5) para 48; APT, *Beware the Gift* (n 13) 21–28.

3.3 Meaning of 'established'

45 According to Article 15 only those statements that have been 'established to have been made as a result of torture' are inadmissible. This formulation gives room for different interpretations, as the case law of the Committee against Torture and relevant domestic courts show. A literal reading of Article 15 might even support an understanding which would require the person against whom the proceeding is being carried out to provide full evidence that his or her confession was extracted by torture, a burden of proof which in almost no case could be met. On the other hand, it might be equally difficult for the prosecutor or any other Government authority to provide full evidence that a given confession or witness statement was definitely not extracted by torture, in particular if such a statement was received from a foreign Government to support an extradition request or from a foreign intelligence service in support of a criminal charge or detention order. Thus, any interpretation which takes into account both the wording and the purpose of Article 15 must aim at striking a *fair balance between the legitimate interests of the State and of the individual against whom the evidence is invoked*.

46 The *burden of proof* is the issue of interpretation with which the Committee has confronted itself more often in the individual complaints procedure.[94] Since its decision *PE v France* of 2002, the Committee has consistently held that Article 15 derives from the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.[95] By doing so, the Committee has set up a positive obligation upon States to examine whether evidence brought before them could be tainted by torture. This positive duty of the State mitigates the general rules on the burden of proof, which would normally require the complainant to prove his/her claim before the Committee,[96] and produces what is normally referred to as a 'shift of the burden of proof'. Yet in order to trigger such procedure and thus the positive duty of the State, the complainant needs to allege prima facie evidence of the torture allegation, so as to demonstrate that his/her allegation are well-founded.[97]

47 While until 2003 the Committee had decided only on four cases and found no violation of Article 15;[98] from 2004 until March 2017 it has found violation of Article 15 in eleven out of the fifteen cases it was called to decide upon.[99] Initially the Committee

[94] On the burden of proof see also Ernst (n 1) 140.

[95] *PE v France* No 193/2001 (n 23); *GK v Switzerland*, No 219/2002 (n 31) para 6.3; *Oskartz Gallastegi Sodupe v Spain*, No 453/2011, UN Doc CAT/C/48/D/453/2011, 23 May 2012, para 7.4; *Yousri Ktiti v Morocco*, No 419/2010 (n 57) para 8.8; *Oleg Evloev v Kazakhstan*, No 441/2010 (n 22) para 9.8; *Déogratias Niyonzima v Burundi,* No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014, para 8.7; *Ali Aarrass v Morocco*, No 477/2011, UN Doc CAT/C/52/D/477/2011, 19 May 2014, para 10.8; *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 22) para 17.11; *X v Burundi*, No 553/2013, UN Doc CAT/C/55/D/553/2013, 10 August 2015, para 7.9; *Taoufik Elaïba v Tunisia*, No 551/2013, UN Doc CAT/C/57/D/551/2013, 6 May 2016, para 7.8.

[96] Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 EJIL.

[97] *GK v Switzerland*, No 219/2002 (n 31) para 6.11.

[98] Until 2003 the Committee had decided 4 cases on Article 15 and found no violation see *Encarnación Blanco Abad v Spain*, No 59/1996, UN Doc CAT/C/20/D/59/1996, 14 May 1998; *Halimi-Nedzibi v Austria*, No 8/1991, UN Doc CAT/C/11/D/8/1991, 18 November 1993, para 13.4; *PE v France*, No 193/2001 (n 23); *GK v Switzerland*, No 219/2002 (n 31).

[99] As of March 2017, the Committee had decided fourteen additional cases and found a violation in eleven of them: see *Ennaâma Asfari v Morocco* No 606/2014 (n 59); *Abdulrahman Kabura v Burundi*, No 549/2013,

seemed to have given particular weight to the existence of medical reports or witness statements corroborating the allegations concerning Article 15, thereby setting up a very high threshold for the applicant.[100] However, in more recent cases, it has found violations of Article 15 also when the complainant was not able to produce any medical report or other corroborating evidence.[101] In other words, once the complainant has brought an arguable claim before the Committee, the fact that the State party does not refute the allegations nor include any specific information on the applicant's claim in its observations to the Committee may be enough for the Committee to find a breach of Article 15.[102] As additional corroborating arguments, the Committee has equally considered the fact that national courts failed to address adequately the complainant's allegations of forced confessions as a result of torture,[103] the existence of additional Convention violations, such as for example Article 12 for failure to carry out any investigations despite numerous complaints of torture,[104] or Article 3,[105] as well as the general situation concerning the implementation of this Convention provision by the State party as documented in its concluding observations.[106] Finally, in some cases, the Committee seems to have taken into account also whether the tainted statements had a decisive impact in the relevant proceedings.[107] This is surprising because, contrary to other instruments where the use of tainted evidence is prohibited on the basis of the right to a fair trial, Article 15 CAT sets up a specific exclusionary rule, which, besides protecting the right to a fair trial of the accused, equally aims to safeguard the integrity of the proceedings and prevent the use of torture. As these additional rationales would be frustrated regardless of the impact of the evidence on the final conviction, such an argument is irrelevant for the purpose of establishing a violation of Article 15. Moreover, even in systems where the use of torture evidence is prohibited on the basis of the right to a fair trial, such as the ECHR, it was concluded that, given the seriousness of the offence, the use of torture tainted evidence always renders automatically unfair the whole criminal proceedings, regardless of the probative value of the evidence and irrespective of whether they had a decisive impact in the final conviction.[108]

UN Doc CAT/C/59/D/549/2013, 11 November 2016; *Taoufik Elaïba v Tunisia*, No 551/2013 (n 95); *X v Burundi*, No 553/2013 (n 95); *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 22); *Déogratias Niyonzima v Burundi*, No 514/2012 (n 95); *Nouar Abdelmalek v Algeria*, No 402/2009, UN Doc CAT/C/52/D/402/2009, 23 May 2014; *Ali Aarrass v Morocco*, No 477/2011 (n 95); *Rasim Bairamov v Kazakhstan*, No 497/2012, UN Doc CAT/C/52/D/497/2012, 14 May 2014; *Oleg Evloev v Kazakhstan*, No 441/2010 (n 22); *Yousri Ktiti v Morocco*, No 419/2010 (n 57); for cases in which no violation was found see *RAY v Morocco*, No 525/2012 (n 57); *Sergei Kirsanov v Russian Federation*, No 478/2011, UN Doc CAT/C/52/D/478/2011, 14 May 2014; *Oskartz Gallastegi Sodupe v Spain*, No 453/2011 (n 95).

[100] *Oskartz Gallastegi Sodupe v Spain*, No 453/2011 (n 95) para 7.4; *Halimi-Nedzibi v Austria*, No 8/1991 (n 98) para 13.3; *GK v Switzerland*, No 219/2002 (n 31) para 6.10; *Yousri Ktiti v Morocco*, No 419/2010 (n 57) para 8.8.

[101] *Taoufik Elaïba v Tunisia*, No 551/2013 (n 95) paras 7.8, 5.2.

[102] eg ibid, para 7.8; *Déogratias Niyonzima v Burundi*, No 514/2012 (n 95) para 8.10; *Rasim Bairamov v Kazakhstan* (n 99) para 8.7; and also on extraditional proceedings *Yousri Ktiti v Morocco*, No 419/2010 (n 57) para 8.8.

[103] *Rasim Bairamov v Kazakhstan* (n 99) para 8; *Oleg Evloev v Kazakhstan*, No 441/2010 (n 22) para 9.8.

[104] *X v Burundi*, No 553/2013 (n 95) para 7.

[105] *Yousri Ktiti v Morocco*, No 419/2010 (n 57) para 8.8.

[106] ibid, para 8.5; *Ennaâma Asfari v Morocco*, No 606/2014 (n 59) para 13.8.

[107] *Oskartz Gallastegi Sodupe v Spain*, No 453/2011 (n 95) para 7.4; *Ali Aarrass v Morocco*, No 477/2011 (n 95) para 10.8.

[108] *Jalloh v Germany* App no 54810/00 (n 34) para 105.

48 In *extradition proceedings*, the Committee has considered in particular the status (eg pending[109] or not[110]) of the proceedings in which the complaint concerning the alleged ill-treatment is being investigated in the requesting State. According to the Committee it is in fact for domestic courts to evaluate facts and evidence in a particular case, 'unless the evidence assessment is clearly arbitrary and amounts to a denial of justice'.[111] In practice, the Committee has found *no violation of Article 15* where the ill-treatment complaints were still being investigated by the requesting State,[112] or when the requesting State's authorities had already taken the decision to discontinue the investigation on the complaint.[113] In the first situation the Committee found that it was not yet possible to establish that the statements had been extracted by torture. However, it is believed that if Article 15 is applicable to extradition proceedings, as the Committee accepted it to be, then it should be incumbent on the domestic authorities deciding on the extradition request to at least wait until the required evidence is established and produced by the requesting State.[114] In the second situation, the Committee has taken the view that the decision of the requesting State authorities to discontinue the ill-treatment complaint was sufficient to establish that the statements had not been made in violation of Article 15. Though it would probably stretch the meaning of Article 15 beyond what can reasonably be expected from the authorities of the requested State to investigate torture complaints in the requesting State after its judicial authorities had closed the respective criminal proceedings, the approach taken by the Committee seems to give the authorities in the requesting State almost unlimited discretion to 'establish' that a given extradition request was not based on statements extracted by torture. *A violation of Article 15* in extradition proceedings was found for the first time in the 2011 case *Ktiti v Morocco.*[115] There, the Committee also found a breach of Article 3, thereby closely linking the guarantees under Article 15 to the prohibition of *refoulement* in Article 3 CAT. If a person cannot be extradited because of substantial grounds for believing that he or she would be in danger of being subjected to torture in the requesting State, then the authorities in the requested State are not discharged by their obligation to verify the content of the author's allegations under Article 15 by simply relying on the results of the investigations in the requesting State. On the contrary, as clarified in *Yousri Ktiti v Morocco,* they will have to also 'verify the content of the author's allegations'.[116]

49 But the jurisprudence of the Committee adopted thus far does not assess the question of what test is to be applied in order to establish that evidence is obtained by torture. Such question has been however addressed by other domestic and international courts.[117]

50 Some national courts have applied a *balance of probability test*. For example, in the *German case of El-Motassadeq*,[118] the defendant was charged with conspiracy to cause the

[109] *PE v France*, No 193/2001 (n 23) para 6.4.
[110] *GK v Switzerland*, No 219/2002 (n 31) para 6.11.
[111] *PE v France*, No 193/2001 (n 23) para 6.4. [112] ibid.
[113] *GK v Switzerland*, No 219/2002 (n 31) para 6.11.
[114] *PE v France*, No 193/2001 (n 23) para 6.4.
[115] *Yousri Ktiti v Morocco*, No 419/2010 (n 57) paras 7.4, 8.8. The case concerned a French national detained in Morocco and awaiting extradition to Algeria. Although the complainant had not invoked Article 15, in this case, the Committee found a violation of Article 15 noting that the statements on which the extradition request was based were allegedly obtained under torture and the State party has neither refuted any of these allegations nor included any information on this question.
[116] ibid, para 8.8. [117] On standard of proof see also Ernst (n 1) 157.
[118] *Mounir El-Motassadeq* Decision of 14 June 2005 (n 11) para 4.1.

attacks of 11 September 2011. The Hanseatic Higher Regional Court of Hamburg had to assess whether the summaries of the interrogations of three suspected Al-Qaeda members sent by the United States could be invoked and used as evidence in the criminal trial before it. In its procedural decision of 14 June 2005,[119] the Hamburg Court decided to accept, as trial evidence, the full summaries of the testimonies given by the three witnesses cited above. The Court based this decision on the reasoning that Article 15 CAT only excluded statements as evidence which were established to have been made as a result of torture but that in the present case it was impossible for the Court to establish that the testimonies were in fact extracted by torture. Although the press articles and NGO reports heard in court supplied indications that alleged Al-Qaeda members had been tortured, the Court was unable to verify them, as no primary sources had been named. Moreover, since the summaries of the interrogations also contained exculpatory elements, this was taken as an indication that no torture had been used. Hence, in its judgment of 19 August 2005, the Hamburg Court sentenced Mr. *El-Motassadeq* to seven years' imprisonment for membership of a terrorist organization. In his reasoning, the presiding judge stated that the summaries sent by the US Department of Justice did not have sufficient probative value, positive or negative, with a view to the uncertainty over how the statements had been obtained. The testimonies of the US detainees had therefore only been taken into account, in considering the evidence and reaching a verdict, to the extent to which they had been clearly corroborated by other objective evidence.[120]

51 The *UK House of Lords* concluded in a similar way in the judgment *A and Others v SSHD* of December 2005.[121] On this occasion, the Law Lords agreed that the conventional approach to the burden of proof is inappropriate in relation to Article 15[122] and on the need to devise a procedure that would afford protection to the appellant without imposing a burden of proof on either party that they would not be able to discharge.[123] But, most interestingly, they disagreed on the specific test to apply in relation to the standard of proof. Ultimately, the majority of the Law Lords took a position similar to those of the German authorities in *El-Motassadeq* and followed the *balance of probability test* establishing that evidence should be excluded only if by means of diligent inquiries it can be established that on a balance of probabilities it was obtained by torture. In case of doubt, evidence should be admitted.[124]

52 Others maintained that a *real risk text* should be applied, arguing that a balance of probabilities test constituted a too high threshold which would be impossible to satisfy for the applicant, thus, undermining the practical efficacy of Convention. For example, the real risk test was put forward by the minority in *A and Others v SSHD*, where Lord *Bingham* argued that evidence should only be admitted if the court establishes that there is no such real risk that evidence is extracted by torture, but excluded in all other cases. Consequently, it would be for the appellant to first advance a plausible reason why evidence may have been procured by torture. But it would then be for the court to inquire as to whether there is a 'real risk' that the evidence has been obtained by torture.[125] Similarly, the *ECtHR* has applied the 'real risk' test in the case *Othman (Abu Qatada) v UK* arguing that it would be unfair to impose on the applicant a burden of proof that

[119] ibid. [120] *Mounir El-Motassadeq* Judgment No IV-1/04 (n 11).
[121] [2005] UKHL 71 (n 9). [122] ibid.
[123] ibid para 55 (Lord Bingham) and para 155 (Lord Carswell). [124] ibid paras 121, 158, 172.
[125] ibid 62.

went beyond the demonstration of a 'real risk' that the evidence in question had been thus obtained.[126] In doing so, the ECtHR pointed out that when assessing the admissibility of torture tainted evidence, it is necessary to give due regard 'to the special difficulties in proving allegations of torture'. The fact that torture is often practiced in secret, by experienced interrogators who are skilled at ensuring that it leaves no visible signs on the victim, and with the complicity of those who are charged with ensuring that torture does not occur—courts, prosecutors, and medical personnel—makes its proof particularly difficult. Hence, the ECtHR concluded that by proving a 'real risk' the applicant had discharged the burden that could be fairly imposed on him. Such an approach is also adopted by the *Trial Chamber of the ECCC*.[127]

53 The use of a balance of probability test under Article 15 CAT by the Hamburg Court has been strongly criticized, as it sets up an unrealistically high standard of proof, making the application of the exclusionary rule illusory in cases, where the information is provided by the intelligence of a foreign country without disclosing the full text of the transcript or the whereabouts of the witnesses.[128] On the contrary, in light of well-founded allegations about the torture and enforced disappearance of the witnesses in US custody, it was the responsibility of the Prosecutor (or the Court) to prove beyond reasonable doubt that these testimonies were *not* extracted by torture, rather than to prove that they were actually obtained by torture.[129] For these reasons, it can be concluded that the real risk test is most in line with the letter and spirit of Article 15 CAT.[130]

54 Moreover, also situations of *enforced disappearance* and *incommunicado detention* require special consideration. In this regard, for example, the African Commission has taken the view that 'any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion' and hence not be admitted as evidence.[131] On this point too, the decision taken in the *El-Motassadeq* case should be criticized.[132] Though a careful analysis of the decision shows that the three witnesses whose testimony were in fact victims of enforced disappearance[133]—the Hamburg Court

[126] *Othman (abu Qatada) v the United Kingdom* App no 8139/09 ECtHR (n 25) para 276; see also *El Haski v Belgium* App no 649/08 (ECtHR, 25 September 2012) para 86.

[127] *Khieu Samphan and Nuon Chea*, ECCC, F26/12 (n 5).

[128] See eg SRT (Nowak) A/61/259 (n 89) para 49-52; and Ernst (n 1) 593.

[129] See the AI statement of 19 August 2005 to the UN Special Rapporteur on Torture, Ref: UN 292/2005. [2005] UKHL 71 (n 9) para 60 (Lord Bingham): 'This is not a precedent which I would wish to follow.' But see also the majority opinion led by Lord Hope who based his approval explicitly on the case of El-Motassadeq: [2005] UKHL 71 (n 9) paras 122–124.

[130] For similar conclusions see [2005] UKHL 71 (n 9) paras 54–62, 80, 98; SRT (Nowak) A/61/259 (n 89) paras 57–62; see also Thienel, 'Foreign Acts' (n 62) 401; William A Schabas, 'House of Lords Prohibits Use of Torture Evidence, but Fails to Condemn Its Use by the Police' (2007) 7 International Criminal Law Review 133; Tobias; APT, 'Amicus Curiae Brief Presented to the Inter-American Court of Human Rights by APT in the Case of Teodoro Cabrera García and Rodolfo Montiel Flores Against the United Mexican States, No 12449' (2010) <https://www.apt.ch/content/files_res/apt-amicus-curiae-case-no-12-449-eng--1.pdf> accessed 15 November 2017.

[131] eg *Malawi African Association et al v Mauritania*, Comm Nos 54/91, 61/91, 98/93, 164–96/97 and 210/98 (ACmHPR,11 May 2000) paras 95–96; *Egyptian Initiative for Personal Rights and Interights*, Comm No 323/2006 (ACmHPR, December 2011) para 218. See also SRT (Nowak) A/61/259 (n 89) paras 55–57.

[132] *Mounir El-Motassade*q Decision of 14 June 2005 (n 11) para 4.1.

[133] The US authorities confirmed their being in US custody but refused to provide any information on their fate and whereabouts. The Hamburg Court even stated explicitly that the place of detention has been kept secret by the United States since September 2002 (in the case of Binalshibh) and March 2003 (in the case of Sheikh Mohammed) respectively. For the witness Ould Slahi the date of arrest was not known. *Mounir El-Motassadeq Judgment* No. No IV-1/04 (n 11) : 'Der Aufenthalt der Zeugen Binalshibh und Sheikh Mohammed wird jedoch bereits seit mehreren Jahren geheim gehalten, im Falle Binalshibhs seit seiner im September 2002

held that prolonged incommunicado detention of less than three years and the denial of a proper trial did not amount to a particular serious human rights violation which would under section 136a of the German Criminal Procedure Code exclude the use of statements made during this secret detention.[134] This legal reasoning clearly underestimates the seriousness of the crime and human rights violation of enforced disappearance.[135] In a comparable case against Libya the HRC, for example, qualified a period of three years of incommunicado detention as even amounting to torture.[136] Similarly, the UN Commission on Human Rights has repeatedly stressed that prolonged incommunicado detention may facilitate the perpetration of torture and can itself constitute a form of cruel, inhuman or degrading treatment or even torture.[137] In other words, even before the adoption of the *UN Convention on Enforced Disappearance*,[138] the Hamburg Court should have applied Article 15 CAT and ruled out categorically the use of any statements made by persons held in incommunicado detention for a prolonged period of time. Whether the use of torture for the purpose of extracting information can be established or not is irrelevant in cases of enforced disappearances as the very fact that a person is kept incommunicado for a prolonged period of time amounts to torture or at least cruel, inhuman or degrading treatment.[139] If it is accepted, as the Hamburg Court reluctantly did, that courts use in criminal trials evidence provided by foreign intelligence services, which at the same time clearly admit that this evidence was obtained through interrogation of victims of enforced disappearance, then minimum standards of the international rule of law and human rights will start being seriously undermined.

3.4 Applicability to Statements Obtained as a Result of Cruel, Inhuman and Degrading Treatment or Punishment

55 Whereas Article 12 of the 1975 Declaration applies both to torture and other cruel, inhuman or degrading treatment, Article 15 CAT only refers to torture. This has to do with the fact that during the drafting of the CAT, States could not reach consensus on which State obligations should apply to all forms of ill-treatment and which

erfolgten Ergreifung und bei Sheikh Mohammed seit seiner Festnahme im März 2003. Für den Zeugen Ould Slahi ist das Datum seiner Erfreifung nicht bekannt.'

[134] ibid: 'Ob dies (Verschwindenlassen) im Ergebnis anzunehmen wäre, kann jedoch dahin gestellt bleiben, da die oben bejahte entsprechende Anwendung des in § 136a StPO normierten Beweisverwertungsverbotes nach zutreffender Auffassung nur in Fällen besonders gewichtiger Menschenrechtsverletzungen in Betracht kommt. Dazu zählt die bloße Nichtgewährung von Freiheit und Außenkontakten sowie die Versagung eines geordneten Gerichtsverfahrens nach Auffassung des Senates jedenfalls nach dem hier anzunehmenden bisherigen Zeitraum von höchstens drei Jahren wie im Falle des im September 2002 festgenommenen Binalshibh noch nicht.'

[135] cf the Report of the Independent Expert of the UN Commission on Human Rights (Nowak) on the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances: UN Doc E/CN.4/2002/71. See also the statement of AI of 19 August 2005.

[136] *El-Megreisi v Libyan Arab Jamahiriya*, No 440/1990, UN Doc CCPR/C/50/D/440/1990, 23 March 1994. See also *Rafael Mojica v Dominican Republic*, No 449/1991, UN Doc CCPR/C/51/D/449/1991, 15 July 1994, para 5.7, in which the HRC concluded that the disappearance of persons is inseparably linked to treatment that amounts to a violation of Art 7 CCPR.

[137] See eg Comm Res 2004/41, para 8.

[138] The CED was adopted on 20 December 2006 by GA Res 61/177. See Art 11(2): 'These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.'

[139] Nowak, *CCPR Commentary* (n 2) 178, § 34.

to torture only. The compromise in Article 16, ie the deliberate decision to include a non-exhaustive list of CAT provisions which establish State obligations for all forms of ill-treatment, causes difficult questions of interpretation. In fact, many States wished to apply Article 15 to all forms of ill-treatment.[140]

56 In its 2008 *General Comment on Article 2*, the Committee considered that 'articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment'.[141] Similarly, in the *reporting procedure*, it suggested repeatedly that statements made as a result of cruel, inhuman or degrading treatment (and therefore not only torture) may not be used as evidence in any proceedings.[142] But in the *individual complaint procedure* the Committee has decided in the negative and in the 2014 decision of *Kirsanov v Russia* it explicitly clarified that

> [w]ith regard to the alleged violations of articles 14 and 15 of the Convention, the Committee notes that the scope of application of the said provisions only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16, paragraph 1, of the Convention, though specifically referring to articles 10, 11, 12 and 13, does not mention articles 14 and 15 of the Convention. . . .[143]

57 In the academic literature, the opinion seems to prevail that Article 15 applies exclusively to torture.[144] Yet a systematic interpretation of Articles 15 and 16 in light of the *travaux préparatoires* leads to the conclusion that those CAT provisions which are directly related to criminal law only apply to torture, whereas the more preventive obligations of States can also apply to all forms of ill-treatment.[145] Since one of the purposes of Article 15 is connected to criminal proceedings, one could argue that it applies exclusively to torture. On the other hand, Article 15 also has a clear and important preventive purpose, which supports a broader interpretation. Moreover, the developments recalled above show that Article 15 does not apply only to criminal proceedings but also to civil and administrative ones, as well as to any other formal proceedings. Hence, Article 15 cannot be regarded as a provision only 'related to criminal law'. Lastly, the application of the exclusionary rule to other forms of ill-treatment is widely supported by the practice of other international bodies, including the HRC[146] and the SRT,[147] as well as the practice of several States.[148]

[140] See below Art 16, § 24. See also Burgers and Danelius (n 1) 70–71, 95–96, 150.

[141] CAT, 'General Comment No 2 Implementation of Article 2 by States parties' (2008) UN Doc CAT/C/GC/2, para 6. See also below Art 16, 3.2.

[142] eg amongst many others CAT, 'Concluding Observations: Azerbaijan' (2016) UN Doc CAT/C/AZE/CO/4, para 19; CAT, 'Concluding Observations: Belgium' (2014) UN Doc CAT/C/BEL/CO/3, para 24; CAT, 'Concluding Observations: Colombia' (2015) UN Doc CAT/C/COL/CO/5, para 23; CAT/C/GBR/CO/5 (n 55) para 11; see also A/48/44/Add.1, para 28; and Ingelse (n 1) 381.

[143] *Sergei Kirsanov v Russian Federation* No 478/2011 (n 99) para 11.4.

[144] See also Burgers and Danelius (n 1) 147; Ingelse (n 1) 366; Ernst (n 1) 120.

[145] See also below Art 16, 3.2.

[146] HRC, General Comment No 20 (1992) para 12, where the HRC explicitly applied such a prohibition to all forms of ill-treatment, recalling how 'it is important for the discouragement of violations of article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment'. Contra *Khieu Samphan and Nuon Chea,* ECCC, F26/12 (n 5) para 61.

[147] SRT (Mendez) A/HRC/25/60 (n 5) para 26.

[148] cf Akma Niyazmatov, 'Evidence Obtained by Cruel, Inhuman or Degrading Treatment: Why the Convention Against Torture 's Exclusionary Rule Should Be Inclusive' (Cornell Law School Inter-University Graduate Student Conference Paper 2011). Niyazmatov's comparative study shows that Canada, the United States, Argentina, Mexico, Germany, the United Kingdom, Japan, China, Russia, and South Africa apply the exclusionary rule also the cruel, inhuman and degrading treatment and punishment.

58 In any event, even if Article 15 was to apply to other forms of ill-treatment, the result would not be that different. This provision aims at preventing confessions and other statements obtained by coercion from being used as evidence in judicial or administrative proceedings, and to extract a confession or information during interrogation of a detainee is, the classical purpose of torture as defined in Article 1.[149] In other words, if interrogation methods aimed at obtaining a confession or other information cause severe pain or suffering, then they amount not only to cruel and inhuman treatment, but also to torture. If they do not reach this level of pain or suffering, they are not prohibited by the CAT unless their particularly humiliating nature can be considered as degrading treatment. The only question of interpretation which remains, therefore, is whether a statement which has been obtained by degrading treatment causing non-severe pain or suffering may be invoked as evidence in any proceedings. In light of the preventive purpose of Article 15, this question can be answered in the affirmative although its practical significance seems to be limited.[150]

3.5 Exception to the Rule

59 Article 15 provides in its last part that the exclusionary rule does not apply 'against a person accused of torture as evidence that the statement was made'. This exception clause is not contained in Article 12 of the 1975 Declaration. It appears first in Article VII of the IAPL draft.[151] In comments based on Article 13 of the original Swedish draft, the *Austrian* delegate sought to include the IAPL provision since Article 13 of the Swedish draft could be interpreted 'in a manner which would prohibit the prosecution of a person accused of having inflicted torture'. Similarly, the *United States* proposed the following formulation: '… except that it (the statement) may be invoked in evidence against a person accused of having obtained such statement by torture'.[152] This debate was then reflected in the revised Swedish draft,[153] as well as in the final version adopted by the Working Group reading as follows: 'except against a person accused of torture as evidence that the statement was made.'[154] In contrast to the US proposal and revised Swedish draft, which broader formulation appeared to allow an 'unlimited use' of evidence against suspected torturers, Article 15 seems to permit the use of tainted statements only for the purpose of proving that the statement was in fact obtained through torture thus enabling a 'limited use' of torture tainted evidence.[155]

60 The purpose of this provision is thus very clear. The drafters wished to confirm explicitly that the rule did not exclude the use of any statements extracted by torture in a criminal procedure against the alleged torturer. Whether such an explicit exception clause was needed is, however, doubtful. As *Burgers* and *Danelius* already showed in their 1988 *Handbook*, this exception 'is more apparent than real'.[156] The rule of Article 15 in fact

[149] See above Art 1, 3.1.4. [150] See also Art 16, § 24.

[151] '… except against a person accused of obtaining it (the statement) by torture.'

[152] E/CN.4/1314 (n 17) para 22; see also above § 7.

[153] E/CN.4/WG1/WP1 (n 19) Art 15, '… except that it may be invoked in evidence against a person accused of having obtained such statements by torture'.

[154] Report of the Commission on Human Rights on its Thirty-sixth Session (1980) UN Doc E/CN.4/1408, para 84.

[155] See also AI, ICJ and REDRESS Trust, 'Amicus Curiae Submission Pursuant to Internal Rule 33 Submitted in Chambers in the Courts of Cambodia No 002/19-09-2007-ECCC-OCIJ-PTC' 8 (2009).

[156] Burgers and Danelius (n 1) 148. See also Pattenden (n 28) 6.

means that the evidence resulting from torture, that is to say the substance of a confession or other statement extracted by torture, should not be used. However, in a criminal trial against the torturer, the prosecutor needs to prove that torture was inflicted, and the victim may give testimony about the torture methods applied and the pain and suffering endured. In other words, what the drafters wished to ensure is less that the contents of a statement could be used as evidence against the torturer, but rather the very fact that the victim made a statement as a result of torture could be proved. Thus, strictly speaking, this provision does not provide an exception to the rule as it does not affect the validity of the principle expressed in Article 15. But it certainly also does no harm to state the obvious.

61 This approach has been recently challenged by the prosecution in the proceedings before the Extraordinary Chambers in the Courts of Cambodia (ECCC),[157] where the prosecutors tried to depart from the standard interpretation recalled above.[158] Once realized that the evidence against the Khmer Rouge officials was limited, the prosecutors tried to use evidence originating from the detention and torture centre at Tuol Sleng that would have otherwise been excluded to prove the criminal responsibility of the Khmer Rouge leaders as well as the ECCC jurisdiction.[159] Starting from the standpoint that 'barring tainted evidence would reward those who participated in bringing about torture', they argued that the sentence 'as evidence that the statement was made' implied that the use of torture statements against the suspect torturers is prohibited *only to prove facts related to the truth of the matter 'confessed'* but can be used *for any other purpose than to prove the truth of its content*.[160]

62 In some early decisions the ECCC refused this approach arguing that 'there is no room for determination of the truth or for use otherwise of any statements obtained through torture' thus confirming that tainted evidence may be relied upon only as proof that a statement was obtained through torture.[161] Yet in a later decision of February 2016, the ECCC—Trial Chamber saw fit going back on the issue of admissibility of torture tainted evidence and taking a different stance.[162] In doing so, it observed that 'Article 15 does not clarify how a statement may be used and for what purpose(s)'.[163] The Trial Chamber maintained that proving that a statement was obtained through torture is only

[157] The ECCC, an ad hoc Cambodian Court with international participation, was set up to bring to trial senior leaders and those most responsible for crimes committed during the time of Democratic Kampuchea (the Khmer Rouge regime). It was established following an official request for assistance by the Kingdom of Cambodia on 21 June 1997, by the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 and entered into force on 29 April 2005; see also GA Res No 57/228 of 13 May 2003 approving the draft ECCC Agreement; and A/60/565, para 4.

[158] Thienel, 'The Admission of Torture Statements' (n 28) 491; Michael P Scharf, 'Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible' (2008) 65 Washington & Lee Law Review 129.

[159] *Ieng Thirith* (ECCC -Office of the Co-Investigating Judges, Case 002, Order E3/1555 of 28 July 2009) para 27; see also Scharf (n 158) fn 8 and Thienel, 'The Admission of Torture Statements' (n 28) 511. The category included for example handwritten annotations made by someone not subject to torture; preliminary biographical material given by the victim during the registration and before torture; any objective information such as the date of the person's arrest, the name, age position and work unit of the person subject to torture.

[160] *Ieng Thirith,* ECCC, E3/1555 (n 159) paras 19–30; *Khieu Samphan and Nuon Chea,* ECCC, F26/12 (n 5) para 66.

[161] *Ieng Thirith* (ECCC Pre Trial Chamber, Case 002, Decision D130/21 of 18 December 2009) para 30. For a more detailed analysis of the ECCC jurisprudence see Thienel, 'The Admission of Torture Statements' (n 28).

[162] *Khieu Samphan and Nuon Chea*, ECCC, E350/8 (n 27) para 71. [163] ibid, para 72.

one of the purposes allowed by Article 15, and consequently agreed to the use of the tainted statements also for other additional purposes such as to determine what action resulted based on the fact that a statement was made,[164] or to demonstrate the proof of reliance on this information by the accused or others within the CPK structure.[165]

63 In a partially dissenting opinion, *Judge Fenz* criticized this interpretation arguing that the majority had wrongly broadened the scope of the exception 'from allowing the use of a statement obtained by torture for *one purpose* to allowing the use of such statement for *all purposes but one* (ie to establish its truth)'.[166] She reaffirmed that 'the purpose of the "exception" is not to establish a substantive exception to the rule but to prevent—by way of this clarification—an overly extensive interpretation of Article 15 which would have indeed bordered on absurd'.[167] In fact, as some commentators have already opined, it is believed that disregarding the rationale of the integrity or fairness of the proceedings in the name of evidentiary efficiency makes a 'disservice to international criminal justice'.[168] This position is further supported by other international instruments (eg CCPR) and regional bodies (eg Inter-American Convention).[169]

64 As to the *personal scope* of the exception to the rule, there is consensus on the fact that the term 'persons accused of torture' encompasses not only the direct perpetrator, but also any other person prosecuted for torture under other modes of criminal responsibility (eg superior responsibility).[170] This view is also supported by the drafting history of Article 15. In fact, whilst the Revised Swedish Draft referred to 'a person accused of obtaining that statement by torture', the final text of the Convention generally point at 'a person accused of torture'.[171]

GIULIANA MONINA

[164] ibid, para 77.

[165] ibid, para 87; see also Scharf (n 158), for whom the ECCC violated the principle 'expression unius est exclusion alterius'.

[166] *Partially Dissenting Opinion of Judge Fenz* ECCC Trial Chamber in Case 002, E350/S.1 para 5.

[167] ibid, para 20.

[168] Kai Ambos, 'The Transnational Use of Torture Evidence' (2009) 42 ILR 381; Thienel, 'The Admission of Torture Statements' (n 28) 512.

[169] The Intern-American Convention to Prevent and Punish Torture provides 'No statement that is verified as having been obtained through torture shall be admissible as evidence in legal proceedings, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means' (Art 10); see also HRC (n 39) para 6 which states 'except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred'.

[170] *Ieng Thirith,* ECCC, E3/1555 (n 159) para 22; Thienel, 'The Admission of Torture Statements' (n 28) 494; AI, ICJ and REDRESS Trust (n 155) 4; for a narrower interpretation see Scharf (n 158) 159.

[171] See also Thienel, 'The Admission of Torture Statements' (n 28) 497.

Article 16

Cruel, Inhuman or Degrading Treatment or Punishment

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

1. Introduction 441
2. Travaux Préparatoires 442
3. Issues of Interpretation 443
3.1 Meaning of Cruel, Inhuman or Degrading Treatment or Punishment 443
3.2 Applicability of Articles 3 to 15 to Other Forms of Ill-Treatment 446
3.3 State Obligations to Prevent Cruel, Inhuman and Degrading Treatment or Punishment 450
3.4 Prevention of Ill-Treatment in Detention 450
3.4.1 Ensuring Adequate Material Conditions of Detention 450
3.4.2 Ensuring Discipline and Security in Line with Human Dignity of Detainees 452
3.4.3 Prevention of Inter-Prisoner Violence 454
3.4.4 Ensuring Protection against Ill-Treatment in Detention for Groups in a Specific Situation of Vulnerability 455
3.5 Preventing Cruel, Inhuman or Degrading Punishments 460
3.5.1 Corporal Punishment 460
3.5.2 Capital Punishment 463
3.6 Extra-Custodial Use of Force and Other Cruel, Inhuman or Degrading Treatment or Punishment 467
3.7 Prevention of Ill-Treatment Committed By Private Actors 470
3.8 Savings Clause (Paragraph 2) 471

1. Introduction

1 The human right to personal integrity is usually defined as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[1] The CAT was not adopted to reaffirm these prohibitions but to 'make more effective the

[1] Art 5 UDHR; Art 7 CCPR; Art 5(2) ACHR; Art 5 ACHPR. Only Art 3 ECHR does not contain the prohibition of cruel treatment or punishment.

struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world',[2] in particular through the creation of specific State obligations to punish the perpetrators and to prevent such practices. Article 16 mirrors Article 2 and provides a broad obligation of States to prevent cruel, inhuman or degrading treatment or punishment. Issues of interpretation that have been thoroughly debated are the scope of Article 16 and which State obligations, as outlined by the Convention, are not only applicable to torture, but also to cruel, inhuman or degrading treatment or punishment. Developments over time in terms of how to interpret these State obligations can especially be witnessed vis-à-vis the legal qualification of corporal and capital punishment.

2. Travaux Préparatoires

2 Although the General Assembly had instructed the Commission in 1977 to draw up a draft Convention on torture and other forms of ill-treatment, it was clear that certain State obligations should only apply to the practice of torture. Some States, such as the *United States*, even suggested that the Convention should exclusively or at least primarily focus on torture alone.[3] Similarly, the IAPL draft only covered torture. The *Swedish* draft, on the other hand, in line with the 1975 Declaration, defined torture as an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment and intended to make most provisions applicable to both torture and other forms of ill-treatment.

3 During the deliberations in the Working Group, the following compromise was achieved: in principle, the Convention only applies to torture as defined in Article 1(1), but in Article 16, States parties shall undertake also to prevent other acts of ill-treatment which 'do not amount to torture as defined in article 1'. This means, first of all, that it was originally envisaged that all obligations related to the use of *criminal law*, ie Articles 4 to 9, only apply to torture. The obligation to *prevent* other forms of ill-treatment was accentuated by the second sentence in Article 16(1) according to which 'in particular, the obligations contained in articles 10, 11, 12, and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment'. But the Convention also contains provisions which are neither criminal nor purely preventive in nature, ie Articles 3, 14, and 15. The reference to these provisions in Article 16 was originally contained in brackets but later deleted in order to achieve a consensus. On the other hand, the words '*in particular*' indicate that the reference to Articles 10, 11, 12, and 13 is not exhaustive. Whether the obligations contained in other provisions, above all the obligation in Article 14 to ensure that the victim obtains redress, compensation, and rehabilitation, only apply to torture or also to other forms of ill-treatment, needs, therefore, to be resolved by means of interpretation. The Committee has also provided more guidance in recent years, eg through its General Comments.

4 During the drafting of Article 16, it also soon became clear that a proper definition of the terms cruel, inhuman or degrading treatment or punishment was impossible to achieve. The precise meaning of these words is also in need of interpretation. Finally, the Convention does not contain any specific human right not to be subjected to torture or other forms of ill-treatment. Article 16(1) only creates a State obligation to prevent cruel,

[2] See above Preamble.

[3] On the *travaux préparatoires* of Art 16 see above Arts 1, 2.

inhuman or degrading treatment or punishment, similar to the obligation in Article 2(1) to take effective measures to prevent torture. The question, therefore, arises whether Article 16 can be invoked as an individual right before domestic courts and in the individual complaints procedure before the Committee, which is clearly to be answered in the affirmative.[4]

3. Issues of Interpretation

3.1 Meaning of Cruel, Inhuman or Degrading Treatment or Punishment

5 There is no definition of cruel, inhuman or degrading treatment or punishment (hereinafter also referred to as 'other forms of ill-treatment') in international treaties, but it is commonly distinguished from torture as defined under Article 1.[5] However, from the drafting history of the Convention and the discussions on the definition of torture, it becomes clear that the drafters had relied more on the approach taken by the *European Commission of Human Rights* in the *Greek case* than on the approach of the *European Court of Human Rights* in the *Northern Ireland case.*[6] It follows that the decisive criteria for distinguishing torture from cruel and inhuman treatment is the *purpose* of the conduct, the *intention* of the perpetrator, and the *powerlessness* of the victim.[7]

6 *Cruel and inhuman treatment or punishment*, therefore, can be defined as the infliction of severe pain or suffering, whether physical or mental, by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Such conduct can be both intentional or negligent, with or without a particular purpose. It does not require the specific situation of detention or direct control of the victim by the perpetrator, which is characteristic only for torture.[8] Cruel and inhuman treatment or punishment, therefore, also encompasses *excessive use of force by law enforcement officials* for other purposes, such as defending a person from unlawful violence, effecting a lawful arrest, preventing the escape of a person lawfully detained, quelling a riot or insurrection, or dissolving a demonstration (see section 3.7 below). Outside the narrow scope of torture, the infliction of severe pain or suffering may be justified if such use of force serves a legitimate purpose and is not excessive.

7 The principle of *proportionality* must, therefore, be applied in order to assess whether the infliction of severe pain or suffering amounts to cruel or inhuman treatment or punishment. If the use of force is not necessary and in the specific circumstances of the case not proportional with the purpose achieved, it amounts to cruel or inhuman treatment.

[4] See Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 274 with further references.

[5] SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/HRC/13/39, para 60.

[6] See above Art 1, paras 67ff.

[7] SRT (Nowak) A/HRC/13/39 (n 5) para 60; See also SRT (Nowak) 'Report of the Special Rapporteur on the Question of Torture' (2005) UN Doc E/CN.4/2006/6; see Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23 NQHR 674.

[8] See above Art 1, para 114. But see Herman Burgers and Hans 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 Publishers 1988) 149, who even assume that 'the victims of acts referred to in article 16 must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment'.

Once a person is powerless, ie is under direct physical or equivalent control of the perpetrator and has lost the capacity to resist or escape the infliction of pain or suffering, the proportionality is no longer applicable.[9]

8 There are no clear legal criteria for distinguishing cruel from inhuman treatment, apart from our common understanding of the meaning of the words 'cruel' and 'inhuman'.[10] However, in practice this seems to be of little relevance and a distinction has so far not been made by the Committee.

9 *Degrading treatment or punishment* can be defined as the infliction of pain or suffering, whether physical or mental, which aims at *humiliating* the victim. Even the infliction of pain or suffering which does not reach the threshold of 'severe' must be considered as degrading treatment or punishment if it contains a particularly humiliating element.[11] According to the ECtHR and the European Commission of Human Rights, a treatment or punishment will be degrading 'if it grossly humiliates [the victim] before others or drives him to act against his will or conscience'[12] and when 'it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing [victims]'.[13] The Court has found a violation also when there was no evidence of intent to humiliate or debase the victim. The UNSRT and ECtHR have found the forcible and discriminatory testing for HIV and Hepatitis C,[14] the shackling or handcuffing in front of a public,[15] or even the unjustified use of force in detention that does not reach the level of severity (such as a slap in the face of a juvenile)[16] as constituting examples for degrading treatment.

10 As for torture, also cruel, inhuman and degrading treatment can be committed by public officials by *instigation, consent, and acquiescence* which need to be interpreted like the terms in article 1 (see further section 3.8 herein below).[17] This obligation of States parties to act with due diligence is part of the general obligation to protect individuals against widespread human rights violations by private parties.[18] This is particularly important as States are increasingly delegating part of their law enforcement, intelligence, and military operations to private companies outsourcing selected tasks, including the use of force, to running entire detention facilities. Thus the UNSRT has recalled that

[9] SRT (Nowak) A/HRC/13/39 (n 5) para 60; SRT (Melzer) 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2017) UN Doc A/72/178, para 31.

[10] According to the *Oxford English Dictionary*, 'cruel' is defined as (1) 'disregarding or taking pleasure in the pain or suffering of others' or (2) 'causing pain or suffering'. The word 'inhuman' is defined as (1) 'lacking positive human qualities'; 'cruel and barbaric' or (2) 'not human in nature or character'. One may conclude that there is no essential difference between cruel and inhuman treatment.

[11] SRT (Nowak) A/HRC/13/39 (n 5) para 60.

[12] Council of Europe (CoE), *Yearbook of the European Convention of Human Rights* (Springer Netherlands 1972) 1.

[13] See eg *Kudła v Poland* [GC] ECHR 2000-XI 197, para 92; *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006) para 68.

[14] When done without respecting consent and necessity requirements, see SRT (Nowak), 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (2009) UN Doc A/HRC/10/44, para 65.

[15] See *Pugžlys v Poland* App no 446/10 (ECtHR, 14 June 2016); *Svinarenko and Slyadnev v Russia* [GC] App no 32541/08 and 43441/08 (ECtHR, 17 July 2014) para 177; *Khodorkovskiy and Lebedev v Russia* App nos 11082/06 and 13772/05 (ECtHR, 25 July 2013) paras 485–86; *Ashot Harutyunyan v Armenia* App no 34334/04 (ECtHR, 15 June 2010) paras 126–29; *Piruzyan v Armenia* App no 33376/07 (ECtHR, 26 June 2012) para 74.

[16] *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015).

[17] See also Art 1, 3.1.6.

[18] See with respect to Art 7 CCPR (n 1) eg Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, Kehl/Strasbourg/Arlington 2005) (*CCPR Commentary*) 182ff.

States cannot absolve themselves from their international legal responsibility for acts of torture and other forms of ill-treatment.[19]

11 The Committee has given various examples of acts thateither amount to torture or 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article' in its Concluding observations. Situations that may constitute cruel, inhuman or degrading treatment or punishment are, but not limited to, poor conditions of detention, corporal and capital punishment, excessive use of force, and failing to protect individuals from ill-treatment by private actors, eg domestic violence, female genital mutilation, and trafficking in human beings, all of which are addressed in the sub-sections below.[20] However, if the additional definition criteria for torture are fulfilled, these practices may also amount to torture.[21]

12 The *United States* entered a *reservation* and considers itself bound by the obligation under Article 16 only in so far as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution.[22] Several member States objected to this reservation as being incompatible with the object and purpose of the Convention,[23] and also the Committee considered this reservation explicitly as a violation of the CAT.[24] The United States later argued that the reservation 'does not introduce any limitation to the geographic applicability of article 16', and that 'the obligations in article 16 apply beyond the sovereign territory of the United States to any territory under its jurisdiction' but it did not follow the Committee's recommendation to withdraw the reservation.[25]

[19] SRT (Méndez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) A/HRC/34/54, para 47.

[20] A/HRC/13/39 (n 5) para 60.

[21] *Dragan Dimitrijevic v Serbia and Montenegro,* No 207/2002, UN Doc CAT/C/33/D/207/2002, 24 November 2004, para 5.3; CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey' (1993) UN Doc A/48/44/Add.1, para 52; and CAT, 'Report of the Committee against Torture Twenty-Fffth session (13-24 November 2000) Twenty-sixth session (30 April–18 May 2001)' (2001) UN Doc A/56/44.

[22] See below Appendix A4. See also the comparable US reservation to Art 7 CCPR, which has been strongly rejected by European States and the HRC <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec> accessed 7 July 2018.

[23] 'The Government of the Netherlands considers the reservation made by the United States of America regarding the article 16 of [the Convention] to be incompatible with the object and purpose of the Convention, to which the obligation laid down in article 16 is essential. Moreover, it is not clear how the provisions of the Constitution of the United States of America relate to the obligations under the Convention. The Government of the Kingdom of the Netherlands therefore objects to the said reservation. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the United States of America.'

'The Government of Sweden would like to refer to its objections to the reservations entered by the United States of America with regard to article 7 of the International Covenant on Civil and Political Rights. The same reasons for objection apply to the now entered reservation with regard to article 16 reservation I (1) of [the Convention]. The Government of Sweden therefore objects to that reservation.'

'A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle to treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty. The Government of Finland therefore objects to the reservation made by the United States to article 16 of the Convention.' Finland (27 February 1996). See below Appendix A4.

[24] CAT, 'Report of the Committee against Torture' (2000) UN Doc A/55/44, para 179(b).

[25] CAT, 'Concluding Observations: USA' (2014) UN Doc CAT/C/USA/CO/3-5, para 10.

3.2 Applicability of Articles 3 to 15 to Other Forms of Ill-Treatment

13 Under Article 16, States parties undertake 'to prevent' acts of ill-treatment.[26] In the second sentence of Article 16(1), the drafters, after long and controversial discussions, specified the obligation to prevent as follows: 'In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.' During the drafting, many States wished to add to this list of obligations those contained in Articles 3, 14, and 15.[27] Since an agreement could not be reached, these references were deleted from the draft, and the words 'in particular' added in order to show that this reference is not exhaustive.[28]

14 There has been a lengthy discussion around the interpretation of the words 'in particular', arguing either that all rules of the Convention *mutatis mutandis* are applicable also to cruel, inhuman or degrading treatment or punishment[29] or that it does not go beyond the obligations covered by Articles 10 to 13.[30]

15 In its General Comment No 2 the Committee appeared to favour a broad interpretation stipulating that: 'Article 16, identifying the means of prevention of ill-treatment, emphasizes "in particular" the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles.'[31] As reasons it states that the obligations to prevent torture and other forms of ill-treatment are 'indivisible, interdependent and interrelated',[32] overlapping and largely congruent in practice. The definitional threshold between them is often not clear and according to experience the very same conditions that enable ill-treatment also facilitate torture. The Committee therefore concludes that 'the measures required to prevent torture must be applied to prevent ill-treatment'.[33] However, this broad interpretation has to be read in the context in which General Comment No 2 was drafted, namely in the light of the atrocities committed in the name of the so called 'war on terror' (eg the incidents of Abu Ghraib) and the threat to the absolute prohibition of torture.[34] The purpose of the Committee's extensive interpretation was thus to reject any attempts to justify torture and other forms of ill-treatment and to bolster its absolute prohibition. This is confirmed by the Committee's subsequent practice where it has not upheld its view that all articles of the CAT apply equally to torture and other forms of ill-treatment.

[26] During the drafting of Art 16, the word 'prohibit' had been replaced by the word 'prevent'. See also above Art 2.

[27] See Burgers and Danelius (n 8) 150, 70–71, 95–96; See also above § 1 and Art 1, 2.2.

[28] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 41.

[29] Joseph Voyame, 'Das UNO-Übereinkommen gegen Folter und andere grausame, unmenschliche und erniedrigende Behandlung oder Strafe' in Franz Matscher (ed), *Folterverbot sowie Religions- und Gewissensfreiheit im Rechtsvergleich. The Prohibition of Torture and Freedom of Religion and Conscience, Comparative Aspects* (Engel 1990) 113. See also Maxime Tardu, 'The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (1987) 56 Nordic Journal of International Law 303, 315; Ingelse (n 4) 248.

[30] While Ingelse (n 4) 248 concedes that the wording 'in particular' in Art 16 (1) does not exclude the obligations following from the other Articles from being applicable to cruel, inhuman or degrading treatment in the sense of Art 16, he is critical of Voyame: 'Voyame goes very far by stating without basis that all rules of the Convention mutatis mutandis are applicable to cruel, inhuman or degrading treatment or punishment'.

[31] CAT, 'General Comment No 2: Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 3.

[32] ibid. [33] ibid, paras 6, 3. [34] See ibid, paras 5, 6.

16 A *literal interpretation* of the term 'in particular' suggests that neither the Convention as a whole nor exclusively the articles mentioned in Article 16 should apply to other forms of ill-treatment. The wording explicitly leaves it open, suggesting that an applicability to other than the mentioned articles is possible.

17 When looking at the Convention as a whole it becomes clear that Article 16 cannot apply to all articles of the Convention as otherwise there would be no reason to separate between Article 2 and 16 in the first place. Moreover Article 16 refers to the obligation of States parties to 'prevent' other forms of ill-treatment not amounting to torture and specifically confirms the applicability of the key preventive articles 10 to 13 to other forms of ill-treatment. In that regard it stands clearly separate from the preceding Articles 4 to 9 that—despite their preventive effect—are primarily of a repressive (criminal) nature. The objective thus seems to be that the mainly preventive obligations can also apply to other forms of ill-treatment unlike the obligations of States parties to use domestic criminal law for the purpose of investigating any crime of torture and bringing the perpetrators to justice. The *travaux préparatoires* equally show that all the provisions relating to the criminal prosecution of the perpetrators of torture (Articles 4 to 9) would only apply to torture in the narrow sense of Article 1, with one argument being the difficulty to define cruel, inhuman or degrading treatment or punishment, because these terms were not defined in the Convention.[35] Only the three provisions, which were put in square brackets during the deliberations in the Working Group (Articles 3, 14 and 15), were considered controversial.

18 This means that the obligations deriving from *Articles 4 to 9* apply exclusively to torture, as defined in Article 1. States are, therefore, not required to introduce the offence of inhuman treatment as a crime in domestic law and apply the principle of universal jurisdiction to these forms of ill-treatment. On the other hand, the obligations to prevent torture by means of education and training, by systematically reviewing interrogation rules and practices, by ensuring a prompt and impartial *ex officio* investigation, and by ensuring an effective complaints mechanism, as laid down in Articles 10 to 13, must be applied equally to torture and other forms of ill-treatment. The applicability of the other provisions of CAT must be considered in light of their specific purpose; in particular, whether these obligations are more of a preventive or repressive (criminal) nature.

19 The *principle of non-refoulement in Article 3* is of preventive nature while at the same time clearly separated from the key preventive articles in the Convention. This confirms its specific importance for the prevention of torture as well as the particular nature of the obligation—relating to a risk of torture in another State. The systematic position and separation from the other preventive articles suggests that the applicability to ill-treatment was not intended. This interpretation is confirmed by the *travaux péparatoires,* showing that during the drafting process, many Governments, above all the *United States*, clearly stated that this principle only applies to the danger of being subjected to torture in the most narrow sense.[36] Moreover, in its first General Comment to Article 3 of 1998, the Committee made clear that 'Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention'.[37] Consequently in its first decision

[35] Report of the Commission on Human Rights on its 36th Session (1980) UN Doc E/CN.4/1408.
[36] See above Art 1, 2.2.
[37] CAT, 'Report of the Committee against Torture Fifty-third Session' (1998) UN Doc A/53/44, para 1.

in an individual case on this issue, *BS v Canada*, the Committee noted that Article 3 does not encompass situations of ill-treatment envisaged by Article 16[38] and it has followed this line in its subsequent decisions, also in case law adopted after its General Comment 2 on Article 2.[39]

20 At the same time, the Committee in the case *MMK v Sweden* (regarding a complaint from a Bangladeshi citizen alleging a violation of Article 16 due to his 'fragile psychiatric condition and severe PTSD') observed that in very exceptional circumstances a removal per se may constitute cruel, inhuman or degrading treatment and thus violate Article 16 (although such exceptional circumstances had not been presented in the complainant's case).[40] Thereby the Committee acknowledges the fact that the duty to prevent torture (Article 2) and other forms of ill-treatment (Article 16) overlap in practice and the definitional threshold is often not clear. This reasoning is confirmed by the revised General Comment No 1 to Article 3 of 2017 in which the Committee interprets Article 3 to apply only to cases of torture, while nevertheless referencing its General Comment No 2. The Committee found that 'States parties should consider whether forms of cruel, inhuman or degrading treatment or punishment that a person facing deportation is at risk of experiencing could likely change so as to constitute torture before making an assessment on each case relating to the principle of "non-refoulement." '[41] Moreover it clarifies that 'the fact that Article 3 of the Convention only deals with torture should not be interpreted as limiting the prohibition against extradition or expulsion which follows from such other instruments'.[42] The position of the Committee is therefore clear insofar as the application of Article 3 does not extend to other forms of ill-treatment. However, this does not exclude the protection from ill-treatment by Article 16 or other non-refoulement principles as derived from Articles 3 ECHR or 7 ICCPR. Seemingly for that reason, the Committee has also recommended to States in some Concluding observations to provide protection from refoulement beyond the scope of Article 3 to ensure that no person in need of protection is returned to a country where he/she is in danger of being subjected to acts of torture and other forms of ill-treatment.[43]

21 Nevertheless, the Committee's position is narrower regarding the applicability of the prohibition of non-refoulement than positions of other international organs: the

[38] *BS v Canada*, No 166/2000, UN Doc CAT/C/27/D/166/2000, 14 November 2001, para 7.4.

[39] *SV et al v Canada*, No 49/1996, UN Doc CAT/C/26/D/49/1996, 15 May 2001 and *TM v Sweden*, No 228/2003, UN Doc CAT/C/31/D/228/2003, 18 November 2003; *MV v The Netherlands*, No 201/2002, UN Doc CAT/C/30/D/201/2002, 2 May 2003, para 6.2; *Eveline Njamba and her daughter Kathy Balikosa v Sweden*, No 322/2007, UN Doc CAT/C/44/D/322/2007, 14 May 2010, para 6.3; *GRB v Sweden*, No 83/1997, UN Doc CAT/C/20/D/83/1997, 15 May 1998, para 6.5. See also above Art 3, 3.5.1.

[40] Also see Art 3 above. This was confirmed by the Committee in a number of individual complaints, see eg *Bachan Singh Sogi v Canada,* No 297/2006, UN Doc CAT/C/39/D/297/2006, 16 November 2007, para 9.3; see also: *BSS v Canada*, No 183/2001, UN Doc CAT/C/32/D/183/2001, 12 May 2004, para 10.2; *MF v Sweden,* No 326/2007, UN Doc CAT/C/41/D/326/2007, 14 November 2008, para 6.4.

[41] CAT, 'General Comment No 1: Implementation of Article 3 of the Convention in the Context of Article 22' (1997), contained in UN Doc A/53/44 (n 37) Annex IX, para 16.

[42] ibid, para 26.

[43] eg CAT, 'Concluding Observations: Serbia' (2015) UN Doc CAT/C/SRB/CO/2, para 15. See also: CAT, 'Concluding Observations: The Philippines' (2016) UN Doc CAT/C/PHL/CO/3, para 14.; CAT/C/USA/CO/3-5 (n 25) para 16.; CAT, 'Concluding Observations: Cameroon' (2010) UN Doc CAT/C/CMR/CO/4, para 28; CAT, 'Concluding Observations: France' (2016) UN Doc CAT/C/FRA/CO/7, para 18; CAT, 'Concluding Observations: Greece' (2012) UN Doc CAT/C/GRC/CO/5-6, para 19; in the 2012 Concluding Observations on Armenia, however, only reference to torture is made: CAT, 'Concluding Observations: Armenia' (2012) UN Doc CAT/C/ARM/CO/3, para 24.

ECtHR has applied the prohibition of refoulement under Article 3 ECHR equally to the risk of torture and other forms of ill-treatment,[44] and the UN Human Rights Committee has followed this jurisprudence in relation to Article 7 CCPR.[45] The UNSRT has stated: 'States are prohibited from returning anyone to a situation where there are substantial grounds to believe that the person may be subject to torture or ill-treatment.'[46]

22 Regarding the *right to remedy and reparation* contained in Article 14 the Committee has held in its first case on the matter, *Hajrizi Dzemajl et al v Yugoslavia*[47] in 2002 that its scope of application only refers to torture and not to other forms of ill-treatment.[48] Nevertheless, it stipulated that the first sentence of Article 16 encompasses the positive obligation to grant redress and compensate the victims.[49] The Committee has consequently stated that the State party has failed to observe its obligations under Article 16 when not providing the complainant with redress and fair and adequate compensation (but not of Article 14).[50] However, ten years later the Committee took a different position in its General Comment No 3 of 2012, considering that it is 'applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment'.[51] This position was however not retained and in the case *Sergei Kirsanov v Russia* the Committee again rejected the applicability of Article 14 to ill-treatment and only found a violation of Article 16.[52]

23 This result is confusing and unsatisfactory. The Committee clearly interprets the words 'to prevent' in Article 16 in a broad sense, to include the positive obligation to grant redress and compensate the victims of an act in breach of Article 16. This is also confirmed by the *travaux préparatoires* indicating that no State had a strong argument against including the right to remedy and reparation in the indicative list of provisions referred to in Article 16(1), but that concerns focused primarily at applying the concept of cruel, inhuman or degrading treatment or punishment in criminal law.[53] Moreover, the words '*in particular*' in the second sentence of Article 16(1) must have some normative sense, as confirmed by the Committee itself in its General Comment. The consequences of ill-treatment for the victim can be the same as with torture and it appears that the Committee intended to extend the scope of Article 14 to afford its broadest protection.[54] Therefore, Article 14 must be interpreted to extend to other forms of ill-treatment.

[44] See eg *Soering v the United Kingdom* (1989) Series A no 161, para 439; *Chahal v United Kingdom* ECHR 1996-V, para 413; *Jabari v Turkey* ECHR 2000-VIII 149.

[45] See eg *Chitat Ng v Canada,* No 469/1991, UN Doc CCPR/C/49/D/469/1991, 5 November 1993; see also Nowak, *CCPR Commentary* (n 18) 18ff.

[46] SRT (Méndez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc A/HRC/31/57, para 33.

[47] *Hajrizi Dzemajl et al v Yugoslavia*, No 161/2000, UN Doc CAT/C/29/D/161/2000, 21 November 2002.

[48] *Besim Osmani v Republic of Serbia*, No 261/2005, UN Doc CAT/C/42/D/261/2005, 8 May 2009, para 10.8. See also *Sergei Kirsanov v Russian Federation,* No 478/2011, UN Doc CAT/C/52/D/478/2011, 14 May 2014, para 11.4.

[49] The Committee refers to *Hajrizi Dzemajl et al v Yugoslavia*, No 161/2000 (n 47) para 9.6. See also above Art 14 §§ 58–59, 80.

[50] ibid, paras 9.6, 10.

[51] CAT, 'General Comment No 3 on the Implementation of Article 14 by States Parties' (2012) UN Doc CAT/C/GC/3, para 1.

[52] *Sergei Kirsanov v Russian Federation*, No 478/2011 (n 48) para 11.4; see also *Besim Osmani v Republic of Serbia,* No 261/2005 (n 48) para 10.8.

[53] E/CN.4/1408 (n 35) para 91.

[54] This interpretation was equally confirmed during a meeting with Committee members on 21 November 2017.

24 A similar argument can be made regarding *Article 15* that has a preventive purpose and is placed among the preventive obligations rather than those of a repressive (criminal) nature.[55] It is moreover one of the articles that many States wished to add during the drafting phase to be explicitly mentioned under the list of obligations in Article 16.[56] However, even if one were to follow the view that Article 15 only applies to torture, in practice, if Article 15 were applied to other forms of ill-treatment, the result would not be different, because the provision aims at preventing confessions and other statements extracted during interrogation from being used as evidence in court. But extraction of confessions and information is the classical and most widespread purpose of torture. Any severe pain or suffering inflicted for the purpose of extracting a confession or other information therefore constitutes not only cruel and inhuman treatment but also torture.[57]

3.3 State Obligations to Prevent Cruel, Inhuman and Degrading Treatment or Punishment

25 The Committee has elaborated in its individual complaints procedure, as well as in its Concluding Observations, how it interprets Article 16 and the State obligations emanating out of it. In its Concluding Observations the Committee usually references both, Articles 2 and 16 (often in combination with Article 11), thereby acknowledging what it had argued in its General Comment on Article 2, namely that in practice the obligations to prevent torture and ill-treatment are overlapping and that the State's obligations under Articles 2 and 16 have to be considered as 'indivisible, interdependent and interrelated'.[58] Despite the explicit absence of a prohibition, acts of torture and other forms of ill-treatment in the Convention must be interpreted as a violation of Article 2 and 16 respectively and can be claimed before the Committee.[59] This was explicitly accepted by the Committee in numerous cases, mostly with regard to inacceptable conditions of detention, but also in cases of enforced disappearances as well as where abuses were committed by law enforcement officials outside detention.[60]

3.4 Prevention of Ill-Treatment in Detention

3.4.1 Ensuring Adequate Material Conditions of Detention

26 In his final report as UNSRT, Manfred Nowak identified a 'global prison crisis'.[61] In far too many countries in all world regions, the general conditions of detention (overcrowding, lack of adequate food, healthcare, and natural light, and deplorable sanitary conditions, etc) are so poor that they can only be described as cruel, inhuman and degrading treatment. Many detainees report that they suffer more from such prison

[55] See also above Art 15, 3.4.

[56] See Burgers and Danelius (n 8) 150, 70–71, 95–96; see also above § 1 and Art 1, 2.2.

[57] With respect to the purpose as the decisive criterion distinguishing torture from cruel and inhuman treatment see above Art 1, 3.1.4.

[58] CAT/C/GC/2 (n 31) para 3.

[59] See also above Art 2, 3.1.1.

[60] *Hajrizi Dzemajl et al v Yugoslavia*, No 161/2000 (n 47) paras 9.2, 10; *Besim Osmani v Republic of Serbia*, No 261/2005 (n 48) paras 10.4, 10.5; *Diory Barry v Morocco*, No 372/2009, UN Doc CAT/C/52/D/372/2009, 19 May 2014, para 7.2.

[61] SRT (Nowak) 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2010) UN Doc A/65/273, para 1; see also SRT (Nowak) Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2010) UN Doc A/HRC/13/39/Add5, paras 229ff; SRT (Nowak) A/HRC/13/39 (n 5) para 64.

conditions than the torture methods that they have been subjected to in the first days of interrogation, although even the worst forms of detention conditions cannot be characterized as torture because the elements of intention and a specific purpose are lacking.

27 The Committee has found a number of *violations of Article 16*, mostly in conjunction with Article 11, due to insufficient detention conditions in the individual complaints procedure, such as in *Abdulrahman Kabura v Burundi* where the complainant was cramped in a cell of 12m^2 with 10 other detainees, without windows or light and without water, food or any medicines for 17 days, where detainees were forced to drink water from the toilet to survive.[62] In *Boniface Ntikarahera v Burundi* a violation of Article 16 in conjunction with Article 11 was found by the Committee because the detention situation was characterized by overcrowding, insanitary conditions, no access to a doctor and the absence of a monitoring mechanism.[63] In *Sergei Kirsanov v Russian Federation*, the complainant was held in a temporary confinement ward for three-and-a-half months and again for approximately one month, without any bedding or toiletry items, no toilet, table, or sink, only seldom showers, and then, only with cold water, and no walks outside. Additionally, there were insects in the cell and the light always on, no ventilation, and food only once a day—consequently, the Committee found a violation of Article 16.[64] In order to constitute ill-treatment the conditions of detention must attain a minimum level of severity which depends on all circumstances of the case but is usually reached with an accumulation of different factors.[65]

28 Thus, Article 16 entails a *positive obligation* towards persons deprived of liberty to ensure adequate material conditions similarly to the obligations derived from Articles 7 and 10 ICCPR.[66] The Committee emphasizes that detention conditions have to be in line with the internationally recognized standards, particularly the UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules),[67] by reducing overcrowding and taking effective measures to improve conditions of detention.[68] States parties should ensure that detainees have access to medical, psychosocial, and mental healthcare, hygiene

[62] *Abdulrahman Kabura v Burundi*, No 549/2013, UN Doc CAT/C/59/D/549/2013, 11 November 2016, para 7.8.

[63] *Déogratias Niyonzima v Burundi*, No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014, para 8.8.

[64] *Sergei Kirsanov v Russian Federation*, No 478/2011 (n 48) para 11.2. For other violations of Art 16 due to deplorable conditions of detention see *Boniface Ntikarahera v Burundi*, No 503/2012, UN Doc CAT/C/52/D/503/2012, 12 May 2014, para 6.6; *Patrice Gahungu v Burundi*, No 522/2012, UN Doc CAT/C/55/D/522/2012, 10 August 2015, para 7.5; *X v Burundi*, No 553/2013, UN Doc CAT/C/55/D/553/2013, 10 August 2015, para 7.4; *Saidi Ntahiraja v Burundi*, No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015, para 7.7, *Ennaâma Asfari v Morocco*, No 606/2014, UN Doc CAT/C/59/D/606/2014, 15 November 2016, para 13.9.

[65] On this see the case law of the HRC on Arts 7 and 10 ICCPR, eg *Buffo v Uruguay*, No 33/1978, 27 May 1981; *Brough v Australia*, No 1184/2003, UN Doc CCPR/C/86/D/1184/2003, 17 March 2006, para 9.2; and the case law of the ECHR on Art 3: eg *Aerts v Belgium* ECHR 1998-V.

[66] See HRC, 'General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)' (1992) UN Doc HRI/GEN/1/Rev.9 (Vol I) para 3.

[67] GA, 'United Nations Standard Minimum Rules for the Treatment of Prisoners', as revised by Res 70/175 of 17 December 2015 (Mandela Rules); GA, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', Res 43/173 of 9 December 1988 (Body of Principles); UNGA, 'United Nations Rules for the Protection of Juveniles Deprived of Their Liberty', Res 45/113 of 14 December 1990 (Havana Rules); UNGA, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice', Res 40/33 of 29 November 1985 (Beijing Rules); GA, 'Basic Principles for the Treatment of Prisoners', Res 45/111 of 14 December 1990; GA, 'United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders', Res 65/229 of 21 December 2010 (Bangkok Rules).

[68] CAT, 'Concluding Observations: Australia' (2014) UN Doc CAT/C/AUS/CO/4-5, para 11; CAT, 'Concluding Observations: Cambodia' (2011) UN Doc CAT/C/KHM/CO/2, para 19; CAT, 'Concluding

and basic necessities, access to drinking water, and at least two meals per day as well as natural and artificial light and ventilation in the cells.[69] States parties should also take measures to eradicate corruption in prisons[70] and increase the number of staff and especially female prison officers.[71] A lack of resources cannot be invoked by States to justify prison conditions that are not in compliance with minimum international standards, as confirmed by the Human Rights Committee[72] and the UNSRT.[73] Certain minimum standards must be observed regardless of a State's resources and level of development.[74]

29 The Committee has several times asked States to *improve the capacity of prisons through renovations*, in in some instances also recommended the establishment of additional prison facilities to comply with international standards, such as sufficient living space for each detainee.[75] While in some instances old facilities need to be closed and new ones built because it is not possible to bring them in line with international standards, it is important to point out that in situations of overcrowding, instead of building additional prisons, it should always be alternatives to detention that are fostered.

3.4.2 Ensuring Discipline and Security In Line with Human Dignity of Detainees

30 In order to maintain and restore security and discipline in places of detention officials sometimes resort to practices that may violate the human dignity of detainees. Article 16 prohibits any use of force that is not strictly necessary and proportionate to a legitimate aim to be achieved such as in self-defence, or to prevent escape or physical resistance.[76] The Committee has addressed different risk situations in that regard reaching from body searches and measures of restraint to specific conditions of treatment such as solitary confinement and incommunicado detention.

31 The Committee has found that invasive and humiliating *body searches* of individuals detained or deprived of their liberty can constitute ill-treatment and urged that they should be conducted only where absolutely necessary and in full compliance with international standards.[77] This is also specified in the Mandela Rules stipulating that searches should only be undertaken in private and by trained staff of the same sex as the prisoner, respectful of the inherent human dignity and privacy of the individual. Body cavity

Observations: Democratic Republic of the Congo' (2006) UN Doc CAT/C/DRC/CO/1, para 11; CAT, 'Concluding Observations: Togo' (2006) UN Doc CAT/C/TGO/CO/1, para 19.

[69] CAT, 'Concluding Observations: Burkina Faso' (2014) UN Doc CAT/C/BFA/CO/1, para 19; CAT/C/KHM/CO/2 (n 68) para 19; CAT, 'Concluding Observations: Mauritania' (2013) UN Doc CAT/C/MRT/CO/1, para 22; CAT, 'Concluding Observations: Portugal' (2008) UN Doc CAT/C/PRT/CO/4, para 11.

[70] CAT/C/ARM/CO/3 (n 43) para 19.

[71] CAT, 'Concluding Observations: Austria' (2010) UN Doc CAT/C/AUT/CO/4-5, para 17.

[72] *Womah Mukong v Cameroon*, No 458/1991, UN Doc CCPR/C/51/D/458/1991, 21 July 1994, para 9.3; and HRI/GEN/1/Rev.9 (Vol I) (n 66) para 4.

[73] UNSRT (Méndez), 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2013) UN Doc A/68/295, paras 35, 46.

[74] *Womah Mukong v Cameroon* (n 72) para 9.3.

[75] CAT/C/AUT/CO/4-5 (n 71) para 17; CAT, 'Concluding Observations: Peru' (2013) UN Doc CAT/C/PER/CO/5-6, para 9; CAT, 'Concluding Observations: Poland' (2013) UN Doc CAT/C/POL/CO/5-6, para 19; CAT, 'Concluding Observations: Bolivia' (2013) UN Doc CAT/C/BOL/CO/2, para 18; CAT/C/KHM/CO/2 (n 68) para 19.

[76] See Mandela Rules (n 67) Rule 82, para 1.

[77] CAT, 'Concluding Observations: Qatar' (2006) UN Doc CAT/C/QAT/CO/1, para 21; CAT, 'Concluding Observations: France' (2010) UN Doc CAT/C/FRA/CO/4-6, para 28; CAT, 'Concluding Observations: Hong Kong' (2009) UN Doc CAT/C/HKG/CO/4, para 10.

searches should be carried out by healthcare professionals other than those primarily responsible for the care of prisoners or, at a minimum, by appropriately trained personnel.[78]

32 The authorities shall resort to *measures of restraint* only in exceptional circumstances.[79] The Committee has emphasized that their use should be kept under constant review and appropriately recorded.[80] Moreover, it has called for the abolition of certain methods such as electro-shock stun belts and restraint chairs that 'almost invariably leads to breaches of article 16'.[81]

33 The Committee expressed its concern about *solitary confinement* for disciplinary violations for up to fourteen days and for up to two months to prevent escape, violation of life, or death of other persons and other crimes.[82] Solitary confinement is defined by the Mandela rules as 'the confinement of prisoners for 22 hours or more a day without meaningful human contact';[83] prolonged solitary confinement is understood as confinement without meaningful human contact for a time period in excess of fifteen consecutive days.[84] Solitary confinement can have serious effects on mental health; the Committee has therefore repeatedly acknowledged that especially prolonged solitary confinement may constitute torture or ill-treatment.[85] When determining whether solitary confinement amounts to a violation of Article 16 there are several factors the Committee considers: the specific conditions of the solitary confinement, the stringency of the measure, the duration, the objective pursued, and the effect on the person concerned.[86]

34 The Committee has expressly stated that States parties should limit the use of *solitary confinement* as a measure of last resort, for a period of time as short as possible and under strict supervision, with the possibility for judicial review, as well as in line with international standards.[87] The Committee even recommended the abolition of solitary confinement,[88] and underlined that even in high security facilities it should never be applied to persons with a psychosocial disability.[89]

[78] CAT/C/HKG/CO/4 (n 77) para 10; Mandela Rules (n 67) Rules 50, 52, para 2.

[79] See Mandela Rules (n 67) rr 47 and 43(2).

[80] CAT, 'Concluding Observations: New Zealand' (2009) UN Doc CAT/C/NZL/CO/5, para 9.

[81] CAT, 'Report of the Committee against Torture' (2000) UN Doc A/55/44(SUPP) para 180(c) considering the initial report of the US.

[82] CAT, 'Concluding Observations: Bulgaria' (2011) UN Doc CAT/C/BGR/CO/4-5, para 24.

[83] Mandela Rules (n 67) r 44.

[84] ibid, r 44; SRT (Méndez) 'Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc A/66/268, para 26.

[85] CAT, 'Conclusions and Recommendations: New Zealand' (2004) UN Doc CAT/C/CR/32/4, paras 5(d) and 6(d); CAT, 'Concluding Observations: USA' (2006) UN Doc CAT/C/USA/CO/2, para 36; CAT, 'Conclusions and Recommendations: Nepal' (1994) UN Doc A/49/44,, para 133. CAT, 'Report of the Committee against Torture' (1994) UN Doc A/49/44, para 133, considering the second periodic report of Switzerland; CAT, 'Concluding Observations: Japan' (2007) UN Doc CAT/C/JPN/CO/1, para 18.

[86] *AA v Denmark*, No 412/2010, UN Doc CAT/C/49/D/412/2010, 13 November 2012, para 7.4.

[87] CAT, 'Report of the Committee against Torture: Forty-third session (2-20 November 2009); Forty-fourth session (26 April–14 May 2010)' (2010) UN Doc A/65/44, paras 50–51; CAT, 'Concluding Observations: Qatar' (2013) UN Doc CAT/C/QAT/CO/2, para 11; CAT, 'Concluding Observations: Norway' (2012) UN Doc CAT/C/NOR/CO/6-7, para 11; CAT, 'Concluding Observations: Azerbaijan' (2009) UN Doc CAT/C/AZE/CO/3, para 13; CAT, 'Concluding Observations: Denmark' (2007) UN Doc CAT/C/DNK/CO/5, para 14; CAT, 'Concluding Observations: Israel' (2009) UN Doc CAT/C/ISR/CO/4, para 18; CAT, 'Conclusions and Recommendations: Norway' (2002) UN Doc CAT/C/CR/28/3, para 4(d).

[88] See CAT, 'Report of the Committee against Torture' (1997) UN Doc A/52/44, paras 186 and 225; and A/53/44 (n 37) para 156. On the Committee's conclusions regarding New Zealand and the US, see above para 2.1; regarding the solitary confinement of asylum seekers see CAT/C/BGR/CO/4-5 (n 82) para 24.

[89] CAT, 'Concluding Observations: Switzerland' (2015) UN Doc CAT/C/CHE/CO/7, para 19(f).

35 The UNSRT has urged States to prohibit solitary confinement as punishment due to the severe mental pain or suffering it may cause and recommended to develop and apply alternative disciplinary sanctions.[90] When solitary confinement is used, harmful effects on the detainee should be minimized by ensuring access to adequate exercise, social and mental stimulation, and regular monitoring of health.[91] The UNSRT also argued that the use of solitary confinement in pre-trial detention should be ended and that solitary confinement for juveniles and persons with mental disabilities should be abolished.[92] Also indefinite solitary confinement should be abolished. According to the Bangkok Rules pregnant women or women with young children must also never be placed in solitary confinement.[93] According to the UNSRT 'solitary confinement used on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture'.[94]

36 The Committee has expressed concern about the system of holding persons in *incommunicado detention*, where in contrast to solitary confinement, nobody, apart from the authorities, has contact with the detainee. While prolonged incommunicado detention and enforced *disappearances* in any case constitute a human rights violation for both the victim and close family members, solitary confinement might be justified for certain purposes (such as preventing evidence from being distorted) within certain time limits. However, the Committee has stated that regardless of the legal safeguards for its application, incommunicado detention for up to five days with no access to a lawyer, a doctor of choice, nor the ability to notify the family 'facilitates the commission of acts of torture and ill-treatment'.[95] Thus, it has repeatedly recommended in its Concluding Observations to abolish the practices of incommunicado detention altogether.[96] If used it is to be explicitly and strictly regulated by law and has to be subject to 'stringent judicial supervision'.[97]

3.4.3 Prevention of Inter-Prisoner Violence

37 The Committee has repeatedly expressed its concern and addressed the issue of inter-prisoner violence in its Concluding observations.[98] As ill-treatment can be committed by public officials through instigation, consent, and acquiescence, States parties have a duty to prevent and eliminate inter-prisoner violence. If the State fails to act with due diligence to prevent inter-prisoner violence this can amount to ill-treatment.[99] The Committee has acknowledged overcrowding, lack of staff, limited space and inadequate

[90] SRT (Méndez) A/66/268 (n 84) para 84.

[91] ibid, paras 83, 100–01. See also CPT, Twenty-first General Report (2011) CPT/Inf (2011) 28, paras 61–63.

[92] SRT (Méndez) A/66/268 (n 84) paras 85, 86, 87.

[93] Bangkok Rules (n 67) r 22.

[94] SRT (Méndez) 'Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc A/67/279, para 48.

[95] CAT, 'Conclusions and Recommendations: Spain' (2002) UN Doc CAT/C/CR/29/3, para 10.

[96] CAT, 'Concluding Observations: Yemen' (2010) UN Doc CAT/C/YEM/CO.2/Rev.1, para 12; CAT, 'Concluding Observations: El Salvador' (2009) UN Doc CAT/C/SLV/CO/2, para 20; CAT/C/QAT/CO/2 (n 87) para 11; CAT, 'Concluding Observations: Spain' (2009) UN Doc CAT/C/ESP/CO/5, para 12.

[97] CAT/C/PRT/CO/4 (n 69) para 9; CAT/C/QAT/CO/2 (n 87) para 11.

[98] CAT, 'Concluding Observations: Belarus' (2011) UN Doc CAT/C/BLR/CO/4, para 20; CAT/C/BOL/CO/2 (n 75) para 18; CAT/C/BGR/CO/4-5 (n 82) para 23; CAT, 'Concluding Observations: Russian Federation' (2012) UN Doc CAT/C/RUS/CO/5, para 19.

[99] SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to Kazakhstan' (2009) UN Doc A/HRC/13/39/Add.3, para 28; see also CPT Standards, CPT/Inf/E (2002) 1—Rev. 2015, para 27.

material conditions, lack of purposeful activities, drugs, and gangs as factors contributing to inter-prisoner violence and requested States parties to address these factors.[100] In order to prevent violence in prisons, including suicides, the Committee has suggested to increase the number of staff, including those with training in the management of inter-prisoner violence, as well as to install video cameras.[101]

38 The Committee has also called upon States parties to establish confidential systems for complaints, including complaints about sexual violence that are available in all places of detention.[102] Cases of inter-prisoner violence are to be thoroughly investigated and perpetrators punished.[103] Victims of inter-prisoner violence or their families should be in a position to receive compensation.[104]

39 The UNSRT has emphasized the importance of trainings in order to sensitize prison staff about how important it is to take effective steps to prevent and remedy inter-prisoner violence and provide them with the necessary competences to do so.[105]

40 Certain detainees, such as members of particular racial, ethnic, or national groups; lesbian, gay, bisexual, transgender, and intersex people, and persons convicted or suspected of sexual crimes may be at a higher risk of violence and abuse from other prisoners and thus the State may have to afford specific safeguards. States parties should also take measures to eradicate any form of discrimination against detainees.[106] This issue is addressed in the section below.

3.4.4 Ensuring Protection against Ill-Treatment in Detention for Groups in a Specific Situation of Vulnerability

41 As Article 16 contains a general obligation of prevention this also obliges States to put into place safeguards against ill-treatment. The procedural safeguards required at arrest, during interrogation, and detention are the same as required by the obligation to prevent torture (Article 2) as it is largely overlapping and congruent with the obligation to prevent other forms of ill-treatment.[107] Article 16 makes particular mention of Articles 11, 12, and 13 as specific preventive obligations. Therefore reference is made to Article 11 in regard to procedural safeguards and to Articles 12 and 13 in regard to the right to complain and the State duty to investigate cases of ill-treatment.[108]

42 The obligation of States to provide safeguards also means that *unofficial places of detention* are a 'complete negation'[109] of the guarantees against the deprivation of liberty and thus per se a breach of the Convention.[110]

[100] CAT/C/BGR/CO/4-5 (n 82) para 23.

[101] ibid; CAT/C/PRT/CO/4 (n 69) para 11; see also SRT (Rodley) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) UN Doc A/56/156, para 39(i).

[102] CAT/C/BLR/CO/4 (n 98) para 20.

[103] CAT, 'Concluding Observations: The Netherlands' (2013) UN Doc CAT/C/NLD/CO/5-6, para 23; CAT, 'Concluding Observations: Mozambique' (2013) UN Doc CAT/C/MOZ/CO/1, para 15; CAT, 'Concluding Observations: Latvia' (2013) UN Doc CAT/C/LVA/CO/3-5, para 20.

[104] CAT/C/NLD/CO/5-6 (n 103) para 23.

[105] SRT (Rodley) A/56/156 (n 101) para 39(i).

[106] CAT/C/ARM/CO/3 (n 43) para 19.

[107] See CAT/C/GC/2 (n 31) para 3.

[108] See Arts 11, 12, and 13 above.

[109] *Çakıcı v Turkey* App no 23657/94 (ECtHR, 8 July 1999) para 104.

[110] CAT, 'Concluding Observations: Iraq' (2015) UN Doc CAT/C/IRQ/CO/1, para 16 (a); CAT, 'Concluding Observations: Guinea' (2014) UN Doc CAT/C/GIN/CO/1, para 15 (a); CAT, 'Concluding Observations: Sri Lanka' (2011) UN Doc CAT/C/LKA/CO/3-4, para 8; CAT, 'Concluding Observations: Morocco' (2011) UN Doc CAT/C/MAR/CO/4, para 14; CAT, 'Concluding Observations: Saudi Arabia' (2016) UN Doc CAT/

43 Particular measures must be taken to *protect persons in a situation of vulnerability*. The Committee states that

[t]**he** protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment' and that States must ensure that their laws implementing the CAT 'are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction.[111]

For that purpose the Committee has urged State parties to increase their efforts to combat discrimination of persons in a situation of vulnerability[112] and to separate detainees for their protection taking account of their sex, age, criminal record, the legal reason for their detention as well as the necessities of their treatment,[113] particularly juveniles from adults, pre-trial detainees from convicted prisoners and women from men.[114]

44 The Committee expressed specific concern over the conditions of *children*[115] in detention, in particular when they are not segregated from adults and when sentenced to life imprisonment.[116] The CRC specifically prohibits torture and ill-treatment and stipulates that deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate time and in a manner which takes into account the needs of persons of his or her age (Article 37). In this regard, guidance can be found in the UN Rules for the Protection of Juveniles Deprived of their Liberty (*Havana Rules*).[117] In line with the CRC, the Committee has repeatedly asked States parties that children in conflict with the law should only receive a prison sentence as a last resort.[118] The Committee has also recommended that States have to make sure that their juvenile justice system is in compliance with the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).[119]

45 The Committee has expressed concern at children being imprisoned with their mothers and has recommended increasing the use of non-custodial measures.[120] If

C/SAU/CO/2, para 33 (c); CAT/C/USA/CO/2 (n 85) para 11(a); CAT, 'Concluding Observations: China' (2016) UN Doc CAT/C/CHN/CO/5, para 42 (a).

[111] See CAT/C/GC/2 (n 31) para 21.

[112] CAT, 'Concluding Observations: Paraguay' (2011) UN Doc CAT/C/PRY/CO/4-6, para 19.

[113] CAT/C/BOL/CO/2 (n 75) para 18.

[114] CAT/C/BFA/CO/1 (n 69) para 19; CAT/C/KHM/CO/2 (n 68) para 19; CAT, 'Concluding Observations: Romania' (2015) UN Doc CAT/C/ROU/CO/2, para 13; see also Art 10, para 2 ICCPR. However, see SRT (Nowak), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak. Addendum. Mission to Denmark' (2009) A/HRC/10/44/Add.2, para 58ff on the non-separation of men and women in Danish prisons.

[115] A child is defined as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier' in Art 1 CRC.

[116] CAT/C/SLV/CO/2 (n 96) para 19; CAT, 'Concluding Observations: Ethiopia' (2011), UN Doc CAT/C/ETH/CO/1, para 26; 'Concluding Observations: Jordan' (2016) UN Doc CAT/C/JOR/CO/3, paras 19-20.

[117] Havana Rules (n 67).

[118] CAT/C/CMR/CO/4 (n 43) para 15; CAT, 'Concluding Observations: Chad' (2009) UN Doc CAT/C/TCD/CO/1, para 25.

[119] CAT/C/ETH/CO/1(n 116) para 27.

[120] CAT, 'Concluding Observations: Kenya' (2013), UN Doc CAT/C/KEN/CO/2, para 12.

detention is unavoidable, States have to ensure that conditions are in accordance with the UN Rules for the Treatment of Women prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

46 The UNSRT has emphasized that regardless of the conditions in which children are held, 'detention has a profound and negative impact on child health and development',[121] with even short periods of detention having the potential to negatively impact cognitive development.

47 Despite the existing standards, detention of children under inhuman conditions remains a serious problem worldwide with immeasurable consequences on their development and the society at large. Therefore the UN Secretary-General has commissioned an in-depth Global Study on children deprived of liberty, lead by the Independent Expert Manfred Nowak, to examine the scope, reasons, and alternatives to detention of children to be submitted to the General Assembly in 2019.[122]

48 Despite the fact that the number of *elderly detainees* is steadily rising, which leads to questions on how to deal with health issues like dementia, chronic diseases, and other geriatric conditions,[123] the Committee does not seem to have expressed itself on these kind of issues yet.

49 *Women* face specific risks to be subjected to ill-treatment in detention. The Committee and the UNSRT have specifically noted their concern regarding sexual violence and assault, including rape, insults, humiliation, and unnecessary invasive body searches, especially when women are not separated from male detainees or male staff are responsible for their care.[124] Women have specific needs when deprived of liberty which are addressed in detail in the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*Bangkok Rules*)[125] complementing the Mandela Rules.[126] According to the UNSRT, the risk of torture or ill-treatment against women deprived of their liberty would significantly decrease if these standards were implemented and he thus calls on States to create regulations and trainings, as well as to further monitor the situation.[127]

[121] SRT (Méndez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc A/HRC/28/68, para 33. Also see Center for Human Rights and Humanitarian Law, Anti-Torture Initiative, 'Protecting Children against Torture in Detention: Global Solutions for a Global Problem' (American University Washington College of Law 2017) <http://antitorture.org/wp-content/uploads/2017/03/Protecting_Children_From_Torture_in_Detention.pdf> accessed 6 December 2017.

[122] UNGA Res 69/157 of 18 December 2014 (Rights of the Child: Resolution Adopted by the General Assembly on the Report of the Third Committee (A/69/484)) para 52(d); UNGA Res 71/177 of 19 December 2016 (Rights of the Child: Resolution Adopted by the General Assembly on the Report of the Third Committee (A/71/480)) para 88.

[123] Amnesty International (AI), *Combating Torture and other Ill-Treatment: A Manual for Action* (AI 2016) 171. See eg Human Rights Watch (HRW), *Old Behind Bars: The Aging Prison Population in the United States* (HRW 2012).

[124] CAT/C/TGO/CO/1 (n 68) para 20; CAT, 'Concluding Observations: Philippines' (2009) UN Doc CAT/C/PHL/CO/2, para 18; CAT/C/KHM/CO/2 (n 68) para 19; See CAT/C/GC/2 (n 31) para 14; SRT (Méndez) A/HRC/31/57 (n 46) para 19; HRC, 'Concluding Observations: Zambia' (2007) UN Doc CCPR/C/ZMB/CO/3, para 20; HRC, 'Concluding Observations: Canada' (2005) UN Doc CCPR/C/CAN/CO/5, para 18.

[125] Bangkok Rules (n 67).

[126] See for example on segregating male and female prisoners in different institutions: Mandela Rules (n 67), r 11(a); or having women supervision under female staff members: Mandela Rules (n 67) Rule 81.3.

[127] SRT (Méndez) A/HRC/31/57 (n 46) paras 19, 70.

50 The Committee has stated that *gender* is a key factor in the prevention of torture and other forms of ill-treatment emphasizing that also men are 'subject to certain gendered violations … on the basis of their actual or perceived non-conformity with socially determined gender roles'.[128] Moreover, *lesbian, gay, bisexual, transgender, and intersex (LGBTI)* persons run a particular risk of ill-treatment in detention. Both the Committee and Subcommittee have emphasized the risk of ill-treatment of LGBTI persons deprived of liberty in prison, in healthcare facilities, or in immigration detention.[129] The Subcommittee stated that authorities 'must recognize specific risks, identify those who are in a vulnerable situation and protect them in ways that do not leave them isolated' and criticized the lack of institutional policies and methods to adequately address self-identification, classification, risk assessment, and placement.[130] The Yogyakarta Principles provide guidance on measures to protect LGBTI persons against discrimination and abuse in detention.[131]

51 *Pre-trial detainees* do not only face the highest risk to be tortured but also to be subjected to particularly poor detention conditions amounting to ill-treatment.[132] The Committee has repeatedly expressed concern about prolonged pre-trial detention.[133] It found that long periods of pre-trial detention and delays in judicial procedure, together with the overcrowding in prisons resulting in convicted prisoners and prisoners awaiting trial being held in police stations and other places of detention not adequately equipped for long periods of detention, could in themselves constitute a violation of Article 16 CAT.[134]

52 The Committee has expressed its concern that widespread use of pre-trial detention might undermine the right to presumption of innocence[135] and has reiterated that States parties should step up *non-custodial measures* through the application of alternative measures to imprisonment, such as probation, bail, mediation, community service, and suspended sentences and in line with the UN Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)[136] and the Bangkok Rules.[137] States should for example amend their legislation and only impose pre-trial detention as a measure of last resort and

[128] See CAT/C/GC/2 (n 31).

[129] See the Statement by the CAT Committee, SPT, SRT, and UN Voluntary Fund for Victims of Torture on the International Day for the Victims of Torture 2016: 'Targeted and Tortured: UN Experts Urge Greater Protection for LGBTI People in Detention' (2016) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20165&LangID=E> accessed 2 November 2017. See also CAT, 'Report of the Committee against Torture' (2013) A/68/44, para 21 in the framework of its Concluding Observations on the combined fifth and sixth periodic reports of Peru.

[130] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, paras 60, 66, 76.

[131] International Commission of Jurists, 'Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity' (March 2007) Principle 9.

[132] See Moritz Birk and others, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (Open Society Justice Initiative 2011); AI (n 123) 165.

[133] CAT/C/LVA/CO/3-5 (n 103) para 10; CAT, 'Concluding Observations: Lithuania' (2009) UN Doc CAT/C/LTU/CO/2, para 11; CAT, 'Concluding Observations: Hungary' (2007) UN Doc CAT/C/HUN/CO/4, para 7.

[134] A/56/44 (n 21) paras 115–20.

[135] CAT/C/PRY/CO/4-6 (n 112) para 19.

[136] CAT, 'Concluding Observations: Albania' (2012) UN Doc CAT/C/ALB/CO/2, para 16; CAT, 'Concluding Observations: Andorra' (2013) UN Doc CAT/C/AND/CO/1, para 9; CAT/C/AUT/CO/4-5 (n 71) para 17; CAT/C/BFA/CO/1 (n 69) para 19; CAT/C/KHM/CO/2 (n 68) para 19; CAT/C/PER/CO/5-6 (n 75) para 9; CAT/C/ROU/CO/2 (n 114) para 13.

[137] CAT/C/BOL/CO/2 (n 75) para 18.

for a limited period, as well as to make sure that alternatives to detention are effectively applied by the judiciary.[138]

53 The Committee has expressed its concern at the poor conditions and inadequate treatment of persons with *mental or physical disabilities*, especially forceful internment and long-term restraints used in social care institutions and psychiatric hospitals that amount to torture or other forms of ill-treatment.[139] According to the Committee, involuntary deprivation of liberty should only be undertaken on the basis of a legal decision, effectively guaranteeing periodic judicial review as well as all legal safeguards.[140] It recommended community based alternatives in order to proceed with de-institutionalization.[141] States parties should also ensure independent oversight of institutions and frequent monitoring by NHRIs and CSOs.[142] It has stipulated that States parties shall make sure that the right of institutionalized persons to mental and physical integrity, especially in case of restraint measures or enforced treatments such as neuroleptic drugs, is ensured.[143] Means of physical or chemical restraint should be avoided or used as a last resort only, when all other alternatives have failed, never as a punishment, for the shortest duration possible, under strict medical supervision, and should be recorded in registers that are subject to independent monitoring.[144] Moreover, the Committee recommended increasing the number of medical staff and rehabilitation activities in forensic psychiatric hospitals.[145]

54 *Migrants and refugees* tend to be criminalized upon interception or rescue and held in substandard and overcrowded conditions amounting to torture or ill-treatment.[146] The Committee held that the detention of asylum seekers, as well as other migrants should only be used as a last resort, when strictly necessary, and if it is applied, duration shall be as short as possible, as well as proportionate to each individual's case.[147] Mandatory deprivation of liberty for persons entering the territory of the State party should be repealed and at the same time ensured, that persons are not held indefinitely, eg in case of stateless persons receiving a negative decision in their asylum proceeding or persons with 'adverse security or character assessments'.[148] States parties should also ensure that alternatives to detention are made use of when feasible, medical check-up upon arrival is guaranteed, and psychological follow-up examinations by a specifically trained independent health expert in case of signs of torture or traumatisation are provided.[149]

There need to be statutory time limits for the detention, and if a person is detained, he/she needs to have access to an effective judicial remedy and must be in a position to challenge administrative decisions regarding the person's detention, expulsion or refoulement.[150] In *AA v Denmark*, where the detention lasted less than three months, with

[138] CAT/C/ALB/CO/2 (n 136) para 16; CAT/C/PRY/CO/4-6 (n 112) para 19.

[139] CAT, 'Concluding Observations: Serbia' (2009) UN Doc CAT/C/SRB/CO/1, para 16; CAT, 'Concluding Observations: Russian Federation' (2007) UN Doc CAT/C/RUS/CO/4, para 18; CAT/C/ROU/CO/2 (n 114) para 14.

[140] CAT/C/SRB/CO/1 (n 139) para 18. [141] ibid.

[142] CAT/C/BGR/CO/4-5 (n 82) para 19. [143] ibid.

[144] CAT, 'Concluding Observations: Austria' (2016) UN Doc CAT/C/AUT/CO/6, para 40; CAT/C/SRB/CO/1 (n 139) para 18; CAT/C/PRT/CO/4 (n 69) para 11.

[145] CAT/C/PRT/CO/4 (n 69) para 11. [146] SRT (Méndez) A/HRC/31/57 (n 46) para 32.

[147] CAT/C/AUS/CO/4-5 (n 68) para 16. [148] ibid, para 16.

[149] *AA v Denmark,* No 412/2010 (n 86) para 7.3; CAT/C/MRT/CO/1 (n 69) para 16; CAT, 'Concluding Observations: New Zealand' (2015) UN Doc CAT/C/NZL/CO/6, para 18.

[150] CAT/C/MRT/CO/1 (n 69) para 16; CAT/C/NZL/CO/6 (n 149) para 18; CAT/C/AUS/CO/4-5 (n 68) 16.

regular judicial reviews and psychiatric examination and medication, the Committee did not find a violation of Article 2 and 16 of the Convention.[151]

3.5 Preventing Cruel, Inhuman or Degrading Punishments

55 The Committee and other human rights monitoring bodies have dealt extensively and controversially with the issue of corporal and capital punishment. While these are still applied to this day by the State or with its acquiescence, the view of human rights mechanisms on such forms of punishment has developed significantly over the last decades. Other punishments which the Committee has criticized as possibly constituting violations of Article 16, include life imprisonment for children,[152] and for certain crimes;[153] hard labour;[154] internal exile and confinement at home;[155] solitary confinement as a punishment;[156] 'chain gangs', electro-shock stun belts, and restraint chairs if used as punishments[157] (if used as methods of restraint see section 3.4.2). The lawful sanctions clause in Article 1, paragraph 2 cannot be understood to legitimize forms of punishment that are cruel, inhuman or degrading.[158]

3.5.1 Corporal Punishment

56 There are two forms of corporal punishments: administrative and judicial.[159] Judicial corporal punishments are imposed by courts in a sentence after conviction; administrative corporal punishments are disciplinary measures, eg in prisons or schools.

57 In 1978, the *ECtHR* had ruled that birching of a juvenile as a traditional punishment on the Isle of Man was no longer compatible with the prohibition of degrading punishment in Article 3 ECHR.[160] Shortly thereafter the *HRC*, in a General Comment of 1982, expressed the unanimous opinion that the prohibition of Article 7 CCPR 'must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure' which was confirmed in the revised General Comment of 1992.[161] But it was only in 2000 that the HRC confirmed this opinion in an individual case. In the landmark decision of *Osbourne v Jamaica*, which concerned the judicial sentence of ten strokes with the tamarind switch on the naked buttocks in the presence of twenty-five prison warders, it took a very clear and unanimous position:[162] 'Irrespective of the

[151] *AA v Denmark*, No 412/2010 (n 86).

[152] See discussion on the US report, above para 31.

[153] See the discussion of the report of Canada in CAT/C/SR.446, para 38. On the question of whether life imprisonment without any real chance of release can be considered as inhuman see the individual opinion of Lallah in the HRC's decision in *Teesdale v Trinidad and Tobago*, No 677/1996, UN Doc CCPR/C/74/D/677/1996, 1 April 2002 and Bundesverfassungsgericht (German Constitutional Court), BVerfGE 45 187, Judgment of 21 June 1977

[154] See the discussion of the report of Luxembourg in CAT/C/SR.376, para 11.

[155] See the discussion of the report of Cuba in CAT/C/SR.314, para D(5).

[156] CAT, 'Concluding Observations: Bulgaria' (2011) UN Doc CAT/C/BGR/CO/4-5, para 24. See above 3.4.2.

[157] CAT, 'Conclusions and Recommendations of the Committee against Torture: United States of America' (15 May 2000) A/55/44, paras 175 –80 (Concluding Observations/Comments).

CAT, 'Report of the Committee against Torture' (2000) UN Doc A/55/44(SUPP) paras 179 (g) 180(c) considering the initial report of the US.

[158] See Art 1 above.

[159] SRT (Rodley), 'Report of the Special Rapporteur on Torture' (1997) UN Doc E/CN.4/1997/7, para 5; Also see AI (n 123) 84.

[160] *Tyrer v United Kingdom* (1978) Series A no 26.

[161] HRC, 'CCPR General Comment No 7 on Article 7' (27 July 1982) para 2; HRC, 'CCPR General Comment No 20 on Article 7 (10 March 1992) para 5.

[162] *Osbourne v Jamaica*, No 759/1997, UN Doc CCPR/C/68/D/759/1997, 13 April 2000, para 3.3.

nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant'. This case law has been reaffirmed in later decisions.[163]

58 The Committee against Torture had a more difficult task since Islamic and other States took the position that corporal punishment was covered under the *lawful sanctions clause* in Article 1 and, therefore, could not be considered as a violation of Article 16.[164] Other Governments, in the State reporting procedure, reported under Article 16 about their efforts to reduce and eradicate corporal punishment. The *Canadian* representative referred in 1993 to a statement by the Supreme Court that certain punishments, such as corporal punishment, will always offend the protection against cruel and unusual punishment. Canada was also re-examining a provision in the Criminal Code which permitted reasonable force by a parent or school teacher in the correction of a child.[165] Similarly, *Sweden* in the same year informed the Committee in relation to Article 16 that under its domestic law the use of corporal punishment against children was prohibited.[166]

59 These legal opinions of Governments encouraged the Committee, which in the early years was very hesitant to take up corporal punishment, to take a firmer stand.[167] During the discussion of the *Jordanian* report in 1995, the Committee expressed concern that the continuing application of capital and corporal punishment 'could constitute in itself a violation in terms of CAT' and recommended that the Government review its policy relating to corporal punishment.[168] Similarly, in 1997 the Committee recommended to *Namibia* the 'prompt abolition of corporal punishment insofar as it is legally still possible under the Prisons Act of 1959 and the Criminal Procedure Act of 1977'.[169] In respect of *Libya* in 1999, the Committee noted with satisfaction that corporal punishment had not been used in recent years, but stressed nevertheless that it should be abolished by law.[170] In 2005 the Committee welcomed the abolition of corporal punishment in *Uganda* following the 1999 judgment of the Supreme Court in *Kyamanywa v Uganda*.[171]

60 The clearest conclusion that corporal punishment was not in conformity with the Convention was reached when the Committee discussed the reports of *Saudi Arabia, Yemen*, and *Qatar* in the early 2000s; a conclusion that was only recently re-confirmed.[172] With respect to *Saudi Arabia*, in 2002 the Committee considered the imposition of corporal punishments (including in particular flogging and amputation of limbs) to be in breach of the Convention and recommended that the State party re-examine it. Such recommendation was reiterated in 2016, when it recommended to stop immediately the

[163] See Nowak, *CCPR Commentary* (n 18) 168.
[164] On the interpretation of the lawful sanctions clause see above Art 1, 3.3.
[165] CAT, 'Report of the Committee against Torture' (1993) UN Doc A/48/44, para 307.
[166] ibid, para 378. [167] See also Ingelse (n 4) 278.
[168] CAT, 'Report of the Committee against Torture' (1995) UN Doc A/50/44, paras 169, 177.
[169] A/52/44 (n 88) para 250.
[170] CAT, 'Report of the Committee against Torture' (1999) UN Doc A/54/44, paras 180, 189.
[171] CAT, 'Conclusions and Recommendations: Uganda' (2005) UN Doc CAT/C/CR/34/UGA, para 3(b).
[172] See CAT, 'Conclusions and Recommendations: Saudi Arabia' (2002) UN Doc CAT/C/CR/28/5, paras 4(b), 8(b); CAT, 'Conclusions and Recommendations: Yemen' (2004) UN Doc CAT/C/CR/31/4, para 6(b); CAT, 'Conclusions and Recommendations: Qatar' (2006) UN Doc CAT/C/QAT/CO/ 1, para 12; CAT, 'Conclusions and Recommendations: Egypt' (2002) CAT/C/CR/29/4, para 3(a); on the controversial discussion with the representative of Saudi Arabia concerning the relation between corporal punishment and the lawful sanctions clause see above Art 1, § 139.

practices of flogging/lashing, amputation of limbs, and any other form of corporal punishment and prohibit their use by law, as they amount to torture and ill-treatment and constitute a violation of the Convention.[173] While noting the State party's indication that *Shari'a* expressly prohibits torture and other cruel, inhuman or degrading treatment, the Committee drew attention to the fact that domestic law itself does not explicitly reflect this prohibition, nor does it impose criminal sanctions.[174]

61 Successive *UN Special Rapporteurs on Torture* have also addressed the question of corporal punishment in their reports.[175] UNSRT Nowak stated in his 2009 report, that corporal punishment as a form of ill-treatment remains widespread.[176] In his 2005 report to the General Assembly, he concluded, on the basis of a review of jurisprudence of international and regional human rights mechanisms, that 'any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Moreover, States cannot invoke provisions of domestic law to justify the violation of their human rights obligations under international law, including the prohibition of corporal punishment'[177] and called upon States to abolish all forms corporal punishment without delay.[178]

62 The prohibition of corporal punishment also extends to *administrative punishment and disciplinary measures* outside of any criminal or other judicial process. This is explicitly stated for places of detention in the Mandela Rules and regional soft law standards.[179] Also regarding the use of corporal punishment in *schools and other welfare institutions* for children the Committee has expressed its concern and urged to implement legislation banning such practices and to establish competent monitoring mechanisms for such facilities.[180] The Human Rights Committee[181] and the Committee on the Rights of the Child[182] have equally argued that the use of corporal punishment is a violation of the respective Conventions.

63 This also extends to corporal punishment by *private actors* if committed with the consent and acquiescence of the State. The Committee expressed its concern where some forms of corporal punishment are still allowed by law in the home by parents or *in loco parentis* (ie in the legal responsibility of a person or organization taking over the functions and responsibilities of a parent), or are not specifically prohibited by law.[183] The

[173] CAT/C/SAU/CO/2 (n 110) para 11.

[174] CAT/C/CR/28/5 (n 172) paras 4(a), (b) and 8(b).

[175] See SRT (Kooijman), 'Report of the Special Rapporteur on torture (incl. visit to Former Yugoslavia)' (1992) UN Doc E/CN.4/1993/26, para 593; E/CN.4/1997/7 (n 159) para 8; SRT (Nowak), 'Report of the Special Rapporteur on torture' (2005) UN Doc A/60/316, para 28.

[176] SRT (Nowak) A/HRC/10/44 (n 14) para 47.

[177] SRT (Nowak) A/60/316 (n 175) para 28; also see SRT (Nowak) A/HRC/10/44 (n 14) para 63.

[178] SRT (Nowak) A/HRC/10/44 (n 14) para 47.

[179] Mandela Rules (n 67) r 43(1)(d); Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle 1; CoE, European Prison Rules (2006), Rule 60.3.

[180] CAT, 'Concluding Observations: South Africa' (2006) UN Doc CAT/C/ZAF/CO/1, para 25.

[181] HRC, 'General Comment No 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment' (1992) para 5.

[182] CRC, 'General Comment No 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (arts 19; 28, para 2; and 37, inter alia)' (2007) UN Doc CRC/C/GC/8, para 7.

[183] CAT, 'Concluding Observations: United Kingdom of Great Britain and Northern Ireland' (2013) UN Doc CAT/C/GBR/CO/5, para 29; CAT, 'Concluding Observations: Czech Republic' (2012) UN Doc CAT/C/CZE/CO/4-5, para 22; CAT, 'Concluding Observations: Djibouti' (2011) UN Doc CAT/C/DJI/CO/1, para 23; CAT, 'Concluding Observations: Gabon' (2013) UN Doc CAT/C/GAB/CO/1, para 25.

Committee recommended introducing an explicit prohibition of corporal punishment in all settings and to implement awareness-raising campaigns addressing the harmful effects of corporal punishment.[184]

64 The UN Global Study on violence against children also highlighted that violence against children may lead to 'greater susceptibility to lifelong social, emotional, and cognitive impairments and to health-risk behaviours',[185] and health and social problems for the children themselves, but there are also significant economic costs to society.[186]

65 One can, therefore, conclude that corporal punishment, as a judicial or disciplinary sanction, committed by the State or with its acquiescence is nowadays considered a form of ill-treatment prohibited by international law confirmed by the Committee against Torture, the Human Rights Committee, the Committee on the Rights of the Child, and the UN Special Rapporteur on Torture, as well as regional human rights mechanisms such as the Inter-American Court of Human Rights,[187] the European Court of Human Rights, and European Committee of Social Rights.[188] The *lawful sanctions clause* in Article 1 CAT cannot be invoked as a legal justification for corporal punishment. States that practise corporal punishment as a judicial or disciplinary measure or that do not take effective measures to prohibit and prevent it in the private sphere thus violate the prohibition of ill-treatment.[189]

3.5.2 Capital Punishment

66 More difficult to answer is the question whether *capital punishment* per se violates Article 16 CAT because the right to life in Article 6 CCPR, Article 2 ECHR, and Article 4 ACHR explicitly permits the death penalty under certain circumstances. In a well-reasoned landmark judgment of 1995, the *South African Constitutional Court* considered capital punishment in any case as a cruel, inhuman, and degrading punishment.[190] Similarly, in the 1989 judgment in *Soering v the United Kingdom,*[191] the ECtHR

[184] CAT/C/MRT/CO/1 (n 69) para 25.

[185] UNGA, 'Rights of the Child: Note by the Secretary-General' (2006) UN Doc A/61/299, para 36.

[186] The report estimated the 'financial costs associated with child abuse and neglect, including future lost earnings and mental health care' for the United States in 1996 at US$ 12.4 billion: ibid, para 37.

[187] *Winston Caesar v Trinidad and Tobago* Series C No (IACtHR, 11 March 2005).

[188] In 2003, the European Committee of Social Rights found a violation of three collective complaints, alleging that the States concerned had not effectively prohibited all corporal punishment of children as provided for under Art. 17 of the European Social Charter. In *OMCT v Greece* (collective complaint No 17/2003) the ECSR found that corporal punishment was not adequately prohibited in the home, in secondary schools and in institutions caring for children, and that even if violence against the person is punished under criminal law provisions and subject to increased penalties where the victim is a child, this does not constitute sufficient prohibition to comply with Art.17(1) of the revised Charter; in *OMCT v Belgium* (collective complaint No 21/2003) it found that the law did not adequately prohibit corporal punishment by parents and 'other persons', including for education purposes; and in *OMCT v Ireland* (collective complaint No 18/2003) it noted in the decision that the corporal punishment of children within the home is permitted in Ireland by virtue of the existence of the common law defence of reasonable chastisement. Under the procedure based on reports, a number of States have been found in violation of Art. 17 of the Charter on grounds that the corporal punishment of children is not adequately prohibited (Belgium, Czech Republic, Estonia, France, Germany, Hungary, Lithuania, Malta, Moldova, the Netherlands, Poland, Romania, the United Kingdom, Slovakia, Slovenia, Spain and Turkey). Governmental Committee of the European Social Charter, 'Report Concerning Conclusions 2005' (30 November 2005) CoE Doc T-SG (2005) 25, paras 19ff. Governmental Committee of the European Social Charter, paras 74ff.

[189] A/HRC/10/44 (n 14) para 47.

[190] South African Constitutional Court, No CCT/3/94, Judgment of 6 June 1995, *State v Makwanyane and Mchunu*.

[191] *Soering v the United Kingdom*, ECtHR (n 44).

found the death row phenomenon in Virginia to constitute inhuman and degrading punishment. In the case of *Öcalan v Turkey* the Court concluded that it would be contrary to the ECHR to implement a death sentence following an unfair trial, but finally left open the question of whether the death penalty per se violates Article 3.[192] In *Al-Saadoon and Mufdhi v the UK*, the Court found that the judicial execution involves the 'deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering.'[193] The Court found a violation of Article 3 due to the mental suffering the applicants have been subjected to because of their fear of execution, amounting to inhuman treatment within the meaning of Article 3.[194]

67 Thus, the ECtHR is the first international human rights court which clearly states that capital punishment is nothing but an aggravated form of corporal punishment and therefore, in any case, constitutes a cruel and inhuman punishment in violation of the right to dignity. On the other hand, the UN treaty bodies are still struggling with this issue.

68 The *HRC* found itself in highly intractable debates on various issues in relation to its legal qualification of capital punishment, cautiously taking a more critical stance in recent years.[195]

In a General Comment of 1992, the HRC argued that the death penalty must be carried out 'in such a way as to cause the least possible physical and mental suffering'.[196] As such, it has found public executions a degrading form of punishment in violation of articles 6 and 7 ICCPR,[197] and the use of execution methods such as stoning,[198] injection of untested lethal drugs,[199] firing squad, gas chambers,[200] burning and burying alive,[201] and decapitation to be cruel, degrading, and inhuman and thus contrary to Articles 7 and 6, paragraphs 1 and 2 of the ICCPR. It also explained that failure to provide individuals who await the application of the death penalty with timely information about the execution date is ill-treatment, which makes the subsequent execution incompatible with Articles 6 and 7 of the Covenant.[202] However, in its draft General Comment No 36 on Article 6, the HRC points out that an increasing number of ratifications of the Second Optional Protocol and other international instruments, as well as changing State practice 'suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment'[203] and that 'such a legal

[192] *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 March 2003) and [GC] App no 46221/99 (ECtHR, 12 May 2005).

[193] *Al-Saadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECtHR, 2 March 2010) para 115.

[194] ibid, para 171.

[195] Nowak, *CCPR Commentary* (n 18) 168ff.

[196] HRC, General Comment 20 (n 161) para 6.

[197] HRC, 'Concluding Observations: Democratic People's Republic of Korea' (2001) UN Doc CCPR/CO/72/PRK, para 13.

[198] HRC, 'Concluding Observations: Iran' (2011) UN Doc CCPR/C/IRN/CO/3, para 12.

[199] HRC, 'Concluding Observations: USA' (2014) UN Doc CCPR/C/USA/CO/4, para 8.

[200] *Ng v Canada* (n 45) para 16.4.

[201] *Malawi African Association et al v Mauritania*, Comm Nos 54/91, 61/91, 98/93, 164–96/97 and 210/98 (ACmHPR, 11 May 2000) para 120.

[202] HRC, 'Concluding Observations: Japan' (2014) UN Doc CCPR/C/JPN/CO/6, para 13.

[203] HRC, 'Draft General Comment No 36: Article 6: Right to Life' (2015) UN Doc CCPR/C/GC/R.36/Rev.2, para 53.

development ought to be welcomed as it is consistent with the pro-abolitionist sprit of the Covenant, which manifests itself, inter alia, in the texts of article 6, paragraph 6 and the Second Optional Protocol'.[204]

69 The *Committee against Torture* has similar problems in arriving at a clear position regarding capital punishment.[205] Some individual members have suggested repeatedly that the death penalty per se constituted cruel, inhuman or degrading punishment in violation of Article 16 CAT[206] and expressed concern that the continued application of the death penalty could 'in itself constitute a violation of the terms of the Convention'.[207] But this opinion has not become the general practice of the Committee. While it recommended the abolition of the death penalty and found the extension of the death penalty to new crimes to be violating international law, it focused otherwise mainly on the *procedures and methods of execution*.[208] The Committee observed that public hanging as a method of execution could be regarded as cruel and degrading punishment[209] and asked to carefully review execution methods, in particular lethal injection, in order to prevent severe pain and suffering.[210] Also the conditions of detention of death row inmates may amount to ill-treatment according to the Committee, particularly due to the excessive length of time on death row.[211] It was emphasized that 'where capital punishment occurs, it shall be carried out as to inflict the minimum possible suffering'.[212]

70 The Committee also expressed concerns about 'inadequate' *procedures leading to the death penalty* [213] or delayed procedures for appeals that keep prisoners sentenced to death in a situation of incertitude and anguish for many years that may amount to torture or ill-treatment.[214] Thus, it recommended specific safeguards for death row inmates including: giving reasonable advance notice to detainees and their families about their scheduled time of execution, revising the rule of solitary confinement for death row prisoners, ensuring these detainees are guaranteed effective legal assistance at all stages of the proceedings, including confidential meetings with their lawyers, provide the possibility of pardon, commutation and reprieve, as well as the introduction of a mandatory system of review following a death penalty convicting at first instance.[215] Finally, the Committee underlined that there should be an independent review of every case, when there is evidence that a detainee on death row is mentally ill. The Committee confirmed that it shall be ensured that mentally ill detainees are not executed.[216] The Committee has moreover

[204] ibid. [205] Ingelse (n 4) 279ff; see also above 2.1.

[206] eg CAT/C/SR162, para 67. In relation to Egypt, Committee member Burns stated that, 'although it could be argued that the death penalty in itself was not cruel, summary trials without basic legal safeguards were'; CAT/C/SR266, para 44 In relation to Korea Alternate Country Rapporteur Regmi stated that: 'Since all were agreed that the death penalty was a cruel, inhuman and degrading punishment he requested the Government of the Republic of Korea to abolish it'.

[207] A/50/44 (n 168) para 169; CAT/C/SR29, para 33.

[208] A/50/44 (n 168) paras 75 (g), 168; CAT/C/USA/CO/3-5 (n 25) para 25; A/56/44 (n 21) para 39(g); CAT, 'Concluding observations: China' (2008) UN Doc CAT/C/CHN/CO/4, para 34; CAT/C/IRQ/CO/1 (n 110) para 20; CAT/C/CHN/CO/4 (n 208) para 34; CAT/C/IRQ/CO/1 (n 110) para 20; CAT/C/USA/CO/3-5 (n 25) para 25.

[209] A/48/44 (n 165) para 58.

[210] CAT/C/USA/CO/2 (n 85) para 31; CAT, 'Report of the Committee against Torture' (1996) UN Doc A/51/44, para150(c).

[211] CAT/C/ETH/CO/1 (n 116) para 24. [212] CAT/C/USA/CO/3-5 (n 25) para 25.

[213] A/56/44 (n 21) para 45 (i). [214] CAT/C/USA/CO/3-5 (n 25) para 25.

[215] CAT, 'Concluding Observations: Japan' (2013) UN Doc CAT/C/JPN/CO/2, para 15.

[216] ibid.

underlined that if the death penalty is imposed, this is only done for the most serious crimes and in compliance with international norms.[217]

71 The *UNSRT* has been more outspoken than the UN treaty bodies in the interpretation of the death penalty noting that human rights are a rapidly developing concept and thus the interpretation of what constitutes torture or other forms of ill-treatment may change over time.[218] While recognizing that international bodies have not per se held the death penalty as a violation of the absolute prohibition of torture and ill-treatment, there is a clear trend in this direction at the regional and national levels, based on practice by States and judiciaries.[219] The UNSRT stipulated that, in practice, executions often violate the absolute prohibition of torture and ill-treatment 'either because of the death row phenomenon or because the method applied involves unnecessary suffering and indignity'.[220] Emphasizing that some methods of executions (such as stoning or gas asphyxiation) already is 'clearly prohibited under international law' there is no 'categorical evidence' that any method of conducting the death penalty exists that actually complies with the absolute prohibition of torture and ill-treatment.[221] Also the death row phenomenon can be a violation of Article 7 ICCPR and of Article 1 or Article 16 of the CAT, depending on the severity of conditions and the length of isolation.[222] Referring to regional and domestic jurisprudence[223] the UNSRT also concludes that 'the mandatory death penalty, a legal regime under which judges have no discretion to consider aggravating or mitigating circumstances with respect to the crime or the offender, violates due process and constitutes inhumane treatment.'[224] While much speaks for capital punishment generally constituting an act of ill-treatment, it is 'inherently cruel' in the case for the execution of pregnant women, nursing mothers, elderly persons and persons with mental disabilities.[225] State practice has also lead to a *ius cogens* norm regarding the prohibition of the execution of juveniles.[226]

72 It can therefore be concluded that a dynamic interpretation of the terms 'cruel, inhuman and degrading punishment' in Articles 16 CAT and 7 ICCPR, as applied in respect to corporal punishment, outweighs the argument for the need for a systematic interpretation between the right to life and the right to personal integrity and dignity.[227] It is not unreasonable to argue that the death penalty, although not constituting a violation of the right to life in those countries that are not parties to the second OP to the ICCPR, nevertheless must be considered an inhuman and degrading punishment according to the present understanding of these terms. It seems to be a more consistent interpretation of these different provisions than arriving at the conclusion that capital punishment is less inhuman and degrading than six strokes with the tamarind switch. After all, *capital punishment is an aggravated form of corporal punishment*. In addition, the death penalty is not the only exception to the right to life, whereas the prohibition of torture, cruel, inhuman and degrading treatment and punishment, which are practices that are considered

[217] CAT/C/IRQ/CO/1 (n 110) para 20; CAT, 'Concluding Observations: Kuwait' (2011) UN Doc CAT/KWT/CO/2, para 17.
[218] See SRT (Nowak) A/HRC/10/44 (n 14) para 34.
[219] SRT (Méndez) A/67/279 (n 94) paras 53, 72. [220] ibid, paras 29, 75.
[221] ibid, para 77. [222] ibid, para 78.
[223] Court of Appeal of Kenya, *Godfrey Ngotho Mutiso v Republic*, H.C.CR.C.NO.55 of 2004, 30 July 2010.
[224] SRT (Méndez) A/67/279 (n 94) para 59. [225] ibid, para 63. [226] ibid, para 64.
[227] See also Nowak, *CCPR Commentary* (n 18) 16ff.

as most direct attacks on the core of human dignity, have been laid down as one of the few absolute human rights in international treaty law. Although both the Human Rights Committee and the Committee against Torture are still divided on this issue, a systematic interpretation of both the ICCPR and the CAT, in light of the present day circumstances and the legal trend towards abolition of the death penalty, leads to the conclusion that Article 16 CAT prohibits not only corporal but also capital punishment.

3.6 Extra-Custodial Use of Force and Other Cruel, Inhuman or Degrading Treatment or Punishment

73 It has been argued that in view of the history of the Convention, the victims of acts referred to in Article 16 'must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment'.[228] This interpretation would exclude excessive use of police force outside detention and similar factual control from the scope of application of the Convention. However, the *travaux préparatoires* show that detention and similar direct control was meant only to constitute a precondition for the qualification of torture, as defined in Article 1.[229] The Committee has also followed this interpretation and considered excessive use of force in routine police operations or dissolving riots or demonstrations as a violation of Article 16.[230]

74 Also the UNSRT has repeatedly confirmed that the prohibition of torture and other forms of ill-treatment is not restricted to conduct against persons deprived of liberty, but also covers conduct of law enforcement agencies, eg excessive police violence, as well as torture and other forms of ill-treatment by acquiescence, ie non-State actors committing torture and other forms of ill-treatment and States not adhering to their due diligence obligation to prevent such acts.[231]

75 Since the police are entitled to use physical force and arms for lawful purposes, the *principle of proportionality* must be applied in order to determine whether the use of force is excessive or not. Only such use of force, which results in severe pain or suffering and which, in the particular circumstances of a given case, is considered to be excessive and non-proportional in relation to the purpose to be achieved amounts to *inhuman or cruel treatment* or punishment. The use of force by State agents is only legitimate if it complies with several cumulative principles. It needs to have a legal basis (legality), it can only be applied when strictly necessary (necessity), it should not be excessive (proportionality).[232] Finally, it is also essential to highlight the principle of precaution, meaning that law enforcement operations shall be organized beforehand in a way to avoid an excessive use of force to minimize possible harms. If force is used in a particularly humiliating manner, it may be qualified as *degrading treatment* even if less severe pain or suffering is thereby inflicted.

76 The Committee has found a violation of Article 16 in the case of *Fatou Sonko v Spain*, which concerned the death of a migrant after he had been intercepted on the sea

[228] Burgers and Danelius (n 8) 149.
[229] See above Art 1, § 114ff; see also E/CN.4/2006/6 (n 7) and Nowak 'Challenges' (n 7) 674.
[230] See below § 78; see also Ingelse (n 4) 286.
[231] SRT (Melzer) A/72/178 (n 9) para 34; for prevention of ill-treatment by private actors, see below 3.7.
[232] SRT (Melzer) A/72/178 (n 9) paras 5ff; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Code of Conduct for Law Enforcement Officials.

by Spanish border guards, trying to enter Spanish territory. The complainant, the sister of Mr. Sonko, argued that the Spanish border guards made Mr. Sonko and other intercepted persons jump into the water after they had actually been brought onto their vessel and after they had punched their dinghies—something that the Spanish authorities contested. The Committee concluded that while the exact course of events remained unclear, he had in any case been put in a situation that caused his death.[233] The Committee determined that Mr. Sonko had been subjected to physical and mental suffering prior to his death, which, though not amounting to torture, it constituted ill-treatment under Article 16. In doing so, the Committee considered that physical and mental suffering experienced by the victim had been aggravated by this particular vulnerability as a migrant.[234]

77 Another important example is the case *Diory Barry (or Diodory Barry) v Morocco* where border guards pushed migrants back into the sea and the expulsion of a group of migrants from Morocco to Mauretania.[235] According to the complainants, 40 undocumented migrants, some severely injured, were left in the border area between Morocco and Mauretania with only minimal food and water supplies and were forced to walk 50 km through an area containing anti-personnel mines in order to reach an inhabited area on the Mauritanian side. The Committee found these circumstances of expulsion an infliction of severe physical and mental suffering by public officials and qualified it as cruel, inhuman or degrading treatment as defined by Article 16.[236]

78 The Committee expressed specific concern about the excessive use of force during *demonstrations and public assemblies* [237] including the use of dogs[238], plastic bullet rounds,[239] pepper spray[240] or even firearms[241] for the purposes of crowd control. It needs to be recalled that individual protection against ill-treatment shall be granted even when assemblies are unlawful or violent.[242] With regard to assemblies, the UNSRT has emphasised, that individuals cannot lose their protection against torture and other forms of ill-treatment 'under any circumstances whatsoever, including in the context of violent riots or unlawful protests'.[243]

79 The Committee also dealt with the problem of extra-custodial use of *weapons*, which can amount to torture or other forms of cruel, inhuman or degrading treatment if employed unnecessarily or in an excessive manner.[244] Clearly the use of *firearms* carries an inherent risk of causing unnecessary suffering and injury. The Committee recommended that there should be a clear and unambiguous message to all levels of the police as well as to prison staff that torture, ill-treatment and violence are not acceptable.[245] To

[233] *Fatou Sonko v Spain*, No 368/2008, UN Doc CAT/C/47/D/368/2008, 25 November 2011, para 10.4.
[234] ibid. [235] *Diory Barry v Morocco*, No 372/2009 (n 60). [236] ibid, para 7.2.
[237] ibid, paras 95 (i), 113(c). [238] A/52/44 (n 88) para 182.
[239] A/54/44 (n 170) para 76 (g). [240] A/56/44 (n 21) para 58 (a).
[241] CAT, 'Concluding Observations: Syrian Arab Republic' (2012) UN Doc CAT/C/SYR/CO/1/Add.2, para 20(j).
[242] SRT (Melzer) A/72/178 (n 9) para 15.
[243] ibid; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 232) , principles 12–14; See also SRT (Kiai/Heyns) 'Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association' (2016) UN Doc A/HRC/31/66, paras 18-27 and 60-63; SRT (Heyns) 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2011) UN Doc A/HRC/17/28, para 42.
[244] SRT (Melzer) A/72/178 (n 9) para 48; CAT/C/NZL/CO/6 (n 149) para 17.
[245] CAT, 'Concluding Observations: Italy' (2007) UN Doc CAT/C/ITA/CO/4, para 17; Also see CAT, 'Concluding Observations: Slovakia' (2015) UN Doc CAT/C/SVK/CO/3, para 11.

this end, States should introduce a code of conduct and police disciplinary regulations in line with international instruments,[246] rules of engagement fully in accordance with the Convention and other international standards[247], SOPs and a monitoring system to adhere to these.[248] States should train all of its law enforcement personnel in the proper use of force and should regulate the use of firearms by its security forces in line with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and to integrate provisions of these international instruments in the police disciplinary regulation.[249]

80 The use of alternatives to firearms, so called *less-lethal weapons* (such as certain types of kinetic impact projectiles, electrical discharge weapons, chemical irritants, water cannons and disorientation devices) is increasing and can minimize harm. At the same time, a widespread availability may result in an overuse with indiscriminate effects that runs counter to the principles of necessity and proportionality.[250] The Committee has expressed in various occasions its concern over the use of *electrical discharge weapons* delivering electric shocks (eg tasers) as a weapon involving a high risk of ill-treatment, not only causing severe pain but also death. It asked States parties to consider relinquishing the use of tasers, to revise the regulations involving its use and prohibit their use on children and pregnant women.[251] Further, the Committee has recommended that tasers should only be used by trained and certified staff, only in extremely limited situations, in case of a real and immediate threat to life or risk of serious injury, strictly as a substitute for lethal weapons.[252]

81 The Committee has expressed specific concern about reports of brutality and extra-custodial use of *excessive force by law enforcement officials against groups in situations of vulnerability*, in particular racial minorities, migrants and persons of different sexual orientation which have not been adequately investigated.[253] Furthermore, the Committee has underlined that no one should be detained on the basis of social status, but States parties are to find human alternatives for vulnerable groups, as well as provide them with the required assistance.[254] When private actors or groups commit violence against persons or specific groups, the State will have to protect the persons subjected to these forms of ill-treatment.[255]

82 The prohibition of excessive use of force applies also to the *military*. In its conclusions on the report of the *Ukraine* in 1997, the Committee considered the systematic mistreatment and beatings of recruits in the armed forces as a flagrant violation of Article 16.[256] The Committee and the UNSRT have also called States parties to take effective

[246] CAT/C/ITA/CO/4 (n 245) para 17; CAT/C/HUN/CO/4 (n 133) para 14; CAT/C/MOZ/CO/1 (n 103).

[247] CAT, 'Concluding Observations: Israel' (2016) UN Doc CAT/C/ISR/CO/5, para 33.

[248] CAT, 'Concluding Observations: Turkey' (2011) UN Doc CAT/C/TUR/CO/3, para 13.

[249] CAT/C/MOZ/CO/1 (n 103) para 9.

[250] SRT (Melzer) A/72/178 (n 9) para 54.

[251] ibid; CAT/C/NZL/CO/5 (n 80) para 16; see also CAT/C/PRT/CO/4 (n 69) para 14.

[252] CAT/C/NZL/CO/5 (n 80) para 16; CAT/C/NLD/CO/5-6 (n 103) para 27; CAT, 'Concluding Observations: Canada' (2012) UN Doc CAT/C/CAN/CO/6, para 21; CAT/C/USA/CO/2 (n 85) para 35; CAT/C/POL/CO/5-6 (n 75) para 15; CAT, 'Concluding Observations: Portugal' (2013) UN Doc CAT/C/PRT/CO/5-6, para 15.

[253] CAT/C/USA/CO/2 (n 85) para 37; CAT, 'Concluding Observations: France' (2006) UN Doc CAT/C/FRA/CO/3, para 5; CAT/C/GIN/CO/1 (n 110) para 19; CAT/C/NZL/CO/5 (n 80) para 16; CAT/C/NLD/CO/5-6 (n 103) para 27.

[254] CAT/C/KHM/CO/2 (n 68) para 20; CAT/C/PER/CO/5-6 (n 75) para 22; CAT, 'Concluding Observations: Mongolia' (2011) UN Doc CAT/C/MNG/CO/1, para 25.

[255] See also below 3.7.

[256] A/52/44 (n 88) para 136.

measures to eradicate hazing in the armed forces, ensure prompt, impartial and effective investigations and prosecution of such abuse and report publicly on the results.[257] Appropriate punishment of the perpetrators, including the exclusion from the armed forces and redress for the victims should be ensured.[258]

3.7 Prevention of Ill-Treatment Committed By Private Actors

83 Cruel, inhuman and degrading treatment can also be committed by public officials by acquiescence, as confirmed by the Committee in the *Dzemajl et al v Yugoslavia.*[259] The case was submitted by 65 persons of *Romani* origin, whose settlement was burned down, looted and demolished with the knowledge and partly in the presence of the local police and without the police preventing its occurrence or investigating the incident further. The applicants claimed that *Yugoslavia* had violated Articles 1, 2, 12, 13, 14 and 16 CAT. The Committee did not consider the complaint under Articles 1 and 2 but failed to give any reasons for this. It simply found that the burning and destruction of houses, in the circumstances constitute cruel, inhuman or degrading treatment or punishment. The Committee also underlined the particular vulnerability of the victims and the fact that there was a racial motivation behind the violence against the Roma inhabitants of the settlement and that even though these acts were not committed by public officials, 'the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.'

84 In the State reporting procedure the Committee has emphasized that the protection of minority and marginalized individuals and groups who are especially at risk of torture is an important part of the State's obligation to prevent torture or other forms of ill-treatment.[260] It has expressed its serious concern regarding a number of States parties about harassment, violent attacks, as well as hate crimes based on discrimination regarding members of certain racial and ethnic groups, immigrants or LGBTI individuals or socially marginalized groups, such as sex workers, victims of trafficking, drug users, migrant workers, homeless persons, beggars, street children and mentally ill persons.[261]

85 The Committee stated that States parties should take effective measures to protect people at risk by establishing a comprehensive legal framework to combat discrimination, including hate crimes, hate speech and promoting and inciting violence because of discrimination.[262] States should also make sure to effectively enforce anti-discrimination legislation.[263]

86 Protective measures against attacks should be put into place and States parties should ensure that effective policing and that functional complaints mechanisms are in place, as well as that any allegations of attacks against persons, discrimination and hate speech are systematically and promptly, thoroughly and impartially investigated.[264] Offenses carried

[257] CAT, 'Concluding Observations: Republic of Moldova' (2010) UN Doc CAT/C/MDA/CO/2, para 25; CAT/C/RUS/CO/5 (n 98) para 16; CAT, 'Concluding Observations: Turkmenistan' (2011) UN Doc CAT/C/TKM/CO/1, para 22; CAT, 'Concluding Observations: Ukraine' (2014) UN Doc CAT/C/UKR/CO/6, para 23; SRT (Melzer) A/72/178 (n 9) para 19.

[258] CAT/C/RUS/CO/5 (n 98) para 16.

[259] On the term 'public official or other persons acting in an official capacity', see above Art 1, 3.1.6.2.

[260] CAT/C/GC/2 (n 31) para 21.

[261] CAT/C/PER/CO/5-6 (n 75) para 22; CAT/C/KHM/CO/2 (n 68) para 20; CAT/C/ROU/CO/2 (n 114) para 10; CAT/C/USA/CO/3-5 (n 25) para 26.

[262] CAT/C/MNG/CO/1 (n 254) para 25; CAT/C/RUS/CO/5 (n 98) para 15.

[263] CAT/C/POL/CO/5-6 (n 75) para 25; CAT/C/BGR/CO/4-5 (n 82) para 28.

[264] CAT/C/MNG/CO/1 (n 254) para 25; CAT/C/BGR/CO/4-5 (n 82) para 28.

out motivated by discrimination should constitute an aggravating circumstance in the criminal prosecution process.[265] Perpetrators are to be brought to justice and punished accordingly and victims should receive redress in line with the Convention.[266] Stereotypes and discrimination should be eradicated through training for law enforcement officials on combating crime against minorities, awareness-raising, information campaigns and attacks against minorities should be publicly condemned.[267] Members of minorities, eg Roma, should be recruited for law enforcement agencies.[268]

87 The Committee has also emphasized repeatedly that States parties have to ensure that *human rights defenders, journalists and NGOs* can undertake their work and need to be protected from violence, threats, killings and intimidation as a result of their activities, with any violence needing to be investigated effectively and punished appropriately.[269]

88 The Committee has expressed concerns about the persistence of *harmful practices* such as female genital mutilation. It urged states to go beyond its criminalization and take the necessary steps to eradicate the practice, including through nationwide awareness-raising campaigns for both women and men, offering alternative sources of income to those earning their living by performing FGM and other harmful traditional practices and to punish the perpetrators of such acts. [270] Also the UNSRT expressed concern regarding harmful practices committed by non-State actors such as female genital mutilation, domestic violence and human trafficking that can amount to torture or other forms of cruel, inhuman or degrading treatment.[271]

3.8 Savings Clause (Paragraph 2)

89 As stated in Article 1(2), Article 16(2) also contains a savings clause to the effect that the provisions of Article 16(1) 'are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion'. For the interpretation of this savings clause, reference should be made to the commentary on Article 1(2).[272] Article 1(2) expressly stipulates that Article 1 has no effect on international instruments and national legislation with provisions having a wider scope. Similarly, Article 16(2) stipulates the same in respect of other cruel, inhuman or degrading treatment.

[265] CAT/C/BGR/CO/4-5 (n 82) para 28.

[266] ibid; CAT/C/POL/CO/5-6 (n 75) para 25; CAT/C/MNG/CO/1 (n 254) para 25; CAT/C/PRT/CO/4 (n 69) para 18.

[267] CAT/C/PRT/CO/4 (n 69) para 18; CAT/C/RUS/CO/5 (n 98) para 15.

[268] CAT/C/ROU/CO/2 (n 114) para 10.

[269] CAT/C/BLR/CO/4 (n 98) para 12; CAT, 'Concluding Observations: Mexico' (2012) UN Doc CAT/C/MEX/CO/5-6, para 14; CAT, 'Concluding Observations: Montenegro' (2014) UN Doc CAT/C/MNE/CO/2, para 18; CAT, 'Concluding Observations: Nicaragua' (2009) UN Doc CAT/C/NIC/CO/1, paras 18-19; CAT/C/PHL/CO/2 (n 124) para 11; CAT/C/RUS/CO/5 (n 98) para 12; CAT, 'Concluding Observations: Rwanda' (2012) UN Doc CAT/C/RWA/CO/1, para 17; CAT/C/SAU/CO/2 (n 110) para 19; CAT, 'Concluding Observations: Senegal' (2013) UN Doc CAT/C/SEN/CO/3, para 20.

[270] CAT/C/TGO/CO/1 (n 68) para 26; CAT/C/CMR/CO/4 (n 43) para 29; see above 2.1.

[271] SRT (Melzer) A/72/178 (n 9) para 34; A/HRC/13/39 (n 5); SRT (Méndez) A/HRC/31/57 (n 46) paras 51–53 (sexual violence); SRT (Nowak), 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Togo' (2008) UN Doc A/HRC/7/3/Add.5, para 54; SRT (Nowak), 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Moldova' (2009) UN Doc A/HRC/10/44/Add.3, paras 49–53.

[272] See above Art 1, 3.4.

90 Article 16(2) makes it clear that any wider protection mechanism relating to cruel, inhuman or degrading treatment in national or international law is not affected by the provisions of the Convention. Accordingly, in so far as other international instruments or national laws provide better protection to individuals, they are entitled to benefit from it; however, other international instruments or national law can never restrict the protection which the individual enjoys under the Convention. A typical example of the application of the savings clause in Article 16(2) is the *non-refoulement* principle derived from Article 3 ECHR and Article 7 CCPR, which, according to the jurisprudence of the relevant treaty bodies, applies not only to the danger of being subjected to torture (as in Article 3 CAT), but also to the danger of being subjected to cruel, inhuman or degrading treatment.[273]

91 In the third periodic report of *Canada*, the interpretation of Article 16(2) was discussed. The Committee noted with concern Canada's policy that compelling security interests could be invoked to justify the removal of aliens to countries where they might face a substantial risk of torture or ill-treatment. Article 3 CAT had not been incorporated in domestic legislation and consequently recognized refugees could be returned if they were considered a danger to the public or had committed acts that were contrary to Canada's national security interests. The Committee did not consider that such exceptions to the *non-refoulement* principle were appropriate or admissible. The Committee further noted that Article 3(1) CAT had been challenged by the Federal Court of Appeal on the grounds that the *prohibition of refoulement* was a derogable right. In this case, the Court also interpreted Article 16(2) as meaning that the exceptions to the prohibition of *refoulement* in the case of alleged threats to national security provided for in Article 33(2) of the Convention relating to the Status of Refugees were applicable. The Committee noted, however, that Article 16 concerned cruel, inhuman or degrading treatment or punishment, whereas Article 3 concerned torture. Accordingly it was submitted that the two provisions should be viewed as complementary rather than contradictory and the Canadian delegation was asked by the country rapporteur, Ms *Gaer*, to explain why its Government relied on an interpretation that would lower standards and diminish the victim's protection.[274]

92 Regarding the savings clause in Article 16(2), the Committee also refuted the argument of the *United States* that the Convention was not applicable in times and in the context of *armed conflict* on the basis of the argument that the 'law of armed conflict' was the exclusive *lex specialis* applicable, and that the Convention's application 'would result in an overlap of the different treaties which would undermine the objective of eradicating torture'. The Committee concluded that the United States should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction and that the application of the Convention's provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its Articles 1 and 16.[275] The Committee also emphasized in its General Comment that the prohibition of ill-treatment is non-derogable 'and its prevention to be an effective and non-derogable measure'.[276]

GERRIT ZACH AND MORITZ BIRK

[273] See above § 3.2. [274] CAT/C/SR.446 (n 153) para 30.
[275] CAT/C/USA/CO/2 (n 85) para 13. [276] CAT/C/GC/2 (n 31) para 3.

PART II

PROCEDURAL ARTICLES

Article 17

Committee against Torture

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

1. **Introduction** 476
2. **Travaux Préparatoires** 477
2.1 Chronology of Draft Texts 477
2.2 Analysis of Working Group Discussions 480
3. **Issues of Interpretation** 484
3.1 Nature and Functions of the Committee 484
3.2 Composition of the Committee—Article 17(1) 485
3.3 Nomination and election of Committee members—Article 17 (2)–(6) 488
3.3.1 Nomination 488
3.3.2 Election 489
3.3.3 Casual Vacancies 491
3.4 Financing of the Committee—Article 17(7) 493

1. Introduction

1 The Committee against Torture (hereinafter CAT Committee or the Committee) is one of the presently ten treaty monitoring bodies of the United Nations (UN), similar to the Human Rights Committee (HRC), the Committee on Economic, Social, and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee on the Rights of the Child (CRC), the Committee on Migrants Workers (CMW), and the more recently established bodies under the Convention for the Protection of All Persons from Enforced Disappearance (CED), the Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention Against Torture (OPCAT).[1] Since the Committee is modelled on the HRC established in accordance with Article 28 CCPR, the following considerations will be fairly brief and draw upon the interpretation developed in the CCPR Commentary.[2]

2 Strictly speaking, the Committee is not a body of the UN but a relatively autonomous quasi-judicial treaty based organ created by the States parties of the Convention. This is underlined by the fact that all ten expert members of the Committee must be nationals of, and are nominated and elected by, States parties. In addition, Article 17(7) requires States parties to bear the financial responsibility for the expenses of Committee members. In practice, this has led to serious financial problems which were solved by integrating the Committee more into the UN.

3 The Committee has more monitoring functions than some of the other treaty bodies. In addition to the mandatory State reporting procedure under Article 19 and the optional inter-State and individual complaints procedures under Articles 21 and 22,

[1] On the role of UN treaty monitoring bodies see eg Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000); Anne F Bayefsky, *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International 2000); Michael O'Flaherty, *Human Rights and the UN: Practice Before the Treaty Bodies* (Springer 2002); Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill Nijhoff 2003) 78; OMCT, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, vol 4 (2nd edn, OMCT 2014).

[2] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) (*CCPR Commentary*) 668; on the CAT see, in particular, Manfred Nowak in Dorothea Steurer and Hannes Tretter (eds), *Fortschritt im Bewußtsein der Grund- und Menschenrechte—Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora* (Engel 1988); Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999); Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Kluwer Law International 2001); OMCT (n 1).

the Committee is also entrusted by virtue of Article 20 to carry out confidential *ex officio* inquiries in the case of well-founded indications that torture is being systematically practised in a State party. The inquiry procedure is mandatory but States parties may 'opt out' in accordance with Article 28. With the entry into force of the Optional Protocol to the CAT in 2006, the Committee also assumed a further, albeit limited, function of supervising the work of the newly created Sub-Committee on Prevention of Torture (SPT).[3]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *IAPL Draft (15 January 1978)*[4]

Article XIII

1. The Contracting Parties undertake to submit to the Human Rights Committee established under the Covenant periodic reports on the legislative, judicial, administrative and other measures they have adopted to implement this Convention.

2. The first report shall be submitted within one year of the entry into force of the Convention and thereafter a report shall be submitted every two years.

3. The Chairman of the Human Rights Committee shall, after consulting the other members of the Committee, appoint a Special Committee on the Prevention of Torture, consisting of five members of the Human Rights Committee who are also nationals of the Contracting Parties to this Convention to consider reports submitted by contracting Parties in accordance with this Article.

4. If, among the members of the Human Rights Committee, there are no nationals of the Contracting Parties to this Convention or if there are fewer than five such nationals, the SG of the UN shall, after consulting all Contracting Parties to this Convention, designate a national of the Contracting Party or nationals which are of the Contracting Parties which are not members of the Human Rights Committee to take part in the work of the Special Committee established in accordance with paragraph 3 of this Article, until such time as sufficient nationals of the Contracting Parties to this Convention are elected to the Human Rights Committee.

5. The Special Committee on the Prevention of Torture shall meet not less than once a year for a period of not more than five days, either before the opening or after the closing of the sessions of the Human Rights Committee and shall issue an annual report of its findings.

5 *Original Swedish Draft (18 January 1978)*[5]

Article 16

States undertake to submit to the Secretary-General of the United Nations, when so requested by the Human Rights Committee established in accordance with article 28 of the CCPR (hereinafter referred to in the present Convention as the Human Rights Committee), reports or other information on measures taken to suppress and punish torture and other cruel, inhuman or degrading treatment or punishment.

[3] See below Arts 16 and 24 OP.

[4] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[5] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

Such reports or information shall be considered by the Human Rights Committee in accordance with its procedures set out in the CCPR and in the Rules of Procedure of the Human Rights Committee.

6 *Draft Optional Protocol by Costa Rica (6 March 1980)*[6]

Article 4

1. The Committee shall be composed of 10 members until such time as there are not less than 25 States Parties to the present Protocol. Thereafter the Committee shall be composed of 18 members.

2. The members of the Committee shall be persons of high moral character and in the matters dealt with in the Convention and the present Protocol.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 5

1. The members of the Committee shall be elected for a term of four years. However, at the first election half of the members shall be elected for two years. Thereafter, elections shall be held every two years for half of the members of the Committee.

2. Each State Party may nominate not more than four persons or, where there are not less than 25 States Parties, not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

7 *Swedish Proposal for the Implementation Provisions (22 December 1981)*[7]

Article 17

1. There shall be established a Committee against Torture (hereinafter the Committee). It shall consist of nine members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States to the present Convention and, so far as possible, of persons who are also members of the Human Rights Committee established in accordance with Article 28 of the Covenant. The members of the Committee shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

8 *Draft Implementation Provisions, submitted by the Chairman-Rapporteur of the Working Group as possible Alternative to the new Swedish Proposals (1 February 1982)*[8]

Article 17

1. For the performance of the functions described in articles 18 and 19 there shall be established a group consisting of five persons of recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

[6] Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[7] Draft Articles Regarding the Implementation of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1981) UN Doc E/CN.4/1493.

[8] Draft Implementation Provisions Submitted by the Chairman-Rapporteur of the Working Group (1982) UN Doc E/CN.4/1982/WG.2/WP.6.

2. The Chairman of the Commission on Human Rights shall appoint the members of the group from among representatives to the Commission on Human Rights who are nationals of States Parties to the Convention. If fewer than five States Parties to the Convention are members of the Commission on Human Rights, the Secretary-General of the United Nations shall, after consulting with all States Parties to the Convention, designate one or more nationals of the States Parties which are not members of the Commission to take part in the work of the group until the next session of the Commission on Human Rights.

3. The members of the group established in accordance with the proceeding paragraphs shall serve in their personal capacity.

4. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance and functions of the group established in accordance with paragraphs 1 and 2.

5. The groups established in accordance with paragraphs 1 and 2 shall forward an annual report on its performance of the functions described in articles 18 and 19 to the States Parties to the Convention. It shall forward a copy of this report to the Commission on Human Rights.

9 *Four Draft Articles on Implementation, with the Explanatory Note, submitted by the Chairman-Rapporteur (24 December 1982)*[9]

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

[9] Four Draft Articles on Implementation Submitted by the Chairman-Rapporteur of the Working Group (1983) UN Doc E/CN.4/1983/WG.2/2.

> 5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3.
>
> 6. For filling casual vacancies, the State party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
>
> 7. The members of the Committee shall receive emoluments as well as compensation for their expenses while they are in performance of the Committee functions, on such terms and missions as the biennial meetings of States Parties may decide. The States Parties shall be responsible for these emoluments and expenses in the same proportions as their contributions to the general budget of the UN.

2.2 Analysis of Working Group Discussions

10 The Working Group of the Human Rights Commission did not deal with the supervisory mechanism of the Convention in its sessions between 1978 and 1980. However, the written comments of several States, made in 1978, on the implementation provisions of the original Swedish draft Convention,[10] shaped the subsequent discussions of the Working Group.[11]

11 The question of the nature and composition of the enforcement mechanism was discussed, for the first time, during the Working Group session in 1981.[12] Several proposals were subject to the deliberations of the Working Group. The original Swedish draft suggested in its Articles 16 to 21 that the implementation monitoring of the Convention should be carried out by the *HRC* established by Article 28 CCPR.[13] The proposal of the IAPL (in its articles XIII and XIV),[14] also attributed the monitoring of the implementation of the CAT to the HRC, but, in addition, provided for the appointment of a Special Committee on the Prevention of Torture (Article 13). The latter would consist of five members of the HRC who were also nationals of the States parties to the CAT. Both proposals provided for the monitoring of the implementation of the Convention based primarily on mandatory State reporting as well as inter-State and individual complaints procedures.[15]

12 In 1980, *Costa Rica* submitted a draft Optional Protocol[16] which provided for the establishment of an Independent International Committee as supervisory body authorized to arrange preventive visits to places of detention of all kinds under the jurisdiction of the States parties having ratified the OP.[17]

[10] E/CN.4/1285 (n 5); see above § 5.

[11] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, paras 99–103. See also Boulesbaa (n 2) 242.

[12] J Herman Burgers and Hans 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) 74.

[13] E/CN.4/1285 (n 5); see above § 5.

[14] E/CN.4/NGO/213 (n 4); see above § 4.

[15] Art 16 of the Swedish Draft 1978 and Art XIII(1) IAPL Draft.

[16] E/CN.4/1409 (n 6); see above § 6.

[17] The draft Optional Protocol was based on Jean-Jacques Gautier's (a Swiss banker's) idea, who proposed in 1977 a universal system of preventive visits to places to detention. This system was only realized by the adoption of the OP in 2002 and its entry into force in 2006. See below OP.

13 Moreover, the *Netherlands* had submitted an amendment to the Swedish proposal modifying Article 16 and providing for the establishment of a *new Committee* that would be composed of members of the HRC, functioning as the supervisory body of the Convention.[18] According to an additional Article, the procedures provided for in the CCPR and/or in the Protocol would apply between States parties to the Convention which were also parties to the CCPR and which had accepted the competence of the HRC under Article 41 and/or under the first OP to the CCPR, whereas otherwise the procedures provided for in the Convention would apply.

14 During this session, the Working Group also discussed a telegram by the Legal Counsel of the United Nations, explaining the legal difficulties that would be encountered if the monitoring mechanism of the Convention were the HRC.[19] According to the Legal Counsel this proposal would constitute a modification of the terms of the CCPR. Moreover, the general concordance in purpose of Article 7 CCPR and the Convention would not be sufficient to give monitoring competence over the CAT to the HRC, since the latter must function in compliance with its constituent treaty.[20]

15 Several delegations who shared the opinion of the Legal Counsel concerning the potential difficulties involved stated that the parties to the Convention and the CCPR would not necessarily be the same.[21]

16 In general, some States (for example *Argentina* and *Brazil*) defended the option of self-enforcement, meaning that each State party would oversee its own implementation of the Convention.[22] It was therefore suggested that international supervision should be optional. However, the opponents to this suggestion pointed out that self-enforcement would be unrealistic as evidenced by the fact that torture was still widely practised despite national and international legislation prohibiting the practice. In view of other delegations including the *Soviet Union*, the task of implementation could also be entrusted to the Human Rights Commission or to its Sub-Commission.[23]

17 *Sweden* submitted a second proposal which provided for the establishment of a *new Committee* acting as the only supervisory body of the Convention.[24] According to this proposal 'the members of the Committee shall be nationals of States Parties, serve in their personal capacity and shall as far as possible be chosen among members of the Human Rights Committee. Members shall be elected for a period of four years.'[25]

18 During the 1982 Working Group it was discussed whether the implementation procedures should have a mandatory or optional character. Some delegations expressed doubts regarding the advisability of establishing international bodies with extensive jurisdiction and stated that the implementation provisions should be made optional.[26]

[18] Amendments to the Swedish Proposals Submitted by the Netherlands (1981) UN Doc E/CN.4/1981/WG.2/WP.3.

[19] Telegram from the Legal Counsel of the United Nations (1981) UN Doc E/CN.4/1981/WG.2/WP.6.

[20] Burgers and Danelius (n 12) 76.

[21] Report of the Working Group of the Commission on Human Rights (1981) UN Doc E/CN.4/L.1576, para 51.

[22] Burgers and Danelius (n 12) 77.

[23] E/CN.4/L.1576 (n 21) para 57.

[24] Alternative Suggestion for the Establishment of a Committee to Supervise the Convention Submitted by Sweden (1981) UN Doc E/CN.4/1981/WG.2/WP.7.

[25] Burgers and Danelius (n 12) 77.

[26] Report of the Working Group of the Commission on Human Rights (1982) UN Doc E/CN.4/1982/L.40, para 53.

19 The continued deliberations regarding the nature and composition of the implementation organ were based on a new Swedish proposal with a complete set of eighteen alternative implementation provisions, mostly modelled according to the corresponding provisions of the CCPR[27] and an alternative proposal of four draft articles and an explanatory note by the *Chairman-Rapporteur*.[28] The latter suggested a supervisory body consisting of five members of the *Human Rights Commission* (nationals of the States parties) who were appointed by the Chairman of the Human Rights Commission (paragraph 2 of the Rapporteur's draft article); this formula was borrowed from the International Convention on the Suppression and Punishment of the Crime of Apartheid.[29] The *Swedish* proposal provided for the establishment of a new *Committee against Torture* consisting of nine nationals of the States parties to be nominated and then elected by States parties.

20 In general, a number of delegations reacted to the Chairman's proposal by stating that such a supervisory body would introduce strong political factors, which was undesirable since the Convention aims to prohibit torture by public officials.[30] Furthermore, questions were raised regarding the criteria for selection.[31] Thus, it was proposed that the members of the new supervisory body should be appointed by the Chairman of the HRC from the members of the latter Committee.[32]

21 Although some representatives of States parties expressed their concern regarding the multiplication of international organs, pointing out that a new body would create sizeable financial implications,[33] a number of delegates stated their preference for the Swedish proposal. They pointed to its advantage of providing for independence of Committee members from governmental instructions or pressures since the members of the Committee would serve 'in their personal capacity'.[34] In the opinion of these delegations, the fact that the members of the Committee should 'so far as possible' also be members of the Committee would enhance harmonization between the implementation mechanism of the CCPR and the Convention and avoid the legal problems pointed out by the Legal Counsel of the United Nations.[35]

22 In 1982 the Working Group did not come to any consensus and continued its discussions regarding the nature and composition of the implementation organ during its session in 1983. The majority of delegations clearly preferred the implementation organ to be elected by States parties, as had been proposed by Sweden.[36] However, since the Swedish proposal regarding the implementation provisions was drafted in considerable detail in twelve articles modelled according to the CCPR, the Chairman-Rapporteur submitted a draft with four simpler provisions on implementation taking into consideration the corresponding provisions in CERD and CEDAW.[37] On the basis of this draft, the delegations discussed the size of the Committee. Some speakers stated that nine was too small as decisions may sometimes be taken by only three members since the quorum

[27] E/CN.4/1493 (n 7); see above § 7. [28] E/CN.4/1982/WG.2/WP.6 (n 8); see above § 8.
[29] GA Res 3068 (XXVIII) of 30 November 1973. Under Art IX of the Apartheid Convention the monitoring body consists of only those members of the Commission: see A/9030 (1974) and Boulesbaa (n 2) 245.
[30] Burgers and Danelius (n 12) 81; E/CN.4/1982/L.40 (n 26) para 64.
[31] E/CN.4/1982/L.40 (n 26) para 64. [32] ibid, para 65; Boulesbaa (n 2) 246. [33] ibid 58.
[34] Boulesbaa (n 2) 245. [35] E/CN.4/1982/L.40 (n 26) para 57.
[36] Burgers and Danelius (n 12) 86. [37] E./CN.4/1983/WG.2/2 (n 9); see above § 9.

was set at five.[38] Moreover, it would be difficult to reflect an equal geographical distribution with nine experts.[39]

23 The delegations were still unable to agree on whether the implementation system should have an optional or mandatory character. Some States continued to object to a mandatory character of the implementation provisions. In particular the *Soviet Union*, arguing that the inclusion of a mandatory implementation system in the Convention was not necessary for those States that were already bound by the implementation provisions of the CCPR, suggested an optional protocol containing the implementation procedures and said that this would facilitate worldwide support of the Convention.[40] Other delegations were in favour of provisions with a mandatory character, stating that to make implementation optional was tantamount to allowing a qualified commitment to the fight against torture; moreover, it could lead to varying degrees of obligations on States parties. The delegation of the *Ukrainian Soviet Socialist Republic* suggested as a compromise, to retain the implementation provisions in the Convention but to introduce a clause which required that a State party recognize the competence of the Committee.[41] No final decision was taken regarding the abovementioned issues.

24 During this Working Group session Article 17(6) and (7) of the Chairman's proposal was also a topic of discussion. Some delegations criticized the modus of filling vacancies provided for in paragraph 6 which had been taken *verbatim* from the corresponding mechanisms of the anti-discrimination Conventions of 1965 and 1979.[42] Ideally, vacancies should be filled using the same system as used for designating the original members, namely through election by States parties (eg articles 33 and 34 CCPR). Therefore, the *Chairman-Rapporteur* submitted another proposal for paragraph 6[43] which suggested that the appointment of a new member should be 'subject to the approval of the majority of States Parties'.[44]

25 Regarding the proposal for paragraph 7, according to which States parties shall be responsible for the *expenses* 'in the same proportion as their contributions to the general budget of the United Nations', some delegations stated that States parties to the Convention may not necessarily be members of the United Nations. They therefore expressed their preference for the analogous provision of CERD, providing for the coverage of the expenses of the members for their Committee duties by States parties, such as submitted in proposal by the Chairman-Rapporteur.

26 During its fifth session in 1984, the Working Group finally adopted Article 17 CAT. The *Soviet Union* had informed the Group that it would no longer insist on the optional character of the provision concerning the creation of an implementation organ, and the *Ukrainian Soviet Socialist Republic* also took a similar stand and withdrew its respective draft Article 17.[45] Furthermore, the Working Group had decided that the Committee should consist of ten instead of nine experts elected for four years. In this

[38] Burgers and Danelius (n 12) 86; Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63, para 34.

[39] E/CN.4/1983/63 (n 38) para 34. [40] ibid, para 30.

[41] ibid. [42] Burgers and Danelius (n 12) 81.

[43] Paras 6 and 7 as proposed in the Proposals for Draft Article 17 Submitted by the Chairman-Rapporteur (1983) UN Doc E/CN.4/1983/WG.2/WP.9.

[44] E/CN.4/1983/63 (n 38) paras 36, 37.

[45] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 45.

regard, the part of the second sentence of paragraph 5 stating that after the first election four members should be chosen by the Chairman to serve only for two years, was accordingly amended to 'five' members.[46] Concerning all other paragraphs the Working Group agreed on the last submitted version.

3. Issues of Interpretation

3.1 Nature and Functions of the Committee

27 The *aims* of the Convention are threefold: to establish specific obligations for States parties to prevent torture and to assist victims of torture; to require the use of criminal law and jurisdiction to fight impunity of torturers; and to provide for stronger measures of international monitoring of States' compliance with the absolute prohibition of torture.

28 The *original Swedish draft* contained a proposal which would entrust the *HRC with the monitoring of State compliance*. The IAPL even suggested that the eighteen-member HRC appoint a five-member Special Committee on the Prevention of Torture. After the Legal Counsel of the UN explained the legal difficulties of burdening an already existing treaty body with additional duties stemming from another treaty, the Working Group finally agreed on the creation of an independent treaty body for the CAT. However, reaching this conclusion had not been easy. *Argentina* and *Brazil* had even proposed that each State oversee its own implementation of the Convention, while the *Soviet Union* wished to make international monitoring purely optional, and the *Dutch* Chairman-Rapporteur suggested entrusting the monitoring to a group of five members of the Human Rights Commission, similar to the Apartheid Convention. Despite a certain reluctance against a further proliferation of UN treaty monitoring bodies, the Working Group finally agreed on the creation of a fourth independent treaty body, after the CERD Committee (established in 1970), HRC (established in 1976), and the CEDAW Committee (established in 1981). Yet the States continued insisting that the CAT Committee be smaller than the other treaty bodies. The Swedish proposal of nine members was later extended to ten. Since the prohibition of torture was already contained in the CCPR, the Swedish proposal for implementation provisions also maintained a certain link between the HRC and the CAT Committee. This is reflected in Article 17(2) CAT according to which States parties shall bear in mind the usefulness of nominating persons who are also members of the HRC.

29 The *main monitoring functions* of the Committee are laid down in Articles 19 to 22: *consideration of State reports* including adoption of concluding observations and general comments; conducting of *ex officio inquiry procedures* including fact-finding missions to the countries concerned; examination of *inter-State communications* including the establishment of an ad hoc conciliation commission; and *examination of individual communications*. After the entry into force of the OPCAT in June 2006, the SPT was established with the functions of carrying out preventive visits to places of detention and of cooperating with the national preventive mechanisms to be established in every State party to the OPCAT. Article 10(3) OPCAT and Rule 62 CAT provide that the Committee shall meet with the SPT at least once a year, during the regular sessions they both hold simultaneously. According to Article 16(3) OP and Rule 63 CAT, the SPT shall present a public annual report on its activities to the

[46] ibid, para 46.

Committee. If a State party refuses to cooperate with the SPT, the Committee, in accordance with Article 16(4) OP, may decide to make a public statement on the findings, recommendations and observations of the SPT in relation to a specific visit.

3.2 Composition of the Committee—Article 17(1)

30 The respective provisions of Article 17 are based on Articles 28 to 32 CCPR.[47] In contrast to the HRC and the majority of other UN treaty monitoring bodies, the CAT Committee only consists of *ten members.*[48]

31 Although the members are nominated by States parties and elected by the meetings of States parties, they serve, pursuant to Article 17(1), as individual 'experts of high moral standing and recognized competence in the field of human rights' who '*shall serve in their personal capacity*', ie they do not represent their country nor their region. This *independence from States parties* is further underlined by Article 23, which entitles them to the 'facilities, privileges and immunities of experts on mission for the United Nations'. Before assuming their duties, according to Rule 14, Committee members shall make a solemn declaration that they will perform their duties 'honourably, faithfully, impartially and conscientiously'. Rule 15 further emphasizes the importance of impartiality and independence. In the performance of their duties, Committee members shall maintain the 'highest standards of impartiality and integrity'. Members are 'accountable only to the Committee and their own conscience'. Hence, they shall 'neither seek nor accept instructions from anyone'.[49] Rule 15 also explicitly recalls the *Addis Ababa Guidelines* on the independence and impartiality of members of the human rights treaty bodies, which since 2014 are integral part of the RoP of the CAT constituting an Annex.[50] This high degree of independence and impartiality justifies regarding the Committee as a *quasi-judicial organ*. Yet, in reality ambassadors and other civil servants have regularly been elected to the Committee.[51] In this regard, more clarity is brought by the *Addis Ababa Guidelines*.[52] Explicitly regulating the relationship of treaty members with States, the Guidelines specify that independence and impartiality 'is compromised by the political nature of their affiliation with the executive branch of the State' and that treaty bodies' members should therefore 'avoid functions or activities which are, or are seen by a reasonable observer to be, incompatible with the obligations and responsibilities of independent experts' (Guideline D). The Guidelines further spell out that individual holding or assuming decision-making positions in any organization or entity which may give rise to a real or

[47] See Nowak, *CCPR Commentary* (n 2) 66ff.

[48] Among the other human rights treaty bodies, memberships is composed as follows: CED: 10; CMW: 14; CERD, CCPR, CESCR, CRC, and CRPD: 18; CEDAW: 23; OPCAT: 25. For an overview of the membership of other human rights treaty bodies see OHCHR, *Handbook for Human Rights Treaty Body Members* HR/PUB/15/2 (United Nations 2015) 14ff <https://www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf> accessed 7 December 2017.

[49] Rule 15 on the independence of members of the Committee was introduced for the first time by the Committee with the RoP as amended at the forty-fifth session in 2010 (CAT/C/3/Rev.5); and then confirmed in the latest version of the RoP as amended at the fiftieth session in 2013 (CAT/C/3/Rev.6).

[50] Rule 15(3); see also UN, 'United Nations Reform: Measures and Proposals' (2012) UN Doc A/66/860, para 4.4.1.

[51] See eg Mr Luis Gallegos Chiriboga (2006–2011); Mr Claude Heller Rouassant (2016–2019); Mr Adreas Mavrommatis (1998–2007); Mr Yu Mengjia (1998–2004); Mr Julio Prado Vallejo (2004–2006); Mr Xuexian Wang (2005–2013); see also Appendix A6.

[52] Annex to the Rules of Procedure: Addis Ababa Guidelines (2014) CAT/C/3/Rev.6.

perceived conflict of interest shall 'whenever so required, not undertake any functions or activities that may appear not to be readily reconcilable with the perception of independence and impartiality' (Guideline E). The relevance of the independence of members of human rights treaty bodies was further reaffirmed in the GA resolution 68/268, where it was stressed how important it is that all stakeholders, including the Secretariat, respect the independence of the members and avoid any interference with their mandate.[53]

32 Pursuant to Article 17 there are *other relevant factors* to be taken into account when electing Committee members. Further to being independent, under Article 17(1) members of the Committee shall also be experts of '*high moral standing and recognized competence in the field of human rights*'. In this regard, if the GA recommendations 68/268 of 2014 generally encourages States to nominate individuals with competence and expertise 'in particular in the field covered by the relevant treaty',[54] Article 17 provides explicitly that for the election of CAT members consideration shall be given to the 'usefulness of the participation of some persons having legal experience'. This provision has been taken literally from Article 28(2) CCPR but has no equivalent in other UN human rights treaties. In addition, Article 17(2) provides that States parties shall bear in mind the 'usefulness of nominating persons who are also members of the HRC'. Both provisions underline that the prevention and prohibition of torture is primarily a civil right that requires specific legal expertise. Since the prohibition of torture and cruel, inhuman or degrading treatment is already contained in Article 7 CCPR, the original Swedish draft had even suggested entrusting the specific monitoring functions of the Convention to the HRC. After respective legal problems had been raised by the Legal Counsel of the UN and a number of States, a compromise of establishing a certain *link with the HRC* and its legal expertise had been reached which was first reflected in the revised Swedish draft.[55]

33 In practice, while the *HRC* consists almost exclusively of persons with a *legal background* which is also underlined by the high legal quality of its work,[56] the composition of the CAT *Committee* is more *diverse*. While law professors and legal practitioners constitute the majority, many experts have a different professional background, above all medical doctors, psychologists, political scientists, and journalists.[57] In our opinion, this composition better corresponds to the multidisciplinary task of combating and preventing torture.

34 On the other side, the idea of *linking the membership of the CAT Committee with the HRC* was implemented only in a few cases. For example, the French judge *Christine Chanet*, who served on the HRC from 1987 until 2006, also served on the CAT Committee from 1988 until 1991. The first Chairperson of the HRC, Ambassador *Andreas Mavrommatis* from Cyprus, who served on the HRC from 1977 to 1996, was elected to the CAT Committee in 1998 and has acted as its Chairperson from 2006 to 2008. *Julio Prado Vallejo* from Ecuador who served as an expert within the HRC from 1976 to 1986, was also a member of the CAT Committee for a short period in 2006 before he died on 20 October 2006.

[53] GA Res 68/268 of 9 April 2014 (Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System) para 35.

[54] ibid, para 10.

[55] See above 2.2.

[56] cf Nowak, *CCPR Commentary* (n 2) 670.

[57] As of December 2017 the membership of the Committee is composed by five members with legal background (Ms Essadia BELMIR; Ms. Sapana PRADHAN-MALLA; Ms Ana RACU; Mr Sébastien TOUZÉ; Mr Kening ZHANG); two members with medical background (Mr Jens MODVIG and Mr Abdelwahab HANI); one diplomat (Mr Claude HELLER ROUASSANT) and two political scientists (Mr Alessio BRUNI and Ms Felice GAER). For a complete list of experts who have served on the Committee since 1988 see below Appendix A.6.

35 Article 17(1) further requires to give consideration to '*equitable geographical distribution*'. Although there is no formal quota, such requirement can be found in every UN human rights treaty as a general principle for the composition of UN bodies.[58] Most treaties, including Article 9 of the ICJ Statute and Article 31(2) CCPR, also contain the need for an '*equitable representation of the different forms of civilization and of the principal legal systems*', which is, however, not reflected in Article 17 CAT.[59] Since the CAT Committee consists of only ten members, the most equal geographical distribution would be two members per each of the five UN geopolitical regions. On the other hand, 'equitable' distribution means a composition which corresponds as proportionally as possible to the number of States parties per region.[60] Whether the maintenance of an Eastern European Group and a Western and Others Group is still justified more than twenty years after the end of the Cold War is another question that might be taken into account when considering the most equitable geographic distribution.

36 After the first election in 1987, the Committee was composed of four experts from the Western Group, two each from the Eastern European and Latin American Groups, and only one each from the Asian and African Groups. At that time, the Western Group had by far the highest number of States parties (nine out of a total of twenty-seven States parties). Some representatives, in particular those from African States, regretted that only one African member was elected, which in their view contradicted the informal consensus of one member from Asia, two from Latin America, two from Eastern Europe, three from Western Europe, and two from Africa, reached during the preparatory consultations in form of a 'gentleman's agreement'.[61] Two years later, the States parties gave due account to the consensus regarding equitable distribution; two African representatives were elected.[62] As of December 2017, the Committee consists of four experts from the Western Group (40%); two from the African (20%) and the Asian Groups (20%), and one from the Latin American (10%), and the Eastern European groups (10%).[63] Compared to the number of States parties from the respective regions (30 Western European and other; 49 African, 23 Latin American, 23 Eastern European, and 38 Asia Pacific States), this composition can no longer be considered equitable.

37 Although not explicitly mentioned in the Convention, *gender equality* should also be taken into consideration.[64] In this sense, the GA in its resolution 68/268 of 2014

[58] GA Res 68/268 of 9 April 2014 (n 53) para 13. The only UN human rights treaty providing for a formal quota for regional groups is the CESCR see OHCHR, 'Human Rights Treaty Bodies and Election of Treaty Body Members: A Guide for United Nations Delegates Based in New York' (2013) 12 ('Guide').

[59] But see GA Res 68/268 of 9 April 2014 (n 53) 13, which 'encourages States parties, in the election of treaty body experts, to give due consideration, *as stipulated in the relevant human rights instruments*, to equitable geographical distribution, the *representation of the different forms of civilization and the principal legal systems*, balanced gender representation and the participation of experts with disabilities in the membership of the human rights treaty bodies'.

[60] cf Nowak, *CCPR Commentary* (n 2) 680.

[61] Burgers and Danelius (n 12) 111.

[62] CAT/SP/SR.1; CAT/SP/SR.2; CAT/SP/SR.3.

[63] As of 31 December 2017, the membership of the Committee is as follows: Western Group (Mr Alessio BRUNI: Italy; Ms Felice GAER: USA; Mr Jens MODVIG: Danmark; Mr Sébastien TOUZÉ: France); African Group (Ms Essadia BELMIR: Morocco; Mr Abdelwahab HANI: Tunisia); Asian Group (Mr Kening ZHANG; Ms Sapana PRADHAN-MALLA: Nepal); Latin American Group (Mr Claude HELLER ROUASSANT: Mexico); Eastern European Group (Ms Ana RACU: Moldova). See also below Appendix A6.

[64] In contrast see Rule 16, which when regulating the election of 'officers' provides that the election shall be done taking due consideration 'to equitable geographical distribution and appropriate gender balance and, to the extent possible, rotation among members'.

explicitly encouraged States parties to inter alia consider '*balanced gender representation*' within each treaty body Committee.[65] As of December 2017, four out of ten members of the Committee are women.[66] The GA further encouraged States parties to nominate 'experts with *disabilities* in the membership of the human rights treaty bodies'.[67] As it will be seen below, since the elections must be carried out by secret ballot, there is no guarantee that any of the principles mentioned above are fully taken into account.

3.3 Nomination and election of Committee members—Article 17 (2)–(6)

3.3.1 Nomination

38 The nomination and election of Committee members are regulated by Article 17(2)–(6) and Rules 11 to 15, which elaborate further on the election procedure, the filling of vacancies, the solemn declaration, and the independence and impartiality of members of the Committee.

39 Under Article 17(2) the right of nomination of candidates rests exclusively with *States parties* to the Convention. While CCPR and OPCAT empower each State party to nominate up to two candidates,[68] the CAT restricts the right of nomination to one person who must be a national of the nominating State. In practice, this no longer makes much of a difference since nominating two persons necessarily reduces their election chances.[69] Regional groups often agree on a reduced number of candidates from their respective groups in order to increase their chances of being elected. Usually, political considerations and trade-offs among States play a role which is as decisive as the individual qualification of the respective candidates. At least four months before the date of each election, the UN Secretary-General shall address a letter to all States parties to the Convention inviting them to submit their nominations within three months. The Secretariat will then prepare a list of candidates and nominating States and shares it with the States parties.[70] If such deadline is not respected, it cannot be guaranteed that candidate's details are processed and shared to all States parties before the date of the election. In any event, it is a well-established practice for the meeting of States parties to endorse the nomination of candidates received after the deadline.[71]

40 Although the CAT leaves the nomination process up to States parties, in exercising their right to nomination States parties shall bear in mind the usefulness of nominating persons who are also members of the HRC. Furthermore, the High Commissioner for Human Rights has encouraged States to adopt an open and transparent process, give consideration to expertise in the relevant area, willingness to take over responsibilities, avoid nominations of candidates holding positions that might create conflicts of interests or lack of independence, and limit the terms of service of a member to a reasonable number.[72] All candidates may be withdrawn and re-nominated, whether elected or not.

[65] GA Res 68/268 of 9 April 2014 (n 53) 13.

[66] As of 31 December 2017, they are: Ms Essadia BELMIR; Ms Felice GAER; Ms Ana RACU; and Ms Sapana PRADHAN-MALLA. See also below Appendix A.6 and cf OHCHR, *Handbook* (n 48) 20.

[67] GA Res 68/268 of 9 April 2014 (n 53) para 13.

[68] For CCPR see Art 29(2) and for OPCAT Arts 6 and 7.

[69] cf Nowak, *CCPR Commentary* (n 2) 672ff.

[70] Art 17(4) CAT, taken literally from Art 30(2) CCPR. For details on nominations see OHCHR, 'Guide' (n 58) 21.

[71] ibid 13.

[72] A/66/860 (n 50) para 4.4.2.

3.3.2 Election

41 Pursuant to Article 17(3) Committee members are elected at biennial meetings of States parties convened by the UN Secretary-General. In contrast to other UN human rights treaty bodies, for which meeting of States parties always take place at UN Headquarters in *New York*, for the CAT elections take place in Geneva in the month of October every two years (odd years).[73] In practice, meetings of States parties are organized by OHCHR.

42 The election procedure is laid down in Article 17(3) and in the RoP of the Meeting of States parties to the CAT.[74] These are modelled on Article 30 CCPR and the RoP of the Meeting of States parties to the CCPR.[75] At least two-thirds of the States parties shall be represented in the meeting of States parties (*quorum*). If less than two-thirds of the States parties are present, elections cannot take place. Candidates must be elected, through a secret ballot, by an *absolute majority* of States parties present and voting. Representatives of States parties who abstain from voting are considered as not voting.[76] Each State party may vote for as many candidates as there are seats to be filled, ie usually five. Should more than five candidates receive an absolute majority, those who obtain the largest number of votes are elected. In the case of a draw on the vote, although no provision is included with this regard in the RoP of the Meetings of States parties, it is most likely that the situation would be resolved by a tie-breaker vote.[77] If fewer than five candidates receive an absolute majority, additional balloting is required.[78] Votes may be cast for those unelected candidates who obtained the most votes in the previous ballot, with a maximum of twice as many candidates being eligible for election as there are places remaining to be filled. If all five members are still not elected after the third inconclusive ballot, then all candidates are to take part in subsequent balloting. In this situation as well, draws on the vote would likely to be resolved by a tie-breaker vote.[79] Since Article 17(3) CAT expressly requires an absolute majority of votes, in no case may a candidate who has achieved only a relative majority be considered elected.[80]

43 It is, in fact, not uncommon for either of the scenarios to occur. One example is the election procedure of the tenth meeting of the States parties to the CAT in 2005.[81] During this meeting, five members were elected to the CAT Committee to replace those whose terms of office were due to expire on 31 December 2005. Following the standard procedure, in accordance with Article 17, a vote was taken by secret ballot. Of the eight candidates up for election, six obtained the required majority of fifty-eight votes. Because there were more successful candidates than there were available seats, the five candidates having obtained both the required majority and the largest number of votes were elected to the Committee.

44 The opposite situation has also occurred, albeit less frequently. As exemplified during the fourth meeting of the States parties to the CAT in 1993, the standard voting procedure is slightly more complicated when the election yields fewer successful candidates than seats available.[82] This specific election required four separate ballots to fill the

[73] For details on elections see OHCHR, *Handbook* (n 48) 11, 25.
[74] CAT/SP/2/Rev.1. [75] cf Nowak, *CCPR Commentary* (n 2) 678.
[76] Rule 15 of the RoP of the Meeting of States parties to the CAT, CAT/SP/2/Rev.1.
[77] cf Nowak, *CCPR Commentary* (n 2) 678. [78] Rule 15, CAT/SP/2/Rev.1.
[79] See Nowak, *CCPR Commentary* (n 2) 678. [80] ibid.
[81] CAT/SP/SR.13. For further examples see also CAT/SP/SR.1; CAT/SP/SR.9; CAT/SP/SR.10; CAT/SP/SR.12.
[82] CAT/SP/SR.5 and CAT/SP/SR.6; see also CAT/SP/SR.8.

five vacant seats. Moreover, despite complying with Rule 15, the procedure followed in order to determine the candidates for the last vacant seat met with opposition from four different delegations. The issue in this case was that there were five seats up for election, yet after both the first and second ballots, only three candidates had obtained the required majority (three in the first ballot, and none in the second). Since no candidate had been successful after the second ballot, according to Rule 12, a third ballot was needed. One candidate obtained the required majority in the third ballot and a fourth ballot was proposed in order to elect the fifth and final member of the Committee. The Chairperson proposed that the election should be between the two candidates with the largest number of votes among those who had not obtained the necessary majority in the third ballot. The delegations of *Uruguay, Morocco, Yemen*, and *Jordan* objected to the procedure as proposed by the Chairperson and referred to Rule 15, which stated that 'after the third inconclusive ballot, votes may be cast for any eligible nominee'. However, the Secretary of the Committee emphasized the need to restrict the voting to the candidates who had obtained the largest number of votes. He also referred to Rule 15 in order to explain that the rule pertaining to 'inconclusive' ballots did not apply in this instance and, therefore, the voting should proceed as proposed by the Chairperson. Although the Chairperson took note of the comment made by the Uruguayan representative who pointed out that the text of Rule 15 was not harmonized in all languages because the Spanish text did not contain the word '*inconclusive*', he still endorsed the Secretariat's position regarding Rule 15. He also said that it was necessary to respect the precedent established during the election of members to the Committee on the Rights of the Child. A fourth ballot was thus held between the two candidates who had amassed the largest number of votes in the previous election and a final member was the fifth elected. The initial election had to be held no later than six months after the entry into force of the Convention.[83] Pursuant to Article 27(1), the Convention entered into force on 26 June 1987, and the first elections took place exactly five months later during the first meeting of the States parties on 26 November 1987.[84]

45 Under Article 17(5), also based on Article 32(1) CCPR, Committee members are elected for a term of *four years* and are *eligible for re-election if renominated*. In contrast to other UN treaties,[85] the CAT does not limit the number of renominations and re-elections, allowing in principle unlimited re-election. In accordance with Rule 12(1), the term of office of the members elected at subsequent elections shall begin on the day after the date of expiry of the term of office of the members whom they replace. In 2002, the Committee added a second paragraph to this rule, thereby allowing the officers of the Committee to continue performing their duties until one day before the first meeting of the Committee, composed of its new members, when it then elects its officers (Rule 12(2)).[86]

[83] Art 17(4) CAT, taken literally from art 30(1) CCPR.

[84] CAT/SP/SR.1, para 49. The following twenty-seven States were parties to the Convention then: Afghanistan, Argentina, Austria, Belize, Bulgaria, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Denmark, Egypt, France, German Democratic Republic, Hungary, Luxembourg, Mexico, Norway, Panama, Philippines, Senegal, Spain, Sweden, Switzerland, Togo, Uganda, Ukrainian Soviet Socialist Republic, USSR, and Uruguay.

[85] See eg CED, CRPD, and OPACT. For the OPCAT see also below Art 9 OP.

[86] CAT/C/SR.521, paras 11–20. This new paragraph was introduced in order to prevent the officers from not being able to work because the Committee had no quorum.

46 In order to ensure *continuity in membership*, as in other UN human rights treaties,[87] elections are staggered and the *principle of partial renewal* applies. Immediately after the first election, the names of five elected members whose term of office expired after two years were chosen by lot. The meeting of States parties agreed that the term of office of all Committee members started on 1 January 1988.[88] Since the term of the five members chosen by lot expired on 31 December 1989, the second regular meeting of States parties took place on 19 December 1989. Every two years, the States parties elect five members. In doing so, they aim to strike a fair balance between the principles of continuity and that of renewal.

47 Some Committee members have been re-elected several times.[89] Three original members of the Committee, Mr *Alexis Dipanda Mouelle* from Cameroon (January 1988 to December 1997), Mr *Bent Sørensen* from Denmark (January 1988 to December 1999) and Mr *Peter Thomas Burns* from Canada (January 1988 to December 2003) served for respectively ten, twelve, and sixteen years in their function. From the current Committee members, Ms *Felice Gaer* from the USA has served since 2000, which makes her the longest serving member thus far.

3.3.3 Casual Vacancies

48 Article 17(6) and Rule 13 regulate the occurrence of causal vacancies, the declaration of vacant seats, and filling of casual vacancies in the CAT Committee. A casual vacancy may occur in three cases: if a Committee member dies, resigns, or if he/she 'for any other cause can no longer perform his Committee duties'. During its discussions of the RoP in 1988, the Committee considered the meaning of the term 'any other cause' in Article 17(6). While the Committee thought it difficult to define the term more precisely, it rightly stressed that this provision cannot be interpreted as referring to any kind of political interference on the part of a State but rather relates to the personal circumstances of the Committee member to be replaced.[90] In practice, nine Committee members have so far resigned from their duties and two experts passed away while they were members. They were replaced by other experts appointed by the respective States parties without any objections from other States parties.[91] Questions of interpretations in relation to the words '*any other cause*' arose in one case. A member from Uruguay, Mr *Hugo Lorenzo*, who had been elected to the Committee in 1991, was appointed to serve as an international civil servant within the UN human rights mission MINUGUA in Guatemala. Although he was not allowed by the UN Secretary-General to attend the fourteenth session in May 1995 and further meetings of the Committee on grounds of

[87] See eg Art 13 ICJ Statute; Art 8(5) CERD; Art 17(5) CEDAW; Art 43(6) CRC; Art 23(3) ECHR; Arts 37, 54 ACHR; Art 36 ACHPR; ECOSOC Res 1985/17. See also OHCHR, *Handbook* (n 48) 12.

[88] This decision was later laid down by the Committee in Rule 12(1) during its first session in 1988.

[89] See also Appendix A.6.

[90] CAT/C/SR.5, paras 33–44. See also Ingelse (n 2) 95.

[91] Mr. Antonio Perlas (Philippines) took over from Mr. Alfredo Bengzon in 1991; Mr. Habib Slim (Tunisia) was appointed as successor of Mr. Hassib Ben Ammar in 1995; Mr. Andreas Mavrommatis (Cyprus) replaced Mr. Georghios M. Pikis in 1998; Ms. Ada. Polajnar-Pavcnik (Slovenia) replaced Mr. Bostjan Zupanic in 1999: Mr. Bent Sørensen (Denmark) was replaced in 2000 by Mr. Ole Vedel Rasmussen; in 2003 Mr. Claudio Grossmann (Chile) replaced Mr. Alejandro González Poblete who passed away; Mr. Xuexian Wang (China) was appointed in 2005 following the resignation of Mr. Yu Mengjia; in 2006 Mr. Luis Gallegos Chiriboga (Ecuador) was appointed as a successor to Mr. Julio Prado Vallejo who informed the Secretary-General in April 2006 of his decision to resign and later died on 20 October 2006; and 2014 in Sapana Pradhan-Malla. (Nepal) was appointed as a successor of Mr. Bhogendra Sharma who on 6 February 2014 informed the Secretary-General of his decision to cease his functions as a member of the Committee. See also Appendix A.6.

alleged incompatibility between his present status of international civil servant and that of member of the Committee, he did not resign. Neither did the Secretary-General declare his seat vacant according to the procedure foreseen in Rule 13. As the respective discussions in the Committee revealed uncertainty about a possible incompatibility between the two functions, the Committee simply waited until his term of office expired.[92] There is no convincing argument why the function of international civil servant (as domestic civil servant) should be considered generally incompatible if the respective expert finds sufficient time to attend Committee meetings. Rather this should depend on the question of independence and availability as for all other professions.

49 Where one of these three situations occur, in accordance with Rule 13(1), the Secretary-General shall immediately declare the seat of that member to be vacant and request the State party whose expert has ceased to function as a member to appoint another expert from among its nationals within two months, if possible, to serve for the remainder of the term of his or her predecessor. The appointment is subject to the *silent approval of the majority of States parties*. According to Article 17(6) and Rule 13(2), if States parties do not agree with the appointment they have to respond within six weeks after having been informed by the Secretary-General. Only objections by half of all States parties—which is highly unlikely ever to occur in practice—can prevent the appointment of a Committee member who is not deemed qualified or independent.

50 The procedure for filling casual vacancies set up by the CAT differs from that of other UN treaty bodies for two main reasons. First, unlike the CCPR, the CAT does not provide for the possibility of casual vacancies to be filled by an election at an extraordinary meeting of States parties if the State party does not replace the member within six months.[93] During the discussions in the Working Group, some delegations criticized this modus of filling vacancies and proposed, instead, to follow the system of special elections as provided for in Articles 33 and 34 CCPR.[94] In practice, however, the holding of special meetings of States parties to the CCPR for the sole purpose of filling vacancies of members of the HRC proved to be a fairly futile exercise because the States parties always elected the compatriots of the members who had died or resigned.[95] In addition, the procedure foreseen in Article 33 CCPR of declaring a seat of a HRC member vacant remained 'dead law'.[96] On the other hand, the system in the two anti-discrimination treaties, namely to subject the appointment by the State party to the approval of the respective expert bodies, does not seem to be an effective procedure against abusive practices by States parties.[97] The Chairman-Rapporteur, therefore, proposed a compromise aimed at avoiding the need to hold special sessions of States parties for the sole purpose of filling one vacancy, while at the same time providing States parties with the right to object to nominations which did not fulfil the minimum criteria of Committee membership provided for in Article 17.[98] *Second*, under the CAT the nomination of the new member by the original nominating State must be approved by the other States parties and not by the respective Committee as in most UN human rights treaties.[99]

[92] See CAT, 'Report of the Committee Against Torture' (1995) UN Doc A/50/44, para 7; CAT/C/SR.227, paras 7–20; Ingelse (n 2) 95, 99.

[93] Art 34 CCPR. See also OHCHR, 'Guide' (n 58) 24. [94] See above 2.2.

[95] See Nowak, *CCPR Commentary* (n 2) 691ff. [96] ibid 686.

[97] Information received from the OHCHR, 2 August 2007.

[98] E/CN.4/1983/WG.2/WP.9 (n 43).

[99] Approval by the respective Committee is required under: CERD, CEDAW, CRC, and CMW; on the contrary approval by States parties is required also under CED. See OHCHR, 'Guide' (n 58) 24.

51 Furthermore, the procedure for declaring a seat of a Committee member vacant under Article 17(6) and Rule 13(1) is less specific than comparable provisions in other human rights instruments, most notably the CCPR. Article 17(6) CAT fails to specify any procedure to determine whether or not a member of the CAT Committee, apart from *death* or *resignation*, can no longer perform his or her duties due to illness, disability or any other cause. In contrast, Article 33(1) CCPR provides for a special impeachment procedure, involving the HRC, its Chairman and the UN Secretary-General. The procedure allows the Committee to terminate the term of office of a member who, in the unanimous opinion of the other members, "has ceased to carry out his functions for any cause other than absence of a temporary nature". Whether the CAT Committee felt empowered to itself declare a seat of a Committee member vacant due to personal inconvenience or difficulty was deliberately left open during its discussions of the RoP in 1988. It is highly doubtful whether the impeachment procedure under Article 33 CCPR could be applied *per analogiam* if a member of the CAT Committee, for whatever reason, does not resign voluntarily. Even if a member is seriously ill or refrains from participating in the Committee's sessions without any proper excuse, it is more prudent to wait until the expiry of his or her term of office rather than to remove the person without a proper procedure explicitly provided for in the Convention.[100]

3.4 Financing of the Committee—Article 17(7)

52 Articles 17(7) and 18(5) deal with the financial issues of the Convention and its Committee. Whereas the activities of other treaty bodies do not provide for any financial responsibilities of States parties for the expenses of their Committees which are funded in the context of the regular UN budget, the CAT and CERD are the first international instruments in the field of human rights which provided for an implementation system relying on voluntary financial contributions of States parties.[101]

53 With respect to the financing of UN human rights treaty bodies, *two different philosophies* emerged.[102] One line of argument is that UN treaty bodies are not organs of the UN and only carry out functions in relation to the respective *States parties* which, therefore, shall alone be responsible for bearing all the expenses for the members of treaty bodies, its secretariat, meetings, conference services, etc. This philosophy found its expression first in Article 8(6) CERD and was followed by other treaties, including *Articles 17(7) and 18(5)* CAT. During the Cold War, this was the argument most forcefully advanced by the Soviet Union and its allies. The opposite line of argument stressed that UN human rights treaties were not drafted merely for the benefit of a small group of States but rather in general served the promotion of international cooperation and other objectives of the United Nations, which called for the closest possible link with the world organization and the payment of all expenses out of the general *UN budget*. This philosophy, which was primarily advanced by Western States (with the exception of the United States), first found its expression in Article 35 CCPR. According to the aforementioned Article, members of the HRC shall 'receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities'. In addition, Article 36 CCPR

[100] On the dangers of such impeachment procedure see Nowak, *CCPR Commentary* (n 2) 685 et seq.
[101] OHCHR, 'Guide' (n 58) 6.
[102] See Nowak, *CCPR Commentary* (n 2) 693ff with further references.

stipulates that the UN Secretary-General shall provide the necessary staff and facilities for the effective performance of the functions of the HRC. This model was followed by other human rights treaties, eg Article 17(8) and (9) CEDAW, Article 43(11) and (12) CRC, and Article 72(7) and (8) CMW, Article 36(7) CED, and Article 34(11) and (12) CRPD.

54 These two philosophies led to different treatment of UN treaty bodies. While the members of the other human rights treaties received a modest annual honorarium of US$3,000 (for the Chairperson, US$5,000), members of the CERD and CAT Committees received no honorarium. In practice, this financial dependence on States' contributions has been of great hindrance to the work of the Committee. The Committee had experienced severe difficulties in discharging its functions as a result of the delayed payments or non-payments of the contributions by States. During the UN financial crisis starting in the late 1980s, the CERD and CAT Committees were most seriously affected and had to cancel more sessions than other Committees due to a large number of outstanding contributions owed by the respective States parties. Consequently, the Chairpersons of the various treaty bodies called upon the General Assembly to finance all treaty bodies from the regular UN budget.[103] This recommendation has also been strongly supported by a well-known study by *Philip Alston* on UN treaty body reform.[104]

55 In 1992, Australia proposed amendments to the relevant provisions of CERD and the CAT with a view to including the financing of the activities under the Convention in the regular budget of the UN. A conference of States parties, convened in accordance with Article 29(1) by the Secretary-General in New York on 9 September 1992, adopted those amendments which were subsequently endorsed by the General Assembly in its Resolution 47/111.[105] The General Assembly requested the Secretary-General to take the appropriate measures for financing the Committee from the regular budget of the UN beginning from the biennium 1994 to 1995.[106] According to the amendment, Articles 17(7) and 18(5) should be deleted and a new provision should be inserted as new paragraph 4 of Article 18: 'The members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.'[107] Amendments will enter into force after they have been accepted by two-thirds of the States parties. As of December 2017, only thirty-one parties have notified the Secretary-General that they have adopted the amendment.[108] Therefore, this amendment is not yet in force. However, as a provisional measure, the General Assembly has agreed to cover the expenses of the Committee out of the UN budget.[109] In 2002, the General Assembly also decided to reduce the modest *honorarium* paid so far to the members of the HRC, the CEDAW, and CRC Committee

[103] Independent Expert (Philip Alston), 'Effective Implementation Of United Nations Instruments on Human Rights and Effective Functioning of Bodies Established Pursuant to Such Instruments' (1990) UN Doc A/45/636, para 53.

[104] See UN (Philip Alston), 'Final Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System' (1997) E/CN.4/1997/74, para 98.

[105] See CAT/SP/SR.4; CAT/SP/1992/L.1; GA Res. 47/111 of 16 December 1992.

[106] CAT/SP/16, para 6.

[107] CAT/SP/13, para 6; as a result of inserting the above provision, the existing Art 18(4) will be renumbered as paragraph 5.

[108] See UN Treaty Collection, 'Status of Treaties: Amendments to Articles 17 (7) and 18 (5) (Ch IV 9.a)' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-a&chapter=4&clang=_en> accessed 30 December 2017.

[109] GA Res 47/111 of 16 December 1992, paras 9 and 10. See also Ingelse (n 2) 106; OHCHR, 'Guide' (n 58).

as well as to the International Law Commission and similar expert bodies to the symbolic sum of US1$, which was strongly criticized by the respective bodies.[110] On the other hand, one might argue that equality among the UN experts (members of treaty bodes, special procedures, etc) has been achieved. Taking into account, however, how much time many UN experts spend on their respective UN functions, only few privileged individuals, such as university professors, affluent practising lawyers, or retired civil servants, can afford to serve several months per year for the UN without any *honorarium*.

GIULIANA MONINA

[110] GA Res 56/272 of 27 March 2002; see also Nowak, *CCPR Commentary* (n 2) 694.

Article 18

Rules of Procedure

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

1. Introduction	496
2. Travaux Préparatoires	497
2.1 Chronology of Draft Texts	497
2.2 Analysis of Working Group Discussions	498
3. Issues of Interpretation	498
3.1 Rules of Procedure	498
3.2 Meaning of 'officers'	500
3.3 Voting (Article 18(2))	502
3.4 Staff and Facilities (Article 18(3))	503
3.5 Meetings (Article 18(4))	504
3.5.1 Sessions	504
3.5.2 Public and Private Meetings	504
3.5.3 Records	505
3.5.4 Conduct of Business	505
3.6 Financing of the Committee (Article 18(5))	506

1. Introduction

1 Article 18 CAT corresponds to Articles 35 to 39 CCPR. The Committee against Torture (CAT Committee or Committee), as the Human Rights Committee (HRC), elects its officers (a Chairperson, three Vice-Chairpersons and a Rapporteur) and adopts its own Rules of Procedure (RoP), subject only to the procedural provisions in Articles 19 to 22 and a few other rules contained in the Convention. This means that the Committee

is free to decide about the number of its sessions (subject, of course, to financial constraints and the availability of UN conference services), its officers and subsidiary bodies (working groups and rapporteurs), its official and working languages, and its conduct of business, including voting and election methods.

2 As it will be seen below, the Committee first deliberated on its RoP on the basis of draft rules prepared by the Secretary-General. After their adoption at the first session, the RoP were further expanded and amended at the second, thirteenth, fifteenth, twenty-eighth, forty-fifth, and lastly fiftieth session. The RoP of the Committee are modelled on those of the HRC which, in turn, are based on the RoP of the Committee on the Elimination on Racial Discrimination (CERD).

3 After a short overview of the *travaux préparatoires*, this article provides a brief overview of the *general rules* (1 to 64) of the RoP in light of the practice of the Committee, the Secretariat and States parties. The rules (65 to 121) relating to the functions of the Committee in the State reporting, inquiry, inter-State, and individual complaints procedures will be analysed in the context of the relevant provisions in Articles 19 to 22.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *Draft Implementation Provisions, submitted by the Chairman-Rapporteur (1 February 1982)*[1]

Article 17

1. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance and functions of the group established in accordance with the paragraphs 1 and 2.

5 *Four Draft Articles on Implementation, with the Explanatory Note, submitted by the Chairman-Rapporteur (24 December 1982)*[2]

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedures, but these rules shall provide, inter alia, that:

   (a) five members shall constitute a quorum

   (b) decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

[1] Draft Implementation Provisions Submitted by the Chairman-Rapporteur of the Working Group (1982) UN Doc E/CN.4/1982/WG.2/WP.6.

[2] Four Draft Articles on Implementation Submitted by the Chairman-Rapporteur of the Working Group (1983) UN Doc E/CN.4/1983/WG.2/2.

2.2 Analysis of Working Group Discussions

6 The Working Group of the Human Rights Commission did not deal with the supervisory mechanism of the Convention in its sessions between 1978 and 1980. Although the Working Group started its deliberations on the implementation provisions in 1981, Article 18 was discussed for the first time only during the 1983 session. The Working Group based its discussion on the draft Article 18 submitted by the Chairman-Rapporteur.[3] Paragraphs 1, 2, 3, and 4 of this draft Article are modelled on Articles 39(1)–(2), 36, and 37(1)–(2) CCPR. The Working Group reached a consensus on the first four paragraphs, making only one amendment based on Chairman-Rapporteur J Herman Burgers' observation that the second paragraph contained an error and should read 'six members' instead of 'five members'.

7 The Working Group discussions on this draft focused almost exclusively on the *financial aspects* because paragraph 5 constituted a new type of financial regulation in the field of human rights treaties. The *United States* suggested adding the following final paragraph:[4]

> The States Parties shall be responsible for expenses incurred in connection with the holding of the meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of the staff and facilities, incurred by the United Nations pursuant to paragraph 3 above.

8 Some delegations supported this paragraph, considering it inappropriate for the United Nations (UN) to bear expenses for an entity existing outside the UN, and to which UN members were not legally committed to finance or support. Other States said that they could not accept the new paragraph because it might hinder less affluent States in their decision to become a member of the Convention. In addition, they worried that this rule would give the impression that the UN considered the fight against torture less important than the elimination of discrimination against women,[5] whose Committee is funded by the UN.[6]

9 Nevertheless, during the Working Group session in 1984, no delegation persisted in its opposition to paragraph 5, and it was consequently adopted during the fifth meeting.[7]

3. Issues of Interpretation

3.1 Rules of Procedure

10 Article 18 did not give rise to major discussions during its drafting in the Working Group and contains only a few provisions in need of interpretation. Article 18 (2) empowers the Committee to establish its own RoP by simple majority, without approval of any other organ.[8] The RoP established by the Committee are modelled on the RoP of the HRC which, in turn, are based on those of the CRPD Committee. During its first session, the Committee deliberated on the basis of draft rules prepared by the Secretary-General.[9] After the adoption

[3] ibid.

[4] Proposal for Draft Article 18 Submitted by the United States (1983) UN Doc E/CN.4/1983/WG.2/WP.2.

[5] Draft Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1983) UN Doc E/CN.4/1983/WG.2/WP.16, paras 43–47.

[6] See Art 17(8)–(9) CEDAW.

[7] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 48; see also above Art 17, 3.4.

[8] For a similar provision cf Article 39(2) CCPR.

[9] CAT/C/L and Add.1.

at the first session,[10] the RoP were further expanded and amended at the second, thirteenth, fifteenth, twenty-eighth, forty-fifth, and lastly fiftieth session.[11]

11 The RoP with regard to the inquiry procedure under Article 20 were only first discussed at the *second session*.[12] Since this was a new procedure in the field of human rights treaties, the Secretary of the Committee preferred first to undertake a detailed review of other similar procedures existing within the UN system before proceeding further.[13] The amendments made during the *thirteenth, fifteenth, and twenty-eighth sessions* primarily concerned the Rules regarding the State reporting procedure under Article 19 and the individual complaints procedure under Article 22.[14] At its *forty-fifth session* extensive changes were introduced especially with regard to the decisions taken by the meetings of chairpersons of human rights treaty bodies and the inter-committee meetings, and to bring them in line with new methods of work that the Committee is implementing as well as to include the adoption of new procedures.[15] Amendments in the *fiftieth session* aimed at strengthening the independence and impartiality of the members and were adopted to endorse the Addis Ababa guidelines.[16]

12 The RoP are divided into two parts: the first part sets out *general rules* governing the functioning of the Committee and its decision making (Rules 1 to 64); the second part covers *rules relating to the functions of the Committee* (Rules 65 to 121). In contrast to other UN human rights treaties, the RoP of the CAT Committee do not contain a specific section on interpretation, nor do they include the RoP of their Optional Protocol, as Article 10 OPCAT empowered the *Subcommittee on the Prevention of Torture (SPT)* to adopt its own RoP.[17]

[10] CAT/C/SR.2; CAT/C/SR.3; CAT/C/SR.4; CAT/C/SR.5; CAT/C/SR.6.

[11] For the current version of the RoP as lastly amended by the Committee at its fiftieth session in 2013 see CAT/C/3/Rev.6. Provisional RoP—not yet regulating the procedure on the inquiry procedure under Article 20—were initially adopted by the Committee at its first session in 1988 with UN symbol CAT/C/3 (Report of the Committee Against Torture (1988) UN Doc A/43/46, Annex III) and then amended at its second session in 1989 (CAT/C/3/Rev.1; Report of the Committee Against Torture (1989) UN Doc A/44/46, Annex IV); at its thirteenth session in 1994 (CAT/C/3/Rev.1; Report of the Committee Against Torture (1995) UN Doc A/50/44, para 14 and Annex VI); at the fifteenth session in 1995 (CAT/C/3/Rev.3; Report of the Committee Against Torture (1996) UN Doc A/51/44, para 282 and Annex VI); at the twenty-eighth session in 2002 (CAT/C/3/Rev.4; Report of the Committee Against Torture Twenty-seventh Session (12–23 November 2001) Twenty-eighth Session (29 April–17 May 2002) (2002) UN Doc A/57/44, para 15 and Annex X), and the forty-fifth session in 2010 (CAT/C/3/Rev.5; A/66/44, Annex IX); and lastly at its fiftieth session. It is to be noted that both amendments made at the second and thirteenth are referred to by the Committee as 'CAT/C/3/Rev.1'; this seems to be a mistake as the subsequent amendments of the fifteenth session are in fact referred to as CAT/C/3/Rev.3. See also CAT/C/SR.2; CAT/C/SR.3; CAT/C/SR.4; CAT/C/SR.5; CAT/C/SR.6; CAT/C/SR.9; CAT/C/SR.20; CAT/C/SR.228; CAT/C/SR.230, paras 49–61; CAT/C/SR.240; CAT/C/SR.244/Add.1; CAT/C/SR.240; CAT/C/SR.247; CAT/C/SR.513, paras 2–102; CAT/C/SR.521, paras 11–37; CAT/C/SR.525, paras 12–45; the deliberations concerning the RoP during the thirteenth session took place in a private meeting see A/50/44, para 202; similarly the deliberations at its and the forty-fifth and fiftieth were conducted at close meetings.

[12] CAT/C/SR.2; CAT/C/SR.3; CAT/C/SR.4; CAT/C/SR.5; CAT/C/SR.6; see also below Art 20, § 35.

[13] CAT/C/SR.3, para 17.

[14] CAT/C/SR.513, paras 2–102; CAT/C/SR.521, paras 11–37; CAT/C/SR.525, paras 12–45; for more details see below Arts 19 and 22.

[15] CAT, 'Report of the Committee Against Torture Forty-third Session (2–20 November 2009) Forty-fourth Session (26 April–14 May 2010)' (2010) Un Doc A/65/44, para 20.

[16] CAT, 'Report of the Committee Against Torture Forty-ninth Session (29 October–23 November 2012) Fiftieth Session (6–31 May 2013)' (2013) UN Doc A/68/44, para 33.

[17] See eg CED, CEDAW, CESCR, CMW, and CRPD as examples of RoPs that includes a section on interpretation; see CEDAW and CESCR as examples of RoPs including sections on their OPs. For a comparative overview see UN, 'Overview of the Human Rights Treaty Body System and Working Methods to the Review of States Parties' (2013) UN Doc HRI/MC/2013/2, para 7.

3.2 Meaning of 'officers'

13 Article 18(1) is taken *verbatim* from Article 39(1) CCPR, which is based, in turn, on Article 21(1) of the ICJ Statute. Rule 15 provides for the election of *five officers*: a *Chairperson*, three *Vice-Chairpersons* and a *Rapporteur*.[18]

14 According to Article 18(1), the Committee shall elect its officers for a term of four years. Chapter IV (Rules 16 to 21) is entitled 'Officers' but does not really define the term. Since the RoP have been amended several times, it is no longer clear who the officers of the Committee are and what their respective functions are called. Rule 16 provides, similar to other RoP of human rights treaty bodies, that the 'Committee shall elect from among its members a Chairperson, three Vice-Chairperson and *a Rapporteur*'. But Rule 17 refers 'Chairperson, *members of the Bureau* and *Rapporteurs*'.[19] This gives the impression that there are more than the five officers indicated in Rule 16.

15 The term 'Bureau' is nowhere defined but usually the five officers together constitute the Bureau. For a Committee of only ten members, a Bureau of five members seems to be excessive. In larger bodies, such as the Human Rights Council, a Bureau of five members serves the purpose of equitable geographic distribution among the five regional groups of the UN system. The Committee does its best to ensure an equal distribution, but this would require in the present composition that the single members from Asia and Africa must always be elected officers.

16 Having clarified that the Bureau consists of the Chairperson, three Vice-Chairpersons and one *Rapporteur*, the question remains why Rules 12 and 16 speak of 'Rapporteurs' in plural. It seems that the Committee mixed up the Rapporteur of the Committee (the member responsible for the annual report to the General Assembly) with other 'Rapporteurs' who, according to Rule 61(3), may be appointed by the Committee to perform such duties as mandated by the Committee, eg Country Rapporteurs, the Rapporteurs on Follow-up and the Rapporteurs on reprisals. Are such Rapporteurs also officers to be elected for a term of two years in accordance with Article 18(1), as suggested by Rule 16? Since Rule 61(3) uses the term 'appoint' rather than 'elect', it is believed that the plural of 'Rapporteurs' in Rules 12 and 16 is simply a mistake, that only the five persons mentioned in Rule 15 are to be considered as officers (together as Bureau) to be elected in accordance with Article 18(1), and that other Rapporteurs and similar subsidiary bodies may also be appointed for a shorter term of office, such as one year.[20]

17 Rules 11 to 14 determine election procedures, beginning of term of office, the filling of vacancies and the solemn declaration of members of the Committee. These five officers of the Committee are elected for a term of two years and *may be re-elected* (Rule

[18] Since 2010, the RoP contained both the terms 'Chairpersons' and 'Chairmen'. This was however corrected in 2013 see CAT, 'Rules of Procedure, as Lastly Amended by the Committee at Its Fiftieth Sessions (06 May 2013–31 May 2013)' (2014) UN Doc CAT/C/3/Rev.6, which now refers only to the gender neutral term of 'Chairperson'.

[19] Emphasis added.

[20] This uncertainty has persisted over the years, as in its annual reports the Committee has sometimes included the issue of the designation of the various rapporteurs under Article 61 under the heading 'Election of officers' but referring to the 'designation' of the rapporteurs (eg CAT, 'Report of the Committee Against Torture Fifty-first Session (28 October–22 November 2013) Fifty-second Session (28 April–23 May 2014)' (2014) UN Doc A/69/44, para 10); and sometimes referred to the elections of the officers including also the rapporteurs (eg CAT, 'Report of the Committee Against Torture Fifty-fifth Session (27 July–14 August 2015) Fifty-sixth Session (9 November–9 December 2015) Fifty-seventh Session (18 April–13 May 2016)' (2016) UN Doc A/71/44 19, Annex XI).

17). If any of the officers is unable to continue serving in his or her position, a new officer is elected for the unexpired term of his or her predecessor (Rule 21). As of the forty-fifth session in 2010, the RoP explicitly provide that in electing its officers the Committee 'shall give consideration to equitable geographical distribution and appropriate gender balance and, to the extent possible, rotation among members'.[21]

18 Rule 61(1) permits the Committee to establish ad hoc *subsidiary bodies, such as working groups*, and define their composition and mandate as it deems necessary. The subsidiary body shall elect its own officers and adopt its own RoP. Failing such, the Committee's RoP are to apply. In addition, Rule 61(3) sets out the possibility for the Committee to generally appoint one or more of its members as '*Rapporteurs*' with mandates to perform special duties.[22]

19 With regard to the *individual complaint procedure*, Rule 112 further specifies that the Committee may establish a *working group* for the purpose of deciding on the admissibility and making recommendations on the merits of the complaint or otherwise assisting the Committee. The members of the working group should be no less than three and no more than five. The working group can also designate Special rapporteurs for specific complaints.[23] Moreover, since 2002 the Committee has established a Pre-sessional working group of three to five members to assist the plenary in its work under Article 22, a Rapporteur for new complaints and interim measures; a Rapporteur for follow-up on decisions adopted under Article 22 (Rule 120); and a Rapporteur on reprisals under Article 22.[24] The Pre-sessional working group seems to be no longer in place as of 2005.[25]

20 Similar functions were created in the framework of the *reporting procedure under Article 19*, namely a Country Rapporteur and alternate Rapporteurs, a Rapporteur for follow up to concluding observations (Rule 72), and a Rapporteur on reprisals under Article 19;[26] and *the inquiry procedure under Article 20,* namely a Rapporteur for follow up under Article 20 (which is exercised jointly by the Rapporteur for follow up under Article 22); and a Rapporteur on reprisals under Article 20.[27]

21 Strictly speaking, with the entry into force of the OPCAT in 2006, another subsidiary body, the *SPT*, was established.[28] As the OPCAT was established with a view to complement and reinforce the provisions of the Convention, the two treaties set up various ways in which the CAT Committee and the SPT interrelate. First and foremost, Article

[21] See r 16. This amendment was introduced with at the Committee's forty-fifth session in 2010 (CAT/C/3/Rev.5); and then confirmed in the latest version of the RoP (CAT/C/3/Rev.6)

[22] Subparagraph 3 of Rule 61 was added in 2002 at the twenty-eighth session (CAT/C/SR.521, paras 21–25).

[23] Initially the position of rapporteur for specific complaints was introduced at the ninth and thirteenth session. See also below Art 22, § 134.

[24] The pre-sessional working group, the Rapporteur for new complaints and interim measures; and the Rapporteur for follow-up under Article 22 were established in 2002 at the twenty-eighth session, see A/57/44 (n 11) para 203. The Rapporteur on reprisal under Article 22 was established at the fifty-first session in 2013 see A/68/44 (n 16) para 27. See also below Art 22, § 113, §§ 178–82; §186.

[25] Information received from OHCHR, 2 August 2007.

[26] The Country rapporteurs were first introduced at the fifth session in 1990 see A/50/44 (n 11) Annex I; the Rapporteur on follow-up under Article 19 at the twenty-eighth session in 2002 see A/57/44 (n 25) para 203; the Rapporteur on reprisals under Article 19 at the forty-ninth session in 2012 see A/68/44 (n 16) para 27. See also below Art 19, §§ 55, 79–80, 107.

[27] The Rapporteur for follow-up under Article 20 was established at the thirty-first session in 2003 see CAT, 'Report of the Committee against Torture Thirty-first Session (10–21 November 2003) Thirty-second Session (3–21 May 2004)' (2004) UN Doc A/59/44, para 15. The Rapporteur for reprisals under Article 20 at the fifty-first session in 2013 see A/68/44 (n 16) para 27. See also below Art 20, §§ 83, 86.

[28] See below Arts 6 and 7 OP.

10(3) OPCAT and Rule 62 CAT provide that the CAT Committee shall meet with the SPT at least once a year, during the regular session they both hold simultaneously in November. They have also decided to set up an informal contact group to strengthen their cooperation.[29] Secondly, Article 16(3) OPCAT and Rule 63 CAT oblige the SPT to submit its annual report to the CAT Committee, who references it in its own annual report to the States parties and the GA. Finally, under Article 16(4) OPCAT if a State party refuses to cooperate with the SPT, the CAT Committee may, at the request of the SPT, decide to make a public statement or to publish the report of the SPT.[30] In practice, however, the SPT has developed in a fairly autonomous way with its own RoP[31] and has presented itself as 'a brother committee' rather than a 'sub-committee'.[32]

3.3 Voting (Article 18(2))

22 While Article 18(2)(a) provides that the quorum should be constituted by six members, Article 18(2)(b) establishes that '[d]ecisions of the Committee shall be made by a majority vote of the members present'. If the vote is equally divided, then the matter—with the exception of elections—is regarded as rejected (Rule 51).

23 But the CAT Committee decided, since its first session in April 1988, to follow the practice of the HRC to expressly include in its RoP that Committee members should try to reach *decisions by consensus before voting*, provided that such attempts did not unduly delay the work of the Committee. However, at the request of any member or the Chairperson, the proposal can be put to vote.[33] Towards the outside world, the Committee, as with other human rights treaty bodies, pretends that its decisions are adopted by consensus, and some commentators maintain that 'no vote has been taken to date'. Although the adoption of general comments, concluding observations by consensus might enhance the authority of the Committee's decisions and opinions, one should not forget that the consensus rule dates from the Cold War and reflects the fears of the former members from Socialist States of being overruled by others. In practice, the Committee applies the consensus rule in a fairly flexible manner. Since elections are held by secret ballot pursuant to Rule 58, the consensus principle cannot be applied. Moreover, in the individual complaints procedure, the Committee allows for individual (concurring or dissenting) opinions in order to provide members with the opportunity to express their

[29] CAT, 'Working Methods' XIII.

[30] See also below Art 16 OP.

[31] The CAT Committee's RoP contain only a brief reference to the work of the SPT, which has the power to adopt its own RoP under Article 10 OP. In contrast the RoP of other human rights treaties bodies (eg CEDAW and CESCR) contain sections regulating their OPs see also HRI/MC/2013/2 (n 17) para 7.

[32] See Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 139. See also below Art 11 OP.

[33] The reference to consensus in decision making had been initially (at the first session) incorporated in the RoP with the addition of a footnote to Rule 50 (A/43/46 (n 11) Annex III; CAT/C/SR.2, para 68); however, at its forty-fifth session such reference has been included directly in the text of Rule 50 with the addition two new paragraphs: see Rules 50(2) and (3) as modified at its forty-fifth in CAT/C/3/Rev.5 and then confirmed in the amendments of the fiftieth session in CAT/C/3/Rev.6. See also Rule 51 in the RoP of the HRC and its footnote (CCPR/C/3/Rev.10). On certain absurd consequences of maintaining the principle of consensus even in decisions on individual complaints with dissenting opinions see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 708ff; and Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Martinus Nijhoff 2001) 106, who maintains that the CAT Committee has taken its decisions by consensus notwithstanding certain decisions on individual complaints which contain dissenting opinions.

disagreement. It would be strange to maintain that a decision with a dissenting opinion attached was adopted by consensus.

24 The voting normally takes place by show of hands, unless a member requests a roll-call, which is then taken in alphabetical order (Rules 52 and 53). Parts of a proposal shall be voted on separately if a Committee member requests that the proposal be divided. Once each section is approved, the proposal will be put to vote as a whole (Rule 55). In the case of amendments to a proposal, the Committee shall first vote on the amendments, beginning with the furthest removed in substance (Rule 56). With regard to two or more proposals relating to the same question, the Committee shall, unless it decides otherwise, vote on the proposals according to the order in which they have been submitted (Rule 57).

25 Rules 58 to 60 determine the *method of elections* within the Committee, ie its officers and subsidiary bodies. Rule 58 provides that elections are to be held by *secret ballot*. Unlike the practice of the HRC, the elections within the CAT Committee are conducted by secret ballot.[34] In this respect, Chairperson *Joseph Voyame* explained during the first session of the Committee that elections are always to be held by secret ballot, and that only in cases in which there was one single candidate for one election could the Committee decide to proceed otherwise.[35]

3.4 Staff and Facilities (Article 18(3))

26 In performing its various functions, the Committee is assisted by a Secretary and other staff members of the OHCHR in Geneva. The role of the Secretariat is regulated by Article 18(3), which is taken *verbatim* from Article 36 CCPR, and Chapter V of the RoP. Subject to the fulfilment of the financial obligations undertaken by States parties in accordance with Article 18(5), the Secretary-General shall provide the necessary staff (the Secretariat) and facilities for the effective performance of the Committee's functions (Rule 22).

27 The Secretary-General or his representative (the *Secretary of the Committee*) shall attend all Committee meetings and has the right to make oral or written statements (Rule 23). The latter is also responsible for keeping the members of the Committee informed of any questions which may have been submitted for the Committee's consideration (Rule 25). In addition, the Secretary, a professional of the OHCHR, is responsible for all necessary arrangements for meetings of the Committee and its subsidiary bodies. He or she organizes the meetings and takes care of the documentation, conference room, interpreters, and minutes. Furthermore, the Secretary, in consultation with the Chairperson of the Committee, prepares the provisional agenda for regular Committee sessions (Rule 6).

28 At its Fourteenth session in 1995, the Committee, taking into consideration that the increased workload of the Committee was also increasing the work of the Secretariat, included in its annual report a request to the Secretary-General to increase substantially the staff assigned to service the Committee.[36] In practice, the Committee is currently

[34] See CAT/SP/SR.2, para 34; CAT/SP/SR.5, para 27; CAT/SP/SR.6, para 1; CAT/SP/SR.8, para 4; CAT/SP/SR.9, para 21; CAT/SP/SR.10, para 20; CAT/SP/SR.11, para 18; CAT/SP/SR.12, para 19; CAT/SP/SR.13, para 19; in contrast to the RoP of the HRC, where the election provisions are contained in the same section as the rules on voting procedures, the CAT election rules are contained in a separate section. Thus, the question regarding the application to elections of the footnote (to Rule 50, respectively Rule 51) on decision-making by consensus did not arise, as it did in the case of the HRC.

[35] CAT/C/SR.2, para 78. [36] CAT/C/SR.225.Add.1, para 9.

served by one full-time Secretary. Its sessions and inquiries are serviced by a pool of professionals in one of the two treaty implementation teams in the *Treaties and Council Branch* of the OHCHR. Furthermore, the *Petitions Unit* within the OHCHR is responsible for the individual complaints under Article 22.

29 Since its forty-fifth session in 2010, the Committee's *official languages* are Arabic, Chinese, English, French, Russian, and Spanish. These are also '*to the extent possible*' the *working languages*. (Rule 27).[37] All formal decisions and official documents shall be issued in all official languages. (Rule 30). Speeches made in any of the working languages shall be interpreted into the other working languages (Rule 28). If speakers address the Committee in a language other than the working languages, the speakers shall provide for interpretation into one of the working languages. Interpretation into the other working languages may be based on the interpretation given in the first language (Rule 29).

3.5 Meetings (Article 18(4))

3.5.1 Sessions

30 The CAT Committee works in sessions, rather than through the whole year. The initial meeting was convened by the Secretary-General from 18 to 22 April 1988, pursuant to Article 18(4). The number of further sessions and meetings was set by the Committee in Rule 2. The Committee, like most other treaty bodies, decided at its first session to convene *twice a year* for two-week sessions.[38] However, beginning in 1994, it became clear that under the increasing workload caused by individual complaints and States parties' reports, as well as the increased activities relating to the inquiry procedure, four weeks of meeting time per year was not enough. The Committee recognized the risk that it might not be able to comply with Rule 1, which provides that the Committee will hold as many meetings as necessary for the satisfactory performance of its functions.[39] Hence, over the years the Committee's sessions have been prolonged several times. Further to the decisions taken by the GA in its Resolution 68/268 of 2014, with effect of 2015 the Committee is meeting for *three sessions per year*, for a total of 11.6 weeks, normally *two four-week sessions in November* and *April/May* and *one three-week session in July/August*. [40]

31 The Committee decides in consultation with the Secretariat on its meeting schedule (Rule 2(2)). According to Rule 3, the Committee can also convene *special sessions*. This rule has, however, never been applied. The sessions of the Committee are normally held at the UN Office in Geneva (Rule 4). Prior to each session, the Secretariat prepares, in consultation with the Chairperson of the Committee, a provisional agenda for the session (Rules 6 to 7).

3.5.2 Public and Private Meetings

32 Rule 31 establishes the principle of *public meetings* of the Committee. Various NGOs with ECOSOC consultative status, as well as the media, regularly benefit from this provision.

[37] Until the amendments to the RoP introduced at the forty-fifth session (CAT/C/3/Rev.5, then confirmed in CAT/C/3/Rev.6), the *official and working languages* of the Committee were English, French, Russian, and Spanish.

[38] CAT/C/SR.2, paras 3–9 and CAT/C/SR.5, paras 16–32.

[39] CAT/C/SR.207, paras 3 and CAT/C/SR.289, paras 38–48.

[40] For the decision to extend the meeting time of the Committee to *three sessions* (see A/69/44 (n 20) para 153 and GA Res 68/268 of 2014, paras 26–27). Previously, the Committee has met since 1998 for *two sessions one three-week session in May and a two-week session in November* (see Report of the Committee Against Torture (1999) UN Doc A/54/44).

However, Rule 31 also explicitly states that the Committee may hold private meetings if it decides to do so and if it appears from the relevant provisions of the Convention that the meeting should be held in private. *Closed meetings* are held with regard to the inquiry procedure under Article 20 (Rule 79), examinations of inter-State complaints under Article 21 (Rule 95) and examinations of individual complaints under Article 22 (Rule 107).

33 During its first session, the Committee had several long discussions on whether NGOs, specialized agencies and regional intergovernmental organizations with consultative status with ECOSOC should be given *observer status* in public meetings of the Committee.[41] Organizations and agencies enjoying such status would be formally invited to Committee meetings, issued the Committee's official documents, and permitted to speak after Committee members.[42] Given that no consensus could be reached on this issue, despite long discussions, such a rule was not included in the RoP.[43] Consequently, NGOs are only allowed to attend the Committee meetings 'as members of the general public'.[44] Similarly, the draft of the rule on submission of information, documentation, and written statements prepared by the Secretariat proposed to invite NGOs with ECOSOC consultative status, specialized agencies, concerned UN bodies, and regional intergovernmental organizations to provide information to the Committee. Committee member *Kithrin* from the USSR objected to this proposal on the grounds that the Committee would be exceeding its powers. The majority of the Committee members, however, were in favour of this rule.[45] Thus, the CAT Committee is the first human rights treaty body to allow *NGOs* and other organizations to *provide information* under its RoP. NGOs may provide information in the context of all procedures: the State reporting procedure under Article 19, the inquiry procedure under Article 20, the inter-State complaints procedure under Article 21, and the individual complaints procedure under Article 22. According to Rule 107, NGOs can also lodge a complaint on behalf of victims under Article 22.

34 With regard to the Committee's interaction with the media and the general public, Rule 32 foresees that a *communiqué* may be issued by the Committee in order to inform the media and the general public of its activities at its closed meetings (Rules 80, 96, 108 concerning closed meetings under Articles 20, 21, and 22, respectively).

3.5.3 Records

35 Summary records of public meetings, reports, formal decisions, and all other official documents of the Committee are published, unless the Committee decides otherwise (Rules 34, 35). Summary records are prepared by the Secretariat and first distributed to the Committee members in a provisional form. After correction by the Committee members, they are published in final form. Reports, formal decisions, and other official documents of the Committee relating to Articles 20, 21, and 22 CAT are directly distributed to the Committee members and concerned States parties (Rule 35(2)).

3.5.4 Conduct of Business

36 Provisions on the *conduct of business* are contained in Rules 36 to 48. Six members constitute a quorum, according to Article 18(2)(a) and Rule 36. The Chairperson opens

[41] Draft Rule 32; see CAT/C/SR.2, paras 45–58; CAT/C/SR.5, paras 45–59; CAT/C/SR.6, paras 2–4.
[42] CAT/C/SR.2, paras 46–57; CAT/C/SR.5, paras 45–59; CAT/C/SR.2, paras 46–57; see also Ingelse (n 33) 112.
[43] CAT/C/SR.6, paras 2–4. [44] Ingelse (n 33) 112.
[45] Draft Rule 63; CAT/C/SR.2, paras 82–86; CAT/C/SR.6, paras 2–3.

and closes the Committee meetings, determines the points of order, calls the Committee members to order regarding time limits on statements, and announces the list of speakers (Rules 37 to 40). Each Committee member may move to adjourn or close a debate, and to suspend or adjourn a meeting. These motions are put to an immediate vote (Rules 41 to 44). Proposals and substantive amendments or motions are to be introduced in writing (Rule 45). Motions calling for the decision on the competence of the Committee to adopt a proposal shall be put to the vote immediately before a vote is taken on the proposal in question (Rule 46). Furthermore, motions may be withdrawn before voting and reintroduced at a later stage by any Committee member (Rule 47). However, adopted or rejected proposals may in principle (unless the Committee decides otherwise) not be reconsidered at the same session (Rule 48).

3.6 Financing of the Committee (Article 18(5))

37 At their first meeting, the States parties discussed the financial issues raised in Article 18(5) on the basis of a document prepared by the secretariat containing a statement by the Secretary-General saying that the Convention was the first human rights instrument that was completely dependent on the contributions of its States parties.

38 In practice, the novelty of a human rights body entirely depending on States parties financial contributions has proven to be a bad idea. States have paid late or simply missed payments completely. In light of this difficulty, Australia suggested amendments to Articles 17(7) and 18(5) in 1992 to bring the expenses of the Committee under the general UN budget.[46] Despite their adoption by the General Assembly in 1992, such amendments have never entered into force, as they have not been accepted by two thirds of the States parties, as required by Article 29(2).[47] Nevertheless, the expenses of the Committee have since then been covered out of the general UN budget on the basis of a provisional decision of the GA.[48] This provisional solution of simply overruling non-functioning provisions of the Convention seems to have become a permanent one, and nobody requests that States parties comply with their treaty obligation of reimbursing the OHCHR for all expenses incurred in connection with the monitoring functions of the Committee.

GIULIANA MONINA

[46] See also above Art 17, §§ 52–55.
[47] See also below Art 29.
[48] GA Res 47/111 of 16 December 1992, paras 9, 10; see also Art 17, § 55.

Article 19

State Reporting Procedure

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

---

1. Introduction 508

2. Travaux Préparatoires 510

2.1 Chronology of Draft Texts 510

2.2 Analysis of Working Group Discussions 512

3. Issues of Interpretation 517

3.1 Traditional Reporting Procedure 517

3.1.1 Submission of States Reports (Article 19(1)) 517

3.1.1.1 Meaning of 'reports on the measures they have taken'—Initial Reports 518

3.1.1.2 Meaning of 'supplementary reports'—Periodic Reports 518

3.1.1.3 Meaning of 'other reports' 519

3.1.1.4 Reporting Periodicity 520

3.1.2 Additional Sources of Information 521

3.1.3 Pre-sessional Preparation: List of Issues 522

3.1.4 Consideration of States Reports by the Committee (Article 19(3)) 522

3.1.4.1 The Procedure of the 'constructive dialogue' 522

3.1.4.2 Attendance from Committee Members and Country Rapporteurs 523

3.1.4.3 Attendance by States Parties 523

3.1.4.4 Request for Additional Reports or Information 524

3.1.4.5 Meaning of 'general comments on the report'—Concluding Observations 524

3.1.5 Meaning of 'general comments on the provisions of the Convention' (Rule 74) 528

3.1.6 Follow-up to Concluding Observations 529

3.1.6.1 Development of the Procedure 529

3.1.6.2 Criteria for Identifying and Selecting Recommendations 530

3.1.6.3 The Rapporteur for Follow-up to Concluding Observations 530
3.1.6.4 The Submission of Follow-up Report by the State Party 531
3.1.6.5 Analysis of the State Information by the Rapporteur for Follow-up 531
3.1.6.6 Communication with the States Parties 532
3.2 Simplified Reporting Procedure (Rule 66) 532
3.3 Other Measures to Address the Problem of Overdue Reporting 536
3.3.1 Consolidation of Reports (Rule 65(2)) 536
3.3.2 Reminders and Statement in the Annual Reports (Rule 67) 536
3.3.3 Examination in the Absence of a Report (Rule 67(3)) 537
3.4 Reprisals Following to Article 19 538

1. Introduction

1 The State reporting process serves to monitor the implementation of human rights treaties at the national level and creates a basis for constructive dialogue between States and treaty bodies. It is the only mandatory monitoring mechanism included in all nine core human rights treaties and under two Optional Protocols (OP) to the Convention of the Right of the Child (CRC).[1]

2 Since Article 19 CAT was drafted according to the model of Article 40 CCPR, the following interpretation will take into account the similarities and differences between both provisions. As with Article 40 CCPR, the drafting process of Article 19 CAT was dominated by the fear of delegates from Socialist States that the examination of State reports by the Committee against Torture (CAT Committee or Committee) might lead to critical observations on States' compliance by the Committee, which they considered as undue interference with State sovereignty. As the Convention only entered into force towards the end of the Cold War, this controversy between experts from Western and Socialist States, which had dominated the first ten years of the Human Rights Committee (HRC)'s practice, no longer played a significant role in the Committee against Torture.

3 States shall submit an initial report on their domestic implementation of the Convention within one year after the entry into force of the Convention and shall thereafter submit periodic reports on any new developments every four years. In addition, they might be requested by the CAT Committee to submit other additional or special reports on an ad hoc basis. The Committee dedicates a substantial amount of its meeting time to the consideration of State reports, which usually takes place in a spirit of constructive dialogue with State representatives. Contrary to the approach of Socialist States, which aimed at avoiding any country specific conclusions and recommendations, the Committee started adopting concluding observations on each State report in the early 1990s. These concluding observations contain both positive aspects and subjects of concern, but in the course of the years, the critical comments and recommendations have gradually become the main focus of the Committee's conclusions. As of 2002, concluding observations are also subject to a special follow-up procedure, which has now become an integral part of the reporting cycle and a key mechanisms for assessing the impact of the Committee's recommendations.

4 In principle, the State reporting procedure is a useful tool for States parties to regularly review the actual state of their compliance with the various obligations deriving from

[1] They are OPCRC-SC and OPCRC-AC. The OPCAT does not, instead, provide for an additional reporting procedure.

the Convention, including problems and difficulties encountered (*self-assessment*), and for the Committee to evaluate critically the respective State's level of compliance (*external assessment* by an independent expert body). But, as with other reporting systems of human rights treaty bodies, the proper functioning of the reporting procedure before the CAT Committee is hampered by the problem of late or non-reporting.[2] This problem seems to be particularly relevant for the reporting procedure under the CAT which is among the UN human rights treaty per lowest reporting rate.[3]

5 To date there have been several initiatives at the *general UN level* aimed at overcoming such problems and, more generally, *strengthening the treaty bodies*,[4] the latest being the initiative of Navi Pillay started in 2009 and resulted in GA Resolution 68/268 of 2014.[5] Inter alia, the proposal advanced by Pillay encouraged States to adopt a number of measures concerning the reporting procedures, ie to introduce a comprehensive reporting calendar, a simplified and aligned procedure, as well as measures aiming at strengthening the capacity of States to implement the treaties. In this spirit, also the Committee has, since it has been operational, developed various methods and mechanism aimed at improving the States parties' compliance with their reporting duty. Most recently, for example, the Committee has adopted the so-called simplified reporting procedure, which substitutes the traditional reporting procedure for the States parties that have decided to accept it. The new procedure aims at facilitating the reporting process and strengthening the States parties' capacity to fulfil their reporting obligations in a timely and effective manner.[6]

6 In addition to the reporting procedure itself, on the basis of its experience in the State reporting (and other) procedures, the Committee may also issue general comments on the interpretation of certain treaty provisions. So far, the Committee has adopted four general comments.

7 Finally, recognizing the crucial importance of civil society in the proper functioning of the reporting procedure, the Committee has since 2012 strengthened its policy on reprisals against individuals or organizations as a consequence for having communicated with the Committee.

8 After illustrating the different types of State reports, this article will provide an overview of the reporting procedure by looking at all its different steps, namely the submission of State reports; their consideration by the Committee; and, lastly, the adoption, publication of and follow-up to the concluding observations adopted by the Committee.

[2] See eg UN, 'Status of the Human Rights Treaty Body System: Report of the Secretary-General' (2016) UN Doc A/71/118, para 5.

[3] For statistics on reporting see UN, 'Timely, Late and Non-Reporting by States Parties to the Human Rights Treaty Bodies' (2016) UN Doc HRI/MC/2016/2, para 10; and the OHCHR website on late reporting <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx> accessed 2 November 2017.

[4] Previous proposals were advanced by the Philip Alston (1988–96); the Secretary-General on the single report (2002–06); the High Commissioner Arbour on a unified standing treaty body (2006). For all relevant documents concerning the Treaty Body Strengthening Process see OHCHR, 'Treaty Body Strengthening Process' <http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx> accessed 2 November 2017.

[5] The initiative of Pillay started in 2009; a comprehensive reform proposal was advanced in 2012 with UN, 'United Nations Reform: Measures and Proposals' (2012) UN Doc A/66/860; the process was then concluded in 2014 with the GA Res 68/268 of 9 April 2014 (Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System). The latter resolution also established two review mechanisms: (a) a biennial report by the UN Secretary-General on the state of the treaty body system; and (b) an overall review of the effectiveness of the measures taken pursuant to Res 68/268 no later than 2020. For the first biennial report see A/71/118 (n 2).

[6] A/66/860 (n 5) para 4.2.1; CAT, 'Status of the Optional Reporting Procedure of the Committee Against Torture and Proposals for Its Revision' (2011) UN Doc CAT/C/47/2, para 3.

The article then continues with an overview of the problem of overdue reports as well as on the measures so far taken in this regard; and concludes with a short survey on the Committee's policy on reprisal following Article 19.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

9 *Original Swedish Draft (18 January 1978)*[7]

Article 16

States Parties undertake to submit to the Secretary-General of the United Nations, when so requested by the Human Rights Committee established in accordance with article 28 of the International Covenant on Civil and Political Rights (hereafter referred to in the present Convention as Human Rights Committee), reports or other information on measures taken to suppress and punish torture and other cruel, inhuman and degrading treatment or punishment. Such reports or information shall be considered by the Human Rights Committee in accordance with the procedures set out in the International Covenant on Civil and Political Rights and in the Rules of Procedures of the Human Rights Committee.

10 *Swedish Proposal for Implementation Provisions (22 December 1981)*[8]

Article 29

1. The States Parties to the present Convention undertake to submit to the Secretary-General of the United Nations

(a) within one year of the entry into force of the Convention for the States Parties concerned, reports on the measures they have taken to give effect to their undertakings under the Convention; and

(b) subsequently, when so requested by the Committee, reports or other information relating to the application of the Convention.

2. Such reports or other information shall be considered by the Committee which shall transmit such comments or suggestions relating to them as it may consider appropriate to the States Parties. The Committee may also transmit such comments or suggestions to the Economic and Social Council along with copies of the reports it has received from the States Parties.

3. The States Parties may submit to the Committee observations on any comments or suggestions that may be made in accordance with paragraph 2 of this article.

11 *Draft Implementation Provisions, Submitted by the Chairman-Rapporteur (1 February 1982)*[9]

Article 18

1. States Parties to the Convention undertake to submit to the Secretary-General of the United Nations reports on the measures they have taken to give effect to their undertakings under the Convention:

[7] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[8] Draft Articles Regarding the Implementation of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1981) UN Doc E/CN.4/1493.

[9] Draft Implementation Provisions Submitted by the Chairman-Rapporteur of the Working Group (1982) UN Doc E/CN.4/1982/WG.2/WP.6.

(a) within one year of the entry into force of the Convention for the States Parties concerned; and

(b) whenever any new measures have been taken; and

(c) when the group established in accordance with article 17 so requests.

2. Such reports shall be considered by the group established in accordance with article 17, which shall transmit them with such comments and suggestions as it may consider appropriate to the States Parties. The group may also transmit such comments or suggestions to the Commission on Human Rights along with copies of the report it has received from the States Parties.

3. The States Parties may submit to the group established in accordance with article 17 observations on any comments or suggestions that may be made in accordance with paragraph 2 of the present article.

12 *Four Draft Articles on Implementation, with the Explanatory Note, Submitted by the Chairman-Rapporteur (24 December 1982)*[10]

Article 19

1. The States Parties undertake to submit to the Secretary-General of the United Nations reports on the measures they have taken to give effect to their undertakings under the Convention:

(a) within one year of the entry into force of the Convention for the States Parties concerned; and

(b) whenever any new measures have been taken; and

(c) when the Committee so requests.

2. Such reports shall be considered by the Committee, which shall transmit them with such comments or suggestions as it may consider appropriate to the States Parties. The Committee may also transmit such comments or suggestions to the United Nations Commission on Human Rights along with copies of the reports it has received from States Parties.

3. The States Parties may submit to the Committee observations on any comments or suggestions that may be made in accordance with paragraph 2.

13 *Draft Resolution Submitted by the Netherlands (et al.) to the General Assembly (23 November 1984)*[11]

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the

[10] Four Draft Articles on Implementation, with the Explanatory Note, Submitted by the Chairman-Rapporteur (1983) UN Doc E/CN.4/1983/WG.2/2.

[11] Draft Resolution Submitted by the Netherlands (et al) to the General Assembly' (1984) UN Doc A/C.3/39/L.40.

State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1.

2.2 Analysis of Working Group Discussions

14 Despite the similarities between Article 19 of the draft Convention and Article 40 CCPR, and despite the establishment of comparable reporting procedures under various other human rights treaties, such as Article 18 CEDAW and Article 9 CERD, consensus on paragraphs 3 and 4 of this article was only reached in the Third Committee meeting of the General Assembly in 1984.[12] The debate focused primarily around the words 'comments or suggestions' in paragraphs 3 and 4. Some States, particularly the delegation of the Soviet Union, supported by the delegation of the Ukrainian SSR and the *German Democratic Republic*, were against the idea of authorizing the Committee to make 'comments and suggestions' on the report of States parties and to include such 'comments and suggestions' in its annual report to the General Assembly. They proposed to replace the disputed terms with 'general comments' and 'comments' respectively.

15 The Working Group of the Human Rights Commission did not deal with the supervisory mechanism of the Convention in its sessions between 1978 and 1980. However, the written comments made by several States in 1978 regarding Article 16 of the original Swedish draft, influenced the subsequent discussions of the Working Group.[13] Draft Article 16 provided for a system which required States parties to submit reports to the HRC established under Article 28 CCPR upon special request only.[14] *Austria* welcomed the reporting system as proposed in the original Swedish draft and stated that it would be undesirable to establish another obligation of regularly submitting reports, since the number of reporting procedures under international human rights law had sharply risen over the last years.[15] The *USA* and *Switzerland* also supported draft Article 16 and the idea of the HRC as monitoring body of the CAT. The delegation of *France*, on the other hand, considered the proposed arrangement legally unsatisfactory, since the two instruments concerned are different and the States parties would not necessarily be the same.[16]

16 In 1981, in a pre-sessional meeting of the Working Group, the *Netherlands* presented a new implementation proposal in the form of amendments to the original Swedish draft.[17] It was the first proposal that provided for the establishment of a new Committee

[12] GA Res 39/46 of 10 December 1984.

[13] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, paras 99–103; E/CN.4/1285 (n 7).

[14] The original Swedish draft proposed that the HRC should also be the supervisory body for the implementation of the CAT.

[15] E/CN.4/1314 (n 13) para 99. [16] ibid, para 103.

[17] Amendments to Draft Article 29 Submitted by Brazil (1982) UN Doc E/CN.4/1982/WG.2/WP.3; see also J Herman Burgers and Hans 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) 75.

composed of members of the HRC. Thus, according to this proposal the States parties would submit their reports to the new Committee.

17 In 1982 the Working Group began its actual deliberations on the reporting procedure basing its discussion on draft Article 29 of the Swedish proposal for implementation provisions.[18] This proposal had incorporated some of the State comments made in 1978 and, instead of referring to the HRC as its implementation organ, provided for a Committee against Torture composed of nine members. Several delegations supported the proposal contained in draft Article 29 according to which States would be required to submit reports and other information relating to the application of the Convention to the new Committee.[19] Other States objected to the inclusion of 'other information' in the provision. Consequently, the *Brazilian* delegation submitted a proposal amending draft Article 29 which did not explicitly request States to submit other information. The proposal was further amended according to the discussion in the Working Group.[20] The revised version which authorized the Committee in its second paragraph to transmit comments and suggestions to the States parties was accepted by the Swedish delegation and no other delegation objected to the new text.[21]

18 Article 18 of the alternative proposal for the implementation provisions submitted by the Chairman-Rapporteur did not contain any new elements but simply reflected the outcome of the discussions concerning Article 29 of the Swedish proposal that had taken place.[22]

19 In 1983, the Working Group based its deliberations regarding the implementation mechanism on the four draft implementation provisions submitted by the Chairman-Rapporteur reflecting the outcome of the 1982 Working Group discussion on the reporting procedure under Article 19.[23] According to Article 19(3) States parties were allowed to submit to the Committee observations on any comments or suggestions that may be made in accordance with paragraph 2.

20 The question of whether the implementation procedures under the Convention, including the reporting mechanism, should be *mandatory* or *optional* was a central point of discussion and disagreement. Most States supported a mandatory nature of the implementation organ and consequently also a mandatory reporting procedure. Some delegations were in favour of an optional complaints procedures, but welcomed the mandatory reporting procedure. A third group of States was of the opinion that all implementation provisions should be optional.[24] An alternative suggestion by the *Ukrainian Soviet Socialist Republic* proposed to insert a clause in paragraph 1 which only obliged States parties who have recognized the Committee's status to report on the measures taken.[25]

21 More specifically, the delegation of *Australia* stressed that reporting 'whenever new measures have been taken' would be too burdensome for States parties and

[18] E/CN.4/1493 (n 8); see above § 10.

[19] Report of the Working Group of the Commission on Human Rights (1982) UN Doc E/CN.4/1982/L.40, para 70.

[20] E/CN.4/1982/WG.2/WP.3 (n 17).

[21] E/CN.4/1982/WG.2/WP.3/Rev.1; E/CN.4/1982/L.40 (n 19) paras 70–71.

[22] E/CN.4/1982/L.40 (n 19) para 82; draft implementation provisions in E/CN.4/1982/WG.2/WP.6 (n 9).

[23] Draft Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1983) UN Doc E/CN.4/1983/WG.2/WP.16.

[24] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63, paras 30, 31.

[25] Alternative Suggestions of the Ukrainian Soviet Socialist Republic for Amendments to Draft Article 19 (1983) UN Doc E/CN.4/1983/WG.2/WP.5; E/CN.4/1983/WG.2/WP.16 (n 23) para 49.

therefore suggested the establishment of a periodic reporting cycle.[26] Many States supported Australia's proposal, while others stated that the existing obligation to report periodically under other human rights treaties was already burdensome for many countries. As a result, the Chairman submitted several new proposals which took into account the outcomes of the discussion.[27] The last proposal, establishing a reporting periodicity of four years, did not meet any objections from the Working Group.[28]

22 Furthermore, the discussion on draft Article 19 focused on the word '*measures*'. There was general agreement among the delegations that this term did not mean any limitation in scope but was intended to include legislative as well as judicial, administrative, and other measures.[29] Moreover, the *Australian* delegation, requesting clarification on paragraphs 2 and 3, stated that it was not clear if the reports would lead to a dialogue between the Committee and the State party concerned. Following interventions by other delegations, Australia submitted an informal suggestion to reformulate the latter paragraphs.[30] This suggestion was taken into consideration by the Chairman-Rapporteur who subsequently submitted consolidated new text proposals.[31] The Working Group delegations agreed on a final version.[32]

23 During the 1984 Working Group, the *USSR* withdrew its previous demands that all implementation procedures be optional and objected only to the Article 20 inquiry procedure.[33] This meant that an agreement had been reached between all delegations regarding the *mandatory reporting procedure* under Article 19. However, the USSR stated that it disagreed with the present formulation of paragraphs 3 and 4 authorizing the Committee to, first, make such '*comments or suggestions*' on the report of whichever State party it considers appropriate and, secondly, to include such 'comments or suggestions' in its annual report to the General Assembly. The Soviet delegation, supported by the delegation of the *Ukrainian Soviet Socialist Republic* and the *German Democratic Republic*, proposed replacing the words 'comments or suggestions' by the words '*general comments*' in accordance with Article 40 CCPR. However, the majority of speakers wished to keep the formulation 'comments or suggestions', which had met with no opposition during the prior Working Group sessions. Several delegations stressed that, in contrast to the CCPR, the CAT was more specific and should therefore provide that appropriate comments can be made by the CAT Committee.[34]

24 Furthermore, the States discussed whether the States parties' reports could be transmitted to the General Assembly. *India* suggested the following additional sentence to paragraph 4: 'If so requested by the State Party concerned, the Committee may also transmit a copy of the report submitted by the State under paragraph 1.'[35] The proposal was accepted by the Working Group and the sentence added to paragraph 4. Nevertheless, there was still disagreement on the terms 'comments or suggestions' and the draft Article could not be adopted at this stage.[36]

[26] E/CN.4/1983/WG.2/WP.16 (n 23) para 50.

[27] Proposals on Draft Article 19 Submitted by the Chairman-Rapporteur (1983) UN Doc E/CN.4/1983/WG.2/WP.1; and Proposals on Draft Article 19 Submitted by the Chairman-Rapporteur (1983) UN Doc E/CN.4/1983/WG.2/WP.3.

[28] Consolidated Proposals on Draft Article 19 Submitted by the Chairman-Rapporteur (1983) UN Doc E/CN.4/1983/WG.2/WP.7; E/CN.4/1983/WG.2/WP.16 (n 23) paras 50–51.

[29] E/CN.4/1983/63 (n 24) para 52. [30] E/CN.4/1983/WG.2/WP.1 (n 27).

[31] E/CN.4/1983/WG.2/WP.3 (n 27).

[32] E/CN.4/1983/63 (n 24) para 52; E/CN.4/1983/WG.2/WP.7 (n 28).

[33] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 45.

[34] ibid, para 49. [35] ibid, para 50. [36] ibid, para 51.

25 By the time the Working Group presented its text to the Human Rights Commission in February 1984, it had reached consensus on all articles except on paragraphs 3 and 4 of Article 19 and Article 20.[37] *Herman Burgers*, the Chairman-Rapporteur of the Working Group, handed over the task of finalizing the text to the Commission.[38]

26 At the Commission's thirty-second meeting, the *Federal Republic of Germany* stated that the procedures provided for in Articles 19 and 20 were the absolute minimum needed to ensure the effectiveness of the enforcement mechanisms and joined the *USA* in expressing their regret that, although a consensus of a large majority within the Working Group had been reached, some States had refused to accept Article 19(3) and (4) as well as Article 20. In fact, the representative from the USA accused the two objecting delegations, the *Soviet Union* and the *Ukrainian Soviet Socialist Republic*, of blocking consensus on the remaining articles. The *German Democratic Republic*, however, seriously objected to what it saw as the broad scope of procedures under Articles 19 and 20, noting that this delegation saw it as an infringement on State sovereignty.[39]

27 The following day, at the Commission's thirty-third and thirty-fourth meetings, *Uruguay, Argentina, Switzerland*, and *Australia* supported the current version of paragraphs 3 and 4 of Article 19 and stated that in their opinion the Committee should be empowered to make any 'comments or suggestions' it considered appropriate; to forward them to the State party concerned; and to include them in its annual report.[40] The *USSR*, supported by the delegation of *Bulgaria*, objected to this version, preferring the replacement of the term 'comments or suggestions' with 'general comments'. It was proposed that this wording would avoid the risk of interference in internal affairs, deemed inherent to the expression 'comments or suggestions'.[41] Italy suggested a compromise solution which would replace 'comments or suggestions' by the word 'comments' only.[42]

28 Rather than voting on Articles 19 and 20 or renewing the mandate of the Working Group in order to continue debate on these articles, the Commission submitted the draft Convention as it stood, with the unresolved language in square brackets, to the General Assembly.[43] It did so by adopting a resolution introduced by *Finland* and the *Netherlands*, based on consultations with delegations from different regions.[44] After a seven-year process, many delegations were eager for the adoption of a final draft. Further, many members of the Commission had not participated in the Working Group and were not closely familiar with the concerns involved in the discussion.[45]

29 Pursuant to the above-mentioned resolution, the Commission transmitted the report of the Working Group[46] as well as the summary records of the Commission's debate on the item during its fortieth session to the *General Assembly*.[47] Additionally, the Secretary-General invited all States to communicate their comments on the draft

[37] Summary Record of the Thirty-second Meeting (1984) of the Commission on Human Rights UN Doc E/CN.4/1984/SR.32, paras 62–104.

[38] ibid, para 65.

[39] ibid, para 103.

[40] Summary Record of the Thirty-third Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.33, paras 39–40; and Summary Records of the Thirty-fourth Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.34, paras 107–08, 115.

[41] E/CN.4/1984/SR.33 (n 40) paras 13 and 28.

[42] ibid, para 1.

[43] E/CN.4/1984/72 (n 33); see also Burgers and Danelius (17) 99–100.

[44] Burgers and Danelius (17) 100.

[45] ibid (citing E/CN.4/1984/1.36).

[46] E/CN.4/1984/72 (n 33).

[47] E/CN.4/1984/SR.32 (n 37) paras 34, 42; see also 'Report of the Secretary-General' (1984) UN Doc A/39/499, para 1.

Convention.[48] Australia, Belgium, Canada, Denmark, France, Italy, the Netherlands, Sweden, Switzerland, the UK, the USA, Cyprus, Greece, Luxembourg, and Spain expressed their support for adopting Article 19(3) and (4) as drafted including the expression 'comments or suggestions'.[49] Some of them emphasized at the same time that the implementation procedures should be mandatory. Italy expressed its opinion that these provisions would render the dialogue between the Committee and the reporting State more effective and added that the gravity of torture and other similar treatment or punishment does require more advanced implementation provisions than those established by Article 40 CCPR and its OP.[50] Finland, New Zealand, Norway, Ireland, and the Syrian Arab Republic expressed overall support and acceptance of the text but did not specifically mention Article 19(3) and (4).[51] Thailand and Venezuela, however, objected to the wording of the respective paragraphs and to the mandatory implementation mechanisms, stating that it would bear the risk of interference in internal affairs of member States.[52]

30 At its thirty-ninth session in September 1984, the General Assembly formally dealt with the draft Convention. The *Netherlands* chaired several informal meetings in an attempt to reach a consensus on Articles 19 and 20.[53] These meetings revealed that Western and Latin American States, along with some Asian and African States, supported the language of the Articles as they stood. The USSR and other Eastern European States were willing to adopt the Convention, but only if the procedures in question were made optional and if their proposal was adopted for the wording of Article 19. Support for expedited adoption of the Convention was not as robust among the general membership as it had been among the members of the Human Rights Commission. Objections were raised with regard to other Articles of the Convention, and some delegations favoured a return to the drafting table.

31 These considerations compelled *Argentina*, the *Netherlands*, and *Sweden* immediately to propose the adoption of the Convention and to submit, along with Bolivia, Colombia, Costa Rica, Denmark, the Dominican Republic, Finland, Gambia, Greece, Samoa, Norway, and Spain, a draft resolution to that effect. The Third Committee of the General Assembly thus included, in its annex, the text of the Working Group, without the respective brackets in Article 19 and 20.[54]

32 In reaction to these developments, the *Ukrainian Soviet Socialist Republic*, supported by Afghanistan, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, the USSR, and Vietnam, introduced amendments to the draft resolution which contained the terms 'general comments' instead of 'comments or suggestions' in Article 19(3) and only 'comments' instead of 'comments or suggestions' in Article 19(4).[55] In addition, the Soviet Union and the Byelorussian Soviet Socialist Republic submitted other amendments to the draft resolution.[56]

[48] A/39/499 (n 47) para 1 (citing Commission on Human Rights Res. 1984/21 of 6 March 1984). See also Burgers and Danelius (17) 102.

[49] A/39/499 (n 47); A/39/499/Add.1; A/39/499/Add.2.

[50] A/39/499 (n 47) para 4.

[51] A/39/499 (n 47) para 4; A/39/499/Add.1; A/39/499/Add.2.

[52] A/39/499/Add.2.

[53] Burgers and Danelius (17) 102.

[54] A/C.3/39/L.40 (n 11); see Burgers and Danelius (17) 103.

[55] A/C.3/39/L.49; A/C.3/39/L.50; see also Report of the Third Committee, Thirty-ninth Session (1984) UN Doc A/39/708, para 9.

[56] A/C.3/39/L.63; A/C.3/39/L.64; A/C.3/39/L.66; A/C.3/39/L.67.

33 Eventually, the draft sponsors chose to seek consensus rather than further pursue confrontation.[57] The draft as it stood would have resulted in several negative votes among the Soviet bloc and many abstentions from African and Asian States. This could have seriously weakened the chances for wide adherence to the Convention. Alternatively, there might have been no conclusive vote at all, which would have led to the reopening of the debate and a likely watered-down Convention. Since the sponsors regarded many of the demands put forth by the Soviet Union and other Eastern States to be unacceptable, they chose to *compromise* by deleting the words '*or suggestions*' contained in Article 19(3) and (4). Following this amendment, the Chairman made clear that all other proposals should be withdrawn.[58] Nevertheless, the sponsors later also accepted that the word '*general*' be placed before 'comments' in Article 19(3). This final amendment was also a compromise, made in exchange for the complete withdrawal of all other amendments by the Byelorussian Soviet Socialist Republic.[59] The orally revised draft resolution was thus adopted by the Third Committee without a vote.

34 On 10 December 1984 the resolution as submitted by the Third Committee was unanimously adopted by the General Assembly.[60]

3. Issues of Interpretation

3.1 Traditional Reporting Procedure

35 The *traditional reporting procedure* consists of four steps: the submission of the report by the State; the preparation of list of issues (LOIs) by the treaty body and their transmission to the State; the submission of written replies to the LOIs by the State; and, finally, the so-called 'constructive dialogue', ie the examination of the report and the adoption of concluding observations. As explained below, a different procedure applies for those States that have accepted to report under the new simplified reporting procedure (see 3.2 below).

3.1.1 Submission of States Reports (Article 19(1))

36 The terminology used by Article 19(1) CAT does not correspond to the practise of the HRC and other treaty bodies. In addition to the *first (initial) reports*, all treaty bodies refer to the subsequent regular reports as *periodic reports*, under Article 19(1) CAT they are called '*supplementary reports*'. The term '*other reports*' in Article 19(1) CAT refers to non-regular reports, which are submitted in response to a special request by the Committee. While the HRC calls them supplementary and emergency reports,[61] the CAT Committee avoided both terms. As it will be seen below, it requests '*additional reports*' if the information contained in initial or periodic reports is not sufficient, and '*special reports*' in particularly serious or emergency situations.

37 Moreover, for States that have accepted the simplified reporting procedure the written replies to the LOIPR (list of issues prior reporting) constitute the State party's report and fulfil its reporting obligations under Article 19 (see 3.2, § 95 below).

[57] Burgers and Danelius (n 17) 104–05.
[58] ibid 105–06. [59] ibid 106. [60] GA Res 39/46 of December 1984.
[61] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) (*CCPR Commentary*) 716.

3.1.1.1 Meaning of 'reports on the measures they have taken'—Initial Reports

38 Initial reports shall contain information on the measures that States parties have taken 'to give effect to their undertakings under this Convention'. The difference in wording between Article 19 CAT and Article 40(1) CCPR ('give effect to the rights recognized herein') can be explained by the fact that the CAT provides for specific obligations to prevent torture and to bring the perpetrators of torture to justice, rather than for additional human rights. This means that States should report on an Article-by-Article basis on all the measures taken to implement the respective provisions of the Convention. Although no provision equivalent to the second sentence of Article 40(2) CCPR was included in Article 19 CAT, States should report on any factors and difficulties which affect the implementation of the Convention.[62] As envisaged by Rule 65(4) States parties have to follow the *Guidelines of the Form and Content of Initial Reports*, as lastly amended in 2005.[63] As of 1991, these Guidelines also include the so-called *Consolidated Guidelines for the Initial Part of all State Reports*,[64] which were adopted in 1990 with the aim of coordinating the reporting obligations under the various human rights treaties.[65] According to the Guidelines, the initial report should be presented in two parts. The first part should include information of a general nature and the second should provide information in relation to each of substantive article of the Convention. [66] For initial reports, States parties should respect the word limit of 31,800 words.[67]

3.1.1.2 Meaning of 'supplementary reports'—Periodic Reports

39 The second type of report is the so-called *periodic* or '*supplementary' report.* It is regulated by the Committee's *Guidelines regarding Periodic Reports* of 1991,[68] last revised

[62] Article 40(2) CCPR explicitly provides that: '… Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.'

[63] CAT, 'Guidelines on the Form and Content of Initial Reports under Article 19 to be Submitted by States Parties to the Convention Against Torture' (2005) UN Doc CAT/C/4/Rev.3. The Guidelines were modelled on the basis of the reporting guidelines adopted by the HRC (CAT/C/SR.6, para 40), originally adopted at the CAT Committee's first session in April 1988 (CAT/C/4), they were then amended at the third session in November 1989 (CAT/C/Rev.1; CAT/C/SR.21, paras 1–21; CAT/C/SR.38, paras 21–41); at the sixth session in April 1991 (CAT/C/Rev.2; CAT, 'Report of the Committee Against Torture' (1991) UN Doc A/46/46, Annex V); and at the thirty-third and thirty-fourth session (CAT/C/Rev.3; CAT, 'Report of the Committee Against Torture Thirty-third Session (16–26 November 2004) Thirty-fourth Session (2–20 May 2005)' (2005) UN Doc A/60/44, Annex VIII). Following a retreat on the Committees' working methods held at its fifty-third session in 2014, the Committee decided to 'to establish a working group to update the reporting guidelines on initial and periodic reports, if needed', but no measures were yet undertaken in this regard. See CAT, 'Report of the Committee Against Torture Fifty-third Session (3–28 November 2014) Fifty-fourth Session (20 April–15 May 2015)' (2015) UN Doc A/70/44, para 26(c); CAT, 'Report of the Committee Against Torture Fifty-fifth Session (27 July–14 August 2015) Fifty-sixth Session (9 November–9 December 2015) Fifty-seventh Session (18 April–13 May 2016)' (2016) UN Doc A/71/44, para 21. On initial reports see also CTI and APT, 'UN Ratification tool' (2016) 24.

[64] CAT/C/SR.82, paras 43–44.

[65] HRI/1991/1; UN, 'Report of the Third Meeting of Persons Chairing the Human Rights Treaty Bodies' (1990) UN Doc A/45/636, Annex. The consolidated guidelines for the initial part of the reports of States parties were approved with minor amendments at its forty-ninth meeting (fourth session) on 26 April 1990 (CAT/C/L.5; A/45/44, para 41 and Annex IV). They were based on the idea was that States parties would draft a core document containing general information on State organization and other conditions relevant to human rights and then submit the document together with the substantive part of their initial report to various treaty bodies.

[66] UN, Manual on Human Rights Reporting: under Six Major Human Rights Instruments (1997) 369–71.

[67] GA Res 68/268 of 9 April 2014 (n 5) para 16.

[68] CAT, 'General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 19 of the Convention' (1998) UN Doc CAT/C/14/Rev.1; CAT/C/SR.82, paras

in 1998.[69] Periodic reports shall not repeat the information contained in earlier reports, but focus instead on any new measures and developments taken. They shall give a brief general description of the legal and administrative framework within which the Convention operates, as well as on the measures taken to comply with the Committee's conclusions and recommendations on earlier reports as well as any other additional information explicitly requested. For periodic reports, States parties should respect the limit of 21,200 words.[70]

3.1.1.3 Meaning of 'other reports'

40 The third and fourth types of reports are the so-called '*other reports*'. The legal basis of the Committee's authority to request such reports is enshrined in Article 19(1), which states that 'States parties shall submit supplementary reports … *and such other reports as the Committee may request*'. The idea behind was that the Committee should not have to wait the four years between reports, but could rather request a special report from a State party when the situation in a country justified it.[71] This provision has been used by the Committee for additional reports and for special reports. *Additional reports* are regulated by Rule 69(2). This Rule allows the Committee to request an additional report—as well as additional information—if an initial or periodic report does not contain sufficient information or the information provided is outdated. The Committee also indicates by what date the aforementioned report shall be submitted. In fact, when considering a report, the Committee must first confirm that the report contains all information required according to Rule 69 (and implicitly Article 19(1)). This check is done with the help of the reporting guidelines.[72] If the information provided in the report is not sufficient, or is outdated, the Committee may request, through a list of issues to be sent to the State party, an additional report or specific information, usually to be submitted within a year's time.[73] In practice, during its first years, the Committee requested, explicitly or implicitly, additional reports from *Belize, Ecuador, Cameroon, China, Libya, Chile, Afghanistan*, and *Nepal*, mostly because the initial reports were not drafted in accordance with the guidelines of the Committee.[74] Between 1991 and 1993, the Committee considered additional reports submitted by Chile, Ecuador, Cameroon, Libya, and China.[75] Belize, Afghanistan, and Nepal never submitted the additional reports requested. In contrast, in emergency or similar situations that require an urgent response, the Committee has used its power under Article 19(1) to request a *special report* on an ad hoc basis. To date

46–54; CAT/C/SR.85, paras 1–11; CAT, 'Report of the Committee Against Torture' (1998) UN Doc A/53/44, Annex VI. For the original version see CAT/C/14. Following a retreat on the Committees' working methods held at its fifty-third session, the Committee decided to 'to establish a working group to update the reporting guidelines on initial and periodic reports, if needed', but so far no measures seem to have been taken in this regard. See A/70/44 (n 63) para 26(c); A/71/44 (n 63) para 21.

[69] CAT/C/14/Rev.1 (n 68); see also Chris Ingelse, *United Nations Committee against Torture: An Assessment* (Kluwer Law International 2001) 133; UN, Manual on Human Rights Reporting (n 66).

[70] GA Res 68/268 of 9 April 2014 (n 5) para 16.

[71] CAT/C/SR.2, paras 92–120; see also Ingelse (n 69) 135.

[72] Ingelse (n 69) 133.

[73] ibid; Rule 69 (2).

[74] Ingelse (n 69) 135, nn 38–45; CAT, 'Report of the Committee Against Torture' (1990) UN Doc A/45/44, paras 279 (Cameroon), 375 (Chile), 501 (China); CAT, 'Report of the Committee Against Torture' (1991) UN Doc A/46/46, para 127 (Ecuador); CAT, 'Report of the Committee Against Torture' (1992) UN Doc A/47/44, para 158 (Libya). See also below § 59.

[75] A/46/46 (n 74) paras 237–62; A/47/44 (n 74) paras 60–92, 244–84; CAT, 'Report of the Committee Against Torture' (1993) UN Doc A/48/44, paras 181–207, 387–429.

this has been done three times, namely in respect of Israel,[76] Syria,[77] and Burundi.[78] In its concluding observations to Syria and Burundi, the Committee has also requested the States to submit follow-up special reports.[79]

41 Finally, although not explicitly mentioned in Article 19(1), States parties are also encouraged to submit a *common core document*,[80] either before or at least with their initial reports and maintain it up-to-date throughout the reporting cycle if necessary. The same core document can be submitted to all UN human rights treaty bodies. In fact, such document was introduced with the purpose to facilitate the reporting burden of States and include in one single document all those general information that are required by all the treaty bodies. In addition to such general information, the State will have to submit all other information specifically relevant for the obligations arising from the CAT. For the common core document, States parties should respect the limit of 42,400 words.[81]

3.1.1.4 Reporting Periodicity

42 Whereas Article 40(1) CCPR requires States to submit initial reports within one year and further reports 'whenever the Committee so requests', Article 19(1) CAT is more specific. In addition to initial reports *within one year*,[82] it provides for 'supplementary reports *every four years*' and for 'such other reports *as the Committee may request*'. The four-year reporting cycle takes into account the negative experiences of the CERD-Committee with a two-year reporting cycle,[83] and the practice of the HRC that in 1981 had established a five-year cycle.[84] The specific date by which the State party examined should submit the next periodic report is normally indicated at the end of the concluding observations.[85] State reports are public document and are available on the Committee's website.

[76] See CAT, 'Report of the Committee Against Torture' (1997) UN Doc A/52/44, paras 25 and 253–60; CAT/C/33/Add.2/Rev.1; CAT/C/SR.295, 296, 297/Add.1.

[77] The special report was requested by the Committee at its 1072nd meeting in 2012 (CAT/C/SR.1072); no report was submitted by Syria and the Committee adopted concluding observations under Rule 67(3) see CAT, 'Concluding Observations in the Absence of a Special Report: Syrian Arab Republic' (2012) UN Doc CAT/C/SYR/CO/1/Add.2.

[78] CAT, 'Report of the Committee Against Torture Fifty-eighth Session (25 July–12 August 2016) Fifty-ninth Session (7 November–7 December 2016) Sixtieth Session (18 April–12 May 2017)' (2017) UN Doc A/72/44, para 36.

[79] ibid, para 24; CAT, 'Concluding Observations on the Special Report of Burundi Requested under Article 19' (2016) UN Doc CAT/C/BDI/CO/2/Add.1, para 35.

[80] See CAT, 'Working methods, II; Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Documents' (2006) UN Doc HRI/MC/2006/3; A/66/860 (n 5) para 3, where the GA 'encourages States parties to consider submitting a common core document and updating it as appropriate … '. For a more recent overview, see also UN, 'Report of the Chairs of the Human Rights Treaty Bodies on Their Twenty-eighth Meeting' (2016) UN Doc A/71/270, para 23.

[81] A/66/860 (n 5) para 16.

[82] In addition to CCPR, for initial reports, other UN treaty bodies with a periodicity of one year are CERD, CEDAW, CMW. In contrast, CESCR, OPCRC-SC, OPCRC-AC, and CRPD have a periodicity of two years. For an overview on reporting periodicity see UN, 'Timely, Late and Non-Reporting by States Parties to the Human Rights Treaty Bodies' (2015) UN Doc HRI/MC/2015/5, para 6.

[83] Art 9(1) CERD.

[84] Art 40 CCPR does not explicitly regulates periodicity, the HRC however requests that periodic reports be submitted every three to six years following State party review, depending on the situation. For more information on the CCPR see Nowak, *CCPR Commentary* (n 61) 715. Other UN treaty bodies with a reporting periodicity of four years: CEDAW; and CRPD; with a reporting periodicity of five years: CESCR, CRC, CMW, CRC-OPSC, OPCRC-AC; periodic reports under CED are submitted as requested by the CED Committee. For an overview on reporting periodicity see HRI/MC/2015/5 (n 82) para 6.

[85] OMCT, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, vol 4 (2nd edn, OMCT 2014) 121.

43 In practice, however, the reporting periodicity is not always respected (see 3.3 below). In addition, the reporting cycle may de facto vary depending on whether the Committee applies Rule 65(2) on the consolidation of reports, which allows the State party to submit two or more periodic reports at the same time (see 3.3.1 below); requests additional information or a follow-up report within one year (see 3.1.6 below); as well as whether the State party has accepted the simplified reporting procedure (see 3.2 below).

3.1.2 Additional Sources of Information

44 The State report is the first source of information. However, the Committee, particularly the Country rapporteurs, bases its work on collective information from various sources. As an additional source of information, the Committee often uses official UN documents, such as information from the HRC and the Special Rapporteur on Torture.[86]

45 Similarly, of crucial importance for the work of the Committee are the information submitted by *civil society organizations and media reports*. In practice, the input of NGOs often takes the form of *shadow reports,* also called alternative or parallel reports. These reports are often structured on Article-by-Article basis similarly to the reports of States parties, but may also focus on specific thematic issues. NGOs may engage with the Committee by providing *written information* for the LOIs and LOIPR, for the examination of the State party's report, as well as for the follow-up phase.[87] NGOs that have submitted written information for the examination of a give State party's report may also meet with the Committee in *formal in-session briefings* of around one hour. The Committee encourages NGOs to coordinate their presentations in order not to repeat each other's information. This role is currently carried out by the World Organisation against Torture (OMCT).[88] In addition, NGOs can organize *informal briefings* with CAT members. These are not in-session and there is no interpretation provided by the OHCHR.

46 With the exception of the confidential reports, information sent by NGOs to the Committee is published on the OHCHR website. This practice allows the State party to be better prepared to respond to questions that may be posed by the Committee on the basis of such information. It is not uncommon for Committee members themselves to refer to information provided by international NGOs such as Amnesty International, Human Rights Watch, the Association for the Prevention of Torture (APT), the OMCT, and a great number of national NGOs.[89] Similarly, information may be provided by *NHRIs and NPMs*.[90]

47 In the literature, it has been noted that the use of additional sources has made the system 'increasingly triangular', shifting from a bilateral dialogue between the State and

[86] cf Ingelse (n 69) 143, 150.

[87] For practical guidance see the website of the OHCHR, 'Information for Civil Society Organisations and National Human Rights Institutions (NHRIs)' <http://www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx> accessed 11 November 2017, where the Committee indicates the specific deadlines to be followed; and the CAT Working methods, VIII; see also APT, 'Alternative reporting to the Committee Against Torture' (2013); OMCT (n 85) 121; Centre for Civil and Political Rights, 'UN Human Rights Committee: Participation in the Reporting Process. Guidelines for Non-Governmental Organisations (NGOs)' (3rd edn, 2015). For specific information on the follow up procedure see CAT, 'Guidelines for Follow-up to Concluding Observations' (2015) UN Doc CAT/C/55/3, para 14; and OHCHR, 'How to Follow up on UN Human Rights Recommendations: A Practical Guide for Civil Society' (2014) 33.

[88] A/72/44 (n 78) 15.

[89] Ingelse (n 69) 142.

[90] A/70/44 (n 63) 18; see OHCHR, Information for CSO and NHRIs (n 87).

the treaty bodies to a dialogue in which the State is confronted with potentially conflicting information provided by other sources.[91]

3.1.3 Pre-sessional Preparation: List of Issues

48 Once the State party has submitted its report, the Committee examines it under Article 19(3) starting a dialogue with the State's representatives. To this extent, the two Country rapporteurs prepare the *list of issues* (LoIs) to be sent to States whose periodic reports will be considered during the upcoming sessions. The Committee does not issue LoIs for initial reports. The LoIs are intended to clarify and update certain questions and issues as well as to focus, without restricting, the dialogue with the States on matters of particular interest for the Committee.[92] The list should be uniform on the one hand, but tailored with details relating to the specific circumstances of each State party. They are prepared, inter alia, on the basis of the information contained in the report, the Committee's past concluding observations and information from other treaty bodies, special procedures and from the UN system as well from others sources, including regional human rights mechanisms, NHRI, NPMs, and NGOs and adopted by the Committee in plenary. States parties reply in writing but also send national delegations to Geneva during the session in order to discuss the issues orally.

49 For States that have accepted the simplified reporting procedure the LoIs is adopted by the Committee prior to the State report (see § 93 below).

3.1.4 Consideration of States Reports by the Committee (Article 19(3))

3.1.4.1 The Procedure of the 'constructive dialogue'

50 The consideration of State reports takes the form of a *constructive dialogue* aiming to give the Committee a picture of the situation with regard to torture and other forms of ill-treatment in the State party.

51 The presentation and examination of a report takes place in *a public session* over two consecutive half-day, which is live streamed via the UN Web TV. First, the delegation presents the report and provides additional information on new legislative developments or other facts that occurred after the submission of the report and responds to the LoIs. Next, the Country rapporteur and other Committee members make initial observations and ask additional questions to the State party which are subsequently answered by the delegation. Then, the Committee members can address other questions to the State representatives and make their final remarks. They can also raise matters that had not been referred to in the LoI. On the following day, the second meeting will be devoted to the replies of the State party's representatives to the questions posed by the members during the first meeting as well as to any follow-up issues that might be raised by the Committee. [93]

52 The number of reports considered in each session varies from three up to six. At its forty-third session, the Committee decided that States parties' reports will be scheduled for examination according to the following *order of priority*: initial reports, reports presented under the simplified reporting procedure, long overdue periodic reports, and date of submission of periodic reports. If deemed necessary, the Committee may decide to prioritize a report over others.[94]

[91] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2014) 877.

[92] CAT, 'Working methods' III (A). [93] ibid III (B).

[94] CAT, 'Report of the Committee against Torture Forty-third Session (2–20 November 2009) Forty-fourth Session (26 April–14 May 2010)' (2010) UN Doc A/65/44, para 28.

53 In 2014, further to the GA Resolution 68/268 of 2014, the Chairpersons of the treaty bodies put forward recommendations aimed at harmonizing treaty bodies' practices and adopted a *Guidance note on constructive dialogue*.[95] Though pointing out the need to respect the Convention's 'specificities' in the dialogue, the Committee adopted such Guidance note at its fifty-fifth session in 2014.[96]

3.1.4.2 Attendance from Committee Members and Country Rapporteurs

54 According to the Committee's practice, members do not participate in the consideration of reports of States parties of which they are nationals.[97] They are, however, present in the room. But in the past, under Chairperson *Joseph Voyame*, the nationals in question even had to leave the conference room.

55 At its fifth session in 1990, the Committee, on the basis of Rule 61, decided that the Chairperson should designate, in consultation with the Committee members, *Country rapporteurs* for the consideration of State reports.[98] Normally, the Committee appoints two of its members to act as Country rapporteurs for each report. One member can act as rapporteur for more than one report during the same session. The Country rapporteurs would be responsible for preparing the discussion; formulating the main questions, remarks, and concluding observations; and would be involved with drafting the LoIs.[99] The names of the Country rapporteurs with their respective countries is indicated in the annual reports.[100]

3.1.4.3 Attendance by States Parties

56 Rule 68 governs the *attendance by States at the examination of reports*.[101] In order to make the constructive dialogue possible, representatives of States are requested to attend the sessions in which their reports are being considered. After being duly notified by the Committee,[102] if a State party fails to send a representative to the session, the Committee may, at its discretion, decide either to postpone the consideration of the report and notify the State party that, at a specified session, it intends to examine the report (Rule 68(2)(a)); or alternatively, to proceed at the session originally specified and submit to the State party its provisional concluding observations. The final concluding observations should be adopted at its following session (Rule 68(2)(b)).

57 In practice, the Committee has made used of both options. For example, in 2005 at its thirty-fourth session, the Committee was not able to consider the initial report of *Togo* due to the absence of its representatives and, hence, decided to postpone such an examination to the thirty-sixth session in May 2006 under Rule 68(2)(a). *Togo* excused

[95] See UN, 'Constructive Dialogue between Treaty Bodies and States Parties' (2014) UN Doc HRI/MC/2014/3; UN, 'Report of the Chairs of the Human Rights Treaty Bodies on Their 26th Meeting' (2014) UN Doc A/69/285, Annex I; and GA Res 68/268 of 9 April 2014 (n 5) para 5.

[96] A/70/44 (n 63) para 26(b).

[97] ibid, Annex VI para 11.

[98] CAT, 'Report of the Committee Against Torture' (1995) UN Doc A/50/44, Annex IV; see also CAT, 'Working methods' III.

[99] CAT/C/SR.574, para 35.

[100] Until 2014 the Committee had included an annex on Country rapporteurs in its annual reports. From its annual report of 2015 the Committee includes the list of Country rapporteurs directly under the 'consideration of reports submitted by States parties under article 19 of the Convention', see for the latest A/71/44 (n 63) paras 38–39.

[101] Rule 68 has been amended in 2002 at its twenty-eighth session, see CAT/C/SR.525, paras 16–29; and lastly at its fifty-first and fifty-second sessions see CAT/C/3/Rev.6.

[102] For the procedure on notification see Rule 68(1).

its absence by referring to the great difficulties the country faced at the scheduled time, which did not allow the Government to appoint a delegation and make the resources available for such a delegation to travel. In taking this decision, the Committee emphasized the importance of having the State delegation present during the examination of its report, particularly the initial report which was, in this case, over ten years overdue.[103] Also, on several occasions the Committee examined a report without representatives of the concerned States parties being present (Rule 68(2)(b)). For example, this occurred in 2003 for the initial report of *Cambodia, Cape Verde*, and *Antigua and Barbuda*,[104] and in 2012 and 2016 for the special reports of *Syria* and *Burundi* respectively.[105]

58 In order to facilitate States representatives' participation, where internet connections and time differences allow, the Committee may agree to conduct the dialogue via a *videoconference*.[106]

3.1.4.4 Request for Additional Reports or Information

59 If the report does not contain all the information required, the Committee may, according to Rule 69(2), request the State party in question to provide an additional report.[107] States can also be invited to withdraw their report if the latter is below the requested standard. For example, in November 1993 after a preliminary dialogue with the representative of *Belize*, the Committee decided to request the Government of this State party to withdraw the report submitted and to hand in a revised version of its initial report together with its second periodic report, which was also overdue, in a single document. In fact, the report[108] was extremely brief and did not contain any of the background information the Committee needed for its work.[109]

3.1.4.5 Meaning of 'general comments on the report'—Concluding Observations

60 After the dialogue with the delegation, as provided by Article 19(3), the Committee adopts its 'general comments on the report' and forwards these to the State party concerned which in reply may submit to the Committee any comment that it considers appropriate. This wording—simply referring to 'general comments' on the

[103] A/60/44 (n 63) paras 18–22; CAT, 'Report of the Committee against Torture Thirty-fifth Session (14–25 November 2005) Thirty-sixth Session (1-–19 May 2006)' (2006) UN Doc A/61/44, para 36; see also eg the examples of Guatemala and Belize who did not come to the respective sessions either, CAT/C/SR.215, CAT/C/SR.232, CAT/C/SR.91; see Ingelse (n 69) 144, note 87.

[104] For Cambodia see CAT/C/SR.574, para 36; CAT/C/CR/30/2; for Cape Verde see CAT, 'Concluding observations on Cabo Verde in the absence of a report' (2017) UN Doc CAT/C/CPV/CO/1,, para 2; for Antigua and Barbuda see CAT, 'Concluding Observations on Antigua and Barbuda in the absence of a report' (2017) UN Doc CAT/C/ATG/CO/1, para 2.

[105] For Syria see CAT, 'Report of the Committee Against Torture Forty-seventh Session (31 October–25 November 2011) Forty-eighth Session (7 May–1 June 2012)' (2012) UN Doc A/67/44, para 46; and CAT/C/SYR/CO/1/Add.2 (n 77) para 15; for Burundi see CAT/C/BDI/CO/2/Add.1 (n 79) para 6 and A/72/44 (n 78) para 36, where it is stated 'the [Burundian] delegation did not attend the second half of the dialogue, arguing that the review was based on non-governmental organization reports that had not been shared, that it went beyond the issues covered in the special report, and that the Committee had not allowed the delegation sufficient time to reply. The Committee dismissed those accusations, while providing the State party with the opportunity to submit its written replies and stressing its wish to continue the dialogue. On 12 October 2016, Burundi submitted its follow-up replies'.

[106] eg Antigua and Barbuda was offered this possibility in 2017 CAT/C/ATG/CO/1 (n 104) para 2; see also CTI, 'Reporting to the UN Committee Against Torture, CTI/UNCAT Implementation Tool 3/2017' (2017) 3.

[107] See above § 40. [108] CAT, 'Initial Report: Belize' (1991) UN Doc CAT/C/5/Add.25.

[109] CAT/C/SR.574, paras 1–12; CAT, 'Report of the Committee Against Torture' (2004) UN Doc A/49/44, para 46; A/50/44 (n 98) para 28.

one side, but then simultaneously adding that general comments are 'on the report' and shall be forwarded 'to the State Party concerned'—has raised the question as to whether Article 19(3) authorizes the Committee to issue comments addressing the situation of one specific State party or rather allows it to adopt only comments generally referring to all States parties.

61 As the drafting of Article 19 CAT was strongly influenced by the *experiences of the HRC* during the Cold War,[110] it is worth drawing a comparison with such instrument. Article 40(4) CCPR provides that the HRC shall study State reports and transmit 'its reports, and such general comments as it may consider appropriate to the States parties'. It is clear from a systematic interpretation of this provision that the examination of a State report is only completed when the HRC has summarized its conclusions as to the State party's compliance with its obligations under the Covenant in its own report and has sent it to all States parties. In addition to these country-specific reports, the HRC is entitled to formulate general comments on the basis of its experience in the State reporting procedure. These general comments are not country-specific but provide the HRC with an opportunity to clarify the meaning of the various provisions of the Covenant, above all the meaning of the human rights contained therein. While the HRC started in 1981 adopting general comments, first on the reporting obligations of States parties and soon thereafter on the meaning of individual rights, the Cold War prevented it for more than ten years from complying with its task of completing the reporting procedure by adopting country-specific reports with respective conclusions and recommendations.[111] Nevertheless, since 1984 it has become common practice for individual HRC members, first introduced by experts from Western States, to submit a quasi-concluding personal statement on the human rights situation of the State party concerned. After the end of the Cold War, the HRC started to appoint special rapporteurs on each State report and, since 1992, to adopt by consensus joint and fairly cautious comments on every State report, balancing 'positive aspects' with 'factors and difficulties impeding the application of the Covenant'. In 1997, the HRC introduced the term 'concluding observations' instead of 'comments', and in 2002 the first Special Rapporteur for Follow-Up on Concluding Observations was appointed.

62 The *drafting history of the Convention against Torture* shows that both the original Swedish draft of 1981 and the two proposals of the Chairman-Rapporteur of 1982 envisaged that the CAT Committee should transmit after the consideration of each State report its own 'comments or suggestions as it may consider appropriate' to the States parties. This formulation seems to have been taken from Article 9(2) CERD, which entrusted the CERD Committee to 'make suggestions and general recommendations based on the examination of the reports'. During the 1984 Working Group of the Commission on Human Rights, the *USSR* and its allies strongly urged that the words 'comments and suggestions' be replaced by 'general comments'. This was the only issue in Article 19 on which no compromise could be achieved. Since the Socialist States strongly maintained their opposition against any country-specific comments by the Committee, the Western and other States finally gave in and thereby saved the consensus on the Convention. It is thus clear from the *travaux préparatoires* that Article 19(3) CAT was not meant to empower the CAT Committee to formulate country-specific conclusions and recommendations. The text only refers to 'general comments' and not to both 'its reports' and 'general comments', as in Article 40(4) CCPR.

[110] See above § 2.
[111] cf Nowak, *CCPR Commentary* (n 61) 739ff.

63 On the other hand, under Article 19(3) the Committee is entitled to make 'such general comments *on the report* as it may consider appropriate' and forward these '*to the State Party concerned*'. A literal interpretation of this formulation indicates that the general comments are indeed country-specific and not addressed to all States parties, as in Article 40(4) CCPR.[112] In fact, the words 'general comments on the report' are somewhat contradictory and could only mean that the Committee should not become too specific in formulating its comments on an individual State Party.

64 However, since the CAT Committee started its work, the issue of interfering with State sovereignty turned out to be fairly uncontroversial in practice. The Committee did not feel restrained by the narrow wording and the drafting history of Article 19(3) and it never used the term 'general comments' for its country-specific comments, which were soon developed into fairly elaborate and critical conclusions and recommendations on each State report. Moreover, since 2002, the Committee has explicitly addressed the issue in its RoP, where it included a provision expressly allowing it to make not only 'general comments' but also to 'concluding observations or recommendations on the report as it may consider appropriate'. [113] The wording concluding observations is today widely used by the UN human rights treaty bodies, the chairpersons and other UN actors.[114] It is also preferable in order to distinguish it from the 'general comments on the provision of the Convention' regulated under Rule 74.[115]

65 Initially, the Committee elaborated its conclusions and recommendations immediately after the consideration of the report. In order to improve the quality, in 1998 the Committee decided to elaborate and adopt them after the consideration of the report.[116] Today, after consideration of the State report in public meetings, the Country rapporteurs draft a proposal for concluding observations, which is subsequently discussed and adopted in a closed plenary meeting of the Committee.[117]

66 The *structure of the concluding observations* has been revised several times. In the early years, there was no 'common' conclusion after the consideration of a State report but only individual members that presented their comments. Hence, the 'general comments' consisted in a summary of the different individual positions drawn up by the Chairperson.[118] These were not properly structured.[119] The Committee started in 1992 issuing 'common' concluding observations reflecting the position of the Committee as whole, and in 1994 to adopt properly structured concluding observations.[120] This

[112] In this sense see also Burgers and Danelius (17) 158, who affirm that 'the present Convention leaves no doubt on this question in its formulation of paragraph 3 of article 19, since this paragraph refers to comments 'on the report' (singular) and to the forwarding of such comments 'to the State Party concerned' (singular); Ingelse (n 69) 146.

[113] Rule 71. A reference to 'conclusions and recommendations' was first made in RoP as Amended by the Committee at its twenty-eighth Session in 2002 (CAT/C/3/Rev4, Rule 68); the Rule was then again amended at the forty-fifth session in 2010 (CAT/C/3/Rev.5) which substituted the wording 'conclusions' with 'concluding observations'.

[114] See eg UN, 'Concluding Observations' (2014) UN Doc HRI/MC/2014/2; GA Res 68/268 of 9 April 2014 (n 5).

[115] See above 3.1.5. [116] A/53/44 (n 68) 27. [117] CAT, 'Working methods' III (C).

[118] See eg Ingelse (n 69) 147; Ahcene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 260. In this regard, Ingelse notes that this was linked with the fact that at this time the Committee did not yet have Country rapporteurs, and that as soon as they were established in 1990 the Committee started publishing conclusions.

[119] CAT/C/SR.38, paras 75–84.

[120] See De Schutter (n 91) 872, who notes that the practice of 'common' concluding observations was first introduced by the CESCR in 1990; see also Ingelse (n 69) 148, who reminds that the first attempt of a properly structured concluding observations is to be found in the initial report of Paraguay see CAT/C/SR.161.

structure has been maintained mostly unchanged until today, concluding observations being structured as follows: (a) introduction; (b) positive aspects; (c) principals subjects of concern and related recommendations.[121] In respect to the original structure, the main difference seems to be that, as of 2006, the Committee has merged the parts of 'subject of concerns' and 'recommendations' thereby including its recommendations directly under each of the thematic subject of concerns.[122] Moreover, pursuant to a better harmonization of the treaty body system, at their twenty-fifth meeting in 2014 the Chairs have discussed the possibility to introduce a common format for concluding observations.[123]

67 The part on subject of concerns includes the pending follow-up issues from the previous reporting cycle, as well as the observations and recommendations of the Committee thematically clustered. At the end of the document, the Committee normally adds information on the follow-up procedure and 'other issues' covering for example its recommendations to made declarations under Articles 21 and 22 CAT; or ratify other human rights treaties; and, above all, the invitation to submit the next periodic report within a specific date.

68 According to Article 19(3), *States parties* may submit any *observation* deemed appropriate in reply to the Committee's conclusions and recommendations.[124] Article 19(4) authorizes the Committee, 'at its discretion', to 'include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24'. As of 2015, the Committee's annual reports no longer include the full text of the concluding observations.[125] Instead, they contain a list of the States reports considered and the concluding observations adopted by the Committee per each session. The full text of the concluding observations is published separately, referenced in the annual report, and made available online on the website of the OHCHR under the respective session.

69 Moreover, if a State party responds with any observations on the concluding observations, the Committee publishes them with an official document and posts them on the website.[126] It can only avoid this obligation by deciding not to include any of its own conclusions and recommendations in the annual report. Furthermore, if so requested, the Committee may also include a copy of the State report in the annual report.[127] In practice, no State has ever put forward this request, and the Committee has never done so. Since State reports are public documents, there does not seem to be any need to include a copy in the annual report, as envisaged in Article 19(4).

70 The Committee recommends that the State party widely disseminates, at the national level and in all the appropriate languages, the concluding observations as well as the State report and the State's written replies to the LOIs. States are obliged to publish the recommendations[128] and take those legislative and administrative and other measures

[121] See also CAT, 'Working methods' III (C).

[122] See A/60/44 (n 63) where the concluding observations included therein have a separate part on recommendations at the end; and A/61/44 (n 103) where these have been joint to the subject of concerns.

[123] For more details see HRI/MC/2014/2 (n 114) in particular the Annex 'Draft aligned format for concluding observations'.

[124] CAT, 'Working methods' III (C).

[125] GA Res 68/268 of 9 April 2014 (n 5) paras 4, 15; see also below Art 24.

[126] CAT, 'Working methods' III (C). An example of this practice are the observations submitted by the Government of Tunisia submitted in 1999 see CAT, 'Report of the Committee Against Torture' (1999) UN Doc A/54/44, para 105.

[127] Rule 71 (3). [128] Ingelse (n 69) 149.

that are required to ensure full national compliance with the provisions contained in the Convention. The steps taken must be recorded adequately for inclusion in the next report and be submitted to the Committee.[129]

3.1.5 Meaning of 'general comments on the provisions of the Convention' (Rule 74)

71 As the HRC, the CAT Committee uses the term 'general comments' only for the general statements on the interpretation of specific provisions of the Convention. The HRC derived its power from its State reporting functions under Article 40 CCPR. In its first general comment, the CAT Committee seemed to have based its power on Article 22(4) and its experience in the *individual complaints procedure*.[130] This seems surprising, as Article 22(4) does not contain any competence to adopt general comments. The practice also does not correspond to that of other treaty monitoring bodies, which elaborated general comments in the context of the State reporting procedure only. The reference to Article 22 was not reiterated in the subsequent General Comments No 2 and 3 but is included in the General Comment No 4. This could be explained by the fact that General Comment No 4 aims to clarify not only the scope of Article 3 but also issues concerning the admissibility and the merits of individual communications under Article 3.

72 Moreover, since its forty-fifth session in 2010, the Committee has also explicitly empowered itself to adopt 'general comments on the provisions of the Convention with a view to promoting its further implementation or assisting States parties in fulfilling their obligations' by adopting an express provision on general comments in its RoP (Rule 74).[131]

73 In contrast to the HRC, the Committee has been fairly reluctant to make use of such power with the first general comment being adopted only in November 1997 on Article 3. Since then, it has adopted three additional general comments, namely on Articles 2, 14, and 3.[132] The General Comment No 4 replaces General Comment No 1, hence, there are currently three General Comment into force.[133]

74 In 2015, with a view to harmonize their practices, the Chairpersons have put forward recommendations for the treaty bodies on how to conduct the consultation process for the elaboration of general comments.[134] These have been, for example, implemented by the Committee for the adoption of its revised General Comment No 4. On this occasion, the Committee has organized a public general discussion on the subject, making a first draft of the revised comment available online and explicitly soliciting feedback

[129] UN, Manual on Human Rights Reporting (n 66) 391.

[130] CAT, 'General Comment No 1 on the Implementation of Article 3 of the Convention in the Context of Article 22' (1998) UN Doc A/53/44, Annex IX, 52.

[131] See Rule 74; see also CAT, 'Working methods' IX. The words 'general comments' are also used in Rule 71(1) concerning concluding observations by the Committee. The reference is somewhat misleading, but was obviously intended to establish a formal link with the wording of Art 19(3) CAT. On the authority of the Committee to issue general comments see also Ingelse (n 69) 150.

[132] A/53/44 (n 68); CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2; CAT, 'General Comment No 3 on the Implementation of Article 14 by States Parties' (2012) UN Doc CAT/C/GC/3; CAT, 'General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22 (2017) UN Doc CAT/C/GC/4.

[133] CAT/C/GC/4 (n 132).

[134] UN, 'Consultation Process for the Elaboration of Treaty Body General Comments' (2015) UN Doc HRI/MC/2015/4.

written submissions and oral intervention from States parties, UN agencies and bodies, human rights mechanisms, NHRIs, CSOs, academic institutions, and other organizations, as well as individuals.[135]

3.1.6 Follow-up to Concluding Observations

3.1.6.1 Development of the Procedure

75 Follow up and implementation of recommendations are increasingly problematic. Hence, similarly to other UN treaty bodies, over the years, the Committee has gradually developed a follow-up mechanism under the reporting procedure.[136] The first step in this regard was the amendment of the RoP in 2002 and the establishment of the position of *Rapporteur for follow-up to concluding observations.*[137] In 2003, the Committee established a *procedure for follow-up* as well as criteria to identify and select recommendations for follow-up.[138] Such procedure was, then, periodically revised by the Committee. Key changes were adopted in 2005 with the decision to document the status of the follow-up replies provided by States in a chart;[139] and in 2007, with the decision to make public and available online the Rapporteur's letters to the States parties as well as all States parties' replies, and civil society submissions.[140] Additional developments occurred in 2011 when the Committee decided to make it more 'focused' on three main issues, ie investigations, prosecutions, and legal safeguards; [141] and in 2015 with the adoption of the *Guidelines for follow-up to concluding observations*.[142] Today the procedure has become 'an integral part of the reporting cycle' and a key mechanism for assessing the impact of the Committee's recommendations.[143] Further steps with regard to the follow-up procedure were discussed in August 2016. On this occasion, the Committee reflected on whether the reporting

[135] See OHCHR, 'Announcement of General Discussion on the Draft Revised General Comment on the implementation of article 3 of the Convention in the context of article 22' <http://www.ohchr.org/EN/HRBodies/CAT/Pages/GCArticle3.aspx> accessed 2 December 2017.

[136] As of December 2017 six treaty bodies have follow-up procedures in place: HRC, CERD, CEDAW, CRDP, CED, CAT.

[137] CAT/C/SR.525, paras 30–33.

[138] CAT, 'Report of the Committee Against Torture (2003) UN Doc A/58/44, para 12.

[139] The chart was published in the annual report from 2005 (A/60/44 (n 63) para 120) until 2012 (A/67/44 (n 105) para 82). As of 2013, the chart is no longer included in the annual reports but made available online on a separate webpage dedicated to follow-up to concluding observations see OHCHR, 'Follow-up to concluding observations' <https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/FollowUp.aspx?Treaty=CAT&Lang=en> accessed 2 November 2017.

[140] This decision was taken in 2007 at the thirty-eighth session see CAT, 'Report of the Committee Against Torture Thirty-seventh Session (6–24 November 2006) Thirty-eighth Session (30 April–18 May 2007)' (2007) UN Doc A/62/44, para 44; see also OHCHR, 'Follow-up to Concluding Observations' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/FollowUp.aspx?Treaty=CAT&Lang=en> 2 November 2017.

[141] With a view to strengthening its system, the Committee started a discussion on the follow-up procedure in 2009 see A/65/44 (n 94) para 77. Further to such process, and considering the growing number of items that were being identified for follow-up, in 2011 the Committee decided to focus its follow-up items on three key issues with the aim to provide a more coherent and focused procedure for States parties. Specifically, it was decided that follow-up requests should concern one of the following issues: investigations, prosecutions and legal safeguards; and when deemed necessary the issue of remedies and redress or other issues. The three issues indicated by the Committee were chosen on the basis of a detailed analysis of its follow-up procedure by the Committee according to which investigations, prosecutions, and legal safeguards resulted to be the most frequent follow-up items in its concluding observations. For more details see also CAT, 'Report of the Committee Against Torture Fifty-first Session (28 October–22 November 2013) Fifty-second Session (28 April–23 May 2014)' (2014) UN Doc A/69/44, paras 76–78.

[142] CAT/C/55/3 (n 87). For more information on the guidelines see A/70/44 (n 63) para 46.

[143] CAT/C/55/3 (n 87) para 1.

deadline could be shortened to six months for urgent matters; and how implementation of follow-up recommendations could be strengthened, focusing in particular on the role of civil society.[144] As the Guidelines for follow-up have codified the previous practice of the Committee and constitute an invaluable instrument for understanding the follow-up procedure to concluding observations, the analysis below will focus thereupon.

3.1.6.2 Criteria for Identifying and Selecting Recommendations

76 As indicated above, already at its Thirtieth session, the Committee had decided to select among its recommendations those which had to be followed-up as a matter of priority.[145] Initially, the Committee had the practice to identify between three and six recommendations,[146] selecting them based on three main criteria: 'they are serious, protective, and are considered able to be accomplished within one year.'[147] In 2015, the Guidelines have further elaborated on these criteria specifying that follow-up recommendations must: fall within the reach of specific thematic areas, ie legal safeguards, investigations, prosecutions, or redress to victims; be implementable within one year; and be 'specific, measurable, attainable, realistic and time-bound' so as to facilitate their implementation.[148] According to the Guidelines, a maximum of four follow-up recommendations should be selected.[149] Such elements seem to be in line with the 2014 GA Resolution 68/268 that encourages treaty bodies to adopt 'short, focused and concrete concluding observations'.[150]

77 In practice, at the end of each concluding observations the Committee includes a paragraph specifying the recommendations for which the State party need to provide follow-up information and the deadline for their submission. An extract of such recommendations, referred to as 'follow-up issues', is made available as a separate documents on the Committee's webpage.[151]

78 While States parties are requested to submit information only on the selected 'follow-up recommendations', they are additionally encouraged to submit a '*voluntary plan for the implementation of all or some of the remaining recommendations included in the concluding observations*'.[152]

3.1.6.3 The Rapporteur for Follow-up to Concluding Observations

79 The *Rapporteur for follow-up to concluding observations* is established under Rule 61 and regulated by Rule 72. Although Rule 72 allows for the appointment of 'at least one mandate holder', so far the Committee has nominated only one Rapporteur at a time.

80 The mandate of the Rapporteur is only briefly described under the RoPs, which provide that the Rapporteur shall 'assess the information provided by the State party' in consultation with the Country rapporteurs and report to the Committee (Rule 72(2)).

[144] See CAT, 'Committee Against Torture Discusses Follow-up to Concluding Observations and to Reprisals' Press release of 10 August 2016 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20360&LangID=E#sthash.0O6xtnjS.E3bE3C1z.dpuf> accessed 2 November 2017.

[145] A/58/44 (n 138) para 12

[146] A/60/44 (n 63) para 115; A/61/44 (n 103) para 44.

[147] A/62/44 (n 140) para 47; these criteria were subsequently reiterated see eg A/69/44 (n 141) para 78(a).

[148] CAT/C/55/3 (n 87) para 7.

[149] In the past, the Committee identified between three and six recommendations see eg A/60/44 (n 63) para 115; A/61/44 (n 103) para 44.

[150] GA Res 68/268 of 9 April 2014 (n 5) para 6.

[151] The 'follow-up issues' are not given a specific UN symbol but are published online as extracts of the concluding observations.

[152] CAT/C/55/3 (n 87) para 11.

On the contrary, the Guidelines seem to provide a broader mandate encompassing various activities ranging 'from the adoption of concluding observations to the discontinuation of the follow-up procedure'.[153] In practice, they include (1) seeking and receiving information concerning the State party's implementation of the Convention and compliance with the Committee's conclusions and recommendations upon the former's initial, periodic or other reports; (2) assessing such information; and (3) communicating with the States parties under the follow-up procedure. The type of communication with the States parties may vary depending on whether the State has or not submitted follow-up information and, if so, on the conclusions reached by the Rapporteur when assessing the information provided. The Rapporteur is also mandated to present to the Committee at each session the so-called 'progress report' on the activities he/she has undertaken pursuant to the mandate. A summary of the progress report is included in the annual report.[154]

3.1.6.4 The Submission of Follow-up Report by the State Party

81 The State party shall report the developments regarding the principal areas of concern and recommendations to the Committee, through its Rapporteur. The follow-up report should include 'sufficient information' for the Committee to assess whether or not the recommendations have been implemented. It must be in one of the UN official languages and respect the 3,500 word limit.[155] The deadline for submission by the State party concerned of its follow-up report is generally set at one year. Such reports are published in the Committee's website under the name of 'follow-up State party's report.[156] As it will be seen below, if the follow-up report is considered 'insufficient' by the Committee, the State is requested to submit an additional State party's follow-up report. In addition to States parties, follow-up information may also be submitted by NHRIs, NGOs, and other stakeholders. The Committee encourages these stakeholders to submit that information within three months of the State party's deadline.[157]

3.1.6.5 Analysis of the State Information by the Rapporteur for Follow-up

82 The Rapporteur will then proceed with an assessment of the information received by the States parties and other stakeholders. The scope of the assessment covers the quality and extent of the information provided as well as the degree of implementation of the recommendations. Information may be classified as '*satisfactory*' when they are thorough and extensive, and relating directly to the recommendations; '*partly-satisfactory*' when they are thorough and extensive but not fully respond to the recommendations; '*unsatisfactory*' when they are vague and incomplete and/or fail to address the recommendations. A fourth category is applied when the State party does not provide any response.[158] Similarly, the assessment of the *implementation degree of the recommendations* can be graded on the basis of six different categories,[159] as it is the case for the *implementation plans* for which three grading categories exist.[160]

[153] ibid, para 4. [154] ibid, para 6. [155] ibid, para 12.

[156] The UN symbol of follow-up reports is composed by the symbol of the relevant concluding observations and '/Add.1', '/Add.3', etc.

[157] For further guidance see CAT/C/55/3 (n 87) 14ff; and Centre for Civil and Political Rights (n 87) 16.

[158] CAT/C/55/3 (n 87) para 19.

[159] ibid, para 20. The categories in relation to the implementations of the recommendations are: A largely implemented; B1 partially implemented; B2 partially implemented; C not implemented; D not enough information; E counteracted.

[160] ibid, para 21. The categories in relation to the implementation plan are: A largely addresses all recommendations; B addresses only some recommendations; C not provided.

3.1.6.6 Communication with the States Parties

83 Once the information provided has been assessed, ie between fifteen and eighteen months after the adoption of the concluding observations,[161] the Rapporteur will establish a dialogue with the State party concerned in cooperation with the respective Country rapporteur.

84 When the State party fails to submit its report, the Rapporteur will send a *reminder*. According to the Guidelines, a maximum of two reminders shall be sent: the first three months and the second six months after the deadline for the submission of the follow-up report.[162] Similarly, if the State has provided insufficient information (category D), the Committee may send an *additional request for information* asking the State to provide the additional information. States are normally requested to provide such information in the next reporting cycle.[163] In addition, the Rapporteur will interact with the State party, and request consultations with its representatives,[164] modelling its communication 'registry' based on the grade assigned during its assessment on the implementation of the recommendation.[165] The follow-up procedure can be *discontinued* only if the information submitted by the State party is satisfactory and the recommendations have been considered 'largely implemented'.[166]

85 Finally, the Guidelines attempt to coordinate the reporting procedure with the follow-up procedure. They stipulate, on the one side, that the LoIs or LOIPRs for the subsequent reporting cycle should include recommendations that have not been fully implemented or have not yet received reply; and, on the other side, that concluding observations should integrate the outcome of the follow-up procedure.[167]

86 More generally, another way to follow-up to the Committee's concluding observations may be the Universal Periodic Review (UPR). Making reference to the Committee's recommendations in the UPR will also facilitate a more coordinated and integrated approach between different mechanisms.[168]

3.2 Simplified Reporting Procedure (Rule 66)

87 The problem of late and non-reporting seems to be particularly relevant for the CAT Committee, which is among the UN human rights treaty bodies per lowest reporting rate.[169] As of December 2017, the CAT reporting procedure counted sixty-eight overdue reports, with twenty-eight initial and forty periodic overdue reports. Some initial reports are even due after more than twenty years.[170]

[161] ibid, para 22.

[162] ibid, para 27. These reminders are published on the Committee's website.

[163] The Committee's letter(s) requesting additional information to the States parties are published on the Committee's website. In this regard, it should also be noted that since 2006 the Rapporteur has also identified a list of 'recurring concerns' which are not fully addressed by States parties in their follow up replies. See A/62/44 (n 140) para 47, and following annual reports.

[164] CAT/C/55/3 (n 87) paras 26, 28. [165] ibid, paras 23–25. [166] ibid, para 31.

[167] ibid, paras 29–30. The need to streamline the follow-up with the simplified procedure was already raised in the past see eg CAT, 'Report of the Committee Against Torture' (2011) UN Doc A/66/44, para 74; CAT, 'Report of the Committee Against Torture Forty-ninth Session (29 October–23 November 2012) Fiftieth Session (6–31 May 2013)' (2013) UN Doc A/68/44, para 92; A/69/44 (n 141) para 89.

[168] Centre for Civil and Political Rights (n 87) 21.

[169] See above § 4. See also OHCHR 'List of States Parties without Overdue Reports' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx> accessed 2 November 2017; see also HRI/MC/2016/2 (n 3) para 10.

[170] eg Somalia (since 1991); the Seychelles and Niger (since 1993); Antigua and Barbuda (since 1994); Cote d'Ivoire and Malawi (since 1997), and Bangladesh (since 1999). See also OHCHR, 'List of States Parties

88 In order to overcome such challenges, in parallel to the several initiatives at the general UN level,[171] also the Committee has developed various mechanisms aimed at improving the States parties' compliance with their reporting duty.

89 One of such mechanisms is the so-called *simplified reporting procedure*, also referred to as *optional reporting procedure* or *list of issues prior to reporting procedure (LOIPR)*. The traditional reporting procedure described above has been the only reporting procedure followed by the Committee until 2007. However, after that date, States parties may report under a new optional procedure.[172] The Committee adopted such new procedure at its thirty-eighth session in 2007, thereby being the first human rights treaty body to introduce it.[173] Since then, seven additional treaty bodies have agreed to offer to States parties the simplified reporting procedure.[174] The procedure is regulated under Rule 66.

90 The simplified reporting procedure remains *optional*, meaning that it applies only to States parties that have formally accepted it.[175] Once a State party has accepted the simplified reporting procedure, there is no need to reiterate the acceptance for each new reporting cycle.[176] At the end of each concluding observations, the Committee reminds States parties reporting under the simplified reporting procedure to continue submitting their reports under this procedure and indicates that it will transmit a LOIPR in order to enable them to prepare the next periodic report.[177] In addition, the Committee encourages the States parties reporting under the traditional procedure to accept the new simplified procedure by sending them a *note verbale* as their periodic reports become due and by including invitations in its concluding observations.[178]

91 Initially introduced on a pilot basis,[179] considering the positive feedback received and the high rate of acceptance of the simplified reporting procedure by States parties, the procedure was then adopted on a regular basis as of 2009 (forty-second session).[180]

without Overdue Reports' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx> 2 November 2017.

[171] See above § 5.

[172] A/62/44 (n 140) para 23. At its fifty-second session, the Committee decided to refer to this procedure as the 'simplified reporting procedure (lists of issues prior to reporting)'. See also CTI (n 106) 2.

[173] UN, 'Implementation by Treaty Bodies of the Conclusions and Recommendations of the Treaty Body Chairpersons at Their Twenty-sixth Meeting in the Framework of General Assembly Resolution 68/268' (2015) UN Doc HRI/MC/2015/2, para 7.

[174] They are HRC, CMW, CRPD, CRC, CESCR, CEDAW, CERD. In practice, the procedure applies to all but the OPCAT and CED as the OPCAT does not have a reporting procedure at all and that CED does not have a periodic reporting procedure. The modalities of the simplified reporting procedure vary according to the treaty body. See HRI/MC/2015/2 (n 173) paras 5–16.

[175] UN, 'Simplified Reporting Procedure' (2014) UN Doc HRI/MC/2014/4, para 19.

[176] Information provided by the Secretariat of the Committee against Torture.

[177] See eg CAT, 'Concluding Observations: Finland' (2017) UN Doc CAT/C/FIN/CO/7, para 37; HRI/MC/2014/4 (n 175) paras 17, 23.

[178] See eg CAT, 'Concluding Observations: Iraq' (2015) UN Doc CAT/C/IRQ/CO/1, para 36; HRI/MC/2014/4 (n 175) paras 17, 23.

[179] At its thirty-eighth session, in 2007, the Committee had decided to introduce the new procedure on a trial basis for periodic reports falling due in 2009 and 2010, with the exception of reports that had already been submitted. During this trial period, the Committee sent the LOIPR together with a request for acceptance for the procedure in order to provide States parties with a concrete example of the LOIPR. This approach was later amended by Committee at its forty-second session, when it decided to draft, adopt and transmit the LOIPR only after an explicit agreement of the procedure by the States party. See A/62/44 (n 140) para 24; HRI/MC/2014/4 (n 175) paras 16, 19.

[180] A/64/44 (n 64) para 27; CAT/C/47/2 (n 6) para 9, 33(b).

At the same session, the Committee also decided that it would draft, adopt, and transmit LOIPRs only after an explicit agreement of the procedure by the States party.[181] So far, the Committee has confirmed its decision to continue with such procedure at each reporting cycle.

92 At its forty-sixth session in 2011, the Committee undertook a *preliminary evaluation* of the simplified reporting procedure and proposed various measures to improve the procedure as well as the effectiveness of the Committee's working methods.[182] Proposals included, inter alia, the application of the procedure to initial reports; the introduction of simplified LOIPRs for States parties that report regularly and cooperate with the Committee; the adoption of a new procedure for the review of a State party in the absence of a report; the adoption of short guidelines on replies to LOIPRs; and the limitation of the number of issues included in the LOIPR to thirty focused questions or paragraphs.[183] Most of these issues were discussed by the Committee during a retreat on the working methods held in 2014 at its fifty-third session. There, the Committee decided to offer the simplified reporting procedure to States parties with long overdue initial reports. It further decided to establish a working group responsible for a substantive evaluation of the simplified reporting procedure.[184] Following-up to the retreat, a preliminary substantive evaluation and a private discussion on this topic was held during the Committee's fifty-fifth session.[185]

93 In contrast to the traditional one, the simplified procedure has only three steps: the adoption of the LOIPR by the treaty body and its transmission to the State party; the submission of written replies to the LOIPR by the States; and lastly the constructive dialogue. One of the main differences is that the list of issues is sent to the State party before it has submitted its national report and with the main aim of guiding the State in the implementation of its reporting duty. In fact, the *key purpose* for the establishment of the simplified reporting procedure was to address the failure of States parties to reply to the standard list of issues in time as well as for practical reasons concerning the translation of documents.[186] More specifically, the procedure aims at (a) guiding States parties in the preparation and content of their periodic reports, thus improving the quality and focus of reports; (b) facilitating the reporting process; and (c) strengthening the States parties' capacity to fulfil their reporting obligations in a timely and effective manner.[187]

94 With regard to the *scope of application of the procedure*, the Committee has initially offered the procedure for all *periodic reports* falling due in 2009 and 2010 regardless of the number of years the report was overdue. As a general principle, it did not however apply the procedure to *initial reports*.[188] But further to its 2014 retreat on working methods, the Committee has decided to offer the simplified reporting procedure also to States with long overdue initial reports. Bearing in mind the limited capacity of the Secretariat, however, this exception is applied only to two States per year.[189]

[181] HRI/MC/2014/4 (n 175) para 19, in this sense the Committee revised its previous approach to send sending the LOIPR simultaneously with the request for acceptance of the procedure by the State party.
[182] CAT/C/47/2 (n 6). [183] ibid 38; HRI/MC/2014/4 (n 175) para 25.
[184] A/71/44 (n 63) para 30. [185] ibid, paras 21(b), 30. [186] A/69/285 (n 95) para 29.
[187] A/66/860 (n 5) para 4.2.1; CAT/C/47/2 (n 6) para 3.
[188] A/62/44 (n 140) para 24; HRI/MC/2014/4 (n 175) para 16; CAT/C/47/2 (n 6) para 2.
[189] See also below § 98.

95 Under this new procedure, the CAT Committee prepares and adopts lists of issues, known as the LOIPR, which are then transmitted to States parties prior to the deadline for the submission of their respective periodic reports.[190] The LOIPR are drafted[191] and adopted depending on the respective due date of each State party's report,[192] in order to be transmitted to the relevant State party at least one year (usually eighteen to twenty-four months) in advance of the due reporting date.[193] If recent concluding observations of the Committee exist, they constitute the basis of the LOIPR.[194] The *written replies to the LOIPR* constitute the State party's report and fulfil its reporting obligations under Article 19.[195] No further written information is required from the State party prior to the consideration of its report during the constructive dialogue.[196]

96 Reports submitted under the simplified reporting procedure are to be examined no later than eighteen months after submission in order to ensure that they remain current.[197] If reports cannot be considered in a timely manner, the Committee would have to adopt and transmit a new LOIPR in order to ensure that the information provided is updated.[198] With the exception of initial reports, reports received under the simplified reporting procedure are thus prioritized by the Committee in terms of scheduling their consideration at upcoming sessions.[199]

97 In addition, States Parties are encouraged to submit and update a *common core document*, as described in the *Harmonized Guidelines on Reporting*.[200] The Committee has not yet developed specific guidelines for reporting under the simplified reporting procedure.[201] In line with the word limits imposed to all States parties' documentation, the GA has similarly called upon treaty bodies to limit the number of questions to be included in the LOIPR.[202]

98 In practice, the simplified reporting procedure has been offered to States for all periodic reporting since 2009; and for two long overdue initial reports per year as of 2015. As of May 2017, with regard to *periodic reports*, out of the 128 States parties that were at the periodic reporting stage: ninety-four States (73.5%) have expressly accepted the simplified reporting procedure; four States (3%) have declined to report under it; and thirty States (23.5%) have not yet answered or have not been invited to report under it.[203] With regard to *long overdue initial reports*, as of May 2017, the procedure has been offered

[190] A/62/44 (n 140) paras 23–24. As of 2009 at its forty-second session the Committee decided that it would send LOIPRs only after an explicit agreement of the procedure by the States party and revised its previous approach to send sending the LOIPR simultaneously with the request for acceptance of the procedure by the State party. In this sense, see HRI/MC/2014/4 (n 176) para 19.

[191] For the outline of the LOIPR used by the CAT Committee see HRI/MC/2014/4 (n 175) Annex I.

[192] CAT/C/47/2 (n 6) para 4; HRI/MC/2014/4 (n 175) para 22.

[193] CAT/C/47/2 (n 6) para 4; HRI/MC/2014/4 (n 175) para 22.

[194] HRI/MC/2014/4 (n 175) para 21. [195] A/62/44 (n 140) para 23; CAT/C/47/2 (n 6) para 5.

[196] CAT/C/47/2 (n 6) para 6. [197] HRI/MC/2014/4 (n 175) para 22.

[198] CAT/C/47/2 (n 6) para 6. [199] ibid, para 7.

[200] Generally, on the common core document see above § 41. On the core document in the framework of the simplified procedure see HRI/MC/2014/4 (n 175) para 43.

[201] ibid, para 50. [202] GA Res 68/268 of 9 April 2014 (n 5) para 16.

[203] A/72/44 (n 78) para 30. The simplified reporting procedure was rejected by the following four countries: Algeria (for its fourth periodic report due in 2012); China (for its fifth periodic reports due in 2012); Sri Lanka (for its fifth periodic report due in 2015); and Uzbekistan for its fourth and fifth periodic reports due in 2011 and 2017 respectively). For an overview of the acceptance status of the simplified reporting procedure for periodic reports see the OHCHR 'Optional Reporting Procedure' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/OptionalReporting.aspx?TreatyID=1&Lang=En> accessed 2 November 2017.

to six States: Antigua and Barbuda, Cape Verde, Côte d'Ivoire, Malawi, Seychelles, and Somalia.[204] Côte d'Ivoire, Malawi, and Somalia have accepted the offer.[205]

99 All in all, the Committee considers the simplified reporting procedure as a positive step that facilitates the reporting process and helps States parties to fulfil their reporting obligations.[206] The Committee has, for example, welcomed the relatively high *reporting rate under the simplified reporting procedure*.[207] Nevertheless, despite some progress having been achieved, the problem of late or non-reporting persists also under the new procedure.[208] Moreover, the Committee has identified some additional challenges. For example, it stressed that the procedure of drafting LOIPRs has substantially increased its workload as their preparation requires more work than the LoIs prepared by the Committee under the traditional reporting procedure.[209] Due to its comparatively small membership, the Committee is therefore dependent on significant support from the staff of the OHCHR.[210] Moreover, the Committee highlighted the need for a standard and consistent approach of human rights treaty bodies to addressing delayed replies to the LOIPR.[211]

3.3 Other Measures to Address the Problem of Overdue Reporting

3.3.1 Consolidation of Reports (Rule 65(2))

100 Other measures to address the problem of overdue reports are regulated by Rule 65(2). According to this rule, the Committee may consider, in appropriate cases, information contained in recent reports as covering information that should be included in overdue reports;[212] and recommend States parties to consolidate their periodic reports, ie to combine several periodic reports in one single submission.[213]

3.3.2 Reminders and Statement in the Annual Reports (Rule 67)

101 According to Rule 67(1), the Secretary-General informs the Committee of all cases of non-submission of reports. The latter may transmit to a State party a *reminder* in case of non-submission of a report. In this regard, Rule 67(1) simply states that the Committee 'may' transmit a reminder to the State concerned without giving any further details as to the circumstances in which the reminder should be sent.[214] At its fifty-third session in 2015, the Committee has reviewed its practice and has, since then, sent reminders to all States parties

[204] The Committee offered the procedure to Seychelles and Cape Verde at its fifty-third session in 2014; to Antigua and Barbuda and Côte d'Ivoire at its fifty-sixth session in 2015; and to Malawi and Somalia at its fifty-ninth session in 2016 see A/72/44 (n 78) para 34.

[205] A/72/44 (n 78) para 30. [206] ibid, paras 26, 31; CAT/C/47/2 (n 6) para 19, 33(a).

[207] CAT/C/47/2 (n 6) para 21.

[208] For up to date statistics see OHCHR, 'Optional Reporting Procedure' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/OptionalReporting.aspx?TreatyID=1&Lang=En> accessed 2 November 2017.

[209] A/71/44 (n 63) para 26. [210] ibid; A/69/285 (n 95) para 29.

[211] A/69/285 (n 95) para 29.

[212] This measure was introduced at the twenty-eighth session in 2002 see CAT/C/SR.521, paras 27–32; CAT/C/3/Rev.4.

[213] This measure was introduced at the forty-fifth session in 2010 see CAT/C/3/Rev.6.

[214] This practice was initially started in 1989, at its third session see CAT/C/SR.38, paras 10–11; A/48/44 (n 75) para 33. At their eleventh meeting in 1999, the Chairpersons of the treaty monitoring bodies decided to introduce a new system providing for an annual outlining of the reporting history of States parties in order to remind them of their reporting obligations, including the CAT (CAT, 'Report of the Committee Against Torture' (2000) UN Doc A/55/44, para 32). Despite this new system, the Committee against Torture continued sending reminders to the States parties who did not comply with their reporting duty.

whose initial reports were overdue as well as to all States parties whose periodic reports were overdue for four or more years.[215] Information on what specific reminders have been sent by the Committee can be found in the annual report.

102 Furthermore, if a State party fails to submit a report after a reminder, the Committee shall so note in a *statement in its annual report* to the General Assembly.[216] Since 1996, the Committee used to include in its annual reports an annex on the status of reporting presenting the situation regarding all overdue reports.[217] The practice to publish such annex in the annual report has however been abandoned as of 2015 due to the word limit imposed to all UN documents. Despite this, a list showing the status of overdue reports is made available online at each session as part of the provisional agenda.[218]

3.3.3 Examination in the Absence of a Report (Rule 67(3))

103 According to Rule 67(3), the Committee may inform the defaulting State of its intention to examine the measures taken by the State party *in the absence of a report*.[219] In a spirit of cooperation, the Committee uses this measure only as a last resort, ie in case of long overdue reports and after having sent specific reminders or having offered the possibility to report under the simplified procedure.

104 To date, the Committee has examined four States in the absence of a report, namely Guinea,[220] Cape Verde,[221] Syria,[222] and Antigua and Barbuda.[223] The rule was applied three times (Guinea, Cape Verde, and Antigua and Barbuda) in relation to initial reports, and once (Syria) in relation to a special report.

105 Despite all positive steps taken thus far to overcome the problem of overdue reports, it seems that the Committee did not manage to bring States parties into full compliance with regards to the reporting procedure. To this extent, one should consider that some of these initiatives aiming at strengthening the treaty bodies, such as the simplified reporting procedure, have been adopted only a few years ago and it will be possible to measure their impact only in the long run. On the other hand, it seems that the problem of overdue reports is a structural one that can only be resolved by a major structural reform. In this sense, one solution could be to overhaul the system of periodic State reports and replace it with a system requiring one comprehensive report every five years. The existing

[215] A/72/44 (n 78) para 32.

[216] See Rule 67(2); this practice was initially started in 1989, at its third session. See CAT/C/SR.48, para 40.

[217] CAT, 'Report of the Committee Against Torture' (1996) UN Doc A/51/44, para 21. For every State party, the list detailed the date on which the report was due and—until 2000—the number of reminders sent to the State party (A/52/44 (n 76) para 20). Since 2000 the number of reminders has not longer been indicated in the list. See A/55/44 (n 214) para 29. See also below Art 24.

[218] See the OHCHR 'Sessions for CAT' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=cat> accessed 1 November 2018.

[219] This measure was introduced at the twenty-eighth session in 2002; see CAT/C/SR.260, para 14; CAT/C/SR.521, paras 33–37; CAT/C/SR.525, paras 12–15.

[220] Although the Committee has considered its concluding observations on Guinea as being adopted in the absence of its initial report, formally Guinea had submitted a national report the evening before its delegation appeared before the Committee, which however did not allow the Committee to study it in time for the first day of the dialogue or to have it translated into the Committee's working languages. See CAT, 'Concluding Observations in the Absence of Its Initial Report: Guinea' (2014) UN Doc CAT/C/GIN/CO/1, para 2.

[221] Cape Verde was examined in the absence of an initial report at the fifty-ninth session see CAT/C/CPV/CO/1 (n 104).

[222] CAT/C/SYR/CO/1/Add.2 (n 77).

[223] Antigua and Barbuda was examined in absence of an initial report at the sixty-first session see CAT/C/ATG/CO/1 (n 104).

system of treaty monitoring, which currently consists of several expert bodies, could be condensed into one single permanent expert examination body consisting of a sufficient number of full-time experts. Finally, an international court of human rights, composed of full-time judges, could be established in order to oversee the adjudication of complaints.[224]

3.4 Reprisals Following to Article 19

106 In contrast to other human rights treaties, the CAT does not contain a provision addressing expressly the issue of reprisal against individuals or organizations as a consequence for having communicated with its Committee. However, in setting out the right to compliant under Article 13, the Convention stipulates that 'steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given'.[225]

107 As with other UN treaty bodies,[226] the CAT Committee has recently clarified its position on reprisals. At its forty-ninth session in 2012, it decided to adopt a mechanism to prevent, monitor, and follow up cases of reprisals against civil society organizations, human rights defenders, victims, and witnesses that engage and cooperate with the treaty bodies. To this extent, it established two Rapporteurs on reprisals: one for reprisals under Article 19 and one under Articles 22 and 20, and adopted a statement outlining its policy.[227] These decisions came soon after the 2012 recommendations made by the OHCHR in the report on the strengthening of human rights treaty bodies, who urged treaty bodies to set up 'mechanisms for action' against reprisals and a 'focal point among its membership to draw attention to such cases'.[228] Finally, as a clear endorsement of the *San José Guidelines*,[229] at its fifty-fifth session in 2015 the Committee adopted detailed *Guidelines on the Receipt and Handling of Allegations of Reprisals under Articles 13, 19, 20 and 22*.[230] One section of such guidelines describe measures to be taken in case of reprisals under Article 19.[231]

108 The Committee's policy on reprisals applies to any 'individuals, groups and institutions' that were subject to a reprisal measure as a consequence of seeking to cooperate with or otherwise assist the Committee.[232] Cooperation with the Committee may include 'providing it with information, or by communicating about the findings or actions of the Committee, advancing compliance with reporting obligations or assisting the Committee in the pursuit of any of its functions'.[233]

[224] See Nowak, *CCPR Commentary* (n 61) 719; Manfred Nowak 'The Need for a World Court of Human Rights' (2007) 7 HRLR 251–259; Julia Kozma, Manfed Nowak and Martin Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010).

[225] Such an explicit provision is included in OPCAT (Art 15); OP3-CRC (Art 4); OPCESCR (Art 13); OPCEDAW (Art 11). Some treaty bodies have regulated reprisals in their RoPs, ie CESCR; CEDAW; CRC; CRDP; CED. On reprisals under the CAT, see also Arts 13, 20, and 22. For an overview on other UN treaty bodies see UN, 'Reprisals in the Context of United Nations Human Rights Mechanisms' (2015) UN Doc HRI/MC/2015/3.

[226] HRI/MC/2015/3 (n 225) para 14.

[227] A/68/44 (n 175) para 27; CAT, 'Statement of the Committee Against Torture, Adopted at Its Fifty-first Session (28 October–22 November 2013) on Reprisals' (2013) UN Doc CAT/C/51/3.

[228] A/66/860 (n 5) 68.

[229] Guidelines against Intimidation or Reprisals (San Jose Guidelines) (2015) UN Doc HRI/MC/2015/6.

[230] CAT, 'Guidelines on the Receipt and Handling of Allegations of Reprisals Against Individuals and Organizations Cooperating with the Committee Against Torture Under Articles 13, 19, 20 and 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc CAT/C/55/2, para 22.

[231] ibid. [232] CAT/C/51/3 (n 227). [233] ibid, para 4.

109 With regard to Article 19, the Guidelines provide that the Rapporteur, in co-operation with the Secretariat, receives complaints and information on reprisals; makes a preliminary assessment; and if it can be determined that there is 'real threat' or a 'violation has been conducted' he/she will 'decide on the appropriate course of action'.[234] They envisage, for example, the possibility to communicate with the Permanent Representative and issue public statements. With a view to strengthen their efficacy, the Guidelines provide that measures against reprisals may be taken in cooperation with other treaty bodies informing other relevant bodies, such as with a joint public statement, but also more generally that NHRIs, NPMs, or other mechanisms can be informed.[235] Documents adopted by the Rapporteurs for reprisals are published online on the page of the OHCHR.[236] The Guidelines also require explicit consent of the complainant and the respect of the principles of confidentiality and 'do not harm' for all allegations.[237]

GIULIANA MONINA

[234] CAT/C/55/2 (n 230) para 6. [235] ibid, para 8.

[236] See OHCHR, 'The CAT Committee: Reprisals' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=130> accessed 2 November 2017.

[237] CAT/C/55/2 (n 230) paras 6(g) and 7.

Article 20

Inquiry Procedure

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

1. Introduction 541

2. Travaux Préparatoires 542

2.1 Chronology of Draft Texts 542

2.2 Analysis of the Discussions in the Working Group and the Third Committee 544

3. Issues of Interpretation 550

3.1 Meaning of 'systematic practise of torture' 552

3.2 Article 20(1): Evaluation of Sources of Information 556

3.2.1 Meaning of 'reliable information' 557

3.2.2 Meaning of 'well-founded indications' 558

3.3 Article 20(2): Decision to Undertake An Inquiry 558

3.4 Article 20(3): Conducting the 'inquiry' 559

3.4.1 Meaning of the Word 'inquiry' 559

3.4.2 The Country Visit to the State Party 560

3.4.3 Hearings 562

3.4.4 Assistance during the Inquiry 562

3.5 Article 20(4): Adoption and Publication of the Findings 563

3.5.1 Adoption of the Report and Transmission to the State Party 563

3.5.2 Publication of the Findings 564

3.6 Follow-up under Article 20 565
3.7 Reprisals under Article 20 565

1. Introduction

1 At the time of its adoption, the inquiry procedure was the most innovative element of the monitoring mechanisms of the Convention and had no precedent in other human rights treaties. As will be explained below, the idea of carrying out confidential investigations into a systematic practice of serious (gross) and reliably attested human rights violations is based on the so-called 1503 procedure of the former Sub-Commission on the Promotion and Protection of Human Rights[1] and a number of other mechanisms, such as for example the ILO's supervisory procedures.[2] Since its first adoption, the procedure has become a model for later treaties and to date five UN human rights treaties contain a similar mechanism.[3]

2 Because of its innovative character, this provision proved to be one of the most controversial one during the drafting history. The idea of an inquiry procedure was strongly opposed by the Soviet bloc, who criticized it for the broad definition of 'reliable' information and because it envisaged a fact-finding mission in the territory of the State party concerned. In the end, a compromise was reached, and Article 20 provides that although the inquiry procedure is not subject to an explicit declaration by States parties to accept this competence of the Committee against Torture (CAT Committee or Committee)—as is the case with the complaints mechanism—any State party may decide to 'opt out' by means of a specific reservation in accordance with Article 28. Originally, only Socialist States and Chile made such an '*opting out' reservation*. With the exception of Afghanistan and China, all States later withdrew their respective reservations made during the late 1980s. There were, however, other States that used this option when acceding to the Convention during the 1990s and even in more recent years, as in the cases of Equatorial Guinea, Mauritania, and Syria. As of December 2017, the procedure applied to 148 States parties, with fourteen States having opted out.[4]

3 The Committee has so far concluded ten inquiry procedures. The majority of them have been based on information provided by non-governmental organizations (NGOs), such as Amnesty International (AI), Human Rights Watch (HRW), and national organizations. The inquiry procedure, therefore, resembles to some extent an *actio popularis* by NGOs.

4 Below, after an overview of the controversial discussions that took place during the drafting of Article 20, the article will analyse its scope of application as well as the functioning of the procedure in light of the inquiry procedures concluded so far by the Committee.

[1] J Herman Burgers and Hans 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) 160; Chris Ingelse, *United Nations Committee against Torture: An Assessment* (Martinus Nijhoff 2001) 157.

[2] Ingelse (n 1) 157; see also Maxime Tardu, 'The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in Ludwik Dembinski (ed), *International Geneva Yearbook 1988* (Springer 1988) 318, who refers also to UN ad hoc investigations on South Africa, Chile, Israeli-occupied territories, and other situations, and practices of the International Committee of the Red Cross.

[3] In addition to the CAT, five UN human rights treaties provide for an inquiry procedure: OP-CESCR (Art 11), OP-CEDAW (Art 8), OP-CRC (Art 13), CED (Art 33), OP-CRPD (Art 6).

[4] See also below Art 28, §§ 2, 14; Appendix A3.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

5 *Original Swedish Draft (18 January 1978)*[5]

Article 17

If the Human Rights Committee receives information that torture is being systematically practised in a certain Sate party, the Committee may designate one or more of its members to carry out an inquiry and to report to the Committee urgently. The inquiry may include a visit to the State concerned, provided that the Government of that State gives its consent.

6 *Swedish Proposal for Implementation Provisions (22 December 1981)*[6]

Article 30

1. If the Committee receives reliably attested information from any source indicating that torture is being systematically practised in the territory of a State party to the present Convention, the Committee, after giving that State party the opportunity to state its views on the situation, may designate one or more of its members to make a confidential enquiry and to report to the Committee urgently.

2. An enquiry made in accordance with paragraph 1 of this article may include a visit to the territory of the State party concerned, unless the Government of that State party refuses to give its consent.

7 *Draft Implementation Provisions, Submitted by the Chairman-Rapporteur of the Working Group as Possible Alternative to the new Swedish Proposals (1 February 1982)*[7]

Article 19

1. If the group established in accordance with article 17 receives information from any source which in its view appears to indicate that torture is being systematically practised in the territory of a State party to the Convention, the group shall invite that State party to submit observations with regard to the information concerned.

2. On the basis of all relevant information available to the group, including any observations which may have been submitted by the State party concerned, the group may, if it decides that this is warranted, designate one or more of its members to make a confidential enquiry and to report to the group urgently.

3. An enquiry made in accordance with paragraph 2 of this article may include a visit to the territory of the State party concerned, unless the Government of that State party when informed of the intended visit, does not give its consent.

4. After examining the report of its member or members submitted in accordance with paragraph 2 of this article, the group may transmit to the State party concerned any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the group under this article shall be confidential.

[5] Draft International Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[6] Draft Articles Regarding the Implementation of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1981) UN Doc E/CN.4/1493.

[7] Draft Implementation Provisions Submitted by the Chairman-Rapporteur of the Working Group (1982) UN Doc E/CN.4/1982/WG.2/WP.6.

8 *Four Draft Articles on implementation, with the explanatory note, submitted by the Chairman-Rapporteur (24 December 1982)*[8]

Article 20

1. If the Committee receives information from any source which in its view appears to indicate that torture is being systematically practised in the territory of a State party, the Committee shall invite that State party to submit observations with regard to the information concerned.

2. On the basis of all relevant information available to the Committee, including any observations which may have been submitted by the State party concerned, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential enquiry and to report to the Committee urgently.

3. An enquiry made in accordance with paragraph 2 may include a visit to the territory of the State party concerned, unless the Government of that State party when informed of the intended visit, does not give its consent.

4. After examining the report of its member or members submitted in accordance with paragraph 2, the Committee may transmit to the State party concerned any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee under this article shall be confidential.

9 *Draft Resolution Submitted by the Netherlands to the General Assembly (23 November 1984)*[9]

Article 20

1. If the Committee receives information which appears to it to contain reliable indications that torture is being systematically practised in the territory of a State party, the Committee shall invite that State party to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State party concerned as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2, the Committee shall seek the co-operation of the State party concerned. In agreement with that State party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2, the Committee shall transmit these findings to the State party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1–4 shall be confidential. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, at its discretion, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

[8] Four Draft Articles on Implementation Submitted by the Chairman-Rapporteur of the Working Group (1983) UN Doc E/CN.4/1983/WG.2/2.

[9] Draft Resolution Submitted by the Netherlands to the General Assembly (1984) UN Doc A/C.3/39/L.40.

10 *Amendment to the Draft Resolution by the Byelorussian Soviet Socialist Republic*

Article 28

1. Each State may, at the time of the signature or satisfaction of this Convention or accession thereto, declare that it does recognize the competence of the Committee provided for in article 20.

2. Any State Party having made a reservation in accordance with the preceding paragraph may, at any time, withdraw this notification to the Secretary-General of the United Nations.

2.2 Analysis of the Discussions in the Working Group and the Third Committee

11 Because Article 20 had no exact precedent in the CCPR, or in other human rights instruments,[10] it proved to be one of the more controversial provisions in the Working Group; so much so that a consensus on the text was only reached at the Third Committee meeting in 1984.[11] Although the specific language and procedures contained in Article 20 were innovative, the idea of an *ex officio* procedure to examine gross and systematic violations of human rights by States parties was not completely novel. The Article 20 procedure has its roots in Resolution 1503 of the ECOSOC (1970)[12] and a number of other mechanisms, such as for example the ILO's supervisory procedures.[13]

12 The Working Group did not deal with the supervisory mechanism of the Convention in its sessions between 1978 and 1980. However, the written comments of several States in 1978 regarding Article 17 of the original Swedish draft[14] shaped the subsequent discussions within the Working Group.[15] This original draft, which envisioned the Human Rights Committee (HRC) as the supervisory mechanism, allowed for visits to the State party provided that the Government of that State gave its consent.[16] *Austria* and *Switzerland* supported the draft Article, with Switzerland proposing that the procedure be strengthened by shifting the presumption to one of consent, so that a State party under inquiry would have to object actively if it opposed such a visit.[17] The *German Democratic Republic* objected to the draft Article because it considered the powers granted to the HRC to be outside the scope of its mandate as derived from the CCPR.[18] At this early stage, France and the *USA* also voiced objections, but their concerns were with specific provisions of the procedure rather than with the existence of the procedure itself. France felt that the HRC should not begin an inquiry at all without first obtaining the State party's consent. The proposal submitted by the *USA* would have required a State party expressly to declare its recognition of the implementation organ's competence to carry out such inquiries. Once it had done so, however, that State party would be bound to accept any visits the organ deemed necessary.[19]

[10] Burgers and Danelius (n 1) 160; Ingelse (n 1) 157.

[11] Report of the Third Committee, 39th Session (1984) UN Doc A/39/708; Burgers and Danelius (n 1) 160.

[12] Burgers and Danelius (n 1) 160; Ingelse (n 1) 157.

[13] Ingelse (n 1) 157; see also Tardu (n 2) 318, who refers also to UN ad hoc investigations on South Africa, Chile, Israeli-occupied territories, and other situations, and practices of the International Committee of the Red Cross.

[14] E/CN.4/1285 (n 5) Art 17. The IAPL draft did not provide for an inquiry procedure.

[15] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, paras 104–108.

[16] E/CN.4/1285 (n 5) Art 17. [17] E/CN.4/1314 (n 15) paras 104, 108.

[18] ibid, para 107. [19] ibid, paras 105–06.

None of these ideas were explicitly adopted in the 1981 draft, although that draft did include a provision requiring that the inquiry itself be confidential.[20]

13 In its 1982 session, the Working Group began its examination of the inquiry procedure for allegations of systematic torture,[21] basing its discussion on Article 30 of the Swedish proposal for implementation provisions.[22] This draft had incorporated some of the States' comments made in 1978 and no longer referred to the HRC as its implementation organ.

14 Some delegations criticized draft Article 30 for not clarifying that the procedure should involve three distinct steps. They noted that the implementation organ should, first, consider whether or not there were sufficient reasons for addressing itself to a State party. It should then take into account all relevant information at its disposal in order to consider whether it would be warranted to initiate an inquiry. Finally, the organ should consider, in the light of the results of the inquiry, whether to transmit any comments or suggestions to the State party concerned. The delegations further noted that the draft Article failed to clarify that each phase of the proceeding should be confidential.[23]

15 One delegation suggested that the grave nature of torture justified further strengthening of the procedure. It proposed granting the implementation organ greater power to go public if the Government clearly failed to comply with the necessary measures of its suppression (action to prosecute) after one year.[24] It highlighted criminal prosecution as one such measure; the lack of which could trigger publication of a summary account of the inquiry in its public report to the ECOSOC.[25] Some delegations disagreed with this proposal, making a distinction between the obligation to submit cases to competent authorities to decide about prosecution, which was required by the Convention, and the obligation to prosecute. It was also noted that adequate measures to suppress torture may often be of a different character than criminal prosecution.[26]

16 At this same 1982 session, Sweden submitted a revised text to the Working Group.[27] Under this draft, the Committee could contact a State party pursuant to information which appeared to indicate, rather than that which simply indicated, the practise of systematic torture. Furthermore, the draft Article provided that the decision to initiate an inquiry should be made on the basis of all relevant information available to the Committee, including any explanations provided by the State party concerned. It also gave the implementation organ the option of transmitting its comments or suggestions to the State party; and specified that all proceedings under the Article were to be confidential. The revision also, without stated explanation, removed the requirement that the information received be 'reliably attested', an issue that would resurface under slightly different language in the next Working Group discussion.[28]

17 Some members favoured empowering the Committee by increasing its ability to analyse the information independently in order to discern whether a systematic practice of torture was taking place and, if so, whether it warranted an inquiry. Amendments to

[20] E/CN.4/1493 (n 6) Art 30(1).

[21] Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982) UN Doc E/CN.4/1982/L.40, paras 72–78.

[22] E/CN.4/1493 (n 6) Art 30. [23] E/CN.4/1982/L.40 (n 21) para 74. [24] ibid, para 75.

[25] ibid. [26] ibid, para 76.

[27] Revised Text of Draft Article 30 Submitted by Sweden (1982) UN Doc E/CN.4/1982/WG.2/WP.4, as cited in E/CN.4/1982/L.40 (n 21) para 77.

[28] E/CN.4/1982/L.40 (n 21) para 77.

this effect were presented and accepted.[29] The Working Group also replaced 'explanations' in paragraph 2 with a more neutral term; included the clause 'when informed of the intended visit' in the last sentence of paragraph 3; and substituted 'does not give its consent' for 'refuses to give its consent'.

18 The Working Group continued its discussion in 1983 and, as a basis for its deliberations, used the Chairman's four draft Articles on implementation[30] which had been reformulated to incorporate the changes made to Article 20 adopted at the 1982 session.[31] First, the Working Group rejected the Ukrainian proposal to make the procedure apply only to States parties that had announced their recognition of the Committee's status.[32] However, because many delegations deemed it important to include a requirement of reliability for the information or source, paragraph 1 was redrafted so that the new text required information to contain 'reliable indications that torture was being systematically practised'.[33] Paragraph 2 was amended to highlight the importance of observations submitted by the State party. Further, in order to appease several delegations that wanted the Committee to seek cooperation with the State party in order to initiate the inquiry, paragraph 3 was redrafted to read: 'If an enquiry is made … the Committee shall seek the co-operation of the State party concerned. In agreement with that State party, such an enquiry may include a visit to its territory.'[34]

19 Debate ensued as to whether the Committee should submit the final report to the State party. Some felt that it should, whereas others noted that the confidentiality of some sources might be compromised. The delegations agreed that the State party had, at least, a right to know the Committee's findings as a result of the inquiry. Consequently, the new version of paragraph 4 referred explicitly to the Committee's findings and made it mandatory for them to be transmitted to the State party.[35] The 1982 draft had not required the Committee to transmit anything at all; it had merely given the Committee the option of transmitting comments or suggestions, without mention of the findings themselves.

20 While there was consensus within the Working Group as to *confidentiality* during the proceedings, no conclusions were reached at this stage as to whether confidentiality need be maintained once the inquiry had been completed. The Working Group decided to give the Committee the option of publicizing a summary of the results and added the following provision to paragraph 5: 'After such proceedings have been completed with regard to an enquiry made in accordance with paragraph 2, the Committee may, at its discretion, decide to include a summary account of the results of the proceedings in its annual report … '[36]

21 At this phase, the Working Group did not reach a decision on whether Article 20 and other implementation procedures should be *optional* or *mandatory*. Most delegations supported the mandatory nature of the inquiry procedure and all other implementation procedures, willing to cede the optional character only in the case of individual complaint procedures. Some were adamant that without strong implementation procedures,

[29] ibid, para 78.

[30] Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1983) UN Doc E/CN.4/1983/63, paras 55–62.

[31] E/CN.4/1983/WG.2/2 (n 8) Art 20. [32] E/CN.4/1983/63 (n 30) para 56.

[33] ibid, para 57. [34] ibid, para 59.

[35] ibid, para 60: 'After examining the findings of its member or members submitted in accordance with paragraph 2, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation'.

[36] ibid, para 61.

the Convention would lose its effectiveness. Making implementation optional, they said, was tantamount to allowing a qualified commitment to the struggle against torture. In contrast, some delegations, including the *USSR*, felt that mandatory implementation procedures would make it difficult for the Convention to gather worldwide support. The Soviets added that such procedures were unnecessary for States already bound by similar procedures under the CCPR. They favoured removing those procedures from the draft Convention and placing them in an optional protocol. The *Ukrainian Soviet Socialist Republic* proposed a compromise in which the implementation provisions were retained within the draft Convention, but Articles 17, 19, and 20 were amended so as to make them binding only on States parties that expressly accepted their competence. Meanwhile, some delegations were still not ready to make a decision.

22 This discussion, on what would prove to be the most enduring and contentious of debates, continued at the 1984 Working Group session. There, the *USSR* and *Ukraine* withdrew demands that all implementation procedures be optional, but continued to object to a mandatory Article 20 inquiry procedure.[37] The *German Democratic Republic* supported the USSR's position. Most delegations, however, remained strongly in favour of keeping Article 20 mandatory, and saw its existence as essential to implementation and progress in the realm of human rights treaties. Making it optional, they stated, would seriously weaken its value. They argued that sufficient safeguards had already been built into the procedure. These safeguards included requirements that there be constant cooperation between States parties and the Committee; that States must give their consent for visits; and that high standards are abided by for Committee membership as set out in Article 17. They noted further that the ILO already used such a procedure without encountering any problems. No consensus was reached at this stage and Article 20 was not adopted.

23 By the time the Working Group presented its text to the Human Rights Commission in February 1984, it had reached consensus on all articles except Article 20 and paragraphs 3 and 4 of Article 19.[38] *Jan Herman Burgers*, the Chairman-Rapporteur of the Working Group, handed over to the Commission the task of finalizing the text.

24 At the Commission's thirty-second meeting, Canada, the USA, and the Federal Republic of Germany expressed their opinion that Article 20 should be mandatory. *Canada* went as far as to say that a Convention without such a feature would not be worth signing. It noted that only a minority of delegations had held out for optionality, and even accused a few delegations of seeking to tie the Committee's hands. The *USA* said that the only two States blocking consensus on the remaining articles were the USSR and the Ukrainian Soviet Socialist Republic.[39] The *German Democratic Republic*, however, voiced its own serious objections to what it saw as the broad scope of procedures under Articles 19 and 20, which it considered an infringement on State sovereignty.

25 The following day, at the Commission's thirty-third and thirty-fourth meetings, Italy, France, Senegal, Uruguay, Argentina, Sweden, Norway, Switzerland, and Australia joined the delegations supporting the view that Article 20 be mandatory.[40] The *USSR* continued

[37] Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UN Doc E/CN.4/1984/72, paras 45 e ff.

[38] Summary Record of the Thirty-second Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.32, paras 62–104.

[39] ibid, para 91.

[40] Summary Record of the Thirty-third Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.33, paras 1, 3–4, 6–7, 21–23, 39, 44, 57; Summary Records of the Thirty-fourth Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.34, paras 107–08, 115.

to object. It claimed that the inquiry procedure was unnecessary given that the systematic practice of torture, because of its widespread nature, was easily identifiable, and that specific details could already be obtained through the Commission's other procedures. It further commented that the inquiry procedure would allow States, individuals, or NGOs to vilify publicly other States parties. This would be an unacceptable situation given that the 'reliable indications' provided for by Article 20(1) could easily prove to be unreliable, and thus such accusations would not only be unfounded, but would also constitute an unjustified interference in domestic affairs. It further argued for the importance of producing a Convention that could gather a broad consensus in order to ensure that States parties which did not ratify it would feel sufficiently politically isolated. Finally, the Soviets countered the claim made by the USA that it and the Ukraine were the only two delegations opposing the inquiry procedure. Claiming that other delegations had mischaracterized the division on this article, the USSR said that in fact, only Western States had supported the procedure, whereas many other States had objected. Unlike the other delegations, the USSR favoured resubmitting the draft to the Working Group, rather than passing it on to the General Assembly. *Bulgaria* expressed the view that, although it was not yet ready to reach a final decision, it supported the USSR and Ukrainian proposals. *Senegal* noted that it was an example of a non-Western State that fully supported a mandatory Article 20 procedure.

26 Several NGOs expressed their views on the draft Convention. The *International Commission of Jurists*, in particular, noted that it attached the greatest importance to Article 20, observing that the USSR, because it accepted Resolution 1503, had no reason to reject the procedures provided for by the Article in question.

27 Rather than voting on Articles 19 and 20, or renewing the mandate of the Working Group so that it could continue debating the Articles, the Commission sent the draft Convention as it stood to the *General Assembly*, with the unresolved language issues in square brackets.[41] The Working Group was given authority to do so by the adoption of a resolution that was based on consultations with delegations from different geographic regions and was introduced by *Finland* and the *Netherlands*. After seven years, it was clear that many delegations were eager for the adoption of a final draft. Furthermore, the sponsors were aware that many members of the Commission had not participated in the Working Group and were not closely familiar with the concerns involved in the discussion.

28 Pursuant to the above resolution, the Commission also transmitted the report of the Working Group on the draft Convention, as well as the summary records of the Commission's debate on the item during its fortieth session, to the General Assembly.[42] Additionally, the Secretary-General invited all States to communicate to the Secretary-General their comments on the draft Convention.[43] Australia, Austria, Belgium, Burundi, Canada, Cyprus, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the UK, the USA, and Venezuela expressed their support for adopting the text of Article 20 as drafted, which ensured that the inquiry procedure remained mandatory.[44] Finland, New Zealand, Panama, and the Syrian

[41] E/CN.4/1984/72 (n 37). See Burgers and Danelius (n 1) 99–100.

[42] Report of the Secretary-General (1984) UN Doc A/39/499, para 1 (citing E/CN.4/1984/72; E/CN.4/1984/SR.32–34, 42).

[43] ibid, para 1 (citing the Commission on Human Rights Res 1984/21 of 6 March 1984). See also Burgers and Danelius (n 1) 102.

[44] A/39/499 (n 43); A/39/499/Add.1; A/39/499/Add.2; some of these countries express general support for mandatory implementation procedures and do not specifically mention Art 20 by number.

Arab Republic expressed overall support or acceptance of the text but did not specifically mention Article 20 or the other implementation procedures.[45] Hungary, Thailand, and Yugoslavia, however, objected to the text of draft Article 20 and/or to mandatory implementation mechanisms.[46]

29 At the thirty-ninth session of the General Assembly in September 1984, the *Netherlands* chaired several meetings in an attempt to reach a consensus on Articles 19 and 20.[47] These meetings revealed that Western and Latin American States, along with some Asian and African States, supported the language of these Articles as it stood. The USSR and other Eastern European States were willing to adopt the Convention, but only if the procedures in question were made optional. Meanwhile, other African and Asian States questioned the Article 20 inquiry procedure and some favoured its deletion from the Convention altogether. Many States were not prepared to take a strong stand either way. Support for an expedited adoption of the Convention was not as robust among the general membership as it had been among the members of the Commission on Human Rights. Objections were raised with regard to other Articles of the Convention, and some States even favoured a return to the drafting table. These considerations led *Argentina*, the *Netherlands* and *Sweden* to propose the immediate adoption of the Convention.[48]

30 At the fifty-sixth meeting of the General Assembly on 3 December 1984, after the Ukraine had again proposed, unsuccessfully, that paragraph 1 of Article 20 include a requirement that a State party make a declaration recognizing the competence of the Committee to make inquiries, the *Byelorussian Soviet Socialist Republic* proposed a compromise. It suggested adding an Article 28 that would allow a State party to declare that it did not recognize the competence of the Committee under Article 20.[49] Although the Byelorussian language would present a victory for States seeking a form of optionality, it nevertheless raised the political cost of opting out by requiring a State party to reserve explicitly out of the procedure, unlike previous proposals, which would have allowed States to ratify the Convention fully without acceding to the inquiry competence.

31 In the end, the draft sponsors chose to seek *consensus* rather than pursue further confrontation.[50] The draft as it stood would have resulted in several negative votes among the Soviet bloc and many abstentions from African and Asian States. This could have seriously weakened the chances for wide adherence to the Convention. Alternatively, there might have been no conclusive vote at all, which would have led to the reopening of debate and, probably, a watered-down Convention. Finding unacceptable many of the other demands placed by the Soviet Union and other Eastern States, the sponsors chose to compromise on Article 20, in consideration also of the misgivings expressed by several African and Asian States.

32 At the General Assembly's sixtieth meeting, then, the *Netherlands* provided an oral revision of Article 20.[51] The new draft shifted the requirement of reliability to the information received by the Committee, rather than to the indications of systematic torture. It proposed, instead, that those indications be well-founded. It also made clear that the

[45] ibid.

[46] ibid. Brazil reported that it had no comment to make on the text. Tonga reserved the opportunity to decide later on all implementing provisions.

[47] Burgers and Danelius (n 1) 102.

[48] A/C.3/39/L.40 (n 9). See Burgers and Danelius (n 1) 103.

[49] A/39/708 (n 11) para 8.

[50] Burgers and Danelius (n 1) 104–05.

[51] A/39/708 (n 11) paras 10–11.

Committee's invitation to the State party to submit observations was for the purpose and in the service of cooperating with the State party in the examination of information. With regard to confidentiality, the new draft provided that the Committee would include the summary account after consultations with the State party concerned, rather than at its own discretion. Furthermore, it specified that even though absolute confidentiality is provided for only in the procedures detailed in paragraphs 1 to 4, the cooperation of the State party should be sought at all stages of the procedure; seeming to include, by implication, the publication of the summary as well. Perhaps most significantly, the sponsors accepted the Byelorussian amendment, thus adding an article that allowed States parties to opt out of Article 20.[52]

33 On 10 December, the Soviet bloc delegations withdrew their remaining amendments, and the Third Committee of the General Assembly adopted the revised draft resolution without a vote.[53]

3. Issues of Interpretation

34 The procedure is governed by Article 20 and Rules 75 to 90. According to Article 20 the CAT Committee may initiate an inquiry into the *systematic practice of torture* in a State party. It cannot be used to address individual cases of torture, and it applies only to the practice of torture, not cruel, inhuman or degrading treatment or punishment.

35 As noted above, this provision proved to be one of the most controversial one during the drafting history. Its adoption was not only contested during the drafting history of the Convention but also in the context of the adoption of the Rules of Procedures (RoP). In contrast to the other parts, the Committee waited to consider the provisions of the RoP concerning the inquiry procedure until its second session due to the complex, sensitive, and novel nature of such procedure.[54] The draft Rules were based on the provisions of the Convention and took into account relevant procedures existing elsewhere within the UN system.[55]

36 The inquiry procedure has four main characteristics. First, it is *optional*. According to Article 20 read in conjunction with Article 28, States parties may decide to 'opt out', ie to not accept the competence of the CAT Committee to conduct an inquiry procedure.[56] Second, it is of a *reactive nature*, ie it can be undertaken by the Committee only after it has received reliable information about systematic practices of torture in the territory of a State party and for the purpose of investigating these allegations. The Committee cannot conduct an inquiry procedure in order to prevent torture, like the monitoring bodies created under the Optional Protocol to the CAT, ie the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the National Preventive Mechanisms (NPMs). Third, it is *confidential*. In accordance with Article 20 and Rules 78 and 79, all documents and proceedings of the Committee

[52] ibid, para 12 (citing A/C.3/39/L.66). [53] ibid, paras 13–14.

[54] CAT/C/SR.3, para 17; CAT/C/SR.9, para 6.

[55] CAT/C/SR.8, para 9; CAT/C/SR.9, para 6, where it is pointed out that: 'In preparing the draft Rules, the secretariat relied on the wording of article 20 of the Convention, on *travaux préparatoires* for the drafting of the Convention, on the Model Rules of Procedure for United Nations bodies dealing with violations of human rights, on the Report of the 1963 UN Fact-Finding Mission to South Vietnam, and on the practice of the International Labour Organization's supervisory bodies with respect to on-the-spot visits.'

[56] On the optional character see below Art 28.

relating to its functions are confidential, similarly to all meetings concerning Article 20 which are closed. The Committee may in principle lift the principle of confidentiality and decide to publish the results of the proceedings, but, as will be explained more in detailed below, it can do so only at the very end of the procedure and under specific circumstances. Finally, the procedure under Article 20 is based on the *principle of cooperation*. This is well exemplified by the fact that the inquiry procedure is designed in such a way so as to require the consultation of the State party concerned at every single stage, including the country visit itself, which can be conducted only with the previous consent of the State party.

37 As illustrated in Table 1, to date the Committee has concluded ten inquiries on nine countries (twice on Egypt). All but three States (Brazil, Mexico, Nepal) have decided to keep the reports of the inquiry confidential.

Table 1 **Overview on Inquiry Procedures**

Country	Duration of the inquiry	Visit	Systematic Torture?	Publication
Egypt	5 years, 3 months (Mar 2013–June 2017)	Not consented	Yes	Summary Account (A/72/44, § 58–71)
Lebanon	6 years (Oct 2008–Oct 2014)	8–18 April 2013 (10 days)	Yes	Summary Account (A/69/44, Annex XIII)
Nepal	6 years, 11 months (Nov 2005–Oct 2012)	Not consented	Yes	Full report (A/67/44, Annex XIII)
Brazil	5 years, 10 months (Nov 2002–Sept 2008)	13–29 July 2005 (16 days)	Yes	Full report (CAT/C//39/2)
Federal Republic of Yugoslavia (Serbia and Montenegro)	6 years, 10 months[57] (Dec 1997–Oct 2004)	8–19 July 2002 (11 days)	Yes	Summary Account (A/59/44, § 156–240)
Mexico	4 years, 7 months (Oct 1998–May 2003)	23 Aug to 12 Sept (20 days)	Yes	Full report (CAT/C/75)
Sri Lanka	4 years, 3 months (July 1998–Oct 2002)	19 Aug to 1 Sept (13 days)	No	Summary Account (A/57/44, § 123–195)
Peru	6 years, 6 month (Apr 1995–Oct 2001)	13 Aug to 13 Sept 1998 (1 month)	Yes	Summary Account (A/56/44, § 144–193)
Egypt	4 years, 6 months (Nov 1991–May 1996)	Not consented	Yes	Summary Account (A/51/44, § 180–222)
Turkey	3 years, 7 months (Apr 1990 –Nov 1993)	6–18 June 1992 (12 days)	Yes	Summary Account (A/48/44/Add.1)

[57] Due to the political situation of the State party, the Committee had decided to postpone the examination of the information received before it, which was resumed in May 2000. See CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Serbia and Montenegro' (2004) UN Doc A/59/44, para 156.

38 An inquiry procedure can be divided into four main phases involving: the evaluation of sources of information; the decision to undertake the inquiry; conducting the inquiry, and; finally, the adoption and publication of the findings of the inquiry. Strictly speaking, the Committee seems to consider that the procedure starts with the examination of the information brought before it and ends with the transmission of the findings to the State party.[58] In practice, however, after the transmission of the report to the State, there are still important steps to be considered, including the publication of the summary account or the full report on the inquiry, as well as follow-up activities. As shown in Table 1, measured from the date in which the Committee received the relevant information to the publication of its findings, the inquiry procedures conducted thus far lasted between three and six years. The longest inquiries (Peru, Serbia and Montenegro, Nepal) took over six years to complete.[59] Several encompassed one, sometimes two changes in Government.[60]

39 In the following, this article will illustrate the key aspects of the procedure and provide an analysis of the inquiries so far concluded by the Committee.

3.1 Meaning of 'systematic practise of torture'

40 The fundamental question underlying the inquiry procedure is whether torture is systematically practised in a State party. Such a question is usually considered twice by the Committee. The first assessment is done at the very beginning of the procedure, during the preliminary consideration conducted by the Committee in order to decide whether the information provided to it is reliable and contains well-founded indications that torture is being systematically practised. The second assessment is done in the final stage of the procedure, ie after the inquiry has been carried out by a delegation of the Committee.

41 As the procedure is confidential and the only information available are those published after the inquiry has been concluded, there are very few details on what standards the Committee applies when assessing whether or not torture might be practised systematically. However, more information is available on the assessment conducted in the final stage of the procedure which is made public in the summary account.

42 The Committee defined for the first time the concept of 'systematic practice of torture' in its first summary account of the results of the proceedings concerning the inquiry on *Turkey* in November 1993. The definition provides as follows:

[58] The Committee has not always been consistent in this regard, in several cases, the dates of start and end of the procedure are not spelled out (eg see A/59/44 (n 57); CAT, 'Report on Brazil Produced by the Committee Under Article 20 of the Convention and Reply from the Government of Brazil' (2009) UN Doc CAT/C/39/2; CAT, 'Report on Nepal Adopted by the Committee Against Torture Under Article 20 of the Convention and Comments and Observations by the State Party' (2012) UN Doc A/67/44, Annex XIII; CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Egypt' (2017) UN Doc A/72/44, para 58). Even when dates are spelled out, the practice of the Committee seems to vary: as start date, the Committee has used both the date in which it decided to undertake an inquiry (eg CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Sri Lanka' (2002) UN Doc A/57/44, para 124); and the date in which it started the examination of the information (eg CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Egypt' UN Doc A/51/44, para 182). Similarly, as end date of the inquiry, the Committee has generally used the date in which it adopts the report and transmits the findings to the State party, but also referred to the publication date in at least one case (eg A/57/44 (58) para 124)

[59] CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Peru' (2001) UN Doc A/56/44; A/59/44 (n 57) paras 156, 240; A/67/44, Annex XIII (n 58).

[60] See eg CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey' (1993) UN Doc A/48/44/Add.1, para 11; A/56/44 (n 59) paras 2–3; CAT, 'Report on Mexico Produced by the Committee Under Article 20 of the Convention and Reply from the Government of Mexico' (2003) UN Doc CAT/C/75, para 15.

The Committee considers that torture is practised systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be *habitual, widespread and deliberate in at least a considerable part of the territory of the country in question*. Torture may in fact be of a systematic character *without resulting from the direct intention of a Government*. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. *Inadequate legislation* which in practice allows room for the use of torture may also add to the systematic nature of this practice. [61]

43 This definition was then confirmed in all subsequent inquiry procedures, ie all summary accounts of later inquiries[62] and full reports on Mexico,[63] Brazil,[64] and Nepal.[65]

44 When assessing whether torture is practised in a *habitual manner*, the Committee has so far considered several elements, including the number of torture allegations and whether such allegations come from different, and reliable[66] and consistent sources.[67] Information is considered reliable if it is coming from sources who have proved to be so in connection with other activities of the Committee.[68] Allegations are considered consistent when they described in the same way the circumstances in which the cases arose, the purpose of the torture, the methods employed, and the places where torture is practised and by whom. As for the required number of torture allegations, in its first inquiry the Committee clarified that:

… even though only a small number of torture cases can be proved with absolute certainty, the copious testimony gathered is so consistent in its description of torture techniques and the places and circumstances in which torture is perpetrated that the existence of systematic torture in Turkey cannot be denied.[69]

45 In fact, considering that torture is usually practised clandestinely and is routinely denied by Governments, it is difficult to prove beyond reasonable doubt, even after two or three weeks of intensive fact-finding in the country concerned, that the practise of it is 'habitual, widespread and deliberate in at least a considerable part of the territory of the country in question'. Therefore, when there are different, reliable, and consistent sources showing that torture is systematically practised, the Committee does in practice consider that the requirement of 'habitual torture' is met, despite the fact that the number of instances of torture that can be proved with absolute certainty is not very high. Furthermore, a State party may be found to practise torture systematically despite the fact that there has been a decrease in the number of torture allegations.[70] This is not always the case. In the inquiry procedure on *Serbia and Montenegro*, in fact, the Committee concluded that torture had been systematically practised in Serbia only prior to October

[61] A/48/44/Add.1 (n 60) para 39.

[62] A/51/44 (n 58) para 214; A/56/44 (n 59) para 163; A/57/44 (58) 182 (n 1); A/59/44 (n 57) para 211 (n 16); A/72/44 (n 58) para 67.

[63] CAT/C/75 (n 60) para 218. [64] CAT/C/39/2 (n 58) para 178.

[65] A/67/44, Annex XIII (n 58).

[66] A/51/44 (n 58) 219; CAT/C/75 (n 60) para 218; A/56/44 (n 59) para 20; A/67/44, Annex XIII (n 58) para 101.

[67] A/48/44/Add.1 (n 60) para 38; A/51/44 (n 58) para 219; CAT/C/75 (n 60) para 218.

[68] A/51/44 (n 58) para 219; CAT/C/75 (n 60) para 218; A/56/44 (n 59) para 20; A/67/44, Annex XIII (n 58) para 101.

[69] A/48/44/Add.1 (n 60) para 38; see also eg A/67/44, Annex XIII (n 58) para 102.

[70] A/56/44 (n 59) para 160; A/67/44, Annex XIII (n 58) para 102; CAT/C/75 (n 60) para 218.

2000, but no longer so after that date due to the fact that, under the new political regime, the incidents of torture appeared to have dropped considerably and torture was, thus, no longer systematic. Nonetheless, it was clear that cases of torture continued to occur, particularly in police stations, and that reforms of the police and the judiciary had yet to demonstrate their full effectiveness in preventing and punishing the practice.[71]

46 Secondly, according to the Committee's definition in order to be systematic torture must be '*widespread*'. In this regard, it was clarified that it is not necessary that such practice occurs in all parts of a country.[72] On the other hand, torture must be widespread and habitual in at least a considerable part of the territory of the country in question. In the inquiry on *Serbia and Montenegro*, systematic torture was only found explicitly in the Republic of Serbia, not in Montenegro. Thus, the summary account does not contain any clear finding on the situation in Montenegro before or after October 2000.[73]

47 Thirdly, systematic torture must also be '*deliberate at least in a considerate part of the country*' though it does not have to result from the 'direct intention of the Government'. The comparison of the ten inquiries concluded so far has showed that an explicit Government policy instructing the intelligence or law enforcement bodies to use torture for the purpose of extracting information or confessions is not required by the Committee for arriving at the conclusion that torture is practiced systematically in a given country. However, the Committee has not been always very consistent in this regard. For example, in the inquiry on *Sri Lanka*, despite having in the initial assessment 'reaffirmed that the information available to it provided well-founded indications that torture was being systematically practised in Sri Lanka',[74] the Committee finally concluded that torture was not systematic. In so doing, it took into particular consideration the fact that the torture incidents had taken place 'mainly in connection with the internal conflict' but that further developments, particularly the ceasefire agreement on 23 February 2002 monitored by an international monitoring mission, effectively removed the conditions which had been identified by the Committee as a major cause for the prevalence of torture and other forms of ill-treatment connected.[75] If one takes into account that, according to the Committee's working definition, torture may in fact be of a systematic character without resulting from the *direct intention of the Government* and it may be the consequence of factors which the Government has difficulty in controlling, this conclusion indicates a comparatively high standard for the systematic character of torture from the point of Governments. This particular aspect of the Committee's definition was criticized by *Brazil*. More specifically, Brazil argued that the Committee had attached a special meaning to the expression of 'systematic torture' without it reflecting either the intention of the States parties or the common meaning normally attached to the term 'systematic' in international human rights, humanitarian. or criminal law.[76] According to Brazil, to be regarded as systematic a violation would have to be carried out in 'a deliberate and planned manner' and 'be committed according to a certain pattern, under an international plan or policy, albeit not explicitly admitted'. On the basis of this interpretation, Brazil disagreed with the Committee's opinion that torture

[71] A/59/44 (n 57) para 212.

[72] In the respective chapter of the summary account regarding Montenegro, the Committee states that only a few of the reported cases had occurred in Montenegro. The visit of the Committee's delegation in Montenegro did not reveal much evidence either, but the summary account lacks any clear findings with respect to Montenegro: cf A/59/44 (n 57) paras 203–10.

[73] ibid.

[74] A/57/44 (58) para 127. [75] ibid, paras 181–92. [76] CAT/C/39/2 (n 58) para 229.

was systematically practised, as it denied the existence of any deliberate plan or policy for the practice of torture in the country.[77]

48 A further element explicitly recalled in the above mentioned definition of systematic torture is the existence of '*inadequate legislation* which in practice allows room for the use of torture [which] may also add to the systematic nature of this practice'. In this regard, it shall be noted that in its last two inquiry procedures (Nepal and Lebanon) when assessing the notion of systematic torture the Committee has explicitly recalled its General Comment No 2 and the obligation of States to take effective legislative, administrative, judicial, and any other appropriate measures to prevent torture according to Article 2 CAT. In the inquiry on Nepal, for example, the Committee found that the failure to prosecute those responsible for acts of torture and to end the practices of falsification of registers, incommunicado detention, and disrespect for fundamental legal safeguards had contributed to the continuing habitual, widespread, and deliberate practise of torture in Nepal.[78] Similar conclusions were reached in the inquiry on Lebanon.[79] In the case of Nepal, the Committee further concluded that such inadequacies were to be regarded as 'deliberate'[80] and that the 'actions and omissions … amount[ed] to more than a casual failure to act'[81] but demonstrated that 'the authorities not only fail to refute well-founded allegations but appear to acquiesce in the policy that shields and further encourages these actions, in contravention to the requirements of the Convention.' [82] In fact, if it is apparent from information provided by reliable sources that torture is widespread, and if at least some of these cases are corroborated during the fact-finding mission by testimonies from victims, witnesses, and/or Government officials, first-hand impressions of particularly harsh prison conditions, an analysis of inadequate legislation, and other means of taking evidence, such as forensic examinations, the Committee may find a *systematic practise of torture by Government acquiescence or lack of adequate control*.

49 The Committee also stressed that the existence of specific legislation aimed at combating terrorism and other particularly serious offences, which undermined the rights of detained persons and made them particularly vulnerable to torture, proved that 'torture has been occurring with the authorities' acquiescence'. In addition, it held that the deplorable conditions of detention amounted to CIDT (no electricity, no drinking water, extremely cold temperatures at a height of more than 4,500 metres above sea level without heating, etc.) and to torture (long period of detention of arrested persons and sensorial deprivation and almost total prohibition of communication) and underlined its systematic practise.[83]

50 Finally, although not explicitly mentioned in the definition, *other factors* may influence the Committee's assessment. For example, the refusal to allow a fact-finding mission to its territory, as in the case of *Egypt* and *Nepal*, does not shield the respective Government from any finding of systematic torture, and may even nurture the suspicion that the Government wishes to hide such practice. On the other hand, full cooperation by the Government, as in the case of *Sri Lanka*, may lead the Committee to conclude that the practice of torture, although widespread, is not systematic. Similarly, a change of Government and the acceptance of the new Government that torture was

[77] ibid, para 241. [78] A/67/44, Annex XIII (n 58) para 105.
[79] CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Lebanon' (2014) UN Doc A/69/44, Annex XIII, para 36.
[80] ibid. [81] A/67/44, Annex XIII (n 58) para 104.
[82] ibid. [83] A/56/44 (n 59) paras 177, 178, 183, 186.

systematic under the previous regime might also be a factor leading to such conclusion. In the case of *Serbia and Montenegro*, the Committee even made a clear distinction between systematic practice of torture in Serbia under the Milosevic regime and individual cases occurring under the Government of President Kostunica, which were no longer considered as systematic.

51 As illustrated in Table 1, out of the ten inquiry procedures conducted thus far, the Committee found 'systematic torture' in all cases but one, namely Sri Lanka.

3.2 Article 20(1): Evaluation of Sources of Information

52 The first phase, described in Article 20(1), is triggered by the receipt of information alleging the systematic practise of torture in a State party. The Secretary-General is then tasked to forward to the Committee any 'information which is, or appears to be, submitted for the Committee's consideration under article 20, paragraph 1, of the Convention' (Rule 75). Although this Rule empowers the Secretariat to exercise some screening ultimately the decision on whether information is reliable and well-founded remains with the Committee.[84]

53 The inquiry procedure being *optional*, only information concerning States parties which are bound by the inquiry procedure can be received, ie States parties that have not made a reservation under Article 28 or that have subsequently withdrawn their initial reservation. Moreover, contrary to Article 22, there is no requirement to exhaust domestic remedies before an inquiry procedure can be started.[85]

54 At this point, the Committee conducts a preliminary consideration of the information received. The preliminary consideration normally concerns two aspects, namely whether the information is 'reliable' and whether it contains 'well founded indications that torture, as defined in article 1 of the Convention, is being systematically practiced in the territory of the State party concerned' (Rule 81). Though Article 20 foresees the designation of members only once the decision to undertake the inquiry is already warranted, in certain cases, the Committee has designated one or more members already at the first stages of the procedure, either in order to analyse the information provided to it[86] or, as will be seen below, in order to verify the responses provided by the States parties.

55 In so far as the information is 'reliable' and 'well-founded', the Committee may initiate an inquiry *ex officio*, ie on its own initiative, without it being based on a specific complaint of a victim, an NGO, or a State party. In practice, however, most inquiries concluded thus far have been based on information received from NGOs, such as AI, HRW, and national organizations.[87] The inquiry procedure, therefore, resembles to some extent an *actio popularis* by NGOs. Nevertheless, the procedure is clearly of a *reactive nature*, and it can be undertaken only after the Committee has received information about systematic practices of torture in the territory of a State party and for the purpose of investigating these allegations; and not in order to prevent torture, as do other monitoring bodies.

[84] CAT/C/SR.9, paras 7–26.

[85] ibid, para 8.

[86] See eg CAT, 'Report of the Committee Against Torture Fifty-first Session (28 October–22 November 2013) Fifty-second Session (28 April–23 May 2014)' (2014) UN Doc A/69/44, para 108; A/56/44 (n 59) para 3.

[87] See below § 58.

3.2.1 Meaning of 'reliable information'

56 According to Rule 81(1), when necessary, the Committee 'may' ascertain the *reliability of the information and its source(s)* through the Secretary-General. It may also obtain additional relevant information to substantiate the facts of the situation. Rule 81's language suggests that these two particular steps are discretionary.

57 The drafting history of the RoP shows that Rule 81 was adopted only after significant debate over the quality of information needed to trigger an Article 20 procedure.[88] In the end, the Committee concluded that no additional proof or evidence of any kind should be required, because the objective of an Article 20 inquiry was to gather such proof or evidence. At this stage, it decided that the Committee should simply determine in a two-step process whether the information is reliable and the indications well-founded. No definition of reliability was included because the assessment should be made on a case-by-case basis.

58 Neither the Convention nor the Committee's RoP, therefore, place any restrictions on the *type of source* the information should come from. In principle, the Committee could initiate an inquiry based on media reports, as feared by States such as the *USSR* and *India* during the drafting period.[89] In practice, allegations of systematic torture have mostly come from *NGOs*. Six of the ten Committee's concluded inquiries were initiated in response to information received from NGOs with headquarters in New York, London, or Geneva,[90] whereas three began as a response to NGOs based in the State party being investigated.[91] Most recently, the Committee has shown a willingness to be proactive in initiating an Article 20 procedure by not waiting to receive a specific request before undertaking an assessment.[92] For example, in its inquiry procedure against Nepal, the Committee seems to have first taken into account its concluding observations, where it had inter alia expressed 'serious concerns about allegations of widespread use of torture'.[93]

59 In order to assess the *reliability of the 'sources'*, the CAT Committee has taken into account whether they have proved to be reliable in connection with other activities of the Committee.[94] To this end, it may also decide to examine 'additional information'. To date, the Committee has considered information obtained from the State party, other international and local NGOs, information from UN officials and bodies, such as for example the Special Rapporteur on Torture (SRT), the Office of the High Commissioner of Human Rights (OHCHR), the Committee on the Rights of the Child (CRC), the Working Group on Enforced or Involuntary Disappearances (WGEID), as well as from the ACmHRP.[95] In some cases, the CAT Committee has even consulted the State party

[88] CAT/C/SR.9, paras 38–60. [89] Tardu (n 2) 317.

[90] A/48/44/Add.1 (n 60) para 3: AI; A/51/44 (n 58) para 182: AI; A/56/44 (n 59) para 3: HRW; A/57/44 (58) para 125: the British Refugee Council, the Medical Foundation for the Care of Victims of Torture, the Refugee Legal Centre, the Immigration Law Practitioners Association and the Refugee Legal Group; A/69/44 (n 86) para 107: Alkarama; and A/72/44 (n 58) para 59: Alkarama.

[91] CAT/C/75 (n 60) para 3: Miguel Agustín Pro Juárez Human Rights Center based; A/59/44 (n 57) para 156: Humanitarian Law Centre; CAT/C/39/2 (n 58) para 3: formally by OMCT and Action by Christians against Torture (ACAT-Brazil) on the basis of a previous report of seven Brazilian NGOs.

[92] Information received from the OHCHR, 22 June 2007.

[93] CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Nepal' (2012) UN Doc A/67/44, paras 89–91. It shall be noted, however, that in the same document the Committee equally mentions a report of the SRT and information received by NGOs, hence, also in this case NGOs seem to have played a role.

[94] A/51/44 (n 58) para 219.

[95] A/48/44/Add.1 (n 60) para 4; A/51/44 (n 58) paras 182–83; A/56/44 (n 59) paras 3–5; A/59/44 (n 57); A/67/44, Annex XIII (n 58) paras 7–8.

directly regarding its observations on the source's reliability.[96] In contrast, the CAT Committee's summary report to the inquiries into *Sri Lanka* and *Brazil* suggest that in those cases no corroboration of the original sources was required before deciding that the information provided to it was reliable.[97]

3.2.2 Meaning of 'well-founded indications'

60 In addition to the reliability of the information, during this initial assessment, the Committee shall determine whether it contains indications of a systematic practice of torture that are 'well-founded'. Considering that the objective of this inquiry is to gather preliminary proof or evidence of torture, it is usually not at this stage that the Committee seeks or evaluates additional evidence—especially before it invites the Government directly concerned to cooperate under Article 20(1).[98] It is not known in how many of the cases the information received was insufficient to initiate a further inquiry, either because the source was deemed unreliable or because the Committee had obtained other information indicating that the practise of torture was not systematic. What is known, however, is that reliable information submitted by at least three NGOs did not lead to an inquiry.[99] Ultimately, given that this stage of the proceedings remains confidential, it is not possible to know precisely which standards the Committee applies in assessing whether or not torture might be practised systematically. However, the standards applied by the Committee in the adoption of the findings are clearer and will be analysed below.

3.3 Article 20(2): Decision to Undertake an Inquiry

61 If the Committee determines that the information meets the initial threshold set out by Article 20(1), then it must proceed to the second phase of the inquiry by inviting the State party to cooperate in its examination of the information and to submit observations with regard to that information (Rule 82(1)). To avoid undue delay, the Committee shall indicate a time limit for the submissions of *observations by the State party concerned* (Rule 82(2)). In examining the information received, it must take into account any observations submitted by the State party, as well as any other relevant information available to it (Rule 82(3)). Finally, if it deems it appropriate, it may decide to obtain additional information from the State party, governmental bodies, NGOs, or individuals (Rule 82(4)).

62 In practice, the Committee has generally requested that States parties respond within two to four months at this phase.[100] Turkey, Sri Lanka, Mexico, Serbia and Montenegro, and Lebanon responded either before the deadline given, or at least in time for the Committee to consider its observations during its next session.[101] Egypt, Peru, and Nepal were late with their responses and significantly delayed the process.[102] Brazil did not submit any reply at

[96] A/56/44 (n 59) para 5; A/51/44 (n 58) para 183. See also A/48/44/Add.1 (n 60) para 4, in which the Committee reports that its examination at this stage also included the consultation of a letter addressed to the Chairman from the Turkish mission in Geneva. Although the report does not specify the contents of the letter, it was written in the same month in which the Committee first began its examination.

[97] A/57/44 (58) paras 125–27; CAT/C/39/2 (n 58) paras 3–4.

[98] See above 3.1 and 3.2.

[99] Information provided by the OHCHR

[100] eg A/48/44/Add.1 (n 60) para 5; A/51/44 (n 58) para 184; A/57/44 (58) para 126.

[101] A/48/44/Add.1 (n 60) para 6; A/57/44 (58) para 126; CAT/C/75 (n 60) para 6; A/59/44 (n 57) para 156; A/69/44 (n 86) para 109.

[102] A/51/44 (n 58) para 185; A/56/44 (n 59) paras 8–9; A/67/44, Annex XIII (n 58) paras 9–10.

this stage.[103] The content of the observations varied among States. While some simply challenged the Committee's competence to make such an inquiry and refused to cooperate in the process,[104] others supplied the members with extensive information, including statistics, on legislation and other measures taken by authorities to fight torture, as well as contested that the information provided met the required standards, either because they were not reliable or because they did not indicate that torture was 'systematic'.[105]

63 With Turkey, Egypt, Peru, and Mexico, the Committee at this stage requested or considered *additional information* from NGOs, a regional human rights body, and the respective States.[106] In each of these cases, the Committee also assigned two or three of its members to analyse all additional information presented by the Government and to submit proposals for further action to the Committee.[107]

64 If the Committee deems that the response provided by the State party is not satisfactory, it decides to undertake the confidential inquiry. This decision of the Committee is a *discretionary* one.[108] At this point, the Committee may designate one or more of its members to conduct the inquiry and to report urgently to the Committee (Article 20(2) and Rule 84(1)). In practice, however, in most cases members had already been designated at an earlier stage in the proceedings, and those initial members have been retained to conduct the inquiry, unless they were unable to continue their participation.[109] Only in its *Sri Lanka* proceedings did the Committee wait to designate members until after its decision to undertake an inquiry.[110] The inquiry against Nepal marked the first time in which a female member was designated to conduct an Article 20 inquiry.[111] As of 2011, the Rule 79 regulating meetings also specifies that a member shall neither take part in nor be present at any proceedings under Article 20 of the Convention if he/she is a national of the State party concerned, is employed by that State, or if any other conflict of interest is present.[112]

3.4 Article 20(3): Conducting the 'inquiry'

3.4.1 Meaning of the Word 'inquiry'

65 Once the Committee has decided to initiate an inquiry, the procedure enters into its third stage, the inquiry itself. Although the inquiry procedure consists of several steps, the term 'inquiry' in Article 20(2), strictly speaking, only applies to the *investigations carried out by a delegation of the Committee*. Sometimes, the Committee may, at an early stage, assign some members, or even an informal working group, to the task of analysing the information and observations supplied by the sources and the Government

[103] CAT/C/39/2 (n 58) para 5.

[104] A/48/44/Add.1 (n 60) para 6.

[105] eg CAT/C/75 (n 60) para 6; A/67/44, Annex XIII (n 58) para 18.

[106] A/48/44/Add.1 (n 60) para 8; A/51/44 (n 58) para 184; A/56/44 (n 59) para 8; CAT/C/75 (n 60) para 7.

[107] eg A/48/44/Add.1 (n 60) para 8; A/51/44 (n 58) para 185; A/56/44 (n 59) para 8; CAT/C/75 (n 60) para 7; A/69/44, Annex XIII (n 79) para 3.

[108] Wouter Vandenhole, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence Or Convergence?* (Intersentia 2004) 298.

[109] A/48/44/Add.1 (n 60) para 8; A/51/44 (n 58) para 185; A/56/44 (n 59) para 8; CAT/C/75 (n 60) para 9.

[110] A/57/44 (58) para 127.

[111] A/67/44, Annex XIII (n 58) para 11, the Committee members were Ms Felice Gaer and Mr Luis Gallegos Chiriboga; see also A/69/44, Annex III (n 79) para 3, where the Committee members were Ms Essadia Belmir, Mr Ferdnando Marino Menéndez, and Ms Nora Sveaass.

[112] Rule 79(1) as amended by the Committee at its Forty-Fifth Session in 2010 (CAT/C/3/Rev.5); and then confirmed at its Fiftieth session in 2013 (CAT/C/3/Rev.6).

respectively. However, the inquiry only starts officially when the Committee makes the decision, in accordance with Article 20(2) and Rule 84, and informs the Government accordingly.

66 The modalities of the inquiry are set by the Committee as it deems appropriate, and the working methods are agreed to by the designated members in conformity with the Convention and the RoP (Rule 85(2)–(3)). As with all documents and proceedings of the Committee related to its functions under this Article, the inquiry is *confidential* (Rule 85(4)).

67 The members of the Committee entrusted with the inquiry resort to the usual methods of independent fact-finding based on the principle *audiatur et altera pars*.[113] This means that they shall work in close cooperation with the Government concerned and take all reliable written and oral information into account (Rule 85). The Committee may request the State party to designate an accredited representative to meet with the designated members, to provide its members with information they or the State party consider useful for confirming related facts, and to indicate any other form of cooperation that will facilitate the conduct of the inquiry (Rule 85). In practice, there have been meetings with State representatives in almost all the inquiries, often summoned at the request of the State party.[114] These representatives have included delegates from the country's mission in Geneva as well as Government officials sent from the State's capital.[115]

3.4.2 The Country Visit to the State Party

68 The most important part of the inquiry is a 'visiting mission' to the country concerned, which includes meetings with high Government officials, victims, witnesses, NGOs, and other sources of information, inspections of detention facilities and private interviews with detainees, inspections of prison registers and similar documents, etc. (Rule 86). If the Committee finds it necessary to *visit the State party's territory*, it shall request the agreement of the State party and shall inform it of its wishes with regard to the timing of the mission and the facilities required to permit the members to perform their task (Article 20(3), Rule 86). This means that visits can be conducted only with the previous consent of State party. In practice, the Committee has considered it necessary to visit all States under inquiry and has usually requested such a visit immediately after deciding to undertake the inquiry.[116]

69 None of the governments subject to an inquiry procedure completely denied any cooperation with the Committee's delegation, but two refused to allow a visit to their territory, namely Egypt and Nepal.[117] Despite denying the visit, the Committee met an Egyptian delegation in Geneva during the inquiry phase, whose comments and

[113] The principle *audiatur et altera pars* can be translated as 'let the other side be heard as well'.

[114] A/48/44/Add.1 (n 60) para 12; A/51/44 (n 58) para 192; CAT/C/75 (n 60) para 7. See also A/56/44 (n 59) para 9. Peruvian representatives requested a meeting with the Committee's designated members at an earlier phase, before the Committee had decided to undertake an inquiry.

[115] CAT/C/75 (n 60) para 10.

[116] A/48/44/Add.1 (n 60) paras 9–10; A/56/44 (n 59) para 10; A/57/44 (58) para 127; CAT/C/75 (n 60) para 8; A/59/44 (n 57) para 157. Egypt was the sole exception, in which the Committee decided to undertake the inquiry during its tenth session (19–30 April 1993), but waited until after the designated members had presented a progress report at its eleventh session (8–19 November 1993), before requesting a visit. See A/51/44 (n 58) paras 186–87.

[117] For Egypt see A/51/44 (n 58) paras 187, 195; A/72/44 (n 58) para 61; for Nepal see A/67/44, Annex XIII (n 58).

observations were then included in the Committee's findings.[118] Nepal, instead, did not provide any information during this phase but submitted comments with regard to the Committee's decision to initiate the procedure under Article 20 and the final report and also authorized the publication of the full report.[119]

Consequently, the non-authorization of the *in situ* visit does not stop the Committee from continuing its inquiry based on the Governments' replies and other sources of information.[120]

70 As shown in Table 1 above, the Committee's *visits* have ranged in length from eleven to thirty days.[121] The geographic breadth covered by the designated Committee members during these visits has varied significantly. While members visited only two provinces in *Turkey* in 1992, the 2001 delegation to *Mexico* visited at least ten cities in five states and federal districts.[122] The criteria for selecting regions are not explicitly provided in the Committee's publications. In the case of the *Sri Lanka* inquiry, however, the Committee did not visit the regions from which the worst or most numerous allegations of torture had been received. This omission was due to security reasons related to the ongoing civil conflict, but the Committee did not specify whether that security determination was made by the Committee or the Sri Lankan Government.[123]

71 Although the Committee has never explicitly articulated a set of general standards to which a State must consent before it conducts a visit, on several occasions the Committee laid out the conditions it required of specific governments. A reference to these standards is done for the first time in the Committee's report to Mexico.[124] These included, for example, access to any place where there might be persons deprived of liberty; guaranteed access in all such places to all premises, including any written document it might determine useful to consult, such as detainee registers; the possibility of private conversations with anybody, including detainees and officials of detention centres, whom they wished to interview; and the possibility of returning to places of detention already visited.[125] In subsequent inquiries the Committee also specifically mentioned assurances of non-reprisals, appropriate security arrangements, and same privileges and immunity for all missions' members and assisting personnel.[126]

[118] In the first inquiry the Committee met an Egyptian delegation in Geneva see A/51/44 (n 58) para 195; in the second inquiry Egypt sent two communication to the Committee: the first communication, transmitted on 4 October 2013, describes the State party's constitutional and legislative guarantees prohibiting torture; second, transmitted on 16 January 2014, denies the admissibility and reliability of the information submitted by Alkarama see A/72/44 (n 58) paras 60–62. At the end of the second inquiry Egypt also sent Comments and observations on the findings of the Committee A/72/44 (n 58) para 71.

[119] A/67/44, Annex XIII (n 58) paras 18, 111.

[120] A/51/44 (n 58) paras 201, 207.

[121] A/48/44/Add.1 (n 60) para 12 (Turkey: 6–18 June 1992); A/56/44 (n 59) para 10 (Peru: 19 August–1 September 2000); A/57/44 (58) para 129 (Sri Lanka: 31 August–13 September 1998); CAT/C/75 (n 60) para 15 (Mexico: 23 August–12 September 2001); A/59/44 (n 57) para 157 (Serbia and Montenegro: 8–19 July 2002).

[122] A/48/44/Add.1 (n 60) para 15; CAT/C/75 (n 60) paras 16–19.

[123] A/57/44 (58) para 129.

[124] CAT/C/75 (n 60) para 20; CAT/C/39/2 (n 58) para 18; A/69/44 (n 86) para 111.

[125] CAT/C/75 (n 60) para 20.

[126] CAT/C/39/2 (n 58) para 18 (c)–(e); A/69/44 (n 86) para 111(g)–(i); CAT, 'Guidelines on the Receipt and Handling of Allegations of Reprisals Against Individuals and Organizations Cooperating with the Committee Against Torture Under Articles 13, 19, 20 and 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc CAT/C/55/2, para 27; for a comparison see also the Revised Terms of Reference for country visits by Special Procedures mandate holders of the United Nations Human Rights Council of June 2016 (based on Appendix V, E/CN.4/1998/45 of 20 November 1997); SPT, 'Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties under article 11 (a) of the Optional Protocol' (2015) UN Doc CAT/OP/5.

72 In practice, Committee members have generally examined prisons and pre-trial detention centres. Most missions have also made sure to include visits to centres run by a variety of different public agencies, such as justice, interior, and defence ministries, including for example penitentiaries for women,[127] juveniles,[128] and administrative detention centres for irregular migrants and centres for social rehabilitation.[129] No report mentions visits or allegations related to mentally ill persons or persons with disabilities.

3.4.3 Hearings

73 According to Rule 87, the designated members may decide to conduct *hearings* in connection with the inquiry as they deem appropriate. If such hearings take place during a fact-finding mission, the specific conditions and guarantees shall be established in cooperation with the State party concerned. In particular, the Government shall be requested to ensure that no retaliatory measures are taken against any witnesses, victims, and their families appearing at such a hearing.[130] Such hearings may also be held outside a fact-finding mission on the spot, for example in Geneva. In practice, the Committee's delegations have not made use of formal hearings, in which witnesses shall be requested to take an oath or make a solemn declaration concerning the veracity of their testimony.

74 Instead the Committee has held interviews with detainees, witnesses, and victims during the visits to the States parties, in an informal setting and conducted in private. The visits have included meetings with high-level officials in the State party's capital (such as presidents, ministers of justice, ministers of foreign affairs, military commanders, high court presidents, attorneys general, chief prosecutors, and police chiefs) as well as lower-level officials in regional centres.[131] Committee members have also met with members of National Human Rights Institutions (NHRIs), representatives of regional bodies, and NGOs.[132] Finally, all visits have included interviews with alleged victims who were either in detention or had been at one time.[133] Alleged victims were selected based on reports from NGOs or other reliable sources stating that they had been tortured, medical and legal records at the places of detention indicating they had arrived with injuries, their recent arrival to detention centres, or simply at random.[134] The interviews with victims are conducted in private, ie without the presence of any prison officers, or other State party officials and it is for this reason that the Committee has selected, through the Secretariat, its own interpreters, even where that might be difficult (for example, for Tamil or Singhhalese during the inquiry in Sri Lanka in 2000).

3.4.4 Assistance during the Inquiry

75 Designated members may take with them on their visits the staff and facilities provided by the Secretary-General, as well as interpreters and persons with special

[127] A/56/44 (n 59) para 37; A/59/44 (n 57) para 170; CAT/C/39/2 (n 58) para 15.
[128] CAT/C/39/2 (n 58) para 15.
[129] A/69/44, Annex III (n 79) para 6; CAT/C/75 (n 60) paras 16–19.
[130] See also CAT/C/55/2 (n 126) para 11.
[131] A/48/44/Add.1 (n 60) paras 13–15; A/56/44 (n 59) para 16; A/57/44 (58) para 129; CAT/C/75 (n 60) para 16; A/59/44 (n 57) paras 158–59.
[132] A/48/44/Add.1 (n 60) para 15; A/56/44 (n 59) para 16; A/57/44 (58) para 130; CAT/C/75 (n 60) para 19; A/59/44 (n 57) paras 158–59.
[133] A/48/44/Add.1 (n 60) para 15; A/56/44 (n 59) para 16; A/57/44 (58) para 130; CAT/C/75 (n 60) para 23; A/59/44 (n 57) para 160.
[134] A/56/44 (n 59) para 16; CAT/C/75 (n 60) para 23; A/59/44 (n 57) para 163.

competence in the medical field or in the treatment of prisoners (Rule 88(1)). These experts may assist the Committee at all stages of the inquiry, and if they are not bound by an oath of office to the UN, they will also be required to solemnly declare that they will perform their duties honestly, faithfully, and impartially, and they will respect the confidentiality of the proceedings (Rule 88(1)–(2)). These persons should be entitled to the same facilities, privileges, and immunities provided to the members of the Committee under Article 23 CAT (Rule 88(3)). In practice, the Committee has not published much information on who accompanies them on these visits. Some summaries do refer specifically to medical experts,[135] however, and the full Mexico report identifies two members of the Secretariat who took part in the visit.[136]

3.5 Article 20(4): Adoption and Publication of the Findings

3.5.1 Adoption of the Report and Transmission to the State Party

76 Formally, the inquiry terminates with a *report* of the Committee's delegation, which is examined by the full Committee and transmitted to the Government concerned in accordance with Rule 83, together with any comments or suggestions that the Committee deems appropriate. At this time, the State party is invited to inform the Committee of the action it takes with regard to the findings, suggestions, and recommendations and asked to report on this information within a reasonable time frame (Rule 89).

77 Most States parties have responded to the Committee in about four months, usually in time for the Committee's next session. The sole exceptions were *Serbia and Montenegro* and *Brazil*, which took respectively eleven months, and one year and five months to submit their observations to the Committee. The *Sri Lanka* inquiry, proving again to be an exception, included one additional phase between the visiting members' report and the Committee's adopting a finding. Expressing unanimous satisfaction at the Sri Lankan Government's cooperation, the Committee determined that it would be premature to issue a conclusion upon hearing the designated members' report of their visit, and that more would be gained through continued cooperation with the State party.[137] To that effect, it sent a letter with preliminary recommendations to the Sri Lankan Government and requested that it submit information on the measures taken to implement them.[138] Following the receipt of three submissions by Sri Lanka (as well as information by NGOs) over the span of one year, the Committee finally concluded its inquiry and transmitted its findings to the Government.[139]

78 In practice, Committee reports have included a *conclusion as to the existence of systematic torture* in the State under inquiry as well as *recommendations* to the State on how to reform its legislation and practice so that it is in compliance with the Convention. Typical recommendations included, for example, creating independent investigation mechanisms,[140] limiting the power of military and national security courts,[141] establishing a presidential commission for the strengthening of democratic institutions,[142] providing early access to counsel,[143] incorporating independent medical

[135] A/48/44/Add.1 (n 60) para 15; A/56/44 (n 59) para 16. [136] CAT/C/75 (n 60) para 15.
[137] A/57/44 (58) para 132. [138] ibid, para 133. [139] ibid, para 135.
[140] See eg A/51/44 (n 58) para 221.
[141] See eg A/56/44 (n 59) para 47(b); CAT/C/75 (n 60) para 220(g).
[142] See eg A/56/44 (n 59) para 47(a).
[143] See eg A/57/44 (58) para 136(g); CAT/C/75 (n 60) para 220(e).

experts in the investigation process,[144] and developing a central register for detainees in all parts of the country.[145]

3.5.2 Publication of the Findings

79 Once the proceedings have been completed, Rule 84 provides that the Committee may decide to include a *summary account* of the results of the proceedings in its *annual report* (Rule 90(1)). However, as Article 20(5) provides for strict confidentiality of all the proceedings in relation to the inquiry procedure, it is only after completion of the proceedings that the Committee is authorized to include a summary account in the annual report. Moreover, in line with the principle of cooperation, before publication, the Committee must consult with the State party and invite it to submit its observations concerning the question of a possible publication within a given time limit (Rule 90(2)). If it decides to include such a summary account, the Committee shall forward its text to the State party concerned (Rule 90(3)).

80 In the past, the Committee has decided that publication of its findings was necessary, even when the States parties vehemently disagreed. The governments of *Turkey* and *Egypt*, for example, expressed their belief that publication was unjustified, with Egypt going as far as saying that any such publication would encourage terrorism.[146] The Government of *Egypt* used this opportunity to put considerable pressure on the Committee to refrain from publication. First, it invoked various principles to underline that there was no justification for publication. Secondly, it stated that 'the overall repercussions of a publication could prove highly prejudicial not only to Egypt's relations with the Committee but also to the principles and purposes of the Convention'.[147] Finally, by referring to a recent terrorist attack, the Government of Egypt went even so far as to accuse the Committee of encouraging terrorism.[148] However, the Committee was rather unimpressed by these threats and justified the publication of a summary account as 'necessary in order to encourage full respect for the provisions of the Convention in Egypt'.[149] Legally speaking, the Committee is authorized by Article 20(5) to publish a summary account even against strong objections by the Government concerned.

81 Neither Article 20 nor the RoP, however, mention the publication of the inquiry's *full report*. Nevertheless, an increasing number of States parties has authorized the Committee to publish its report in full. The first Government to authorize the publication of the full report was *Mexico*,[150] which it was then followed by *Brazil* and *Nepal*.[151] In the other six cases, the Committee published only *summary accounts*. Both always incorporate the government's comments, either interspersed within the text or in a separate section devoted exclusively to them.

82 The summary accounts of the results of the proceedings are published in the annual reports of the Committee. Full reports are instead normally published with a separate UN document number.[152]

[144] See eg CAT/C/75 (n 60) para 220(j)–(k).
[145] See eg A/57/44 (58) para 136(b).
[146] A/48/44/Add.1 (n 60) para 20; A/51/44 (n 58) para 199.
[147] A/51/44 (n 58) para 199.
[148] Para 6 of a letter of the Permanent Mission of Egypt in Geneva to the UN Office at Geneva of 3 May 1996, reproduced in A/51/44 (n 58) para 199.
[149] ibid, para 200.
[150] CAT/C/75 (n 60) para 222.
[151] CAT/C/75 (n 60); CAT/C/39/2 (n 58); A/67/44, Annex XIII (n 58).
[152] CAT/C/75 (n 60); CAT/C/39/2 (n 58); the only exception seems to be the report of Nepal which was made public in the annual report see A/67/44, Annex XIII (n 58).

3.6 Follow-up under Article 20

83 Neither Article 20 nor the RoP regulate the issue of follow up to the inquiry procedure.[153] Nonetheless, a Rapporteur on follow-up to Article 20 was appointed for the first time at the thirty-first session in 2003, when the Committee's member Mr Rasmussen was appointed 'to carry out activities aiming at encouraging States parties on which inquiries had been conducted and the results of such inquiries had been published, to take measures to implement the Committee's recommendations'.[154] Besides a short reference in the annual report, however, no other documentation is available on the Rapporteur's mandate or the activities carried out. At its fifty-sixth session in 2015, the Committee adopted internal guidelines on practical modalities and criteria for deciding on follow-up visits to inquiry missions carried out under article 20 of the Convention.[155] Unfortunately these guidelines are not public.

3.7 Reprisals under Article 20

84 In contrast to other human rights treaties, the CAT does not contain a provision addressing expressly the issue of reprisal against individuals or organizations as a consequence for having communicated with the respective monitoring body. However, in setting out the right to complaint under Article 13, the Convention stipulates that 'steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given'.[156]

85 As with other UN treaty bodies,[157] the CAT Committee has clarified its position on reprisals at its forty-ninth session in 2012 and decided to adopt a mechanism to prevent, monitor, and follow-up cases of reprisals against civil society organizations, human rights defenders, victims, and witnesses that engage and cooperate with the CAT Committee.[158] The issue of reprisals was also addressed in 2012 by the UN High Commissioner for Human Rights, who in her report on the strengthening of human rights treaty bodies urged treaty bodies to set up 'mechanisms for action' against reprisals and a 'focal point among its membership to draw attention to such cases'.[159]

86 Further to such recommendations, at its fifty-first session, the Committee adopted a statement[160] and established the function of the 'Rapporteur on reprisals' as a focal

[153] In contrast see Rules 72 and 120 that regulate the follow-up procedure respectively for the reporting and the individual compliant procedures, respectively.

[154] CAT, 'Report of the Committee against Torture Thirty-first Session (10–21 November 2003) Thirty-second Session (3–21 May 2004)' (2004) UN Doc A/59/44, paras 15, 155.

[155] CAT, 'Report of the Committee Against Torture Fifty-fifth Session (27 July–14 August 2015) Fifty-sixth Session (9 November–9 December 2015) Fifty-seventh Session (18 April–13 May 2016)' (2016) UN Doc A/71/44, para 58. It seems that those guidelines have been adopted further to a retreat on the working methods held at the Fifty-second session, where the issue of follow-up to Article 20 was also discussed.

[156] Such an explicit provision is included in OPCAT (Art 15); OP3-CRC (Art 4); OP-ICESCR (Art 13); OP-CEDAW (Art 11). Some treaty bodies have regulated reprisals in their RoPs, ie CESCR; CEDAW; CRC; CRDP; CED. On reprisals under the CAT, see also Arts 13, 19, 22. For an overview on other UN human rights treaty mechanisms see UN, 'Reprisals in the Context of United Nations Human Rights Mechanisms' (2015) UN Doc HRI/MC/2015/5.

[157] ibid, para 14.

[158] CAT, 'Report of the Committee Against Torture Forty-ninth Session (29 October–23 November 2012) Fiftieth Session (6–31 May 2013)' (2013) UN Doc A/68/44, para 27.

[159] UNGA, 'United Nations Reform: Measures and Proposals' (2012) UN Doc A/66/860, para 68.

[160] CAT, 'Statement of the Committee against Torture, Adopted at Its Fifty-first Session (28 October–22 November 2013), on Reprisals' (2013) UN Doc CAT/C/51/3.

point. In practice the mandate concerning reprisals in the context of inquiry procedures has been so far always assigned to the same person holding the mandate for reprisals relating to the individual complaints procedure, who is referred to as the 'Rapporteur for reprisal under Articles 20 and 22'.[161]

87 Finally, as a clear endorsement of the San José Guidelines, at its fifty-fifth session, the Committee adopted detailed Guidelines on the receipt and handling of allegations of reprisals against individuals and organizations cooperating with the Committee under articles 13, 19, 20, and 22.[162] For reprisals in connection to the inquiry procedure, the Guidelines describe a series of measures to be adopted before the visit, during the visit, and after the visit.

88 Within the measures to be adopted *before the visits*, the Guidelines mention the inclusion of an explicit 'clause of non-retaliation' in the official terms of reference of the visit that are usually sent to the State party concerned;[163] as well as measures aiming at facilitating the rapid alert of the Committee's members in case of reprisals.[164] In this last regard, the Guidelines mention the amendment of the standard questionnaire for interviews conducted in the framework of the inquiry procedure so as to include a specific question asking for the consent of the person or group interviewed to establish contact with the Committee through its Secretariat; and the establishment of line of contacts between UN country teams, NHRIs, NGOs, lawyers, and NPMs and the Secretariat.

89 As for the measures to be adopted *during the visit*, the Guidelines suggest that Committee members make clear to all concerned that any action taken will take in primary consideration the security of the person(s) threatened; and clearly explain to the authorities that they are keeping the contact information of those interviewed so as to monitor reprisals.[165] As actions to be adopted *after the visits*, they acknowledge that the best way to verify the implementation of its recommendations and to prevent reprisals would be to carry out a follow-up visit one or two years after the conclusion of the inquiry.[166] Yet they additionally provide that the State party should be informed that the Committee will publish any case of 'sanctions' applied to persons who have cooperated with the Committee in the summary account.[167]

90 Documents adopted by the Rapporteurs for reprisals are published online on the page of the OHCHR.[168] As the Committee's policy on reprisal is fairly recent there is no public information available yet on actions taken against reprisals under Article 20.

GIULIANA MONINA

[161] The annual reports A/68/44 (n 158) para 29 and A/69/44, Annex XIII (n 79) para 25 also specifically refer to the Rapporteur for reprisals under Article 20 mentioning that it had to be designated at a later stage. However, in practice the function of the Rapporteur on reprisals under Article 20 was joint to that on reprisals under Article 22. In this sense see the subsequent annual reports CAT, 'Report of the Committee Against Torture Fifty-third Session (3–28 November 2014) Fifty-fourth Session (20 April–15 May 2015)' (2015) UN Doc A/70/44, para 19; A/71/44' (n 155) para 18, which refer to 'the rapporteur on reprisals under articles 20 and 22'.

[162] CAT/C/55/2 (n 126) para 22. [163] ibid, para 10. [164] ibid, paras 11–12.

[165] ibid, paras 13–15. [166] ibid, paras 19–20. [167] ibid, para 21.

[168] See the OHCHR, 'CAT Committee: Reprisals' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=130> accessed 2 November 2017.

Article 21

Inter-State Communications

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

1. Introduction	568
2. Travaux Préparatoires	569
2.1 Chronology of Draft Texts	569
2.2 Analysis of Working Group Discussions	572
3. Issues of Interpretation	574
3.1 Scope of Application	574
3.2 Optional Character	575
3.3 Procedure	577
3.3.1 Preliminary Procedure (Article 21(1)(a))	577
3.3.2 Notification of the Committee (Article 21(1)(b))	577
3.3.3 Admissibility Requirements (Article 21(1)(b) and (c))	577
3.3.4 Friendly Solution (Article 21(1)(e))	578
3.3.5 Ad Hoc Conciliation Commission (Article 21(1)(e))	579
3.3.6 Other Procedural Provisions (Article 21(1)(d), (f), (g))	580
3.4 Conclusion of the Procedure and Report (Article 21(1)(h))	580
3.5 Entry into Force (Article 21(2))	581

1. Introduction

1 As most contemporary human rights treaties, the Convention against Torture provides for the establishment of a series of monitoring procedures aiming at enforcing the compliance of States parties with their respective treaty obligations.[1] As with other human rights treaties,[2] the CAT allows States Parties to complain about alleged violations of the treaty by another State Party through the *inter-State communication procedure*.[3]

[1] Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 279.

[2] Inter-State communications procedure are similarly envisaged by the following UN human rights treaties: CCPR (arts 41–43); CERD (arts 11, 12); CESCR-OP (arts 10); CRC-OP- IC (art 12); CMW (art 76); CED (art 32). Similarly, among regional mechanisms see ECHR (art 24); ACHR (art 45); ACHPR (art 47).

[3] In the present article the terms inter-State communication procedure and inter-State complaint procedure are used interchangeably.

2 The inter-State communication procedure represents the weakest monitoring procedures under the Convention. As of December 2017, only 63 out of a total of 162 States parties have made the optional declaration under Article 21(1) recognizing the competence of the Committee against Torture to receive and consider inter-State communications. To date none of them has ever resorted to such procedure. Despite this, the article below will give an overview of how this procedure works.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Swedish Draft (18 January 1978)*[4]

Article 18

1. A State party may at any time declare under this article that it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Human Rights Committee. No communications shall be received by the Human Rights Committee if it concerns a State Party which has not made such a declaration.

2. Communications received under this article shall be dealt with in accordance with the procedure provided for in article 41 of the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Committee.

Article 19

If a matter referred to the Human Rights Committee in accordance with article 18 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission. The procedures governing the Commission shall be the same as those provided for in article 42 of the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

4 *Swedish Proposal for Implementation Provisions (22 December 1981)*[5]

Article 31

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration.

[4] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[5] Draft Articles Regarding the Implementation of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1981) UN Doc E/CN.4/1493.

Communications received under this article shall be dealt with in accordance with the following procedure.

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter.

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc Conciliation Commission.

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing.

(h) The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report:

  (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached.

  (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

  (iii) In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such

a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

5 *Draft Implementation Provisions, Submitted by the Chairman-Rapporteur (1 February 1982)*[6]

Article 20

1. The States Parties to the Convention shall seek a solution to any dispute that may arise between them concerning the interpretation or application of the Convention through the means indicated in article 33 of the Charter of the United Nations.

2. The existence of such a dispute shall particularly be recognized when a State Party to the Convention has addressed to another State Party a written communication alleging that this other State Party has failed to fulfil of its obligations under the Convention and the State Party to whom the communication has been addressed denies the allegation or fails to reply within 45 days.

3. If after the expiry of a period of 45 days after the existence of the dispute is recognized the States Parties concerned have not agreed on another method of settlement, any of them may set in motion the procedure of conciliation specified in the Annex to the present Convention, through a request made to the Secretary-General of the United Nations.

Annex

1. A list of conciliators consisting of persons of high moral character and recognized competence in the field of human rights shall be maintained by the Secretary-General of the United Nations. To this end, every State Party to the Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of conciliator, including that of any conciliator nominated to fill a vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraphs.

2. When a request has been made to the Secretary-General in accordance with article 20, paragraph 3, of the Convention, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows.

The State or States constitution one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or one of those States, who may or may not be chosen from the list referred to in paragraph 1, and

(b) one conciliator of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators the same way. The four conciliators chosen by the parties to the dispute shall be appointed within 45 days following the date on which the Secretary-General receives the request.

The four conciliators shall, within 45 days following the appointment of the last of them, appoint a fifth conciliator from the list, who shall be the chairman of the Conciliation Commission.

[6] Draft Implementation Provisions of the International Convention Against Torture and Other Cruel, Inhumane or Degrading treatment or Punishment Submitted by the Chairman-Rapporteur of the Working Group (1982) UN Doc E/CN.4/1982/WG.2/WP.6.

> If the appointment of the chairman or any of the other conciliators has not been made within the period prescribed above for such appointments, it shall be made by the Secretary-General within 45 days following the expiry of that period. Any of the periods within which the appointments must be made may be extended by agreement between the parties to the dispute.
>
> Any vacancy shall be filled in the manner prescribed for the initial appointment.
>
> 3. The Conciliation Commission shall decide its own procedure. Decisions and recommendations of the Commission shall be made by a majority vote of five members.
>
> 4. The Commission shall hear the parties to the dispute and examine the claims and objections. It may make recommendation at any time and shall present a Final Report within 180 days after its constitution. The report, and any recommendation made by the Commission, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the considerations to the parties.
>
> 5. The Secretary-General shall provide the Commission such assistance and facilities as it may require for the performance of its function. The expenses of the Commission shall be borne by the United Nations.

2.2 Analysis of Working Group Discussions

6 The Working Group of the Human Rights Commission did not deal with the supervisory mechanism of the Convention in its sessions between 1978 and 1980. Although the proposal by the IAPL did not contain any form of inter-State communication procedure, such a procedure was provided for in the original Swedish proposal under its Article 18. In this proposal, the Human Rights Committee was envisaged as a treaty monitoring body for the CAT as well, and as such could receive communications to the effect that another State is not fulfilling its obligations under the Convention. Nevertheless, it was further proposed that communications could only be issued by a State which had made a declaration explicitly recognizing the competence of the Human Rights Committee with respect to this communication procedure, and could only be issued against a State which had done so as well. Further, Article 19 provided for the establishment of an ad hoc Conciliation Commission which would be set up according to the provisions provided for in Article 42 CCPR.

7 In 1978, however, several States made written comments regarding Article 18 of the original Swedish draft.[7] *Austria* generally supported the possibility for the Human Rights Committee to receive communications.[8] *Spain* argued that since the rules of application of the Covenant and the new Convention were basically identical, it was not able to see the added value of the new Convention in the fight against torture. It was suggested that the proposed texts would only lead to a duplication of instruments. *Spain* further pointed out that it was unlikely that States which had not signed the OP to the ICCPR would recognize the competence of the Human Rights Committee under Article 18 of the draft Convention.[9]

8 In 1981, the *Dutch* delegation submitted a document with comprehensive amendments to the Swedish draft.[10] According to this text, the monitoring body of the

[7] E/CN.4/1285 (n 4); see above § 3. For comments see Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314.

[8] E/CN.4/1314 (n 7) para 109. [9] ibid, paras 110–12.

[10] Amendments to the Swedish Proposals Submitted by the Netherlands (1981) UN Doc E/CN.4/1981/WG.2/WP.3.

Convention would no longer be the Human Rights Committee, but a new Committee composed of members of the Human Rights Committee would be established. The Dutch proposal also provided for a mandatory inter-State complaints procedure.[11]

9 The Committee began its real deliberations on the inter-State communications procedure only at the Working Group session in 1982.[12] At this session, Sweden submitted a draft text on the implementation provisions,[13] regulating the inter-State procedure under Article 31. In this document, the inter-State procedure was drafted along very similar lines to Article 41 CCPR. Contrary to the original Swedish proposal, it envisaged that the competence to receive and consider communications rested with an ad hoc body, the Committee against Torture. Some delegations expressed their support for the complaint procedure under Article 31.[14] Others feared that with the establishment of an ad hoc Committee against Torture there would be a risk of duplication or even (worse) a conflict between the CCPR and CAT procedures.[15] Another key element of the Swedish proposal of 1982 was the optional character of the inter-State procedure. In light of this, some delegations went so far as to question the overall value of two optional complaints procedures (individual and inter-State), and suggested omitting them from the Convention altogether.[16] In any event, the majority of the Working Group delegations preferred an optional inter-State complaint procedure.[17]

10 During the 1982 Working Group session, an unidentified State delegation further argued that State complaints based on the fact that another State is failing to give effect to the provisions of the Convention could simply be considered as a 'dispute' between States on the interpretation or the application of the Convention. Consequently, there would be no need to give the allegation of non-respect of the obligations the character of a 'complaint' and no need to establish an inter-State complaints procedure. Such a 'dispute' should be subject to the procedures for peaceful settlement set out in the *Charter of the United Nations*. Thus, in the event of such a 'dispute', the States parties concerned should be obliged to submit it to a mandatory conciliation procedure. The delegation argued that this would be preferable since States would more easily accept conciliation, as it would fall in the generally accepted treatment of inter-States disputes under a treaty.[18]

11 The 1982 sessions went on with the submission by the Chairman-Rapporteur of a draft implementation provision introducing a mandatory conciliation procedure.[19] The proposal was based on the conciliation procedure provided in the VCLT[20]and reflected the discussions held on the original Swedish draft, thus suggesting not to provide for an inter-State communication procedure, but only for a procedure regarding disputes. Such a proposal was not, however, supported by the delegations in the Working Group.[21] Some States pointed out that the international treaties on which the Chairperson-Rapporteur

[11] J Herman Burgers and Hans 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) 75.

[12] Report of the Working Group of the Commission on Human Rights (1982) UN Doc E/CN.4/1982/L.40; see also Boulesbaa (n 1) 281.

[13] E/CN.4/1493 (n 5).

[14] E/CN.4/1982/L.40 (n 12) para 79. [15] ibid. [16] ibid. [17] ibid, para 80.

[18] ibid, para 81. [19] ibid, para 82.

[20] VCLT, Art 66 (b) and Annex. See also Boulesbaa (n 1) 282.

[21] E/CN.4/1982/WG.2/WG.6 (n 6).

based his draft were based on subjects of an entirely different character. Others expressed the opinion that there was a difference between disputes regarding the application of the Convention, such as disputes related to jurisdiction and extradition, and disputes concerning the occurrence of torture. Disputes over the non-respect of the provisions under the Convention and/or the occurrence of torture would be more naturally the subject of the complaints procedures. The complaint procedure included in the Swedish proposal was deemed preferable as it would not only involve the States parties, but also the implementation organ of the Convention.[22]

12 Consequently, in 1983, the Working Group discussed the inter-State complaints procedure on the basis of the Swedish draft. The Swedish delegation informed the Working Group that it wished to maintain its proposal. The discussions were rather brief and the Chairman referred to the extensive discussions concerning the inter-State complaints procedure in 1982. Only one State assured that it could accept an *optional* inter-State complaints procedure as suggested by Sweden, but that it could not accept a mandatory procedure. Thus, the Working Group temporarily closed its debate on this draft Article and decided that this question, as well as the mandatory conciliation procedure for disputes between States, would be discussed at a later stage when the final clauses were under consideration.[23]

13 In 1984, all Working Group members agreed on a final version of the provision which provided for an optional inter-State communication procedure according to the Swedish proposal. Subsequently, Article 31 of the Swedish proposal was adopted with some minor drafting changes, as Article 21 CAT.[24]

3. Issues of Interpretation

3.1 Scope of Application

14 As recalled in the introduction, similarly to other international treaties, the CAT allows States parties to complain about alleged violations of the treaty by another State party. This inter-State communication procedure is regulated by Article 21 and Rules 91 to 101. Article 21 CAT is taken almost literally from Article 41 CCPR.

15 Pursuant to Article 21(1), a State party may submit a communication when it claims that 'another State party is not fulfilling its obligations under this Convention'. On the other hand, the wording of Article 21(1)(a) is different, stipulating that a State party may bring its initial written communication to another State party if it considers that the latter 'is not giving effect to the provisions of this Convention'. The formulation of both provisions indicates, however, that the subject of an inter-State communication may relate to any alleged violation of a substantive or procedural provision of the Convention.

[22] E/CN.4/1982/L.40 (n 12) paras 82–83.

[23] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63, paras 63–64.

[24] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 57. Main differences to Art 41 ICCPR: Art. 21(1)(c) regarding requirement of exhaustion of domestic remedies adds exception where it 'is unlikely to bring effective relief to the person who is the victim of the violation of this Convention'; Art 21(1)(e) makes reference to a friendly solution on the basis of 'respect for the obligations provided in this Convention'. In contrast to the CCPR, the CAT is silent on the establishment and functioning of an ad hoc Conciliation Commission. Art 21 enters into force when five States parties have made a declaration under paragraph 1; see Burgers and Danelius (n 11) 165.

For instance, a State party may complain that another State party has practised torture in violation of its prevention duty under Article 2; has violated the *non-refoulement* principle under Article 3; has not exercised universal jurisdiction in accordance with Articles 5(2) and 7; or has not complied with any of its reporting obligations under Article 19.

16 The scope of application of Article 21 should also be read in conjunction with Article 30 on dispute settlement. As it was seen in the analysis of the *travaux préparatoires*, the opportunity to include a procedure on inter-State communications and/or dispute settlement was widely discussed during the Working Group sessions. Eventually, it was decided that the Convention should include both. The Convention, however, does not explicitly regulate the relationship between the two articles and thus the question arises as to whether they have the same scope of application.[25] For example, the question remains open as to whether a State's claim that another State is systematically practising torture can be considered only under Article 21 or also under Article 30 as a dispute between States. During the drafting history some delegations pointed out that there was a difference between disputes regarding the application of the Convention, such as disputes related to jurisdiction and extradition, and disputes concerning the occurrence of torture. In the latter case especially, it seemed important that the matter was not exclusively dealt with between the States parties and that the Committee would be involved in the matter.[26]

3.2 Optional Character

17 Though the drafting history of the Convention shows that a mandatory inter-State complaints procedure had been discussed,[27] all Working Group members had eventually agreed on an optional inter-State communication procedure. The optional character of the procedure implies that every State party may submit a *declaration recognizing the Committee's competence* to receive and consider inter-State communications.[28]

18 As of December 2017, 63 out a total of 162 States parties have made the optional declaration under Article 21.[29] There are several reasons for the reluctance of States to make the optional declaration and/or to lodge inter-State complaints:

- Inter-State complaints represent the traditional means of States to solve disputes amongst themselves under international law. However, since human rights violations do not constitute disputes between States, this means of conflict resolution is not considered an adequate remedy. But individual complaints against States to an international monitoring body were only gradually accepted as a more appropriate means to hold States accountable. In the early days of international human rights protection, inter-State complaints were, therefore, regarded as a substitute.
- The submission of a formal complaint against another State accusing it of violating human rights constitutes an unfriendly act. In the 1950s and 1960s, when the UN Human Rights Commission was blocked by the 'no power to take action doctrine', this seemed, however, the only effective method by which States could express their concerns about gross and systematic human rights violations in other States. Today,

[25] Under Article 21(1), a State party may claim that 'another State party is not fulfilling its obligations under this Convention'. Art 30(1), however, refers to a 'dispute between two or more States Parties concerning the interpretation or application of this Convention'.

[26] E/CN.4/1982/L.40 (n 12) paras 82–83.

[27] E/CN.4/1981/WG.2/WP.3 (n 10); Burgers and Danelius (n 11) 75.

[28] Art 21(1); see also Rule 91.

[29] For more details see Appendices A3 and A4.

there are many less formal and more effective ways and means for States to raise human rights concerns in the Human Rights Council, the General Assembly, and even in the Security Council.

- In certain cases, such as the situation of gross and systematic human rights violations in Greece during the military dictatorship of the late 1960s, or in Turkey during the military regime of the early 1980s, a joint inter-State complaint lodged by a group of States[30] might be more effective than many individual complaints. But this only holds true if the inter-State complaint can lead to a final decision by an independent human rights monitoring body. Under UN human rights treaties, the procedure is, however, much weaker than under regional human rights treaties or respective ILO procedures.
- With respect to the CAT, it is more effective for States to provide the Committee with reliable information about the systematic practice of torture and to request it to start an *ex officio* inquiry under Article 20 CAT,[31] because this procedure leads to a quasi-judicial assessment of the situation and to suggestions of how to improve it.

19 The procedure functions on a *reciprocal basis*. At the time a communication is submitted by State A against State B, both States must have made the relevant declaration in accordance with Article 21(1). The wording of Article 21 clearly states that the reciprocity relates to the date on which the communication is submitted to the Committee and not to the date of the alleged violation. Thus, a State party may submit a communication to the Committee although it had not yet made the declaration of the Committee's competence on the day of the alleged violation. In other words, a State party may issue such a declaration and the next day transmit a communication to another State party about a human rights violation which occurred several years ago, but still after the entry into force of the Convention for the State party concerned.[32]

20 Under Article 21(2) States parties may also *withdraw* at any time their previously made declarations recognizing this optional procedure by notification to the Secretary-General. Such a withdrawal 'shall not prejudice the consideration of any matter which is the subject of a *communication* already transmitted under this article'. As a consequence of the withdrawal, 'no further *communication* by any other State party shall be received'. Since Article 21 uses the term 'communication' to describe both the initial communication by State A to State B (Article 21 (1) (a)) and the communication to the Committee (Article 21 (1) (b)), this provision requires some interpretation. While this was not elaborated on during the drafting phase of the CAT, the same issue was discussed when Article 41(2) of the CCPR was drafted. Hence, an analysis of the *travaux préperatoires* of the CCPR can provide some clarity. During the discussion in the third Committee of the GA, the position prevailed that the term 'communication' refers not to the communication to the Committee but rather to the initial communication by State A to State B. Otherwise, it would be possible for State B to withdraw its declaration after receipt

[30] See the respective inter-State complaints lodged by the Governments of Denmark, Netherlands, Norway and Sweden v Greece App nos 3321–3323, 24 January 1968 and CM Resolution DH (70) 1 of 15 April 1970 and App 3344/67, 31 May 1968, CM Resolution DH (74) 2 of 26 November 1974; and by the Governments of Denmark, France, the Netherlands, Norway and Sweden v Turkey App nos 9940–9944/82, 6 December 1983, resolved through friendly settlement.

[31] See also Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Kluwer Law International 2001) 200.

[32] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) (*CCPR Commentary*) 763.

of the initial communication and thereby to avoid the adoption of the matter by the Committee.[33] Similarly, it can be concluded that a withdrawal, pursuant to Article 21(2) CAT, does not have an effect on any existing communications but simply precludes the acceptance of new communications. To date no State party has withdrawn its previous declaration under Article 21.

3.3 Procedure

3.3.1 Preliminary Procedure (Article 21(1)(a))

21 Before the Committee can receive a communication the complaining State must first try to resolve the matter by sending a *written communication to the State* accused of not giving effect to the provisions of the Convention. Pursuant to Article 21(1)(a), within three months after the receipt of the communication, the receiving State shall give the State which sent the communication an explanation or any other statement in writing clarifying the matter. If appropriate and possible, the communication should include references to domestic procedures and remedies taken, pending, or available on the matter.

3.3.2 Notification of the Committee (Article 21(1)(b))

22 If the matter is not treated to the satisfaction of both States concerned within six months after the State has received the written communication, both States may refer the matter to the *Committee* by giving notice both to the Committee and the other State. Rule 92(2) RoP requires that the communication referred to the Committee shall contain, or be accompanied by information regarding (a) steps taken to adjust the matter in accordance with Article 21(1)(a) and (b), including the text of the initial communication and any subsequent written explanation or statement by the States parties; (b) steps taken to exhaust domestic remedies; (c) any other procedure of international investigation or settlement resorted to by the States parties concerned.[34] The Secretary-General maintains a permanent register of all inter-State communications received by the Committee.[35]

3.3.3 Admissibility Requirements (Article 21(1)(b) and (c))

23 In addition to the declaration under Article 21, two additional requirements must be respected for the Committee to consider an inter-State communication: the six month time limit prescribed in Article 21(1)(b); and the exhaustion of domestic remedies as required by Article 21(1)(c).[36]

24 Under the latter requirement, the Committee may only consider a communication if all domestic remedies have been invoked and exhausted. The exhaustion of domestic remedies requirement in Article 21(1)(c) is subject to conformity with the 'generally recognized principles of international law'.[37] However, as established in the final sentence of Article 21(1)(c), there are two exceptions to this admissibility requirement: the first applies when the remedy is unreasonably prolonged, the second when the remedy is

[33] Nowak, *CCPR Commentary* (n 32) 763.

[34] See below 3.3.3, on the requirements for admissibility.

[35] CAT, 'Rules of Procedure, as Lastly Amended by the Committee at its Fiftieth Sessions (06 May 2013–31 May 2013)' (2014) UN Doc CAT/C/3/Rev.6, Rule 93.

[36] See also Rule 97 (b) and (c) respectively.

[37] On the requirement to exhaust domestic remedies as a recognized principle of international law see also Nowak, *CCPR Commentary* (n 32) 768.

'unlikely to bring effective relief to the person who is the victim of the violation of this Convention'.[38]

25 Article 21, however, does not contain any provision to the effect that the Committee shall not consider an inter-State communication if the same matter has already been examined under, or is pending before, another procedure of international investigation or settlement. In contrast, Article 22(5)(a) prohibits the double consideration of individual communications. The absence of the non-duplication principle with respect to the inter-State communications procedure corresponds to international practice and points to the fact that States and individuals are different legal subjects under international law. While individuals should not be encouraged to submit multiple complaints on the same subject, States 'should be able to use cumulatively every peaceful means of settling disputes'.[39] But Rule 92(c) requires the complaining State when referring the matter to the CAT Committee to inform it of any other international procedure to which it had previously resorted. Even if one of the States parties concerned has referred the same dispute to an arbitration mechanism or the ICJ in accordance with the procedure foreseen in Article 30 CAT, the Committee would not be empowered to declare the communication inadmissible.[40]

26 Although no other admissibility requirements are mentioned in this Article, the Committee must nonetheless examine whether the communication is compatible with the Convention *ratione materiae, loci, personae*, and *temporis*. If the alleged violation concerns an obligation which is either not contained in the Convention or which occurred before the entry into force of the Convention for the State party concerned, the Committee may declare such communication inadmissible *ratione materiae* or *temporis*, respectively.

3.3.4 Friendly Solution (Article 21(1)(e))

27 The main function of the Committee in the inter-State communication procedure is to *mediate*, that is to 'make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention' in accordance with Article 21(1)(e).[41] As soon as the Committee has declared an inter-State communication admissible, it shall attempt to mediate between the States parties concerned. The procedure for dealing with inter-State communications represents a pure mediation and conciliation procedure without the possibility of a final decision if the efforts to reach conciliation fail.[42]

28 On the other hand, a friendly solution must be reached 'on the basis of respect for the obligation provided for in this Convention'. Thus, it is important that the Committee does not simply mediate between the States parties concerned, but that it ensures that any

[38] See eg *TPS v Canada*, No 99/1997, UN Doc CAT/C/24/D/99/1997, 16 May 1999, para 10.1; for examples by the HRC see *Ländsmann v Finland*, No 511/1992, CCPR/C/52/D/511/1992, 26 October 1994, para 6.2; *Faurisson v France*, No 786/1997, CCPR/C/58/D/550/1993 19 July 1995, para 6.1. The second exception concerning ineffective remedies is not included in any other UN human rights treaties see eg ICCPR (art 41(1)(c)); CESCR-OP (art 10 (1)(c)); CERD (art 11 (3)); and CMW (art 76 (1) (c)), which all provide only that domestic remedies shall not be unreasonably prolonged. The texts of CED (art 32) and the CRC-OP-IC (art 12) do not provide any exception of this kind. For an example by the ECtHR see *Ireland v the United Kingdom* (1978) Series A no 25.

[39] See Manfred Nowak, Dorothea Steurer, and Hannes Tretter (eds), *Fortschritt im Bewußtsein der Grund- und Menschenrechte: Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora* (Engel 1988) 189; Nowak, *CCPR Commentary* (n 32) 763.

[40] On the relationship between the Arts 21 and 30 see below Art 30, 3.4.

[41] Rule 98; in this sense see also Ingelse (n 31) 198.

[42] cf Nowak, *CCPR Commentary* (n 32) 759.

friendly solution is based on the respect for the obligations under the CAT, as required by Article 21(1)(e). One should bear in mind that an inter-State complaints mechanism does not relate to a classical dispute among States, which might be settled by means of compensation or trade-offs, but to allegations of serious human rights violations relating to the absolute and non-derogable prohibition of torture and ill-treatment. If the Committee finds that torture is indeed practised systematically in the State party against which a communication had been lodged, it would not be compatible with this provision if that State offered to pay a certain amount of compensation to the State party which had submitted the communication. The State found to violate the obligations under the Convention would have to ensure by legislative and other measures that the systematic practise of torture stops, that the victims of torture are provided with adequate reparation in accordance with Article 14 CAT, and that the perpetrators of torture are brought to justice.

3.3.5 Ad Hoc Conciliation Commission (Article 21(1)(e))

29 Article 21(1)(e) further stipulates that 'when appropriate' the Committee may establish an ad hoc *Conciliation Commission* for the purpose of its activities in the context of its good offices.

30 Conciliatory Commissions are equally envisaged in other UN treaties, such as the CERD (Articles 11 to 13) and the CCPR (Article 42). Each of the three treaties, however, regulate the ad hoc Commission in a different manner. While the procedure under the CCPR is triggered only if the Human Rights Committee failed its efforts to achieve a friendly solution,[43] the CAT does not set up a similar condition and simply states that the Committee may set up an ad hoc Conciliation Commission if it finds it 'appropriate', which means for example also at an early stage of the proceedings. In both treaties, however, the establishment is optional. Yet, unlike the Human Rights Committee, the CAT Committee does not need the prior consent of the States parties concerned. In contrast, the setting up of an ad hoc Commission under CERD is mandatory and envisaged as a second phase after the CERD Committee has collected all relevant information on admissibility and fact-finding. Under CERD, the Commission shall additionally submit a report including its findings on the relevant factual questions and recommendations for resolving the dispute.

31 Whilst the CERD and CCPR include elaborate provisions on the establishment and functioning of such ad hoc Commissions,[44] the CAT simply confers the power to establish a Commission to the CAT Committee but is silent on the composition, mandate, and procedure that the ad hoc Commission should have.[45] Since the RoP also do not contain any provisions to this effect, it will be up to the Committee, when establishing such a Conciliation Commission, to amend its RoP or else leave this entirely up to the Conciliation Commission itself. To facilitate the achievement of an amicable solution it seems, however, useful to appoint the members of the Conciliation Commission in agreement with the States parties concerned, as provided for in Article 42(1)(b) CCPR.[46] As it currently stands, Article 42 CCPR has the potential to serve as a model for conciliation if ever the Committee against Torture is confronted with a disagreement or inter-State communication to that effect.

[43] ibid 777ff. [44] For an analysis of the CERD and CCPR procedures see ibid 780.

[45] ibid 777ff.

[46] Article 42(1)(b) CCPR states that 'The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.'

3.3.6 Other Procedural Provisions (Article 21(1)(d), (f), (g))

32 The inter-State communication procedure is *confidential.* This follows from the requirement of Article 21(1)(d) that the Committee shall hold closed meetings when examining such communications.

33 Furthermore, pursuant to subparagraph (g), States Parties have the right to be represented when the matter is being considered by the Committee and make submissions, except during the Committee's deliberations on the report.[47] For this reason, the States parties concerned shall be informed of the opening date and duration of the session as early as possible.[48] In addition, Rule 96 provides that the Committee, after consultation with the States parties concerned, may issue communiqués for the use of the information by the media and the general public regarding its activities under Article 21, including during ongoing proceedings.

34 Finally, under Article 21(1)(f), the Committee may request States Parties to submit additional information,[49] and set up a deadline for the submission of the requested information.[50]

3.4 Conclusion of the Procedure and Report (Article 21(1)(h))

35 Unlike the individual complaints procedure, under Article 21 the Committee is not empowered to adopt a decision, but can only 'submit a report'. Such report shall be adopted within twelve months after having received the notice by one of the States parties concerned.

36 Pursuant to Article 21(1)(h) if a solution is reached (due to the good offices provided by the Committee) the report shall be confined to a brief statement of the facts and of the solutions reached.[51] If the attempts of the Committee, and perhaps also of the ad hoc Conciliation Commission, to reach a friendly solution fail, the Committee shall submit a report which shall, according to Article 21(1)(h)(ii), contain a brief statement of the facts as well as the written and oral submissions of the States parties concerned.[52]

37 Although the final report of the Committee shall not contain any legal assessment whether or not the State party concerned violated its obligations under the Convention, it shall in any case (whether a friendly solution has been achieved or not) contain a '*brief statement of the facts*'. This requires at the very least, a minimum of fact-finding as well as the evaluation of such facts. But Article 21(1)(h), in contrast to Article 20(3), does not authorize the Committee to carry out fact-finding missions to the territory of the State party concerned. It may only call upon the States parties concerned to 'supply any relevant information' pursuant to Article 21(1)(f) and Rule 99 as well as to hold oral hearings in accordance with Article 21(1)(g) and Rule 100. Although neither the Convention nor the RoP use the term '*oral hearing*', this clearly derives from the right of the States parties concerned under Article 21(1)(g) 'to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing'.[53]

38 Taking into account that the Committee only meets a few times a year, it seems very difficult for it to carry out its various fact-finding and mediation functions, including oral hearings and the establishment of an ad hoc Conciliation Commission, within one year. Nevertheless, the Committee is required to submit a report. In practice, such a report will most likely only be of a preliminary nature, since nothing in the Convention

[47] Rules 100 and 101 (2). [48] Rule 100. [49] Rule 99. [50] Rule 99.
[51] Article 21(1)(h)(i) CAT. [52] Article 21(1)(h)(ii) CAT.
[53] On the possibility of oral hearings in the individual complaints procedure see below Art 22, § 155.

prevents the Committee from continuing its fact-finding and mediation efforts after this date and supplementing its preliminary report with a concluding report at a later stage.

39 Although the Committee is not authorized to make a legal assessment as to whether or not the State party concerned violated its obligations under the Convention, the statement of the facts, of course, contains a certain evaluation whether or not torture was in fact practised or whether other obligations were implemented or violated. It would, therefore, also be advisable for the Committee to provide for a certain follow-up to such a report to ensure that the State party concerned complies with the terms of the friendly solution. In particular, nothing would prevent the Committee from *ex officio* initiating an *inquiry procedure* under Article 20 CAT on the basis of the information which it received in the course of an inter-State communications procedure, provided that such information is reliable and contains well-founded indications that torture is being systematically practised in the territory of the State party concerned. In this case, the Committee would be authorized to conclude with a legal assessment, findings, and suggestions and to include at least a summary account of the results of the proceedings in its annual report.[54] Finally, any State party concerned is authorized to submit this unsolved dispute to another arbitration mechanism and, in the last instance, to the ICJ under the procedure provided for in Article 30.[55]

40 The Convention is silent regarding the possibility of *publishing* the final report or at least a summary account of the results of the proceedings in the annual report, as provided for in Article 20(5). The fact that the report, according to the last sentence of Article 21(1), shall be communicated only to the States parties concerned may be used as an argument against such publication.[56] On the other hand, the confidentiality requirement described above only refers to 'meetings', and similar provisions relating to the individual complaints procedure in Article 22(6) and (7) have not prevented the Committee, along with other UN treaty monitoring bodies, from publishing the full text of all final decisions in the annual reports. It follows, therefore, that the Committee is authorized also to publish the full text of its reports under Article 21(1)(h).[57]

3.5 Entry into Force (Article 21(2))

41 Article 21(2) provides that the inter-State communication procedure shall enter into force when *five* States Parties had made a declaration under Article 21(1). The low number of signature required by the Convention was meant to facilitate the entry into force of the provision, avoiding that the mechanism would enter into force only years after, as it happened for Article 41(2) CCPR.[58] In practice, the inter-State communication procedure entered into force, together with the Convention on *26 June 1987*.[59] The first five States parties to accept the CAT inter-State procedure were: Argentina, France, Norway, Sweden, and Switzerland.[60]

GIULIANA MONINA

[54] See above Art 20. [55] See below Art 30. [56] See also r 101(3).

[57] In this sense see also Ingelse (n 31) 199.

[58] Art 41 of the CCPR required ten declarations. The CCPR inter-State procedure entered into force only on 28 March 1979, that is, more than three years after the Covenant.

[59] For the entry into force of the Convention see below Art 27.

[60] Declarations were made on 2 December 1986. See A/43/46, Annex I. But see A/61/44, Annex III, which indicates that Uruguay might have made its declaration on 24 October 1986, ie before Switzerland. According to the latter annual report, seven States parties (including Hungary which at that time was a still a Socialist State) had recognized the inter-State communication procedure by the date of entry into force of the Convention on 26 June 1987.

Article 22

Individual Complaints Procedure

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

- **(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;**
- **(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.**

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

1. Introduction 584
2. Travaux Préparatoires 585
2.1 Chronology of Draft Texts 585
2.2 Analysis of Working Group Discussions 586
3. Issues of Interpretation 588
3.1 Optional Character 588
3.2 Article 22(1): Standing of the Applicant 589
3.2.1 Meaning of 'individuals' 589
3.2.2 Meaning of 'victim' 590
3.2.3 Meaning of 'on behalf of individuals' 592
3.3 Article 22(1): Individuals Subject to Its Jurisdiction 593
3.4 Article 22(2): Inadmissibility of Anonymous Complaints 595
3.5 Article 22(2): Abuse of the Right of Submission 596
3.6 Manifestly Unfounded 596
3.7 Article 22(2): Incompatibility with the Provisions of the Convention 598
3.7.1 Ratione personae 598
3.7.2 Ratione materiae 599
3.7.3 Ratione temporis 600
3.7.4 Ratione loci 601
3.8 Article 22(5)(a): Examination under Another Procedure 602
3.8.1 Meaning of 'another procedure of international investigation or settlement' 602
3.8.2 Meaning of 'has not been, and is not being' 603
3.8.3 Meaning of 'examined' 604
3.8.4 Meaning of 'same matter' 605
3.9 Article 22(5) (b): Exhaustion of Domestic Remedies 605
3.9.2 Meaning of 'all available domestic remedies' 606
3.9.2.1 Compliance with Domestic Procedures 606
3.9.2.2 Existence of Several Remedies 607
3.9.2.3 Existence and Appropriateness 607
3.9.3 Meaning of 'unlikely to bring effective relief to the person . . . ' 610
3.9.4 Meaning of 'unreasonably prolonged' 612
3.9.5 Procedural Aspects Concerning Article 22(5)(b) 613
3.10 Interim Measures 616
3.10.1 Authority of the Committee to Request Interim Measures 616
3.10.2 Scope of Application 617
3.10.3 The Procedure for Granting Interim Measures 618
3.10.4 Revision and Withdrawal of Interim Measures 620
3.10.5 Non-Compliance of Interim Measures 621
3.10.6 Remedying a Violation of Article 22 for Non-Compliance 623
3.11 Article 22(3), (4), (6) and (7): Procedure before the Committee 623
3.11.2 Submitting a Complaint 624
3.11.3 Rapporteurs and Working Group 624
3.11.4 Registration of Complaints 625
3.11.5 Procedure on Admissibility 627
3.11.6 Procedure on the Merits 627
3.11.7 Decisions and their Legal Effect 631
3.12 Follow-up Procedure 633
3.12.1 Development of the Follow-up Procedure 633
3.12.2 Indication of Reparation Measures by the Committee 633
3.12.3 The Rapporteur for Follow-up and Its Practice 634
3.13 Reprisals 636

1. Introduction

1 The right of victims of torture, ill-treatment, and other torture-related violations stipulated in the CAT, such as violations of the *non-refoulement* principle under Article 3, to an effective remedy and reparation derives from the human right not to be subjected to torture, ill-treatment, and similar violations of the Convention. Since torture constitutes a typical example of a gross violation of human rights, this important procedural right is also underlined by the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[1] This right shall primarily be provided by respective complaints procedures on the domestic level. Most importantly, Article 13 CAT contains the obligation of States parties to ensure that any victim of torture and other forms of ill-treatment has 'the right to complain to, and to have his case promptly and impartially examined by, its competent authorities'.[2] If such domestic remedies are not effective or, for whatever reason, do not provide satisfactory redress, the victim shall be granted the possibility of submitting an individual complaint to a competent international monitoring body.

2 While a mandatory right of individual complaints is guaranteed, for example, by Article 34 ECHR and Article 44 ACHR, UN human rights treaties only provide for *optional individual complaints mechanisms to quasi-judicial bodies*.[3] The respective provisions of UN treaties, most of which were drafted during the Cold War and constitute a kind of lowest common denominator between the Western and the Socialist concepts of human rights,[4] contain extremely weak language. Instead of complaints, they speak of '*communications*', instead of judgments or at least decisions on the merits, they use the term '*views*', which are considered as non-legally binding even vis-à-vis States parties that have explicitly and voluntarily accepted the competence of the respective monitoring bodies to receive and consider individual complaints.

3 Nevertheless, over the course of the years the Human Rights Committee (HRC) and the Committee against Torture (CAT Committee or Committee) have developed these weak procedures into fairly *effective quasi-judicial complaints procedures* by clearly going beyond the powers originally entrusted to them. The CAT Committee even changed the terminology and speaks about individual complaints and decisions on the merits (Rule 118 (4)), which in their structure and substance clearly resemble judicial decisions. Following the model of the HRC, it also developed the practice of issuing requests for interim measures and appointing Rapporteurs on follow-up.

4 Only 68 out of a total of 162 States parties to the Convention have accepted the optional individual complaints procedure, and the clear majority of these States are from

[1] GA Res A/60/147 of 16 December 2005; see also George Ulrich and Louise Krabbe Boserup, *Human Rights in Development Yearbook 2001: Reparations: Redressing Past Wrongs* (Martinus Nijhoff 2003); Koen De Feyter and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2006).

[2] See above Art 13.

[3] See below 3.1.

[4] Oddly enough, even treaties adopted in 2006 still follow the same model: cf art 31 CED and the OP to the CRPD. The establishment of a World Court of Human Rights still seems to constitute an almost utopian idea: see Manfed Nowak, 'The Need for a World Court of Human Rights' (2007) 7 HRLR 251; Julia Kozma, Manfed Nowak and Martin Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010).

Europe and Latin America and are also subject to the respective mandatory complaints procedures under the ECHR and the ACHR.

5 During the roughly thirty years of its existence, the CAT Committee has registered 825 complaints concerning thirty-eight States parties. Up until May 2017, 234 of them were discontinued, 86 found inadmissible, 175 were still pending, and in the remaining 329 cases the Committee took a decision on the merits.[5] In 131 cases of all decisions on the merits, the Committee established violations of one or more provisions of the Convention. The vast majority of decisions on the merits do not concern allegations of the practise of torture or other forms of ill-treatment itself, but allegations of the violation of the *non-refoulement* principle in Article 3 CAT.[6] This is the result of the fact that European and other industrialized States constitute the majority of States parties which accepted the optional complaints procedure. In addition victims of torture and other forms of ill-treatment in countries known for their practise of torture often lack effective access to international complaints procedures or are afraid of submitting complaints.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

6 *Original Swedish Draft (18 January 1978)*[7]

Article 20

1. A State Party may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to have been subjected to torture or other cruel, inhuman or degrading treatment or punishment in contravention of the obligations of that State Party under the present Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Communications received under this article shall be dealt with in accordance with the procedure provided for in the Optional Protocol to the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

7 *Swedish Proposal for the Implementation Provisions (22 December 1981)*[8]

Article 32

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.

[5] CAT, 'Report of the Committee Against Torture Fifty-eighth Session (25 July–12 August 2015) Fifty-ninth Session (7 November–7 December 2015) Sixtieth Session (18 April–12 May 2016)' (2017) UN Doc A/72/44, para 77.

[6] For more precise statistics see above Art 3, § 2; also Appendix A7b Figure 1.

[7] Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[8] Draft Articles Regarding the Implementation of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1981) UN Doc E/CN.4/1493.

2. The Committee shall consider inadmissible any communication under this article which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that

(a) the same matter has not been, and is not being, examined under another procedure of international investigation or settlement

(b) the individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of the present Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to the present Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

2.2 Analysis of Working Group Discussions

8 Deliberations in the Working Group on Article 22 only began in 1982. However, in 1978 some States had already submitted their comments to Article 20 of the original Swedish draft.[9] *Austria* had objected to the examination of individual complaints under the CAT by the HRC, arguing that this would mean that obligations voluntarily assumed by States under the CAT would be monitored by a body whose nominating States had not assumed the same obligations. Austria therefore suggested that individual complaints be referred to a sub-group (or chambers) of the Committee composed of nationals of

[9] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314; see above § 6.

States which had made the declaration under Article 20.[10] Whilst noting that no Arab State and only few African, Asian, and Latin American States had made a declaration recognizing the competence of the HRC in accordance with the OP to the CCPR, *Morocco* expressed its support for the individual complaints procedure to the HRC provided for in draft Article 20.[11]

9 In 1982, the Working Group based its discussions on the individual complaints procedure (as well as the inter-State communications) on a revised draft text on the implementation provisions submitted by Sweden.[12] Draft Article 32, which later became Article 22 CAT, was modelled on the provisions of the first OP to the CCPR. Some delegations expressed their support for the individual complaints procedure under draft Article 32. Other delegations felt that, in light of the fact that the proposal also suggested two parallel Committees, the HRC and the CAT Committee, there would be a risk of duplication or, even worse, a conflict between the two procedures. Some delegations even went as far as suggesting that it be considered that the two complaints procedures (individual and inter-State complaint procedure) be omitted from the Convention, given that they were of an optional character.[13]

10 In 1983, the complaints procedures (under Articles 31 and 32 of the new Swedish proposal) were discussed only briefly in the Working Group. The Swedish delegation informed the Working Group that it wished to maintain its proposal. *Switzerland* expressed its strong support for including an individual complaints procedure in the draft Convention.[14] No other delegation expressed its opinion on the issue at this stage.

11 In the 1984 Working Group session all States agreed on the inclusion of an optional individual complaints procedure as provided for in draft Article 32 and consequently the Article was adopted without any substantial changes.[15]

12 At the fortieth session of the Commission on Human Rights in 1984, States had a substantial debate on the achievements of the Working Group. During this session *Bangladesh* expressed concern with regard to Article 22 that complaints could only be launched against States which had made the declaration. The delegation wondered how many States would be willing to make the declaration. With regard to the requirement of exhaustion of all available domestic remedies before submission of a complaint to the Committee, the delegation stated that it would be extremely difficult for political opponents to do so and to fulfil this condition. Despite these comments, Bangladesh expressed its support for the draft Convention and hoped that it would be transmitted to the General Assembly as soon as possible.[16]

[10] ibid, para 109; see also Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 288.

[11] Summary by the Secretary-General in Accordance with Resolution 18 (XXXIV) of the Commission on Human Rights' (1979) UN Doc E/CN.4/1314/Add.4, para 16.

[12] E/CN.4/1493 (n 8); see above § 7.

[13] Report of the Working Group of the Commission on Human Rights (1982) UN Doc E/CN.4/1982/L.40, para 79.

[14] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63, para 63; J Herman Burgers and Hans 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) 89.

[15] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 57.

[16] Summary Record of the Thirty-third Meeting of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/SR.33, paras 32–33.

3. Issues of Interpretation

3.1 Optional Character

13 In contrast to the mandatory character of individual complaints under regional human rights treaties,[17] the UN has been for long time extremely reluctant to accept the right of victims of human rights violations to submit complaints. Therefore, they only provide for *optional individual complaints mechanisms to quasi-judicial bodies* on the basis of a separate optional protocol or an optional clause in the text of the respective treaty. Individual complaints are provided for by all nine treaty bodies.[18]

14 The drafting history of Article 22 shows that the optional character of the individual complaints procedure under the CAT, which is modelled on the provisions of the first OP to the CCPR, was never seriously put into question.[19] Consequently, victims of alleged violations of the CAT may only submit a complaint to the Committee against a State party which has made a declaration explicitly recognizing the competence of the Committee to deal with such complaints in accordance with Article 22(1).

15 The procedure concerning declarations is regulated by Article 22(1) and (8) and Rule 102. A State party may declare that it recognizes the competence of the Committee *at any time*.[20] Such declarations are deposited with the Secretary-General of the United Nations, who acts as the depositary of the Convention.[21] As of December 2017, 68 States parties have made a declaration under Article 22.[22]

16 Article 22(8) CAT provides for the possibility for States parties to *withdraw declarations* under Article 22(1) at any time by notification to the Secretary-General. In contrast to a denunciation under Article 12 of the first OP to the CCPR, which takes effect three months after the date of receipt of the notification by the Secretary-General, the withdrawal of a declaration under Article 22(8) CAT takes effect immediately, ie the day after the notification of withdrawal is received. Yet, as indicated in Rule 102(2), the withdrawal of the declaration 'shall not prejudice the consideration of any matter which is the subject of a complaint already transmitted under that article'. Thus, all individual complaints which reach the OHCHR in Geneva prior to the notification of withdrawal shall be accepted, registered, and considered by the Committee. Any subsequent complaints are to be declared inadmissible by the Committee pursuant to Article 22(2) as incompatible *ratione personae*, regardless of whether the alleged violation of the Convention has occurred at a date on which the State party still had accepted the individual complaints

[17] See ECHR Art 34; ACHR Art 44; ACHPR Art 55.

[18] Individual complaints procedure are possible before nine treaty bodies; four of them are regulated directly by the treaties: see CERD art 14 (entry into force of the Convention/individual complaint procedure: 1969/1982); CAT art 22 (entry into force of the Convention/individual complaint procedure: 1987); and CMW art 77 (entry into force of the Convention/individual complaint procedure: 2003/not yet entered into force); CED art 31 (entry into force of the Convention/individual complaint procedure: 2010); five of them are regulated in the respective OP see OP-ICCPR (1976); OP-CEDAW (2000); OP-CPRD (2008); OP-ICESCR (2013); OP-CRC (2014).

[19] Only Bangladesh in 1984 expressed concerns and wondered how many States would actually be willing to make such an optional declaration: see above § 12.

[20] See Article 22(1) and (8) CAT; Rule 102 (1) as lastly amended by the Committee at its fiftieth meeting in 2013 (CAT/C/3/Rev.6; hereinafter: the Rule of Procedure). Normally declarations are made upon ratification or accession but they can be made also after.

[21] See below Art 32; for a template of the declaration accepting the procedure under Art 22 see CTI and APT, 'UNCAT Ratification Tool' (2nd edn, 2016).

[22] See Appendix A3.

procedure.[23] While some States have made use of their right to denounce the first OP to the CCPR,[24] to date no State party to the CAT has withdrawn its declaration under Article 22(8) CAT.[25]

17 Article 22(8) stipulates that five declarations are needed for the individual complaints procedure to enter into force. Since among the first twenty States that ratified or acceded to the Convention in accordance with Articles 25 and 26, there were more than five States which also made the respective declaration under Article 22(1), the individual complaints procedure entered into force together with the Convention on 26 June 1987.[26]

3.2 Article 22(1): Standing of the Applicant

3.2.1 Meaning of 'individuals'

18 By making an optional declaration under Article 22(1), a State party accepts the competence of the Committee to 'receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State party of the provisions of the Convention'. This formulation is based on Articles 1 and 2 of the first OP to the CCPR.[27]

19 First of all, only *individuals* have standing to lodge a complaint to the Committee. As with the first OP to the CCPR, the CAT individual complaints procedure does not provide a remedy for the violation of collective rights. Legal persons such as corporations, NGOs, or religious groups cannot claim to be victims under Article 22. While this requirement seems too narrow for a general human rights treaty such as the CCPR, and has led to controversial discussions as to the standing of groups and legal entities,[28] it is less problematic in relation to victims of torture and other forms of ill-treatment. The right not to be subjected to torture or other forms of ill-treatment is a typical individual right, and it is difficult to imagine how a legal entity might become a victim.

20 However, torture can be practised systematically against a particular group of individuals, and victims can collectively suffer harm, as stated by the Committee in its General Comment No 3 to Article 14.[29] In such cases *collective complaints* may be divided into individual cases by the Secretariat in accordance with Rule 111(5).[30] Thus, complaints may be brought on behalf of a group of individuals, as long as each individual is identified. In practice, the Committee has received very few such complaints.

[23] See eg *Thomas v Jamaica*, No 532/1993, UN Doc CCPR/C/61/D/532/1993, 3 November 1997; and Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) (*CCPR Commentary*) 906.

[24] Nowak, *CCPR Commentary* (n 23), XXXVIII with further references.

[25] cf on 14 March 2012 Qatar has, however, withdrawn a previous reservation made upon accession on 10 February 2000 concerning the competence of the Committee under arts 21 and 22: see Appendix A4.

[26] See below Art 27. The first OP to the CCPR also entered into force together with the Covenant, whereas Art 14 CERD (which requires ten declarations) only entered into force in late 1982, ie nearly fourteen years after CERD itself.

[27] Nowak, *CCPR Commentary* (n 23) 829.

[28] For HRC jurisprudence, see above all *Lubicon Lake Band v Canada*, No 167/1984, 26 March 1990.

[29] See CAT, 'General Comment No 3 on the Implementation of Article 14 by States Parties' (2012) UN Doc CAT/C/GC/3, para 3, which states 'Victims are persons who have individually or *collectively suffered harm*, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention'.

[30] See also below Art 14 §§ 39–42.

3.2.2 Meaning of 'victim'

21 Complaints can only be submitted by or on behalf of a *victim*, generally a *person who is directly affected by a violation of a provision of the Convention* by a State party. The victim requirement aims at preventing an *actio popularis*, ie the challenging of a law, State policy or practice in the abstract without demonstrating how the alleged victim is individually affected. In this regard, the Committee clarified that to be victims and, thus, have legal standing individuals have to be 'personally and directly affected by the alleged breach in question'.[31] For example, in *Rosenmann v Spain*, concerning a Spanish citizen of Chilean origin claiming that Spain had violated Articles 5, 8, 9, 13, and 14 by failing to investigate and prosecute alleged acts of torture falling within its jurisdiction and to pursue the extradition proceedings to the furthest extent possible, the Committee found that the victim requirement was not met. The main reason for this was that the complainant was not a civil party to the criminal proceedings in Spain against the alleged offender (General Pinochet) nor did his case form part of the Spanish extradition request. In other words, the Committee noted that 'even if General Pinochet had been extradited to Spain, the complainant's situation would not have been materially altered (at least without further legal action on the complainant's part)'. The fact that he had standing under Spanish law to join the case if he wished did not seem to be relevant for the Committee, as the complainant had failed to demonstrate that he was a victim of the alleged failure of the State 'at the time of the communication'.[32]

22 More recently, however, the question arose as to whether the Convention also covers *indirect victims*. For what concerns Article 14, this issue has been addressed by the Committee in its General Comment No 3, where it was clarified that the notion of victim extends to 'affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization'.[33] Similarly, under Article 14(1), dependants are entitled to compensation in case of *death of the direct victim*.[34]

23 More in general, since the CAT, as a specialized treaty aimed at strengthening the universally recognized absolute prohibition of torture and other forms of ill-treatment, primarily contains procedural obligations of States, the question arises whether any non-compliance with such obligations necessarily produces victims with the right to submit an individual complaint to hold the respective State party accountable. A victim is a person whose human rights have been violated by a State party. Consequently, the right to submit a complaint under Article 22 only refers to violations of CAT provisions which entail *subjective rights of individuals*. Every right of an individual creates a corresponding obligation of States, but not every obligation of States corresponds to a particular individual right. The obligation to submit periodic State reports certainly belongs to the second category, and nobody has the right to submit a complaint alleging to be a victim of a violation of Article 19. On the other hand, the prohibition of *refoulement* under Article 3 is a subjective right which can be enforced by the victims through individual

[31] *Roitman Rosenmann v Spain*, No 176/2000, UN Doc CAT/C/28/D/176/2000, 30 April 2002, paras 6.4, 4.2. See also above Arts 2, 3.2.1; Art 5, 3.2.1.

[32] *Roitman Rosenmann v Spain*, No 176/2000 (n 31) para 6.4.

[33] CAT/C/GC/3 (n 29) para 3. On the notion of indirect victim see above Art 14 §§ 43–50.

[34] See also above Art 14 §§ 51–52.

complaints, as the rich case law of the Committee in relation to Article 3 illustrates. But for certain provisions, it is difficult to assess whether an alleged violation had a direct effect on a particular person who would therefore meet the victim requirement. Often, this can only be decided on a case-by-case basis taking into account all circumstances of the specific case.[35]

24 In this regard it may be useful to look at the Committee's jurisprudence. Strictly speaking, the Convention does not contain a specific *right not to be subjected to torture or other forms of ill-treatment*. But a person who has been subjected to torture can claim to be a victim of a violation of the respective State party's obligation under Article 2 to take effective measures to prevent torture. In such cases, the Committee normally finds a violation of Article 2 alone or in conjunction with Article 1.[36] Similarly, in the case of other forms of ill-treatment, the Committee found violations of the States' obligations to prevent such acts in accordance with Article 16.[37] Thus far the Committee has equally found violations of the obligations enshrined by Articles 11, 12, 13, 14, and 15.[38] Several questions remain with regard to Article 10. Does the failure of a State party to include the prohibition of torture in the training of staff at a particular prison in clear violation of *Article 10* constitute a legitimate subject of a complaint by every detainee of this prison, or only by detainees who have been tortured, or does the victim have to prove that the lack of training was the decisive reason for his or her being subjected to torture? Those questions have not yet been addressed by the Committee.[39]

25 More difficult to answer is the question whether a failure of a State party to criminalize torture with appropriate penalties under domestic law in accordance with *Article 4* or to establish the respective types of jurisdiction, including universal jurisdiction, in accordance with all requirements laid down in *Articles 5 to 9*, and to bring alleged perpetrators of torture to justice constitutes a violation of respective rights of torture victims. In the leading case of *Guridi v Spain*, the Committee admitted a claim of torture victims and found a violation of Article 4 in view of the much too lenient measures taken by the Spanish authorities against the perpetrators.[40] Similarly, in the *Hissène Habré* case, the Committee found violations of Articles 5 and 7 CAT by *Senegal* for its failure to establish universal jurisdiction in its criminal justice system and to take respective action either to extradite the former dictator of Chad to Belgium or to bring him to justice before Senegalese courts.[41] On the other hand, in *Rosenmann v Spain*, the Committee denied that a victim of the *Pinochet* regime had a right under Articles 5(1)(c), 8 and 9 such that the Spanish authorities should insist on the extradition of General Pinochet from the United Kingdom to Spain.[42]

[35] See also Wouter Vandenhole, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence Or Convergence?* (Intersentia 2004) 264; Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Martinus Nijhoff 2001) 181.

[36] See above Art 2, §§ 20–26. [37] See above Art 16.

[38] See above Arts 11, 12, 13, 14, 15. [39] See above Art 10, 3.4.

[40] *Kepa Urra Guridi v Spain*, No 212/2002, UN Doc CAT/C/34/D/212/2002, 17 May 2005, paras 3.2, 6.7; see also *Rached Jaïdane v Tunisia*, No 654/2015, UN Doc CAT/C/61/D/654/2015, 11 August 2017; and for more details Art 4, above.

[41] *Suleymane Guengueng et al v Senegal*, No 181/2001, UN Doc CAT/C/36/D/181/2001, 17 May 2006. See also above Arts 5, 3.2, 4.1; Art 7, 3.2.1.

[42] *Roitman Rosenmann v Spain*, No 176/2000 (n 31) para 6.7.

3.2.3 Meaning of 'on behalf of individuals'

26 Complaints may also be submitted '*on behalf of individuals*'. These words were inserted already in the Swedish draft of 1981 on the basis of the experience with many complaints which had been submitted to the HRC on behalf of detainees in Uruguay by family members who had fled the country.[43] The RoP give some guidance on how this could be interpreted providing that '[t]he complaint should be submitted by the individual himself/herself or by his/her relatives or designated representatives, or by others on behalf of an alleged victim when it appears that the victim is unable personally to submit the complaint and, when appropriate authorization is submitted to the Committee'.[44]

27 Unlike Rule 110 on the conditions for registration, Rule 113 does not require that relatives bringing the complaint be 'close' to the victim. Although the admissibility language seems more inclusive, in practice during the admissibility phase the Committee may apply the standards more strictly than at the registration stage.[45]

28 In addition, Rule 113 provides for a residual category of unspecified 'other persons' that may act on behalf of the victim. More specifically, Rule 113(a), as modified in 2002, provides that 'other persons' can only act on behalf of a victim 'when appropriate authorization is submitted to the Committee'. The amendment setting up a much stricter criteria for the concept of 'other persons' aimed at minimizing the risk of persons acting without good reasons or even against the intentions of the victim.[46] The previous text of the Rule, in fact, stated

> [t]he communication should be submitted by the individual himself or by his relatives or designated representatives or by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf.[47]

29 The standing requirement was interpreted by the Committee in *JHA v Spain*. In this case, the complaints were lodged by a member of a Spanish NGO acting on behalf of a number of Indian citizens held in detention outside Spain (in Mauritania) but under Spanish de facto control. Although recognizing Spain's jurisdiction, the Committee declared the case inadmissible due to the lack of standing (*locus standi)* of the complainant.[48] The Committee found that the alleged victims should have expressly authorized the complainant to approach the Committee on their behalf, unless it was impossible for them to do so, given the situation. In the present case, the Committee did not find it to be impossible to obtain express authorization, especially because the alleged victims had previously provided authorization to lodge a domestic appeal to the Spanish Commission for Refugee Assistance, and had been interviewed by representatives of various international and NGOs during their detention.[49]

30 If the reasons beyond the 2002 amendments to Rule 113 are understandable, one should similarly avoid to apply the standing requirement in a too restrictive manner as

[43] Nowak, *CCPR Commentary* (n 23) 835. [44] Rule 113 (a).

[45] On the registration criteria see also below §§ 134–43.

[46] The Rule was amended by CAT Committee at its twenty-eighth Session in 2002 (CAT/C/3/Rev.4), and then confirmed by the Committee at its Fiftieth Sessions (CAT/C/3/Rev.6); see also Vandenhole (n 35) 260.

[47] See Rules of Procedures (1994) UN Doc CAT/C/3/Rev.1.

[48] *JHA v Spain*, No 323/2007, UN Doc CAT/C/41/D/323/2007, 10 November 2008, para 8.2. See above Art 3, § 87.

[49] ibid, para 8.3.

this may frustrate the very reason of why this provision was adopted. It is clear from this provision that complaints may be submitted directly by the victim, by duly authorized representatives (lawyers, NGOs, or other representatives explicitly authorized by the victim), or by other persons who are not explicitly authorized by the victim but who act on the victim's behalf because he or she is unable personally to submit a complaint. This is the case, for example, if a torture victim is held *incommunicado*, has disappeared, if he or she has been *tortured to death*, or has been disabled, or for similarly serious reasons is unable to act personally. In such exceptional cases, relatives, close friends, or other persons may submit a complaint on behalf of the victim, but they must justify this with good reasons. It is, therefore, recommended that the wording 'appropriate authorization' should be interpreted in a broad sense of justifying why the author is unable to provide a proper authorization by the victim.

3.3 Article 22(1): Individuals Subject to Its Jurisdiction

31 In order to submit a complaint to the Committee, an individuals must be subject to that State party's jurisdiction. The concept of jurisdiction of States parties goes beyond their immediate territory and also applies to persons and territories where authorities of the respective State party exercise 'directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law'.[50] The Committee has further clarified this concept with regard to *interception measures*. In *JHA v Spain*, it stipulated that the broad interpretation of the concept of jurisdiction is applicable not only 'in respect of article 2, but of all provisions of the Convention, including article 22'.[51] In this case, the Committee recognized Spain's jurisdiction with regard to a complaint lodged on behalf of a number of Indian citizens who were rescued in international waters by a Spanish vessel and, after days of negotiations between the Spanish and Mauritanian authorities, disembarked in Mauritania in the port of Nouadhibou, where they were held in detention in a former fish-processing plant. Given these circumstances, the Committee found that Spain had indeed exercised constant de facto control over the complainants 'from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou', and it had done so 'by virtue of a diplomatic agreement concluded with Mauritania'.[52] Similarly, in *Sonko v Spain* the Committee concluded that the complainants were subject to Spain's jurisdiction due to the control exercised by Spanish officers on board the vessel, despite the interception measure was performed in the territorial waters of another State (Morocco).[53]

32 The issue as to how the term 'individuals subject to its jurisdiction' within the meaning of Article 22 should be interpreted arose in two leading cases on *universal criminal jurisdiction*. In the *Guengueng et al v Senegal* case, Senegal argued that the communication invoking Articles 5 and 7 was inadmissible because the torture acts alleged by the complainant were suffered by foreign nationals, had occurred in a foreign country and were committed by a foreign actor. Senegal further argued that the complainants were not subject to its jurisdiction under Article 22, since in such cases its domestic law did not allow to lodge a complaint before Senegalese courts regardless of the victims'

[50] CAT/C/GC/3 (n 29) para 16.
[51] *JHA v Spain*, No 323/2007 (n 48) para 8.2.
[52] ibid.
[53] *Fatou Sonko v Spain*, No 368/2008, UN Doc CAT/C/47/D/368/2008, 25 November 2011, para 10.3.

nationality.[54] In this case, however, the Committee rejected Senegal's arguments, holding that in order to establish whether a communication falls within the jurisdiction of a State party under Article 22, various factors that are not confined to the complainant's nationality must be considered. The Committee also noted that Senegal did not 'dispute that the authors were the plaintiffs in the proceedings brought against Hissène Habré in Senegal' and considered that, as required by domestic law, the complainants had accepted Senegalese jurisdiction in order to pursue the proceedings against Habré, which they instituted. Based mainly on these considerations, the Committee found that the complainants were indeed subject to the jurisdiction of Senegal for the purpose of Article 22 and thus declared the communication admissible.[55] Without elaborating further, the Committee concluded by saying that 'the principle of universal jurisdiction enunciated in article 5 … and article 7 of the Convention implies that the jurisdiction of States parties must extend to *potential* complainants in circumstances similar to the complainants'.[56]

33 The issue of jurisdiction within the meaning of Article 22 arose again in *HBA v Canada*. In this case, Mr Bush (former President of the US) travelled to Toronto to give a talk. The complainants, alleging to be torture victims of the CIA detention programme, argued that the presence of Mr Bush in the territory of Canada triggered universal jurisdiction. The complainants' counsel called upon the Attorney General of Canada to launch a criminal investigation against Mr Bush for his role in authorizing and overseeing his administration's torture programme. As no reply had been provided, the complainants' counsel attempted to file information to commence private prosecution, a procedure allowed under Canadian law.[57] Such procedure was, however, ultimately stayed. Mr Bush was not questioned, investigated, or prosecuted by the Canadian authorities who also did not take any measure to secure his presence, hence he returned to the US. Under these circumstances, the complainants claimed that Canada had violated Articles 5, 6, and 7 CAT. In this case, the Committee reiterated the argument made in *Guengueng et al v Senegal* that various factors that are not only confined to the complainant's nationality should be considered, and specified that 'a decisive factor is whether the complainant has accepted the jurisdiction of a particular State party in order to pursue the proceedings that the complainant has initiated against an alleged perpetrator of torture'.[58] When applying such principles to the present case, the Committee observed that Canada, contrary to Senegal, had disputed that the complainants were party to the private prosecution brought against Mr Bush in Canada.[59] It further noted that the complainants, who were

[54] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 41) paras 2.5–2.7, 4. On 4 July 2000, the Indictment Division dismissed the charge against Hissène Habré and the related proceedings on the grounds of lack of jurisdiction, affirming that 'Senegalese courts cannot take cognizance of acts of torture committed by a foreigner outside Senegalese territory, regardless of the nationality of the victims: the wording of article 669 of the Code of Criminal Procedure excludes any such jurisdiction.' The decision was later confirmed by the Senegalese Supreme Court.

[55] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 41) paras 6.3, 6.5.

[56] ibid, para 6.4; *HBA et al v Canada*, No 536/2013, UN Doc CAT/C/56/D/536/2013, 2 December 2015, paras 4.12, 7.2.

[57] See Criminal Code of Canada s 504.

[58] *HBA et al v Canada*, No 536/2013 (n 56) para 9.7.

[59] Canada argued that victims of torture were not 'party' to the prosecution because they did not show that they were present in Canada's territory nor that they had accepted its jurisdiction and therefore could be said to have accepted or be subject to the State's jurisdiction within the meaning of Article 22(1). In this last regard, Canada maintained that 'a person seeking to commence a private prosecution must appear before the judge who receives the information as the laying of criminal charges proceeds by an individual swearing to the

listed as victims of torture, did not show to have authorized the person who submitted the information before the Canadian prosecution (the Director of the Canadian Centre for International Justice) to act as their legal representative before Canadian authorities.[60]

34 While the two cases mentioned above provide some guidance for the interpretation of this provision in cases of criminal universal jurisdiction, various questions remain. Namely, what requirements need to be fulfilled by a complainant in order to be considered a 'party' of a criminal proceeding for the purpose of establishing jurisdiction under Article 22? Does the Committee consider that the acceptance of the State's jurisdiction within the meaning of Article 22 can be exercised by victims of torture that are not present on the territory of the State party through a legal representative? In replying to those questions it will be of utmost importance not to set up too strict requirements, as this would risk, on the one side, to weaken the States obligations under Articles 5, 6, and 7 and, on the other side, to frustrate the subjective rights of victims of torture, above all, the victims' right to bring a complaint before the Committee.

3.4 Article 22(2): Inadmissibility of Anonymous Complaints

35 As established by Article 22(2) a complaint shall not be anonymous. It is a general rule of individual complaints procedures under international law that the identity of the applicant must be revealed to the authorities of the State party, otherwise, the State party would not be in a position to investigate and respond properly to the allegations. Rule 104(b) suggests that anonymous complaints are not even registered by the Secretariat, in that they do not fulfil the criteria for registration.[61] Yet under Rule 105(a) the Secretariat may also request clarification from anonymous applicants as to their name, address, age, occupation, and the verification of their identity. A combined reading of these provisions seems to suggest that in order to comply with Article 22(2) the Committee and at least its Rapporteur on new complaints must have an opportunity to review such a decision of the Secretariat.[62]

36 The need to reveal the identity of applicants to the respondent State party and the Committee does, however, not require to reveal the identity of all applicants to the public. Upon request the Committee will normally agree to keep a complainant's identity anonymous to the public in both inadmissibility and decisions on the merits.[63]

truth of the information and any supporting facts; the individual must be within the jurisdiction of the court for purposes of enforcement of any orders against them, inter alia so that they may be held accountable for malicious prosecution' (see *HBA et al v Canada*, No 536/2013 (n 56) paras 9.7, 4.11, 4.12, 6.1, 6.2). On the other side, the applicants claimed that 'by ratifying and implementing the Convention, including enacting legislation to exercise its jurisdiction over alleged torturers present in its territory, and lodging a declaration under Article 22, Canada accepted jurisdiction over all victims of alleged torturers present in Canada … This is to say that when an alleged torturer is present in territory of a State party and thus falls within the jurisdiction of that State, its jurisdiction extends to all victims of alleged torturer because any of those victims is a potential complainant' (see the submission of the complainants of 17 July 2014 submitted by the CCR and the CCIJ <https://ccrjustice.org/sites/default/files/assets/17%20July%202014%20Final%20Reply%20UN%20CAT%20CCR%20CCIJ.pdf> accessed 2 November 2017).

[60] *HBA et al v Canada*, No 536/2013 (n 56) para 9.8.

[61] CAT, 'Rules of Procedure, as Lastly Amended by the Committee at Its Fiftieth Sessions (06 May 2013–31 May 2013)' (2014) UN Doc CAT/C/3/Rev.6, Rule 104 (2) (b).

[62] On the similar provision of Art 3 of the first OP to the CCPR see Nowak, *CCPR Commentary* (n 23) 852.

[63] *YHA v Australia*, No 162/2000, UN Doc CAT/C/27/D/162/2000, 23 November 2001; cf *MAK v Germany*, No 214/2002, UN Doc CAT/C/32/D/214/2002, 12 May 2004; *SSS v Canada*, No 245/2004, UN Doc CAT/C/35/D/245/2004, 16 November 2005.

3.5 Article 22(2): Abuse of the Right of Submission

37 Inadmissibility on grounds of *abuse* is an exception in the practice of the Committee.[64] As with the HRC, the CAT Committee is extremely reluctant to make use of its power under Article 22(2) and Rule 113(b) to declare a complaint inadmissible because of considering it as an abuse of the right to submit a complaint. So far, the Committee has rarely dismissed a complaint on grounds that the complaint constitute an abuse of right.[65]

38 In order for a complaint to be inadmissible for abuse of right, the Committee requires that one of the following conditions are met: (1) the submission amount to a malice or a display of bad faith or intent at least to mislead, or be frivolous; or (2) the acts or admissions referred to must have nothing to do with the Convention.[66] Typical examples of abusing the right of submitting a complaint are attempts to mislead the Committee with incorrect information, the use of extremely insulting and offensive language, or facts which show that the applicant is not taking the procedure seriously at all.

39 In contrast, complaints concerning related victims and similar, but not identical facts are not re-submissions of an already decided issue, and do not, therefore, constitute abuse of process.[67] Furthermore, in *Thabti v Tunisia, Abdelli v Tunisia*, and *Ltaief v Tunisia*, the Committee rejected the State party's arguments that complainants had abused their right to submit communications by virtue of their alleged political and partisan commitments.[68] In response to *Tunisia*'s further allegations that the complaints constituted defamation and thus, also abuse of procedure, the Committee noted that reports of torture were always serious and could not be deemed defamatory without a review on the merits.[69]

3.6 Manifestly Unfounded

40 Although not explicitly provided for in Article 22, Rule 113(b) regulates the inadmissibility ground of manifestly unfounded complaints. As with the HRC,[70] the CAT Committee applied this controversial inadmissibility ground and rejected as inadmissible a number of cases where it considered the complaint to lack sufficient evidence to substantiate the applicant's claim. As will be seen below, this bar to admission has been used mainly in the rejection of Article 3 claims but also other Convention Articles such as Article 16.

41 Sometimes, it is difficult to distinguish between manifestly unfounded complaints and those declared inadmissible as incompatible *ratione materiae*,[71] and both

[64] Information received from OHCHR, 2 August 2007. See also OMCT, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, vol 4 (2nd edn, OMCT 2014) 76.

[65] *PR v Spain*, No 160/2000, UN Doc CAT/C/25/D/160/2000, 23 November 2000, para 7; for cases that have been declared admissible but in which the ground of the abuse of right of submission had been raised see eg *Ali Ben Salem v Tunisia,* No 269/2005, UN Doc CAT/C/39/D/269/2005, 7 November 2007; *AM v France,* No 302/2006, UN Doc CAT/C/44/D/302/2006, 5 May 2010; *TM v Republic of Korea*, No 519/2012, UN Doc CAT/C/53/D/519/2012, 21 November 2014.

[66] *Ali Ben Salem v Tunisia*, No 269/2005 (n 65) para 8.4; *TM v Republic of Korea*, No 519/2012, (n 65) para 8.3.

[67] *Agiza v Sweden*, No 233/2003, UN Doc CAT/C/34/D/233/2003, 20 May 2005, para 9.2.

[68] *Thabti v Tunisia*, No 187/2001, UN Doc CAT/C/31/D/187/2001, 14 November 2003; *Abdelli v Tunisia*, No 188/2001, UN Doc CAT/C/31/D/188/2001, 14 November 2002; *Ltaief v Tunisia,* No 189/2001, UN Doc CAT/C/31/D/189/2001, 14 November 2002.

[69] *Thabti v Tunisia,* No 187/2001 (n 68); *Abdelli v Tunisia,* No 188/2001 (n 67); *Ltaief v Tunisia*, No 189/2001 (n 68).

[70] Nowak, *CCPR Commentary* (n 23) 839.

[71] See eg *SA v Sweden,* No 243/2004, UN Doc CAT/C/32/D/243/2004, 6 May 2004; *IAFB v Sweden*, No 425/2010, UN Doc CAT/C/49/D/425/2010, 13 November 2012, para 7.3.

inadmissibility grounds usually involve the risk of deciding questions on the merits at the admissibility stage. Since the CAT Committee usually combines both questions in one decision, this risk is less serious than with other procedures. To avoid such risk, the Committee has often decided that that 'the arguments before it raise substantive issues which should be dealt with on the merits and not on admissibility considerations alone'.[72]

42 Similarly, it is not always easy to identify what standards the Committee applies to determine whether or not a complaint is sufficiently substantiated in accordance to Rule 113(b), especially because normally the Committee gives very few details as to why a certain conclusion is reached.[73] From the case law, it emerges that the Committee has declared complaints inadmissible on this ground mainly when they provided almost no evidence or arguments at all; or when the evidence or arguments provided were insufficient to substantiate the claim.

43 In the first category, the Committee has normally rejected complaints as inadmissible because they fail to raise to the basic level of substantiation required for purposes of admissibility,[74] especially when the complainants had ample opportunity to provide evidence before domestic authority. The same conclusion was reached when no 'fresh evidence' casting doubts on the findings of the domestic authorities was submitted.[75]

44 More controversial are, instead, decisions rejecting complaints for failing to provide sufficient evidence or arguments to substantiate the claim.[76] In conducting such an assessment the Committee has, for example, taken into consideration whether the complaint included a detailed and punctual description of the facts, the legal proceedings/complaints initiated against the alleged violations, and their results;[77] but above all whether the complainant had submitted any corroborating documentary evidence supporting the claim,[78] such as a copy of the domestic judgment,[79] and especially medical evidence.[80]

45 For example, in its *jurisprudence on Article 3*, in *RS v Denmark* the Committee has rejected the complaint for failing to establish a *prima facie* case because the complainant

[72] See eg the following cases concerning Article 3: *SPA v Canada*, No 282/2005, UN Doc CAT/C/37/D/282/2005, 7 November 2006, para 6.3; *EVI v Sweden*, No 296/2006, UN Doc CAT/C/38/D/296/2006, 1 May 2007, para 7.4; *Z v Denmark*, No 555/2013, UN Doc CAT/C/55/D/555/2013, 10 August 2015, para 6.3; *RG et al v Sweden*, No 586/2014, UN Doc CAT/C/56/D/586/2014, 25 November 2015, para 7.3.

[73] In this sense see also above Art 3, § 222.

[74] With regard to Art 3 see eg *HSV v Sweden*, No 229/2003, UN Doc CAT/C/32/D/229/2003, 12 May 2004, para 8.3; *X v Switzerland*, No 17/1994, UN Doc CAT/C/13/D/17/1994, 17 November 1994, para 4.2; *X et al v Switzerland*, No 697/2015, UN Doc CAT/C/59/D/697/2015, 25 November 2016, para 6.7; with regard to Art 16 see eg *SPA v Canada*, No 282/2005 (n 72); *LJR v Australia*, No 316/2007, UN Doc CAT/C/41/D/316/2007, 10 November 2008, para 6.3.

[75] See eg *KA v Sweden* [2007] CAT No 308/2006, UN Doc CAT/C/39/D/308/2006, 16 November 2007, para 7.5; *RT v Switzerland*, No 242/2003, UN Doc CAT/C/35/D/242/2003, 24 November 2005, para 6.2.

[76] With regard to Art 3 see eg *RS v Denmark*, No 225/2003, UN Doc CAT/C/32/D/225/2003, 19 May 2004, para 6.2; *SA v Sweden*, No 243/2004 (n 71) para 4.2; *RT v Switzerland* (n 76) paras 6.2–6.3; with regard to Article 16 see eg *BSS v Canada,* No 183/2001, UN Doc CAT/C/32/D/183/2001, 12 May 2004, para 10.2; *SSS v Canada*, No 245/2004 (n 63) para 7.3; *MF v Sweden*, No 326/2007, UN Doc CAT/C/41/D/326/2007, 14 November 2008, para 6.4; *Rasim Bairamov v Kazakhstan*, No 497/2012, UN Doc CAT/C/52/D/497/2012, 14 May 2014, para 7.4.

[77] *LJR v Australia*, No 316/2007 (n 74) para 6.3.

[78] ibid; *Rasim Bairamov v Kazakhstan*, No 497/2012 (n 76) para 7.4. On evidence in support of Art 3 claims see above Art 3, §§ 234–37.

[79] *Tony Chahin v Sweden*, No 310/2007, UN Doc CAT/C/46/D/310/2007, 30 May 2011, para 8.4.

[80] *MM et al v Sweden*, No 332/2007, UN Doc CAT/C/41/D/332/2007, 11 November 2008, paras 6.4, 7.4; *Said Amini v Denmark*, No 339/2008, UN Doc CAT/C/45/D/339/2008, 15 November 2010, para 6.2; *Tony Chahin v Sweden* (n 80) 8.4.

had not provided evidence supporting the claim that he was politically active, or explaining why the political group he worked for was targeted by the State.[81] Moreover, even if provided, the Committee may find that medical evidence is not sufficient if it is inconclusive about the reasons underlying the complainant's physical and psychological symptoms,[82] or if it substantiates only past incidents of torture, without providing sufficient proof or argument as to why the alleged victim would be at risk in the future.[83]

46 For *cases invoking Article 16* in relation to medical care while in detention, the Committee further considered whether the complainant submitted any medical or other evidence concerning the medical treatment received while in detention or any deterioration of the victim's state of health as well as information on any complaints he/she might have lodged.[84] This ground was equally applied in regard to Article 16 cases alleging that a return measure to the country of origin of the complainant would constitute a violation of Article 16 per se due to the complainant's state of health.[85] In these cases, the Committee has consistently repeated that an aggravation of the condition of an individual's physical or mental health by virtue of a deportation is generally insufficient, in the absence of additional factors, to amount to a violation of Article 16.[86] In its assessment the Committee also considered whether health care was available in the country of origin.[87]

3.7 Article 22(2): Incompatibility with the Provisions of the Convention

47 Pursuant to Article 22(2) and Rule 113(c), the Committee shall consider inadmissible any complaints which are incompatible with the provisions of the Convention. As with other complaints procedures, there are four incompatibility grounds: *ratione personae, materiae, loci*, and *temporis*.[88]

3.7.1 Ratione personae

48 Incompatibility *ratione personae* deals with the requirements of active and passive legitimacy of complaints.

49 *Active legitimacy* concerns the legal standing of the complainant. This means that the Committee may dismiss complaints on the basis of this ground if they are not submitted by an individual who is a victim of a Convention's violation or on his/her behalf.[89]

50 *Passive legitimacy* concerns the State party against which a complaint has been lodged before the Committee and can encompass various situations: first, this grounds allows the Committee to dismiss complaints that are submitted against States that have not ratified the Convention or States that have ratified the Convention but have not made the

[81] *RS v Denmark*, No 225/2003 (n 76) para 6.2. [82] ibid.

[83] ibid; see also eg *SA v Sweden*, No 243/2004 (n 71). On *prima facie* cases see also below §§142, 159, and Art 3, 3.7.1 above; on medical evidence see also above Art 3, §§ 234–237.

[84] *Rasim Bairamov v Kazakhstan*, No 497/2012 (n 76) para 7.4.

[85] See eg *GRB v Sweden*, No 83/1997, UN Doc CAT/C/20/D/83/1997, 15 May 1998, para 6.7; *BSS v Canada*, No 183/2001 (n 76) para 10.2; *RD v Sweden*, No 220/2002, UN Doc CAT/C/34/D/220/2002, 2 May 2005, para 7.2; *SSS v Canada,* No 245/2004 (n 63) para 7.3; *MF v Sweden*, No 326/2007 (n 76) paras 6.4, 2.7, 4.8; *Eveline Njamba and her daughter Kathy Balikosa v Sweden*, No 322/2007, UN Doc CAT/C/44/D/322/2007, 14 May 2010, para 7.3.

[86] ibid.

[87] See eg *MF v Sweden,* No 326/2007 (n 76) para 6.4; *Eveline Njamba and her daughter Kathy Balikosa v Sweden*, No 322/2007 (n 85) para 7.3.

[88] Nowak, *CCPR Commentary* (n 23) 854. [89] See above 3.2.2.

optional declaration under that Article 22 and, hence, do not recognize the competence of the Committee to receive and consider individual complaints. Second, complaints directed against *other States* or *against non-State actors* are to be declared inadmissible *ratione personae,* if they are not imputable to the State party in question.[90] In this regard, in *Roitman Rosenmann v Spain* the Committee declared the claim inadmissible *ratione personae* because in the circumstances of the case Spain was neither the State responsible for the acts of torture, nor the State in which territory General Pinochet was found at the time of the submission of the communication.[91] In doing so, it seems that the Committee considered Articles 13 and 14 justiciable vis-à-vis only either the State responsible for the acts of torture or the other States in whose territory the alleged torturer may be found. Similarly, complaints directed against non-State actors, such as private individuals, business corporations, insurgent groups, inter-governmental, or non-governmental organizations, are to be declared inadmissible as incompatible *ratione personae*.[92] This does not, of course, rule out State responsibility for violations of the Convention by non-State actors, as torture and other forms of ill-treatment can also be committed by mere acquiescence.

3.7.2 Ratione materiae

51 The purpose of the individual complaints system under Article 22 is that victims claim violations by States parties of provisions of the Convention against Torture. Complaints alleging violations of provisions falling outside the scope of the Convention or covered by other treaties will, therefore, be declared inadmissible as incompatible *ratione materiae*. In *Roitman Rosenmann v Spain*, for example, the Committee decided that Spain had no obligation under the Convention to request the extradition of General *Pinochet* from the United Kingdom, and that the complaint was, therefore, incompatible *ratione materiae* with the respective provisions of the CAT.[93] The Committee, referring to Article 5(1)(c), considered that the latter provision establishes a discretionary faculty rather than a mandatory obligation to make, and insist upon, an extradition request.[94] This decision strongly resembles a decision on the merits.

52 Sometimes, inadmissibility decisions based on this incompatibility ground address difficult questions regarding the scope of application of a particular provision. In *TM v Sweden*, the Committee ruled that the scope of the *non-refoulement* obligation under Article 3 only covers the risk of torture, but does not extend to the risk of other forms of ill-treatment in accordance with Article 16. Consequently, the claims relating to the expulsion of the applicant were declared incompatible *ratione materiae* already at the admissibility stage.[95] In other situations, however, the Committee addressed such issue within

[90] See above Art 1, 3.1.6; see also Nowak, *CCPR Commentary* (n 23) 826.
[91] *Roitman Rosenmann v Spain*, No 176/2000 (n 31) para 6.6, concerning Arts 8, 9, 13, and 14.
[92] See above Art 1, 3.1.6; see also Nowak, *CCPR Commentary* (n 23) 826.
[93] *Roitman Rosenmann v Spain*, No 176/2000 (n 31) para 6.7. See above Art 5 §§ 75–78.
[94] ibid.
[95] *TM v Sweden*, No 228/2003, UN Doc CAT/C/31/D/228/2003, 18 November 2003, para 6.2. The decision to declare the case inadmissible *ratione materiae* due to the fact that the article did not apply to cruel, inhuman or degrading treatment or punishment was criticized in an individual dissenting opinion of the Member Mr Fernando Mariño Menéndez, who maintained that the Committee should have ruled 'in keeping with the Committee's jurisprudence in case BS v Canada (Case No 166/2000, Decision adopted on 14 November 2001) it would, in my judgement, have been more correct to find that the complaint raised substantive issues relating to a possible violation of article 16 which should be dealt with at the merits and not at the admissibility stage.' See also Vandenhole (n 35) 264.

the considerations on the merits.[96] In *Kirsanov v Russia*, for example, the Committee rejected the claims under Articles 14 and 15 when considering the merits of the case and held that the scope of application of the said provisions only refers to torture in the sense of Article 1 of the Convention and does not cover other forms of ill-treatment.[97]

53 In *Z v Switzerland* the Committee equally declared the case outside the scope of Article 3 and, hence, inadmissible *ratione materiae* the claim from an applicant who, despite holding a short-term residence permit in Switzerland on the basis of his wife's employment, argued to be at risk of refoulement to Armenia because his wife could lose her job and the permit was renewable only on a yearly basis with the sponsorship of his wife's employer. In this case, the Committee clarified that 'a complainant cannot be entitled to a protection under a particular legal status such as asylum if such protection can instead be guaranteed thought other kinds of legal arrangements' and that 'having obtained a residence permit, the author is no longer at risk of removal'.[98]

3.7.3 Ratione temporis

54 It is a generally recognized principle of international law that a treaty is not applicable to situations that took place or ceased to exist prior to entry into force of the treaty in the State concerned. Consequently a complaint must refer to an alleged violation of the Convention provisions which took place after the entry into force of the Convention for the State in question. The *ratione temporis* condition was reaffirmed by the Committee in its decision in *OR, MM and MS v Argentina*, which stated that the provisions of the Convention did not cover torture that took place in 1977, ten years before the entry into force of the Convention, thus declaring the communications inadmissible.[99]

55 But the Committee is entitled to deal with complaints when the Convention continues to be violated following its entry into force or when effects constituting a violation first became evident after this date.[100] For example, if an applicant, who was tortured shortly before the entry into force of the Convention, complained about the fact that his/her complaints were not properly investigated, that the perpetrators were not brought to justice, and that he did not receive adequate reparation, and if this situation continued after the entry into force of the Convention, the Committee may find violations of the respective obligations under Articles 12, 13, 14, and 7 CAT.

56 More controversial is the question whether the Committee may examine violations of the Convention that occurred after entry into force of the Convention but *prior to entry into force of Article 22*, ie if a State first becomes party to the Convention and only later accepts the individual complaints procedure.

57 By way of a declaration, certain States parties have explicitly limited the right to submit individual communications concerning situations that have taken place after entry into force of Article 22.[101] For these States parties individual complaints concerning such situations are normally considered inadmissible *ratione temporis*. But the question remains for States parties that have not made such a declaration. The *HRC* tends to apply

[96] *BS v Canada*, No 166/2000, UN Doc CAT/C/27/D/166/2000, 14 November 2001; *ES v Australia,* No 652/2015, UN Doc CAT/C/59/D/652/2015, 6 December 2016.

[97] eg *Sergei Kirsanov v Russian Federation*, No 478/2011, UN Doc CAT/C/52/D/478/2011, 14 May 2014, para 11.4.

[98] *Z v Switzerland*, No 545/2013, UN Doc CAT/C/56/D/545/2013, 25 November 2015, para 8.2.

[99] *OR et al v Argentina*, Nos. 1/1988, 2/1988 and 3/1988, 23 November 1989, paras 7.5, 8.

[100] On the respective jurisprudence of the HRC see Nowak, *CCPR Commentary* (n 23) 856.

[101] See eg the respective declarations of Guatemala and the Ukraine in Appendix A4.

this interpretation even to States which have ratified the first OP to the CCPR without making any specific declaration, although this jurisprudence is controversial.[102]

58 To a certain extent, the issue was addressed by the CAT Committee in *Gerasimov v Kazakhstan*.[103] As Kazakhstan ratified the Convention in 1998 but made the declaration under Article 22 only on 21 February 2008, the question arose as to whether the Committee was competent in deciding on complaints alleging violations occurred after the ratification of the Convention but before the declaration under Article 22. In this case, the Committee stated that although

> a State Party's obligations under the Convention apply from the date of its entry into force for that State party … it can examine alleged violations of the Convention which occurred before a State party's recognition of the Committee's competence under article 22 if the effects of these violations continued after the declaration, and if the effects constitute in themselves a violation of the Convention.[104]

For this purpose, the Committee considered that 'a continuing violation must be interpreted as an affirmation, after the formulation of the declaration, by act or by clear implication, of the previous violations of the State party.'[105] This approach was also confirmed in General Comment No 4.[106]

59 So far, however, the Committee has not yet had the chance to specifically address the issue with regard to violations with no continuing effect. On this point, *Ingelse* seems to follow the HRC approach when he asserts that 'the alleged violation must have been committed after formal acceptance by the State party in question of the Committee's competence to receive individual complaints with respect to that State'.[107] To conclude, the date of entry into force of Article 22 is relevant only with respect to the right of victims to submit a complaint.[108] In other words, if a State ratified the Convention in 2000 and made the declaration under Article 22 in 2004, an individual who was tortured in 2003 may submit a complaint in 2005, and the Committee is competent to deal with this complaint even if the practice of torture ceased in 2003 and had no continuing effect in 2004.

3.7.4 Ratione loci

60 Article 2(1) CAT clearly establishes the obligation of States parties to prevent acts of torture 'in any territory under its jurisdiction'. The CAT Committee has interpreted this provision in its General Comment No 2, clarifying that a State party's jurisdiction includes any territory where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law.[109] *De*

[102] cf eg *Aduayom et al v Togo*, Nos 422–24/1990, 12 July 1996, para 7.3. See Nowak, *CCPR Commentary* (n 23) 854; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press 1994) 160.

[103] *Alexander Gerasimov v Kazakhstan*, No 433/2010, UN Doc CAT/C/48/D/433/2010, 24 May 2012, para 11.2.

[104] ibid; see also *NZ v Kazakhstan*, No 495/2012, UN Doc CAT/C/53/D/495/2012, 28 November 2014, para 12.3.

[105] *NZ v Kazakhstan*, No 495/2012 (n 104) para 12.3.

[106] CAT, 'General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 2' UN Doc CAT/C/CG/4, para 32.

[107] Ingelse (n 35) 181.

[108] See also Nowak, *CCPR Commentary* (n 23) 854 with further references; Vandenhole (n 35) 261; OMCT (n 63) 58.

[109] CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2; OMCT (n 64) 5.

facto effective control of the State party may include for example occupation, leasing of territory, or simply by carrying out of sovereign actions on foreign territory, by military, police, intelligence, diplomatic, or other authorities.[110] It follows that complaints against actions taken by agents of a State party abroad shall not be declared inadmissible as being incompatible *ratione loci*.

61 Article 22(1) mirrors this interpretation by granting the Committee the competence to deal with complaints of individuals 'subject to its jurisdiction', ie of the respective State party. Unlike Article 2, the wording of Article 22 does not refer to the wording 'any territory under its jurisdiction' but only to 'jurisdiction'. This calls for an even broader interpretation of jurisdiction. Whilst the Committee has used several time Article 22(1) to declare a complaint inadmissible, it has so far not declared any complaint inadmissible on ground of incompatibility *ratione loci*.

3.8 Article 22(5)(a): Examination under Another Procedure

62 According to Article 22(5)(a) and Rule 113(2)(d), the Committee does consider communications only if it ascertains that the same matter 'has not been, and is not being, examined under another procedure of international investigation or settlement'.

3.8.1 Meaning of 'another procedure of international investigation or settlement'

63 The term '*another procedure of international investigation or settlement*' covers only individual complaints procedures under international or regional human rights treaties, such as the ECHR, ACHR, first OP to CCPR, CERD, CMW, CED, OP to CRPD, and the OP to CEDAW, as well as certain ILO procedures.[111] With regard to other UN bodies, the Committee has consistently held that

> extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, whose mandates are to examine and report publicly on human rights situations in specific countries or territories or on cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 22, paragraph 5 (a), of the Convention.[112]

64 Not covered by the inadmissibility ground of Article 22(5)(a) are, for example, all reporting and inquiry procedures as well as complaints procedures before the UN Human Rights Council and its special procedures, such as for example the Special Rapporteur on Torture[113] and the Special Rapporteur on extrajudicial, summary, or arbitrary executions.[114] The Geneva Refugee Convention or the Statute of the *UNHCR* does not provide for a procedure for international investigation or settlement which might prevent the CAT Committee from examining an allegation of a violation of the *non-refoulement* principle under Article 3.[115] Also the procedures of *preventive visits to places of detention*

[110] cf Art 2, 3.2.

[111] Nowak, *CCPR Commentary* (n 23) 879.

[112] eg *Dégratias Niyonzima v Burundi*, No 514/2012, UN Doc CAT/C/53/D/514/2012, 21 November 2014, para 7.1.

[113] eg ibid, para 7.2; *Ali Aarrass v Morocco,* No 477/2011, UN Doc CAT/C/52/D/477/2011, 19 May 2014; *Djamila Bendib v Algeria*, No 376/2009, UN Doc CAT/C/51/D/376/2009, 8 November 2013.

[114] eg *Djamila Bendib v Algeria*, No 376/2009 (n 113) para 5.1.

[115] eg *VXN and HN v Sweden*, Nos 130/1999, 131/1999, UN Doc CAT/C/24/D/130&131/1999, 15 May 2000, para 13.1.

before the European Committee for the Prevention of Torture[116] or the UN Subcommittee on Prevention of Torture are not considered procedures of settlement or investigation according to Article 22(5)(a). Moreover, since the same matter must relate to allegations of torture or other forms of ill-treatment, the application of this provision is further limited. For example, the Committee has observed that the Working Group on Arbitrary Detention is not a 'procedure' within the meaning of Article 22(5)(a) also because its mandate concerns, *ratione materiae*, the issue of arbitrary deprivation of liberty and not torture. [117]

3.8.2 Meaning of 'has not been, and is not being'

65 The wording of Article 22(5)(a) shows that this provision applies not only to complaints that are *simultaneously* being examined under another comparable procedure but also to those that have been examined in the past. In comparison with the first OP to the CCPR, which prevents the HRC from considering individual complaints only if the same matter is *simultaneously* 'being examined' under another comparable procedure,[118] Article 22(5)(a) CAT is broader and extends this inadmissibility ground also to any *previous* examination of the same matter by another procedure of international investigation or settlement.[119]

66 The Committee's jurisprudence on this aspect is not always consistent. Some clarifications on the meaning of 'being examined' were given by the Committee in the 2008 case of *Keremedchiev v Bulgaria*.[120] There, notwithstanding that an application on the same matter was pending before the ECtHR, the Committee considered the case as admissible. In doing so, it noted that, by the time the complaint was lodged before the Committee, the application before the ECtHR had been only registered but not yet communicated to the Government. For this reason, it held that the complaint could not be seen as 'being' or 'having been' considered under another procedure of international investigation or settlement.[121] However, in other instances the Committee rejected cases still pending before the ECtHR without considering whether or not they were communicated to the respective Government.[122] Furthermore, the Committee did not consider inadmissible the claim of a complainant who had already lodged an application before the ECtHR but then withdrawn it before it was examined, even though the ECtHR had already rejected the applicant's request for interim measures.[123]This practice has been

[116] eg *AEM and CBL v Spain*, No 10/1993, UN Doc CAT/C/13/D/10/1993, 14 November 1994, paras 3.3, 4.1, 5.2.

[117] eg *Déogratias Niyonzima v Burundi*, No 514/2012 (n 112) para 7.2.

[118] See Article 5(2)(a) OP-CCPR. On the CCPR see Nowak, *CCPR Commentary* (n 23) 875.

[119] The same applies for other international treaties and conventions see eg Art 35(2)(b) ECHR; Art 47(d) ACHR; Art 77(3)(a) CMW Art 4(2)(i) OP to CEDAW; Art 31(2)(c) CED; Art 2(c) OP to CRPD. The OP to CRPD is similar to the CAT as it also includes earlier examinations. See eg *EE v Russian Federation*, No 479/2011, UN Doc CAT/C/50/D/479/2011, 24 May 2013, para 8.3.

[120] *Kostadin Nikolov Keremedchiev v Bulgaria*, No 257/2004, UN Doc CAT/C/41/D/257/2004, 11 November 2008.

[121] ibid, para 6.1.

[122] *NB v Russian Federation*, No 577/2013, UN Doc CAT/C/56/D/577/2013, 25 November 2015, para 8.2; *AG v Sweden,* No 140/1999, UN Doc CAT/C/24/D/140/1999, 2 May 2000, paras 4.2, 6.2; *WJ v Austria,* No 5/1990, UN Doc CAT/C/5/D/5/1990, 22 November 1990, para 3. See also Fanny De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill 2016) 112.

[123] For complaints before the ECtHR *JAGV v Sweden*, No 215/2002, UN Doc CAT/C/31/D/215/2002, 11 November 2003, para 6.1; *Inass Abichou v Germany*, No 430/2010, UN Doc CAT/C/50/D/430/2010,

criticized as it contributes to the multiplication of international procedures on the same matter by leaving open the possibility for complainants to first lodge an application and request for interim measures in Strasbourg and, then, should this be unsuccessful, try before the Committee.[124]

3.8.3 Meaning of 'examined'

67 The most difficult question of interpretation is what the term '*examined*' under another international procedure means. The Committee's jurisprudence sheds little light on the issue.

68 If the ECtHR or Inter-American Court of Human Rights (IACHR) have considered on the merits the torture allegations of the same applicant and found that the treatment suffered by the applicant amounted neither to torture nor to other forms of ill treatment, then the same matter has certainly been examined by a competent body and the CAT Committee shall declare the complaint inadmissible.

69 Yet if the ECtHR or the IACHR have declared this application *inadmissible*, it is much more difficult to assess whether the same matter was in fact examined. Certain inadmissibility grounds, such as the six-month time limit in Article 35(1) ECHR and Article 46(1)(b) ACHR, simply do not exist in Article 22 CAT and a dismissal of a complaint on this ground does not prevent the CAT Committee from considering such a case.[125] This holds true for most other inadmissibility grounds, even if similar provisions can be found in Article 22 CAT. The fact that the ECtHR declared the complaint of the same applicant as incompatible with the ECHR *ratione temporis* or *ratione personae* may have no relevance as the CAT may have entered into force for the State party concerned before the ECHR and the State concerned may be a party to the CAT but not to the ECHR. In other words, the CAT Committee shall only consider an inadmissibility decision by another monitoring body as having examined the same matter if it is sure that it really concerned the same inadmissibility requirement, such as the non-exhaustion of domestic remedies. But even in such a case it might be more prudent to rely on Article 22(5)(b) than on Article 22(5)(a).[126]

70 In practice, the Committee is reluctant to declare inadmissible complaints that have been rejected only for procedural reasons by the other international bodies and seems to interpret the term 'examined' as requiring at least some examination on the merits of the case. In respect to the IACHR, the Committee held that the decision of the IACHR to lift the provisional measures and archive the file, indicating that 'in this matter there is no related individual petition being processed before the Commission', did not involve any consideration of the merits of the case and, thus, held that such procedures

21 May 2013, paras 4.4, 8.1–8.4, 10.1; for a complaint before the Inter-American Commission of Human Rights see *Mariano Eduardo Haro v Argentina,* No 366/2008, UN Doc CAT/C/52/D/366/2008, 23 May 2014, paras 4.1, 8.2.

[124] De Weck (n 122) 112.

[125] Information received from the OHCHR, 22 June 2007. See eg *EE v Russian Federation*, No 479/2011 (n 119) paras 5.3, 8.2, where the argument of the six months rule was used by the complainant to argue that the complaint was admissible. Finally, however, the Committee declared the case inadmissible because 'the material on file demonstrates that the European Court, the Court does not reveal any violation of the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms'.

[126] See eg *AH v Sweden*, No 250/2004, UN Doc CAT/C/35/D/250/2004, 15 November 2005, paras 4.7, 4.9, 5.8, where, although an the issue under Article 22 (5)(b) was raised, the Committee declared the complaint inadmissible on grounds of non-exhaustion of domestic remedies; see also Nowak, CCPR Commentary (n 23) 883.

did not constitute an examination of the matter within the meaning of Article 22(5)(a).[127] Similarly, in respect to the ECtHR, the Committee accepted a complaint when the previous application before the ECtHR has been rejected 'on procedural grounds' and without a clear examination of the merits. In doing so, the Committee has taken in particular consideration the fact that the ECtHR's inadmissibility decision had a very limited reasoning and only stated that the admissibility requirements set out in articles 34 and 35 of the ECHR had not been met. Such limited reasoning, the Committee held, did not allow to conclude that the ECHR had 'examined the complainant's application, including whether it conducted a thorough analysis of the elements related to the merits of the case'.[128] On the other hand, if the ECtHR explicitly has declared the applications before it inadmissible on grounds that they 'do not disclose any appearance of violation of the rights and freedom set out in the Convention', the CAT Committee concludes that the ECtHR's decision is not 'solely based on mere procedural issues, but on reasons that indicate a sufficient consideration of the merits of the case' and declares the communications before it inadmissible under Article 22 (5)(a).[129]

3.8.4 Meaning of 'same matter'

71 With regard to the requirement of '*the same matter*', the Committee has followed the jurisprudence of the HRC by stating that the term must be understood as relating to 'the same parties, [130] the same facts and the same substantive rights.[131]

72 In principle, the possibility for the Committee to *review its earlier inadmissibility decision* in accordance with Rule 116(2) also applies to cases which were declared inadmissible under Article 22(5)(a). Since Article 22(5)(a) also applies to previous examinations by another monitoring body it is difficult to imagine a case in which the earlier reasons for inadmissibility 'no longer apply'. In fact, this rule primarily, if not exclusively, applies to the exhaustion of domestic remedies requirement in Article 22(5)(b).

3.9 Article 22(5) (b): Exhaustion of Domestic Remedies

73 It is a generally recognized principle of international law that international human rights monitoring bodies can only be resorted to once all national appeals instances have failed to provide relief.[132] The aim of such a rule is to allow national authorities to address Convention violations first within their domestic systems.

74 The Convention against Torture contains quite a number of domestic remedies for torture victims which States parties are required to provide and implement. For example, any torture complaint shall be promptly and impartially examined by a competent authority under Article 13, perpetrators of torture shall be brought to justice under criminal

[127] *Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela*, No 456/2011, UN Doc CAT/C/54/D/456/2011, 15 May 2015, para 5.2.

[128] eg *S v Sweden*, No 691/2015, CAT/C/59/D/691/2015, 25 November 2016, paras 7.1–7.5; *SAC v Monaco*, No 346/2008, UN Doc CAT/C/49/D/346/2008, 13 November 2012, para 7.1.

[129] eg *MT v Sweden*, No 642/2014, UN Doc CAT/C/55/D/642/2014, 7 August 2015, paras 8.3–9; *U v Sweden*, No 643/2014, UN Doc CAT/C/56/D/643/2014, 23 November 2015, paras 6.2–6.4.

[130] *Mariano Eduardo Haro v Argentina*, No 366/2008 (n 123) para 8.2.

[131] eg *U v Sweden,* No 643/2014 (n 129) para 6.3; *MT v Sweden*, No 642/2014 (n 129) para 8.3; *AA v Azerbaijan*, No 247/2004, UN Doc CAT/C/35/D/247/2004, 25 November 2005, para 6.8; *ARA v Sweden*, No 305/2006, UN Doc CAT/C/38/D/305/2006, 30 April 2007, para 6.2; *DIS v Hungary*, No 671/2015, UN Doc CAT/C/56/D/671/2015, 8 December 2015, para 10.2. See also OMCT (n 64) 72–75.

[132] See eg Art 21(1)(c) CAT; and below Art 21, §§ 23–26.

laws,[133] and torture victims are guaranteed by Article 14 a comprehensive right to obtain redress and adequate reparation, including as full rehabilitation as possible.

75 Despite these extensive obligations, torture victims in many countries do not enjoy any effective remedies and even if such remedies exist in theory, they are often put under strong pressure not to lodge any complaints regarding their torture experiences.[134] This is the reason why Article 22(5)(b) and Rule 113(e) provide that the exhaustion of domestic remedies rule shall not be applied if the respective remedy 'is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention'.[135]

76 It is difficult in practice for the Committee to strike a *fair balance* between the requirement that domestic remedies must be exhausted before lodging a complaint under Article 22 and the practical problems faced by many applicants in a considerable number of States parties. This applies not only to the situation in countries where torture actually is widely practised, but also to countries that wish to expel applicants to other countries where a real risk exists that they will subjected to torture after return.

77 Though it is difficult to develop general rules of interpretation from the Committee's jurisprudence, as decisions have to be taken on a case-by-case basis taking into account all relevant circumstances of the case, the following paragraph provides an illustration of the most important aspects of the Committee's practice of the application of non-exhaustion rule. The analysis of the rich case law of the Committee shows that, despite certain inconsistencies, the Committee has succeeded in striking a fair balance between the legitimate interest of States that applicants make use of reasonable remedies they offer, and the convincing arguments of many applicants that effective remedies were either not available at all, would unreasonably prolong the proceedings, or would be unlikely to bring effective relief.

3.9.2 Meaning of 'all available domestic remedies'

3.9.2.1 Compliance with domestic procedures

78 In exhausting domestic remedies, the complainant must respect procedural requirements established by national law and pursue such remedies with due diligence.[136] For example, in *X v Switzerland*, the Committee declared a complaint inadmissible, inter alia, because the author had not proved that the appeal was submitted within the deadline prescribed in law.[137]

79 Non-observance of national procedural requirements is not necessarily a bar to admissibility. For example, the *Parot v Spain* a complaint invoking Article 13 was admitted although the alleged victim had failed formally to request an investigation.[138] As he had, however, complained to an investigating magistrate about ill-treatment, the Committee concluded that even if his 'attempts to engage available domestic remedies may not

[133] See above Arts 4 to 9.

[134] During the drafting of the Convention, the delegate of Bangladesh rightly observed in 1984 that 'it would be extremely difficult for political opponents' to fulfil the requirement of exhaustion of domestic remedies: see above 2.2.

[135] This exception goes beyond the comparable provision in Art 5(2)(b) of the first OP to the CCPR and was already contained in Art 32(5)(b) of the Swedish draft of 1981: see above § 7.

[136] *ZH v Canada*, No 604/2014, UN Doc CAT/C/56/D/604/2014, 20 November 2015, para 7.3.

[137] *X v Switzerland*, No 686/2015, UN Doc CAT/C/59/D/686/2015, 5 December 2016, para 8.4.

[138] *Parot v Spain,* No 6/1990, UN Doc CAT/C/14/D/6/1990, 2 May 1995, paras 4.1, 5.1, 6.1–6.2.

have complied with procedural formalities prescribed by law, they left no doubt as to Mr Parot's wish to have the allegations investigated'.[139] Similarly, in *Sodupe v Spain* the Committee accepted a complaint under Article 12 despite the non-compliance with the domestic legal requirements for the application for *amparo* given that the complainant had anyway informed the competent domestic court that he had been tortured and torture is an offence that must be prosecuted *ex officio*.[140]

80 On a few occasions, the Committee avoided assessing whether the procedural requirements established under national law were met. In *MAK v Germany*, the Committee declined to pronounce itself on the specific procedural requirements governing the submission of a constitutional complaint, holding that a complaint is inadmissible only if it exhibits a manifest failure to comply with the exhaustion requirement.[141]

81 The complainant's ignorance of the available remedies is generally not a defence, as was established by the Committee in the case of *R v France*.[142] In *Helle Jensen v Denmark*, the Committee rejected the complainant's argument that she was exempt from the exhaustion requirement because Denmark's Public Prosecution had not answered a letter from her counsel, in which he had indicated that a lack of response from the Director would be taken as acknowledgment that domestic remedies had been exhausted. The Committee considered that it was not the Director of Public Prosecutions' function to inform counsel whether domestic remedies have been exhausted.[143] Also, an alleged error made by a privately retained lawyer, who advised the complainant not to apply for judicial review, cannot normally be attributed to a State party and has not been considered a justification for failing to exhaust domestic remedies.[144] Similarly, 'alleged mental and emotional problems' affecting the complainant at the time of an expulsion were not considered enough to absolve him from the requirement to exhaust domestic remedies.[145]

3.9.2.2 Existence of Several Remedies

82 In certain cases, national law may provide for more than one remedy (criminal, administrative, civil), and the question may arise as to whether the complainant should exhaust only one or all of them. This issue was addressed in *Osmani v Serbia*, where the Committee clarified that 'having unsuccessfully exhausted one remedy one should not be required […] to exhaust alternative legal avenues that would have been directed essentially to the same end and would in any case not have offered better chances of success.'[146]

3.9.2.3 Existence and Appropriateness

83 Applicants are only obliged to exhaust domestic remedies which are available in theory and in practice. In several cases concerning Article 3, the Committee has noted that a domestic remedy should encompass a *judicial review of the merits* of the case and not merely a judicial review 'of the reasonableness' or 'gross errors of law'.[147]

[139] ibid, para 6.1.
[140] *Sodupe v Spain*, No 453/2011, UN Doc CAT/C/48/D/453/2011, 23 May 2012, para 6.4.
[141] *MAK v Germany,* No 214/2002 (n 63) paras 7.1–7.2.
[142] *R v France*, No 52/1996, UN Doc CAT/C/19/D/52/1996, 10 November 1997, paras 6.3,7.2.
[143] *Helle Jensen v Denmark*, No 202/2002, UN Doc CAT/C/32/D/202/2002, 5 May 2004, para 6.2.
[144] *RSAN v Canada*, No 284/2006, UN Doc CAT/C/37/D/284/2006, 17 November 2006, para 6.4.
[145] *AH v Sweden*, No 250/2004 (n 126) para 7.2.
[146] *Besim Osmani v Republic of Serbia*, No 261/2005, UN Doc CAT/C/42/D/261/2005, 8 May 2009, para 7.1.
[147] *NS v Canada*, No 582/2014, UN Doc CAT/C/59/D/582/2014, 1 December 2016, para 8.2; see also eg *Nirmal Singh v Canada*, No 319/2007, UN Doc CAT/C/46/D/319/2007, 30 May 2011, paras 8.8, 8.9; *WGD v Canada,* No 520/2012, UN Doc CAT/C/53/D/520/2012, 26 November 2014, paras 7.2, 7.3.

84 Similarly, *extraordinary remedies* are not a substitute for available judicial remedies. According to the Committee, in fact, neither procedures before the Ombudsman[148] nor those before National Human Rights Commissions[149] constitute a remedy within the meaning of Article 22. In *AH v Sweden*, for example, the Committee did not accept the complainant's argument that the submission of a complaint to the Swedish Government and the Swedish Parliament's *Ombudsman* absolved him from the duty to exhaust the judicial ones, consequently rejecting the complaint as inadmissible.[150] Similarly, in *Martínez et al v Mexico* the Committee held that, due to the very nature of the Commission's recommendations, investigations conducted by the *National Human Rights Commission*, did not constitute an effective and enforceable remedy in terms of the exhaustion of domestic remedies.[151]

85 Over the years, the Committee has often been called to pronounce itself on whether an application for *permanent residence on humanitarian and compassionate grounds* and an appeal against the refusal to such permit are to be considered remedies that need to be exhausted before submitting a complaint under Article 22. Although in its early jurisprudence the Committee had been reluctant to consider such type of remedies as ineffective,[152] as of 2001 the Committee revised its approach and has since then provided detailed guidance on what would constitute an effective remedy. The first case of this type that the Committee declared admissible was *BS v Canada*.[153] There, it held that a humanitarian or compassionate application did not constitute a remedy likely to bring effective relief, since the same court, which had already denied other submissions of the complainant, would decide on such an application.[154] The Committee had, then, further elaborated its positon in *Falcon Ríos v Canada*.[155] In this respect, once could identify three main lines of reasoning. The first concerned the fact that such remedies have a '*discretionary and non-judicial nature*'. In this sense, the Committee observed that 'although the right to assistance on humanitarian grounds is a remedy under the law, such assistance is granted by a minister on the basis of purely humanitarian criteria, and not only on a legal basis, and is thus ex gratia in nature'. The second was based on the *lack of independence* of the civil servants deciding such appeals. In this sense, the Committee further noted that

> when judicial review is granted, the Federal Court returns the file to the body, which took the original decision or to another decision-making body and does not itself conduct the review of the case or hand down any decision. Rather, the decision depends on the discretionary authority of a minister and thus, of the executive.

The third concerned rather the scope of application of the principle of exhaustion of domestic remedies, which, according to the Committee's well established jurisprudence concerning Article 3 cases,[156] requires the petitioner to use *remedies that are directly related*

[148] *AH v Sweden*, No 250/2004 (n 126) para 7.2.

[149] *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012, UN Doc CAT/C/55/D/500/2012, 4 August 2015, para 16.4.

[150] *AH v Sweden*, No 250/2004 (n 126) para 7.2.

[151] *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 149) para 16.4.

[152] *LMVRG and MABC v Sweden*, No 64/1997, UN Doc CAT/C/19/D/64/1997, 19 November 1997, para 4.2; *PSS v Canada*, No 66/1997, UN Doc CAT/C/21/D/66/1997, 13 November 1998, para 6.2; *LO v Canada*, No 95/1997, UN Doc CAT/C/24/D/95/1997, 19 May 2000, para 6.5.

[153] *BS v Canada*, No 166/2000 (n 96) para 6.2.

[154] ibid.

[155] *Enrique Falcon Ríos v Canada*, No 133/1999, UN Doc CAT/C/33/D/133/1999, 23 November 2004.

[156] ibid, para 7.4; see also *AR v Sweden*, No 170/2001, UN Doc CAT/C/27/D/170/2001, 23 November 2001, para 7.1.

to the risk of torture in the country to which he would be sent, not those that might allow him/her to remain in the sending State for other reasons.[157] With regard to the third argument, the Committee further clarified that it would not consider elements totally unrelated to the complainant's allegations relating to torture, such as his links with Swedish society or the fact that he had married a Swedish citizen.[158] This jurisprudence has been confirmed by the Committee over the years,[159] and in General Comment No 4.[160]

86 On a similar note, in *Guridi v Spain*[161] the Committee rejected the State party's exception on non-exhaustion of domestic remedies because it did not find that the judicial review of King's pardon was a remedy within the meaning of Article 22(5)(b). In doing so, it considered: first, the fact that, under Spanish law, the injured party was not entitled to be a party to pardon proceedings, but he could have only be heard if he opposed the pardon; and second, that he did not have a 'right as such' to request that no pardon be allowed. In these circumstances, the Committee concluded that no remedies 'with a reasonable chance of success' were available to the victim and accordingly considered the communication admissible.

87 Another question that is usually discussed is whether *appeals before Constitutional Courts* are to be considered domestic remedies within the meaning of Article 22(5)(b). The issue arose in *Roitman Rosenmann v Spain* where the Committee was called to assess if the complaint has to be declared inadmissible due to the fact that the applicant did not appeal the Supreme Court's decision before the Spanish Constitutional Court.[162] Unfortunately, however, the Committee did not elaborate on this question and simply concluded that it was not in a position to consider this *amparo* remedy as a priori futile.[163]

88 In a number of instances, the Committee has recognized that, though available in law, remedies were not available 'in practice'. This is the case, for example, when the complainant's lawyer had received the decision after the deadline for appeal had expired,[164] or the complainant was not at all officially notified of the extradition order.[165] From an analysis of the Committee's jurisprudence, it also emerges that the Committee has considered factors such as whether the State party had effectively informed the complainant of the available remedies,[166] or whether the complainant was in a position of particular vulnerability.[167]

89 Concerns that a specific domestic remedy might lead to an aggravation of the complainant's or other persons' legal situation have likewise not been acknowledged by the Committee to exempt complainants from exhaustion of domestic remedies. For

[157] *Enrique Falcon Ríos v Canada*, No 133/1999 (n 155) paras 7.3, 7.4; *AR v Sweden*, No 170/2001 (n 154) para 7.1.

[158] *AR v Sweden*, No 170/2001 (n 154) para 7.1.

[159] *A v Canada,* No 583/2014, UN Doc CAT/C/57/D/583/2014, 9 May 2016, para 6.2; *RSM v Canada,* No 392/2009, UN Doc CAT/C/50/D/392/2009, 24 May 2013, para 6.3; *Arthur Kasombola Kalonzo v Canada*, No 343/2008, UN Doc CAT/C/48/D/343/2008, 18 May 2012, para 8.2; *TI v Canada,* No 333/2007, UN Doc CAT/C/45/D/333/2007, 15 November 2010; *NS v Canada*, No 582/2014 (n 147) para 8.2.

[160] CAT/C/GC/4 (n 106) paras 34 and 35.

[161] *Kepa Urra Guridi v Spain*, No 212/2002 (n 40) paras 5.1, 6.3.

[162] *Roitman Rosenmann v Spain*, No 176/2000 (n 31) para 6.5.

[163] ibid.

[164] *Alexander Gerasimov v Kazakhstan*, No 433/2010 (n 101) para 11.5.

[165] *RAY v Morocco*, No 525/2012, UN Doc CAT/C/52/D/525/2012, 16 May 2014, para 6.5.

[166] *Diory Barry v Morocco*, No 372/2009, UN Doc CAT/C/52/D/372/2009, 19 May 2014, para 6.2.

[167] ibid; see also *AH v Sweden*, No 250/2004 (n 126) paras 5.9, 7.2, where the complainant's argument that his personal mental and emotional problems, such as extreme stress, trauma, and shock, prevented him from taking up a possible remedy, was not accepted by the Committee, which declared the complaint inadmissible.

example, in the case of *AH v Sweden*, the complainant explained that he had not appealed his expulsion order to the Court of Appeal because another appeal to the same body, in a previous procedure, had led to the imposition of a heavier sentence.[168]

3.9.3 Meaning of 'unlikely to bring effective relief to the person . . . '

90 Article 22(5)(b) CAT does not require individuals to exhaust domestic remedies that are 'unlikely to bring effective relief to the person' within the meaning of Article 22.

91 Mere doubts or a priori assessments about the effectiveness of a domestic remedy have not been considered sufficient to absolve the complainant from seeking to exhaust such a remedy.[169] Instead, the Committee conducts such an assessment by taking into consideration the specific circumstances of the case. To this extent, complaints based on the assumption that domestic remedies are *in abstracto* 'illusory' or a 'mere theoretical possibility' but not furnishing evidence proving that such remedies would be unlikely to bring effective relief in their particular case have been normally rejected as inadmissible. For example, the Committee usually disregards the complainants' arguments based on the probability that a positive decision is minimal, even if corroborated by statistical data or on prior jurisprudence from relevant domestic bodies, or the complainant's own lack of success with previous domestic remedies.[170] The Committee seems to have been more lenient in the case of *TPS v Canada*, where it suggests that complainants need not exhaust all remedies if they can show that they vigorously pursued other available remedies. Here, the Committee admitted the applicant's Article 3 complaint despite his failure to appeal one of several determinations by Canada that he belonged to an inadmissible category.[171] He had, however, appealed the Government's two subsequent decisions, which included a deportation order and an opinion presented by the Canadian Minister of Justice declaring him a threat to public safety. Given that the Canadian Federal Court rejected both of these subsequent appeals, the former before his deportation and the latter following it, the Committee judged that an appeal of the aforementioned inadmissibility decision would probably not have afforded an effective or necessary remedy.

92 The *lack of financial means* of the complainant was similarly repeatedly used as an argument to contest effectivity of a remedy. Where this argument was not substantiated, as the complainants failed to provide any information on the cost of legal representation, court fees or his/her efforts to obtain legal aid, the Committee has considered the case

[168] *AH v Sweden*, No 250/2004 (n 126) para 5.9; see also *HSV v Sweden*, No 229/2003 (n 74) paras 5.1, 8.3.

[169] *SK and RK v Sweden*, No 365/2008, UN Doc CAT/C/47/D/365/2008, 21 November 2011, para 11.3; *Jensen v Denmark*, No 202/2002 (n 149) para 6.3; *REG v Turkey*, No 4/1990, UN Doc CAT/C/6/D/4/1990, 29 April 1991, para 3. See also *MA v Canada,* No 22/1995, UN Doc CAT/C/14/D/22/1995, 3 May 1995, para 4, where the Committee held that 'it is not within the scope of the Committee's competence to evaluate the prospects of success of domestic remedies, but only whether they are proper remedies for the determination of the author's claims'.

[170] See eg *MA v Canada*, No 22/1995 (n 169) paras 3–4; *SK and RK v Sweden*, No 365/2008 (n 169) para 11.3; *PMPK v Sweden*, No 30/1995, UN Doc CAT/C/15/D/30/1995, 20 November 1995, para 7 (where the applicants claimed that only 5% of such cases were decided favourably); *PS v Canada*, No 86/1997, UN Doc CAT/C/23/D/86/1997, 18 November 1999 (where the complainant claimed that evidence indicated that the domestic court almost never intervened in similar cases, and when it did so it upheld almost 98% of the Immigration and Refugee Board's decisions); *RK v Canada*, No 42/1996, UN Doc CAT/C/19/D/42/1996, 20 November 1997, para 6.4; *Jensen v Denmark,* No 202/2002 (n 149) paras 5.1, 6.3; *Thu Aung v Canada,* No 273/2005, UN Doc CAT/C/36/D/273/2005, 15 May 2006, paras 6.3–6.4 (where the complainant's own lack of success with previous domestic remedies was not considered a sufficient indicator of ineffectiveness).

[171] *TPS v Canada*, No 99/1997, UN Doc CAT/C/24/D/99/1997, 16 May 1999, para 10.1.

inadmissible.[172] However, in *ZT v Norway* the Committee admitted a second complaint based on the fact that the Norwegian Government had rejected his application for *legal aid*. The Committee observed that, taking into consideration the financial situation of the complainant as well as his inability to represent himself in court, the denial of legal aid made a potential remedy unavailable for him. Thus, it declared the complaint admissible because the complainant was not in a position to exhaust potential remedies.[173] Similarly, in *CM v Switzerland*, considering the financial hardship of the complainant, the Committee held that it was unfair to oblige him to pay the sum of 1,200 Swiss francs to lodge an appeal before domestic courts and, hence, declared the communication admissible.[174]

93 Domestic remedies have been equally considered ineffective when there existed *procedural obstacles* for the complainant and his/her lawyer to lodge them. In *Saadi Ali v Tunisia*, the authorities' refusal to allow the lawyer to register the complaint constituted an 'insurmountable procedural impediment' which rendered the remedy ineffective.[175]

94 As most of its decisions concerned non-refoulement cases, the Committee has developed an extensive jurisprudence on this inadmissibility ground with regard to *Article 3 complaints*. Domestic remedies must also have a *suspensive effect*, ie they must stay the execution of the removal up until the final decision on the complainant's application. In *Dar v Norway*, for example, the Committee found the case admissible notwithstanding the complainant's asylum case was pending before the High Court at the time of consideration of admissibility. In doing so, it observed that such domestic proceeding did not have any suspensive effect, and that the complainant might have faced irreparable harm if returned to *Pakistan* before completion of the judicial review.[176] In its reporting procedure, the Committee regretted that a domestic appeal against a return (refoulement) or expulsion order had suspensive effect only if combined with a motion to stay execution, and pointed out that domestic remedies should have an *automatic suspensive effect*.[177] When the parties disagree on whether a remedy has suspensive effect, the Committee may be called to pronounce itself on the issue. In *RAY v Morocco*, the Committee had to assess whether a remedy of revocation against extradition orders was to be considered effective despite the fact that Moroccan domestic law did not 'explicitly' provide for it. In these circumstances, the Committed found the case admissible after giving careful consideration to 'the silence of Moroccan legislation on this matter and the fact that the State party has failed to provide any specific example of jurisprudence clarifying the suspensive nature of the application'.[178]

[172] *SH v Norway*, No 121/1998, UN Doc CAT/C/23/D/121/1998, 19 November 1999, para 7.3; *ZT v Norway*, No 127/1999, UN Doc CAT/C/23/D/127/1999, 19 November 1999, para 7.3; *RSAN v Canada,* No 284/2006 (n 144) para 6.4; *AE v Switzerland,* No 24/1995, UN Doc CAT/C/14/D/24/1995, 2 May 1995, para 4; *JB v Canada*, No 529/2012, UN Doc CAT/C/57/D/529/2012, 6 May 2016, para 8.3.

[173] *ZT v Norway (No 2)*, No 238/2003, UN Doc CAT/C/35/D/238/2003, 14 November 2005, paras 8.1–8.4.

[174] *CM v Switzerland*, No 355/2008, UN Doc CAT/C/44/D/355/2008, 14 May 2010, para 9.2.

[175] *Saadia Ali v Tunisia*, No 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008, para 12.3; see also *Sahli v Algeria*, No 341/2008, UN Doc CAT/C/46/D/341/2008, 3 June 2011, para 8.5.

[176] *Nadeem Ahmad Dar v Norway*, No 249/2004, UN Doc CAT/C/38/D/249/2004, 11 May 2007, para 6.3; see also eg *TI v Canada*, No 333/2007 (n 159) para 6.3; and *SAC v Monaco,* No 346/2008 (n 128) para 7.2; *AP v Finland,* No 465/2011, UN Doc CAT/C/60/D/465/2011, 10 May 2017, para 8.3.

[177] eg CAT/C/MCO/CO/4-5, para 9 and for the respective follow-up report CAT/C/MCO/CO/4-5/Add.1, para 9.

[178] *RAY v Morocco*, No 525/2012 (n 165) paras 4.2, 5.1, 6.3.

95 Hence, according to the Committee's jurisprudence a remedy that 'remains pending after the act which it was designed to avert has already taken place, by definition, becomes pointless, since the irreparable harm can no longer be avoided even if a subsequent judgment were to find in favour of the complainant'.[179] In a number of cases, France had claimed that the authors had not exhausted domestic remedies, either because of pending administrative rulings regarding their removal or because domestic law provided an opportunity to appeal such rulings.[180] The Committee disagreed, noting that, on all occasions, the administrative bodies had failed to rule on the authors' fates until after they had already been removed from France. Given that the relevant remedy sought was suspension of deportation, once deported, the complainants no longer had access to further meaningful remedies. Even an eventual decision favourable to the complainant would be incapable of repairing the harm suffered. Any appeal of these decisions, the Committee emphasized, would be similarly ineffective. Assuming that the applicants could somehow appeal from abroad, which the Committee deemed unlikely, the effectiveness of the remedy would nevertheless be measured by its ability to prevent the deportation. Furthermore, even if repatriation to France were considered an effective remedy, the Committee was highly sceptical that the French courts would grant it. Thus, the Committee concluded that a remedy pending after deportation was 'by definition pointless' because irreparable harm could no longer be averted.

96 Furthermore, in order to be effective and not illusory, complainants must be afforded a *reasonable time period in which to pursue the domestic remedies*. The Committee admitted several cases in which States have deported the complainants immediately after notifying them of their deportation order, giving them no time or opportunity to access family or counsel, let alone to file an appeal.[181] Contrary, in *Mopongo et al v Morocco* the Committee considered the complaint inadmissible, despite the fact that the authors had been expelled from Morocco to Algeria without receiving any notification at all, and in violation of the procedural guarantees provided for by the law. Yet, in that case, the complainants had not been admitted into Algeria and had been obliged to return back into Moroccan territory. The Committee, therefore, declared the complaint inadmissible as legal action could have been initiated later on, once the complainants were back in Morocco.[182]

3.9.4 Meaning of 'unreasonably prolonged'

97 The rule on the exhaustion of domestic remedies does not apply when such remedies are *unreasonably prolonged*. Like the effectiveness assessment, a mere assumption that proceedings before a domestic authority would probably be unreasonably prolonged is not deemed sufficient by the Committee to establish that the remedy was *unreasonably prolonged*.[183] Consequently, the Committee decides on a case-by-case basis.

[179] *Tebourski v France*, No 300/2006, UN Doc CAT/C/38/D/300/2006, 1 May 2007, para 7.3; *Josu Arkauz Arana v France*, No 63/1997, UN Doc CAT/C/23/D/63/1997, 9 November 1999, para 6.1; *ISD v France*, No 194/2001, UN Doc CAT/C/34/D/194/2001, 3 May 2005, para 6.1; *Brada v France*, No 195/2002, UN Doc CAT/C/34/D/195/2002, 17 May 2005, paras 7.6, 7.9.

[180] *Josu Arkauz Arana v France*, No 63/1997 (n 179) para 6.1; *ISD v France*, No 194/2001 (n 179) para 6.1; *Brada v France*, No 195/2002 (n 179) paras 7.6–7.9; *Tebourski v France*, No 300/2006 (n 179) paras 7.3, 7.4.

[181] *Josu Arkauz Arana v France*, No 63/1997 (n 179) para 6.1; *ISD v France,* No 194/2001 (n 179) para 6.1; *Brada v France*, No 195/2002, (n 179) para 7.6; *Tebourski v France,* No 300/2006 (n 179) para 7.4.

[182] *Kwami Mopongo et al v Morocco*, No 321/2007, UN Doc CAT/C/53/D/321/2007, 7 November 2014, para 6.2.

[183] *R v France*, No 52/1996 (n 142) paras 6.4, 7.2.

98 When torture and other forms of ill-treatment complaints are at stake, the effectiveness of the remedy will depend also on the promptness of the investigation as well as to provide redress to the victims. In *Halimi Nedyibi v Austria*, the Committee deemed unreasonably prolonged a torture investigation that took fifteen months to initiate and had been ongoing for almost two years at the time of the Committee's review.[184] Pending proceedings regarding torture complaints that had lain idle for years without formal dismissal do not bar the Committee from reviewing the authors' cases on the merits, if the Committee finds that the pending proceedings have been unreasonably lengthy.[185] The Committee equally admitted the cases of *Thabti v Tunisia*, A*bdelli v Tunisia*, and *Ltaief v Tunisia* on the grounds that the authors' complaints to the Tunisian authorities, made many years before, had not led to any of the steps described by the State party as appropriate and possible. In particular, the Committee voiced concern over the ten-year statute of limitations on bringing these proceedings, which may have apparently expired with relation to some of the acts.[186]

99 In relation to *Article 3 claims*, a four-year delay in enforced repatriation proceedings was equally considered unreasonable. The fact that more than four years after their first request for asylum the complainants' fate had still not been decided made the Committee determine that the proceedings as a whole had not been concluded within a reasonable time.[187]

100 On the other hand, the Committee declared inadmissible the case of *Akhimien v Canada*, inter alia, because of the parties' pending case before a Canadian civil court, in which they sought compensation for the treatment and death of their relative. The Committee considered and rejected the applicants' claim that the civil suit, which had allegedly been stalled for two years due to circumstances not attributable to them, was unreasonably prolonged.[188]

3.9.5 Procedural Aspects Concerning Article 22(5)(b)

101 Although there is no statute of limitations for submitting a complaint before the Committee, the *time elapsed since the exhaustion of domestic remedies should not be so unreasonably prolonged* as to render consideration of the claims unduly difficult for the Committee or the State party (Rule 113 (f)). The issue arose in *Haro v Argentina*.[189] In this case, the Committee held a period of around two years was not as unreasonably prolonged as to make the complaint 'unduly difficult for the Committee or the State

[184] *Qani Halimi-Nedzibi v Austria*, No 8/1991, UN Doc CAT/C/11/D/8/1991, 18 November 1993, para 6.2; for similar decisions see *Saadia Ali v Tunisia*, No 291/2006 (n 175) para 12.3 (2 years); *Ali Ben Salem v Tunisia*, No 269/2005 (n 65) (5 years); *Ntahiraja v Burundi*, No 575/2013, UN Doc CAT/C/55/D/575/2013, 3 August 2015 (more than three years); *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 149) (six years); *Déogratias Niyonzima v Burundi*, No 514/2012 (n 112) (eight years).

[185] *Jovica Dimitrov v Serbia and Montenegro*, No 171/2000, UN Doc CAT/C/34/D/171/2000, 3 May 2005, paras 2.3, 6.1 (eight-and-a-half years); *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000, UN Doc CAT/C/35/D/172/2000, 16 November 2005, paras 2.5, 6.2 (eight years); *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002, UN Doc CAT/C/33/D/207/2002, 24 November 2004, paras 2.3, 5.2 (almost five years); *Déogratias Niyonzima v Burundi*, No 514/2012 (n 112) para 7.2.

[186] *Thabti v Tunisia*, No 187/2001 (n 68) para 7.2; *Abdelli v Tunisia*, No 188/2001 (n 67) para 7.2; *Ltaief v Tunisia*, No 189/2001 (n 68) para 7.2.

[187] *VNIM v Canada*, No 119/1998, UN Doc CAT/C/29/D/119/1998, 12 November 2002, para 6.2; *CARM et al v Canada*, No 298/2006, UN Doc CAT/C/38/D/298/2006, 18 May 2007, paras 2.5, 5.2, 8.4.

[188] *EO Akhidenor et al v Canada*, No 67/1997, UN Doc CAT/C/21/D/67/1997, 17 November 1998, para 6.3.

[189] *Mariano Eduardo Haro v Argentina*, No 366/2008 (n 123) para 8.4.

party'. In doing so, the Committee considered the date in which the request to reopen the case was denied, and not the date in which the original complaint alleging acts of torture and other forms of ill-treatment in the police station was dismissed by the Chief Prosecutor. [190]

102 The requirement for the complainant to exhaust domestic remedies is normally determined *with reference to the date on which the complaint is submitted to the Committee*. Even if available and not exhausted at the time the applicant submitted the communication, the Committee will admit the case if it determines that domestic remedies are exhausted at the time it considers the complaint.[191] Thus, a number of applicants have submitted a complaint to the Committee while domestic procedures were still pending. In *PSS v Canada*, the complainant had sought *interim* measures from the Committee while a number of domestic remedies were still available or pending because he feared that by the time all remedies were exhausted he would immediately be deported to *India*. Since at the time of consideration of the case by the Committee domestic procedures were still open to the complainant, the Committee had to declare the complaint inadmissible.[192] This practice seems to be linked to the fact that the resubmission of an identical complaint when the domestic remedies have been subsequently exhausted is permitted.[193]

103 At the outset, the *burden of proof* is on the complainant, who is required to bring an 'arguable claim' to the Committee and provide information on the national legal action he or she has taken in order to fulfil this condition. Thus, the applicant is responsible to demonstrate that he or she has either exhausted all remedies or that any open remedy is in practice not available to him or her, unreasonably prolonged or ineffective. Once an applicant has made credible allegations to this effect, the *onus* is on the State to refute these allegations, ie to give details on which timely and effective remedies the complainant should have pursued or could still pursue.[194] As it was seen, mere doubts or any a priori assumption that remedies in the respective State are generally not effective or unreasonably long will not suffice for the Committee.[195] If, on the other hand, the State party does not raise any objections regarding admissibility for reasons of non-exhaustion of domestic remedies, the Committee will assume that all available remedies have been exhausted.[196] However, if a State challenges admissibility on these grounds, it

[190] ibid. The Committee considered the period from 9 October 2006, date in which the prosecution rejected the request to re-open the case, to 18 November 2008 date of submission of the complaint. See also *Agiza v Sweden*, No 233/2003 (n 66) para 9.3.

[191] *AH v Sweden*, No 265/2005, UN Doc CAT/C/37/D/265/2005, 16 November 2006, para 11.1; *AAC v Sweden*, No 227/2003, UN Doc CAT/C/37/D/227/2003, 16 November 2006, para 7.1; *NZS v Sweden*, No 277/2005, UN Doc CAT/C/37/D/277/2005, 22 November 2006, para 7.

[192] *PSS v Canada*, No 66/1997 (n 152) paras 5.1, 6.2, 7. [193] OMCT (n 64) 60.

[194] CAT/C/GC/2 (n 109) para 71.

[195] Cases where the complainants did not or not sufficiently substantiate why they chose not to pursue available remedies or why they deemed pending procedures ineffective or unreasonably prolonged include for example *SK and RK v Sweden*, No 365/2008 (n 169) para 11.3; *Jensen v Denmark*, No 202/2002 (n 149) para 6.3; *REG v Turkey* (n 172) para 3; *JE and EB v Spain* (n 116); *ND v France*, No 32/1995, UN Doc CAT/C/15/D/32/1995, 20 November 1995; *JMUM v Sweden,* No 58/1996, UN Doc CAT/C/20/D/58/1996, 15 May 1998, para 3.2; *AR v Sweden*, No 170/2001 (n 154) para 7.2.

[196] *Encarnación Blanco Abad v Spain,* No 59/1996, UN Doc CAT/C/20/D/59/1996, 14 May 1998; see also *Jovica Dimitrov v Serbia and Montenegro*, No 171/2000 (n 185); *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000 (n 185); *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002 (n 185) where the Committee noted that, in the absence of pertinent information from the State party, it was obliged by its RoP to consider the admissibility of the complaint in the light of the available information, due weight being given to the complainant's allegations to the extent that they have been sufficiently substantiated. In a few

is responsible for specifying such claims. In cases where the State has contested admissibility due to non-exhaustion of domestic remedies, but has not specified what additional remedies had to be exhausted[197] or substantiated their claim as required by the RoP, the Committee declared the complaint admissible.[198] In *Thabti v Tunisia*, for example, the author explained that he had been severely tortured in 1991 and had complained about this at his own trial before a military court in 1992. However, the judge had ignored his statements and he was sentenced to a long prison term and later put under house arrest based on his confessions obtained under torture. Throughout this period he was prevented from lodging a complaint. In these circumstances, though the respondent State argued that he had not exhausted domestic remedies because he could have brought criminal charges against his perpetrators, the Committee found that, while Tunisian law in principle provided for a remedy, the State had not sufficiently demonstrated that it was willing to start any investigations into this case or to interrupt the statute of limitations of ten years for the crimes in question.[199]

104 The Committee generally finds that *new evidence*, such as documentary or medical evidence, emerging after domestic proceedings have been concluded, must first be subjected to domestic review in order to give the authorities the opportunity to examine it.[200] The State party should always have an opportunity to evaluate the new evidence before the communication is submitted for examination under Article 22 of the Convention. The same applies for *new allegations* that complainants raise for the first time before the Committee.[201] At the same time, despite the non-exhaustion of domestic remedies, the Committee seems not to completely disregard new evidence indicating that the complainant could have been subject to torture in the past.[202]

105 An inadmissibility decision on grounds of exhaustion of domestic remedies constitutes only a *suspensive barrier to admissibility*. Complaints that have been rejected for failing to exhaust domestic remedies can be reviewed again at a later date.[203] When declaring a case inadmissible on these grounds, the Committee will at the same time state that this decision may be reviewed upon receipt of a written request by or on behalf of the alleged victim containing information to the effect that the reasons for inadmissibility

cases, the State decided not to challenge admissibility although it found that there were still domestic remedies available to the complainants; in this regard see eg *SS Elmi v Australia,* No 120/1998, UN Doc CAT/C/22/D/120/1998, 14 May 1999, para 4.3; *EVI v Sweden,* No 296/2006 (n 72).

[197] *X v Russian Federation*, No 542/2013, UN Doc CAT/C/54/D/542/2013, 8 May 2015, para 10.2.

[198] *Khaled Ben M'Barek v Tunisia*, No 60/1996, UN Doc CAT/C/23/D/60/1996, 10 November 1999, para 7.3. *Hajrizi Dzemajl et al v Yugoslavia*, No 161/2000, UN Doc CAT/C/29/D/161/2000, 21 November 2002, paras 4, 6.

[199] *Thabti v Tunisia*, No 187/2001 (n 68) paras 2.1–2.16, 4.1–4.10, 7.2; see also *Abdelli v Tunisia*, No 188/2001 (n 67); *Ltaief v Tunisia,* No 189/2001 (n 68); *Aleksei Ushenin v Kazakhstan*, No 651/2015, UN Doc CAT/C/60/D/651/2015, 12 May 2017, para 6.2.

[200] *FM-M v Switzerland*, No 399/2009, UN Doc CAT/C/46/D/399/2009, 26 May 2011, para 6.5; *AE v Switzerland*, No 24/1995 (n 170) para 3; *PMPK v Sweden* (n 173) para 7; *KKH v Canada*, No 35/1995, UN Doc CAT/C/15/D/35/1995, 22 November 1995, para 5; *KN v France,* No 93/1997, UN Doc CAT/C/23/D/93/1997, 18 November 1999, para 6.3; *SK and RK v Sweden,* No 365/2008 (n 169) para 11.3; *JLL v Switzerland*, No 364/2008, UN Doc CAT/C/48/D/364/2008, 18 May 2012, para 11.4; *BMS v Sweden*, No 437/2010, UN Doc CAT/C/49/D/437/2010, 12 November 2012, para 7.

[201] *SSS v Canada*, No 245/2004 (n 63) para 7.1; *Akhidenor et al v Canada*, No 67/1997 (n 186) para 6.3.

[202] *MMK v Sweden*, No 221/2002, UN Doc CAT/C/34/D/221/2002, 3 May 2005, para 7.5; *ZK v Sweden,* No 301/2006, UN Doc CAT/C/40/D/301/2006, 9 May 2008, para 8.4; *RK et al v Sweden,* No 309/2006, UN Doc CAT/C/40/D/309/2006, 16 May 2008, paras 8.4, 8.5.

[203] Rule 116.

no longer apply.[204] In certain cases, the Committee reopened the considerations of the communication. It declared inadmissible the first complaint submitted in the case of *Parot v Spain* because of a pending examination by an investigating magistrate.[205] Two years later, however, it admitted the case based on new evidence that the alleged victim's complaint to the investigating magistrate had been to no avail.[206] *ZT v Norway* was first rejected on the grounds that the complainant had neither initiated judicial review proceedings, nor had he proven his lack of financial resources to pursue that legal avenue.[207] The Committee admitted a second complaint four years later based on evidence that the Norwegian Government had rejected his application for legal aid, and that he remained unable to finance the lawsuit and was unable to represent himself successfully.[208]

3.10 Interim Measures

3.10.1 Authority of the Committee to Request Interim Measures

106 Although the Convention does not grant the Committee an explicit authority to request *interim* measures, it has in urgent cases developed the practice of requesting States parties to take such *interim measures* as are necessary to avoid *irreparable damage* to the victim. As with the HRC[209] and other treaty monitoring bodies, above all the ECtHR and IACHR,[210] this raises the controversial questions as to the *power of the Committee to request interim measures* and their *binding nature*.[211] Article 63(2) ACHR explicitly empowers the *IACHR* in cases of extreme gravity and urgency to 'adopt such provisional measures as it deems pertinent in matters it has under consideration'. In the *Constitutional Court* case, in which judges of the Peruvian Constitutional Court had been illegally removed from office, the Inter-American Court held in 2000 that the ACHR makes it 'mandatory for the state to adopt the provisional measures ordered by this Tribunal' and based this decision on a 'basic principle of the law of international state responsibility, supported by international jurisprudence, according to which States must fulfil their conventional obligations in good faith *(pacta sunt servanda)*'.[212] Similarly, in the *LaGrand* case, which concerned the execution of a *German* citizen in the *United States* despite an order for provisional measure by the ICJ, the ICJ held in 2001 that its order of provisional measures was 'binding in character and created a legal obligation'.[213] This question was disputed because Article 41 of the ICJ Statute authorizes the Court only to 'indicate' rather than to 'order' or 'adopt' provisional measures, as in Article 63(2) ACHR.

[204] See eg *Parot v Spain,* No 6/1990 (n 138) para 4(b); *AEM and CBL v Spain,* No 10/1993 (n 116) para 6(b).
[205] *Parot v Spain*, No 6/1990 (n 138) paras 3.1–3.2.
[206] ibid, para 6.1.
[207] *ZT v Norway*, No 127/1999 (n 172) paras 7.2–7.5.
[208] *ZT v Norway (No 2)*, No 238/2003 (n 173) paras 8.1–8.4.
[209] Nowak, *CCPR Commentary* (n 23) 849.
[210] Jo M Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38 VJTL 1; Andrea Saccucci, *Le Misure Provvisorie nella Protezione Internazionale dei Diritti Umani* (Giappichelli 2006); Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012); De Weck (n 122) 82. American University Washington College of Law—CHRHL, 'Litigation Before the UN Committee against Torture: Strengthening This Important Tool against Torture. Proceedings of a Conference Presented by the American University Washington College of Law and the World Organisation Against Torture' (2013) 20 Human Rights Brief 9.
[211] On the legal status of decisions see also Keller and Ulfstein (n 210) 92.
[212] *Constitutional Court Case v Peru*, Provisional Measures, Order, Series E No 14 (IACtHR, 14 August 2000) para 14.
[213] *LaGrand (Germany v United States of America)*, Judgment, ICJ Reports 2001 466, paras 110ff.

107 Contrary to the ACHR and the ICJ Statute, the ECHR does not contain any provision concerning interim measures. That is the main reason why the *ECtHR* originally took the view that *interim* measures requested by the former ECommHR were not binding.[214] But in the judgment of *Mamatkulov and Abdurasulovic v Turkey*, which concerned the extradition of two Uzbek citizens by *Turkey* to *Uzbekistan*, the European Court, relying on general principles of international law, held that Turkey's failure to comply with the Court's indication of *interim* measures resulted in a breach of its obligations under the ECHR. It clarified that when a State ratifies a treaty and accepts the competence or jurisdiction of the tribunal charged with the enforcement of the rights protected in the treaty, the State must comply in good faith not only with the substantive provisions of the treaty but also with its procedural and regulatory provisions.[215]

108 The same arguments, in principle, also apply to *quasi-judicial bodies*, such as the HRC and the CAT Committee.[216] In this sense, the General Comment No 33 of the HRC, has shed some light not only on the HRC's power to request interim measures, but also their binding legal status. It clarified that the provisions on interim measures contained in its RoP were adopted 'in order to be in a position to meet these needs under the Optional Protocol' and that '[f]ailure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol.'[217] Of course, no decisions of these Committees, including decisions on the merits, are legally binding in a formal sense. But the obligations under the respective UN treaties are legally binding, and by becoming parties to these treaties States accepted the competence of the respective treaty bodies to monitor their compliance with such legally binding obligations by means of different procedures. The *individual complaints procedure* is one of the most powerful procedures in which treaty monitoring bodies have the exclusive authority to decide whether or not a particular State party in a specific case violated certain obligations or not. *Interim measures constitute an essential element of individual complaints procedures* in order to prevent, in urgent cases, *irreparable harm* to the applicants. If States parties to the CAT choose to ignore a request for interim measures issued by the CAT Committee, they violate their binding obligations under Article 22 CAT to cooperate in good faith with the Committee in exercising its task of considering individual complaints, and the Committee has the exclusive competence to hold States responsible for such violation, even if its decisions, strictly speaking, are not legally binding.[218]

3.10.2 Scope of Application

109 Pursuant to Rule 114(1), at any time after the receipt of a complaint, the Committee, a Working Group, or the Rapporteur(s) for new complaints and interim measures, may transmit to the State party concerned, for its urgent consideration, a request that it take such *interim measures* as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations. Interim measures are also commonly referred to as 'provisional measures' and 'precautionary measures'.

[214] *Cruz Varas v Sweden* (1991) Series A No 201, para 36.

[215] *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) para 109. For a more detailed overview of ECtHR jurisprudence on interim measures see De Weck (n 122) 66.

[216] Pasqualucci (n 210) 1.

[217] HRC, 'General Comment No 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights' (2008) UN Doc CCPR/C/GC/33, para 19.

[218] Keller and Ulfstein (n 210) 101.

110 Interim measures may be requested with a view to obtaining a negative action from the State. In the Committee's jurisprudence, complainants frequently requested preventive protection in connection to Article 3 CAT, particularly in cases concerning imminent *expulsion* or *extradition*.[219] Most requests for *interim* measures were, indeed, issued in relation to *non-refoulement* cases concerning the immediate risk of *deportation* of the applicant.[220] Yet the Committee has applied Rule 114 also in other situations. For example, in the *Hissène Habré* case, when the Government of *Senegal* was requested not to expel the former dictator of *Chad* and to bring him to justice before its own courts,[221] in *PE v France* when the State party was asked not to extradite the complainant on the basis of Article 15,[222] or in *Rached Jaïdane v Tunisia* to prevent any threats or acts of violence to which the complainant and his family might be exposed, particularly as a result of having lodged the present complaint, and to keep the Committee informed of the measures taken with that end in view.[223]

111 But interim measures may also request a positive action. This was for example the case in *Martinez v Mexico*, where the Committee applied the Rule to request that *Mexico* provides appropriate specialized medical care and support to one of the complainants during his detention. In this case, the Committee considered 'irreparable harm' the risk for the complainant to lose his eardrum if he did not undergo urgent microsurgery, as diagnosed by a specialist practitioner.[224]

112 Strictly speaking the wording of Rule 114 would allow to grant interim measures only to 'victim or victims of the alleged violations'. In literature some authors have suggested that the notion of victims of the alleged violations should be interpreted broadly including also measures to protect lawyers and human rights defenders.[225] So far the Committee has never pronounced itself on such issue. In those cases, however, the Committee's policy on reprisals would apply.[226]

3.10.3 The Procedure for Granting Interim Measures

113 Requests for *interim* measures in accordance with Rule 114 are normally issued by the *Rapporteur for new complaints and interim measures.* The establishment of

[219] CAT, 'Report of the Committee against Torture, Twenty-ninth session (11–22 November 2002) and Thirtieth session (28 April–16 May 2003)' (2003) UN Doc A/58/44, para 62; CAT, 'Report of the Committee against Torture Thirty-first Session (10–21 November 2003) Thirty-second Session (3–21 May 2004)' (2004) UN Doc A/59/44, para 248; CAT, 'Report of the Committee Against Torture Thirty-third Session (16–26 November 2004) Thirty-fourth Session (2–20 May 2005)' (2005) UN Doc A/60/44, para 133; CAT, 'Report of the Committee against Torture Thirty-fifth Session (14–25 November 2005) Thirty-sixth Session (1–19 May 2006)' (2006) UN Doc A/61/44, para 59.

[220] See above Art 3, 3.8. See also *NK v The Netherlands*, No 623/2014, UN Doc CAT/C/60/D/623/2014, 1 May 2017, paras 6.1, 7.3, 9.3, where the complainant argued that the refusal to access the asylum-seeker benefits (shelter, livelihood assistance, and healthcare insurance) available to people awaiting the outcome of proceedings in connection with their applications for asylum or a residence permit or on the basis of a court decision—on grounds that the CAT Committee's request for interim measures is not equivalent to a court order—amounts to a failure by the State party to comply in good faith with article 22 of the Convention. The Committee declared the case inadmissible insufficiently substantiated because it was 'unclear whether the complainant has ever raised the claim that the refusal of shelter amounts to inhuman and degrading treatment before the domestic authorities'.

[221] *Suleymane Guengueng et al v Senegal*, No 181/2001 (n 41).

[222] *PE v France*, No 193/2001, UN Doc CAT/C/29/D/193/2001, 21 November 2002, paras 1.2, 3.1.

[223] *Rached Jaïdane v Tunisia*, No 654/2015 (n 40).

[224] *Ramiro Ramírez Martínez et al v Mexico,* No 500/2012 (n 149) paras 12, 17.12.

[225] American University Washington College of Law—CHRHL (n 210) 12.

[226] See below 3.13.

the Rapporteur was first discussed during the thirteenth session in 1994, when the Committee considered possible ways to make its methods of work under Article 22 CAT more effective.[227] In light of the communications received by the Committee, in particular with regard to Article 3, the Committee took the view that it was necessary to appoint from among its members inter-sessional rapporteurs who would take urgent action on new communications submitted to the Committee and report on any action taken to the Committee at the beginning of its subsequent session.[228] Amendments were adopted at a private meeting in November 1994 concerning the designation of *Special Rapporteurs* from among its members to assist in the handling of communications received under Article 22.[229]

114 At its twenty-eighth session, in 2002, the Committee further revised its RoP and established the function of *Rapporteur for new complaints and interim measures.* The mandate of the Rapporteur[230] includes, *inter alia*:

- requesting interim measures of protection pursuant to Rule 108;
- withdrawing requests for interim measures in appropriate cases;
- following up on State compliance with requests for interim measures of protection;
- deciding on the registration of new complaints in such cases where the Secretariat has sought instructions on registration;
- informing the Committee at each session on action taken during the intersessional period; and
- drafting recommendations for the Committee's consideration of the admissibility of complaints.

Where a request for *interim* measures is made by the Working Group or Rapporteur(s), they should inform the Committee members of the nature of the request and the complaint to which the request relates at the next regular session of the Committee. The Secretariat maintains a list of such requests.[231]

115 The Committee has conceptualized *formal and substantive criteria for granting or rejecting requests for interim measures of protection*. With regard to formal criteria, the Committee specifies that the request for interim measures must, first, be submitted in a timely manner. This means that complainants may submit a request 'at any time after the receipt of a complaint'. Such requirement differs from the original wording of the

[227] An informal note requested by the Committee and prepared by the Secretariat with information on the working methods of other human rights treaty bodies aided the Committee's discussions on the question of possible ways to make its working methods more effective. See CAT, 'Report of the Committee Against Torture' (1993) UN Doc A/48/44, para 11.

[228] CAT, 'Report of the Committee Against Torture' (1995) UN Doc A/50/44.

[229] Rule 114(9) was amended to reflect this: 'In the course of the consideration of the question of the admissibility of a communication, the Committee or the working group or a special rapporteur designated under Rule 112, paragraph 3, may request the State party to take steps to avoid a possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. Such a request addressed to the State party does not imply that any decision has been reached on the question of the admissibility of the communication.' A new paragraph was further added to Rule 112: '(3) The Committee may designate special rapporteurs from among its members to assist in the handling of communications.'

[230] Rules 98 and 108. See CAT/C/SR.527 and CAT, 'Report of the Committee Against Torture Twenty-Seventh Session (12–23 November 2001) Twenty-Eighth Session (29 April–17 May 2002)' (2002) UN Doc A/57/44, Annex VIII.

[231] Rule 114(3) and (4).

Committee's RoP on *interim* measures,[232] which allowed for the Committee to request *interim* measures only during the examination of the merits phase, ie at the stage when the communication had already been declared admissible.[233] Secondly, the request must respect the basic admissibility criteria set out in Article 22 CAT. In this last regard, it is noted that the requirement of exhaustion of domestic remedies can be lifted, if the only remedies available to the complainant are without suspensive effect. In such cases, the Rapporteur may request the State party to refrain from deporting an applicant, while his or her complaint is under consideration by the Committee, even before domestic remedies have been exhausted.

116 As for the *substantive criteria*, a complaint must have a substantial likelihood of success on the merits for it to be concluded that the alleged victim would suffer irreparable harm.[234] Moreover, in cases concerning imminent expulsion or extradition where a complaint failed to establish a *prima facie* case, the complainant is requested in writing to confirm his or her interest in having his or her communication considered by the Committee, despite the rejection, by the Rapporteur, of the respective request for interim measures.[235] In practice, as of May 2017 the Committee has granted interim measures in forty-five out of seventy requests.[236] In respect to other human rights mechanisms, it seems that the Committee grants interim measures quite generously.[237]

3.10.4 Revision and Withdrawal of Interim Measures

117 According to Rule 114 the decision to grant interim measures may be adopted on the basis of information provided in the complainant's submission. Such decision does not, however, imply a determination of the admissibility or merits and may, therefore, be reviewed at the request of the State party.

118 In this sense, the Rapporteur must inform the State party,[238] which may, in a timely manner, submit information to the effect that the submission is not justified and the complainant does not face any prospect of irreparable harm, together with any subsequent comments from the complainant' (Rule 114(3)). Moreover, as provided by Rule 114(7), the State party should also inform the Committee that the reasons for the interim

[232] The original draft RoP (CAT/C/L.1/Add 1) were prepared by the Secretariat and considered by the Committee at its second and sixth meetings, held from 18–20 April 1988 see CAT, 'Report of the Committee Against Torture' (1988) UN Doc A/43/46, Annex III.

[233] See former Rule 116(3) in CAT/C/3/Rev.1, which stated '[i]n the course of its consideration, the Committee may inform the State party of its views on the desirability, because of urgency, of taking interim measures to avoid possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not prejudge its final views on the merits of the communication.' See former Rule 114(9) in CAT/C/3/Rev.1, which stated '[i]n the course of the consideration of the question of the admissibility of a communication, the Committee or the working group may request the State party to take steps to avoid a possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. Such a request addressed to the State party does not imply that any decision has been reached on the question of the admissibility of the communication.'

[234] CAT, 'Report of the Committee Against Torture Fifty-first Session (28 October–22 November 2013) Fifty-second Session (28 April–23 May 2014)' (2014) UN Doc A/69/44, para 123. See also UN Doc CAT/NONE/2004/Rev.1.

[235] A/69/44 (n 253) para 124.

[236] See A/72/44 (n 5) para 76.

[237] For a comparison with the practice of the ECtHR see De Weck (n 122) 87.

[238] See eg *AH v Sweden*, No 250/2004 (n 126); *SG v Netherlands*, No 135/1999, UN Doc CAT/C/32/D/135/1999, 12 May 2004.

measures have lapsed or present arguments why they should be lifted. Requests for *interim* measures may be then confirmed or withdrawn by the Committee (Rule 114(8)).

119 Some States parties have adopted the practice of systematically requesting the Rapporteur to withdraw his request for interim measures of protection. In the view of the Rapporteur on new complaints and interim measures, such requests need only be addressed 'if based on new and pertinent information which was not available to him or her when he or she took his or her initial decision on interim measures'.[239]

120 The first decision to withdraw a request for interim measures was made in *GK v Switzerland* in January 2003.[240] In this case, the complainant, a German national, was awaiting *extradition* from *Switzerland* to *Spain* where she had been indicted on counts of collaboration with Euzkadi Ta Askatasuna (ETA) and storage of firearms and explosives. The Committee had issued *interim* measures not to extradite her while her complaint (that extradition to Spain would constitute a violation of Articles 3 and 15 CAT) was under consideration and, at the same time, specified that this request could be reviewed in light of new arguments presented by Spain or on the basis of guarantees and assurances from the Spanish authorities. On receiving the aforementioned legal guarantees from the State party, the Committee subsequently decided to withdraw its request and the complainant was extradited to Spain.

3.10.5 Non-Compliance of Interim Measures

121 In the vast majority of cases where the Committee requested *interim* measures, States parties acceded to the request. However, from an early stage, the Committee met with resistance from certain States parties who expressed dissatisfaction with the procedure and questioned the legal status of *interim* measures.[241]

122 Since various governments disputed the competence of the Committee to issue requests for *interim* measures and openly ignored them, the Committee, in a number of well-known cases, took the view that non-compliance with the interim measures entails a violation of Article 22. If in some earlier cases it refrained to explicitly labelling the non-compliance as a violation of Article 22,[242] the Committee has then then revised its approach and found an express violation of Article 22 for the first time in *Brada v France*.[243] Since then, it has consistently confirmed the *Brada* jurisprudence[244] observing that the adoption

[239] eg A/69/44 (n 234) para 122.

[240] *GK v Switzerland*, No 219/2002, UN Doc CAT/C/30/D/219/2002, 7 May 2003. See A/58/44 (n 219) para 164; see also eg *YR v Australia,* No 713/2015, UN Doc CAT/C/61/D/713/2015, 3 August 2017.

[241] The Committee took up the concerns of States parties in its 2006 Annual Report see A/61/44 (n 219) para 62: '[t]he Committee is aware that a number of States parties have expressed concern that interim measures of protection have been requested in too large a number of cases, especially where the complainant's deportation is alleged to be imminent, and that there are insufficient factual elements to warrant a request for interim measures. The Committee takes such expressions of concern seriously and is prepared to discuss them with the States parties concerned. In this regard it wishes to point out, that in many cases, requests for interim measures are lifted by the Special Rapporteur, on the basis of pertinent State party information.' See also eg the position that the Swiss Government had taken in *X v Switzerland*, No 27/1995, UN Doc CAT/C/18/D/27/1995, 28 April 1997; *KN v Switzerland*, No 94/1997, UN Doc CAT/C/20/D/94/1997, 19 May 1998, paras 5.1, 5.2. For the position of the Committee member EL Masry see CAT/C/SR/.435 (2000) para 9.

[242] eg *Aemei v Switzerland*, No 34/1995, UN Doc CAT/C/18/D/34/1995, 9 May 1997, para 11; *Cecilia Rosana Núñez Chipana v Venezuela*, No 110/1998, UN Doc CAT/C/21/D/110/1998, 10 November 1998, para 8; *TPS v Canada*, No 99/1997 (n 171) paras 16.1–16.4.

[243] *Brada v France*, No 195/2002 (n 179).

[244] *Agiza v Sweden,* No 233/2003 (n 66) para 13.9; *Elif Pelit v Azerbaijan*, No 281/2005, UN Doc CAT/C/38/D/281/2005, 1 May 2007; *Tebourski v France,* No 300/2006 (n 179) paras 8.6, 8.7; *Nadeem Ahmad Dar*

of interim measures 'is vital to the role entrusted to the Committee' under Article 22, and that failure to respect that provision undermines the protection of the rights enshrined in the Convention and, hence, amounts to a violation of Article 22. By making the declaration under Article 22, 'States parties implicitly undertake to cooperate with the Committee in good faith'.[245] This includes also the obligation to comply with Committee's requests on interim measures as regulated by the RoP. In fact, Article 18 vests the Committee with competence to establish its own RoP, 'which become inseparable from the Convention to the extent they do not contradict it'.[246] Governments have invoked various grounds to justify the non-compliance with interim measures, including obligations provided by national law or extradition treaties, the fact that the complainant represented a danger to the public, and finally, in Article 3 cases, the absence of substantial risks of refoulement. These and other arguments did not prevent the Committee from finding a violation of Article 22. In this regard, the Committee often reaffirmed that, as established by Article 27 VCLT, domestic law cannot be invoked as a justification for the failure to implement a treaty provision;[247] and that the non-refoulement principle has absolute character.[248]

123 The Committee has found *violations of Article 22* because of non-compliance with requests for interim measures on several occasions. In some cases, the violation of Article 22 was found despite the main claim was inadmissible[249] or not in violation of the Convention.[250] In several cases, the State party received the request for interim measures after the deportation/expulsion had already been carried out.[251]

124 This practice has been contested in several individual dissenting opinions by Committee member *Bruni*. Departing from the fact that interim measures are contained only in the RoP but not explicitly regulated by Article 22 of the Convention, Bruni concludes that the Committee has no competence to find a breach of Article 22 for the violation of an interim measure by the State. In contrast, and despite acknowledging that non-compliance with an interim measures shows 'a clear sign of non-cooperation undermining the Committee's effectiveness of its mandate',[252] Bruni argues that the Committee is only entitled to 'raise serious doubts about the State willingness to implement Article 22 in good faith' or 'blame' the State.[253]

v Norway, No 249/2004 (n 176); *Abdussamatov et al v Kazakhstan*, No 444/2010, UN Doc CAT/C/47/D/444/2010, 15 November 2011, para 14; *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 149) para 17.12; *Bachan Singh Sogi v Canada,* No 297/2006, UN Doc CAT/C/39/D/297/2006, 16 November 2007, para 10.11; *RS et al v Switzerland*, No 482/2011, UN Doc CAT/C/53/D/482/2011, 21 November 2014, para 9; *Khairullo Tursunov v Kazakhstan*, No 538/2013, UN Doc CAT/C/54/D/538/2013, 8 May 2015, para 7.1; *X v Russian Federation,* No 542/2013 (n 197) para 9.1; *X v Kazakhstan*, No 554/2013, UN Doc CAT/C/55/D/554/2013, 3 August 2015, para 10.1; *PSB and TK v Canada*, No 505/2012, UN Doc CAT/C/55/D/505/2012, 13 August 2015, para 6.1; *DIS v Hungary*, No 671/2015 (n 131) para 9.1.

[245] eg *DIS v Hungary*, No 671/2015 (n 131) para 9.1.

[246] *Tebourski v France*, No 300/2006 (n 179) paras 8.6–8.7.

[247] See eg *X v Kazakhstan*, No 554/2013 (n 244) para 10.3.

[248] See eg *DIS v Hungary,* No 671/2015 (n 131) para 9.2.

[249] See eg *DIS v Hungary*, No 671/2015 (n 131).

[250] See eg *RS et al v Switzerland*, No 482/2011 (n 244); *PSB and TK v Canada*, No 505/2012 (n 244).

[251] See eg *VV v Canada*, No 47/1996, UN Doc CAT/C/20/D/47/1996, 19 May 1998; *Josu Arkauz Arana v France*, No 63/1997 (n 179); *LO v Canada*, No 95/1997 (n 152); *M.PS v Australia*, No 138/1999, UN Doc CAT/C/28/D/138/1999, 30 April 2002. In *JAGV v Sweden*, No 215/2002 (n 123) the complainant's deportation was already taking place when the State party received the request for interim measures but the deportation was not halted.

[252] *PSB and TK v Canada*, No 505/2012 (n 244).

[253] See Bruni's individual dissenting opinions in *RS et al v Switzerland*, No 482/2011 (n 244); *Khairullo Tursunov v Kazakhstan*, No 538/2013 (n 244*); X v Russian Federation*, No 542/2013 (n 197); *PSB and TK v*

125 But the practice of finding a violation of Article 22 in case of non-compliance with interim measures has been confirmed also by General Comment No 4 of 2017. There, the Committee has stated that non-compliance would 'constitute a serious damage and obstacle to the effectiveness of the Committee's deliberations and would cast a serious doubt on the willingness of the State party to implement Article 22 of the Convention in good faith' and that '[t]his has resulted in the Committee's determination that the non-compliance with its request for interim measures constitutes a breach of Article 22 of the Convention'.[254]

3.10.6 Remedying a Violation of Article 22 for Non-Compliance

126 In the case of *Dar v Norway*, the CAT Committee indicated how a breach of Article 22 might be *remedied* by the State party concerned. After having deported the applicant to *Pakistan* in violation of a request for *interim* measures, the Norwegian authorities had facilitated the safe return of the applicant and granted him a residence permit for three years, which the Committee considered as an *effective remedy and reparation*.[255]

3.11 Article 22(3), (4), (6) and (7): Procedure before the Committee

127 The Convention only contains rudimentary rules regarding the procedure of receiving and considering individual complaints. Complaints must be submitted to the State party concerned for its written explanations and clarifications, the procedure is *written* and *confidential*. These few principles are based on Articles 4 and 5(3) of the first OP to the CCPR.

128 In practice, the CAT Committee has developed these rudimentary rules into a much more sophisticated procedure of dealing with individual complaints, which is also reflected in its respective RoP.[256] Rules 102 to 121 of the RoP regulate in detail the procedure before the Committee. They are modelled on the RoP to Articles 1 to 6 of the first OP to the CCPR and have over the years been subject to various amendments in view of improving the procedure.[257]

129 The individual complaints procedure is *confidential*; the meetings during which complaints are examined are closed and all documents are confidential.[258] If the

Canada, No 505/2012 (n 244); *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 149); *X v Kazakhstan*, No 554/2013 (n 244)*; DIS v Hungary,* No 671/2015 (n 131); *Subakaran R Thirugnanasampanthar v Australia* [2017] CAT No 614/2014. In its opinions, Bruni also noted that ' … the Committee must, at least, notify the State party that it considers a non-compliance with its rule 114 as a breach of the State party's obligations under article 22 of the Convention before taking the decision that the State party has violated that article' (*RS et al v Switzerland,* No 482/2011 (n 244); *Khairullo Tursunov v Kazakhstan,* No 538/2013 (n 244); *X v Russian Federation,* No 542/2013 (n 197)); and that in contrast to OP to the CEDAW (Art 5), the OP to the CRPD (Art 4), the CED (Art 31) and the OP to the ICESCR (Art 5), the CAT does not contain an explicit provision on interim measures, hence in order for the CAT Committee to find violations of Article 22 it 'should be either amended in accordance with their amending mechanisms or provided with an additional optional protocol to explicitly include the notion of legally binding interim measures of protection'(*Subakaran R. Thirugnanasampanthar v Australia* [2017] CAT No 614/2014).

[254] CAT/C/GC/4 (n 106) para 36.

[255] *Nadeem Ahmad Dar v Norway*, No 249/2004 (n 176). For details on remedial measures see above Art 3, §§ 251–52.

[256] Rules 96–115; for the procedure of the HRC see also Nowak, CCPR Commentary (n 23) 865, 1080.

[257] CAT/C/3/Rev.6 (n 62). See also above Art 18.

[258] Article 22(6) and Rule 107(1). See also Michael O'Flaherty, *Human Rights and the UN: Practice Before the Treaty Bodies* (Springer 2002) 159.

Committee decides so, meetings during which general issues regarding Article 22 are discussed may be public.[259]

130 According to Rule 109, Committee members who have a personal interest in the case; have participated in any capacity, other than as a Committee member, in the making of any decision; are nationals of or employed in the State party concerned, shall not take part in the examination of a complaint. Where any of the grounds apply, the Committee member 'shall not be present during any non-public consultations or meetings of the Committee, as well as during any discussion, consideration or adoption related to that complaint'.[260] Any questions regarding this rule are to be decided by the Committee without the participation of the member concerned. In addition, Rule 110 provides an optional non-participation clause, according to which a Committee member may 'for any reason' decide that he/she should not take part or continue to take part in the examination of a complaint.[261] In practice, Committee members have occasionally withdrawn. For example, in the case *Agiza v Sweden*[262] some Committee members withdrew because they had directly participated in the disposition of the case at national level and because their country of origin was involved.[263]

131 The Committee takes on average about *two-and-a-half years to consider a complaint*. In urgent cases the procedure normally only lasts some months.[264]

3.11.2 Submitting a Complaint

132 Complaints must be submitted in writing via email, fax, or regular post to the Secretariat, specifically, the *Petitions Unit of the OHCHR* in Geneva.[265] *Model complaint forms* are available on the Secretariat's website.[266] Only complaints in one of the official languages of the UN can be accepted. These are also '*to the extent possible*' the *working languages* (Rule 27).[267] However, complaints submitted in languages other than the working languages are likely to be delayed.

133 Neither Article 22 nor the Rules of Procedures impose a condition of *legal representation*, nor do they provide for financial assistance to indigent complainants who lack the means to secure competent counsel. Further, communications need not invoke particular articles of the Convention to be registered, or even to be deemed admissible. Cases are registered in their entirety, meaning that all allegations within the complaint will be reviewed during admissibility, even if some of them seem manifestly implausible.[268]

3.11.3 Rapporteurs and Working Group

134 In light of Rule 61, the Committee may set up ad hoc subsidiary bodies and appoint one or more of its members as Rapporteurs to perform duties as mandated by the

[259] Rule 107(2).

[260] Rule 109(2); see also CAT, 'Report of the Committee Against Torture Forty-ninth Session (29 October–23 November 2012) Fiftieth Session (6–31 May 2013)' (2013) UN Doc A/68/44, Annex XIV.

[261] These rules were amended in 2002: see CAT/C/SR.§§ 15–39; A/57/44 (n 230) paras 15–16, Annex X.

[262] *Agiza v Sweden*, No 233/2003 (n 66).

[263] Information received from OHCHR, 2 August 2007.

[264] GA, 'United Nations Reform: Measures and Proposals' (2012) UN Doc A/66/860, para 2.3.2.

[265] Due to the high volume of emails received by the unit, faxed and mailed petitions may receive a more prompt response.

[266] See OHCHR, 'Committee Against Torture: Model Complaint Form' <https://www.ohchr.org/Documents/HRBodies/ComplaintFormOPICCPR_CAT_CERD.doc> accessed 2 November 2017.

[267] Until the amendments to the RoP of the forty-fifth session (CAT/C/3/Rev.5), the *official and working languages* of the Committee were English, French, Russian and Spanish. This was confirmed in CAT/C/3/Rev.6.

[268] For a more details see below §§134ff.

Committee. The function of Rapporteur was introduced for the first time in the framework of Article 22 in 1993, at the ninth session, when the Committee appointed two of its members as *Rapporteurs responsible for specific communications* in order to expedite the examination of communications.[269] Later, during its thirteenth session in 1994, the Committee amended its RoP and decided, in light of the number of recent communications received, in particular with regard to Article 3, that 'any member of the Committee may act as an *inter-sessional rapporteur for a new communication* and examine the communication received by the Committee and take urgent action' during intersessional periods and report on any action taken to the Committee at the beginning of its subsequent session.[270]

135 Since the twenty-eighth session, the Committee introduced several Rapporteurs, including those relevant for the individual complaint procedure, ie the Rapporteur for new complaints and interim measures and the Rapporteur for follow-up on decisions adopted under Article 22.[271] At the same session, the Committee, according to Rule 61(1), additionally established a Pre-sessional Working Group on Complaints of three to five members which assist the plenary in its work.[272] Its members are elected by the Committee every two sessions. The idea of forming a Working Group began in 1999, but the first Working Group did not meet until April 2002. As provided by Rule 112(3), the Working Group may designate Rapporteurs from among its members to deal with specific complaints. However, since 2005 a Working Group has no longer been in place.[273]

3.11.4 Registration of Complaints

136 While Rule 104 of the RoP provides that complaints can be registered by the Committee, by the Secretariat or by the Rapporteur for new complaints and interim measures, in practice, they are usually registered by the *Special Rapporteur on new complaints and interim measures* on the proposal of the Secretariat, ie the *Petitions Unit* at the Office of the High Commissioner for Human Rights in Geneva.[274] The Secretariat maintains a permanent register of all complaints.

137 As required by Rule 103(1), the Secretariat staff (according to RoP terminology, the Secretary-General) conducts a first screening to determine whether a complaint meets basic information requirements. First, the Secretariat staff verifies if the complaint is directed towards the CAT Committee, and if so, whether the registration requirements indicated in Rule 104 are complied with.

138 The Petitions Unit, which is also responsible for processing complaints to other UN treaty bodies, often receives complaints that are addressed to multiple treaty bodies or that do not specify any particular to whom they are addressed to. In those cases, the Secretariat will, on the basis of Rule 103(2), contact the author of the complaint asking whether he or she wishes to have his or her complaint submitted to the CAT Committee. In cases which might equally be treated by the CAT Committee or the HRC, the complainant is asked to choose between one of the two bodies. Generally, complainants who

[269] A/48/44 (n 227) para 471, initially they were responsible for three communications: *Parot v Spain,* No 6/1990 (n 138); No 7/1990 and *Qani Halimi-Nedzibi v Austria*, No 8/1991 (n 184).

[270] A/50/44 (n 228) para 14, Annex VI (CAT/C/3/Rev.1).

[271] A/57/44 (n 230) Annex X (UN Doc CAT/C/3/Rev.4). For more information see §§ 112 and 177.

[272] A/57/44 (n 230) para 203; Rule 112; four Committee members were designated to be in the first Working Group: Mr Burns, Mr Camara, Mr González Poblete, and Mr Yakovlev.

[273] Information received from OHCHR, 2 August 2007.

[274] Also referred to as Petitions Team or Petitions and Inquiry Section.

face deportation are more likely to submit their complaints to the CAT Committee because of the particularly strong protection offered by Article 3. Otherwise, complaints that may also involve violations of provisions or rights not covered by the CAT, such as arbitrary detention and discrimination, are usually submitted to the HRC.[275]

139 The Secretariat staff then verifies whether the complainant has provided all necessary information. To this extent, the Secretariat may also ask the complainant for clarification (Rule 105).

140 Rule 104(2) establishes the minimum requirements that need to be satisfied in order for a complaint to be registered. The Rule provides that the Secretariat does not register a complaint:

a) which concerns a State party which has not made a declaration under Article 22(1);
b) by an anonymous author;
c) which is not submitted in writing by the alleged victim, by close relatives of the alleged victim on his or her behalf or by a representative with appropriate written authorization.

141 In contrast to Rule 113(1)(a), which refers generally to 'relatives' of the victim, Rule 104(2)(c) refers to 'close relatives'. In practice, however, the Secretariat has registered cases by non-immediate relatives and even friends.[276] Standards may be applied more strictly at the admissibility stage. The case of *BM'B v Tunisia*, for example, was successfully registered but later found inadmissible due to the complainant's failure to submit sufficient proof of his authorization to act on behalf of the victim and his family.[277]

142 Once it has collected the necessary information, in accordance with Rule 104, the Secretariat prepares a list with complaints that meet the initial requirements with a brief summary of their contents and a recommendation on registration and forwards it to the Rapporteur, who decides whether or not to register the case or if there is a need to request additional information. In prima facie cases, the registration is done immediately and, as is the case for all other registered cases, the Secretariat drafts a summary of the relevant information received and, according to Rule 106, circulates it to the Committee members.[278] In practice, the summary is first forwarded to the Rapporteur on new complaints and interim measures.[279]

143 When the registration conditions are not met, the Secretariat staff will send applicants standard letters specifying why their complaints cannot at this stage be accepted. If the complaint is registered, the Secretariat will brief applicants on the ensuing procedure, including that their complaints will be confidentially transmitted to the State party concerned (Rule 105(5)).

144 All complaints received are recorded in a log, even if they are not formally registered and forwarded to the Committee. As soon as possible after it has been registered, the complaint should be *transmitted to the State party* in accordance with Article 22(3) and Rule 115.

[275] Ingelse (n 35) 177.
[276] eg *M'Barek v Tunisia*, No 60/1996 (n 198).
[277] *BM'B v Tunisia*, No 14/1994, UN Doc CAT/C/14/D/14/1994, 5 May 1994, para 4.4.
[278] Ingelse (n 35) 178; Vandenhole (n 35) 258.
[279] Information received from OHCHR, 2 August 2007.

3.11.5 Procedure on Admissibility

145 In most of the cases, admissibility and merits are treated jointly. The State party is requested to submit a *written reply* within six months on both questions of admissibility and the merits. Only in exceptional cases may the Committee or the Rapporteur on new complaints request a reply that relates only to the question of admissibility (Rule 115(2)). Within two months States parties may request in writing that the examination on the questions of admissibility and merits are separated. The Committee or the Special Rapporteur may decide whether or not to grant such request. (Rule 115(3)).

146 Both parties may be asked for additional written information, clarification, or observations within the timeframe indicated by the Committee (Rule 115(4) (5) and (6)). A complaint may only be declared admissible if the State party had an opportunity to furnish information or observations (Rule 115(8)).

147 Given the lack of funds for legal assistance, plenty of time is often spent requesting further information from complainants who have poor or no legal representation. As with other requests for submission, parties must comply within a given time limit to avoid undue delay. Failure to comply with this time limit will not prevent the reviewing body from continuing its admissibility determination using the information available. Additionally, the State party and the complainant are given the opportunity to respond, also within a given time limit, to the other party's submission. The RoP do not provide for an oral consideration during this phase.

148 Admissibility determinations can be made by the Committee or the Working Group.[280] The latter decides on admissibility (by majority vote) or on inadmissibility (by unanimity) of cases and makes recommendations to the Committee regarding the merits of complaints.[281] In practice, most decisions on admissibility are made by the *whole Committee*, which may also choose to consider several communications jointly or to sever consideration of complaints by multiple complainants.[282]

149 Communications do not need to invoke the correct Convention articles, or even any specific provisions at all to be admitted. If the Committee, Working Group, or Rapporteur finds that the facts suggest a violation of a particular Article that is not alleged by the complainant, it can admit the complaint *ex officio*.[283] It may also decide to admit the case on some of the alleged grounds, but not others.[284]

150 Decisions on inadmissibility should be promptly communicated to the complainant and to the State party concerned (Rule 116(1)). These may be later reviewed at the request of a Committee member or at the written request of the complainant. A complainant making such a request must include evidence indicating that the reasons for inadmissibility referred to in Article 22(5) no longer apply.

3.11.6 Procedure on the Merits

151 As it was seen above, there are two possible paths leading to the consideration of the merits of a complaint by the Committee: first, and in most cases, when the *Committee considers the admissibility and merits jointly together*; second, when the Committee, Working Group, or Rapporteur has decided to *separate the consideration of the merits from the admissibility question*.

[280] Rule 115(1). [281] Rule 115(2). [282] Rule 115(4) and (5).
[283] See eg *OR et al v Argentina*, Nos 1/1988, 2/1988 and 3/1988 (n 99) para 7.4.
[284] *Abdelli v Tunisia,* No 188/2001 (n 67).

152 Once the Committee or the Working Group has decided that a complaint is admissible, the Committee should inform the parties and forward any submissions not already transmitted (Rule 117(1)). The Committee then establishes a period of time[285] within which the State party should submit written explanations or statements[286] clarifying the case and if any, the measures that it may have taken in relation to it. Any explanations or statements by the State party are to be forwarded to the complainant who has, within a time limit to be decided by the Committee, the possibility to submit additional written information or observations.[287]

153 In a few cases, in which the decision on the admissibility had already been taken during an earlier session, States parties presented further information and called upon the Committee to *reconsider its decision on admissibility*. This new information can relate to earlier submissions and reveal their erroneousness, or demonstrate that a certain situation has changed since the Committee's decision on admissibility. In accordance with Rule 117(5) the Committee may *revoke its decision* that a complaint is admissible, but only after having transmitted the explanations or statements of the State party to the complainant, so that he or she in turn may submit additional information within a time limit set by the Committee. In general, the Committee considers the new information and takes note of such requests in the introductory part of its views on the merits.[288] There has, however, been at least one case in which the Committee changed its decision with regard to one Article claimed to have been violated.[289]

154 Where a party has not submitted additional written information, clarifications or observations relevant to the question of the merits (or the question of admissibility) within the time period set by the Committee, the Working Group, or Rapporteur(s), they are entitled to take a decision without these submissions in order to avoid undue delay (Rule 115(7)). In *Dragan Dimitrijevic v Serbia and Montenegro*, the State party did not submit any information at all, leading the Committee to the conclusion that 'the State party has not contested the facts as presented by the complainant … In the circumstances … due weight must be given to the complainant's allegation … '[290] In its submission in *Danilo Dimitrijevic v Serbia and Montenegro*, the State party only said that it accepted the complaint, explaining some months later, in a second submission, that 'acceptance' only implied the recognition of the competence of the Committee to consider the complaint, but not 'the responsibility of the State concerning the complaint'. Furthermore, the State promised to provide the Committee with some data collected by the Ministry on Human and Minority Rights in Serbia, but in fact never submitted this information to the Committee.[291] Consequently, the Committee considered (the

[285] Until the amendments of the RoP at its twenty-eighth session, the Committee granted a six-month period to States parties to submit additional information. This term was then changed to 'the period established by the Committee' providing the Committee with more latitude.

[286] During its discussions of the amendments at the twenty-eighth session, the Chairperson of the Committee confirmed the interpretation that statements by States parties would also include oral statements: CAT/C/SR.518, Add.1, para 6.

[287] Rule 117(3). [288] See eg *Ltaief v Tunisia*, No 189/2001 (n 68) para 10.2.

[289] *Josu Arkauz Arana v France*, No 63/1997 (n 179) paras 6.1, 11.1, 11.2, where the Committee reconsidered the question of admissibility in the light of the observations made by the State party and reversed its previous decision of 19 May 1998 ultimately declaring the complaint inadmissible for non-exhaustion of the domestic remedies.

[290] *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002 (n 185) para 5.3.

[291] *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000 (n 185) para 4.1.

admissibility and) the merits in the light of the information available in accordance with Rule 115(7). With regard to the alleged violation of Article 14, the Committee made its decision that the State party had effectively violated its obligations under Article 14, inter alia, on the basis of the fact that the State party had not contested this allegation.[292]

155 As under other human rights conventions, the individual complaints procedure of the CAT is mainly a *written* one, but the RoP provide for the possibility of *oral hearings* (Rule 117(4)).[293] The Committee can invite the complainant or his or her representative as well as representatives of the State party to closed meetings with the aim of further clarifying points in relation to the merits of the complaint. Should only one party be heard during the meeting, an invitation has nevertheless to be forwarded to the other party. Non-appearance does not prejudice the consideration of the case (Rule 117(4)). On the request of the State party, an oral hearing was held in the case *Abdussamatov et al v Kazakhstan*.[294]

156 Furthermore, at least in one case one of the complainants requested the Committee to proceed with an independent assessment of the authenticity of the documentary evidence and to grant a personal hearing in order to witness his emotional distress when talking about his torture experiences.[295]

157 On the other hand, the Committee interprets Article 22(4) in a broad sense by not only basing its decisions on information made available by the parties, but by also soliciting *information from other sources* (Rule 118(2)). The inclusion of '*other sources*' was the result of an amendment to the RoP during the Committee's twenty-eighth session in 2002 allowing for the inclusion of information from *NGOs*.[296] Rule 63 provides for similar sources, but goes somewhat further by allowing the Committee to make requests relevant to any activity under the Convention. In practice, the Committee has referred, for example, to initial and periodic reports of the State party under Article 19 CAT or to the HRC,[297] UNHCR documents,[298] information the Committee has gathered in the course of a visit to a State party,[299] reports of Rapporteurs of the Commission on Human Rights regarding the situation in a specific country,[300] or reports by the CPT.[301]

158 Since torture usually takes place behind closed doors without independent witnesses and is regularly denied by States, it is probably the human rights violation which

[292] ibid, para 7.4.

[293] While Article 5(1) of the first OP to the CCPR requires the HRC to decide on individual complaints in the light of all 'written information' made available by both parties, the word '*written*' was deleted from the text of Article 22(4) CAT. This word was already missing in Art 32(4) of the Swedish draft of 1981: see above § 7.

[294] *Abdussamatov et al v Kazakhstan*, No 444/2010 (n 244) paras 9.1–10.9; for the problems resulting from a purely written procedure Nowak, CCPR Commentary (n 23) 871; see also Burgers and Danelius (n 14) 167.

[295] *SNAW et al v Switzerland*, No 231/2003, UN Doc CAT/C/35/D/231/2003, 24 November 2005, para 5.3. The Committee did not accede to this request, since it found that the complainants had not adduced in relation to their Article 3 case sufficient grounds for believing that they would run a substantial, personal and present risk of being subjected to torture upon return to their country of origin, and it therefore would not need to consider the complainant's request. See also Peter Burns, 'The Committee Against Torture' in Anne Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International 2000) 167.

[296] A/57/44 (n 230) para 15, Annex X; see also Ingelse (n 35) 265.

[297] cf eg *Josu Arkauz Arana v France*, No 63/1997 (n 179) para 11.4.

[298] cf eg *Elif Pelit v Azerbaijan,* No 281/2005 (n 244) para 11.

[299] See eg *Enrique Falcon Ríos v Canada*, No 133/1999 (n 155) para 8.3.

[300] cf eg *Mutombo v Switzerland*, No 13/1993, UN Doc CAT/C/12/D/13/1993, 27 April 1994, para 9.5; *Tala v Sweden*, No 43/1996, UN Doc CAT/C/17/D/43/1996, 15 November 1996, paras 4.5. and 10.4; *Aemei v Switzerland*, No 34/1995 (n 240) para 9.9.

[301] cf eg *Josu Arkauz Arana v France,* No 63/1997 (n 179) para 11.4.

is most difficult to prove. The limited possibilities for the Committee to take evidence, therefore, constitute a serious problem. One of the possibilities to provide equality of arms is to shift the burden of proof at least partly from the applicant to the State party.[302] If an applicant can prove, for example, that he or she entered a police station without any injuries and left it a few days later with visible injuries, it is up to the authorities of the State party to prove the reason for such injuries. Mere allegations that these were self-inflicted shall not be sufficient to dismiss well-substantiated allegations of the applicant.

159 Having said this, it is important to remember that the Committee emphasized in its General Comment No 4

> it is the responsibility of the author … to provide exhaustive arguments for his/her complaint of alleged violation of Article 3 of the Convention in such a way that, from the first impression (prima facie) or from subsequent submissions, if necessary, the Committee finds it relevant for consideration under article 22 of the Convention and fulfilling each of the requirements established under Rule 113 of the Committee's rules of procedure.[303]

It further stated that it is also the author's task to collect and present evidence in support of his or her account of events.[304] Furthermore, 'it made it clear that it is not the Committee's place to question the evaluation of evidence by domestic courts unless it amounts to a denial of justice',[305] that it would be not competent to pronounce itself on the standard of proof applied by national courts,[306] and 'reiterate[d] that it is not an appellate, quasi-judicial or administrative body'.[307]

160 The Committee is not limited to the purported violations forwarded by the author,[308] but has, *ex officio*, the possibility to widen the scope of the complaint. This has already been done during the consideration of the first three complaints concerning *Argentina*.[309]

161 In accordance with Rule 50 the decisions of the Committee require a *majority vote* of all members present. Rule 50 (2) provides that 'before voting, the Committee shall endeavour to reach its decisions by consensus, provided that the Convention and the rules of procedure are observed and that such efforts do not unduly delay the work of the Committee'.[310] In line with this, the Committee has mostly reached *unanimous decisions* on its cases.[311] However, individual Committee members availed themselves of the possibility of appending an *individual opinion* to the decision as provided for by Rule 119.[312]

[302] Ingelse (n 35) 190, with further references to the jurisprudence of the HRC. See also above Art 3, 3.7.

[303] CAT/C/GC/4 (n 106) para 4; see also eg *MAK v Germany,* No 214/2002 (n 63).

[304] cf eg *SL v Sweden,* No 150/1999, UN Doc CAT/C/26/D/150/1999, 11 May 2001, para 6.4; *MAK v Germany*, No 214/2002 (n 63) para 13.5; *Zare v Sweden*, No 256/2004, UN Doc CAT/C/36/D/256/2004, 12 May 2006, para 9.5; *AH v Sweden*, No 265/2005 (n 189) para 11.6; *ERK and YK v Sweden*, Nos 270 & 271/2005, UN Doc CAT/C/38/D/270&271/2005, 30 April 2007, para 7.5; *NZS v Sweden,* No 277/2005 (n 191) para 8.6.

[305] *Falcon Ríos v Canada*, No 133/199, § 8.5. cf eg *Elif Pelit v Azerbaijan*, No 281/2005 (n 244) para 7.11; *SPA v Canada,* No 282/2005 (n 72) para 7.6.

[306] eg *MAK v Germany,* No 214/2002 (n 63) para 13.5.

[307] *NZS v Sweden,* No 277/2005 (n 191) para 8.6.

[308] See above § 149.

[309] *OR et al v Argentina*, Nos 1/1988, 2/1988, and 3/1988 (n 99); see also Ingelse (n 35) 189

[310] See Rule 50 (2). This provision was introduced by the Committee in its first meeting and is modelled according to the footnote to Rule 51 RoP of the Human Rights Committee; see above Art 18, § 23.

[311] On certain absurd consequences of maintaining the principle of consensus even in decisions on individual complaints with dissenting opinions see Nowak, *CCPR Commentary* (n 23) 708. Similarly, Ingelse (n 35) 106.

[312] Strictly speaking Rule 113 provides for dissenting as well as concurring opinions. So far all individual opinions have been at least partly dissenting see *TPS v Canada*, No 99/1997 (n 171); *Hajrizi Dzemajl et al v Yugoslavia*, No 161/2000 (n 198); *Agiza v Sweden*, No 233/2003 (n 66); *Roitman Rosenmann v Spain*, No 176/2000 (n 31), *TM v Sweden*, No 228/2003 (n 95).

162 The Committee's adopted *findings on the merits*, which are called '*decisions*' or '*views*',[313] are presented in an article-by-article manner and explain if and why the Committee has found a violation of the Convention.

163 In accordance with Article 22(7) and Rule 118, the Committee shall forward its views to the State party concerned and to the complainant.

3.11.7 Decisions and Their Legal Effect

164 As with Article 5(4) of the first OP to the CCPR, Article 22(7) CAT uses the term '*views*' for the final decisions on the merits. In reality, the 'final views' of the HRC and the CAT Committee are well-reasoned decisions of quasi-judicial expert bodies, which in their structure and quality of legal reasoning are fully comparable to judgments of international or domestic human rights courts.[314] This is the reason why in 2002 the CAT Committee amended its Rule of Procedures and decided to call its findings on the merits '*decisions*' rather than 'views'.[315] The *quasi-judicial nature* of the Committee's decisions is also underlined by the right of Committee members provided by Rule 119 to append their *individual opinions*. As with all other treaty monitoring bodies of the United Nations, the Committee's decisions on the merits, from a strictly legal point of view, are *not binding* under international law.[316] This is certainly one of the major weaknesses of UN human rights treaty bodies in general.[317] On the other hand, the Committee's decisions can be considered as *authoritative interpretation* of the Convention under international law.[318] If the Committee, therefore, finds that a particular State party violated provisions of the Convention or requests that State party to adopt *interim measures* aimed at preventing a deportation in a given case, then these findings and decisions constitute an authoritative interpretation of the obligations under the Convention and any non-compliance by States parties must be considered as a violation of the respective obligations under the Convention.

165 The answer to the question of how far the Committee's decisions are actually binding upon the States parties is evidently a most crucial one, and ranks pivotal when it comes to the enforceability of individual rights embodied in the Convention.

166 As *Ingelse* notes, there are a number of arguments which, at first sight, would suggest that the individual complaints procedures carry insufficient legal weight, and could therefore be disregarded by States. The Convention does not contain any Article explicitly obliging States parties to put the decisions into practice, and the denotation of the Committee's decisions as '*views*' instead of 'judgments' further reflects the non-binding character on a semantic level. This absence of binding and thus legally enforceable decisions is described by *Schmidt* as one, if not the, major lacuna, of the UN individual complaints procedures, including Article 22 CAT.[319]

167 However, and despite these certainly important points, the decisions of the Committee are more than just mere recommendations that can be taken up by States

[313] Rule 112(4); see also CAT/C/SR.518/Add.1, para 6.

[314] Nowak, *CCPR Commentary* (n 23) 891; see also Keller and Ulfstein (n 210) 93.

[315] The change was first introduced in Rule 112 as amended at the Committee's Twenty-eighth session in 2002, and then confirmed by CAT/C/3/Rev.6 (Rule 118).

[316] Nowak, *CCPR Commentary* (n 23) 894 with further references.

[317] See eg Bayefsky, *The UN Human Rights Treaty System* (n 295) 233; Ingelse (n 35) 196.

[318] See Rajia Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee* (Institute for Human Rights, Åbo Akademi University 2003) in relation to the legal effect of the HRC's decisions.

[319] Bayefsky, *The UN Human Rights Treaty System* (n 295) 233.

parties at their discretion. They are, as stated by *Hanski* and *Scheinin* with regard to decisions by the *HRC* (which follows the same procedure as the CAT Committee), 'the end result of a quasi-judicial adversarial international body established and elected by the States parties for the purpose of interpreting the provisions … and monitoring compliance with them'.[320] They further argue that the basis of the procedure would be undermined if a State did not accept the Committee's decision and replaced it with 'its own interpretation' after having 'voluntarily subject[ed] itself to such a procedure'.[321]

168 The CAT Committee, as the HRC, has chosen a detailed and powerful structure and method to consider individual complaints under Article 22(4). The 'views' or decisions taken by the CAT Committee are, as observed by the former HRC member *Christian Tomuschat*, '… a quasi-diplomatic communiqué but rather a statement clearly borrowing from judicial ideals'.[322]

169 A further entry-point establishing the quasi-binding nature of Article 22 decisions is Article 14 obliging States parties to offer redress to a victim whose rights under the Convention have been violated. *Ingelse* underlines that the States parties have mandated the Committee to adopt 'a legal approach in order to come to an objective, Convention-based assessment of the observance of Convention obligations'.[323] Once the Committee has established a violation, the State party is under an obligation to indicate how it will comply with Article 14 and provide remedy or redress for the violation.

170 During discussions in June 2006 on the information received from *France* on the follow-up of the cases *Arana v France*[324] and *Brada v France*[325] pursuant to the introduction of new follow-up measures, the Committee noted that many States parties implicitly do not understand their obligations under Article 22 when it comes to *interim measures*. Consequently, the Rapporteur on follow-up suggested that a general reminder explaining that the Committee is exercising legitimate powers under Article 22 should be added to future requests to States parties for updated information on decisions of the Committee. Further, he said that although the Committee's decisions were not strictly mandatory, States parties have an obligation to comply with them in good faith. In addition, the Rapporteur stated that the practice of following up decisions was well established in customary law and the Committee should resist attempts that try to challenge this practice.[326]

171 Rule 121 stipulates that the Committee 'shall include in its annual report the text of its final decisions under article 22, paragraph 7 of the Convention'. The Rule applies to both decisions on the merits and admissibility. The cases which are found to be inadmissible by the Committee have been published, except in the early years of the Committee, without the name of the complainant.[327] Similarly, the Committee 'may' also decide to include a summary of the complaints examined, and, where considered appropriate, add a summary of the explanations and statements of the States parties concerned and of the Committee's evaluation thereof.[328] In practice, though the RoP have not formally changed, as of its annual report of 2015, the Committee has no longer included the full text of its decisions in the annual report.[329]

[320] Hanski and Scheinin (n 318) 22.
[321] ibid 11.
[322] Christian Tomuschat, 'Comment on the Massera case (Massera et al v Uruguay, No5/1977 under the Human Rights Committee)' (1979) 6 EuGRZ 501–02.
[323] Ingelse (n 35) 196. [324] *Josu Arkauz Arana v France*, No 63/1997 (n 179).
[325] *Brada v France*, No 195/2002 (n 179). [326] CAT/C/SR.717, paras 60–67.
[327] cf Vandenhole (n 35) 256. [328] Rule 115(1).
[329] For the last annual report including the full text of the Committee's decisions see A/69/44 (n 234).

3.12 Follow-up Procedure

3.12.1 Development of the Follow-up Procedure

172 In contrast with established procedures on the regional level, the question of follow-up to decisions of UN human rights bodies has been a fairly new phenomenon gaining momentum only in the course of the 1990s. With the establishment of the Rapporteur for Follow-up on Views in 1990, the HRC was the first body to do so.[330] The CAT Committee followed in 2002.

173 Under the Convention, the issue of follow-up was for a long time not formalized and not included in the annual reports.[331] A first step in this regard was taken during its twenty-fourth session in 2000, when the Committee took the decision that whenever a State party failed to respond within the time limit given, the Secretariat should, in consultation with the Rapporteur of the communication, send a reminder to the State concerned. This allowed the Committee to take the matter up in its subsequent session and could include it in its annual report, should this action not trigger any reaction by the State.[332] Not long after, at its twenty-eighth session in 2002, the Committee established the function of the Rapporteur for follow-up to decisions on complaints submitted under article 22.[333]

174 Although there is no explicit basis in the Convention for a follow-up procedure, there is nothing in it that would rule out the Committee staying in touch with the State party with respect to responses to its decisions.[334] Article 22 mandates the Committee to 'consider communications', a wording not necessarily implying that a complaint's consideration would be finalized with the adoption of the views.[335] Furthermore, the implementation of a follow-up procedure can be qualified as power implicitly vested in the Committee, since it may enhance the effectiveness of the Convention.[336]

3.12.2 Indication of Reparation Measures by the Committee

175 According to Rule 118(5), the Committee shall invite a State party which was found to have violated the Convention to provide information within a 'specific time period' of the actions it has taken in conformity with the Committee's decision. In practice, this time limit is set at ninety days.[337] For each decision on the merits, in which it finds one or more violations of the Convention, the Committee indicates the need for

[330] American University Washington College of Law—CHRHL (n 208) 27; Nowak, *CCPR Commentary* (n 23) 896.

[331] Ingelse (n 35) 192; Vandenhole (n 35) 269.

[332] CAT, 'Report of the Committee Against Torture' (1999) UN Doc A/54/44, para 19.

[333] A/57/44 (n 230) para 203, Annex IX. Even if the RoP would allow for the designation of more Rapporteurs for follow-up, to date the function of Rapporteur for follow-up has been held always by one single person. The first Rapporteur was Mr González Poblete, and Ms Felice Gaer served as alternate.

[334] Ingelse (n 35) 192.

[335] Markus G Schmidt, 'Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform' [1992] ICLQ 645, 651.

[336] Ingelse (n 35) 193.

[337] cf eg *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002 (n 185) para 7; *Agiza v Sweden*, No 233/2003 (n 66) para 15; *Tebourski v France*, No 300/2006 (n 179) para 10. Until the amendment of the RoP during the twenty-eighth session, the State party was invited to reply more generally within 'due course' instead of a 'specific time period'. The amendment, however, did not influence the Committee's practice in setting a limit of 90 days. See CAT/C/3/Rev.3, para 111(5), A/57/44 (n 230) 232. The 90-day limit is modelled on the practice of the Human Rights Committee: see Nowak, *CCPR Commentary* (n 23) 896, § 43.

appropriate measures of reparation and requests the State party concerned to report on the action it has taken in conformity with the Committee's decision.[338]

176 If in some cases the Committee limited itself to a very general statement, where it indicated that 'it wishes to be informed, within 90 days, on the steps taken by the State party to respond to this decision'.[339] In others, it has included more detailed indications of the measures the State party should take in order to implement its decision. It has, for example, indicated that the State party should conduct a proper impartial and independent investigation conducted in line with the Istanbul Protocol,[340] ordered the immediate release of the complainant,[341] or indicated the necessary legal reforms to be undertaken.[342] For example, in *Ktiti v Morocco*,[343] the Committee urged 'the State party to review its legislation in order to incorporate a provision prohibiting any statement obtained under torture from being invoked as evidence in any proceedings, in conformity with article 15 of the Convention.' The follow-up to this case was, however, closed once the complainant had been released,[344] and no real consideration seems to have been given to the more general legislative reforms specified by the Committee.

177 In this sense, there seems to be a clear trend in the Committee's jurisprudence to include in the final decisions on the merits not only specific and targeted remedies for the victim but also general recommendations to ensure the non-repetition of similar violations in the future, such as changes in law and practice. Such practice was also suggested as a 'common', 'good' practice for the strengthening of individual communications procedures by the OHCHR.[345]

3.12.3 The Rapporteur for Follow-up and Its Practice

178 The competence to follow-up to the decisions of the Committee resides with the Rapporteur for follow-up. The function of the Rapporteur for follow-up is regulated by Rule 120, which states that the Rapporteur may make contacts, take action, and make recommendations as appropriate for the due performance of the follow-up mandate and report accordingly to the Committee' (Rule 120(2)).

Its mandate covers, inter alia, the following activities:[346]

- monitoring compliance with the Committee's decisions by sending notes verbales to States parties enquiring about measures adopted pursuant to the Committee's decisions;
- recommending to the Committee appropriate action upon the receipt of responses from States parties, in situations of non-response, and upon the receipt henceforth of all letters from complainants concerning non-implementation of the Committee's decisions;
- meeting with representatives of the permanent missions of States parties to encourage compliance and to determine whether advisory services or technical assistance by OHCHR would be appropriate or desirable;

[338] American University Washington College of Law—CHRHL (n 208) 28. See also below Art 14, 3.3.

[339] See eg *TA v Sweden*, No 226/2003, UN Doc CAT/C/34/D/226/2003, 6 May 2005, para 9.

[340] *Ali Aarrass v Morocco*, No 477/2011 (n 113).

[341] *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 149).

[342] *Ramiro Ramírez Martínez et al v Mexico*, No 500/2012 (n 149) para 19(d), with regard to the need to repeal the provision of preventive custody (*arraigo*) from its legislation; see also *Yousri Ktiti v Morocco*, No 419/2010, UN Doc CAT/C/46/D/419/2010, 26 May 2011, para 10, with regard to the need to incorporate a provision in line with Art 15 CAT.

[343] *Yousri Ktiti v Morocco*, No 419/2010 (n 342) para 10.

[344] A/68/44 (n 260).

[345] A/66/860 (n 264) para 4.3.2.

[346] A/57/44 (n 230), Annex IX; see also CAT, 'Report of the Committee Against Torture Fifty-third Session (3–28 November 2014) Fifty-Fourth Session (20 April–15 May 2015)' (2015) UN Doc A/70/44, para 79.

- conducting, with the approval of the Committee, follow-up visits to States parties;[347]
- preparing periodic reports for the Committee on his or her activities.

179 During its thirty-fourth session in November 2004, the Committee extended the Rapporteur's scope of duties by requesting the provision of information on follow-ups to all decisions in which the Committee had found a violation, including also those which had been decided prior to the establishment of the Rapporteur's mandate.[348]

180 The Rapporteur is obliged to inform the Committee regularly on the follow-up activities undertaken (Rule 120(3)). The reports of the Rapporteur have been included in the annual reports of the Committee until the fifty-second session.[349] From the fifty-third session, reports were published as separate documents,[350] and only general information on follow-up activities were included in the annual report.[351] The follow-up reports collect information, if received, from the State party as well as from the applicant. Moreover, since 2004 the Committee publishes a country-by-country list containing information on the Committee's decisions and the follow-up information received.[352] Such lists generally compile information received from States parties and complainants in the previous session.

181 In contrast to the follow-up to concluding observations, no guidelines have been published on the follow-up to individual complaints.[353] Consequently, the criteria on the basis of which the Rapporteur assesses the implementation of the Committee's decisions are not made public. According to the latest available information, the Committee has *closed the follow-up dialogue* with a note of satisfactory or partially satisfactory resolution with regard to 55 out of a total of 131 communications where it had found violations of different provisions of the Convention.[354] A *note of 'satisfactory resolution'* means that the Rapporteur closes the follow-up procedure and considers the decision fully implemented. In Article 3 cases, for example, the Committee has closed the follow-up dialogue with a note of satisfactory resolution when the complainant is granted refugee status or permanent residence.[355] Less clear is the category of '*partially satisfactory resolution*'. This means that the Rapporteur has decided to close the follow-up procedure although it does not consider the decision fully implemented. In practice, to date, the Rapporteur has made use of this category in three cases. In the first two instances, the Rapporteur has taken into consideration factors such as the fact that the State had paid individual financial compensation together with the fact that the case was 'quite old'.[356] The third note of 'partially satisfactory resolution' was taken with regard to *Keremedchiev*

[347] Since direct contacts with the States parties' missions in Geneva have so far been sufficient, no Rapporteur for Follow-up has ever made use of the possibility of carrying out an in-situ follow-up visit in a State party against which violations of the Convention had been found in an individual case. In addition, there are only limited budgetary means available in the Committee's budget for this purpose.

[348] A/60/44 (n 219) para 151.

[349] cf eg A/59/44 (n 219) paras 264–72; A/60/44 (n 219) paras 153–155; A/61/44 (n 219) paras 75–79.

[350] CAT, 'Periodic Report on Follow-up to Decisions on Complaints Submitted Under Article 22' (2016) UN Doc CAT/C/57/3; CAT, 'Periodic Report on Follow-up to Decisions on Complaints Submitted Under Article 22' (December 2015) UN Doc CAT/C/56/2; CAT, 'Periodic Report on Follow-up to Decisions on Complaints Submitted Under Article 22' (2014) UN Doc CAT/C/53/2.

[351] eg CAT, 'Report of the Committee Against Torture Fifty-fifth Session (27 July–14 August 2015) Fifty-sixth Session (9 November–9 December 2015) Fifty-seventh Session (18 April–13 May 2016)' (2016) UN Doc A/71/44.

[352] A/59/44 (n 219) para 265. [353] See above Art 19, § 75. [354] A/72/44 (n 5) para 87.

[355] eg CAT/C/53/2 (n 350) paras 10, 38.

[356] The cases, both adopted in 2005, are *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000 (n 185); *Nikolic et al v Serbia and Montenegro*, No 174/2000, UN Doc CAT/C/35/D/174/2000, 24 November 2005; information on the follow-up of such cases can be found in A/69/44 (n 234).

v Bulgaria.[357] In this case, the Rapporteur did not refer to the years elapsed since the decision was taken, but only to the fact that the Bulgarian Government had agreed to pay individual financial compensation (5000 BGN). This may be explained with the fact that the Committee had recommended to provide not only financial compensation but 'an effective remedy … including fair and adequate compensation for the suffering inflicted, in line with the Committee's General Comment No 2, as well as medical rehabilitation'. The dialogue on follow-up was, in this case, kept open until the complainant was contacted to enquire whether he had been notified of the decision to provide him with compensation.[358]

182 When the Rapporteur deems that the State party has not yet taken the necessary measures indicated by the Committee's decision[359] or simply because it has not provided the requested information,[360] the *follow-up procedure is kept open and the dialogue with the State party continues*. Under certain circumstances, the Rapporteur had decided to *discontinue the follow-up* procedure,[361] namely at the request of the complainant;[362] when the complainant had returned voluntarily to his country of origin,[363] when a considerable period of time has lapsed.[364]

183 More generally, another way to follow-up to the Committee's decision may be the Universal Periodic Review (UPR). Making reference to the Committee's decisions and recommendations in the UPR will not increase the chances of implementation but also facilitate a more coordinated and integrated approach between different mechanisms.[365]

3.13 Reprisals

184 In contrast to other human rights treaties, the CAT does not contain a provision addressing expressly the issue of reprisal against individuals or organizations as a consequence for having communicated with its Committee. However, in setting out the right to compliant under Article 13, the Convention stipulates that 'steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given'.[366]

[357] *Kostadin Nikolov Keremedchiev v Bulgaria*, No 257/2004 (n 120). On the follow-up of this case see CAT/C/56/2 (n 350).

[358] CAT, 'Periodic Report on Follow-up to Decisions on Complaints Submitted under Article 22' (July 2015) UN Doc CAT/C/54/3; see also A/71/44 (n 351).

[359] *Saadia Ali v Tunisia*, No 291/2006 (n 175); on the follow-up of this case see CAT/C/53/2 (n 350).

[360] See eg *Boniface Ntikarahera v Burundi*, No 503/2012, UN Doc CAT/C/52/D/503/2012, 12 May 2014; on the follow-up of this case see CAT/C/53/2 (n 350); and CAT/C/56/2 (n 350); *Besim Osmani v Republic of Serbia*, No 261/2005 (n 146); for information on the follow-up procedure of this case see CAT, 'Report of the Committee Against Torture Forty-fifth Session (1–19 November 2010) Forty-sixth Session (9 May–3 June 2011)' (2011) Un Doc A/66/44.

[361] A/66/44 (n 360).

[362] *Ltaief v Tunisia*, No 189/2001 (n 68); on the follow-up of this case see CAT, 'Report of the Committee against Torture Forty-third Session (2–20 November 2009) Forty-Fourth Session (26 April–14 May 2010)' (2010) UN Doc A/65/44.

[363] *Enrique Falcon Ríos v Canada*, No 133/1999 (n 155); *SS Elmi v Australia*, No 120/1998 (n 196); on the follow-up of both cases see A/66/44 (n 360).

[364] *Josu Arkauz Arana v France*, No 63/1997 (n 179); on the follow-up of this case see A/65/44 (n 362).

[365] cf Centre for Civil and Political Rights, 'UN Human Rights Committee: Participation in the Reporting Process. Guidelines for Non-Governmental Organisations (NGOs)' (3rd edn, Centre for Civil and Political Rights, 2015) 21 <http://ccprcentre.org/doc/CCPR/Handbook/CCPR_Guidelines%20for%20NGOs_en.pdf> accessed 7 December 2017.

[366] Such an explicit provision is included in OPCAT (Art 15); OP3-CRC (Art 4); OP-ICESCR (Art 13); OP-CEDAW (Art 11). Some treaty bodies have regulated reprisals in their RoPs, ie CESCR; CEDAW; CRC;

185 As with other UN treaty bodies,[367] the CAT Committee has recently clarified its position on reprisal. At its forty-ninth session in 2012 it decided to adopt a mechanism to prevent, monitor, and follow-up cases of reprisals against civil society organizations, human rights defenders, victims, and witnesses that engage and cooperate with the CAT mechanism.[368]

186 Further, at its fifty-first session the Committee adopted a statement on reprisal[369] and established two rapporteurs: the Rapporteur on reprisals under Article 19 and the Rapporteur on reprisal under Articles 20 and 22.[370] These decisions came soon after the 2012 recommendations on the strengthening of human rights treaty bodies, urging treaty bodies to set up 'mechanisms for action' against reprisals and a 'focal point among its membership to draw attention to such cases'.[371]

187 Finally, as a clear endorsement of the San José Guidelines by the Chairpersons of the treaty bodies, at its fifty-fifth session the Committee adopted detailed Guidelines on the receipt and handling of allegations of reprisals against individuals and organizations cooperating with the Committee under articles 13, 19, 20, and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[372] The Guidelines indicate various ways of handling reprisals, including sending warnings to the State to protect the author of a communication from pressure or threats; bring to the attention of the authorities allegations of threats, acts of intimidation or other forms of reprisal against representatives of complainants, such as lawyers, relatives, or organizations, and if necessary, make an official protest and ask for remedial action. The same measures may be taken also in cases of 'fear of reprisals'. Documents adopted by the Rapporteurs for reprisals are published online on the page of the OHCHR.[373]

GIULIANA MONINA

CRDP; CED. On reprisals see also in this Commentary Arts 13; 19 §§ 106–09; and 20 §§ 84–89. For an overview on other UN human rights treaty mechanisms see UN, 'Reprisals in the Context of United Nations Human Rights Mechanisms' (2015) UN Doc HRI/MC/2015/3.

[367] HRI/MC/2015/3 (n 367) para 14. [368] ibid, para 16.

[369] CAT, 'Statement of the Committee against Torture, Adopted at its Fifty-first Session (28 October–22 November 2013), on Reprisals' (2013) UN Doc CAT/C/51/3.

[370] In reality, the annual reports A/68/44 (n 260) para 29; and A/69/44 (n 234) para 25 also refer to the Rapporteur for reprisals under Article 20 that had to be designated at a later stage. However, in practice the function of the Rapporteur on reprisals under Article 20 was joint to that on reprisals under Article 22. In this sense see the subsequent annual reports A/70/44 (n 346) para 19; A/71/44 (n 351) para 18, which refer to 'the rapporteur on reprisals under articles 20 and 22'.

[371] A/66/860 (n 264) 68.

[372] CAT, 'Guidelines on the Receipt and Handling of Allegations of Reprisals Against Individuals and Organizations Cooperating with the Committee Against Torture Under Articles 13, 19, 20 and 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc CAT/C/55/2, para 22.

[373] OHCHR, 'CAT Committee: Reprisals' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=130> accessed 2 November 2017.

Article 23

Privileges and Immunities

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

1. Introduction	638
2. Travaux Préparatoires	639
2.1 Chronology of Draft Texts	639
2.2 Analysis of Working Group Discussions	639
3. Issues of Interpretation	640

1. Introduction

1 The system of privileges and immunities of United Nations (UN) officials and experts has its origin in Article 105 UN Charter, which reads as follows:

1. 'The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose'.

2 In accordance with Article 105(3), the General Assembly adopted a resolution on 13 February 1946 in which it approved the *General Convention on the Privileges and Immunities of the United Nations*.[1] This UN treaty applies to both UN officials and *experts on mission*. Since the UN human rights treaty monitoring bodies, with the exception of the Committee on Economic, Social, and Cultural Rights which was established by ECOSOC, are in the strict legal sense not organs of the UN, the UN Legal Counsel recommended during the drafting of the Covenants the adoption of a specific provision aimed at extending the privileges and immunities of UN experts on mission to the members of the Human Rights Committee (HRC). Consequently, a respective provision was adopted in Article 43 CCPR, which applies not only to

[1] GA Res 22 A (I), 1 UNTS 16. See further Alison Duxbury, 'The Privileges and Immunities of United Nations' Experts' (2000) APJHRL 88; Paul C Szasz and Thordis Ingadottir, 'The UN and the ICC: The Immunity of the UN and its Officials' (2001) 14(4) LJIL 867.

the members of the *HRC*, but also to those of ad hoc *conciliation commissions* established under Article 42 CCPR.[2] This provision served as the model for Article 23 CAT. Other UN human rights treaties, such as CERD, CEDAW, and CRC, do not contain a similar provision, but there seems to be no doubt that the members of the respective treaty monitoring bodies shall be entitled to the same privileges and immunities. Later treaties, such as Article 72(9) CMW, Article 26(8) CED and Article 34(13) CRPD, and Article 35 OPCAT contain more precise provisions referring to the relevant sections of the Immunities Convention.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Swedish Proposal for Implementation Provisions (22 December 1981)*[3]

Article 33

> The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under Article 31, paragraph 1(e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

4 *Draft Convention submitted by the Working Group in 1983*[4]

Article 23

> The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under Article 21, paragraph 1(e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

2.2 Analysis of Working Group Discussions

5 The Working Group of the Human Rights Commission did not deal with the supervisory mechanism of the Convention in its sessions between 1978 and 1980. However, the written comments of several States, made in 1978, on the implementation provisions of the original Swedish draft convention[5] shaped the subsequent discussions of the Working Group.[6]

6 The first time the implementation provisions were discussed within the Working Group was in 1981. The general debate which took place during that session was largely

[2] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) (*CCPR Commentary*) 787.

[3] Draft Articles Regarding the Implementation of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1981) UN Doc E/CN.4/1493.

[4] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63.

[5] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[6] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, paras 99–103. See also Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 242.

based on the original Swedish draft.[7] In 1982 the Working Group considered implementation provisions more thoroughly,[8] that time on the basis of a revised Swedish draft.[9]

7 The wording of Article 23 of the draft Convention submitted by the Working Group in 1983 was identical to that of Article 33 proposed by Sweden in 1981.[10] This provision did not give rise to further discussions, but was not formally adopted at that stage.[11] In 1984, draft Article 23, which met with no objections from the Working Group, was formally adopted.[12]

3. Issues of Interpretation

8 Article 23 CAT is taken *verbatim* from Article 43 CCPR. Comparable provisions are also included in regional international human rights instruments.[13] Conversely, certain UN treaty monitoring bodies have not been granted such explicit privileges and immunities.[14] Following some early discussions and proposals within the Human Rights Commission regarding Article 43 CCPR,[15] it was finally decided to grant members of the *HRC* and of the ad hoc *Conciliation Commission* established in accordance with Article 42 CCPR the same facilities, privileges, and immunities as those of experts in the field of the UN. The same status applies to members of the *Committee against Torture* and of its ad hoc *Conciliation Commissions*.

9 As stated in Section 23 of the Immunities Convention, the basic principle of this immunity is designed to serve the interests of the UN as an organization, rather than the interests of individuals themselves. The privileges and immunities laid out in the latter cover immunity from personal arrest or detention; seizure of personal baggage; legal process with respect to words spoken or written and acts performed in the course of the Committee functions, as well as the inviolability of all papers and documents and the right to use codes for communications with the UN.[16] These privileges and immunities apply to all States in which Committee members perform their tasks, or through whose territory they travel for this purpose. Since Committee members only exceptionally carry out field missions,[17] Article 23 primarily applies to Switzerland and the home countries of the Committee members.

10 As they pertain to words spoken or written, as well as to acts performed by experts in their official capacity, these immunities are said to be functional.[18] Moreover, as clearly stated in Section 22(b) of the General Convention, members of the Committee will continue to be granted this specific immunity even when they are no longer in UN service.[19]

11 The Secretary of the Committee operating within the UN system, provided by the Secretary-General of the UN according to Article 18(3) CAT,[20] is UN personnel and

[7] E/CN.4/1285 (n 5).
[8] Report of the Working Group of the Commission on Human Rights (1982) UN Doc E/CN.4/1982/L.40.
[9] E/CN.4/1493 (n 3); see above § 3. [10] E/CN.4/1983/63 (n 4) explanatory note.
[11] ibid, para 63.
[12] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 57.
[13] Art 51 ECHR; Art 70 ACHR; Art 43 ACHPR.
[14] See eg the following treaties: CERD, CEDAW, and CRC.
[15] Nowak, *CCPR Commentary* (n 2) 787. [16] Art VI, s 22(a)–(f).
[17] cf above Art 20, §§ 68–72. [18] Szasz and Ingadottir (n 1) 872. [19] ibid.
[20] Chris Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer Law International 2001) 111.

therefore benefits from the privileges and immunities of UN officials as laid down in Article V of the Immunities Convention.[21]

12 Finally, regarding those persons providing assistance during the inquiry procedure, such as *forensic experts* and *interpreters*, Rule 88(3) of the RoP entitles them to the same facilities, privileges, and immunities as the members of the Committee, under Article 23 CAT.[22]

GIULIANA MONINA

[21] Nowak, *CCPR Commentary* (n 2) 788.

[22] For the members of the SPT, experts assisting during its mission, and for members of national preventive mechanisms, see below Art 35 OP.

Article 24

Annual Report

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the GA of the United Nations.

1. Introduction	642
2. Travaux Préparatoires	642
2.1 Chronology of Draft Texts	642
2.2 Analysis of Working Group Discussions	644
3. Issues of Interpretation	646
3.1 Content of the Annual Report	646
3.2 Publication of the Annual Report	647

1. Introduction

1 The annual reports of human rights treaty monitoring bodies provide the public with a comprehensive description of the various activities of the respective committees as well as of the controversial issues discussed among their members. Since these expert bodies are, legally speaking, not organs of the United Nations (UN), the annual reports also serve the purpose of strengthening the link to the relevant political bodies of the UN which have the task and power to ensure that the findings of these expert bodies are in fact implemented by States parties. Consequently, some human rights treaties explicitly provide that the respective treaty bodies shall in their annual reports make suggestions and general recommendations to the political UN bodies based on their monitoring experiences.[1] However, neither Article 45 CCPR nor Article 24 CAT contains a similar provision.

2 The respective treaty provisions differ as to the addressee of annual reports. Article 9(2) CERD provides that the Committee shall report through the Secretary-General to the General Assembly (GA). Articles 45 CCPR, 21 CEDAW, and 44(5) CRC require the respective reports to be submitted through ECOSOC to the GA, but the CEDAW report shall also be transmitted to the Commission on the Status of Women. Article 74(7) of the Migrant Workers Convention requests the Committee to present its report directly to the GA, but the Secretary-General shall also transmit this report to the States parties, ECOSOC, the Commission on Human Rights (since 2006 Human Rights Council), the Director-General of the ILO and other relevant organizations. The CED Committee shall, based on Article 36, report to the States parties and to the GA. According to Article 39 Convention on the Rights of Persons with Disabilities (CRDP), the treaty monitoring body of this Convention shall submit a report to the GA and to the ECOSOC only every two years. Finally, the Subcommittee on Prevention, pursuant to Article 16(3) OP, shall present a public annual report on its activities to the Committee against Torture.[2]

[1] See eg Art 9(2) CERD; Art 21(1) CEDAW; Art 74(7) CMW; Art 39 CRPD.
[2] See below Art 16 OP.

3 The CAT *Committee* is, together with the CED Committee,[3] the only treaty monitoring body which, pursuant to Article 24 CAT, *shall report directly to the States parties and the GA*. As explained by *Herman Burgers* and *Hans Danelius*, 'the authors of the present Convention considered that the responsibility of the Committee against Torture towards the States Parties which have elected it should come first and foremost'.[4] In practice, it does not make much difference to which organ the reports are officially addressed. They are *public documents*,[5] and any political body of the UN with a human rights function can take them up, discuss any relevant issue and adopt recommendations to the respective treaty bodies as well as to the States parties with the aim of improving their implementation of the relevant treaty obligations. After the establishment of the *Human Rights Council* in June 2006, the *universal periodic review* has become an important forum to urge governments to comply with the respective decisions and recommendations of human rights treaty bodies.[6]

4 The annual reports of the CAT Committee are published as Supplements to the Official Records of the GA and are at the same time transmitted to all States parties to the Convention. In addition to organizational and procedural matters, the annual reports contain comprehensive chapters on the activities of the Committee under the State reporting, inquiry and individual complaints procedures.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

5 *International Association of Penal Law Draft (15 January 1978)*[7]

Article XIII

> 5. The Special Committee on the Prevention of Torture shall meet not less than once a year for a period of not more than five days, either before the opening or after the closing of sessions of the Human Rights Committee and shall issue an annual report of its findings.

6 *Original Swedish Draft (18 January 1978)*[8]

Article 21

> The Human Rights Committee shall include in its annual report to the GA a summary of its activities under Articles 16, 17, 18, 19 and 20 of the present Convention.[9]

7 *Draft Optional Protocol by Costa Rica (6 March 1980)*[10]

[3] See Art 36 (1) CED.

[4] J Herman Burgers and Hans 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) 168.

[5] See CAT, 'Rules of Procedure, as lastly amended by the Committee at its Fiftieth Sessions (06 May 2013–31 May 2013)' (2014) UN Doc CAT/C/3/Rev.6, r 35.

[6] See GA Res 60/251 of 15 March 2006.

[7] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[8] Draft Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[9] These articles refer respectively to the State reporting, the inquiry, the inter-state complaints, the conciliation, and the individual complaints procedures.

[10] Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

Article 11

4. The Committee shall submit to the annual Assembly a general report which shall be made public.

8 *Swedish Proposal for Implementation Provisions (22 December 1981)*[11]

Article 34

The Committee shall submit to the GA of the United Nations, through the Economic and Social Council, an annual report on its activities.

9 *Draft Implementation Provisions, Submitted by the Chairman-Rapporteur (1 February 1982)*[12]

Article 17

4. The group established in accordance with paragraphs 1 and 2 shall forward an annual report on its performance of the functions described in Articles 18 and 19 to the States parties to the Convention. It shall forward a copy of this report to the Commission on Human Rights.

10 *New Article Submitted to the Working Group by the Chairman-Rapporteur in 1983*[13]

The Committee shall submit an annual report on its activities under this Convention to the States parties and to the GA of the United Nations.

11 *Report of the Working Group (25 March 1983)*[14]

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States parties and to the GA of the United Nations.

2.2 Analysis of Working Group Discussions

12 The Working Group of the Human Rights Commission did not deal with the supervisory mechanism of the Convention in its sessions between 1978 and 1980. Consequently, no reference was made to the question of annual reporting during this period. However, the written comments of several States, made in 1978, regarding the implementation provisions of the original Swedish draft convention,[15] shaped the subsequent discussions of the Working Group.[16]

13 The first time the Working Group discussed the implementation provisions specifically was in 1981. The general debate which took place during that session was largely based on the original Swedish draft.[17] In 1982 the Working Group carried out a more thorough debate regarding the implementation provisions[18] on the basis of a revised Swedish draft.[19]

[11] Draft Articles Regarding the Implementation of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1981) UN Doc E/CN.4/1493.

[12] Draft Implementation Provisions Submitted by the Chairman-Rapporteur of the Working Group (1982) UN Doc E/CN.4/1982/WG.2/WP.6; see also Annex III of the 1982 Working Group Report (E/CN.4/1982/L.40).

[13] New Draft Article Submitted to the Working Group by the Chairman-Rapporteur (1983) UN Doc E/CN.4/1983/WG.2/WP.8.

[14] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63.

[15] E/CN.4/1285 (n 8).

[16] Summary by the Secretary-General in Accordance with Commission Resolution 18 (XXXIV) of the Commission on Human Rights (1978) UN Doc E/CN.4/1314, paras 99–103. See also Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 242.

[17] E/CN.4/1285 (n 8). [18] E/CN.4/1982/L.40 (n 20). [19] E/CN.4/1493 (n 11).

14 During the 1983 session, the question of annual reporting was discussed for the first time on the basis of Article 34 of the Swedish draft,[20] which provided, in accordance with Article 45 CCPR, for the submission of an annual report by the Committee to the GA of the through the ECOSOC.

15 In view of completing this provision, it was generally observed that, given the responsibility of the supervisory body towards the States parties that had elected it,[21] they should be the primary recipients of the annual reports. The Working Group therefore agreed that these reports should primarily be addressed to them in the first instance. Regarding the submission of reports to the GA, the discussion led the Working Group to conclude that it was unnecessary to have ECOSOC act as an intermediary.[22] In connection with this last point, reference was made to CERD, which did not contain such a provision. Following these discussions, the Chairman-Rapporteur proposed a new version of the text, which read as follows: 'The Committee shall submit an annual report on its activities under this Convention to the States parties and to the General Assembly of the United Nations.'[23] This redrafted article met with no objections from the Working Group,[24] yet was not formally adopted at this stage.

16 In 1983, the issue of annual reporting was also highlighted in the discussions relating to the *State reporting procedure* of draft Article 19, of which paragraph 4 offered the Committee the following possibility: 'The Committee may, at its discretion, decide to include any comments or suggestions made by it in accordance with paragraph 3, together with the observations thereon received from the State party concerned, in its annual report made in accordance with Article … '[25]

17 Regarding the *inquiry procedure* detailed in draft Article 20, and particularly the confidentiality requirement contained in paragraph 5, consensus was reached within the Working Group to keep the proceedings confidential as long as they were still in progress.[26] The question of maintaining confidentiality once the inquiry procedure had been completed was brought up. On the initiative of the *Australian* delegation,[27] some delegations proposed that confidentiality could be set aside once such proceedings had been finalized in respect of a particular case and that a summary of the results should be included in the annual report. The Working Group finally decided that the Committee should have the possibility of including a summary of the results in its annual report. This decision resulted in the adoption of a new paragraph 5 based on the draft text submitted by the Chairman-Rapporteur.[28]

18 During the 1984 Working Group session Article 24 did not give rise to any objections and was thus formally adopted.[29]

[20] E/CN.4/1983/63 (n 14) para 29.
[21] Burgers and Danelius (n 4) 168.
[22] E/CN.4/1983/63 (n 14) para 66.
[23] E/CN.4/1983/WG.2/WP.8 (n 13).
[24] E/CN.4/1983/63 (n 14) para 67.
[25] E/CN.4/1983/63 (n 14) para 54; and Consolidated Proposals on Draft Article 19 Submitted by the Chairman-Rapporteur (1983) UN Doc E/CN.4/1983/WG.2/WP.7.
[26] E/CN.4/1983/63 (n 14) para 61.
[27] Burgers and Danelius (n 4) 88.
[28] Draft Article 20 Submitted by the Chairman-Rapporteur (1983) UN Doc E/CN.4/1983/WG.2/WP.4; see also above Art 20, §§ 11–33, §§ 79–82
[29] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 57.

3. Issues of Interpretation

3.1 Content of the Annual Report

19 Following the example of other treaty monitoring bodies,[30] the Committee reports annually on its activities on the basis of Article 24 and Rule 64. Published as Supplement No 44 to the Official Records of the GA[31] the Committee has, to this date, submitted thirty annual reports, ranging from forty-six pages in 1988 to 282 pages in 2006, 492 pages in 2014, and around twenty pages since 2015.[32] Article 24 and Rule 64 do not contain any specific requirements as to what the annual reports should cover and only quite generally mention the Committee's activities. Rule 64 does, however, state that the annual reports should include 'a reference to the activities of the Subcommittee on Prevention, as they appear in the public annual report submitted by the Subcommittee to the Committee under article 16, paragraph 3, of the Optional Protocol'.[33] Specific indications as to what the Committee may publish in its annual reports can be found in the Convention provisions referring to State reporting (Article 19(4))[34] and the inquiry procedures (Article 20(5))[35] but not, however, in respect of the individual complaints procedure. To this extent, more guidance on the individual complaints procedure is given by Rule 121(2), which establishes that the annual report shall include the full text of its final decisions on the merits as well as—at the discretion of the Committee—a summary of the complaints examined, and the explanations and statements of the States parties concerned. As of 2011, the RoP also state that general comments shall be included in the Committee's annual report (Rule 74(2)). In light of these provisions and rules, the Committee, in the past, pursued the practice of publishing in its annual reports the full text of all decisions on the admissibility and merits of individual complaints,[36] the summary accounts of all results of inquiry procedures[37] as well as all conclusions and recommendations on each State report.[38] However, taking into account the GA resolution 68/268 of 2014 establishing a 10,700 word-limit for each document produced by the human rights treaty bodies and the rule not to include documents published separately and referenced in the annual reports, regrettably, the Committee's annual reports no longer include these elements as of 2015.[39]

[30] See eg Art 45 CCPR; Art 9(2) CERD; Art 21 CEDAW.

[31] With the exception of the 1988, 1989, and 1991 annual reports (A/43/46, A/44/46, and A/46/46), they bear the symbol A/45 . . . 71/44, the middle number referring to the respective session of the General Assembly.

[32] Since 2015, the content of annual reports has been reduced due to a 10,700-word limit for treaty body documentation established by the GA Res 68/268 of 9 April 2014.

[33] Rule 64 was introduced for the first time by the Committee at its Forty-fifth session in 2010 (CAT/C/3/Rev.5); and then confirmed in the amendment adopted at its Fiftieth session in 2013 (CAT/C/3/Rev.6).

[34] See also Rule 71(3) for the publication of comments by the Committee or observations by the State Party and Rule 67(2) for the publication of information on non-submission of reports.

[35] See also Rule 90 (3) on the publication of summary accounts of the inquiry proceedings.

[36] The full text of the decisions on the admissibility and merits of individual complaints was included in the annex to annual reports from 1990 until 2014, with the exception of the annex to the 1993 annual report.

[37] The summary accounts of all results of inquiry procedures were included in annual reports from 1994 until 2014.

[38] The conclusions and recommendations of the Committee on each State report were included in the annual reports from 1994 until 2014.

[39] GA Res 68/268 of 9 April 2014, paras 4 and 15, where it is stated that documents published separately should not be included in the annual report 'without prejudice to the formulation of the annual report of each human rights treaty body as laid out in the respective treaty' (para 4).

20 As regards their *structure*, in addition to organizational and similar matters, the annual reports contain an overview of the actions taken by the Committee at its latest session and a section relating to the submission of reports by States parties under Article 19 CAT, including a subsection on action taken by the Committee to ensure the submission of reports. The sections which then follow are dedicated to the consideration of State party reports under Article 19; follow-up to concluding observations on Sates parties' reports; activities of the Committee under Article 20; and, finally, communications under Article 22.

21 The *annexes to the annual report* have been significantly reduced since GA Resolution 68/268 was passed in 2014. Until 2014, the annexes generally contained three updated lists: one including all the States that have signed, ratified, or acceded to the Convention;[40] one comprising all the States parties that have declared that they do not recognize the competence of the Committee as provided for by Article 20 CAT;[41] and another one comprising all those States parties that have made declarations under Articles 21 and 22 CAT.[42] In the past, the annexes to the annual report also contained information relating to the membership of the Committee;[43] the status of submission of reports by States parties.[44] Furthermore, the Committee followed the practice of the Human Rights Committee of publishing the full text of its admissibility decisions and final views in an annex to its annual report.[45] In its 1998, 2008, and 2013 annual reports, the Committee reproduced the texts of its general comments.[46] Since 2015, however, the only annex included in the annual report contains information relating to the Committee's membership, officers, and mandates.[47]

3.2 Publication of the Annual Report

22 The Committee, which holds three sessions per year, adopts its annual report at the end of its *spring session* in order to ensure the consideration of the report at the GA's regular session, which takes place in November.[48] According to Rule 35(1), annual

[40] The list of States that have signed, ratified, or acceded the Convention was included in the annex of annual reports from 1988 until 2014.

[41] The list of States parties that have opted out of the inquiry procedure established under Articles 20 and 28 of the Convention was included in the annex of annual reports from 1998 until 2014.

[42] This list of States parties that have made the declarations provided for in Articles 21 and 22 of the Convention was included in the annex of annual reports from 1998 until 2014.

[43] Information relating to the membership of the Committee has been included in the annexes to annual reports since the first annual report in 1988.

[44] Information relating to the status of submission of reports by States parties was included in the annexes to annual reports from 1989 until 2014, with the exception of the annex to the 2003–2005 annual reports. From 2006 until 2012, this annex listed overdue reports only.

[45] The full text of all decisions on the admissibility and merits of individual complaints was included in the annex to annual reports from 1990 until 2014, with the exception of the annex to the 1993 annual report.

[46] CAT, 'Report of the Committee Against Torture' (1998) UN Doc A/53/44, Annex IX, 52; CAT, 'Report of the Committee Against Torture, Thirty-ninth Session (5–23 November 2007), Fortieth Session (28 April–16 May 2008)' (2008) UN Doc A/63/44, Annex VI, 176; CAT, 'Report of the Committee Against Torture Forty-ninth Session (29 October–23 November 2012) Fiftieth Session (6–31 May 2013)' (2013) UN Doc A/68/44, Annex X, 254.

[47] CAT, 'Report of the Committee Against Torture Fifty-third Session (3–28 November 2014) Fifty-fourth Session (20 April–15 May 2015)' (2015) UN Doc A/70/44, Annex, 24; CAT, 'Report of the Committee Against Torture Fifty-fifth Session (27 July–14 August 2015) Fifty-sixth Session (9 November–9 December 2015) Fifty-seventh Session (18 April–13 May 2016)' (2016) UN Doc A/71/44, Annex, 18; CAT, 'Report of the Committee Against Torture Fifty-eighth Session (25 July–12 August 2016) Fifty-ninth Session (7 November–7 December 2016) Sixtieth Session (18 April–12 May 2017)' (2017) UN Doc A/72/44, Annex, 24.

[48] A/70/44 (n 48) para 85.

reports, as all other official documents of the Committee, are public and available for free consultation in UN offices, national departments of foreign affairs, and the larger libraries,[49] as well as on the website of the OHCHR.[50]

23 The *GA* has, in its resolutions based on the reports of the Third Committee, regularly welcomed the work of the Committee and underlined the quality of its reports. Moreover, in 1995, the GA expressed its satisfaction in relation to the modified presentation of the annual reports and for the improvements made in the Committee's working methods.[51] In 2006, the GA welcomed the inclusion by the Committee of information on the follow-up by States to its recommendations.[52] In 2012, the GA welcomed the efforts made by the Committee to improve the efficiency of its working methods, including with a view to further harmonizing the working methods of the treaty bodies, and urged the Committee to continue its activities in this regard.[53]

24 Although the annual reports are in fact prepared by the Secretariat, the *Rapporteur of the Committee* has the formal responsibility for the accuracy of the reports. The Rapporteur, who is an officer of the Committee, is elected from among Committee members for a term of *two years* in accordance with Article 18(1) and Rules 16 and 17.[54] The following Committee members have served as Rapporteur: *Dimitar Nikolov Mikhailov* from Bulgaria (1988–1989), *Peter Thomas Burns* from Canada (1990–1993), *Bent Sørensen* from Denmark (1994–1995 and 1998–1999), *Julia Iliopoulos-Strangas* from Greece (1996–1997), *Sayed Kassan El Masry* from Egypt (2000–2005), *Felice Gaer* from the United States (2006–2007), *Myrna Kleopas* from Cyprus (2008–2010), *Nora Sveaass* from Norway (2010–2012 and 2012–2014), *Satyabhooshun Gupt Domah* from Mauritius (2014–2015), *Essadia Belmir* from Morocco (January–April 2016), and *Sébastien Touzé* from France (April 2016–present).[55]

GIULIANA MONINA

[49] Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Martinus Nijhoff 2001) 108.

[50] See the OHCHR, 'The Committee against Torture' <https://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx> accessed 2 November 2017.

[51] GA Res 49/177 of 23 December 1994, para 18.

[52] GA Res 61/153 of 19 December 2006, para 19.

[53] GA Res 67/232 of 24 December 2012, para 1.

[54] See above Art 18.

[55] CAT, 'Report of the Committee Against Torture' (1988) UN Doc A/43/46, para 10; CAT, 'Report of the Committee Against Torture' (1990) UN Doc A/45/44, para 8; CAT, 'Report of the Committee Against Torture' (1992) UN Doc A/47/44, para 8; CAT, 'Report of the Committee Against Torture' (1994) UN Doc A/49/44, para 8; CAT, 'Report of the Committee Against Torture' (1996) UN Doc A/51/44, para 8; A/53/44 (n 47) para 11; CAT, 'Report of the Committee Against Torture' (2000) UN Doc A/55/44, para 10; CAT, 'Report of the Committee Against Torture Twenty-seventh Session (12–23 November 2001) Twenty-eighth Session (29 April–17 May 2002)' (2002) UN Doc A/57/44, para 8; CAT, 'Report of the Committee against Torture Thirty-first Session (10–21 November 2003) Thirty-second Session (3–21 May 2004)' (2004) UN Doc A/59/44, para 7; CAT, 'Report of the Committee against Torture Thirty-fifth Session (14–25 November 2005) Thirty-sixth Session (1–19 May 2006)' (2006) UN Doc A/61/44, para 7; A/63/44 (n 47) para 7; CAT, 'Report of the Committee Against Torture Forty-third Session (2–20 November 2009) Forty-fourth Session (26 April–14 May 2010)' (2010) UN Doc A/65/44, para 7; CAT, 'Report of the Committee Against Torture Forty-seventh Session (31 October–25 November 2011) Forty-eighth Session (7 May–1 June 2012)' (2012) UN Doc A/67/44, para 7; CAT, 'Report of the Committee Against Torture Fifty-first Session (28 October–22 November 2013) Fifty-second Session (28 April–23 May 2014)' (2014) UN Doc A/69/44, para 9; A/71/44 (n 48) Annex, 19; A/72/44 (n 48) Annex, 24.

PART III

FINAL CLAUSES

Article 25

Signature and Ratification

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

1. Introduction	651
2. Travaux Préparatoires	651
2.1 Chronology of Draft Texts	651
2.2 Analysis of Working Group Discussions	652
3. Issues of Interpretation	653

1. Introduction

1 The Convention was adopted and opened for signature, ratification, and accession by GA Resolution 39/46 on 10 December 1984, the UN human rights day, without a vote. Article 25 stipulates how to become a party to the Convention by signature and ratification, while Article 26 regulates accession, which, in practice, also includes succession.[1]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *IAPL draft (15 January 1978)*[2]

Article XV

(Signature and accessions)

1. This Convention is open for signature by all States.

2. Any State which does not sign this Convention before its entry into force may accede to it thereafter.

Article XVII

(Depositing instruments of ratification)

This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

[1] See below Art 26, 3.

[2] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

3 *Proposal for the Preamble and the Final Provisions of the Draft Convention, Submitted by Sweden (22 December 1980)*[3]

Article A

1. The present Convention is open for signature by all States at United Nations Headquarters in New York.

2. Any State which does not sign the Convention before its entry into force may accede to it.

Article B

1. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

4 *Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (31 January 1983)*[4]

Article 25

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

2.2 Analysis of Working Group Discussions

5 The Working Group discussed the final clauses including the provisions leading to Article 25 in its meetings in 1983[5] and 1984.[6]

6 During the Working Group's discussion in 1983, which were based on the set of final clauses contained in the Swedish draft, participants pointed out a contradiction between Article A(2) and Article C(1) with respect to the possibility for accession prior to the Convention's entry into force, which prompted the Chairman-Rapporteur to submit a revised set of final clauses at its eleventh meeting.[7] In this version, the provisions referring to signature and ratification were joined in a new Article, now numbered as Article 25. Its wording already corresponded to the final version eventually adopted.

7 However, due to time constraints, the Working Group did not formally adopt any of the proposed final clauses. It rather decided to put the revised set of final clauses

[3] Proposal for the Preamble and the Final Provisions of the Draft Convention Submitted by Sweden' (1980) UN Doc E/CN.4/1427.

[4] Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (1993) UN Doc E/CN.4/1983/WG.2/WP.15.

[5] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63.

[6] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72.

[7] E/CN.4/1983/WG.3/WP.15 (n 4).

as proposed by the Chairman-Rapporteur in brackets to the annex of its report to the Commission on Human Rights.[8] On 24 February 1983, the Working Group adopted this report without a vote.[9]

8 On 30 January 1984, the Working Group adopted Article 25 as contained in the annex to the 1983 report.[10] After the conclusion of its deliberations, the Article was included without brackets in the report to the Commission on Human Rights[11] and was eventually adopted by the General Assembly.[12]

3. Issues of Interpretation

9 Article 25(1) opens the Convention for *signature* by all States. In accordance with Article 18(a) VCLT (Vienna Convention on the Law of Treaties), the signing of the Convention creates an obligation for the State 'to refrain from acts which would defeat the object and purpose of the treaty' and furthermore, entitles the State to proceed to ratification. The signature, however, neither establishes an obligation to ratify, nor the consent to be bound by the treaty. With respect to potential membership of the Convention, Article 25(1) takes a comprehensive approach by opening it for signature to *all States*. In contrast, non-member States of the United Nations, such as Switzerland at that time, could only sign and ratify CERD and the Covenants upon invitation by the General Assembly.[13]

10 Pursuant to Article 25(2) the Convention is subject to ratification. *Ratification* is an official and formal expression of a State's consent to be bound by a treaty.[14] In most democratic countries, such an expression has to be preceded by an approval by Parliament. The instrument of ratification is subsequently to be deposited with the Secretary-General of the United Nations, who is assigned the role of the depositary by the Convention. Article 77 VCLT provides for the functions of depositaries, which include, inter alia, the receiving of any signatures to the treaty and receiving and keeping custody of any instruments, or informing the States entitled to become parties to the treaty when the number of signatures or instruments of ratification or accession required for the entry into force of the treaty has been received.[15]

11 The Convention entered into force on 26 June 1987. Thirty days earlier, *Denmark* had been the twentieth State to express its consent to be bound by the Convention, and thus to submit the instrument of ratification with the Secretary-General. As of December

[8] E/CN.4/1983/63 (n 5) para 82; the revised set of final clauses did not include Art F, later Art 33, since no changes were proposed. It was therefore included in the appendix as formulated in the Swedish proposal (E/CN.4/1427, Art F).

[9] E/CN.4/1983/63 (n 5) para 83; see also J Herman Burgers and Hans Danelius, *United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff 1988) 91.

[10] E/CN.4/1984/72 (n 6) para 59. [11] ibid.

[12] Report of the Third Committee, Thirty-ninth Session (1984) UN Doc A/39/708, para 18.

[13] See eg Art 17 CERD, Art 48 CCPR, Art 26 CESCR.

[14] Art 14(1)(a) VCLT. For more information on the ratification process and a template of the instrument of ratification see CTI and APT, 'UNCAT Ratification Tool' (2nd edn, 2016) <https://cti2024.org/content/images/CTI%20Ratification%20tool%20-%20executiveaction%20and%20annexes%20compilation%20Nov%20201...pdf> accessed 3 December 2017.

[15] Art 77(1)(f) VCLT. See also below Art 27 OP.

2017, 75 out of 162 States parties have joined the Convention by means of signature and ratification, 80 States have acceded to the treaty, and 7 States became parties by way of succession.[16] Eight States became signatories to the Convention, but have not yet ratified it.[17]

GIULIANA MONINA

[16] See below Appendix A3.

[17] In chronological order: Gambia (23 October 1985), Sudan (4 June 1986), India (14 October 1997), Bahamas (16 December 2008), Palau (20 September 2011), Haiti (16 August 2013), Angola (24 September 2013), Brunei Darussalam (22 September 2015). See below Appendices A3, A4.

Article 26

Accession and Succession

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

1. Introduction	655
2. Travaux Préparatoires	655
2.1 Chronology of Draft Texts	655
2.2 Analysis of Working Group Discussions	656
3. Issues of Interpretation	657
3.1 Accession	657
3.2 Succession	658

1. Introduction

1 The Convention was adopted and opened for signature, ratification and accession by GA Resolution 39/46 on 10 December 1984, the United Nations' human rights day, without a vote. Article 26 supplements Article 25 on signature and ratification and stipulates how to become party to the Convention by means of accession. Though succession is not explicitly mentioned, in practice, several States have used this means to become Party to the Convention.[1]

2 The Convention entered into force on 26 June 1987, on the thirtieth day after the twentieth State party had submitted its instrument expressing the consent to be bound by the treaty with the Secretary-General. Out of these first twenty States parties, five States had joined the Convention by means of accession. As of December 2017, in total, seventy-eight States have deposited their instrument of accession with the Secretary-General of the United Nations, while seventy-eight States joined by means of ratification. Seven States declared themselves to be bound by the Convention by means of succession.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *IAPL Draft (15 January 1978)*[2]

[1] See below § 13.

[2] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

Article XVIII

(Accession)

Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations

4 *Proposal for the Preamble and the Final Provisions of the Draft Convention, Submitted by Sweden (22 December 1980)*[3]

Article A

1. The present Convention is open for signature by all States at United Nations Headquarters in New York.

2. Any State which does not sign the Convention before its entry into force may accede to it.

Article B

1. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary General of the United Nations.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5 *Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (31 January 1983)*[4]

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

2.2 Analysis of Working Group Discussions

6 The Working Group discussed the final clauses including the provisions leading to Article 26 during its meetings in 1983[5] and 1984.[6]

7 During the Working Group's discussion, a contradiction between Articles A(2) and Article C(1) was noted. While the earlier provision was understood as limiting the possibility to accede to the Convention to the period after it had entered into force, the latter allowed for the deposit of the instrument of accession prior to its entry into force. The solutions put forward to settle this issue included inter alia deletion of the words 'or accession' in Article C(1), keeping the Convention open for signature indefinitely as well as allowing for accession right from the beginning, or introducing changes in Article A(1) allowing signatures only for a limited time period.[7]

8 Taking this contradiction and the proposed solutions into consideration, the Chairman-Rapporteur submitted to the Working Group in its eleventh meeting a revised

[3] Proposal for the Preamble and the Final Provisions of the Draft Convention Submitted by Sweden (1980) UN Doc E/CN.4/1427.

[4] Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (1993) UN Doc E/CN.4/1983/WG.2/WP.15.

[5] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63.

[6] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72.

[7] E/CN.4/1983/63 (n 5) para 73; J Herman Burgers and Hans 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) 90.

version of the final clauses.[8] The new Article, now numbered as Article 26, stipulated that '[t]his Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.' Accordingly, the Convention was to provide for accession as well as signature followed by ratification, both prior to and after it had entered into force.

9 Due to time constraints, the Working Group eventually did not formally adopt any of the discussed final clauses in 1983. It decided to put the revised set of final clauses as proposed by the Chairman-Rapporteur in brackets to the annex of its report to the Commission on Human Rights.[9] On 24 February 1983, the Working Group adopted this report without a vote.[10]

10 On 30 January 1984, the Working Group adopted Article 26 as contained in the annex to the 1983 report.[11] After the conclusion of its deliberations, the Article was included without brackets in the report to the Commission on Human Rights[12] and was eventually adopted by the General Assembly.[13]

3. Issues of Interpretation

3.1 Accession

11 *Accession* is an alternative to signature and subsequent ratification of a treaty and it leads to the same end, ie becoming a party to the treaty.[14] In principle, States are free whether they wish to sign a treaty first and later submit it to ratification or to accede without prior signature. If a treaty remains open for signature only for a certain period of time,[15] States wishing to become party after this deadline can only join by means of accession. Certain treaties provide for accession only after their international entry into force.[16] Article A(2) of the Swedish draft of final provisions was based on this assumption when it envisaged that any State which does not sign the Convention 'before its entry into force' may accede to it.[17] The final text of Article 27 confirms, however, that *accession to the Convention may take place before and after its entry into force*.[18] This expression of consent is performed by lodging a corresponding instrument with the Secretary-General. Article 26 assigns to the Secretary-General the function of depositary.[19]

[8] E/CN.4/1983/WG.2/WP.15 (n 4); see above § 5.

[9] E/CN.4/1983/63 (n 5) para 82; the revised set of final clauses did not include Art F, later Art 33, since no changes were proposed. It was therefore included in the appendix as formulated in the Swedish proposal (E/CN.4/1427 (n 3) Art F).

[10] E/CN.4/1983/63 (n 5) para 83. [11] E/CN.4/1984/72 (n 6) para 59 .[12] ibid.

[13] Report of the Third Committee, 39th Session (1984) UN Doc A/39/708, para 18.

[14] cf Art 15(a) VCLT; Ian Brownlie, *Principles of Public International Law* (5th edn, Clarendon Press 1998). For a template of instrument of accession see CTI and APT, 'UNCAT Ratification tool' (2nd edn, 2016) 21 <https://cti2024.org/content/images/CTI%20Ratification%20tool%20-%20executiveaction%20and%20annexes%20compilation%20Nov%20201...pdf> accessed 3 December 2017.

[15] cf eg Art 125(1) ICC Statute which provides for 31 December 2000 as the latest date of signature.

[16] See eg IACPPT (Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women), European Convention on the Legal Status of Children Born out of Wedlock, European Agreement on Transfer of Responsibility for Refugees, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Convention on the Transfer of Sentenced Persons, ECPT (in combination with Protocol No 1).

[17] E/CN.4/1427 (n 3); see above Art 25, 3 [18] See below Art 27, §§ 12–13.

[19] cf Art 16(b) VCLT.

12 Both Articles 25 and 26 contain an '*all States clause*'. This corresponds more to recent UN human rights treaties than it does to both Covenants and CERD, since the latter require an explicit invitation by the General Assembly to become party by means of ratification or accession.[20] In practice, there is no difference between the two as the General Assembly has invited all States to accede.[21] Only independent States which exhibit all the elements of statehood required under international law are allowed to sign, ratify or accede to the Convention. In case of doubt, the UN Secretary-General as depository usually consults the General Assembly for advice.

3.2 Succession

13 *Succession* is not explicitly mentioned as a means of becoming party to the Convention. Although Article 26, as with other UN human rights treaties, is silent about succession, a total of *seven States became parties to the Convention by means of succession*:[22] Croatia (12 October 1992), the *Czech Republic* (22 February 1993), *Slovakia* (28 May 1993), *Bosnia and Herzegovina* (1 September 1993), the former Yugoslav Republic of *Macedonia* (12 December 1994), *Serbia and Montenegro* (12 March 2001), and *Montenegro* (23 October 2006). The sixth former Yugoslav Republic, *Slovenia*, however, acceded on 16 July 1993. Since the *Russian Federation* was considered the principal State successor to the former *Soviet Union*, which had ratified the Convention already on 3 March 1987, it deposited neither an instrument of accession nor succession after the dismemberment of the Soviet Union. The other *former Soviet Republics acceded* to the Convention, albeit at considerably different dates as the following chronological list shows: *Estonia* (21 October 1991), Latvia (14 April 1992), *Armenia* (13 September 1993), *Georgia* (26 October 1994), *Tajikistan* (11 January 1995), *Uzbekistan* (28 September 1995), Republic of Moldova (28 November 1995), *Lithuania* (1 February 1996), *Azerbaijan* (16 August 1996), *Kyrgyzstan* (5 September 1997), *Kazakhstan* (26 August 1998), and *Turkmenistan* (25 June 1999). *Belarus* and *Ukraine*, although formerly part of the USSR (Byelorussian and Ukrainian Soviet Socialist Republics), were considered as separate subjects of international law during the Soviet time and, therefore, as the Russian Federation, did not deposit any instrument of accession.

14 This State practice raises a number of difficult questions of interpretation, since 'State succession is an area of great uncertainty and controversy'.[23] Are States free to choose between accession and succession? If any of the successor States refrains from depositing an instrument of accession or succession or does so with a considerable delay, does this mean that it has no obligations under the Convention after the dismemberment of the predecessor State? Is the deposit of an instrument of succession of a constitutive or only declaratory nature?

15 The *Human Rights Committee* has addressed some of these questions in relation to the CCPR by means of a '*General Comment on issues relating to the continuity of obligations*

[20] Art 48 CCPR; Art 26 CESCR; Art 17 CERD.

[21] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) (*CCPR Commentary*) 805.

[22] cf CAT, 'Report of the Committee against Torture Thirty-fifth Session (14–25 November 2005) Thirty-sixth Session (1–19 May 2006)' (2006) UN Doc A/61/44, Annex I.

[23] Brownlie (n 14) 622. See also the Vienna Convention on Succession of States in respect of Treaties (1978) 17 ILM 1488, the provisions of which, however, 'are not reflected by the practice of states': Brownlie (n 14) 633.

to the International Covenant on Civil and Political Rights'.[24] The question of succession is closely related to the question of *denunciation or withdrawal* which, in the absence of a specific provision in the relevant treaty, is only permitted under the VCLT if it is intended by the parties or implied from the nature of the treaty.[25] The HRC concluded that 'the Covenant is not the type of treaty which, by its nature, implies a right of denunciation'.[26] Furthermore, the

> rights enshrined in the Covenant belong to the people living in the territory of the State party. The HRC has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in Government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.[27]

On the basis of these legal considerations, the HRC refused to accept the notification of withdrawal by the *Democratic People's Republic of Korea* and developed the *doctrine of continuity of obligations* even in the absence of any formal instrument of succession.[28] For example, despite the fact that *Kazakhstan* had not deposited any instrument of accession or succession after the dismemberment of the Soviet Union, the HRC treated the Central Asian Republic as a continuing State party and requested the submission of State reports. This doctrine was also applied to *Hong Kong* and *Macau*.[29]

16 In contrast to both Covenants, Article 31 CAT contains an *explicit denunciation clause*.[30] Nevertheless, in the absence of a notification of denunciation by a successor State, the doctrine of continuity of obligations, in our opinion, equally applies to CAT. Since no State has ever denounced the Convention, the people in the former *Czechoslovakia*, the former *Yugoslavia* and in all Republics of the former *Soviet Union* (not just in the Russian Federation, Belarus and the Ukraine), therefore, continued to enjoy all rights stipulated in the Convention. This implies also that in the period between dismemberment and the deposit of an instrument of accession or succession, the newly independent States had automatically taken over the various substantive and procedural obligations from their predecessor States. The Government of *Turkmenistan* which, for example, only deposited its instrument of accession in 1999, was nevertheless bound to comply with all obligations deriving from the Convention between the dismemberment of the Soviet Union and 1999, including the obligation under Article 19 to submit periodic reports to the Committee.

17 The *Committee against Torture* seems, however, to have taken a *different view*. During the 1990s, *Turkmenistan* was never listed as a State party in the Committee's annual reports.[31] After its instrument of accession was received on 25 June 1999, Turkmenistan was listed as a new member State with 25 July 1999 indicated as the date of the Convention's entry into force, with the consequence that the initial report was

[24] HRC, 'General Comment on Issues relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights' (1997) UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1; cf Nowak, *CCPR Commentary* (n 21) XXXVII, 1133ff.

[25] CCPR/C/21/Rev.1/Add.8/Rev.1 (n 24) para 1 and Art 56 VCLT.

[26] CCPR/C/21/Rev.1/Add.8/Rev.1 (n 24) para 3.

[27] ibid, para 4.

[28] cf Nowak, *CCPR Commentary* (n 21) XXXVII.

[29] ibid, XXXVIII.

[30] See below Art 31.

[31] See eg CAT, 'Report of the Committee Against Torture' (1998) UN Doc A/53/44, Annex I.

due on 25 July 2000.[32] This means that the Committee is under the impression that the Convention only entered into force on 25 July 1999, ie thirty days after the deposit of the instrument of accession, as specified in Article 27(2). In other words, the Committee clearly did not apply the doctrine of continuing obligations to Turkmenistan.

18 Similarly, *Slovenia*, which deposited its instrument of accession on 16 July 1993, is considered as having become a State party on 15 August 1993, ie thirty days after the deposit but more than two years after its independence from the former Yugoslavia.[33] On the other hand, *Bosnia and Herzegovina*, which deposited its instrument of succession on 1 September 1993, is considered as having become a State party to the Convention on 6 March 1992, ie at the time of independence from the former Yugoslavia.[34] Similarly, *Croatia* and *Montenegro* which deposited instruments of succession respectively on 12 October 1992 and 23 October 2006, are considered as having become a State party on 8 October 1991 and 3 June 2006, ie at the time of independence from the former Yugoslavia.[35] This practice seems to indicate that the Committee makes a *distinction between accession and succession*. Since the dates of the receipt of the instruments of succession with respect to successor States are not consistent in the annual reports, it is, however, difficult to assess whether the Committee applies the doctrine of continuity of obligations to States which deposited an instrument of succession rather than of accession.

19 The status of *Yugoslavia (Serbia and Montenegro)* and as of 2006 Serbia under the Convention is worth further consideration. The Socialist Federal Republic of Yugoslavia signed the Convention on 18 April 1989 and deposited its instrument of ratification on 10 September 1991, ie during a violent armed conflict between its two federal Republics of Serbia and Croatia. The Convention entered into force on 10 October 1991.[36] While the 1993 annual report lists the country as Yugoslavia (Serbia and Montenegro),[37] the following reports simply refer to Yugoslavia. In the 2002 annual report, Yugoslavia suddenly appears on the list of successor States, with 10 September 1991 as the date of receipt of the instrument of succession.[38] In the following year, however, Yugoslavia disappears from the list of States parties and is replaced by Serbia and Montenegro as a successor State with 12 March 2001 as the date of receipt of the instrument of succession.[39] 12 March 2001 is also indicated as the date of entry into force of the declarations

[32] See CAT, 'Report of the Committee Against Torture' (1999) UN Doc A/54/44, Annex I; CAT, 'Report of the Committee Against Torture' (2000) UN Doc A/55/44, Annexes I and VI; A/61/44 (n 22) Annexes I and V. See also the dates for the second periodic reports of Tajikistan, Kyrgyzstan and Kazakhstan. Similarly, the second periodic report for Tajikistan was due on 9 February 2000, for Kazakhstan on 24 September 2003, and for Kyrgyzstan on 4 September 2002.

[33] A/61/44 (n 22) Annex V; CAT, 'Report of the Committee Against Torture' (1994) UN Doc A/49/44, Annexes I and III.

[34] A/61/44 (n 22) Annex V. In the annual report of 1993, Bosnia and Herzegovina was, however, not yet listed as a State party: A/48/44, Annexes I and III. It figures for the first time in the 1994 annual report, however, with 6 March 1992 as both the date of receipt of the instrument of succession and the date of entry into force: CAT, 'Report of the Committee Against Torture Twenty-seventh Session (12–23 November 2001) Twenty-eighth Session (29 April–17 May 2002)' (2002) UN Doc A/57/44, Annexes I and V.

[35] cf A/61/44 (n 22) Annex I. Again, the dates in the earlier reports are different. In the annual report of 1993, 8 October was indicated as both the date of receipt of Croatia's instrument of succession and as the date of entry into force of the Convention: A/48/44, Annexes I and III.

[36] CAT, 'Report of the Committee Against Torture' (1992) UN Doc A/47/44, Annexes I and III.

[37] CAT, 'Report of the Committee Against Torture' (1993) UN Doc A/48/44, Annexes I and III.

[38] A/57/44 (n 34) Annex I.

[39] CAT, 'Report of the Committee against Torture, 29th session (11–22 November 2002) and 30th session (28 April–16 May 2003)' (2003) UN Doc A/58/44, Annex I.

under Articles 21 and 22.[40] After the independence of Montenegro, the same date is used to indicate the date of receipt of the instrument of succession of Serbia.[41] In the table concerning the situation of overdue reports, the second and third periodic reports of Serbia and Montenegro were listed as having been due on 9 October 1996 and 9 October 2000, respectively.[42] It seems, therefore, that the Committee had treated Serbia and Montenegro and then, Serbia, simply as the main successor State of the former Yugoslavia without any interruption in the protection of human rights, similar to the status of the Russian Federation as the principle successor State of the former Soviet Union. This was also underlined by the treatment of individual complaints against Yugoslavia (Serbia and Montenegro).[43]

20 Despite the difference between the Covenants and the Convention with regard to the possibility of denunciation, the *practice of the Human Rights Committee seems to be more convincing than that of the Committee against Torture*. If one applies the doctrine of continuity of obligations, it is no longer relevant whether successor States deposit an instrument of accession, succession, or no instrument at all. This is the only way of ensuring that there is no gap in the protection of human rights in the case of dismemberment of States. As from the day of independence, the Government of the newly independent State takes over from its predecessor all substantive and procedural obligations under the Convention, including the obligation to submit periodic reports. If it does not wish to be bound by the Convention, it has the possibility of denunciation under Article 31. But the fact that a Government, for whatever reason, is a few years late in depositing its instrument of accession or succession, as with most Central Asian States, cannot be the reason for an interruption of the international human rights protection of its inhabitants. Similarly, the fact that a Government, for whatever reason, deposits an instrument of accession instead of succession, as in the case of *Slovenia*, cannot be a valid reason for a gap in the human rights protection of its inhabitants either.

21 There remains the question as to whether successor States are also bound by the *reservations* under Articles 28 and 30 and by the *declarations* under Articles 21 and 22 of predecessor States. This issue is for example relevant for the successor States of the Socialist Federalist Republic of Yugoslavia, which at the time of ratification had made declarations recognizing the competence of the Committee with regard to Articles 21 and 22. Among them, Croatia, Yugoslavia (Serbia and Montenegro), and then Montenegro confirmed the declarations under Article 21 and 22 (respectively, on 12 October 1992, 12 March 2001, and 23 October 2006). On the contrary, Bosnia Herzegovina confirmed only the declaration of the Socialist Federalist Republic of Yugoslavia concerning the competence of the Committee in relation to individual complaints (4 June 2003) but not the competence in relation to inter-State complaints. The former Yugoslav Republic

[40] ibid, Annex III.

[41] CAT, 'Report of the Committee Against Torture Thirty-seventh Session (6–24 November 2006) Thirty-eighth Session (30 April–18 May 2007)' (2007) UN Doc A/62/44, Annex I.

[42] ibid, para 22. The initial report of Yugoslavia had been submitted on 20 January 1998: CAT/C/16/Add.7.

[43] See the various individual complaints which concerned violations of the Convention during the Milosevic regime: *Ristic v Yugoslavia*, No 113/1998, UN Doc C AT/C/26/D/113/1998, 11 May 2001; *Hajrizi Dzemajl et al v Yugoslavia*, No 161/2000, UN Doc CAT/C/29/D/161/2000, 21 November 2002; *Jovica Dimitrov v Serbia and Montenegro*, No 171/2000, UN Doc CAT/C/34/D/171/2000, 3 May 2005; *Danilo Dimitrijevic v Serbia and Montenegro*, No 172/2000, UN Doc CAT/C/35/D/172/2000, 16 November 2005; *Slobodan Nikolic and Ljiljana Nikolic v Serbia and Montenegro*, No 174/2000, UN Doc CAT/C/35/D/174/2000, 24 November 2005; *Dragan Dimitrijevic v Serbia and Montenegro*, No 207/2002, UN Doc CAT/C/33/D/207/2002, 24 November 2004.

of Macedonia has confirmed neither of them. The Committee does not list the former Yugoslav Republic of Macedonia under the countries accepting the competence of the Committee under Articles 21 and 22 nor Bosnia Herzegovina under those accepting the Committee's competence under Article 21.[44] In other words, it seems that only those successor States that have explicitly confirmed their predecessor declarations under Article 21 and 22 are considered by the Committee among those accepting the Committee's competence for the inter-State and individual complaints procedures.

GIULIANA MONINA

[44] Bosnia and Herzegovina was included in the States parties having accepted the competence of the CAT Committee under both Articles 21 and 22 from 2004 (A/59/44) until 2009 (A/64/44), but not in the annual reports published after 2010: see A/65/44 and following.

Article 27

Entry into Force

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

1. Introduction	663
2. Travaux Préparatoires	664
2.1 Chronology of Draft Texts	664
2.2 Analysis of Working Group Discussions	664
3. Issues of Interpretation	665

1. Introduction

1 On *26 June 1987*, the Convention against Torture entered into force. Thirty days earlier, *Denmark* had submitted its instrument of ratification with the Secretary-General, passing the threshold of twenty instruments for the treaty's entry into force as stipulated in Article 27(1). Reflecting the importance of this date, the UN General Assembly (GA) adopted in 1998 a resolution[1] following a recommendation of ECOSOC in which it declared 26 June as the *International Day in Support of Victims of Torture*.

2 As of December 2017, a total of 162 States were parties to the CAT. Compared with the number of States parties to other international human rights treaties, such as CRC (196 parties), CEDAW (189), CERD (179), the CCPR (169), or the CESCR (166), the Convention ranks somewhat lower. This seems surprising as the prohibition of torture constitutes *jus cogens* under international law.

3 As provided by Article 27, the Secretary-General acts as depositary. According to Article 77(1)(f) VCLT, this function also includes the task of informing 'the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited'.

[1] GA Res 52/149 of 12 December 1997.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *IAPL draft (15 January 1978)*[2]

Article XIX

(Entry into force)

1. This Convention shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

5 *Proposal for the Preamble and the Final Provisions of the Draft Convention, Submitted by Sweden (22 December 1980)*[3]

Article C

1. The present Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the tenth instrument of ratifications or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

6 *Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (31 January 1983)*[4]

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the [twentieth] instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the [twentieth] instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

2.2 Analysis of Working Group Discussions

7 The Working Group discussed the final clauses in 1983[5] and 1984.[6]

8 In 1983, the discussion on Article C of the Swedish draft set of final clauses focused mainly on the number of ratifications or accessions necessary for the entry into force of the Convention. Some delegations favoured a threshold of thirty-five ratifications or

[2] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[3] Proposal for the Preamble and the Final Provisions of the Draft Convention Submitted by Sweden (1980) UN Doc E/CN.4/1427.

[4] Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (1993) UN Doc E/CN.4/1983/WG.2/WP.15.

[5] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63.

[6] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72.

accessions, similar to Article 49 CCPR and Article 27 CESCR. Other delegations deemed such a high number neither necessary nor desirable and referred to other instruments such as the OP to the CCPR or the CEDAW, requiring a substantially lower number of ratifications or accessions (ten and twenty ratifications or accessions, respectively).[7]

9 With regard to Article C(2), providing for the possibility to accede to the Convention before its actual entry into force, the Working Group observed a contradiction with Article A(2) of the same proposal, since the latter only allowed for an accession after its entry into force. The solutions put forward included, inter alia, the deletion of the words 'or accession' in Article C(1), keeping the Convention open for signature indefinitely as well as allowing for accession right from the beginning, or introducing changes in Article A(1) allowing signatures only for a limited time period.[8]

10 Reflecting the above summarized discussions, the Chairman-Rapporteur submitted to the Working Group a revised version of the final clauses.[9] As a new threshold for the Convention's entry into force, the proposed Article, now numbered as Article 27, struck a balance between the earlier voiced opinions with the requirement of *twenty instruments of ratification or accession*.

11 Due to time constraints, the Working Group eventually did not formally adopt any of the proposed final clauses in 1983, but decided to put the revised set of final clauses as proposed by the Chairman-Rapporteur in brackets to the annex of its report to the Commission on Human Rights.[10] On 24 February 1983, the Working Group adopted this report without a vote.[11] On 30 January 1984, the Working Group finally adopted Article 27 without any further changes.[12]

3. Issues of Interpretation

12 While the two principal human rights Covenants, the CCPR and CESCR, required thirty-five ratifications or accessions for entering into force, which in fact happened only ten years after their adoption by the GA,[13] the drafters of Article 27(1) CAT finally agreed on a *compromise of twenty States*, which is in line with other similar human rights treaties.[14] The first twenty States that had signed and ratified or acceded to the Convention were Sweden, Mexico, France, Belize, the Philippines, Egypt, Norway, Senegal, Argentina, Uruguay, Uganda, Switzerland, Bulgaria, Cameroon, the Ukrainian Soviet Socialist Republic, the Soviet Union, the Byelorussian Soviet Socialist Republic, Afghanistan, Hungary, and Denmark. The latter had submitted its instrument of ratification on 27 May 1987, triggering the thirty-day period for the entry into force of the Convention. Consequently, the Convention entered into force on 26 June 1987, less than three years after its adoption on 10 December 1984. For all States that ratified or

[7] E/CN.4/1983/63 (n 5) para 74; see also J Herman Burgers and Hans 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) 90.

[8] E/CN.4/1983/63 (n 5) para 73. [9] E/CN.4/1983/WG.2/WP.15 (n 4).

[10] E/CN.4/1983/63 (n 5) para 82; the revised set of final clauses did not include Art F, later Art 33, since no changes were proposed. It was therefore included into the appendix as formulated in the Swedish proposal (E/CN.4/1427 (n 3) Art F).

[11] E/CN.4/1983/63 (n 5) para 83. [12] E/CN.4/1984/72 (n 6) para 59.

[13] Both Covenants were adopted by the GA on 16 December 1966. The CESCR, in accordance with Art 27, entered into force on 3 January 1976; the CCPR, in accordance with Art 49, on 23 March 1976.

[14] cf Art 27 CEDAW, Art 49 CRC, Art 87 CMW, Art 39 CED, Art 45 CRPD.

acceded to the Convention after this date, it entered into force on the thirtieth day after the deposit of its respective instrument. The instrument of *Austria's ratification* was, for example, received on 29 July 1987, which meant that the Convention entered into force on 28 August 1987. The same holds true for *accessions*. The date of receipt of instruments of *succession* is, however, of no legal significance as the successor State only declares that it has taken over the obligations from its predecessor State as from the date of independence, or another date indicated by the successor State. In its earlier annual reports, the Committee had wrongly indicated the date of independence as the date of receipt of the respective instrument of succession, whereas more recent reports indicate the actual date of receipt.[15] If a successor State, for whatever reason, chooses to deposit an instrument of accession, the Committee treats it as a new State which became a party on the thirtieth day after the deposit of its instrument of accession.[16]

13 The reference to ratification and accession in both paragraphs of Article 27 clarifies that accession can take place both prior to and after the entry into force of the Convention. This question caused much confusion and discussion during the drafting of Articles 25 to 27.[17] In fact, five States (*Belize, the Philippines, Egypt, Uganda*, and *Cameroon*) had acceded to the Convention before its entry into force.[18] Since the Convention does not indicate any deadline for signature, States may still sign the Convention and ratify it thereafter. In fact, *Andorra* for example signed on 5 August 2002 and *San Marino* on 18 September 2002. States are completely free to choose between signature and ratification on the one hand, and accession on the other, both before and after the date of entry into force.

14 As of December 2017, a total of 162 States were parties to the Convention, out of which 75 became members by signature and ratification, 80 by accession, and 7 by succession. Ten States have signed the Conventions pending its ratification.[19] The seven States having joined the Convention by means of succession are the Czech Republic and Slovakia as well as all former republics of the Socialist Federal Republic of Yugoslavia, with the exception of Slovenia, which acceded to the Convention.[20]

GIULIANA MONINA

[15] See above Art 26, 3.2.

[16] For the dates of entry into force of the Convention indicated in the annual reports of the Committee for Slovenia and Turkmenistan see above Art 26, 3.2.

[17] See above §§ 7–11. [18] See above Art 26, 3.

[19] In chronological order: Gambia (23 October 1985), Sudan (4 June 1986), India (14 October 1997), Sao Tome and Principe (6 September 2000), Comoros (22 September 2000), Bahamas (16 December 2008), Palau (20 September 2011), Haiti (16 August 2013), Angola (24 September 2013), Brunei Darussalam (22 September 2015).

[20] CAT, 'Report of the Committee against Torture Thirty-Fifth Session (14–25 November 2005) Thirty-Sixth Session (1–19 May 2006)' (2006) UN Doc A/61/44, Annex I: Croatia (12 October 1992), Czech Republic (22 February 1993), Slovakia (28 May 1993), Bosnia and Herzegovina (1 September 1993), the Former Yugoslav Republic of Macedonia (12 December 1994), Serbia (12 March 2001), and Montenegro (23 October 2006). Slovenia is the only State of the former Yugoslavia which did not succeed but acceded to the Convention. See above Art 26, 3.2.

Article 28

Opting Out of the Inquiry Procedure

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.

2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

1. Introduction	667
2. Travaux Préparatoires	668
2.1 Chronology of Draft Texts	668
2.2 Analysis of the Discussions in the General Assembly	668
3. Issues of Interpretation	670

1. Introduction

1 Compared to the monitoring procedures established in earlier UN human rights treaties, the inquiry procedure under Article 20 CAT was a major innovation. During the drafting of Article 20, delegations from Socialist States strongly objected to this procedure, which went so far as to envisage fact-finding missions by the Committee on the territory of the State concerned.[1] In addition to watering down the procedure to a considerable extent, the aforementioned States demanded that this new mechanism be optional rather than mandatory. The Commission on Human Rights could not find a consensus on this controversial issue. In the General Assembly, the *USSR* submitted an amendment to the effect that the inquiry procedure should be only applicable to States parties which had recognized the individual and inter-State communication procedures under Articles 21 and 22. As a compromise, the *Byelorussian Soviet Socialist Republic* proposed an opting-out possibility, which was finally accepted by Western and other States in order to ensure that the Convention was adopted by consensus.[2]

2 This opting-out clause was strongly criticized in the literature as a serious setback.[3] But in practice, an opting-out clause has a much less limiting effect on the acceptance of a procedure than the requirement of an optional declaration. In fact, as of December 2017 only fourteen States parties out of 162 have opted out to the inquiry procedure. This shows that it makes a great difference if States parties, wishing to recognize an optional mechanism, are required to make a specific declaration as opposed to simply refraining

[1] See above Art 20, 2.2. [2] See below § 3.

[3] Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Kluwer Law International 2001) 84, 157, 172, 393; Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999) 272.

from doing anything. The burden is shifted to the States that do not wish to be bound to make a special reservation at the time of signature, ratification, or accession. While the lists of States which made the respective declarations under Articles 21 and 22 are 'positive lists' of States parties willing to accept international scrutiny, the list of States which made the reservation under Article 28 is a 'black list' of States parties averse to international monitoring. Finally, if a State withdraws this reservation, it has no further possibility to make another reservation at a later date, unless it chooses to denounce the Convention and re-accede.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Proposal by the Byelorussian Soviet Socialist Republic (29 November 1984)*[4]

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.

2. Any State Party having made a reservation in accordance with the preceding paragraph may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

2.2 Analysis of the Discussions in the General Assembly

4 The origin of Article 28 is most closely linked to the discussions on Article 20.[5] The question of whether the inquiry procedure embodied in Article 20 should be made *mandatory* or not, had been a *bone of contention throughout the meetings of the Working Group*, which, in 1984, eventually reached a consensus on all provisions except for Articles 20, and 19(3) and (4). The task of finalizing the text was ultimately handed over to the Commission on Human Rights, where its members had to choose between the option of renewing the mandate of the Working Group with the request to seek a consensus on the remaining points; to settle them by voting in the Commission; or to transmit the draft as it stood including Article 20 and parts of Article 19 in brackets to the General Assembly. In light of the already advanced state of the draft Convention, after seven years of negotiations in the Working Group, and the fact that a considerable number of members of the Commission on Human Rights were not familiar with the details related to Articles 19 and 20,[6] many delegations favoured the adoption of a resolution transmitting, through the Economic and Social Council, the draft Convention to the General Assembly. After a discussion of the Working Group's report, which also included the question on the mandatory character of Article 20, the Commission adopted such a resolution without a vote.[7]

[4] Proposal by the Byelorussian Soviet Socialist Republic (1984) A/C.3/39/L.66.

[5] See above Art 20, § 11–33.

[6] J Herman Burgers and Hans 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) 99–100.

[7] Commission on Human Rights Res 1984/21 (1984) UN Doc E/CN.4/RES/1984/21 (Draft Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment); see also Burgers and Danelius (n 6) 101.

5 In the first meeting of the *Third Committee*, to which the General Assembly had assigned the item, the *Netherlands* delegation announced the facilitation of multi and bilateral consultations in order to address the prevalent concerns regarding the present draft Convention. As became clear, all Western and most Latin American States advocated for an adoption of the Convention including a mandatory inquiry procedure. This position found support from a limited number of African and Asian States. The Soviet Union together with other East European States voiced their readiness in principle to adopt the draft Convention, however, provided that Articles 19 and 20 would be modified. Many African and Asian States preferred to remain undecided in that respect.[8]

6 These opposing and block-centred views, which were already looming in the course of the informal consultations and the earlier Working Group discussions, hardened when the Third Committee convened in order to discuss the issue.[9] In reaction to information that certain delegations were about to table a draft resolution asking for a postponement of action to the next session of the General Assembly, the delegations of *Argentina, the Netherlands*, and *Sweden* decided to put forward a proposal to adopt the draft Convention as prepared by the Working Group, but without the brackets on the contested Articles 19 and 20.[10]

7 Soon afterwards, on 26 November 1984, the *USSR*, together with nine co-sponsors,[11] submitted two amendments[12] relating to Articles 19 and 20 as contained in the annex of the draft resolution. In order to avert the mandatory character of the inquiry procedure provided for in the resolution, the Socialist States proposed to insert the words 'which has made a declaration in accordance with article 21, paragraph 1, and article 22, paragraph 1' after the words 'in the territory of a State Party' in Article 20(1). Hence, Article 20 would be only applicable to those States parties which had also accepted both procedures for inter-State and individual complaints.[13]

8 Three days later, the delegation of the *Byelorussian Soviet Socialist Republic* came forward with another amendment to Article 20 as included in the annex of the draft resolution. The proposal suggested the insertion of a new Article, after Article 27, which provided for a declaration upon signature or ratification, or accession by the State party not to recognize the Committee's competence set out in Article 20. States wishing to withdraw their declaration may do so at any time by notifying the Secretary-General.[14] Although the amended article would still allow States parties to opt out of the inquiry procedure, it would now require a corresponding *reservation*. This was a novelty in so far as earlier amendments put forward by East European countries had still provided for the possibility to ratify the Convention fully without being subjected to the inquiry procedure.

[8] Burgers and Danelius (n 6) 103.

[9] ibid; Summary Records of the Sixtieth and Sixty-first Meeting of the Third Committee, Thirty-ninth Session (1984) UN Doc A/C.3/39/SR.60 and A/C3/39/SR.61.

[10] Draft Resolution Submitted by the Netherlands to the General Assembly (1984) UN Doc A/C.3/39/L.40; in addition to Argentina, the Netherlands, and Sweden, the draft resolution was sponsored by Bolivia, Colombia, Costa Rica, Denmark, the Dominican Republic, Finland, Gambia, Greece, Norway, Samoa, and Spain.

[11] Afghanistan, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, the Ukrainian Soviet Socialist Republic, and Vietnam.

[12] A/C.3/39/L.49 and L.50.

[13] Burgers and Danelius (n 6) 104. This proposal went further than an earlier amendment put forward by the Ukrainian Soviet Socialist Republic in February 1984, interlinking Art 20 only with Art 21; Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 52.

[14] A/C.3/39/L.66 (n 4); and Burgers and Danelius (n 6) 104.

This preference had apparently been waived by the delegation of the Byelorussian Soviet Socialist Republic and could be read as a conciliatory step towards those interested in a mandatory Article 20.[15]

9 When the Third Committee started to consider the draft resolution, including its provision for a mandatory inquiry procedure, the head of the *Netherlands* delegation, representing the sponsors, announced that in a spirit of compromise a number of changes would be accepted. These changes included, in addition to modifications in relation to Articles 19(3) and (4)[16] and 20(1)[17] and (5),[18] the insertion of a new Article 28 as earlier proposed by the Byelorussian delegation. These measures were however dependent on the withdrawal of all other pending amendments which had previously been put forward by the *USSR* and other East European States.

10 The *Yugoslav* delegation suggested postponing the decision on the draft resolution in order to be able to consult with their missions, but withdrew its proposal after urgent pleas by *Morocco* and *Senegal*. The delegation of *Kuwait* refrained from putting forward a motion to defer the decision-taking to the next session of the General Assembly.[19] The Soviet delegation announced that the pending amendments[20] would be withdrawn. After the sponsors accepted a request by the Byelorussian delegation to include an additional amendment[21] to Article 19, the draft resolution, including the new Article 28, was adopted by the Third Committee without a vote.[22]

3. Issues of Interpretation

11 As the drafting history of the Convention shows, in 1987, the Western States had the choice between putting the Convention—*with a mandatory inquiry procedure*—to the vote, which would have resulted in a considerable number of Socialist (and possibly also some African and Asian) States voting against and, therefore, not joining as States parties, or accepting the *Byelorussian compromise of an opting-out clause*.[23]

12 According to Article 28 reservations can only be made '*at the time of signature or ratification of this Convention or accession thereto*'.[24] It follows that reservations under Articles 28, as any other reservation, cannot be made at any later stage. But reservations may be withdrawn 'at any time'. A *withdrawal* is, however, *irreversible*, unless the State concerned decides to denounce the Convention pursuant to Article 31 and later accedes with a respective new reservation. It is important to note that Article 28 does not refer to

[15] It appears noteworthy that the Byelorussian Soviet Socialist Republic had not co-sponsored the amendment A/C.3/39/L.50 of 1984 tabled by the USSR.

[16] Deletion of 'or suggestions' in Report of the Third Committee, 39th Session (1984) UN Doc A/39/708, para 10; Burgers and Danelius (n 6) 105.

[17] Replacing 'information' by 'reliable information'; replacing 'reliable indications' by 'well-founded indication'; inserting 'to co-operate in the examination of the information and to this end' after the words 'the Committee shall invite that State Party' in A/39/708 (n 16) para 11; Burgers and Danelius (n 6) 105. See above Art 20, §§ 30–33.

[18] Insertion of 'and at all stages of the proceedings the co-operation of the State Party shall be sought' at the end of the first sentence; replacing in the second sentence 'at its discretion' by 'after consultations with the State party concerned'; A/39/708 (n 16) para 11; Burgers and Danelius (n 6) 105. See above Art 20, §§ 30–33.

[19] Burgers and Danelius (n 6) 105.

[20] A/C.3/39/L.50, L.63, L.64; A/39/708 (n 16) para 13.

[21] A/C.3/39/L.67: insertion of 'general' before 'comments' in Art 19(3) and (4).

[22] A/39/708 (n 16) paras 14, 18.

[23] Burgers and Danelius (n 6) 104; see also above § 3.

[24] For a template of instrument of ratification see CTI and APT, 'UN Ratification Tool' (2nd edn, 2016) 22 <https://cti2024.org/content/images/CTI%20Ratification%20tool%20-%20executiveaction%20and%20annexes%20compilation%20Nov%20201...pdf> accessed 4 December 2017.

succession. Consequently, States depositing an instrument of succession are not permitted to use this opportunity to make a reservation under Article 28 if the predecessor State had not taken advantage of this opting-out possibility. Since *Yugoslavia*, which had acceded to the Convention only in October 1991, had abstained from making a reservation under Article 28, none of the successor States were in a position to opt-out. The same holds true for the successor States of the *USSR*, since the USSR had already withdrawn its reservation in October 1991. When former *Czechoslovakia* split into the Czech Republic and Slovakia, both successor States inherited the reservation and withdrew it thereafter.[25]

13 For the first ten years, the Committee's annual reports did not contain any list of States that had made opting-out reservations in accordance with Article 28. It was only the 1998 report which included for the first time a list of eleven States parties.[26] The lists were published in the Committee's annual reports until 2014, but are regrettably no longer included as of 2015, presumably due to the word limit.[27] The lists did not contain any information about States that had already withdrawn an earlier reservation. Such an information can, however, be retrieved from the UN Treaty Collection's website.[28]

14 From the entry into force of the Convention until December 2017, a total of twenty-six States parties have made a reservation in accordance with Article 28.[29] Twelve States parties have later withdrawn such reservations.[30] Hence, fourteen States—out of the 162 that are parties to the Convention—have opted out of the inquiry procedure. Among them, ten belong to the Asia Pacific Group, three to the African Group, and one to the Western Europe and Other Group.[31]

15 State practice shows that most reservations were done in the early years of entry into force of the Convention (twelve in the 1980s; six in the 1990s), when all Socialist States parties (the USSR, the Byelorussian and Ukrainian Soviet Socialist Republics, all other Eastern European States, China, and Afghanistan) and Chile had availed themselves

[25] See Appendices A3 and A4.

[26] CAT, 'Report of the Committee Against Torture' (1998) UN Doc A/53/44, Annex II. The 11 States parties listed there were: Afghanistan, Bahrain, Belarus, Bulgaria, China, Cuba, Israel, Kuwait, Morocco, Saudi Arabia, and the Ukraine.

[27] For the latest annual report publishing the list see CAT, 'Report of the Committee Against Torture Fifty-First Session (28 October–22 November 2013) Fifty-Second Session (28 April–23 May 2014)' (2014) UN Doc A/69/44, Annex 2. On the word limit of the Committee's annual report see above Art 24, § 19.

[28] UN Treaty Collection, 'Status of Treaties' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en> accessed 2 November 2017.

[29] Appendices A3 and A4.

[30] As of December 2017, the States parties that have later withdrawn their reservations under Art 28 are: Bahrain, Belarus, Bulgaria, Chile, Czech Republic, Guatemala, Hungary, Morocco, Russian Federation, Slovakia, Ukraine, Zambia.

[31] As of December 2017, the fourteen opting-out States are in the Asia Pacific Group: Afghanistan, China, Fiji, Kuwait, Lao People's Democratic Republic, Pakistan, Saudi Arabia, Syria, United Arab Emirates, and Vietnam; in the African group: Equatorial Guinea, Eritrea, Mauritania; in the Western Europe and Other Group: Israel. The situations of Cuba and Poland are somewhat unclear and need further explanations: *Cuba* ratified the Convention on 17 May 1995 with a declaration stating: 'in accordance with article 28 of the Convention, that the provisions of paragraphs 1, 2 and 3 of article 20 of the Convention will have to be invoked in strict compliance with the principle of the sovereignty of States and implemented with the prior consent of the States Parties.' The Committee has included Cuba in its 'black list' of opting out States from 1998 to 2000 (A/53/44, Annex II; A/54/44, Annex II; A/55/44, Annex II; A/56/44, Annex II) and then again in 2007 (A/62/44, Annex II), but not in its annual reports from 2002 to 2006 (from A/57/44 to A/61/44) and from 2008 (from A/53/44 to A/69/44). Cuba was also classified as an opting-out State in the first edition of this Commentary. However, given that as of 2008 the Committee has no longer included Cuba in the list and the UN Treaty Collection does not report any reservations/declarations under Art 28 other than that made upon ratification, the authors of this Commentary have decided to revise their previous interpretation and—in light of the available information—consider Cuba as bound by the inquiry procedure under Art 28 CAT. With regard to *Poland*, the Committee

of this possibility. But Chile withdrew immediately after a democratic Government had come to power in 1990. Since the USSR had already withdrawn its reservation on 1 October 1991, no issue of succession arose. Slovakia and the Czech Republic inherited the reservation from the former Czechoslovakia and withdrew it in 1995 and 1996, respectively. All other Central and Eastern European States withdrew their respective reservations between 1989 (Hungary) and 2003 (Ukraine). The only Socialist State which still adheres to this practice is China.[32] An additional ten reservations were made after 2000, mainly by States parties coming from the Asia Pacific Group (six)[33] and African States (three).[34]

16 When compared with the acceptance rates of the procedure under Articles 21 and 22, this result clearly shows that the opting-out procedure limits the level of State acceptance much less than the requirement of an optional declaration.[35]

17 Some governments used Article 28 as a possibility for *interpretive declarations. Cuba*, for example, declared 'in accordance with article 28 of the Convention, that the provisions of paragraphs 1, 2 and 3 of article 20 of the Convention will have to be invoked in strict compliance with the principle of the sovereignty of States and implemented with the prior consent of the States Parties'.[36] When the *German Democratic Republic* declared in 1987, in addition to opting out of the inquiry procedure, that it would 'bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic', many governments objected to this declaration which they considered as a reservation contrary to the object and purpose of the Convention.[37] In objecting to the declaration made by the German Democratic Republic, *Greece, Spain*, and *Italy* took the position that the Convention does not permit any reservations other than those explicitly authorized under Articles 28(1) and 30(2). On the other hand, the Convention does not exclude other reservations, and it is difficult to argue that all reservations, apart from Articles 28(1) and 30(2), are necessarily incompatible with the object and purpose of the Convention, in the sense of Article 19(b) VCLT. In fact, various States have entered reservations in relation to a number of provisions of the Convention, without other States objecting to them.[38]

GIULIANA MONINA

has not included Poland in the lists of opting out States published in its Annual Reports from 1998 until 2005. But Poland was included in the Committee's lists from 2005 until 2009 (A/60/44, Annex II; A/61/44, Annex II; A/62/44, Annex II; A/63/44, Annex II; A/64/44, Annex II), and then was removed again from the Committee's lists as of 2009 (A/64/44, Annex II; A/65/44, Annex II; A/66/44, Annex II; A/67/44, Annex II; A/68/44, Annex II, A/69/44, Annex II). The 'UN Treaty Collection—Status of Treaties' website reports that Poland has made a reservation to Article 20 upon signature, but neither the text of the reservation nor its withdrawal are reported under the webpage 'UN Treaty Collection website—Depositary Notifications'.

See also Appendices A3 and A4.

[32] See Appendix A3.

[33] See Fiji, Lao People's Democratic Republic, Pakistan, Syria, United Arab Emirates, Vietnam. See also Appendices A3 and A4.

[34] See Equatorial Guinea, Eritrea, and Mauritania. See also Appendices A3 and A4

[35] cf below Art 21, 3.2; Art 22, 3.1; see also Appendix A3.

[36] Similarly Indonesia: see below Appendix A4.

[37] Objections were made by the UK, France, Luxembourg, Sweden, Austria, Denmark, Norway, Canada, Greece, Spain, Switzerland, Italy, Portugal, Australia, Finland, New Zealand, and the Netherlands. See Appendix A4.

[38] See Appendix A4.

Article 29

Amendment

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

1. Introduction	673
2. Travaux Préparatoires	674
2.1 Chronology of Draft Texts	674
2.2 Analysis of Working Group Discussions	675
3. Issues of Interpretation	675

1. Introduction

1 Article 29 CAT is based on the fairly complicated and impractical amendment procedure of Article 51 CCPR, which has unfortunately reappeared in later human rights treaties, such as Article 50 CRC, Article 90 CMW, and Article 44 CED. While Article 51(2) CCPR requires approval by the General Assembly and a two-thirds majority of the States parties, Article 29 CAT excludes any role of the General Assembly. Instead of four stages, Article 29 only requires three stages: (1) approval of a special conference by one-third of the States parties; (2) adoption of the text of the amendment by simple majority of the States parties present at such a conference; and (3) the subsequent acceptance by two-thirds of the States parties in accordance with their respective constitutional processes.

2 In practice, the two-thirds requirement has turned out to be an obstacle to the entry into force of the only amendment so far adopted by States parties. But even after acceptance of this amendment by two-thirds of the States parties, the provision of Article 29(3), at least if interpreted literally, would lead to absurd results.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *IAPL Draft (15 January 1978)*[1]

Article XX

(Revision)

1. A request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

4 *Proposal for the Preamble and the Final Provisions of the Draft Convention, Submitted by Sweden (22 December 1980)*[2]

Article D

1. A request for the revision of the present Convention may be made at any time by any State Party by means of notification in writing addressed to Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

5 *Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (31 January 1983)*[3]

Article 28

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

[1] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[2] Proposal for the Preamble and the Final Provisions of the Draft Convention Submitted by Sweden (1980) UN Doc E/CN.4/1427.

[3] Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (1993) UN Doc E/CN.4/1983/WG.2/WP.15.

2.2 Analysis of Working Group Discussions

6 During its meetings in 1983[4] and 1984,[5] the Working Group discussed the final clauses, including the provision leading to Article 29, on the basis of the final clauses contained in the Swedish draft.[6] Several delegations, however, voiced their preference for a procedure facilitating amendments, instead of revisions, since the latter was deemed to relate more to an overall review of the treaty. Furthermore, several speakers proposed changes relating to Article D(2) leaving it up to the General Assembly to decide on requests for reviews. In their view, this task should remain within the power of States parties, since they were also the most affected by any changes of the treaty. Opposition against any changes came from one delegation. Referring to the consistency between the similarly worded Article 23 CERD and Article D, this delegation argued, no additions or changes should be introduced.[7]

7 Taking the above outlined discussion into consideration, the *Chairman-Rapporteur* submitted to the Working Group in its eleventh meeting a revised set of final clauses. The draft provision, now numbered as Article 28, provided for the possibility of amendments instead of revisions and was similarly worded as *Article 51 CCPR*.[8] Due to time constraints, the Working Group did not formally adopt any of the proposed final clauses; however, it did decide to put the revised set as presented by the Chairman-Rapporteur in brackets to the annex of its report to the Commission on Human Rights.[9] On 24 February 1983, the Working Group adopted this report without a vote.[10]

8 During the deliberations in 1984, opposing views emerged regarding whether the text for draft Article 28 would need further changes or additions. Some delegations voiced their preference to keep the article as it was, mirroring to a large extent Article 51 CCPR. The proposal of the delegation of the *United States* to insert 'within four months from the date of such communication' into paragraph 1, limiting the period of time in which States parties can put forward their support for a conference on a proposed amendment, did not meet any objections. In the absence of the insistence on other changes, the Working Group adopted draft Article 28 at its seventh meeting.[11]

9 The provision was later renumbered as Article 29 due to the insertion of a new Article 28 providing for an opting-out of the inquiry procedure as stipulated in Article 20.

3. Issues of Interpretation

10 According to Article 29(1), only States parties to the Convention, ie no other States, may propose an amendment of the Convention. After communication of the proposed amendment by the Secretary-General to the States parties, a conference of States

[4] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63.

[5] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72.

[6] E/CN.4/1427 (n 2); see above § 4.

[7] E/CN.4/1983/63 (n 4) para 75; J Herman Burgers and Hans 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) 91.

[8] E/CN.4/1983/WG.2/WP.15 (n 3); see above § 5.

[9] E/CN.4/1983/63 (n 4) para 82; the revised set of final clauses did not include Art F, later Art 33, since no changes were proposed. It was therefore included in the appendix as formulated in the Swedish proposal (E/CN.4/1427 (n 2) Art F).

[10] E/CN.4/1983/63 (n 4) para 83.

[11] E/CN.4/1984/72 (n 5) para 64.

parties under the auspices of the United Nations shall be convened to discuss the amendment if at least *one-third* of the States parties are in favour of such a conference. On the proposal of the *United States*, a *four-month time limit* was inserted for such approval, which is not included in Article 51 CCPR. For adoption at such a conference, the *simple majority* of the States parties present and voting is sufficient. Abstentions shall, therefore, be counted as negative votes. Pursuant to Article 29(2), an amendment enters into force only when *two-thirds* of the States parties have accepted it in accordance with their respective constitutional processes.

11 To date, there has been one amendment put forward since the Convention entered into force in 1987. On 9 January 1992, the *Australian* delegation proposed an *amendment in relation to Articles 17(7) and 18(5)* with the intention of including the *financing of the activities of the Committee against Torture in the regular budget of the United Nations*. At that time, out of the seven treaty bodies, only the CAT Committee and the CERD Committee were not fully funded under the regular budget of the United Nations. The resulting financial problems and the 'growing recognition that the proper implementation of the main human rights instruments must be a concern to the international community as a whole'[12] fostered the demand for an amendment. Aware of these difficulties, the General Assembly had already earlier invited the States parties to consider the possibility of an amendment.[13] The draft resolution including Australia's proposal stated:[14]

1. Decide to delete paragraph 7 of article 17 and paragraph 5 of article 18;
2. Decide to add a new paragraph, as paragraph 4 of article 18 to read 'The members of the Committee established under the present Convention shall receive emoluments from the United Nations resources on such terms and conditions as the General Assembly shall decide', and as a result of inserting this provision, that the existing paragraph 4 of article 18 should be renumbered as paragraph 5;
3. Recommend that the General Assembly take action of the implementation of the proposed amendment at its forty-seventh session;
4. Recall that the amendment shall enter into force when it has been accepted by two thirds of the States parties to the Convention which shall have so notified the Secretary-General as depository, and on the understanding that the proposed amendments will become operative only when the General Assembly has taken appropriate action;
5. Urge all States parties to meet their financial obligations under the existing article 17, paragraph 7, and article 18, paragraph 5, in full until such time as the proposed amendment in paragraphs 1 and 2 above entered into force;

12 In compliance with Article 29(1), the Secretary-General, acting in the capacity of depositary, forwarded the proposed amendment to the States parties. In his *note verbale*, dated 20 March 1992, he requested all parties to notify him within four months whether they would favour a conference for the purpose of considering and voting upon the proposal.[15] As of 20 July 1992, twenty-nine States parties[16] out of sixty-five had notified him

[12] CAT/SP/SR.4, para 3; see above Art 17 § 63; Art 18 § 8.

[13] GA Res 46/111 of 17 December 1991.

[14] See also Australia's proposed amendment in relation to the financing of the CERD, CERD/SP/45; CAT/SP/1992/L.1.

[15] C.N.10.1192.TREATIES-1.

[16] Australia, Austria, Brazil, Canada, Colombia, Cyprus, Czech and Slovak Federal Republic, Denmark, Ecuador, Finland, France, Germany, Hungary, Jordan, Liechtenstein, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Panama, Portugal, Romania, Russian Federation, Spain, Sweden, Switzerland, and Uganda.

that they would favour such a conference. Consequently, the States parties convened on 9 September 1992 in New York. Australia presented its draft resolution, joined by a number of other States[17] as co-sponsor, and orally introduced a change in operative paragraph 5 where the words 'enter into force' should be replaced by the words '*become operative*'.[18] Several delegations expressed their support for the draft amendment,[19] which was finally adopted as orally amended without any objections. Although the drafters of Article 29 CAT eliminated the requirement of approval by the General Assembly, as contained in Article 51(2) CCPR, in fact the *General Assembly endorsed the Australian amendment by Resolution 47/111 of 16 December 1992*.

13 The endorsement of the General Assembly, which at the same time requested the Secretary-General to provide financing of the Committee out of the regular budget of the United Nations as a provisional measure beginning with the budget for the biennium 1994–1995,[20] turned out to be a prudent one since the *Australian amendment did not pass the third stage of the amendment procedure*. Although the amendment was adopted unanimously at the conference of States parties, only thirty-one States parties[21] have taken the necessary steps since 1992 to ensure acceptance in accordance with their respective constitutional processes. Since this number fails to pass the threshold put forward by Article 29(2), the amendment has not yet entered into force. Nevertheless, as a provisional measure authorized by the General Assembly, the Committee has been paid out of the regular UN budget.[22] While this provisional measure has, in practice, replaced the amendment procedure, the Chairpersons of the meetings of the States parties have repeatedly called for appropriate action to bring the amendment into effect.[23]

14 Should the Australian amendment finally be approved by two-thirds of the States parties and *enter into force*, it would, according to the clear wording of Article 29(3), only be *binding on those States parties which have accepted it*, 'other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted'. In other words, for the two-thirds of the States parties having accepted the Australian amendments, the financial obligations for the funding of the Committee's work would have been transferred to the general budget of the United Nations, whereas the remaining one-third of States parties would still be bound by the old provisions of

[17] Denmark, Egypt, Germany, Luxembourg, New Zealand, Portugal, and Spain.

[18] CAT/SP/SR.4, para, 29.

[19] Switzerland (CAT/SP/SR.4, para 32), United Kingdom (CAT/SP/SR.4, para 34), Canada (CAT/SP/SR.4, para 35).

[20] GA Res 47/111, paras 9(a), 10.

[21] As of December 2017: Australia (15 October 1993), Belgium (11 November 2016), Bulgaria (2 March 1995), Canada (8 February 1995), China (10 July 2002), Colombia (1 September 1999), Cyprus (22 February 1994), Denmark (3 September 1993), Ecuador (6 September 1995), Finland (5 February 1992), France (24 May 1994), Germany (8 October 1994), Iceland (23 October 1996), Liberia (16 September 2005), Liechtenstein (24 August 1994), Luxembourg (31 January 2005), Mexico (15 March 2002), Morocco (11 September 2012), Nauru (26 September 2012), Netherlands (24 January 1995), New Zealand (8 October 1993), Norway (6 October 1993), Philippines (27 November 1996), Poland (23 March 2009), Portugal (17 April 1998), Seychelles (23 July 1993), Spain (5 May 1999), Sweden (14 May 1993), Switzerland (10 December 1993), Ukraine (17 June 1994), United Kingdom (7 February 1994). See the UN Treaty Collection, 'Status of Treaties (Chapter IV 9a)' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-a&chapter=4&clang=_en> accessed 2 November 2017.

[22] Chris Ingelse, *United Nations Committee Against Torture: An Assessment* (Martinus Nijhoff 2001) 106; see also A/CONF.157/PC/62/Add.11/Rev, para 183.

[23] cf CAT/SP/SR.9, para 5; CAT/SP/SR.11, para 3; CAT/SP/SR.12, para 3; CAT/SP/SR.13, para 4.

Articles 17(7) and 18(5) and would thus have to pay their share for the expenses of the Committee, its staff and facilities, meetings of States parties, etc. Although this seems to represent a 'manifestly absurd or unreasonable result' within the meaning of Article 32(b) VCLT,[24] it might have the positive effect of prompting the other States parties to accept the Australian amendment quickly.

15 Article 29(3) CAT, as Article 51(3) CCPR and similar provisions in other human rights treaties, simply does not make sense for certain procedural amendments. It obviously was designed for substantive changes, including the drafting of additional rights, which in practice, are usually achieved by means of Additional or *Optional Protocols* rather than amendments.[25] Even the addition of new procedures is usually achieved by means of Optional Protocols.[26] But certain procedural amendments can only be achieved by changing the text of a treaty provision. When the States parties to the CRC decided in 1995 to increase the number of members of the Committee on the Rights of the Child from ten to eighteen, they simply applied the two-thirds rule of Article 50(2) CRC and ignored the provision of Article 50(3) CRC, which is identical to Article 51(3) CCPR and Article 29(3) CAT.[27] We propose that the States parties of CAT also follow this course of action if need be.

GIULIANA MONINA

[24] cf Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) (*CCPR Commentary*) 813ff.

[25] cf eg the second OP to the CCPR and the two OPs to the CRC.

[26] cf eg the first OP to the CCPR, the OP to CEDAW, the OP to the CAT, and OP to the CESCR and CRC.

[27] cf GA Res 50/155 of 21 December 1995 and CRC/SP/33 and 34. The amendment of Art 43(2) CRC entered into force on 18 November 2002. See also Nowak, *CCPR Commentary* (n 24) 814.

Article 30

Settlement of Disputes

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

1. Introduction	679
2. Travaux Préparatoires	680
2.1 Chronology of Draft Texts	680
2.2 Analysis of Working Group Discussions	682
3. Issues of Interpretation	684
3.1 Opting-out Procedure (Article 30(2) and (3))	684
3.2 The Meaning of 'any dispute'	685
3.3 Negotiations, Arbitration, and Jurisdiction of the ICJ (Article 30(1))	687
3.4 Relationship with the Inter-State Complaints Procedure	688

1. Introduction

1 Most contemporary human rights treaties, such as the ECHR, ACHR, ACHPR, and all nine core human rights treaties of the UN provide for the establishment of regional human rights courts or quasi-judicial expert bodies entrusted with the specific task of monitoring the compliance of States parties with their respective treaty obligations by means of special reporting, complaints, and inquiry procedures. The system of specific international human rights monitoring bodies and procedures has developed in response to the experience of the more traditional methods of international law used to solve disputes between States; methods which have proven not to be sufficient for the protection of human rights.

2 Nevertheless, so far neither the optional inter-State communication procedure nor the dispute settlement procedure has proven more successful. Though the dispute settlement procedure is applicable to more States parties than the inter-State communication procedure—out of 162 States parties only twenty-four States parties are currently making

use of their opting-out power under Article 30(2)—up until now Article 30 has been applied only once, in the case *Belgium v Senegal* before the ICJ. Reasons may be because States do not wish to accept any compulsory jurisdiction of the ICJ, wish to exclude a second additional dispute settlement mechanism, or simply because they are not interested enough to protect human beings in another country against violations by other governments. This shows that although States, by becoming parties to a human rights treaty, have a legal interest, and even a certain obligation, to ensure that all other States parties comply with their respective obligations and thereby respect, protect, and ensure the human rights of all individuals subject to their jurisdiction, in practice they usually only take action if their own nationals are threatened, or if specific political, economic, financial, or other tangible State interests are concerned.

3 Other monitoring procedures, such as individual complaints by the victims of human rights violations, *ex officio* inquiries by an independent monitoring body, or the examination of State reports seem, therefore, more appropriate for the protection of human rights than traditional inter-State procedures. The practice of the last few years indicates that States Parties prefer to use other *fora* to deal with divergent views on human rights, such as the Universal Periodic Review.[1]

4 Specific inter-State human rights complaints mechanisms usually exclude general dispute settlement mechanisms under international law. On the contrary, the CAT constitutes the first human rights treaty which simultaneously provides for an inter-State communication procedure (under Article 21) and for the traditional inter-State dispute settlement procedure before both an arbitration body, which is unrelated to the respective treaty monitoring body, and, finally, the ICJ (Article 30). This is clearly an anomaly which leads to difficult questions of interpretation regarding the relationship between both procedures.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

5 *IAPL Draft (15 January 1978)*[2]

Article XIV

(Settlement of disputes)

Any dispute by Contracting Parties arising out of the interpretation, application or implementation of this Convention which has not been settled by negotiation, arbitration or referral to an independent and impartial body shall, at the request of any party to the dispute, be brought before the International Court of Justice.

6 *Draft Implementation Provisions Submitted by the Chairman-Rapporteur (1 February 1982)*[3]

[1] William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 915.

[2] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

[3] Draft Implementation Provisions of the International Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Submitted by the Chairman-Rapporteur of the Working Group (1982) UN Doc E/CN.4/1982/WG.2/WP.6.

Article 20

1. The States Parties to the Convention shall seek a solution to any dispute that may arise between them concerning the interpretation or application of the Convention through the means indicated in article 33 of the Charter of the United Nations.

2. The existence of a dispute shall particularly be recognized when one State Party to the Convention has addressed to another State Party a written communication alleging that this other State Party to whom the communication has been addressed denies the allegation or fails to reply within 45 days.

3. If after the expiry of a period of 45 days after the existence of the dispute is recognized the States Parties concerned have not agreed on another method of settlement, any of them may set in motion the procedure of conciliation specified in the Annex to the present Convention, through a request made to the Secretary-General of the United Nations.

Annex

1. A list of conciliators consisting of persons of high moral character and recognized competence in the field of human rights shall be maintained by the Secretary-General of the United Nations. To this end, every State Party to the Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraphs.

2. When a request has been made to the Secretary-General in accordance with article 20, paragraph 3, of the Convention, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows.

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or one of those States, who may or may not be chosen from the list referred to in paragraph 1, and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties to the dispute shall be appointed within 45 days following the date on which the Secretary-General receives the request.

The four conciliators shall, within 45 days following the appointment of the last of them, appoint a fifth conciliator from the list, who shall be chairman of the Conciliation Commission.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointments, it shall be made by the Secretary-General within 45 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission shall hear the parties to the dispute and examine the claims and objections. It may make recommendations at any time and shall present a Final Report within 180 days after its constitution. The Report, and any recommendations made by the Commission, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for consideration to the parties.

5. The Secretary-General shall provide the Commission with such assistance and facilities as it may require for the performance of its function. The expenses of the Commission shall be borne by the United Nations.

7 *Proposal by the Netherlands Delegation at the 1983 Working Group*[4]

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

8 *Proposal by the French Delegation at the 1984 Working Group*[5]

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

2.2 Analysis of Working Group Discussions

9 From the very start of the negotiations, the IAPL draft of 1978[6] contained a provision concerning a *mandatory procedure for settlement of disputes* between States parties on questions of interpretation, application, or implementation of the Convention. On the other hand, the Swedish draft of 1978,[7] on which the Working Group based its discussions, left the final clauses to be elaborated at a later stage. In 1980, Sweden proposed a set of final provisions,[8] which, however, did not foresee a regulation of potential disputes between the States parties.

[4] Proposal for a Draft Article on the Settlement of Dispute Submitted by the Netherlands (1983) UN Doc E/CN.4/1983/WG.2/WP.10.

[5] Alternative Draft Article on the Settlement of Disputes Submitted by France (1984) UN Doc E/CN.4/1984/WG.2/WP.1.

[6] E/CN.4/NGO/213 (n 2).

[7] Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Submitted by Sweden (1978) UN Doc E/CN.4/1285.

[8] Questions of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Proposal for the Preamble and the Final Provisions of the Draft Convention Submitted by Sweden (1980) UN Doc E/CN.4/1427.

10 In 1982, during the course of the discussions on the complaints procedures, and particularly on the question of inter-State complaints, the *Brazilian* delegation noted that such complaints were actually allegations by one State that another State failed to fulfil its obligations under the Convention. It could therefore be considered that, in essence, complaints of this sort refer to a dispute between States over the interpretation or application of the Convention, and should thus be resolved by the procedures for peaceful settlement set forth by the Charter of the United Nations. Consequently, the delegation proposed to establish an obligation of the States parties to the Convention to accept a system of mandatory conciliation in case of a dispute, unless they agreed to another procedure.[9]

11 The *Chairman-Rapporteur* of the Working Group, *Herman Burgers*, was authorized to elaborate an alternative set of implementing provisions which he introduced to the Working Group on the first day of the session of the Commission on Human Rights.[10] Inspired by the proposals made by the Brazilian delegation, Article 20 of these implementing provisions foresaw a *mandatory conciliation procedure* which was based on the corresponding Article and Annex of the VCLT, instead of an inter-State complaints procedure. In this regard, the Chairman-Rapporteur also mentioned the *Convention on the Law of the Sea*.[11] The proposed provision was only supported by the *Brazilian* delegation. Other delegations held the opinion that the treaties referred to by the Chairman-Rapporteur could not be compared to the envisaged CAT as they dealt with different matters. Furthermore, it was noted that there was a difference between disputes with regard to the application of the Convention, such as questions of jurisdiction or extradition, and disputes over the occurrence of torture in a State party. The first category of disputes could be resolved by judicial or quasi-judicial procedures, whereas the second would be a natural subject of a complaints procedure. A number of delegations noted that their governments could only accept an optional conciliation procedure. Another proposal was made to insert a mandatory procedure for the judicial settlement of questions pertaining to interpretation or application by the ICJ, such as contained in Article 22 CERD and various other treaties.[12] The delegations decided that the *Swedish procedure on inter-State complaints*[13] was preferable over the proposal by the Chairman-Rapporteur and the question of dispute settlement regarding interpretation and application of the Convention in general was to be discussed at a later stage.

12 The issue of dispute settlement was taken up again by the Working Group in 1983, when the *Netherlands* delegation introduced a draft Article, which followed the example of Article 22 CERD and envisaged the compulsory referral to the ICJ 'unless the disputants agree to another mode of settlement'.[14] While some delegations supported the draft, the *French* delegation asked for the addition of a second paragraph to the draft Article which would provide for an *opting-out clause* for States parties concerning the referring of disputes to the *ICJ*. Again, the discussions on this issue were postponed.[15]

[9] Report of the Working Group of the Commission on Human Rights (1982) UN Doc E/CN.4/1982/L.40, para 81.

[10] E/CN.4/1982/WG.2/WP.6 (n 3).

[11] UN Convention on the Law of the Sea of 10 December 1982 1833 UNTS 3.

[12] E/CN.4/1982/L.40 (n 9) para 83.

[13] See above Art 21.

[14] E/CN.4/1983/WG.2/WP.10 (n 4); see also Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63, para 80.

[15] E/CN.4/1983/63 (14) para 80.

13 In the final Working Group of 1984, some delegations declared their support for the Netherlands' proposal of 1983, while others again expressed their objections to a compulsory jurisdiction of the ICJ.[16] An alternative draft article was introduced by the *French* delegation, and was modelled on the corresponding articles of the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and other UN treaties.[17] The Working Group adopted the French draft article in 1994 at its seventh meeting.[18]

3. Issues of Interpretation

3.1 Opting-out Procedure (Article 30(2) and (3))

14 Contrary to the inter-State communication procedure, which is subject to the State Party's optional declaration, Article 30 binds all States Parties unless they have opted-out through a *reservation* in conformity with Article 30(2). The possibility of opting out is modelled on the inquiry procedure as provided for in Article 28.[19] A reservation under Article 30(2) can only be made at the time of signature and ratification or accession, but not *succession*.

15 In accordance with Article 30(3), reservations may also be *withdrawn* at any time by notification to the Secretary General. Such a withdrawal is irreversible, unless the State concerned wishes to denounce the Convention in accordance with Article 31 and thereafter accede again with a respective reservation. Since the adoption of the Convention, a total of thirty-three States parties have made a reservation deciding not to recognize the dispute settlement procedure foreseen in this Article. Nine States parties, above all former Socialist States, later withdrew their reservations,[20] leaving the number of States parties that are presently to be considered as having opted out to twenty-four.[21]

16 Whereas most of the States parties mentioned above simply put forward a reservation declaring that they did not consider themselves bound by paragraph 1 of Article 30, the Government of *Cuba* stated that it was of the view that any dispute between States parties should be settled by negotiation through diplomatic channels.[22] *Ghana, Afghanistan*, and *Indonesia* declared that the submission of a dispute to arbitration or the ICJ shall only be possible with the consent of all the parties concerned.[23] The *United States* declared that it does not consider itself bound by Article 30(1), but that it reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.[24]

[16] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 61. See above § 7.

[17] ibid, para 62; see also above § 8.

[18] The new draft article was adopted as Art 29 and included in the 1984 report of the Working Group to the Commission on Human Rights: see ibid, para 63. The draft article was later renumbered and adopted as Art 30 CAT.

[19] See above Art 28, §§ 11–19.

[20] As of December 2017, the States parties that have withdrawn their reservations are Belarus, Bulgaria, Chile, Czechoslovakia (Czech Republic and Slovakia), German Democratic Republic, Guatemala, Hungary, Union of Soviet Socialist Republic, Ukraine Soviet Socialist Republic. See also Appendices A3, A4.

[21] As of December 2017, the opting-out States parties were Afghanistan, Bahrain, China, Cuba, Equatorial Guinea, Eritrea, Fiji, France, Indonesia, Israel, Kuwait, Lao's People's Democratic Republic, Mauritania, Monaco, Morocco, Pakistan, Panama, Poland, Saudi Arabia, Thailand, Turkey, United Arab Emirates, United States of America, and Viet Nam. See also Appendices A3, A4.

[22] See Appendix A4. [23] See Appendix A4. [24] See Appendix A4.

17 Similarly to Article 21, the procedure is based on *reciprocity*. If one party to a dispute has opted out of the dispute settlement procedure by making a reservation, no other State party is authorized to invoke the procedure against it. In turn, according to Article 30(2), the other States Parties shall not be bound by Article 30(1) with respect to any State Party having made such a reservation. This means that a State party that has opted out of the procedure cannot request the referral of a dispute to arbitration or the ICJ, even when the other party to the dispute has accepted the dispute settlement procedure. Essentially, in order to make use of the procedure under Article 30 both parties to a dispute need to have accepted it.

18 In practice, so far disagreement over the interpretation or application of the Convention has reached a level where negotiations, arbitration or judicial settlement were deemed necessary only once. In the case *Belgium v Senegal*, Belgium invoked the ICJ jurisdiction to complain about the non-compliance by Senegal with the Convention's obligations on the basis of the dispute settlement procedure under Article 30 to which both States were bound. As explained below, the ICJ adopted a landmark judgment in 2012.[25] Other controversial issues were raised by States Parties through objections to reservations and declarations,[26] such as the declaration made by the *German Democratic Republic* that the only Committee expenses it would cover would be its share of those arising from activities recognized by the German Democratic Republic to be under the Committee's competence, were met by a number of objections from other States parties. Another example of a reservation that met with a number of objections was the declaration made by *Qatar* which attempted to outlaw all interpretations of provisions in the Convention which conflicted with the precepts of *Islamic law* and religion. Although these reservation also triggered a number of objections, none of the States parties felt that it should be subject to a settlement procedure.

3.2 The Meaning of 'any dispute'

19 States parties may not agree on what constitutes a dispute within the meaning of Article 30. The first step in the resolution of the dispute is to establish if a dispute exists in the circumstances of the case.[27]

20 As of today, the Committee has never had the opportunity to clarify the concept of 'dispute' under Article 30. It is thus necessary to look at ICJ jurisprudence for guidance on such concept. According to the ICJ there exists a dispute when it can be shown that 'the claim of one party is positively opposed by the other'.[28] In order to do so, the ICJ conducts an 'objective determination'[29] examining the facts of the case.[30] Moreover, in

[25] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* Judgment, ICJ Reports 2012 422, in which case Belgium invoked the violation of Articles 5, 6, and 7 of the Convention. See also above Art 7, §§ 51–79.

[26] For a full list of reservations and objections see Appendices A3, A4 below.

[27] eg ICJ Reports 2012 422 (n 25) para 51 and in the same judgment the Dissenting Opinion of Judge Ad Hoc Sur, paras 7–13, 51–57.

[28] ICJ Reports 2012 422 (n 25) para 46; see also *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962 328.

[29] ICJ Reports 2012 422 (n 25) para 46; see also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950 74.

[30] ICJ Reports 2012 422 (n 25) para 46; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011 70, para 30.

order for the ICJ to have jurisdiction, the dispute must exist at the time of the submission of the application before the ICJ.[31]

21 The term dispute was also assessed in the case of *Belgium v Senegal*, concerning Senegal's compliance with the CAT's obligations to establish jurisdiction over the crimes of Mr Habré, former President of the Republic of Chad, for the systematic acts of torture which were committed during his regime from 1982 to 1990, and to prosecute or extradite him for the purposes of criminal proceedings (Articles 5, 6, and 7).[32] While the ICJ found no jurisdiction in regard to Article 5 CAT because the dispute had ceased to exist by the time Belgium lodged the application in 2009 as Senegal had by then already adopted a series of legislative measures to establish jurisdiction under Article 5 CAT,[33] it affirmed its jurisdiction for the claims relating to Articles 6(2) and 7(1). To this extent, the ICJ held that the controversy between Belgium and Senegal amounted to a dispute concerning the 'interpretation and application' of the Convention.[34] The ICJ rejected Senegal's argument that Belgium was not entitled to invoke its international responsibility because none of the alleged victims of the acts said to be attributable to Mr Habré was of Belgian nationality at the time when the acts were committed. It found Belgium's claim admissible arguing that being a Party to the CAT Convention was sufficient to have standing before the ICJ.[35] On this point, the legal reasoning of the Court relies in particular on the object and purpose of the Convention which is 'to make more effective the struggle against torture … throughout the world' and on the existence of a 'common interest' of all States Parties in ensuring the prevention of acts of torture and the fight against impunity. Departing from those considerations, the ICJ concluded that the 'common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention', thus amounting to 'obligations *erga omnes partes*'.[36]

22 The ICJ has drawn a parallel to the Convention on the Prevention and Punishment of the Crime of Genocide and clarified that each State party has standing to enforce the Convention provisions regardless the existence of a specific link to the alleged victim nor a special interest.[37]

[31] ICJ Reports 2011 70 (n 30) para 30.

[32] ICJ Reports 2012 422 (n 25) para 48.

[33] ICJ Reports 2012 422 (n 25) para 48; see also above Art 7 § 109ff.

[34] ibid, para 55; see also Senegal's position on admissibility at para 64.

[35] ibid, para 67, this is only one of the legal bases invoked by Belgium to support its claim, the other—principal argument—being its passive criminal jurisdiction. This second argument was not considered by the ICJ.

[36] ibid, para 68.

[37] ibid. The ICJ decision was criticized by Judge Sur and Judge Skotnikov, who questioned the ICJ assumption on the existence of *erga omnes partes* Convention obligations and the fact that this would equate to a procedural right of each State party to invoke the responsibility of another for any alleged breaches of such obligations. In particular, they regretted that in its legal reasoning the ICJ did not take in due consideration that the procedure under Article 30 is optional and that States may opt-out to the CAT Committee's jurisdiction under Article 30 as well as withdraw unilaterally their consent/dissent at any time (see Separate Opinion of Judge Skotnikov paras 11–22; Dissenting Opinion of Judge Ad Hoc Sur paras 30–41). In addition, Judge Skotnikov noted 'that the ICJ judgment is neither in line with other international treaties such as for example the ECHR, under which the entitlement to invoke the responsibility by any State Party is explicitly regulated under Article 33 and not implicitly derived by the notion of common interest, nor with the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 (Article 48)' (paras 17, 21). Finally, Judge Sur pointed out that the Court's conclusions were not supported by the practice of the States Parties, who in thirty years of application of the Convention have never made use of the inter-State communication or the settlement dispute mechanism (para 41).

3.3 Negotiations, Arbitration, and Jurisdiction of the ICJ (Article 30(1))

23 Once the existence of a dispute has been established, Article 30 sets two additional conditions that need to be met before a State Party may bring the dispute before the ICJ. These conditions are that the dispute cannot be settled through negotiation; and that the parties are 'unable to agree' on the organization of the arbitration within six months from the submitting of a request for arbitration by one of the parties.

24 According to the ICJ, in order to prove that a dispute 'cannot be settled through negotiation' there must be 'at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute'.[38] This implies that a theoretical impossibility would not suffice[39] and that, in practice, the condition is met only when 'there has been a failure of negotiations or when negotiations have become futile or deadlocked'.[40] With regard to the second condition, the ICJ held that

> the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept.[41]

In the *Belgium v Senegal* case, the ICJ went on and concluded that the fact that Belgium did not make a detailed proposal for determining the issues to be submitted to arbitration and its organization—but submitted a general request to refer the matter to arbitration—did not mean that this condition was not fulfilled.[42]

25 Although the draft of the Chairman-Rapporteur of 1982 contained a detailed proposal for an *arbitration or conciliation mechanism*,[43] Article 30(1) does not contain any provisions for its composition or procedure.[44] Moreover, in contrast to Article 21, Article 30 solely establishes that it is up to the States involved in a dispute to 'agree on the organization of the arbitration'. According to this provision, the Committee against Torture has no role to play. This is surprising, as the Committee is considered to be the guardian of States parties' compliance with the Convention.

26 As was seen above, one option could be that the ad hoc *Conciliation Commission* envisaged in Article 21(1)(e) may serve as an arbitration mechanism under Article 30(1). This interpretation could provide a way to involve the Committee in the dispute settlement procedure under Article 30. However, it still remains that the Committee can only be involved upon explicit agreement of the States parties concerned. Yet, the ICJ did not give any consideration to Article 21(1)(e) CAT when assessing admissibility of Belgium's claim in the Habré case.[45]

27 Finally, despite the criticism of some States parties,[46] pursuant to Article 30(1) a request to arbitration or to the ICJ can be submitted by one of the States parties only.

[38] ICJ Reports 2012 422 (n 25) para 57; see also ICJ Reports 2011 70 (n 30) para 157.
[39] ICJ Reports 2012 422 (n 25) para 57; see also ICJ Reports 1962 328 (n 28).
[40] ICJ Reports 2012 422 (n 25) para 57; see also ICJ Reports 2011 70 (n 30) para 159.
[41] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006 41, para 92.
[42] ICJ Reports 2012 422 (n 25) para 61; see also Dissenting Opinion of Judge Sur, para 14.
[43] E/CN.4/1982/WG.2/WP.6 (n 3); see above § 6. [44] cf above Art 21, § 29–31.
[45] ICJ Reports 2012 422 (n 25).
[46] Ghana, Afghanistan, and Indonesia, which opted out by the procedure declared that the submission of a dispute to arbitration or the ICJ shall only be possible with the consent of all the parties concerned. See Appendix A4.

3.4 Relationship with the Inter-State Complaints Procedure

28 As mentioned in the introduction, the existence of specific inter-State human rights complaints mechanisms usually excludes general dispute settlement mechanisms under international law. The CAT constitutes the first human rights treaty, which simultaneously provides for an inter-State communication procedure (under Article 21) and for the traditional inter-State dispute settlement procedure before an arbitration body unrelated to the respective treaty monitoring body, and finally, the ICJ.

29 The drafting history of the Convention shows that the issue had been discussed during the Working Group sessions, where some delegations expressed the opinion that an inter-State communications procedure was preferable to the classical dispute settlement procedure under international law. Some delegations also pointed out that there was a difference between disputes regarding the application of the Convention, such as disputes related to jurisdiction and extradition, and disputes concerning the occurrence of torture. In the latter case especially, it seemed important that the matter would not exclusively be dealt with between the States parties but that the 'implementation organ' of the Convention would be involved in the matter.[47] In the end, however, both procedures were simultaneously adopted in Articles 21 and 30 without any reference to their interplay.

30 A different approach is taken by most *other UN human rights treaties*.[48] While some of them provide only for the inter-State communication procedure (CCPR, CESCR-OP) or the dispute settlement mechanism (CEDAW), others include both of them (CERD, CMW, and CED). Yet, unlike the CAT, the CERD, CMW, and CED expressly contain a clause regulating the relationship between the two procedures. For example, under Article 22 CERD, disputes between two or more States parties regarding the interpretation or application of CERD shall be referred to the ICJ only if they are not settled by negotiation 'or by the procedures expressly provided for in this Convention'. This explicit reference relates, above all, to the mandatory inter-State communication procedure regulated in Articles 11 to 13. Similar clauses are expressly included in the CMW, and CED.

31 The *CCPR*, though regulating only the inter-State communication procedure, nevertheless stipulates that the provisions for the implementation of the Covenant 'shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them'. Thus, States parties to the CCPR, which have accepted the compulsory jurisdiction of the ICJ under Article 36(2) of its Statute, may also bring a dispute concerning the interpretation or application of the Covenant before the ICJ. But Article 44 ICCPR does not by itself establish any jurisdiction of the ICJ. In contrast, some UN human rights treaties (*CEDAW, CMW*, and *CED*) expressly grant the ICJ jurisdiction in accordance with Article 36(1) of its Statute.[49]

32 *Regional mechanisms* may be more restrictive when it comes to dispute settlement before other international settings. For example, *Article 55 ECHR* clearly prevents States parties from 'avail[ing] themselves of treaties, conventions or declarations in force

[47] E/CN.4/1982/L.40 (n 9) paras 82–83.

[48] Article 22 CERD also gives the States Parties the possibility not to refer the dispute to the ICJ for decision, and agree to another mode of settlement.

[49] See Art 29 CEDAW, Art 92 CMW, and Art 42 CED. On the jurisdiction of the ICJ by consent ante hoc see Ian Brownlie, *Principles of Public International Law* (5th edn, Clarendon Press 1998) 683.

between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention'.

33 The main question of interpretation with regard to the CAT Convention, therefore, concerns the *relationship between the inter-State communication procedure under Article 21 and the dispute settlement under Article 30*. In the case of the CAT, the drafters seem to have overlooked the problems that could arise from the simultaneous existence of the two procedures, and unlike in other treaties, did not explicitly regulate their relationship. The only provision on this is contained in Rule 92 which simply requires the State party lodging a complaint under Article 21 to inform the Committee on 'any other procedure of international investigation or settlement resorted to by the States parties concerned'.[50] Yet, it is not clear why such information has to be provided, as the Convention does not expressly regulate the relationship between the two instruments. This is clearly an anomaly which leads to difficult questions of interpretation regarding the relationship between the different procedures.

34 In this regard, three main questions arise: (a) Do the two procedures have the same subject-matter? (b) Can the latter only be invoked after the former has failed? (c) If not, can States parties choose which one they resort to first? Or can they even at the same time submit an inter-State communication to the Committee against Torture and refer the same dispute to the ICJ? Such questions will be relevant only for those States parties that are bound by both procedures. With reference to the first question, it shall be noted that Articles 21 and 30 do not have the same wording. While under Article 21(1) a State party may claim that 'another State Party is not fulfilling its obligations under this Convention', Article 30(1) refers to a 'dispute between two or more States Parties concerning the interpretation or application of this Convention'. The question therefore arises whether it can be considered as a dispute between States when a State claims that another State is systematically practising torture? With regard to the second and third questions, one should first remember that Article 21 does not contain any provision similar to Article 22(5)(a), which would authorize the Committee to declare an inter-State communication inadmissible if the same matter has been, or is being, examined under another procedure of international investigation or settlement. Similarly, Article 30 does not contain any clause whatsoever on the relationship with Article 21. The absence of such clauses seems to support the view that a State could bring the same dispute first before the ICJ, and then to the Committee, even while it is still pending before the ICJ. Nevertheless, the relationship between Articles 21 and 30 CAT shall be interpreted in a reasonable manner, taking into account the possibility that the drafters of both provisions may have overlooked the problems arising from a simultaneous application of both provisions.

35 One solution could be to adopt the model taken by the CERD (and the CED). The model for such interpretation can be found in the explicit reference in Article 22 CERD to 'procedures expressly provided for in this Convention', which was unfortunately omitted during the drafting of Article 30 CAT.[51] Thus, States parties claiming that another State party is not fulfilling its (substantive or procedural) obligations under the Convention, shall first submit an inter-State communication to the Committee against

[50] Rule 92(2) (c).

[51] The 1983 Dutch proposal, which was supposedly based on art 22 CERD, had already omitted this reference: see E/CN.4/1983/WG.2/WP.10 (n 4) and above § 7.

Torture in accordance with the procedure envisaged in Article 21. If the mediation efforts of the Committee and/or the ad hoc conciliation commission fail, this definitely constitutes a dispute which may then be settled by the *ICJ* in accordance with Article 30.

36 As mentioned before, the procedure under Article 21, in particular the mediation efforts of the ad hoc Conciliation Commission, may even be interpreted as constituting one of the arbitration mechanisms envisaged in Article 30(1). If the preliminary procedure provided for in Article 21(1)(a) fails and the parties cannot agree, within six months, on the establishment of an ad hoc conciliation commission in accordance with Article 21(1)(e), this might be interpreted as the States concerned being 'unable to agree on the organization of the arbitration' pursuant to Article 30(1), which means that the applicant States may refer the dispute directly to the *ICJ*. The respective jurisdiction of the ICJ derives from Article 36(1) of its Statute which refers to 'all matters specially provided for … in treaties and conventions in force'. Yet, again, in the *Belgium v Senegal* case, the ICJ did not give any consideration as to whether the parties had first resorted to the CAT Committee and the Conciliation Commission under Article 21 when assessing the admissibility of Belgium's claim.[52]

GIULIANA MONINA

[52] ICJ Reports 2012 422 (n 25).

Article 31

Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

1. Introduction	691
2. Travaux Préparatoires	692
2.1 Chronology of Draft Texts	692
2.2 Analysis of Working Group Discussions	692
3. Issues of Interpretation	693

1. Introduction

1 According to Article 56 VCLT, States parties may denounce a treaty if explicitly provided for in the respective treaty; if the parties permit denunciation despite the absence of a corresponding provision;[1] or if a right to denunciation can be derived from the nature of the treaty.

2 Some human rights treaties, such as the two International Covenants, the second OP to the CCPR, CEDAW, and the CED, do not contain a denunciation clause.[2] In a *General Comment on issues relating to the continuity of obligations* to the CCPR, the *Human Rights Committee* in 1997 expressed the legal opinion that at least the two Covenants, which are part of the 'International Bill of Rights', do 'not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted'.[3] In principle, this argument could also be applied to other human rights treaties.

[1] Such intention of the parties may be inferred from the terms or the subject matter of the treaty but, according to the VCLT, the assumption is that the treaty is not subject to denunciation or withdrawal: see Ian Brownlie, *Principles of Public International Law* (5th edn, Clarendon Press 1998) 592.

[2] cf Art 58 ECHR, Art 78 ACHR, Art 21 CERD, Art 52 CRC, Art 89 CMW, Art 48 CRPD, Art 12 of the first OP to the CCPR.

[3] HRC, 'General Comment on Issues relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights' (1997) UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1; see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) (*CCPR Commentary*) XXXVII and 1133ff. See also above Art 26, 3.2.

3 However, many important regional and international human rights treaties do contain an explicit *denunciation clause*, similar to Article 31 CAT. In practice, no States party has thus far declared that it wishes to denounce the CAT.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *Revised Set of Final Clauses, Submitted by the Chairman-Rapporteur (January 1983)*[4]

> Article 29
>
> A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2.2 Analysis of Working Group Discussions

5 The original set of final clauses submitted to the Working Group by Sweden in 1980 did not contain a clause on denunciation. During the discussions of these final provisions in 1983, the delegations noted that they wished to include an article providing for the possibility of denunciations.[5] Thus, the Chairman-Rapporteur introduced a revised set of final clauses which also contained a provision on denunciations, named draft Article 29.[6]

6 Due to the insertion of a provision on dispute settlement, draft Article 29 was renumbered draft Article 30 during the sessions of the Working Group in 1984. In addition, the *United States* proposed a second paragraph to the Article, which was meant to ensure the continued observance of its obligations by a State party denouncing the Convention prior to the date at which the denunciation becomes effective. Furthermore, the Committee should have the possibility to conclude any consideration which it has commenced before this date.[7] Most delegations felt that this additional paragraph would strengthen the protection against torture and therefore favoured its inclusion. An even stricter regime, ie that the denunciation should become effective three years instead of one year after the notification by the Secretary-General, was proposed by one delegation but did not find support. Other delegations expressed their concerns that the additional paragraph proposed by the United States would complicate the procedure and wished to keep the original draft.[8]

7 Furthermore, some representatives asked for safeguards for States parties against the risk of investigations by the Committee of matters arising after the denunciation has become effective. After informal consultations, the *United States* proposed yet another paragraph to draft Article 30, which ruled out the possibility for the Committee

[4] Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (1993) UN Doc E/CN.4/1983/WG.2/WP.15.

[5] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63, para 72.

[6] E/CN.4/1983/WG.2/WP.15 (n 4); see above § 3.

[7] Proposal for a New Draft Article 30(2) Submitted by the United States (1984) UN Doc E/CN.4/1984/WG.2/WP.2.

[8] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72 para 66.

to commence a new investigation of any matter after the denunciation of a State party had taken effect.[9] With these clarifications the Working Group reached agreement on draft Article 30, which it adopted with the additional paragraphs at its eighth meeting in February 1984.[10]

3. Issues of Interpretation

8 Article 31(1) is taken almost literally from Article 21 CERD. Contrary to Article 58(1) ECHR and Article 78(1) ACHR, which stipulate that States parties may denounce the respective treaties only after the expiry of five years from the date on which they became parties, Article 21 CERD and Article 31 CAT do not contain any *time limit*. Consequently, States parties may denounce these treaties even immediately after having deposited the respective instruments of ratification or accession. Pursuant to Article 32(c), the Secretary-General, as depositary of UN treaties, shall inform all UN member States of any denunciations. Denunciations become effective one year after the date of receipt of the notification by the Secretary-General.

9 The first sentence of Article 31(2) has no equivalent in Article 21 CERD. It was, rather, added on the proposal of the *United States* with the aim of ensuring the *continued observance of its obligations* by a State party denouncing the Convention for the *one-year period* until the denunciation becomes effective under Article 31(1).[11] Corresponding provisions can be found in Article 58(2) ECHR and Article 78(2) ACHR. Although this seems self-evident, these provisions emphasize, beyond any doubt, that all substantive and procedural State obligations apply fully until the date when the denunciation becomes effective. Consequently, any State party denouncing the Convention remains under an obligation during this one-year period to prevent torture and ill-treatment; to provide victims of torture with adequate reparation; to bring perpetrators of torture to justice; and to submit overdue reports under Article 19.

10 The interpretation of the second sentence of Article 31(2), which was also added by the US amendment and which roughly corresponds to Article 12(2) of the first OP to the CCPR, proves more difficult. During the drafting in the Working Group, some delegations expressed concern that this provision would complicate the procedure and entail the risk of investigations by the Committee after a denunciation becomes effective. Consequently, the United States proposed an additional provision in Article 31(3), which prevents the Committee from commencing consideration of any new matter after the one-year period.

11 Nevertheless, this additional provision does not solve most of the questions of interpretation. The combined reading of both sentences leads to the result that the *Committee is free to start monitoring proceedings during this one-year period* and to continue them thereafter until they are completed. However, it is not usually easy to decide when such proceedings must be considered complete. If an inter-State communication or an *individual complaint* is submitted during this period in accordance with Articles 21 or 22, the Committee can, of course, continue the consideration of the case until a final decision on inadmissibility or on the merits is reached.[12] What, however, is the situation regarding the *follow-up procedure* as stipulated in Rule 120 of its RoP?[13] The actions taken

[9] ibid, para 67. [10] ibid, para 68. [11] See above § 5.

[12] See also the jurisprudence of the HRC in relation to Art 12 of the first OP to the CCPR in Nowak, *CCPR Commentary* (n 3) 906 ff.

[13] cf above Art 22, 3.12

by the Rapporteur on follow-up must be considered as part of the 'continued consideration of any matter' arising from a decision on the merits. On the other hand, it cannot simply be at the discretion of the Rapporteur to decide when the procedure shall be terminated. Similarly, the Committee is prevented by Article 31(3) from adding new issues to a pending individual complaints procedure after the denunciation became effective.[14]

12 Similarly, the Committee may schedule during this one-year period a meeting with the State party concerned for the examination of a *State report* under Article 19. If the Committee, in its conclusions and recommendations, arrives at the conclusion that some of the obligations of that State party have not been discharged, it may appoint, pursuant to Rule 72 of its RoP, one or more *Rapporteurs to follow up* on the State party's compliance with the Committee's conclusions and recommendations.[15] Again, this may be considered part of the State reporting procedure which may be continued after the one-year period. If the Government does not send a representative to a meeting scheduled for the consideration of its report, the Committee may also continue the consideration of this report by scheduling a meeting after the denunciation became effective.

13 Finally, the Committee may take the notification of a denunciation as an opportunity to initiate an *ex officio inquiry procedure* under Article 20, provided that it has received reliable information indicating a systematic practice of torture in the State party concerned. As the experience with past inquiries shows,[16] such procedures can take several years and may lead to findings which are in need of a follow-up procedure as well.

14 These examples illustrate that the fears expressed by some delegations during the drafting of Article 31 were indeed justified. Any reasonable interpretation of paragraphs 2 and 3 must strike a *fair balance* between the legitimate concern of the Committee not to be prevented from finalizing pending procedures and the legitimate concern of the respective State party that this one-year period will not be misused by the Committee arbitrarily to initiate, continue, and perhaps delay certain proceedings as a reaction to its notification of denunciation.

GIULIANA MONINA

[14] See eg HRC in *Damian Thomas v Jamaica*, No 800/1998, UN Doc CCPR/C/65/D/800/1998, 26 May 1999, para 6.3.

[15] cf above, Art 19, §§ 79–80.

[16] cf above, Art 20, §§ 37–38.

Article 32

Notification by the Secretary-General

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications, and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

1. Introduction	695
2. Travaux Préparatoires	695
2.1 Chronology of Draft Texts	695
2.2 Analysis of Working Group Discussions	696
3. Issues of Interpretation	696

1. Introduction

1 Article 32 is based on similar provisions in UN treaties, such as Article 24 CERD and Article 52 CCPR. It reflects the function of the *Secretary-General as depositary of UN treaties*. Since States parties have the obligation to deposit all instruments of ratification or accession or notifications of denunciations with the UN Secretary-General, he or she has equivalent duties of informing States accordingly.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *IAPL Draft (15 January 1978)*[1]

Article XXI

(Notification)

The Secretary-General of the United Nations shall inform all States of the following particulars:

(1) Signatures, ratifications, accessions and reservations under Articles XV–XVIII of this Convention;

(2) The date of entry into force of the present Convention;

(3) Notification under Article XX of the present Convention.

[1] Draft Convention for the Prevention and Suppression of Torture Submitted by the International Association of Penal Law (1978) UN Doc E/CN.4/NGO/213.

3 *Proposals for the Preamble and the Final Provisions of the Draft Convention, Submitted by Sweden (2 December 1980)*[2]

Article E

The Secretary-General of the United Nations shall inform all States of the following particulars:

(a) Signatures, ratifications and accessions under articles A and B;

(b) The date of entry into force of the present Convention under article C;

(c) Notifications under article D [revision].

2.2 Analysis of Working Group Discussions

4 The Government of Sweden submitted a set of final clauses in 1980,[3] which were then discussed by the Working Group in 1983. Since the Working Group had taken into consideration proposals for the inclusion of an Article regulating denunciations of the Convention as well as a procedure for revision or amendments to the Convention, the delegations noted that the provision should also refer to notification of such denunciation, revision, or amendment.[4] Taking into account these comments, the Chairman-Rapporteur introduced a revised provision to the Working Group,[5] which was included as draft Article 30 to the report of the Working Group.

5 In 1984, after the Working Group had agreed to insert an Article on dispute settlement into the final clauses,[6] draft Article 30 was renamed draft Article 31 and adopted by the Working Group. At the same time, the reference to Article 29 in subparagraph (c) regarding notification of a denunciation was replaced by a reference to Article 30.

3. Issues of Interpretation

6 According to Article 32 CAT, the Secretary-General has a duty to inform all member States of the United Nations and all States which have signed or acceded to the Convention. Since the Convention, pursuant to Articles 25 and 26, is open to signature and accession by all States,[7] non-member States of the United Nations may also sign, ratify, or accede to the Convention, and have the right to be informed accordingly. However, the Secretary-General has no obligation to inform all States; only all UN member States and those non-member States which have signed or acceded to the Convention. In the case of the dismemberment of a State party which is not a UN member State, the Secretary-General shall also inform the respective States that became party by a notification of succession.[8] So far, only UN member States (with the exception of *Switzerland* at the time of signature

[2] Proposal for the Preamble and the Final Provisions of the Draft Convention Submitted by Sweden (1980) UN Doc E/CN.4/1427.

[3] ibid.

[4] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63, para 76.

[5] Revised Set of Final Clauses Submitted by the Chairman-Rapporteur (1993) UN Doc E/CN.4/1983/WG.2/WP.15.

[6] Report of the Working Group of the Commission on Human Rights (1984) UN Doc E/CN.4/1984/72, para 63.

[7] See above Arts 25 and 26.

[8] On the question of succession, see above Art 26, 3.2.

and notification) have signed, ratified, succeeded, or acceded to the Convention, which means that the Secretary-General shall simply inform all UN member States.

7 Article 32 CAT requires the Secretary-General to inform the respective States of all signatures, ratifications, accessions, and denunciations, as well as of the dates of entry into force of the Convention and any amendments thereto. Considering that the only amendment adopted so far by States parties under Article 29 has not yet entered into force,[9] no information requirement has arisen under this provision. Although neither Article 26 nor Article 32(a) explicitly refers to succession, UN member States shall also be informed of any notifications of succession.

8 In practice, the *Office of Legal Affairs* (OLA) treaty section in New York maintains a website[10] with all signatures, ratifications, accessions, denunciations, and dates of entry into force of the Convention or any amendments to the Convention. A reference to the website is included in the Committee's annual report as well as in the depository notifications by the treaty section of the Office of the Legal Affairs sent to the member States via email.

9 Some comparable provisions in other UN human rights treaties also require the Secretary-General to inform States of optional declarations recognizing the competence of the respective treaty bodies to receive and consider inter-State or individual communications, reservations, and requests by States parties for an amendment of the respective treaties.[11] Since the Secretary-General functions as the depositary of UN treaties,[12] it would have been useful to require him or her also to inform all States of all optional declarations under Articles 21(1) and 22(1) CAT; all reservations to the Convention; and, above all, the explicit opting-out reservations and notifications of withdrawals of such reservations in accordance with Articles 28 and 30 CAT, as well as of all proposals for an amendment of the Convention in accordance with Article 29(1) CAT. In practice, the Secretary-General, however, does inform all States of the notifications of States parties by making use of the website.[13]

GIULIANA MONINA

[9] See above Art 29, 3.

[10] UN, 'Office of Legal Affairs' <http://untreaty.un.org/ola> accessed 2 November 2017 and UN, 'Treaty Collection' <https://treaties.un.org/> accessed 2 November 2017.

[11] cf eg Art 24(c) CERD; Art 8(5) of the first OP to the CCPR; Art 10(a) and (b) of the second OP to the CCPR; Art 28(1) CEDAW; Art 51(1) CRC; Art 91(1) CMW.

[12] cf also below Art 33, § 4. Some treaties contain explicit provisions designating the Secretary-General as the depositary of the respective treaties see eg Art 53 CRC; Art 85 CMW.

[13] See above § 8.

Article 33

Authentic Texts

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

1. Introduction	698
2. Travaux Préparatoires	698
2.1 Chronology of Draft Texts	698
2.2 Analysis of Working Group Discussions	699
3. Issues of Interpretation	699

1. Introduction

1 Article 33 CAT represents the customary final clause of treaties concluded under the auspices of the United Nations.[1] In conformity with the procedure common for UN treaties, it states that the text is equally authentic in all UN languages officially recognized at the date the treaty was adopted. This means that the six designated languages, which are also today recognized as the official UN languages,[2] are equally controlling for the interpretation of the text, whereby it can be assumed that the terms in the Convention have the same meaning in each authentic text.[3] Should a comparison of the authentic texts discover a difference in meaning, the true meaning is to be ascertained by applying the rules of interpretation set down in Articles 31, 32, and 33(4) VCLT.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Proposals for the Preamble and the Final Provisions of the Draft Convention, Submitted by Sweden (2 December 1980)*[4]

[1] cf eg Art 25 CERD; Art 53 CCPR; Art 14 of the first OP to the CCPR; Art 11 of the second OP to the CCPR; Art 31 CESCR; Art 30 CEDAW; Art 54 CRC; Art 93 CMW; Art 45 CED; Art 37 OPCAT.

[2] In addition to Chinese, English, French, Russian, and Spanish, Arabic was first recognized by GA Res 3190 (XXVIII) on 18 December 1973 as the sixth official UN language.

[3] cf Art 33 VCLT.

[4] Proposal for the Preamble and the Final Provisions of the Draft Convention (1980) UN Doc E/CN.4/1427.

Article F

1. The present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

2.2 Analysis of Working Group Discussions

3 In the discussion of the final clauses by the Working Group in 1983, Article F of the Swedish proposal of 1980 did not give rise to any comments[5] and was thus adopted without changes by the Working Group in 1984.

3. Issues of Interpretation

4 In conformity with Article 102(1) UN Charter and Article 80 VCLT, Article 33 CAT in fact designates the UN *Secretary-General as depositary of the Convention*.[6] Certified copies of the Convention in all UN languages shall be deposited in the archives of the United Nations. In addition to the information duties of the Secretary-General in relation to all UN member States, and all non-member States which have signed or acceded to the Convention, as stipulated in Article 32, Article 33(2) CAT also requires him or her to transmit certified copies of the Convention to all States. This particular information duty is not contained in certain other UN human rights treaties.[7] Such certified copies shall be transmitted in all official UN languages. In practice, the Secretary-General does not send hard copies of treaties to member States. All treaties are available in all languages on the UN Treaty Collection website.[8] However, the treaty section of the OLA sends depositary notifications to the UN member States via email.

GIULIANA MONINA

[5] Report of the Working Group of the Commission on Human Rights (1983) UN Doc E/CN.4/1983/63, para 77.

[6] cf Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 817. Some UN human rights treaties confirm this by an explicit provision to this effect: cf eg Art 53 CRC; Art 85 CMW.

[7] cf eg Art 30 CEDAW; Art 54 CRC; Art 50 CRPD.

[8] See <https://treaties.un.org/> accessed 7 December 2017.

OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Preamble

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows:

1. Introduction	703
2. Travaux Préparatoires	704
2.1 Chronology of Draft Texts	704
2.2 Analysis of Working Group Discussions	706
3. Issues of Interpretation	710

1. Introduction

1 According to Article 31(1) VCLT, an international treaty is not to be interpreted in isolation but rather in its context. A treaty's context comprises, in addition to the text and annexes, its preamble.[1] This legal significance attributed to the preamble has been generally recognized under international law.[2] The preamble to the OP is more comprehensive

[1] Vienna Convention on the Law of Treaties (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art 31(2).

[2] See eg Ian Brownlie, *Principles of Public International Law* (Oxford University Press 1999) 602.

than the preamble to the CAT and its drafting gave rise to lengthy discussions about controversial issues.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Original Costa Rica Draft (6 March 1980)*[3]

Preamble

The States Parties to the present Protocol,

Considering that in order further to achieve the purpose of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and the implementation of its provisions, it would be appropriate to establish an independent International Committee authorised to arrange visits to places of detention of all kinds under the jurisdiction of the States Parties to the present Protocol and to report thereon with recommendations to the governments concerned,

Have agreed **as follows:**

3 *Revised Costa Rica Draft (15 January 1991)*[4]

The States Parties to the present Protocol,

Considering **that in order to further achieve the purpose of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) it is appropriate to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment, by resorting to non-judicial means of a preventive character based on visits,**

Have agreed **as follows:**

4 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[5]

The States Parties to the present Protocol,

Considering that in order to further achieve the purpose of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) it is appropriate to strengthen the protection of [persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment] [the detained persons],

Considering that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visit,

Bearing in mind also the principles of cooperation and confidentiality as basic principles of the present Protocol,

[3] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica [1980] UN Doc E/CN.4/1409.

[4] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[5] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II.

[Affirming that non-judicial, non-selective, non-duplicative and technical consultative visits can lead to the realization of the provisions of the present Protocol, and complement the functions of the Convention against Torture and other human rights mechanisms related to torture,]

Have agreed as follows:

5 *Mexican Draft (13 February 2001)*[6]

The States Parties to the present Optional Protocol,

***Recognizing* that torture and other cruel, inhuman or degrading treatment or punishment are prohibited,**

***Recalling* that articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment require each State Party to take effective measure to prevent acts of torture and other acts of cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,**

***Further recalling* that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires a combination of legislative, administrative, judicial and other measures,**

***Recognizing* that States have the primary responsibility for implementing international law and the relevant international standards, that strengthening the protection of and full respect for human rights is a common responsibility shared by all and that international mechanisms are complementary to national measures,**

***Convinced* that the protection of persons deprived of liberty against torture and other cruel, inhuman or degrading treatment or punishment may be strengthened by non-judicial means of a preventive character based on visits to places of detention,**

***Desiring* to undertake an international commitment to make the prevention of torture and other cruel, inhuman or degrading treatment or punishment more effective,**

Have agreed as follows,

6 *EU Draft (22 February 2001)*[7]

The States parties to the present Protocol,

Recalling the purposes and principle of the Charter of the United Nations, and the obligation of States under the Charter, in particular articles 55 and 56,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited,

Recalling articles 2 and 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which oblige each State party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Convinced that further measures are necessary to achieve the purpose of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and of the need to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment,

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

[7] ibid, Annex II.

Convinced also that combating impunity constitutes an important element in the prevention of torture and recalling in this regard article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as the Manuel on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol),

Welcoming the positive impact an independent regional and national mechanism could have on the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Considering that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits,

Bearing in mind also the principles of cooperation and confidentiality as basic principles of the present Protocol,

7 *US Draft (16 January 2002)*[8]

The States Parties to the present Optional Protocol,

***Recalling* the purposes and principles of the Charter of the United Nations and the obligations of States under the Charter,**

***Reaffirming* that torture and other cruel, inhuman or degrading treatment or punishment are prohibited,**

***Recalling* that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) requires a combination of legislative, administrative, judicial and other measures,**

***Recognizing* that strengthening the protection of and full respect for human rights is a common responsibility shared by all and that international mechanisms are complementary to national measures,**

***Recognizing* the important contribution that regional mechanisms may make to the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment, particularly by non-judicial means of a preventive character based on visits,**

***Desiring* to undertake an international commitment to make the prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Convention more effective,**

***Bearing* in mind the principles of cooperation and confidentiality as basic principles of the present protocol,**

Have agreed as follows,

2.2 Analysis of Working Group Discussions

8 The Working Group of the Commission adopted its agenda at its first meeting on 19 October 1992. During this first session, the Working Group established an informal open-ended group chaired by the Canadian representative, Mr *Martin Low*. He was tasked with first determining the schedule for consideration of the draft articles and

[8] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E.

then with preparing a preliminary draft report to the Commission. The main thrust pursued during the general discussions was to recognize the importance of a *preventive mechanism based on regular visits to places where persons are deprived of their liberty*, and to have this importance reflected in the preamble and substantive clauses of the OP. It was emphasized that such a system is necessary in order to strengthen the protection for the persons concerned against torture and other cruel, inhuman or degrading treatment or punishment. It was further proposed that such a system should be based on the *principles of cooperation, confidentiality, independence, impartiality, universality*, and *effectiveness*. Moreover, it should take the form of a preventive, rather than adjudicative, mechanism involving an evaluation of current conditions in places of detention and recommendations on how detention practices and facilities should be improved in order to strengthen the protection against torture. Cooperation and confidentiality were judged to be essential for success.[9]

9 At its second meeting in 1993, the Working Group decided that it would focus primarily on the most essential policy elements contained in the draft text and would organize the articles thematically in order to undertake a broad conceptual review of the OP. It was the opinion of the Working Group that this approach would facilitate the identification of possible means for resolving the various issues that would inevitably be raised during the group sessions. The articles of the draft Protocol, as submitted by Costa Rica, were thus divided according to the 'basket' of issues to which they pertained. It was decided that the aims, object and purpose of the OP were to be discussed in reference to the title, preamble and Article 1 of the draft treaty.[10]

10 The predominant view within the Working Group was that the preamble should state, in simple and unambiguous terms, the overriding *object and purpose of the proposed Protocol*. It would be a clear statement designed, first, to confirm an appropriate relationship between the OP and the CAT itself and, second, to emphasize the key aim of protection by a system of preventive character achieved through regular visits rather than *post facto* investigative or adjudicative measures.[11]

11 There was general consensus within the Working Group that the aim of the Protocol should be to establish a mechanism which would assist States in taking 'effective … measures to prevent acts of torture' in the sense of Article 2(1) CAT, and that no substantive obligations should be articulated in the preamble other than those necessary to achieve the purpose of the system of visits. It was, however, noted that this was a very broad aim. As such, some delegations expressed an interest in including within the preamble an elaboration of the basic objectives of the Protocol detailed in precise terms. It was suggested that this method would generate further confidence among States by facilitating the acceptance and enforcement of the OP, while also acting as a *guide to interpretation*. This view was not shared by the majority of the Group, however, who felt that the preamble would benefit more from brevity and clarity like the traditional UN approach to text drafting. It was warned that listing and detailing purposes other than the basic or fundamental objective might limit the overall effectiveness of the treaty and create uncertainty among States about the primary thrust of the instrument. The delegations in support of this view reasoned that the other important details were better addressed in substantive Articles.

[9] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, paras 21–22.

[10] ibid, paras 25–26. [11] ibid, paras 29ff.

12 Many delegations emphasized the importance of using the preamble to maintain a clear *link between the Convention and its OP*, whereby the Protocol is recognized as an instrument to enhance and perform the purposes of the Convention. It was the view of the Working Group that such an arrangement would promote coordination and cost-effectiveness by incorporating the work carried out by the body established by the Convention, namely the Committee against Torture, into the discussion on the Protocol.

13 Two delegations raised the possibility of creating a separate instrument, with a body unrelated to the Convention and its Committee, in order to permit States not parties to the Convention to take part in the Protocol's system of visits. However, a number of delegations opposed this proposal, arguing that it could prejudicially affect the necessary coordination of the Protocol. The matter was discussed further in connection with Article 2.

14 Another debate ensued between those delegations that supported a proposal to add a reference to the provisions of the UDHR and of the CCPR, and those delegations that pointed out that such references had already been made in the preamble to the Convention and it was therefore unnecessary to repeat them in the preamble to the Protocol.

15 A third debate within the Group focused on whether or not a specific mention to the principle of *confidentiality* should be made in the preamble. Some delegations saw a need to emphasize the principle and thus include such a statement, while others felt that the principle of confidentiality was a key working method, rather than an aim. This latter group preferred for the principle to be mentioned in the operative articles rather than in the preamble. While it was generally agreed that the principle of confidentiality represented an essential means of achieving the objectives of the OP, one delegation felt that a reference to it in the preamble might be prejudicial given the prospect that, under the Protocol, confidentiality may be broken in certain restricted circumstances.

16 It was decided at the second session of the Working Group that further consideration of the title and preamble would be given once the whole text of the OP had been discussed and amended.[12]

17 At the first meeting of its eighth session which took place on 4 October 1999, the Working Group agreed with the proposal of the Chairperson-Rapporteur to hold a general discussion on, inter alia, the issue of the Protocol as a preventive, and not a punitive, agreement. It was generally felt that the goal of the OP was to create an effective system, not of sanctions, but of preventive visits in order to help States parties to improve the protection of persons deprived of their liberty. *Prevention, cooperation*, and *confidentiality* were referred to as fundamental principles of the Protocol. This discussion took place during the first and second plenary meetings and was held in reference to the preamble of the OP as well as Articles 3 and 18.[13]

18 Discussion then focused on the principle of *confidentiality* as mentioned during the first session of the Working Group. Several delegations considered the principle of confidentiality to be a *modus operandi* rather than a core issue. They felt that observing confidentiality was not an end itself but a tool facilitating confidence and ensuring cooperation

[12] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, para 18.

[13] E/CN.4/2000/58 (n 5) paras 12, 17–18.

among States. According to another view held by some delegations, confidentiality was one of the important principles on which the OP was based and emphasizing the principle could promote the overall acceptability of the treaty. In order to justify their view, the delegations sharing this opinion made reference to the explicit mention of the guiding principles as detailed in Article 3(3) OP. The Chairperson-Rapporteur, Ms Elizabeth Odio-Benito of Costa Rica, subsequently proposed to consider confidentiality as a principle having a complementary, facilitating function. She also proposed that a reference to confidentiality, as well as to the principle of cooperation, be included in the preamble of the OP.[14]

19 At the tenth plenary meeting on 14 October 1999 the observer for *Australia* pointed out that views were divided within the Working Group as to whether the term 'detained' or 'deprived of their liberty' should be used in the preamble. Many delegations pointed out that the latter term was more commonly used in the human rights arena and that 'detained' could be too narrow. Following the proposal submitted by the Chairperson-Rapporteur, the Working Group agreed to include the text of the preamble, as submitted by the drafting group to the plenary, to serve as a basis for future discussion.[15]

20 At the same meeting, several delegations expressed their views on the first basket of articles and related issues. The representative of *Cuba*, speaking on behalf of the delegations of Algeria, China, Egypt, Saudi Arabia, the Sudan, and the Syrian Arab Republic, made a joint statement on their position paper submitted to the Chair regarding the content of the preamble and Articles 1, 8, 12, 13, and X. They stated that starting from the preamble, the content of the draft Protocol should reflect clearly its cooperative, preventive, confidential, non-duplicative, and advisory nature. The aforementioned delegations expressed concern as to what the effects on national security and domestic affairs would be if the words 'may' and 'any place', as well as 'deprived of their liberty' were to be included in the Protocol. They held that these words were unacceptable because they were too wide, vague, controversial, and undefined.[16]

21 The Working Group held its tenth, and final, session from 14 to 25 January 2002. The Chairperson presented her proposal for an OP during the sixth meeting and invited delegations to submit their comments thereto. These comments were discussed at the seventh and eighth meetings on 22 January 2002. The preamble as proposed by the Chairperson placed particular emphasis on the reference to the obligation to prevent torture as contained in Articles 2 and 16 CAT. It also made specific mention of Resolution 2001/44 of the Commission on Human Rights which, first, recalled that the *World Conference on Human Rights* had firmly declared that efforts to eradicate torture should be concentrated on prevention, and, second, called for the early adoption of an OP to the Convention intended to establish a system to that effect based on regular visits to places of detention.[17]

22 The *Mexican* delegation supported the proposed Protocol, as submitted by the Chairperson, but stated that it would have wanted to see a reference in the preamble to Articles 55 and 56 of the Charter. Despite this comment, the Mexican delegation accepted the proposal in order to reach consensus.[18]

[14] ibid, para 19. [15] ibid, paras 59, 61 [16] ibid, para 63.
[17] E/CN.4/2002/78 (n 8) paras 12, 46. [18] ibid, para 100.

3. Issues of Interpretation

23 The preamble contains the *basic principles* underlying the OP.[19] It starts by the States parties reaffirming the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment as 'serious violations of human rights'.

24 The States parties then voice their conviction that 'further measures' are necessary to achieve the purposes of the CAT and thereby highlight the links between *the OP and the CAT*, as only States parties to the CAT may become parties to the OP.[20]

25 After this reference to further measures for the achievement of the CAT's purposes, the preamble continues by recalling that Articles 2 and 16 CAT oblige each State party to take effective measures to prevent acts of torture and other ill-treatment. Hence, by establishing a system of regular visits to all places of detention as 'one means of prevention',[21] the OP does not set out 'additional substantive preventive obligations', but contributes 'to the prevention of torture'.[22] In other words, the OP specifies only 'further measures' so as to assist the States Parties of the CAT to implement their pre-existing obligation to prevent torture under Articles 2 and 16 CAT in addition to the other measures explicitly provided for in the CAT (the criminalization of torture, prosecution of torture, the systematic review of interrogation techniques, and the investigation of complaints).[23]

26 The requirement for States parties to the CAT to include visits to places of detention as part of a comprehensive preventive framework has been emphasized by the Committee against Torture in its interpretation of Articles 2 and 16.[24] The Committee, in its General Comment 2 on the implementation of Article 2 CAT by States Parties, cited the establishment of 'impartial mechanisms for inspecting and visiting places of detention and confinement' as forming part of the guarantees against torture that States shall put in place in order to comply with their obligations to take preventive measures.[25] In other words, when the OPCAT provides for the establishment of NPMs (National Prevention Mechanisms), it just provides more detailed mechanisms for the fulfilment of the existing obligation under the CAT to monitor the treatment of persons deprived of their liberty.[26] Due to these considerations, one could argue that 'States parties to the Convention are under an obligation to ratify the Optional Protocol as soon as possible'.[27]

27 The *preventive approach* underpinning the OPCAT is clearly formulated in the preamble, where the States parties are 'recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and *other measures*' and affirm

[19] For other principles, see below in particular Arts 2(3) and (4) OP. [20] See below Art 27 OP.

[21] SPT (Subcommittee on the Prevention of Torture), 'Analytical Self-Assessment Tool for National Prevention Mechanisms (NPM)' (2016) UN Doc CAT/OP/1/Rev.1, para 2.

[22] SPT, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/12/6, para 4.

[23] Association for the Prevention of Torture (APT) and Inter-American Institute of Human Rights (IIDH), *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT 2010) 18–19; see CAT/OP/12/6 (n 22) paras 1–3; see Arts 4 and 11 OP.

[24] CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2; APT and Center for Justice and International Law (CEJIL), *Torture in International Law: A Guide to Jurisprudence* (APT and CEJIL 2008) 25–26.

[25] CAT/C/GC/2 (n 24) para 13; see also Art 2 CAT. [26] APT and CEJIL (n 24) 25–26.

[27] See SRT (Nowak) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) UN Doc A/61/259, para 68.

their conviction 'that the protection of persons against torture and [other ill-treatment] can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention'. Independent monitoring mechanisms have been ascribed with an important preventive effect,[28] notably the immediate 'strong deterrent effect' of a system of preventive visits.[29]

28 The long-term objective of preventive visits is to mitigate the risks of ill-treatment and, thus, build an environment where torture is unlikely to occur. In contrast to visits by other bodies, preventive visits under the OPCAT form part of a 'proactive, forward-looking, continuous process of analysis of the system of deprivation of liberty and all its structural aspects'.[30] Preventive visits 'look holistically at the risks factors in institutional, legal and policy frameworks' with the objective 'to enter into dialogue on ways to improve the treatment and conditions of persons deprived of their liberty'.[31] A broad understanding of prevention by the NPMs is reflected when the States parties recall that effective prevention 'requires education and a combination of various legislative, administrative, judicial and other means'.[32]

29 The preamble also introduces *effectiveness* as a highly relevant characteristic of the preventive measures by States parties recalling that Articles 2 and 16 CAT oblige each State Party to take 'effective measures' to prevent torture or other ill-treatment. In 2009, the General Assembly called upon States parties to the OP to fulfil their obligation to designate or establish '*truly* independent and *effective* national preventive mechanisms for the prevention of torture'.[33] In fact, effective functioning of the NPM is a crucial aspect for the strength of its preventive impact.[34]

30 The preamble also introduces the *principle of subsidiarity*, recognizing that 'States have the primary responsibility for implementing those articles', ie that States have the primary responsibility for an efficient protection of human rights. Immediately thereafter, the preamble prescribes the *complementary* relationship between preventive efforts at the international and national levels, recognizing that 'strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and

[28] SRT (Kooijmans) 'Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment' (1987) UN Doc E/CN.4/1987/13, para 83; see also Special Rapporteur of the CHR (Rodley) 'Interim Report on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) UN Doc A/56/156, paras 34 and 39(e); Special Rapporteur of the CHR (van Boven) 'Interim Report on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2002) UN Doc A/57/173, paras 36 and 41; see also Frank Ledwidge, 'The Optional Protocol to the Convention against Torture (OPCAT): A Major Step Forward in the Global Prevention of Torture' (2006) 17 Helsinki Monitor 1, 72; Matthew Pringle, 'The Importance of the Ratification of the Optional Protocol to the United Nations Convention Against Torture for the Worldwide Prevention of Torture' in Harald C Scheu and Stanislava Hybnerova (eds), *International and National Mechanisms against Torture* (University Karlova Law School Publication 2004) 11; Richard Carver and Lisa Handley, *Does Torture Prevention Work?* (Liverpool University Press 2016).

[29] SRT (Nowak) A/61/259 (n 27) para 72. [30] APT and IIDH (n 23) 42. [31] ibid 42–43.

[32] E Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention' (2014) 14 Human Rights Law Review 1, 6, fn 41; 'It should be noted that the SPT has devoted a section of its 5th Annual Report to the role of human rights education in prevention of torture. There the Subcommittee notes that 'human rights education and training is a key mechanism for the prevention of torture and ill-treatment in that it can help counter the numerous root causes': Subcommittee on Prevention of Torture, Fifth Annual Report, 19 March 2012, CAT/C/48/3, paras 65–76.

[33] GA Res 64/153 of 18 December 2009. [34] See below Art 18, § 53.

strengthen national measures'. The wording makes clear that international monitoring bodies only play a supplementary role in ensuring States' compliance with their international obligations.

31 An explicit link was established in the preamble to the *Vienna World Conference on Human Rights*, which called for the adoption of an OP to the CAT in 1993.[35]

STEPHANIE KRISPER

[35] GA, 'Vienna Declaration and Programme of Action' (1993) UN Doc A/CONF.157/23, para 61: 'The World Conference on Human Rights reaffirms that efforts to eradicate torture should, first and foremost, be concentrated on prevention and, therefore, calls for the early adoption of an optional protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which is intended to establish a preventive system of regular visits to places of detention.'

PART I

GENERAL PRINCIPLES

Article 1

System of Preventive Visits to Places of Detention

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

1. Introduction	715
2. Travaux Préparatoires	715
2.1 Chronology of Draft Texts	715
2.2 Analysis of Working Group Discussions	718
3. Issues of Interpretation	723

1. Introduction

1 Article 1 OP defines the objective of the Protocol by highlighting its main features: first, the OP creates a two-pillar system by visits being carried out by both international and national mechanisms. Second, the obligation of States parties to permit regular visits to places of detention is established. Third, the OP is based on the principle of cooperation between the State party, the SPT, and the NPMs. Fourth, prevention of torture and other ill-treatment is defined as the aim of the visits.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Original Costa Rica Draft (6 March 1980)*[1]

> Article 1
>
> A State Party to the Convention that becomes a party to the present Protocol agrees to permit visits in accordance with the terms of the present Protocol to any place (hereinafter referred to as a place of detention) subject to the jurisdiction of a State Party where persons are held who have been deprived of their liberty for any reasons, including persons under investigation by the law enforcement authorities, civil or military, persons in preventive, administrative or re-educative detention, persons who are being prosecuted or punished for any offence and persons in custody for medical reasons.

[1] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica [1980] UN Doc E/CN.4/1409.

A place of detention within the meaning of this Article shall not include any place which representatives or delegates of a Protecting Power or of the International Committee of the Red Cross are entitled to visit and do visit pursuant to the Geneva Conventions of 1949 and their additional protocols of 1977.

3 *Revised Costa Rica Draft (15 January 1991)*[2]

Article 1

1. A State Party to the present Protocol agrees to permit visits, in accordance with this Protocol, to any place within its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held.

2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and form other cruel, inhuman or degrading treatment or punishment in accordance with international standards.

4 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[3]

Article 1

1. A State Party to the present Protocol shall permit visits in accordance with this Protocol to any place in any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held [provided that full respect is assured for the principles of non-intervention and the sovereignty of States].

2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from [, and [to take] measures for the prevention of] torture and from other cruel, inhuman or degrading treatment or punishment in accordance with applicable international [standards], [instruments], [law].

5 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[4]

Article 1

1. The objective of this Protocol is to establish a preventive visiting mechanism to examine the treatment of persons [deprived of their liberty] [detained] with a view to recommending means for strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment [as defined under international law applicable to the State Party] [and relevant international standards].

2. Each State Party agrees to permit visits, [in principle,] in accordance with this Protocol, to [any place] [places of detention] [on any territory] under its jurisdiction [and control] where persons (may, based on reliable information [as determined by a competent and independent judicial authority of the State Party concerned] be deprived or) are [deprived of their liberty] [detained] [including structures intended

[2] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[3] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II.

or used to house or transport such persons] by [or pursuant to an order of] a public authority [or at its instigation or with its consent or acquiescence].

[3. Nothing in this Protocol will be interpreted as allowing:

(a) Visits to any civil or military facility that the State considers related to strategic national interest; or

(b) Interference in the domestic affairs of Member States in a manner which exceeds the provisions of the present Protocol.]

6 *Mexican Draft (13 February 2001)*[5]

Article 1

Each State party to the present Protocol shall establish or maintain, at the national level, a visiting mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national mechanism), which shall carry out visits to places in any territory under its jurisdiction where persons may be or are deprived of their liberty pursuant to an order of a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention), with a view to strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.

7 *EU Draft (22 February 2001)*[6]

Article 3 (old 1 revised)

1. The objective of this Protocol is to establish an international preventive visiting mechanism to examine the treatment of persons deprived of their liberty, with a view to recommending means for strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.

2. Each State Party agrees to permit missions by the Sub-Committee to its territory and visits to any place under its jurisdiction and control where persons are or may be deprived of their liberty.

8 *US Draft (16 January 2002)*[7]

Article 1

1. (a) There shall be established, under the Committee against Torture (hereinafter referred to as the Committee), a Subcommittee on the Prevention of Torture (hereinafter referred to as the Subcommittee on Prevention) which shall carry out the functions hereinafter provided.

(b) The Subcommittee shall consist of [five] experts of recognized competence in the field of human rights, who shall serve in their personal capacity and shall, under its direction, carry out the functions herein provided.

Each State Party may, in furtherance of articles 2 and 16 of the Convention, establish, maintain or provide for national mechanisms to strengthen, if necessary, the protection of persons deprived of their liberty pursuant to an order of a public authority from torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as national mechanisms).

[5] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

[6] ibid, Annex II.

[7] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E.

2.2 Analysis of Working Group Discussions

9 During the first session of the Working Group, held from 19 to 30 October 1992, it was decided to undertake a review of the draft OP[8] from a conceptual perspective. In order to do so, the document was divided into several 'baskets' of issues. The first basket, 'Aims, object, and purpose', contained the title and preamble of the Protocol as well as its Article 1.[9]

10 In general, the Working Group wanted to integrate a very simple and clear expression of the basic international obligation that States would have to accept according to the OP, namely to permit visits to any places over which the State exercises either direct power or control and where persons are deprived of their liberty.

11 The main issues raised regarding Article 1(1) during the Working Group discussions at the first session were the following: the scope of States' obligations; the criteria for carrying out visits; the definition of the term 'places of detention'; the question of jurisdiction; and the standards of assessment which should be applied.

12 With regard to the scope of States' obligations, several delegations felt that Article 1 should concentrate on the system of preventive visits as a new and unique mechanism; other important matters should be dealt with in the other provisions. In their opinion, further detail in Article 1 would only diminish the clarity of the central obligation of the Protocol, namely to *permit preventive visits*.

13 Regarding the criteria for carrying out visits, some delegations found that the phrase 'in accordance with this Protocol', as contained in the draft, established imprecise criteria for the system of visits. These delegations suggested further clarifying the terms on which visits would take place. Several other delegations, however, wanted to ensure that the competence of the Subcommittee should be kept as broad as possible.

14 A number of issues were raised regarding the wording of the phrase '*places of detention*'. The draft text covered both places where persons are detained by a public authority, and other places where detention occurs at its instigation or with its consent or acquiescence. The question of the necessary degree of Government involvement in 'irregular' detention gave rise to much discussion. Due consideration was given to the meaning of the concept of '*acquiescence*'. In this regard, a reference was made to Article 1 CAT, which specifically refers to 'the consent or acquiescence of a public official'. Many delegations felt that this definition was too restrictive and that the Protocol's system should cover more institutions, rather than just those operated by public authorities. A reference was made to a similar provision in the *Declaration on the Protection of All Persons from Enforced Disappearance*. Many delegations found that as a matter of State responsibility under the OP, there should be a right to visit any place where a person is deprived of liberty by another person, or body, who is either under the direct control of the State, or is subject to such direct or indirect influence by the State that control or authority should be inferred or imputed.

15 Concern was also raised with regard to the notion '*may be held*', as some delegations had the impression that this indefinite criterion might give rise to difficulties of interpretation and administration.

16 A discussion also came up with regard to the term '*jurisdiction*' and the more general question on the implementation of the Protocol in federal States. It was pointed

[8] E/CN.4/1991/66 (n 2); see above para 3.

[9] cf Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, paras 25ff.

out that the national authority in such States might have responsibility over the whole territory, however other levels of Government might also have legislative or administrative responsibilities for places to which the Subcommittee should have access.

17 With regard to Article 1(2) OP, some delegations found that the objective of the visits could be broadened to reflect more clearly the full range of activities and responsibilities of the new Subcommittee, including fact-finding, recommendations, and technical assistance.

18 Some delegations found that the standards of assessment contained in Article 1(2) ('*in accordance with international standards*') were too broad and unspecified and that it was not clear which international standards were de facto included in this notion. Some delegations were of the view that it was important to provide a broad frame of reference for the Subcommittee and the States parties that would include the major international standards. Many found that 'international standards' meant the standard or the definition of torture set out in the CAT and, therefore, suggested a deletion of the words 'in accordance with international standards' and, if necessary, inserting a specific reference to the Convention alone.

19 During the second session of the Working Group from 25 October to 5 November 1993, it was agreed to replace the words 'agrees to' by the word 'shall' and 'within its territory' by '*in any territory under its jurisdiction*'.[10]

20 The delegation of *Mexico* proposed to add the words 'provided that full respect is assured for the principles of non-intervention and the sovereignty of States' at the end of paragraph 1. This idea was supported by several other delegations and initiated an interesting discussion on the question of *prior notification of visits* (at that time mentioned under Article 12 of the draft text). Others, however, found that the proposed additional reference would reduce the clarity of the central obligation of the Protocol, which was to permit preventive visits. Thus, the proposed phrase was put in square brackets.

21 Moreover, it was suggested that the prevention of torture as such should be mentioned in Article 1 as a clear objective of the Protocol. The phrase 'and to take measures for the prevention of' was put in square brackets before the word 'torture' in Article 1(2).

22 The issue of applicable 'international standards' of assessment was once again discussed. It was then agreed to keep the word 'standards' and to add the words 'instruments' and 'law' and to put all three words in square brackets.

23 The Working Group held its third session from 17 to 28 October 1994.[11] Although the outcome of the beginning of the first reading had already been put in an annex to the second Working Group report,[12] several delegations did not agree with certain aspects of the text of Article 1(1). Thus, it was decided in the third session to insert the following words into the footnote: a proposal was made by some delegations that further consideration be given at the second reading to adding the words 'arrest or detention', following the words '*deprived of their liberty*'.[13]

[10] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, para 22.

[11] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its third session [1994] UN Doc E/CN.4/1995/38.

[12] E/CN.4/1994/25 (n 10).

[13] E/CN.4/1995/38 (n 11) Annex.

24 During the fifth session from 14 to 25 October 1996 the Working Group decided to consider Articles 1 and 8 together. Although the Working Group decided in the second plenary meeting on 17 October 1996 to suspend the drafting process on Articles 1 and 8, certain negotiations had taken place on both provisions.[14]

25 Different opinions still existed on the question of *prior consent* (for some States, the ratification of the Protocol would in itself mean prior consent to any mission; for others, consent would have to be expressed on each occasion and the Protocol as such should only regulate the different forms of consent). In the course of the discussions, many delegations (among them Australia, Brazil, Canada, Chile, Denmark, Ethiopia, France, Germany, the Netherlands, South Africa, Switzerland, and Uruguay) stated that the ratification of the Protocol itself should be sufficient and no further consent would be needed. In the view of various NGOs (APT, AI, the International Commission of Jurists, IFACAT, ISHR, IFHRL, HRW, and the Women's International League for Peace and Freedom), the entire purpose and functions of the Protocol would be undermined if a requirement of prior consent to receive missions was integrated into the text of the Protocol, as this would permit States parties to avoid obligations under the instrument. Negotiations for each and every visit would be the consequence. The delegation of *Mexico*, however, strongly favoured the idea of prior consent and held that the text of the first reading remained valid. It was supported by the delegations of Cuba, China, and Japan, who shared most of Mexico's concerns.

26 Another point of discussion was the question of how fundamental principles contained in the Charter of the United Nations (in particular the principles of non-intervention and sovereignty of States) were to be reflected in the OP.

27 On 25 October 1996, the Chairperson noted that no agreement could be reached on the texts of Articles 1 and 8 during the fifth session, and it was decided to consider the draft texts of these Articles (which constituted the basis for future work) at a later stage.

28 At the sixth session from 13 to 24 October 1997 and at the seventh session from 28 September to 9 October 1998, Article 1 was not discussed. However, the observer for *Australia*, who chaired the informal consultation at the seventh plenary meeting on 6 October 1998, indicated that with regard to Article 1, the following elements were discussed:[15]

(a) It was felt that the order of paragraphs could be changed so as to focus first on the preventive nature of the Protocol and then on how the Protocol would operate through visits.
(b) A number of delegations noted that further work needed to be done regarding the scope of the article. Language on definitions in the Convention was referred to in particular.
(c) The need for the SPT to accept a mission was discussed, namely whether ratification meant a standing invitation to the Subcommittee or whether each mission should be subject to the prior consent of a State party.
(d) A possible reference to applicable laws and standards in the article was also discussed.

With regard to Article 8, the close and delicate link to Article 1 was generally recognized.

[14] cf Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fifth session [1996] UN Doc E/CN.4/1997/33, paras 23ff.

[15] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session [1998] UN Doc E/CN.4/1999/59, paras 14–15.

29 The Working Group held its eighth session from 4 to 15 October 1999,[16] where it decided to hold a general discussion on several issues, among them the issue of dialogue and cooperation between the Subcommittee and the States parties. Articles 1 (purpose and scope of the Protocol) and 8 (types of missions and their notification) were considered to be directly relevant to this discussion.[17] During the discussion, the following main issues were raised with regard to Article 1.

30 It was brought up that the wording of Article 1(1), permitting visits to any place in any territory under a State party's jurisdiction, might infringe upon domestic legislation or have a potential impact on non-States parties to the Protocol (eg in cases when access would be sought to diplomatic missions or foreign military installations).

31 Furthermore, it was suggested by some delegations that the phrase '*at its instigation or with its consent or acquiescence*' should be deleted, because it provided a wide scope for controversy.

32 Several delegations found that the notion 'may be held' was too broad and imprecise, while others supported this formulation.

33 With regard to the wording '*in accordance with applicable international law and relevant international standards*', as contained in Article 1(2), it was discussed whether or not this formula was sufficiently clear, and whether only binding or also recommendatory standards were comprised by this notion.[18]

34 Another issue that was scrutinized again during the eighth session was the question of *prior consent*. Concerning this open issue, still no consensus could be found within the Working Group. It was emphasized by some delegations that in the absence of a standing invitation, the OP would not bring much, if any, added value to the Convention since Article 20 CAT already allowed the Committee to undertake confidential missions with the prior consent of the State party concerned. Several delegations found that the principle of a standing invitation was in full conformity with the principle of national sovereignty, since the ratification of the Protocol was optional, and the decision to ratify was itself an act of national sovereignty. Others, however, were of the opinion that such far-reaching competences would be an infringement of the *sovereignty of States* and thus unacceptable.[19]

35 During the ninth session from 12 to 23 February 2001, the Working Group held a general debate on the alternative draft, introduced at the second meeting of the Working Group on 13 February 2001, and submitted by the delegation of *Mexico* with the support of *GRULAC*. The draft proposed that States parties to the Protocol should create *national mechanisms for the prevention of torture*. The draft was strongly supported by most of the delegations who especially emphasized the complementary nature of the proposed national and international mechanisms.[20]

36 During the tenth session of the Working Group from 14 to 25 January 2002, a general debate was held on the proposed *two-pillar system*, which would involve combining an international visiting mechanism with national mechanisms in each participating State.[21]

37 With regard to the question of *prior consent*, the delegations of *Denmark* and *Finland* once again emphasized that the visiting powers should be exercised on the basis of an open invitation in order to make the mechanisms as efficient as possible.

[16] E/CN.4/2000/58 (n 4). [17] cf ibid, paras 24ff. [18] ibid, para 32.
[19] ibid, paras 37–39.
[20] E/CN.4/2001/67 (n 5) paras 19–21. For the text of the Mexican Draft see above para 6.
[21] E/CN.4/2002/78 (n 7) paras 13ff.

38 On 17 January 2002, the Chairperson-Rapporteur presented her proposal for an OP.[22] In drafting her proposal, she had been inspired by all the ideas expressed within the various draft texts (the initial Costa Rican draft, the drafts submitted at the ninth session of the Working Group by GRULAC and the EU, as well as the new alternative draft put forward by the US delegation).[23] Part I (General Principles) of her draft set out the objective of the Protocol, ie to establish a system of regular visits by independent international and national mechanisms in Article 1.

39 On 22 January 2002, a debate was then held on the Chairperson's proposal.[24] The following States were in favour: Spain (on behalf of the European Union and the Central European and Eastern European States), Switzerland, Guatemala, Canada, Latvia, New Zealand, Norway, Hungary, Argentina, Slovenia, Mexico, Ecuador, Georgia, Uruguay, Poland, Peru, Costa Rica, Czech Republic, Chile. Others were against it or at least expressed concern: United States of America, Egypt, Russian Federation, Saudi Arabia, Japan, Cuba, India, Syrian Arab Republic, Kuwait, Israel, Algeria, and the Arab Group. China and Turkey seemed to be indifferent.

40 At its fiftieth meeting on 22 April 2002, the *Commission on Human Rights* finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten, with fourteen abstentions.[25]

41 In July of the same year, the draft OP was brought before the *ECOSOC*. Again, the adoption process met with opposition as the *United States* proposed—like *Cuba* had done before—an amendment to the resolution aiming at reopening the drafting discussion on the text of the OP. However, the US proposal was rejected by twenty-nine votes and, therefore, the resolution aiming at the adoption of the Protocol was adopted by thirty-five votes in favour, eight votes against, and ten abstentions (totalling fifty-three members of ECOSOC).[26]

42 The draft text was then forwarded for further consideration to the *Third Committee of the UN General Assembly*, which addressed it during its meeting in November 2002. By that time, it was *Japan* who felt that the vote should be postponed for at least twenty-four hours in order to reconsider the financial aspect laid down in the draft text. But again, after only a short discussion, the proposal was voted down. After the *United States* had tried to hinder the ongoing adoption of the OP a second time by submitting an amendment which foresaw that the new visiting mechanism should only be financed

[22] ibid, Annex I. [23] ibid, para 45. For the texts see above 2.1. [24] ibid, paras 54–114.

[25] UNCHR, 'Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' Res 2002/33 of 22 April 2002. The following States voted *in favour*: Argentina, Armenia, Austria, Bahrain, Belgium, Brazil, Burundi, Canada, Chile, Costa Rica, Croatia, Czech Republic, Democratic Republic of Congo, Ecuador, France, Germany, Guatemala, Italy, Mexico, Peru, Poland, Portugal, Senegal, South Africa, Spain, Sweden, United Kingdom, Uruguay, Venezuela; *against*: China, Cuba, Japan, Libyan Arab Jamahiriya, Malaysia, Nigeria, Republic of Korea, Saudi Arabia, Sudan, Syrian Arab Republic; *abstentions*: Algeria, Cameroon, India, Indonesia, Kenya, Pakistan, Russian Federation, Sierra Leone, Swaziland, Thailand, Togo, Uganda, Vietnam, Zambia.

[26] ECOSOC, 'Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' Res 2002/27 of 24 July 2002. The following States voted *in favour*: Andorra, Angola, Argentina, Austria, Bahrain, Benin, Brazil, Burkina Faso, Burundi, Chile, Costa Rica, Croatia, El Salvador, Fiji, Finland, France, Georgia, Germany, Ghana, Guatemala, Hungary, Italy, Malta, Mexico, Netherlands, Peru, Republic of Korea, Romania, South Africa, Spain, Sweden, Suriname, Uganda, Ukraine, United Kingdom; *against*: Australia, China, Cuba, Egypt, Japan, Libya, Nigeria, Sudan; *abstentions*: Bhutan, Cameroon, Ethiopia, India, Nepal, Pakistan, Qatar, Russian Federation, USA, Zimbabwe.

by contributions of States parties, the issue itself was submitted to a vote and approved by the Third Committee with 104 votes in favour, eight votes against, and thirty-seven abstentions.[27]

3. Issues of Interpretation

43 The *travaux préparatoires* show that after many years of extremely difficult discussions, a compromise could only be achieved through the establishment of the *two-pillar system*, ie visits to be carried out by both international and national mechanisms. Originally, the various drafts of the OP only contained the UN Subcommittee as visiting body until Mexico introduced the idea of a domestic counterpart in 2001.[28] Mexico belonged to the group of States which strongly opposed the Costa Rica Draft because of its alleged interference with State sovereignty and, therefore, favoured the idea of prior consent for every visit by the Subcommittee.[29] Its alternative draft was aimed at saving the principle of *State sovereignty* and non-interference with internal affairs by replacing the Subcommittee, as far as possible, with the introduction of a domestic body and reducing the function of the Subcommittee to being 'responsible for supporting and supervising the work carried out by national mechanisms'.[30] Hence, the suggestion of a national visiting body was not made with the intention to establish a two-pillar system. It is, therefore, not surprising that many States and NGOs were originally very sceptical about the intentions behind the Mexican Draft. They called for a proper balance between the national and international components of the two-pillar system, which ultimately emerged by way of compromise.

44 The two-pillar system works according to the principle of subsidiarity and the complementary nature of the OP,[31] ie the Subcommittee, in addition to conducting visits on its own, can assist NPMs in carrying out their tasks effectively.[32] The SPT conceives this system established by the OP as an 'interlocking network of mechanisms carrying out visits and other related functions under their preventive mandates in cooperation

[27] UNGA, 'Draft Resolution: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2002) UN Doc A/C.3/57/L.30. The following States voted *in favour*: Afghanistan, Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Austria, Azerbaijan, Belgium, Benin, Bosnia Herzegovina, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Cape Verde, Chile, Colombia, Congo, Costa Rica, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Dominican Republic, Ecuador, El Salvador, Eritrea, Estonia, Fiji, Finland, France, Gambia, Germany, Greece, Guatemala, Guinea, Hungary, Iceland, Indonesia, Ireland, Italy, Jordan, Kiribati, Kyrgyzstan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Mali, Malta, Mauritius, Mexico, Mongolia, Monaco, Morocco, Mozambique, Namibia, Nauru, Netherlands, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Paraguay, Peru, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Saint Kitts and Nevis, Samoa, San Marino, Senegal, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Trinidad and Tobago, Turkey, Uganda, Ukraine, United Kingdom, Uruguay, Vanuatu, Venezuela, Yugoslavia, Zambia, Zimbabwe; *against*: China, Cuba, Israel, Japan, Nigeria, Syria, USA, Vietnam; *abstentions*: Algeria, Australia, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Bhutan, Brunei Darussalam, Cameroon, Egypt, Ethiopia, Georgia, Guyana, India, Jamaica, Kazakhstan, Kenya, Kuwait, Libya, Malaysia, Mauritania, Myanmar, Nepal, Oman, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Singapore, Sudan, Tanzania, Thailand, Togo, Tunisia. Uzbekistan.

[28] E/CN.4/2001/67 (n 5) Annex I; see above Art 1 OP, 2.

[29] cf above 2.2.

[30] E/CN.4/2001/67 (n 5) Annex I, Art 2.

[31] See above Preamble OP, § 30.

[32] cf below Art 11(b) OP.

with each other'.[33] In fact, this seems indeed to be a more accurate picture of this system than two pillars: while the SPT and the NPMs are separate bodies working independently from each other, effective communication, information-sharing, and coordination between them are relevant for the effectiveness of their work for the prevention of torture and ill-treatment.[34]

45 Article 1 OP introduces the general *obligation of States parties to permit regular visits to places of detention*. As to the regularity of the visits, although Article 1 OP defines the objective of the present Protocol as the establishment of a 'system of regular visits' undertaken by national and international bodies, the SPT itself has expressed doubts as to whether it will be able to visit every State party once every four to five years, which it considers necessary for effective prevention of ill-treatment.[35] The SPT is reaching its financial and capacity limits by an increasing number of States parties. The SPT Chair stated at the GA in October 2016 that 'as ratifications continue, we will continue to fall further away from achieving our benchmark aspiration of visiting each state party on a periodicity akin to the average reporting cycle to the human rights treaty bodies or of Universal Periodic Review'.[36] In fact, the SPT has actually carried out five visits in 2014, eight visits in 2015, eight visits in 2016, eight visits in 2017, and six visits in 2018.[37] Hence, as predicted,[38] NPMs have been and will be 'the central bodies of the system of prevention that the OPCAT puts in place'.[39] The degree of frequency that is actually necessary for a visiting system to stay truly preventive is elaborated under Article 19 OP.

46 The States parties' obligation to establish a system of regular visits includes all places 'where people are deprived of their liberty'. Together with the two-pillar system between the SPT and the NPMs, these interdependent obligations add up to a system reflecting the *principle of cooperation*. This principle is an overarching theme of the OP

[33] SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, para 6; SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 10; SPT, 'Forth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/C/46/2, para 10.

[34] See Arts 11(b)(ii) and (iii) and 20(f) OP.

[35] SPT, 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc CAT/C/40/2, paras 15–17.

[36] 'Statement by Sir Malcolm Evans, Chairperson of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at the 71st session of the General Assembly' New York, 18 October 2016 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20741&LangID=E> accessed 12 December 2018.

[37] In 2014 SPT undertook five field visits to Maldives, Togo, Malta, Ecuador, and Nicaragua; in 2015 eight visits to Brazil, Turkey, Italy, the Netherlands, Philippines, Guatemala, Nauru, and Azerbaijan; in 2016 SPT carried out eight visits to Mexico, Mauritania, Kazakhstan, Ukraine, Romania, Chile, Cyprus, and Benin, and eight visits were carried out in 2017 as well to Morocco, Spain, Mongolia, Panama, Bolivia, the Former Yugoslav Republic of Macedonia, Hungary, and Niger. In 2019, the SPT visited six countries: Liberia, Kyrgyzstan, Poland, Portugal, Belize, and Uruguay.

[38] SRT (Nowak) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) UN Doc A/61/259, para 71: 'While the Subcommittee on Prevention will only be in a position sporadically to conduct missions to a growing number of States parties, the main responsibility for ensuring increased transparency and accountability of places of detention will rest on the national visiting bodies.'

[39] Elina Steinerte and Rachel Murray, 'Same but Different? National Human Rights Commissions and Ombudsman Institutions as National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture' (2009) Special Issue 2009 Essex Human Rights Review 54, 57.

and visible in its various provisions[40] that foresee a triangular constructive relationship between the State Party, the SPT and NPMs.

47 Finally, Article 1 OP reiterates the principle of prevention enshrined in the preamble,[41] as it formulates that the prevention of torture and other ill-treatment is the key aim of the monitoring bodies' visits. With reference to Article 1 OP, the SPT describes the NPM's visits as its main preventive task.[42] This monitoring procedure is based on the experience that torture usually takes place behind closed doors and can, therefore, be best prevented by opening up closed institutions to independent scrutiny. The very fact that a domestic or international prison inspection team may conduct *unannounced visits to places of detention* has a deterrent effect. Further, only first-hand information enables the monitoring body to have a distortion-free picture of the conditions.[43]

48 The adoption of the OP signifies enormous progress in favour of international human rights monitoring compared to the CAT.[44] In Article 20(3) CAT, the principle of *State sovereignty* was still strongly upheld as the Committee against Torture, in the context of an *inquiry procedure*, is allowed to carry out a fact-finding visit to the territory of the State party concerned only in agreement with the respective Government; further, States parties may opt out of the inquiry procedure in accordance with Article 28. A breakthrough on this issue was only achieved because the purpose of visits under the OP differs fundamentally from those under Article 20 CAT. An *inquiry procedure* is only undertaken after the Committee has received reliable information about systematic practices of torture in the territory of a State party and aims at investigating these allegations. The *visits of the Subcommittee* under the OP are, however, of a purely *preventive nature*, as defined by the objective of the OP in Article 1. Hence, the fact that the Subcommittee visits a particular country does not necessarily indicate that there might be any particular allegations; this principle is underlined by the term '*regular visits*'. The SPT has the power to conduct visits without invitation by the State party. Further, a significant change was undergone through the establishment of national mechanisms who have local expertise and ownership as well as the possibility to conduct regular[45] visits and establish a sustainable dialogue with the authorities.

STEPHANIE KRISPER

[40] See Arts 2(4), 11(1)(c), 12, 14, 16, 22, 31 OP.

[41] See above Preamble OP, § 25.

[42] SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1, para 3.

[43] See below Art 20 OP, § 20.

[44] cf APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, 2010) 70.

[45] The precise meaning of the term 'regular' and other terms used in Article 1 are further defined in the following articles and will be discussed there: cf below for 'regular' Art 17 OP; for 'independent' Art 5 (SPT), Art 18 (NPMs); for 'places where people are deprived of their liberty' Art 4 (NPMs).

Article 2

Establishment of a UN Subcommittee on Prevention

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.

2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.

3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.

4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

1. Introduction	726
2. Travaux Préparatoires	727
2.1 Chronology of Draft Texts	727
2.2 Analysis of Working Group Discussions	729
3. Issues of Interpretation	731

1. Introduction

1 As its name indicates, the Subcommittee on Prevention (SPT) is a *subsidiary organ of the Committee against Torture (CAT Committee or Committee)*, which was established as the main monitoring body of the Convention in accordance with Article 17 CAT.[1] The SPT is, however, largely independent from the CAT Committee. Its members are not elected by the CAT Committee, but by the States parties to the OP.[2] It carries out its mandate, ie conducting visits to places of detention on the territory of States parties as well as advising and assisting States parties and their national preventive mechanisms,[3] in close cooperation with the governments concerned and without any control of the Committee. The main link with the Committee is provided by Article 16: the SPT shall present a public annual report on its activities to the Committee, and the Committee may decide to make public statements or to publish country-specific reports of the SPT.

2 Since the SPT is empowered to carry out preventive missions to the territory of States parties without prior consent, which was considered by many States during the drafting process as undermining the UN principles of State sovereignty and territorial integrity, a number of precautionary provisions were inserted into the text of the OP. First, the SPT is

[1] See above Art 17 CAT. [2] See below Arts 6 and 7 OP. [3] See below Art 11 OP.

required to cooperate with the States parties in carrying out country missions and visits to places of detention as well as other functions. Furthermore, the SPT shall be guided by the purposes, principles and relevant norms of the United Nations (UN) as well as by the principles of confidentiality, impartiality, non-selectivity, universality, and objectivity.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[4]

Article 3

6. The States Parties to the present Protocol shall meet in Assembly once a year. They shall be convened by the Government of . . . or such other Government as may accept their request to do so.

7. The Assembly shall elect the members of an International Committee responsible for the application of the present Protocol (hereinafter referred to as the Committee), shall adopt the budget for implementing the present Protocol, shall consider the general reports of the Committee and any other matters relating to the present Protocol and its application, and shall give general directions to the Committee.

4 *Revised Costa Rica Draft (15 January 1991)*[5]

Article 2

The Committee against Torture shall establish a Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Subcommittee); the Subcommittee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[6]

Article 2

There shall be established a Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [of the Committee of Torture][which shall carry out the functions laid down in the present Protocol] (hereinafter referred to as the Sub-Committee); the Sub-Committee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

Article 3

In the application of this Protocol, the Sub-Committee and [the competent national authorities of] the State Party concerned shall cooperate with each other. The Sub-Committee shall be guided by principles of confidentiality and impartiality.

[4] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica [1980] UN Doc E/CN.4/1409.

[5] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[6] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1995) UN Doc E/CN.4/1996/28.

6 *Text of the Articles which Constitute the Outcome of the Second Reading (26 March 1999)*[7]

Article 2

There shall be established a Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture which shall carry out the functions laid down in the present Protocol (hereinafter referred to as the Subcommittee); the Subcommittee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

Article 3

8. In the application of this Protocol the Subcommittee and the State Party concerned shall cooperate with each other.

9. The Subcommittee shall conduct its work within the framework of the Charter of the United Nations and be guided by the purposes and principles therein.

10. The Subcommittee shall also be guided by the principles of confidentiality, impartiality, universality and objectivity.

7 *Mexican Draft (13 February 2001)*[8]

Article 2

There shall be established a Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture which shall carry out the functions laid down in the present Protocol (hereinafter referred to as the Sub-Committee):

11. The Sub-Committee shall be responsible for supporting and supervising the work carried out by national mechanisms in accordance with the provisions of the present Protocol;

12. The Sub-Committee shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles enunciated therein;

13. The Sub-Committee shall also be guided by the principles of confidentiality, impartiality, universality and objectivity.

8 *EU Draft (22 February 2001)*[9]

Article 2 (old 2)

A Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture shall be established which shall carry out the functions laid down in the present Protocol (hereinafter referred to as the Sub-Committee); the Sub-Committee shall be responsible for organizing missions and visits to the States parties to the present Protocol for the purposes stated in article 3.

The establishment of the Sub-Committee does not preclude the setting up as appropriate of a national mechanism to carry out unrestricted visits to places where persons are deprived of their liberty, as referred to in article 15.

[7] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session [1998] UN Doc E/CN.4/1999/59.

[8] E/CN.4/2001/WG.11/CRP.1. [9] E/CN.4/2001/WG.11/CRP.2.

9 *US Draft (16 January 2002)*[10]

Article 1

1. (a) There shall be established, under the Committee against Torture (hereinafter referred to as the Committee), a Subcommittee on the Prevention of Torture (hereinafter referred to as the Subcommittee on Prevention) which shall carry out the functions hereinafter provided.

(b) The Subcommittee shall consist of [five] experts of recognized competence in the field of human rights, who shall serve in their personal capacity and shall, under its direction, carry out the functions herein provided.

2. Each State Party may, in furtherance of articles 2 and 16 of the Convention, establish, maintain or provide for national mechanisms to strengthen, if necessary, the protection of persons deprived of their liberty pursuant to an order of a public authority from torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as national mechanisms).

2.2 Analysis of Working Group Discussions

10 During the first session of the Working Group, held from 19 to 30 October 1992,[11] Article 2 was discussed within the third basket of issues on 20 October 1992. The general trend of the discussion around Article 2 showed that the retention of an independent body responsible for the implementation of the Protocol was favoured. However, it was found that it should have some *institutional connection with the Committee*. Some delegations stated that the body should be independent from the Committee and should be invested with specific and sufficient powers. A specific proposal was made by the delegation of Chile,[12] stating that the Committee should establish a list of experts to be entrusted with the task of carrying out the visits. This would, in Chile's opinion, simplify matters and reduce delays while at the same time keeping down the costs for the new system. It was felt by some delegations, that the positive aspects of this proposal (streamlining of procedures, reducing financial costs) should be considered further.[13] Another proposal was to establish a special institute with experts of the Committee as members.

11 Some delegations stated that the body should have a status that would inspire respect and credibility and considered that a reliance on the Committee would not be administratively effectual, especially given the Committee's present size and workload. According to the view of some delegations, the principle of confidentiality could only be maintained by the installation of a SPT. Others stated that this would be undesirable for both financial and coordination reasons.

12 Concern was also raised with regard to an 'indirect' election of the SPT by the Committee.

13 In any case, and despite the fact that the trend of the discussion seemed to favour the idea of a *separate body within an appropriate institutional link to the Committee*, a need to clarify the relationship between the functions of the Committee and the SPT was clearly identified.

[10] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session (2002) UN Doc E/CN.4/2002/78.

[11] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28.

[12] See E/CN.4/1992/WG.11/WP.1, paras 20–22.

[13] See E/CN.4/1993/28 (n 11) para 51.

14 In the second session of the Working Group from 25 October to 5 November 1993,[14] the wording of Article 2 was further discussed. The group agreed to replace the opening words 'The Committee against Torture shall establish' by the words 'There shall be established', based on the thought that the text of the Protocol should follow that of the CAT where possible and appropriate.

15 Furthermore, there was a prevailing opinion among the delegations that the body to be established should be separate from the Committee and that the differences in the objectives of both treaty monitoring bodies justified such a separation. A reference was made to the quasi-judicial functions of the Committee, such as the consideration of communications. The main objective of the OP, however, was considered to be to promote the taking of *preventive, as opposed to jurisdictional measures against torture*.

16 Yet most delegations found that an *institutional link between the two bodies* should be foreseen and should both safeguard consistency with the already established system under the Convention and clarify the *subordinate status of the new body* to be established. Thus, a number of delegations wanted the words 'of the Committee against Torture' to be inserted after the word 'Punishment'. One delegation suggested inserting the phrase 'which shall carry out the functions laid down in the present Protocol' thereafter. Some delegations, however, regarded the establishment of a separate body as excessive, for reasons of both coordination and cost.

17 During the fifth session from 14 to 25 October 1996,[15] the Chairperson-Rapporteur called for comments on Article 2 as adopted as the outcome of the first reading. The delegations of *Mexico*, the *Russian Federation* and Cuba pointed out that the draft OP should clearly establish the link between the Committee and the SPT. They wanted to keep the phrases 'of the Committee against Torture' and 'which shall carry out the functions laid down in the present Protocol'. The delegation of Japan, however, stated that the SPT should be independent of the Committee and proposed to delete the reference mentioned. Moreover, it proposed naming the new body the '*Committee for the Prevention of Torture*'.

18 The Drafting Group then decided to reflect the divergence of views in a footnote to be presented to the plenary meeting for adoption.

19 During the ninth session, a general discussion was held on the alternative draft submitted by the delegation of *Mexico* with the support of GRULAC, where among other things the composition and mandate of the international mechanism was considered.[16]

20 In the tenth and final Working Group session, from 14 to 25 January 2002,[17] a debate was held on the proposal presented by the Chairperson-Rapporteur. At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[18]

[14] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25.

[15] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fifth session (1996) UN Doc E/CN.4/1997/33.

[16] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session (2001) UN Doc E/CN.4/2001/67, paras 32–37.

[17] See E/CN.4/2002/78 (n 10).

[18] See CHR Res 2002/33 of 22 April 2002. See also above Art 1 OP, 2.2.

3. Issues of Interpretation

21 The idea of an international body carrying out *preventive visits to places of detention* was already contained in the original Costa Rica Draft of 1980. The revised Costa Rica Draft of 1991 then proposed a *Subcommittee on Prevention to be established by the Committee against Torture*. However, already during the 1992 discussions in the Working Group, concern was raised about a too close relationship between both bodies and an 'indirect' election of the SPT by the CAT Committee.[19] Consequently, in 1993, the words 'The Committee against Torture shall establish' were replaced by the phrase 'There shall be established'. In fact, the delegations which had *concerns about a close relationship between both bodies* prevailed, and the SPT, according to Articles 6 and 7, is not established and elected by Committee, but by the States parties to the Protocol. With ten members, its initial size was equal to that of the Committee. After the fiftieth ratification,[20] the number of members increased to twenty-five, taking into account that the SPT's workload would increase notably with a higher number of States parties.[21] Consisting of twenty-five members, the SPT is currently the largest of all UN treaty bodies. The Protocol does not foresee a further increase of members.

22 In practice, the *SPT works largely independently from the Committee*, but in close *cooperation with States parties*. Although its missions to the territory of States parties do not require any prior consent, the SPT shall notify the States parties pursuant to Article 13(2) of its programme in order that they may make the necessary practical arrangements. The respective Government may oppose the inclusion of a specific expert in the mission[22] and may even object to a visit to a particular place of detention on urgent and compelling grounds.[23] But, in principle, the States parties are under an *obligation to receive the SPT* and to cooperate fully with it in the exercise of its functions and, above all, to grant it *unrestricted access to all places of detention* and their installations and facilities and relevant documents. It must further provide the SPT with the opportunity to conduct *private interviews with detainees*.[24] After each visit, the SPT presents its report, including relevant recommendations and conclusions, directly to the respective Government, and may also publish this report upon request by the State party.[25] The Committee against Torture only receives a public annual report by the SPT and may decide, under certain circumstances, to make a public statement on a particular matter or to publish a mission report of the SPT.[26]

23 According to Article 2(1) OP, the SPT shall carry out the '*functions laid down in the present Protocol*'. These are clearly defined in Part III on the mandate of the SPT.[27] In addition to conducting preventive visits to places of detention in the territory of States parties and making recommendations to governments concerning the protection of detainees against torture and ill-treatment, the SPT shall also advise and assist States parties and their respective national preventive mechanisms and cooperate with the relevant UN organs and other relevant international and regional organizations.[28]

24 In carrying out these functions, the SPT shall '*work within the framework of the Charter of the UN* and shall be guided by the purposes and principles thereof'. These precautionary words were inserted in 1999 for the purpose of ensuring that the SPT will

[19] See E/CN.4/1993/28 (n 11) para 53. See also above 2.2.
[20] Switzerland was the fiftieth State ratifying the OP on 24 September 2009.
[21] See below Art 5 OP. [22] See Art 13(3) OP. [23] See Art 14(2) OP.
[24] cf Arts 12 and 14(1) OP. [25] cf Art 16(1) and (2) OP. [26] cf Art 16(3) and (4) OP.
[27] cf Arts 11 to 16 OP. [28] cf Art 11 OP.

not abuse its mandate. The purposes and principles of the UN are laid down in Articles 1 and 2 of the UN Charter. Promoting and encouraging respect for human rights and for fundamental freedoms is one of the three key purposes of the UN[29] and shall be achieved by means of international cooperation. The main principles, which the drafters of Article 2(2) OP probably had in mind, are the principles of *sovereign equality, territorial integrity* and *non-intervention* in matters which are essentially within the domestic jurisdiction of States, as laid down in Article 2(1), (4) and (7) of the UN Charter. However, these principles were developed for States and have only a limited value for guiding the work of the SPT. The drafters wished to express the principle that the SPT, in conducting missions to the territory of States parties, shall avoid any behaviour which might be interpreted as violating the sovereignty, equality, and territorial integrity of any State. In other words, the SPT shall act in a spirit of cooperation rather than confrontation and respect the customs, traditions, religious, and similar rules of the respective countries.

25 The SPT shall also be guided by '*the norms of the United Nations concerning the treatment of people deprived of their liberty*'. In addition to the right to personal liberty and security in Article 9 CCPR, the prohibition of torture and cruel, inhuman or degrading treatment in Article 7 CCPR, the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person in Article 10 CCPR,[30] other rights of both Covenants are particularly relevant for detainees (such as the rights to privacy, freedom of religion and expression, equality and non-discrimination, the rights to food, water, shelter, clothing, healthcare, and education).

26 The term 'norms' also refers to the relevant *non-binding declarations, principles and guidelines* adopted by the UN for the protection of detainees:[31]

- Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules).[32]
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[33]
- Code of Conduct for Law Enforcement Officials.[34]
- Principles of Medical Ethics relevant to the Role of Health Personnel particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel and Inhuman, Degrading Treatment or Punishment.[35]
- Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).[36]
- Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power.[37]
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[38]
- Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules).[39]
- Basic Principles for the Treatment of Prisoners.[40]

[29] On the interdependence of the three main UN purposes, security, development and human rights, see Kofi Annan, *In Larger Freedom*, A/59/2005, paras 12–17.

[30] cf Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 241ff

[31] See also APT and IIHR, *Optional Protocol to the United Nations Convention Against Torture: Implementation Manual* (2nd rev edn, APT and IIHR 2010) 45.

[32] GA Res 70/175 of 17 December 2015 (Revised UN Standard Minimum Rules for the Treatment of Prisoners).

[33] GA Res 3452 (XXX) of 9 December 1975.

[34] GA Res 34/169 of 17 December 1979.

[35] GA Res 37/194 of 18 December 1982.

[36] GA Res 40/33 of 29 November 1985.

[37] GA Res 40/34 of 29 November 1985.

[38] GA Res 43/173 of 9 December 1988.

[39] GA Res 45/110 of 14 December 1990.

[40] GA Res 45/111 of 14 December 1990.

- Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).[41]
- Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules).[42]
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[43]
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.[44]
- Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines).[45]
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Istanbul Protocol).[46]
- Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.[47]
- Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.[48]
- Rules for the Treatment of Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules).[49]
- Guidelines against Intimidation or Reprisals (San José Guidelines).[50]

27 According to Article 2(3) OP, the SPT shall also be guided by various other *principles*. Most important is the principle of *confidentiality*. This means that all proceedings of the SPT, ie its meetings, visits and deliberations, shall be kept confidential. This corresponds to the principle of confidentiality of the Committee in the communication and inquiry procedures. Where the Committee publishes all conclusions and recommendations in the State reporting procedure under Article 19, all final decisions in the individual complaints procedure under Article 22 and at least a summary account of the results of its inquiry procedure under Article 20 CAT,[51] the SPT, pursuant to Article 16(1) OP, 'shall *communicate its recommendations and observations confidentially* to the State Party'. It may only *publish a mission report* upon explicit request of a State party or if the Government violates its duty of confidentiality.[52] In addition, the CAT Committee may, if a State party refuses to cooperate or to take steps to improve the situation, decide to make a *public statement* on this matter or to publish the respective report of the SPT. Although the ECPT contains similar provisions on confidentiality,[53] the general practice has emerged that most of the reports of the CPT are published in full upon request of the respective governments.[54] The same holds true for the SPT, which encourages States parties to authorize the publication, as it 'believes that publication of its visit reports reflects the spirit of transparency on which preventive visiting is based'.[55] By the end of 2016, the SPT had transmitted a total of fifty-one visit reports to States parties and NPMs, whereof twenty-four had been made public.[56]

[41] GA Res 45/112 of 14 December 1990. [42] GA Res 45/113 of 14 December 1990.
[43] Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, 27 August to 7 September 1990.
[44] GA Res 46/119 of 17 December 1991. [45] ECOSOC Res 1997/30 of 21 July 1997.
[46] GA Res 55/89 of 4 December 2000. [47] ECOSOC Res 2002/12 of 24 July 2002.
[48] ECOSOC Res 2005/20 of 22 July 2005. [49] GA Res 65/229 of 16 March 2011.
[50] Guidelines against Intimidation or Reprisals ('San Jose Guidelines') (2015) UN Doc HRI/MC/2015/6.
[51] cf above Arts 19, 20, 22 CAT. [52] See below Art 16 OP. [53] cf ECPT arts 10 and 11.
[54] See Ursula Kriebaum, *Folterprävention in Europa: Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung* (Verlag Österreich 2000) 135ff; Malcolm D Evans and others, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press 1998) 200. cf also below Art 16 OP.
[55] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, para 16.
[56] See SPT, 'Tenth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) UN Doc CAT/C/60/3, para 20.

28 The other principles mentioned in Article 2(3) OP are not elaborated on further. *Impartiality* means that the members of the SPT shall not be biased; guided by personal, economic, or political interests; and shall not become influenced by strong emotions or media interests. *Objectivity* is closely related to impartiality and means that the SPT shall report on its visits according to the facts as established in a professional, impartial, and non-biased manner. The SPT shall resist any pressure exerted by governments, NGOs, the media, and other interest groups. Finally, the principles of *universality* and *non-selectivity* signify that the monitoring of places of detention is based on a worldwide system and that the SPT, subject of course to the ratification of the OP by States, shall select the countries which it decides to visit by objective and non-selective criteria. This principle is further elaborated by Article 13(1) OP which requires the SPT to 'establish, at first by lot, a programme of regular visits to the States Parties'. In addition to *selecting countries by lot*, the SPT shall also ensure that it visits countries in different world regions and with different legal and political systems on an *equitable basis*.[57]

KERSTIN BUCHINGER

[57] cf below Art 13 OP, 3.1.

Article 3

National Preventive Mechanism

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

1. Introduction	735
2. Travaux Préparatoires	736
2.1 Chronology of Draft Texts	736
2.2 Analysis of Working Group Discussions	737
3. Issues of Interpretation	738

1. Introduction

1 Article 3 OP introduces the national visiting body of the OP's two-pillar system by obliging the States parties to set up, designate, or maintain one or more domestic visiting bodies for the prevention of torture and other ill-treatment, referred to as a national preventive mechanism (NPM). This obligation is the innovative feature distinguishing the OP from its regional counterpart, the ECPT.

2 The introduction of a national visiting body into the OP's prevention system was suggested by Mexico with the intention of weakening the SPT's mandate. This led to the establishment of the two-pillar system in conformity with the principle of subsidiarity, ie that *States have the primary responsibility for an efficient protection of human rights* and that international monitoring bodies play a supplementary role in ensuring States' compliance with their international obligations.

3 However, instead, the creation of an obligation of States parties to prevent torture and other ill-treatment by establishing NPMs has significantly strengthened the OP. Independent national entities, NPMs are in a better position than international human rights mechanisms such as the SPT to conduct regular visits to places of detention, identify the major problems and shortcomings, and follow-up on them with State authorities in a continuous dialogue.[1] NPMs have been called 'the front line of torture prevention'[2] due to their potential for regular involvement with State authorities over the implementation of an international human rights treaty.[3] The SPT has

[1] See above Art 1 OP, § 45.

[2] Statement by Mr Malcolm Evans, Chairperson of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at the seventieth session of the GA, New York, 20 October 2015.

[3] E Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention' (2014) 14 Human Rights Law Review 1, 6, referring to Elina Steinerte, 'The Changing Nature of Relationship between the United Nations Subcommittee

stated its commitment to the development of an NPM in numerous reports by noting that '[o]ne of the crucial factors preventing ill-treatment is the existence of a fully functioning system of independent visits to monitor all places where person may be deprived of their liberty'.[4] And it is for this reason that the SPT's work with NPMs in assisting them to become effective has been said to be of greatest added value to the OPCAT system.[5]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *Mexican Draft (13 February 2001)*[6]

Article 1

Each State party to the present Protocol shall establish or maintain, at the national level, a visiting mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national mechanism), which shall carry out visits to places in any territory under its jurisdiction where persons may be or are deprived of their liberty pursuant to an order of a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention), with a view to strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.

5 *US Draft (16 January 2002)*[7]

Article 1

1. (a) There shall be established, under the Committee against Torture (hereinafter referred to as the Committee), a Subcommittee on the Prevention of Torture (hereinafter referred to as the Subcommittee on Prevention) which shall carry out the functions hereinafter provided.

(b) The Subcommittee shall consist of [five] experts of recognized competence in the field of human rights, who shall serve in their personal capacity and shall, under its direction, carry out the functions herein provided.

2. Each State Party may, in furtherance of articles 2 and 16 of the Convention, establish, maintain or provide for national mechanisms to strengthen, if necessary, the protection of persons deprived of their liberty pursuant to an order of a public authority from torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as national mechanisms).

on Prevention of Torture and National Preventive Mechanisms: in Search for Equilibrium' (2013) 31 Netherlands Quarterly of Human Rights 132.

[4] SPT, 'Report on the Visit to Sweden' (2008) UN Doc CAT/OP/SWE/1, para 16; SPT, 'Report on the Visit to the Maldives' (2009) UN Doc CAT/OP/MDV/1, para 15; SPT, 'Report on the Visit to Benin' (2011) UN Doc CAT/OP/BEN/1, para 14; SPT, 'Report on the Visit to Mexico' (2010) UN Doc CAT/OP/MEX/1, para 12.

[5] Steinerte, 'The Jewel in the Crown' (n 3) 6.

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

[7] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78.

2.2 Analysis of Working Group Discussions

6 On 13 February 2001, at the second meeting of the Working Group during its ninth session from 12 to 23 February 2001, the delegation of *Mexico* introduced its alternative draft (prepared with the support of GRULAC).

7 This draft was based on the principle that *States have the primary responsibility for the protection of human rights* and that the action of the international mechanism has to be complementary to the action taken by each individual State. Thus, in the alternative draft it was proposed that States parties to the Protocol should create national mechanisms for the prevention of torture. A number of delegations from other regional groups supported the Mexican draft and appreciated Mexico's efforts.[8] During the discussions, many delegations emphasized the *complementary nature of the proposed national and international mechanisms*. Others, however, found that there was no proper balance between the national and the international levels and expressed concern that the latter seemed to become subsidiary to the former.[9] The delegations who supported the alternative draft underlined that it constituted an improvement of the original draft, supplemented by the added value of national mechanisms. National mechanisms would be in a better position to prevent torture and to visit facilities all over a country, including those located in remote areas where an international body would probably never be able to go. Some delegations recalled that it had been repeatedly recommended by the CPT to install mechanisms at the national level.[10] Some other delegations raised concern about the financial implications of creating national and international mechanisms.

8 During the tenth session of the Working Group from 14 to 25 January 2002, and after the Chairperson-Rapporteur had presented her proposal, a debate was held on the concept of the *two-pillar system*.[11] The representative of Spain on behalf of the *European Union*, the Central and Eastern European States, including Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia, in association with Cyprus, Malta, and Turkey, presented a common position. These delegations welcomed the initiative to establish a two-pillar system. Similar views were expressed by the delegations of Argentina, Canada, Ecuador, Georgia, Guatemala, Mexico, Norway, New Zealand, the Republic of Korea, the Russian Federation, South Africa, and Switzerland.

9 The delegation of *Mexico* stated that it did not insist on its proposal and that it supported the creation of a strong international visiting mechanism. The delegation of *South Africa* expressed concern that national mechanisms might shift the focus away from the efforts envisaged to achieve strong international standards of prevention against torture. The delegations of China, Cuba, Egypt, and the Syrian Arab Republic spoke in favour of the two-pillar system and emphasized the establishment of strong national mechanisms with visiting functions and an international mechanism which would mainly provide technical assistance. The delegation of the *United States of America* supported a *three-pillar system*, taking into account also the regional level, where States should be encouraged to consider adopting mechanisms that would provide for mandatory visits to places of detention such as those contained in the ECPT and its Protocol I.[12]

10 It was especially the mandatory nature of the proposed national preventive mechanisms that was first questioned by certain delegates, among them Switzerland,

[8] E/CN.4/2001/67 (n 6) para 19. [9] ibid, para 21. [10] ibid, para 28.
[11] E/CN.4/2002/78 (n 7) para 13. [12] ibid, para 17.

Denmark, Germany, and Canada, but also the United States of America, Cuba, and Japan. Others, however, like Guatemala, Argentina, and Mexico, were of the opposite view and supported the mandatory concept.[13] The Working Group finally adopted the text proposed by the Chairperson-Rapporteur. At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[14]

3. Issues of Interpretation

11 According to Article 3 OP, each State party shall 'set up, designate or maintain at the domestic level one or several visiting bodies'. This shows that the OP, in order to accommodate the different situations in States parties,[15] is leaving it open to States parties which structure their NPM has, provided it meets the Protocol's key requirements of independence, impartiality, and efficiency, as stipulated in Articles 18 and 19 OP.

12 However, the SPT has limited the States parties' flexibility by further developing these requirements in its guidelines, tools, and reports. It has increasingly elaborated which prerogatives the organizational form of the NPMs should fulfil and through which procedure the NPMs should come into being.[16]

STEPHANIE KRISPER

[13] ibid, paras 38, 40, 80. [14] See above Art 1 OP, 2.2, § 40.

[15] Malcolm D Evans and Claudine Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture' (2004) 4(1) Human Rights Law Review 19, 50; Elina Steinerte and Rachel Murray, 'Same but Different? National Human Rights Commissions and Ombudsman Institutions as National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture' (2009) (Special Issue) Essex Human Rights Review 54, 57.

[16] See Art 17 OP.

Article 4

Obligation to Allow Preventive Visits to All Places of Detention

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

1. Introduction	739
2. Travaux Préparatoires	740
2.1 Chronology of Draft Texts	740
2.2 Analysis of Working Group Discussions	742
3. Issues of Interpretation	743
3.1 Deprivation of Liberty	743
3.2 Places of Detention	745
3.3 Meaning of 'under jurisdiction and control'	749

1. Introduction

1 Article 4 is one of the key provisions of the OP, as it, first, establishes an unequivocal obligation of States parties to allow visits by both the SPT and the NPMs 'to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.

2 Second, it defines deprivation of liberty and places of detention—but not without controversy. The term 'places of detention' is noted by the provision as the generic term that all places falling within the scope of the Protocol will be referred to. This term is hence used in this Commentary for all places of deprivation of liberty that visiting bodies are allowed to visit according to Article 4 OP.[1]

[1] The Russian language text employs the term 'содержания под стражей' which literally means 'holding someone under (armed) guard'. This has been a potential stumbling block in the post-Soviet countries many of whom have inherited the Soviet system of criminal justice. In fact, in the Republic of Kazakhstan, a disagreement arose between ministries as to whether places such as care homes and children's homes could fall under the umbrella of Article 4 OP, the argument being that in such places nobody is being held under armed guard. See Human Rights Implementation Centre, ' "Deprivation of Liberty" as per Article 4 of OPCAT: The Scope' (October 2011) 1–2 <https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/deprivationofliberty.pdf> accessed 12 December 2017.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[2]

Article 1

1. A State Party to the Convention that becomes a party to the present Protocol agrees to permit visits in accordance with the terms of the present Protocol to any place (hereinafter referred to as a place of detention) subject to the jurisdiction of a State Party where persons are held who have been deprived of their liberty for any reason, including persons under investigation by the law enforcement authorities, civil or military, persons in preventive, administrative or re-educative detention, persons who are being prosecuted or punished for any offence and persons in custody for medical reasons.

2. A place of detention within the meaning of this Article shall not include any place which representatives or delegates of a Protecting Power or of the International Committee of the Red Cross are entitled to visit and do visit pursuant to the Geneva Conventions of 1949 and their additional protocols of 1977.

4 *Revised Costa Rica Draft (15 January 1991)*[3]

Article 1

1. A State Party to the present Protocol agrees to permit visits, in accordance with this Protocol, to any place within its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held.

2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and form other cruel, inhuman or degrading treatment or punishment in accordance with international standards.

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[4]

Article 1

1. A State Party to the present Protocol shall permit visits in accordance with this Protocol to any place in any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held [provided that full respect is assured for the principles of non-intervention and the sovereignty of States].

2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from [, and [to take] measures for the prevention of] torture and from other cruel, inhuman or degrading treatment or punishment in accordance with applicable international [standards], [instruments], [law].

[2] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica [1980] UN Doc E/CN.4/1409.

[3] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28.

6 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[5]

Article 1

1. The objective of this Protocol is to establish a preventive visiting mechanism to examine the treatment of persons [deprived of their liberty] [detained] with a view to recommending means for strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment [as defined under international law applicable to the State Party] [and relevant international standards].

2. Each State Party agrees to permit visits, [in principle,] in accordance with this Protocol, to [any place] [places of detention] [on any territory] under its jurisdiction [and control] where persons (may, based on reliable information [as determined by a competent and independent judicial authority of the State Party concerned] be deprived or) are [deprived of their liberty] [detained] [including structures intended or used to house or transport such persons] by [or pursuant to an order of] a public authority [or at its instigation or with its consent or acquiescence].

[3. Nothing in this Protocol will be interpreted as allowing:

(a) Visits to any civil or military facility that the State considers related to strategic national interest; or

(b) Interference in the domestic affairs of Member States in a manner which exceeds the provisions of the present Protocol.]

7 *Mexican Draft (13 February 2001)*[6]

Article 1

Each State party to the present Protocol shall establish or maintain, at the national level, a visiting mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national mechanism), which shall carry out visits to places in any territory under its jurisdiction where persons may be or are deprived of their liberty pursuant to an order of a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention), with a view to strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.

8 *EU Draft (22 February 2001)*[7]

Article 1 (new)

For the purpose of this Protocol:

(a) Deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will or by order of any judicial, administrative or other public authority;

(b) A mission includes the travel and all the activities carried out by the Sub-Committee in a State party's territory;

[5] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58.

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

[7] ibid, Annex II.

(c) A visit means the inspection of a physical facility where persons are deprived of their liberty;

(d) The Sub-Committee shall be deemed to be represented by its delegation.

Article 3 (old 1 revised)

1. The objective of this Protocol is to establish an international preventive visiting mechanism to examine the treatment of persons deprived of their liberty, with a view to recommending means for strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.

2. Each State Party agrees to permit missions by the Sub-Committee to its territory and visits to any place under its jurisdiction and control where persons are or may be deprived of their liberty.

9 *US Draft (16 January 2002)*[8]

Article 1

1. (a) There shall be established, under the Committee against Torture (hereinafter referred to as the Committee), a Subcommittee on the Prevention of Torture (hereinafter referred to as the Subcommittee on Prevention) which shall carry out the functions hereinafter provided.

(b) The Subcommittee shall consist of [five] experts of recognized competence in the field of human rights, who shall serve in their personal capacity and shall, under its direction, carry out the functions herein provided.

2. Each State Party may, in furtherance of articles 2 and 16 of the Convention, establish, maintain or provide for national mechanisms to strengthen, if necessary, the protection of persons deprived of their liberty pursuant to an order of a public authority from torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as national mechanisms).

2.2 Analysis of Working Group Discussions[9]

10 During the ninth session of the Working Group from 12 to 23 February 2001, a general discussion was held on the scope of prevention under the OP.[10] Some delegations were of the opinion that prevention should be considered in the context of the provisions of the CAT dealing specifically with prevention, for example Articles 10 and 11, and should not involve monitoring activities. At the international level, monitoring should remain in the competence of the Committee and the SRT. Many delegations, however, found that prevention activities should include visits to all places where persons were deprived of their liberty, such as prisons for men and women, police stations, psychiatric wards, detention centres for minors and immigrants, and places of detention under the control of the judicial authorities. Other delegations raised concerns about the implications of such a scope of authority for constitutional and other fundamental rights. Regarding visits to unofficial places of detention, some delegations considered that they should not be part of the preventive activities. The existence of such places constituted, per se, a violation of human rights that should be dealt with by the Committee and the SRT in the framework of their monitoring functions.

[8] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78.

[9] For the first nine sessions of the Working Group cf above Arts 1–3 OP.

[10] E/CN.4/2001/67 (n 6) paras 42ff.

11 During the tenth session of the Working Group from 14 to 25 January 2002, the delegation of *Japan* questioned the appropriateness of an international body with unlimited powers to inspect places of detention in the territory of States parties.[11] The delegation of *Egypt* strongly opposed the idea of an international mechanism with unlimited authority to visit any detention facility within a State at any time, and indicated that such unlimited authority would encounter constitutional obstacles. The delegations of *Cuba* and Egypt also suggested that States should have the possibility of refusing access to places of detention for reasons linked to national security. The Chairperson, however, pointed out that the mandate of the Working Group was to establish a preventive system of regular visits to places of detention on a universal scale and that Article 20 CAT had a clear monitoring and sanctioning function, not a preventive one. It was generally felt that the work of the Committee should not be duplicated and that the new bodies established under the OP should have different and additional functions in the field of torture prevention.

12 The Chairperson-Rapporteur's proposal in its Article 4 emphasized the general principles regarding visits.[12] In the discussion, the delegation of the *United States* of America found that the proposal would create an international Subcommittee on Torture that would have virtually unrestricted authority to visit and inspect any place where persons were or might be detained in any State party to the OP. In its view, this was incompatible with the principle of accountability and the need for reasonable checks and balances on any grant of power.[13] The US delegation referred to its alternative draft, submitted during the fifth meeting[14] of the Working Group on 16 January 2002, which further elaborated ideas presented by it during previous sessions. This draft aimed to recognize the valuable role visiting mechanisms, such as the CPT, could play at the regional level. The delegation of *Cuba* found that this proposal was too vague regarding which places of detention could be subject to visitations.

13 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by 29 votes to 10.[15]

3. Issues of Interpretation

3.1 Deprivation of Liberty

14 Article 4(2) explicitly defines deprivation of liberty as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'. This broad definition can also be found in other international standards.[16]

15 The meaning of deprivation of liberty has been subject of extensive discussions and interpretation by international human rights bodies in relation to the right to liberty in Articles 9 ICCPR and 5 ECHR. Liberty of person is understood to relate to 'freedom of

[11] E/CN.4/2002/78 (n 8) para 21.
[12] E/CN.4/2002/78 (n 8) Annex I (Proposal by the Chairperson-Rapporteur).
[13] E/CN.4/2002/78 (n 8) para 57. [14] ibid.
[15] CHR, 'Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', Res 2002/33 of 22 April 2002. See above Art 1 OP, 2.2.
[16] UNGA, 'United Nations Rules for the Protection of Juveniles Deprived of their Liberty' as revised by Res 45/113 of 14 December 1990 (Havana Rules) r 11b.

bodily movement in the narrowest sense'[17] or 'confinement to a certain limited space'.[18] The notion of deprivation of liberty contains an objective element of a person's physical confinement and a subjective element of lack of free consent.

16 Deprivation of liberty must be delimited from restriction of freedom of movement. According to the ECtHR the difference is 'one of degree or intensity, not of nature or substance'.[19] For the interpretation of deprivation of liberty, the concrete situation is the starting point and account to be taken 'of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'.[20] Factors to be assessed are 'the existence of a possibility of leaving the restricted area, the degree of supervision and control over the person, his or her is isolation, [sic] and the availability of social contacts'.[21]

17 As to the subjective criterion, the Human Rights Committee stated in its General Comment No 35 that deprivation of personal liberty pursuant to Article 9 ICCPR is 'without free consent';[22] so did the Working Group on Arbitrary Detention.[23] The ECtHR has elaborated that the ability of the person concerned to leave the alleged place of detention must not be only a theoretical one.[24] However, the ECtHR has cautioned putting too much focus on the subjective element, holding that

> the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he [the applicant] may have given himself up to be taken into detention, especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.[25]

[17] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 212.

[18] See Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (Verlag CH Beck 2014) 65.

[19] *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980) para 93; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) para 314; *Stanev v Bulgaria* [GC] App no 36760/06 (ECtHR, 17 January 2012) para 115.

[20] *Khlaifia and Others v Italy* [GC] App no 16483/12 (ECtHR, 15 December 2016) para 64 referring to *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 42; and *Stanev v Bulgaria* (n 19) para 115; *Engel and others v the Netherlands* (1976) Series A no 22, paras 58-59; *Gillan and Quinton v the United Kingdom* App no 4158/05 (ECtHR, 12 January 2010) para 56; *Guzzardi v Italy* (n 19) para 92; *Medvedyev and Others v France* [GC] App no 3394/03 (ECtHR, 29 March 2010) para 73; *Creangă v Romania* [GC] App no 29226/03 (ECtHR, 23 February 2012) para 91; *Austin and Others v the United Kingdom* [GC] App nos 39692/09, 40713/09, and 41008/09 (ECtHR, 15 March 2012) para 59.

[21] *Guzzardi v Italy* (n 19) para 95.

[22] HRC, 'General Comment No 35 on Article 9 (Liberty and Security of Person)' (2014) UN Doc CCPR/C/GC/35, para 6.

[23] Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court [2015] UN Doc A/HRC/30/37, para 9.

[24] In respect of asylum claimants restricted, on arrival in airports, to particular zones or holding areas, the Commission considered that, since they were able to leave the airport by taking a plane elsewhere, they were not in fact deprived of their liberty. The Court in *Amuur v France* (n 20), however, found that the mere fact that an asylum seeker may leave the country does not exclude a deprivation of liberty, since this may be only a theoretical possibility if no other country is offering the protection which they seek or is prepared to take them in. Thus an asylum seeker held in restricted conditions for an extended period of time may claim to be deprived of liberty. Short periods while practical matters were arranged, eg, repatriation or granting of asylum, would only constitute a restriction of movement. Where applicants' asylum claims were rejected within a few days, they retained their passports and were not under any supervision or surveillance, the Court found that they were not to be regarded as detained in the transit zone, citing Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (5th edn, Sweet & Maxwell 2015) 430.

[25] *HL v the United Kingdom* App no 45508/99 (5 October 2004) para 90; also *De Wilde, Ooms, and Versyp v Belgium* App nos 2832/66, 2835/66 and 2899/66 (18 June 1971) paras 64–65; *Stanev v* Bulgaria (n 19) para 119; *Storck v Germany* App No 61603/00 (ECtHR, 16 June 2005).

As to custodial settings or placement in hospital, it is for the ECtHR also not decisive if the applicant showed lack of consent, eg by attempts to abscond.[26] However, while a lack of legal capacity does not necessarily lead to the conclusion the person concerned cannot understand and hence consent to the situation,[27] a person may, in certain situations, validly replace the wish of a person with impaired mental faculties, 'acting in the context of a protective measure'.[28]

3.2 Places of Detention

18 As to the interpretation of Article 4 OP, it is worth noting that the second sentence of Article 4(1) reads: 'These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.' This sentence reflects the principle of prevention underlying the OP. Regarding the scope of Article 4 OP, the SPT noted that 'the term "places of detention", as found in article 4 of the Optional Protocol, should be given a broad interpretation'.[29] In its Compilation of Advice, the SPT concretized that '[t]he preventive approach which underpins the OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM'.[30]

19 As Article 4(1) OP obliges States parties to also allow visits to any place where persons 'may be deprived of their liberty', a place falls within the scope of the SPT's and NPM's visiting mandate when the SPT or the NPM considers that a person might be deprived of his/her liberty. Therefore, it is only necessary that a place have the potential to de facto limit the right of personal liberty.

20 Article 4 OP explicitly refers to a 'public or private custodial setting'. The relevant provisions in the two paragraphs of Article 4 seem, however, to contain certain

[26] In the case of a mentally incapacitated person kept in hospital as a 'voluntary patient', the ECtHR found a deprivation of liberty as the applicant was under continuous supervision and control and not free to leave; the Court did not consider it decisive that the applicant was compliant and never sought to leave- see Reid (n 244) referring to *HL v the United Kingdom* (n 25) paras 82–89. See also *Storck v Germany* (n 25) where even if initially compliant, the applicant showed her lack of consent by attempts to abscond.

[27] *Shtukaturov v Russia* App no 44009/05 (ECtHR, 27 March 2008), paras 107–09; *Stanev v Bulgaria* (n 19); *DD v Lithuania* App no 13469/06 (ECtHR, 14 February 2012) para 150.

[28] In the *Stanev* Case—unlike in the *HM* Case where the applicant was placed in a nursing home purely in her own interest and where, after her arrival there, she agreed to stay—domestic law attached a certain weight to an individual's wishes in connection with his placement and the applicant appeared to be well aware of his situation. Moreover, he explicitly expressed his desire to leave the home, both to psychiatrists and through his applications to the authorities to have his legal capacity restored and to be released from guardianship. At no point had he, either expressly or tacitly, agreed to his placement in the home; in Grabenwarter (n 18) 67; 'the Court noted that the applicant was required to live a long distance from his home, that he needed permission to leave, that on occasion he had been returned to the institution against his will, and that key aspects of his life were subject to the long-term control of the institution. The Court left open whether placements of persons under legal incapacity in care homes disclosed in general a deprivation of liberty for which the state was liable, emphasizing that in the particular case the guardianship and care arrangements had been state-imposed and organised and thus falling under its responsibility'; in Reid (n 24) 432 referring to *Stanev v Bulgaria* (n 19) paras 121–32.

[29] SPT, 'Sixth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc CAT/C/50/2, para 67.

[30] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, Annex on 'Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms, para 2. See also SPT, 'Report on the National Preventive Mechanism Advisory Visit to Ecuador' (2015) UN Doc CAT/OP/ECU/2, para 51.

contradictions and are in need of interpretation. Article 4(1) contains an explicit obligation of States parties to allow visits to any place under its jurisdiction and control where persons are or may be deprived of their liberty, 'either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence' while Article 4(2) omits reference to consent or acquiescence by the public authority. However, a systematic interpretation of both provisions, in accordance with the object and purpose of the treaty to provide a comprehensive monitoring of all places of detention, requires that they, as the SPT stated, 'need to read consistently together and … place within the scope of the Optional Protocol any public or private custodial setting'.[31] The SPT noted that an interpretation that is limited to 'such traditional places of deprivation of liberty as prisons would be overly restrictive and, in the view of the Subcommittee, clearly contrary to the Optional Protocol'.

21 The SPT interpreted the application of the terms 'consent' and 'acquiescence' in Article 4(1) OP to mean that the scope of the OP includes

> any place in which a person is deprived of liberty (in the sense of not being free to leave), or where it considers that a person might be being deprived of their liberty, if it relates to a situation in which *the State either exercises, or might be expected to exercise a regulatory function*.[32]

In other words, the conduct of regulating—or the fact that the State should be regulating—creates again the link between the public authority and the place of deprivation of liberty.[33] This limits the scope of Article 4 OP regarding purely private places of detention to situations in which individuals are detained by private groups when State authorities are aware of it and fail to exercise due diligence to prevent such detention.[34] For example, if the police are aware of the fact that private paramilitary groups are holding people in detention and do nothing in their power to prevent this, they become complicit by acquiescence and the SPT or relevant NPM must be granted access to these facilities. The same holds true for private hospitals or nursing homes, which hold persons against their will with the mere knowledge and consent of a public authority. In any case, the visiting bodies must be granted access to detention facilities which governments have outsourced to private companies.

22 Such a broad interpretation of the scope of Article 4 OP is in line with the CPT's understanding of the scope of its mandate pursuant to Article 2 ECPT:[35]

> Visits may be organised in all kinds of places where persons are deprived of their liberty, whatever the reasons may be. The Convention is therefore applicable, for example, to places where persons are held in custody, are imprisoned as a result of conviction for an offence, are held in

[31] CAT/C/57/4 (n 30), para 1. It may be noted that also the comparable provision for the CPT in Article 2 ECPT, that stays behind Article 5 OP by not explicitly referring to a 'public or private custodial setting', was interpreted in the Explanatory Report in the sense that '[v]isits may be carried out in private as well as public institutions'; in CPT, 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Text of the Convention and Explanatory Report', CPT/Inf/C (2002) 1, para 32.

[32] CAT/C/57/4 (n 30) para 3.

[33] The Health and Disability Commissioner, *Residential Aged Care: Complaints to the Health and Disability Commissioner: 2010–2014* (Health and Disability Commissioner 2016) 20 <https://www.hdc.org.nz/media/2700/residential-aged-care-report.pdf> accessed 12 December 2017.

[34] CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2, para 18.

[35] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987) ETS 126 (ECPT) Art 2: 'Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority.'

administrative detention, or are interned for medical reasons or where minors are detained by a public authority. Detention by military authorities is also covered by the Convention.[36]

23 It may be noted that also the comparable provision for the CPT in Article 2 ECPT was interpreted in the Explanatory Report in the sense that

> [v]isits may be carried out in private as well as public institutions. The criterion is whether the deprivation of liberty is the result of action by a public authority. Accordingly, the Committee may carry out visits only in relation to persons who are deprived of their liberty by a public authority, and not voluntary patients. However, in the latter case, it should be possible for the Committee to satisfy itself that this was indeed the wish of the patient concerned.[37]

24 While the term 'places of detention' is to be interpreted extensively and an exhaustive list cannot be made, it should include, inter alia:[38]

- prisons
- police stations
- pre-trial detention centres
- all detention centres under military jurisdiction[39]
- psychiatric institutions[40] and mental health centres including clandestine clinics that 'treat' homosexuality[41]

[36] Explanatory Report (n 31), para 30. [37] ibid, para 32.

[38] CAT/C/50/2 (n 29) para 67; CCPR/C/GC/35 (n 22) para 5; for the Working Group on Arbitrary Detention, deprivation of liberty includes 'placing individuals in temporary custody in protective detention or in international or transit zones in stations, ports and airports, house arrest, rehabilitation through labour, retention in recognized and non-recognized centres for non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, and internally displaced persons, gathering centres, hospitals, psychiatric or other medical facilities or any other facilities where they remain under constant surveillance, given that may not only amount to restrictions to personal freedom of movement but also constitute the de facto deprivation of liberty. It also includes detention during armed conflicts and emergency situations, administrative detention for security reasons, and the detention of individuals considered civilian internees under international humanitarian law': A/HRC/30/37 (n 23) para 9; see the ECHR on Institutions for psychiatric care and social services: *De Wilde, Ooms, and Versyp v Belgium* (n 25); *Nielsen v Denmark* App no 10929/84 (ECtHR, 28 November 1988); *HM v Switzerland* App no 39187/98 (ECtHR, 26 May 2002); *HL v the United Kingdom* (n 25); *Storck v Germany* (n 25); *A and Others v Bulgaria* App no 51776/08 (ECtHR, 29 November 2011); international zones in airports: *Amuur v France* (n 24); *Shamsa v Poland* App nos 45355/99 and 45357/99 (ECtHR 27 November 2003); *Mogos v Romania* App no 20420/02 (ECtHR, 13 October 2005); *Mahdid and Haddar v Austria* App no 74762/01 (ECtHR, 8 December 2005); *Riad and Idiab v Belgium* App nos 29787/03 and 29810/03 (ECtHR, 24 January 2008); interrogation in police stations: *II v Bulgaria* App no 44082/98 (ECtHR, 9 June 2005); *Osypenko v Ukraine* App no 4634/04 (ECtHR, 9 November 2010); *Salayev v Azerbaijan* App no 40900/05 (ECtHR, 9 November 2010); *Farhad Aliyev v Azerbaijan* App no 37138/06 (ECtHR, 9 November 2010); *Creangă v Romania* (n 20): *Mancini v Italy* App no 44955/98 (ECtHR, 2 August 2001); *Lavents v Latvia* App no 58442/00 (ECtHR, 28 November 2002); *Nikolova v Bulgaria* (No 2) App no 40896/98 (ECtHR, 30 September 2004); *Dacosta Silva v Spain* ECHR 2006-XIII; confinement in an 'open prison': *Foka v Turkey* App no 28940/95 (ECtHR, 24 June 2008) para 78; *Gillan and Quinton v the United Kingdom* (n 20) para 57; *Shimovolos v Russia* App no 30194/09 (ECtHR, 21 June 2011) para 50; *Brega and Others v Moldova* App no 61485/08 (ECtHR, 24 January 2012) para 43; *Brega v Moldova* App no 52100/08 (ECtHR, 20 April 2010) para 43; confinement during crowd control efforts': *Austin and Others v the United Kingdom* (n 20).

[39] CAT/OP/ECU/2 (n 30) para 51; SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Netherlands: Recommendations and Observations Addressed to the State Party' (2016) UN Doc CAT/OP/NLD/1.

[40] CAT/OP/ECU/2 (n 30) para 51. [41] ibid; CAT/OP/NLD/1 (n 39).

- social care institutions[42] and welfare homes[43] including homes for elderly persons[44] and facilities for the care of persons with dementia[45]
- juvenile detention centres[46]
- homes for the young, foster homes, institutions for children with disabilities, and other family residences[47] institutions for educational supervision, for children who are using drugs or alcohol, as well as orphanages
- migrant detention centres including at so-called 'hotspots'—major places of entry[48] and confinement to a restricted area of an airport[49]

25 In the State party to visit, *country-specific types of detention* as 'witch camps' or slum communities[50] may be also places of detention to visit. It may, however, be noted that the SPT stated that '[i]n any situations, the NPM ought also to be mindful of the principle of proportionality when determining its priorities and the focus of its work.'[51] This statement does not suggest a prioritization of traditional places over such that fall under Article 4 OP only because of due diligence obligations; it seems only to intend to clarify that just because a facility fits within the visiting mandate of OP, this does not mean that it should be a priority in its preventive monitoring framework.[52]

26 Also *mobile places* such as means of transport are also understood as places of detention. The SPT also noted that 'the place-based nature of inspecting can miss system-wide problems which require an intersectional approach. It can also fail to monitor instances along the chain of custody, such as transfers and periods of detention immediately after apprehension, where torture and ill-treatment can take place.'[53] The SPT recommended that

> the State party ensure that all places of detention are included in NPM visits, in accordance with the SPT's evaluation that all persons deprived of their liberty in a State party are covered by the OPCAT. This includes … periods of deprivation of liberty during apprehension, transfer and removal.[54]

[42] CAT/C/50/2 (n 29) para 67. [43] CAT/OP/ECU/2 (n 30) para 51; CAT/OP/NLD/1 (n 39).

[44] Murray R and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 76.

[45] SPT, 'Report on the Visit to New Zealand' (2014) UN Doc CAT/OP/NZL/1, para 16. It is worth noting that the Inter-American Commission's Principles observe that the category of persons covered by the definition of deprivation of liberty 'includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centres for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty'; Inter-American Commission on Human Rights, 'Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas' (approved by the Commission during its 131st regular period of sessions, March 3–14, 2008) General Provision.

[46] CAT/C/50/2 (n 29) para 67. [47] Murray and others (n 44) 76.

[48] SPT, 'Report on the Visit to Italy' (2016) UN Doc CAT/OP/ITA/1 paras 49 and 51(a) recommended that the State party 'urgently ensure internal and external independent monitoring, including through the NPM, of the immigration facilities … to guarantee its actions are in compliance with international human rights law and standards, including the prevention of torture and ill-treatment'. The 'hotspots' intended to ensure that all migrants are duly 'registered' when entering the country, ie deprivation of liberty of individuals has the sole purpose of collecting biometric data, such as fingerprinting: ibid, para. 30.

[49] ibid, referring to HRC, 'Concluding Observations: Belgium' (2004) UN Doc CCPR/CO/81/BEL para 17 (detention of migrants pending expulsion).

[50] CCPR/C/GC/35 (n 22) para 30. [51] CAT/C/57/4 (n 30) para 3.

[52] The Health and Disability Commissioner (n 33) 20. [53] CAT/OP/NLD/1 (n 39) para 42.

[54] ibid, para 45.

Hence, in accordance with CAT General Comment No 2, the OP also covers police cars and other means by which individuals are transferred.[55] Such deprivation of liberty may be particularly problematic in the context of immigration processes, eg during transfers, disembarkation, and expulsion, as the persons concerned are under high stress and in a very vulnerable situation.[56]

3.3 Meaning of 'under jurisdiction and control'

27 Article 4 OP indisputably obliges States parties to allow visits to places of detention within their territory,[57] including dependencies and overseas territories if the States parties do not limit the reach of the OPCAT at the time of ratification or accession.[58] Any effort to exclude the application of the OP from airports, seaports, islands or border posts—possibly by declaring them 'international zones'—would thus be an act of bad faith not permitted by the rules of international law.

28 Regarding extraterritorial obligations, a strict literal interpretation of the English version of Article 4 OP would come to the result that the place of detention must be under both the 'jurisdiction and control'[59] of the State party in order for the OPCAT to be applicable. The Spanish version reads 'jurisdicción y control', the Russian 'под его юрисдикцией и контролем', the Arabic 'يخضـع لولايتها ولسيطرتها' and the Chinese '管辖和控制下'. However, the French version of the text, which is equally authentic,[60] is formulated 'sous sa jurisdiction *ou* son contrôle' (ie, 'under jurisdiction *or* control').[61]

29 This discrepancy is solved by a systematic interpretation in accordance with the ordinary meaning of the terms in the context and in the light of the object and purpose of the OP.[62] As elaborated for the preamble of the OP,[63] the implementation of the OPCAT is to be seen as an effective preventive measure that Articles 2(1) and 16(1) CAT oblige States parties to the CAT to undertake. In regards to the geographical scope of application of the obligation to prevent torture, the CAT Committee stated that the Convention

[55] CAT/C/GC/2 (n 34) para 19; see also CCPR/C/GC/35 (n 22) para 5, referring to *Delia Saldías de López v Uruguay*, No 52/1979, in HRC, 'Selected Decisions Under the Optional Protocol' (1985) UN Doc CCPR/C/OP/1, 88, para 13.

[56] The SPT noted in its mission report on Italy that it was deeply concerned at the absence of an independent monitoring mechanism to regularly oversee, among immigration facilities, transfers, disembarkation, and expulsion processes and recommended that the State party 'urgently ensure internal and external independent monitoring, including through the NPM, of the immigration … processes': CAT/OP/ITA/1 (n 48) paras 49 and 51(a).

[57] See also Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art 29.

[58] Murray and others (n 44) 78 referring to Art 29 VCLT (n 577), citing as example Denmark having excluded the Faroe Islands when ratifying in 2004, but having removed this restriction in 2005 before the OPCAT had entered into force. New Zealand excluded Tokelau from OPCAT when ratifying in 2007. The Netherlands ratifies only for the European part of the Kingdom. See also CAT/OP/NLD/1 (n 39) para 40, with reference to CAT, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Netherlands' (2013) UN Doc CAT/C/NLD/CO/5-6, para 28; CED, 'Concluding Observations on the Report Submitted by the Netherlands under Article 29, Paragraph 1, of the Convention' (2014) UN Doc CED/C/NLD/CO/1, paras 24–25.

[59] Art 4 OP. [60] See Art 37(1) OP.

[61] See also University of Bristol, 'The Optional Protocol to the UNCAT: Preventive Mechanisms and Standards: Conference Report, Report on the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT)' (2007) 34 <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/apr2007conference.pdf> accessed 12 December 2018.

[62] VCLT (n 577) art 31(1). [63] See Preamble OP.

applies at all times and in any territory under a Contracting State's jurisdiction which is to be understood to 'include all areas under the effective de facto control of the State party, by whichever military or civil authorities such control is exercised' and 'all persons under the effective control of its authorities, of whichever type, wherever located in the world'.[64]

30 In this sense, the SPT stated in its Guidelines for the definition of the OPCAT's geographical scope of application:

> The State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction. For these purposes, the jurisdiction of the State extends to all those places over which it exercises effective control.[65]

31 As 'effective control' is a vague term, its boundaries are not clear-cut.[66] It must be noted that the threshold for deciding whether or not effective control is executed is relatively high by the UN Human Rights Committee as well as the European Court of Human Rights. They have observed that a State has to exercise a degree of 'effective control over an area' or 'overall effective control'[67] over such a territory. Also the ICJ requires either territorial control or the exercise of sovereign rights in occupied territories.[68]

32 Therefore, only situations of effective territorial control are clear-cut. Such are cases in which an individual is detained on a military base or in premises over which the foreign State has control, eg 'diplomatic and consular premises and prisons'.[69] Hence, States parties exercising jurisdiction and control outside their own territories over places of detention, such as the Russian authorities in the Transnistrian region of Moldova or Georgian authorities in Abkhazia and Tskhinvali regions in Georgia, are under an obligation to allow visits of the UN Subcommittee and the respective NPMs.[70] In this sense, a State party can also not evade its responsibility by detaining persons extraterritorially,

[64] CAT, 'Conclusions and Recommendations of the Committee against Torture: United States of America' (2006) UN Doc CAT/C/USA/CO/2, paras 14, 15, 20.

[65] SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 24. See also para 33: 'The NPM should establish a work plan/programme which, over time, encompasses visits to all, or any, suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within the jurisdiction of the State. For these purposes, the jurisdiction of the State extends to all those places over which it exercises effective control.'

[66] As stated by the Parliamentary Assembly of the Council of Europe 'the extent to which Contracting parties must secure the rights and freedoms of individuals outside their borders, is commensurate with the extent of their control'. Parliamentary Assembly, Areas where the European Convention on Human Rights cannot be implemented, Doc 9730, 11 March 2003, para 45.

[67] See eg ICCPR, 'General Comment No 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 10. See also *Loizidou v Turkey* (Preliminary Objections) (1995) Series A No 310, paras 62–64; *Cyprus v Turkey* App no 25781/94 (ECtHR 10 May 2001) para 77; and *Bankovic and Others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom* App no 52207/99 (ECtHR, 12 December 2001) para 71.

[68] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para 112.

[69] Murray and others (n 44) 79, referring to the UK House of Lords interpreting the reference to 'within the jurisdiction' of the State in Article 1 ECHR to cover detention facilities at a British military base in Iraq. *Al-Skeini and Others (Respondents) v Secretary of State for Defence (Appellant), Al-Skeini and others (Appellants) v Secretary of State for Defence (Respondent) (Consolidated Appeals)* [2007] UKHL 26.

[70] See on extra-territoriality also Murray and others (n 44) 79–81. On the notion of 'territory under its jurisdiction' see also above Arts 2, 4.1.2; APT, *Application of OPCAT to a State Party`s Places of Military Detention Located Overseas* (Legal Briefing Series 2009); cf eg E/CN.4/2006/120, para 11: 'The particular status of Guantánamo Bay under the international lease agreement between the United States and Cuba and under United States domestic law e.g. does not limit the obligations of the United States under international human

eg asylum-seekers in extraterritorial processing centres or rejected asylum-seekers in 'regional protection areas' pending return to their countries of origin.[71]

33 The presented definition of scope means that *a contrario* the authorities have no obligation to provide access to places of detention which are under their jurisdiction, but not under their *effective control*. If parts of a State's territory are occupied by another State, such as Nagorno Karabakh, which de jure is part of Azerbaijan, but is currently occupied by Armenia, or under the de facto *control of insurgent groups*, such as certain areas controlled by the Daesh in Syria or Iraq, or governed by de facto *authorities*, such as the territories of Abkhazia and Tskhinvali region in Georgia, the respective governments are not required to provide access to the places of detention in such territories. This does not, however, absolve the governments from their responsibility under international law.

34 It may be noted, however, that the SPT visited areas in the Ukraine in 201 which the Ukraine calls 'uncontrolled territories'; it met with the de facto authorities in Donestk and attempted to visit places of detention under their effective control. As these authorities are not States Parties to the OPCAT, the legal basis for the SPT was that these areas were under the legal jurisdiction of the Ukraine, even though not under its control. Hence, the SPT has, in its practice, reflected the 'jurisdiction *or* control' approach.[72]

35 The SPT elaborated on the issue of 'cross-border monitoring of persons in detention' in such a situation where 'a State party to the Optional Protocol (a sending State) enter into an arrangement under which those detained by that State are to be held in facilities located in a third State (a receiving State)'.[73] The SPT was confronted with the issue in the case of places of detention that are under the jurisdiction and control of a State party, but are being leased by other States and accommodating persons detained by those States.[74] It considered that the sending State should ensure that such an agreement also provides for its NPM to have the legal and practical capacity to visit those detainees in accordance with the provisions of the OP and the Subcommittee Guidelines.[75] In addition, the NPM of the receiving State should also have the capacity to visit those in detention on the basis of such agreements, 'as a natural consequence of its general right to visit all those deprived of their liberty on the basis of public authority and under the jurisdiction and control of the State party'.[76] After the visits, both NPMs should be able to present their recommendations and 'enter into a preventive dialogue with the authorities of both the sending and receiving State. The agreement entered into between the sending and receiving States should provide for that and should permit the variation of its terms in the light of the recommendations made'.[77]

rights law towards those detained there. Therefore, the obligations of the United States under international human rights law extend to the persons detained at Guantánamo Bay.'

[71] Alice Edwards, 'The Optional Protocol to the Convention against Torture and the Detention of Refugees' (2008) 57 The International and Comparative Law Quarterly 789, 816–820.

[72] SPT, 'Report on the Visit to Ukraine Undertaken from 19 to 25 May and from 5 to 9 September 2016: Observations and Recommendations Addressed to the State Party' (2017) UN Doc CAT/OP/UKR/3, para 8.

[73] CAT/C/57/4 (n 30) para 26; the Norgerhaven prison in the Netherlands which is operated by the Norwegian authorities can be taken as an example: <https://www.sivilombudsmannen.no/wp-content/uploads/2017/05/2016-Norgerhaven-prison-Visit-report-EN.pdf> accessed 12 December 2017.

[74] CAT/OP/NLD/1 (n 39) para 44. [75] CAT/C/57/4 (n 30) para 26. [76] ibid, para 28.

[77] ibid, paras 27 and 29; in the case of the Norgerhaven prison, Norwegian NPM have visited it, but not together with the Dutch NPM.

36 However, if a State Party sends a person to a detention facility in a non-State party, the possibility of its NPM to visit such detention facilities may depend on the bilateral or multilateral agreement underpinning the arrangement, as a non-State party has no obligations to cooperate with the OPCAT mechanisms. Whenever the result of such arrangement is that the SPT or the sending State's NPM is inhibited from accessing a detention facility, such lack of access would bring the sending State into breach of its obligation to act in good faith, as such schemes undermine the object and purpose of the OPCAT.

37 As removal falls under the application of Article 4 OP, non-voluntary deportation processes are seen as being covered by the mandate of the SPT and NPMs even beyond the territory of the State party as long as the latter retains at least partially effective control of detainees, 'for instance, when a deportation process is subject to the orders of an airline captain, who is also able to assert some authority over the transfer'.[78] It is important that aircraft used for repatriation flights is registered in the removing country so that it remains under the jurisdiction of the removing state until touchdown (and handover). As it is on handover that much abuse actually occurs, the receiving state ought to be an OPCAT state with an NPM able to monitor the reception.

38 If the NPM is refused access to places of detention, as a result of a lack of information by the concerned authorities on the notion of 'person deprived of liberty' under the OP, the SPT finds it important that 'an investigation for obstruction of public duties, of whatever figure exists in the country to address such a problematic, be carried out efficiently and effectively'.[79]

STEPHANIE KRISPER

[78] APT, *National Preventive Mechanisms: Monitoring the Forces Deportation Flights of Migrants* (OPCAT Briefings 2012); Murray and others (n 44) 75: 'It could extend as far as places within airports or on airplanes where there have been allegations of extraordinary rendition.'

[79] SPT, 'Report on the Visit to Brazil' (2012) UN Doc CAT/OP/BRA/1, para 101.

PART II

SUBCOMMITTEE ON PREVENTION

Article 5

Size and Composition of the Subcommittee on Prevention

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.

2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.

3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.

4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.

5. No two members of the Subcommittee on Prevention may be nationals of the same State.

6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

1. Introduction	755
2. Travaux Préparatoires	756
2.1 Chronology of Draft Texts	756
2.2 Analysis of Working Group Discussions	759
3. Issues of Interpretation	762
3.1 Size of the SPT	762
3.2 Composition of the SPT	762
3.2.1 Professional Experience	762
3.2.2 Equitable Geographical Distribution	763
3.2.3 Balanced Gender Representation	764
3.2.4 Independence and Impartiality	764

1. Introduction

1 The SPT is a UN treaty monitoring body, *initially consisting of ten independent experts*, a number equal to its parent body, the CAT Committee. Taking into account the considerable workload with an increasing number of States parties to be visited by the SPT, the drafters stipulated that the *number of its members shall be increased to twenty-five after the fiftieth ratification or accession*.[1]

[1] After Switzerland's ratification on 24 September 2009, the number of members of the SPT increased to twenty-five.

2 Similar to other UN treaty bodies, the composition of the SPT shall reflect a gender balance, equitable geographic distribution, and the representation of different forms of civilization and legal systems. In addition, the members shall be independent and impartial experts with professional experience in fields relevant to the administration of justice and the treatment of detainees.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[2]

Article 4

1. The Committee shall be composed of 10 members until such time as there are not less than 25 States Parties to the present Protocol. Thereafter, the Committee shall be composed of 18 members.

2. The members of the Committee shall be persons of high moral character and recognized competence in the field of human rights and in the matters dealt with in the Convention and the present Protocol.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 6

1. The members of the Committee shall be elected for a term of four years. However, at the first election half of the members shall be elected for two years. Thereafter, elections shall be held every two years for half of the members of the Committee.

2. Initially the Committee shall not include more than two members from the same State. When there are more than 10 States Parties to the present Protocol, the Committee shall not include more than one member from the same State, save that members elected while there were 10 States Parties or less shall continue to serve for the unexpired portion of their term.

3. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the different legal systems.

4 *Revised Costa Rica Draft (15 January 1991)*[3]

Article 4

1. The Subcommittee shall consist of a maximum of 25 members. While there are less than 25 States Parties to the present Protocol, the number of members of the Subcommittee shall be equal to that of the States Parties.

2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of prison or police administration or in the various fields relevant to the treatment of persons deprived of their liberty or in the field of the international protection of human rights.

[2] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[3] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

3. No two members of the Subcommittee may be nationals of the same State.

4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

Article 6

1. The members of the Subcommittee shall be elected for a period of four years. However, among the members elected at the first election, the terms of five members, to be chosen by lot, shall expire at the end of two years.

2. In the election of the members of the Subcommittee, consideration shall be given to equitable geographical distribution of membership, to a proper balance among the various fields of competence referred to in article 4, paragraph 2, and to the representation of different traditions and legal systems.

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[4]

Article 4

1. The Sub-Committee shall consist of [number to be inserted] members. After the [number to be inserted] accession to the present Protocol, the number of members of the Sub-Committee shall increase to [number to be inserted].

2. The members of the Sub-Committee shall be chosen from among persons of high moral character, having proven professional experience in the field of administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3. No two members of the Sub-Committee may be nationals of the same State.

4. The members of the Sub-Committee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Sub-Committee effectively.

6 *Text of the Articles which Constitute the Outcome of the Second Reading (26 March 1999)*[5]

Article 4

1. The Subcommittee shall consist of 10 members. After the fiftieth accession to the present Protocol, the number of members of the Subcommittee shall increase to 25.

2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3. No two members of the Subcommittee may be nationals of the same State.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1995) UN Doc E/CN.4/1996/28, Annex I; see also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25, Annex.

[5] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session (1998) UN Doc E/CN.4/1999/59, Annex I.

4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

Article 6

4. In the election of the members of the Subcommittee, primary consideration shall be given to the fulfillment of the requirements and criteria of article 4. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 4, to equitable geographical distribution of membership and to the representation of different forms of civilization and legal systems of the States Parties.

5. Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

7 *Mexican Draft (13 February 2001)*[6]

Article 9 (former Article 4)

1. The Subcommittee shall consist of 10 members. After the fiftieth accession to the present Protocol, the number of members of the Subcommittee shall increase to 25.

2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3. No two members of the Subcommittee may be nationals of the same State.

4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

Article 11 (former Article 6)

4. In the election of the members of the Subcommittee, primary consideration shall be given to the fulfillment of the requirements and criteria of article 4. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 4, to equitable geographical distribution of membership and to the representation of different forms of civilization and legal systems of the States Parties.

5. Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

8 *EU Draft (22 February 2001)*[7]

Article 5 (former Article 4)

1. The Subcommittee shall consist of 10 members. After the fiftieth accession to the present Protocol, the number of members of the Subcommittee shall increase to 25.

2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

[6] E/CN.4/2001/WG.11/CRP.1.

[7] E/CN.4/2001/WG.11/CRP.2.

3. No two members of the Subcommittee may be nationals of the same State.

4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

Article 7 (former Article 6)

The members of the Subcommittee shall be elected in the following manner:

4. In the election of the members of the Subcommittee, primary consideration shall be given to the fulfillment of the requirements and criteria of article 4. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 4, to equitable geographical distribution of membership and to the representation of different forms of civilization and legal systems of the States Parties.

5. Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

9 *US Draft (16 January 2002)*[8]

Article 1

1. (a) There shall be established, under the Committee against Torture (hereinafter referred to as the Committee), a Subcommittee on the Prevention of Torture (hereinafter referred to as the Subcommittee on Prevention) which shall carry out the functions hereinafter provided.

   (b) The Subcommittee shall consist of [five] experts of recognized competence in the field of human rights, who shall serve in their personal capacity and shall, under its direction, carry out the functions herein provided.

2. Each State Party may, in furtherance of Articles 2 and 16 of the Convention, establish, maintain or provide for national mechanisms to strengthen, if necessary, the protection of persons deprived of their liberty pursuant to an order of a public authority from torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as national mechanisms).

Article 5

The members of the Subcommittee on Prevention shall be elected in the same manner as members of the Committee referred to in paragraphs 2 to 6 of article 17, consideration being given to equitable geographical distribution and to the usefulness of the participation of persons having professional experience in the field of administration of justice, criminal law, prison or police administration, or in the various medical fields relevant to the treatment of persons deprived of their liberty.

2.2 Analysis of Working Group Discussions

10 During the first session of the Working Group, held from 19 to 30 October 1992,[9] the issues of composition and structure of the SPT were discussed under Articles 2 and

[8] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session (2002) UN Doc E/CN.4/2002/78, Annex II E.

[9] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28.

4 to 7. Most delegations supported the principle of cooperation as being essential to the system envisaged by the Protocol.

11 The general trend of interventions considered that the eventual determination of the appropriate *number of members* should take into account all the relevant factors, including the workload of the body, the number of States parties, requisite qualifications of members, and financial matters. Many delegations considered that a maximum number of twenty-five members for the composition of the SPT was too high. Alternative proposals on the appropriate number of members were put forward based on other human rights treaty bodies and having regard for the potential financial implications of a large body. It was stated that the SPT would be able to rely on assistance from experts for missions and that a large number of members would, thus, not be necessary. Other delegations pointed out that, with regard to the comparison with other UN instruments, existing bodies were essentially committees which operated in meetings and conferences, whereas the body established under the Protocol would work in the field. They referred to the example of the CPT, which has one member per State party as well as experts, for the fulfilment of comparable responsibilities in a narrower framework.

12 With regard to paragraph 2, the trend of interventions emphasized the need to promote the election of persons with the greatest competence and the widest range of *professional qualifications* in relevant fields. It was stated that the present formulation could preclude the election of persons with professional qualities closely related to the needs of the body to be established. This included judges, lawyers, or academics, who might have solid experience in matters of concern but had not been 'administrators' in the field of police or prisons. A number of specific qualities were raised for consideration:

- to add the words 'with recognized competence in the field of human rights';
- relevant professional or legal experience in the treatment of persons deprived of their liberty;
- recognized competence in investigative work;

recognized ability to engage in constructive dialogue at a high level.

Most delegates saw the need for a wide range of different qualifications to be encompassed among the membership of the SPT.[10]

13 During the second session of the Working Group from 25 October to 5 November 1993,[11] it continued to consider Article 4. Concerning paragraph 1, the Working Group agreed to change the wording of the paragraph in such a way as to allow for an *increase in membership* at a later stage but at the same time not require the number of members to equal that of the States parties. To that effect, the wording of the second sentence of paragraph 1 was changed to read as follows: 'After the [number to be inserted] accession to the present Protocol, the number of members of the Subcommittee shall increase to [number to be inserted].'[12] With regard to paragraph 2, the Working Group agreed that the qualifications for membership established were too limiting. A number of delegates considered it useful to include the possibility to nominate and elect members having experience in the administration of justice and in a wider field of human rights. Therefore, it was decided to insert before the word 'prison', the words 'the administration of justice, in particular criminal law'. The Working Group also agreed to delete the words 'the

[10] ibid, para 60. [11] See E/CN.4/1994/25 (n 4). [12] ibid, para 34.

international protection of'. Concerning paragraphs 3 and 4, it decided to retain them in their present form.

14 With regard to Article 5, some delegations emphasized the need for a *proper representation of women* and suggested inserting provisions to that effect. Others underlined that any reference to such representation should not prejudice the principle of *equitable geographical distribution* and the qualifications and requirements for membership of the SPT. Some delegations argued, on the basis of the principle of *non-discrimination*, against any reference to sex. The Working Group agreed on a compromise text, inserting after the word 'men', the words 'on the basis of the principles of equality and non-discrimination'.

15 During the fifth session from 14 to 25 October 1996,[13] the Chairperson-Rapporteur called for comments on Articles 2, 3, 4, and 5, as adopted as the outcome of the first reading. The delegation of *Denmark* made a general statement in which it stressed the necessity for the independence, impartiality, and competence of those carrying out missions. The observer for *Amnesty International* said that the quality and independence of the proposed body would determine its *effectiveness*. She felt that there was a possible contradiction between the desire to appoint the best possible members for the position and the appointment of members by States parties who might be influenced by political considerations. Thus, she suggested that the Committee should play a role in the appointment of members of the proposed body or that other methods of providing independent experts be explored.[14]

16 With respect to Article 4, the delegation of *Mexico* expressed the view that the SPT should be comprised of the same number as, or fewer members than, the Committee. Similarly, the delegations of the *Philippines* and *Japan* stated that the SPT should comprise no more than ten members since it should not have more members than its parent body. The delegations of *Korea, Canada, Australia*, and *Cuba* found that the number of members of the SPT should be linked to the number of States parties to the OPCAT. The delegation of Japan considered the wording of Article 4(2) to be too detailed and proposed the following text: 'The members of the Sub-Committee shall be chosen from among persons of high moral character, known for their competence in the field of prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty.' The representative of Canada stated that, in her view, the wording of Article 4(2) was already sufficiently flexible to allow suitable candidates to be found.[15]

17 With regard to Article 6, several paragraphs had been moved from the text of Article 5.[16] With regard to its paragraph 4, a reference was made to discussions on whether the words '*different forms of civilization*' should be deleted. Due to the willingness of several delegations to show flexibility, the drafting group had finally agreed to retain these words. Finally, paragraph 6 addressed the implications of the decision to enable States parties to nominate non-nationals.[17]

18 During the ninth session from 12 to 23 February 2001, the composition of the international mechanism was discussed with regard to the alternative draft submitted by

[13] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fifth session (1996) UN Doc E/CN.4/1997/33.

[14] ibid, para 52. [15] ibid, para 55. [16] cf the wording of Art 5 in E/CN.4/1996/28 (n 4).

[17] See E/CN.4/1997/33 (n 13) para 64.

the delegation of *Mexico* with the support of GRULAC.[18] Regarding the composition of the SPT, the alternative draft mainly contained the provisions adopted by the Working Group in the second reading of the original draft.

19 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[19]

3. Issues of Interpretation

3.1 Size of the SPT

20 The original Costa Rica Draft of 1980 had already proposed a Committee of ten experts to be increased to eighteen as soon as twenty-five States had become parties to the OP. This seems to have been modelled on Article 17 CEDAW, which had been adopted the year before and which provides for a Committee of eighteen experts which was increased to twenty-three after ratification or accession by thirty-five States. Taking into account that the SPT will have a higher workload than other treaty monitoring bodies, which are usually not required to carry out field missions, and that the CPT consists of a number of experts equal to the number of States parties to the ECPT (presently: 47), the revised Costa Rica draft of 1991 proposed that the *number of SPT experts* should be equal to that of the States parties, until a maximum of twenty-five members was reached. During the discussions in the Working Group, many delegations proposed a smaller number of experts, and finally a compromise was reached with the model of ten to twenty-five members. As the number of States parties rose to fifty after Switzerland's ratification of the Protocol on 24 September 2009, the number of members of the SPT increased to twenty-five. The terms of office of all the newly elected[20] members started on 1 January 2011.[21] Taking into account that the missions shall be conducted by at least two members,[22] and that each member may be in a position to carry out two missions per year, the SPT could, in principle, conduct a *considerable number of missions per year*. This would require, however, personnel and financial *resources* that go far beyond what is presently available from the Office of the High Commissioner for Human Rights.[23]

3.2 Composition of the SPT

3.2.1 Professional Experience

21 The *travaux préparatoires* show that the *professional composition* of the SPT was one of the more controversial issues during the drafting of Article 5. While the original Costa Rica Draft of 1980 envisaged primarily *human rights experts* to serve on the Committee, the professional experience shifted with the revised Costa Rica Draft of 1991 towards

[18] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session (2001) UN Doc E/CN.4/2001/67, para 32. Cf. above § 7.

[19] See CHR Res 2002/33 of 22 April 2002. Cf. above Art 1 OP, 2.2.

[20] The elections were held on 28 October 2010 together with second re-elections of five of the SPT members whose mandates were about to expire on 31 December 2010.

[21] See SPT, 'Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc CAT/C/48/3, para 4.

[22] cf below Art 13(3) OP.

[23] For more details with regard to the funding of the SPT cf. below Arts 25 and 26 OP.

experts in the field of *police or prison* administration. This was later somewhat broadened, but Article 5(2) still puts a major emphasis on experts in the field of the administration of criminal justice, and prison and police administration. Human rights experts are no longer explicitly required, but can be subsumed under the 'various fields relevant to the treatment of persons deprived of liberty'. Other relevant professions falling under this category are, inter alia, *medical doctors, psychiatrists, psychologists, forensic experts, anthropologists*, and *social workers*. With respect to their professional backgrounds, eight members of the initial team[24] had a *legal* and two of them had a *medical background*. Moreover, three European experts were at the same time *members of the CPT*, which means that the SPT was able to draw on their respective experience in a similar body. The then newly elected *first Chairperson of the SPT*, Ms *Silvia Casale*, also served as President of the CPT from 2000 to 2007. With regard to the balance of professional expertise, no progress was made so far; currently, still seventeen out of twenty-two SPT members have a legal background. Two members of the present SPT are at the same time members of the CPT.[25] In order to ensure that the SPT can adequately fulfil its mandate in future, it is recommended that States parties nominate and elect members with different professional expertise in order to reach the *professional pluralism* which is needed. Some members of the SPT should therefore possess medical or health expertise in areas of relevance to the OP, experience in policing and/or administration of justice, expertise in human rights, social work, anthropology, and education, experience in monitoring places where persons are deprived of their liberty, and knowledge of as well as expertise in areas related to persons who might be exposed to situations of vulnerability (eg children, persons with disabilities, LGBTI persons, or migrants/asylum seekers). Besides, experts should demonstrate profound understanding of and commitment to the prevention of torture and other ill-treatment, have experience in working with a wide range of stakeholders, show cultural sensitivity and empathy, possess drafting and analytical skills for research, report writing, and editing as well as fluency in at least one UN language.[26]

23 In addition to the professional qualifications, Article 5 OP requires an *equitable geographic distribution*, the representation of *different forms of civilization* and *legal systems*, as well as a *balanced gender representation*.[27] As with other treaty bodies, no two members may be nationals of the same State, and the members shall be *independent and impartial* experts serving in their individual capacity. They should also have enough time to 'serve the Subcommittee on Prevention efficiently'.

3.2.2 Equitable Geographical Distribution

24 As far as *geographical distribution* is concerned, three of the first ten members[28] of the SPT came from Western and Eastern Europe, and four from Latin America. This was not equitable, but it reflected at least to some extent the geographic distribution of the States parties at the time of elections.[29] As of November 2017, there are five SPT

[24] See Original composition of the SPT in Appendix B5.

[25] See Appendix B5.

[26] See APT, 'October 2016 Elections to the Subcommittee on Prevention of Torture: Guidance on the Selection of Candidates at the Domestic Level and the Elections in Geneva' (July 2016) para 4.2.

[27] In contrast, Art 17(1) CAT only explicitly mentions that consideration shall be given to equitable geographical distribution.

[28] See Appendix B5.

[29] *Eastern European* Group (10): Albania, Armenia, Croatia, Czech Republic, Estonia, Georgia, Moldova, Serbia, Slovenia, Ukraine; *Western European and Others* Group (7): Denmark, Lichtenstein, Malta, New

members belonging to the African region; three experts from the Asia Pacific; seven members from the Eastern European region; four from the Latin American and Caribbean; and six from Western Europe and Others.

25 Twenty-five States parties belong to the African region, whereas five thereof provide members to the SPT. From nine States parties belonging to the Asia-Pacific region, three experts who are citizens of States from this region are elected SPT members. Seven members currently come from the Eastern European region, where nineteen States already ratified the OP. Out of fifteen States from the Latin American and Caribbean regions which ratified the OP, citizens of four States became members of the SPT. Finally, out of nineteen States parties belonging to the group of Western Europe and Others, six countries currently send out members to the SPT. Compared to the number of States parties from the respective regions, the current composition may be considered equitable.

3.2.3 Balanced Gender Representation

26 As only two of the first ten members were women, this cannot have been regarded as gender balanced. With the latest elections that took place on 27 October 2016, however, the SPT consists of thirteen female (52%) and twelve male (48%) experts, which can be seen as a major achievement with regard to gender balance.

3.2.4 Independence and Impartiality

27 With regard to the *independence and impartiality of members* of the human rights treaty bodies in general, new guidelines were adopted at the twenty-fourth annual meeting of the Chairs of the human rights treaty bodies, held in Addis Ababa from 25 to 29 June 2012 (*Addis Ababa Guidelines*).[30] The general principles of those Guidelines stipulate that treaty body members shall not be considered to have real or perceived conflicts of interest as a consequence of their race, ethnicity, religion, gender, disability, colour, descent, or any other basis for discrimination as defined in the core international human rights treaties.[31] Moreover, members shall not be removable during their term of office, except to the extent that the respective treaty provides for. They may not be subject to direction or influence of any kind and shall neither seek nor accept instructions from anyone concerning the performance of their duties.[32] In addition members shall avoid any action which might give the impression that their own or any given State was receiving treatment which was more favourable or less favourable than that accorded to another State.[33] Applying the general principles mentioned, the Guidelines then specify that independence and impartiality 'is compromised by the political nature of their affiliation with the executive branch of the State' and that treaty bodies' members should therefore 'avoid functions or activities which are, or are seen by a reasonable observer to be, incompatible with the obligations and responsibilities of independent experts' (Guideline D). Furthermore, the Guidelines stipulate that individual holding or assuming decision-making positions in any organization or entity which may give rise to a real or perceived conflict of interest shall 'whenever so required, not undertake any functions or activities that may appear not to be readily reconcilable with the perception of independence and

Zealand, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland; *Latin America and Caribbean* Group (9): Argentina, Bolivia, Brazil, Costa Rica, Honduras, Mexico, Paraguay, Peru, Uruguay; *African* Group (5): Benin, Liberia, Mali, Mauritius, Senegal; *Asian* Group (2): Cambodia, Maldives.

[30] A/67/222 and Corr.1, Annex I. [31] ibid, para 3. [32] ibid, para 5. [33] ibid, para 7.

impartiality' (Guideline E). The importance of the independence of members of human rights treaty bodies was further reaffirmed in the GA Resolution 68/268 of 2014 and expanded into Rule 28 of the SPT's RoP.[34] The fact that some of the SPT members to date hold Government positions at least does not promote the impression of independence. In addition, it might also be problematic that some of the SPT experts are at the same time members of the NPM in their States.[35]

KERSTIN BUCHINGER

[34] GA Res 68/268 of 9 April 2014, paras 35 and 36; r 28 of the RoP, CAT/OP/3.

[35] See Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 94–95.

Article 6

Nomination of Subcommittee Members

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.

2. (a) The nominees shall have the nationality of a State Party to the present Protocol;

(b) At least one of the two candidates shall have the nationality of the nominating State Party;

(c) No more than two nationals of a State Party shall be nominated;

(d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.

3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

1. Introduction	766
2. Travaux Préparatoires	767
2.1 Chronology of Draft Texts	767
2.2 Analysis of Working Group Discussions	769
3. Issues of Interpretation	770

1. Introduction

1 The members of the *subsidiary body of the CAT Committee* (henceforth the SPT) are *nominated and elected exclusively by States parties to the OP, rather than by the Committee itself*. In establishing such a system, the drafters wished to underline the extent to which the SPT is, in practice, independent from the CAT Committee. The right of States parties to nominate candidates and the procedure of elections at a meeting of States parties are similar to other UN human rights treaties.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Original Costa Rica Draft (6 March 1980)*[1]

Article 5

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 4 and nominated for the purpose by the States Parties to the present Protocol.

2. Each State Party may nominate not more than four persons or, where there are not less than 25 States Parties, not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

3 *Revised Costa Rica Draft (15 January 1991)*[2]

Article 5

1. The members of the Subcommittee shall be elected by the Committee against Torture by an absolute majority of votes from a list of persons possessing the qualifications prescribed in article 4 and nominated by the States Parties to the present Protocol.

2. Within three months of the entry into force of the present Protocol, the accession of a new member or a vacancy, each State Party shall nominate three persons, at least two of whom shall possess its nationality. They shall be indicated in alphabetical order.

3. Subject to article 4, paragraph 1, the Committee against Torture shall hold elections whenever there is an accession to the present Protocol or a vacancy in the Subcommittee.

4. A member shall be eligible for re-election if renominated.

4 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[3]

Article 5

1. The members of the Sub-Committee shall be elected in the following manner:

   (a) Each State Party may nominate up to three persons possessing the qualifications and meeting the requirements set out in article 4 [one of whom may be a national of a State Party other than the nominating State Party];

   [(b) From the nominations received the Committee against Torture shall prepare a list of recommended candidates, taking due account of article 4 of the

[1] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[2] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[3] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1995) UN Doc E/CN.4/1996/28, Annex I; see also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25, Annex.

present Protocol. This list shall consist of not less than twice the number of members of the Sub-Committee to be elected and not more than two and a half times the number of members to be elected;]

(c) The members of the Sub-Committee shall be elected by [the States Parties] [the Committee against Torture] by secret ballot [from a list of recommended candidates prepared by the Committee against Torture].

2. Elections of the members of the Sub-Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Sub-Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than [to be determined] after the date of the entry into force of the present Protocol. At least four months before the date of the meeting of the Committee against Torture which precedes the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them [and shall submit it to the Chairman of the Committee against Torture]. [The Chairman of the Committee against Torture shall submit to the Secretary-General the list of recommended candidates prepared in accordance with paragraph 1 (b) of this article.] [The Secretary-General shall submit this list of recommended candidates to the States Parties.]

4. In the election of the members of the Sub-Committee, eligible for election in accordance with article 4, consideration shall be given to equitable geographical distribution of membership, to a proper balance among the various fields of competence referred to in article 4 and to the representation of different forms of civilization and of the principal legal systems.

5. Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

6. If a member of the Sub-Committee dies or resigns or for any other cause can no longer perform the member's Sub-Committee duties, [the Committee against Torture shall, after having consulted the State Party of which the member was a national,] [the State Party which nominated the member shall] appoint another person of the same nationality possessing the qualifications and meeting the requirements set out in article 4 to serve for the remainder of the member's term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

5 *Text of the Articles which Constitute the Outcome of the Second Reading (26 March 1999)*[4]

Article 5

1. Each State Party may nominate, in accordance with paragraph 2, up to two candidates possessing the qualifications and meeting the requirements set out in

[4] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session (1998) UN Doc E/CN.4/1999/59, Annex I. Similar provisions are contained in the Mexican Draft of 13 February 2001 (E/CN.4/2001/WG.11/CRP.1, art 10, former art 5); the EU Draft of 22 February 2001 (E/CN.4/2001/WG.11/CRP.2, art 6, former art 5); and the Proposal by the Chairperson-Rapporteur of 17 January 2002 (E/CN.4/2002/WG.11/CRP.1, art 6).

article 4, and in doing so shall provide detailed information on the qualifications of the nominees.

2. (a) Nominees of the Subcommittee shall have the nationality of a State Party to the present Protocol.

   (b) At least one of the two candidates shall have the nationality of the nominating State Party.

   (c) Not more than two nationals of a State Party shall be nominated.

   (d) Before a State Party nominates a national of another State Party, it shall seek and obtain the written consent of that State Party.

3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them.

2.2 Analysis of Working Group Discussions

6 During the first session of the Working Group, held from 19 to 30 October 1992, Article 5 was discussed under the basket of issues called 'Composition and Structure of the Subcommittee'.[5]

7 Regarding Article 5(2), some delegations questioned both the requirement in the text for States parties to nominate three persons and the possibility to nominate non-nationals. It was argued that it may be difficult to find qualified candidates with enough flexibility in their private positions that they may have the time to devote to significant and time-consuming responsibilities. The duty to nominate three persons was considered to be onerous but was not necessarily conducive to the nomination of the most highly qualified persons. Others, however, stated that this technique was highly useful in order to enable the Committee to have the widest possible choice of candidates and qualifications. Some delegates were of the opinion that the facility to nominate *non-nationals* would help smaller States nominate appropriate candidates. Others found that this would require careful consideration in light of the other articles of the Protocol. They were of the opinion that the members of the body should show a clear connection with the preventive system through their States and that the full implications of the idea to allow for a *nomination of non-nationals* were not entirely clear.

8 The general assessment that emerged from the debate surrounding paragraph 4 was that the possibility of indefinite *re-election* should be subject to some appropriate limitation. A number of delegations considered that this was not conducive to renewal and dynamism in the body and felt that a limit on re-election of one additional term was more suitable. One delegate stated that re-election to the CPT was only possible once and that this system should be taken as a model.

9 During the second session of the Working Group from 25 October to 5 November 1993, the issue of nomination was further discussed.[6] With respect to Article 5(1), the Working Group agreed on the text as contained in the Annex to the second Working Group report. Regarding subparagraph (a), there was a consensus that the number of

[5] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28, para 26.

[6] E/CN.4/1994/25 (n 3) paras 37ff.

candidates to be nominated should not be mandatory. With respect to subparagraphs (b) and (c), it was decided to reflect the different views of the delegations by inserting square brackets where appropriate.

10 During the fifth session from 14 to 25 October 1996,[7] the delegations of *Brazil* and *Cuba* and the observer for *Nigeria* stated that the States parties should only nominate their own nationals as members of the SPT. The representative of Brazil proposed to delete Article 5(1)(b) as it did not favour the idea of investing in the CAT Committee the power of veto over the election of members. With respect to Article 5(1)(c), the delegations of *Brazil, Japan, the Philippines*, and *Nigeria* expressed the view that members of the *SPT should be elected by States parties*. In her subsequent report, the Chairperson of the drafting group stated that the outcome of discussions was the requirement that at least one of two nominees of a State party should be a national of the nominating State.

11 The text of Article 5 of the draft, as agreed upon during the fifth session in October 1996,[8] featured in subsequent drafts and was adopted without any changes by the Commission on Human Rights in April 2002 as Article 6 OP.[9]

3. Issues of Interpretation

12 The SPT is a *subsidiary body of the CAT Committee*. Usually, the parent body elects the members of its subsidiary bodies from within its own membership. Since the functions of the SPT are primarily of a *preventive nature*, while the CAT Committee acts more as a quasi-judicial body, it was never envisaged that some CAT Committee members should, in addition to their functions under CAT, also perform the tasks of the SPT. This would also have been difficult given that the Committee only consists of ten members.

13 But the Revised Costa Rica Draft of 1991, which had proposed for the first time to entrust the task of preventive visits to a Subcommittee of the Committee against Torture, envisaged that the members of the SPT should be elected by the CAT Committee upon nomination by States parties.[10] From the beginning of the discussions in the Working Group, States, for the aforementioned reasons, questioned the election of the SPT members by the CAT Committee. During the fifth session of the Working Group in October 1996, the delegates discussed a text which, in a fairly complicated procedure, had attempted to strike a fair balance which consisted of:[11] the nomination of up to three candidates per State party; short listing by the Committee; and election by States parties or, alternatively, by the Committee. During the discussions, the delegations of various States insisted that the *SPT shall be elected by States parties* and, at the same time, called for the deletion of the short-listing function of the CAT Committee. The agreed text of 1996, which follows the normal nomination and election procedure of human rights treaty bodies,[12] was not changed in any of the later drafts.

[7] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fifth session (1996) UN Doc E/CN.4/1997/33.

[8] E/CN.4/1999/59 (n 4) Annex I. See above Art 1 OP, 2.2.

[9] CHR Res.2002/33 of 22 April 2002.

[10] E/CN.4/1991/66 (n 2). See above 2.1.

[11] Art 5 of the draft contained in E/CN.4/1996, 28, Annex I: see above para 4.

[12] eg Art 8 CERD; Arts 29 and 30 CCPR; Art 17 CEDAW; Art 17 CAT.

14 The *right of States parties to nominate up to two candidates* follows the model of Article 29(2) CCPR[13] regardless of the fact that, for tactical reasons, the nomination of two candidates has become a rare practice.[14] So far, none of the States parties to the OP has nominated two candidates at once. For the elections in October 2016, *Niger* had initially nominated two experts but withdrew one of these nominations again before the elections took place.[15] The same holds true for States parties, with the consent of another State party, to nominate nationals of that other State.[16] According to Article 6(3), the Secretary-General shall invite States parties, at least five months before the elections, to submit their nominations within three months. In practice, States parties usually also accept nominations which were submitted after this deadline.[17] As practice shows, the same holds true for nominations of SPT members.

15 In a *note verbale* dated 18 July 2006, the Secretary-General invited the States parties to the OP to submit their *nominations for the election of the first ten members* of the SPT within three months, ie by 18 October 2006. In fact, four candidates who had been nominated after this deadline were also allowed to participate in the elections on 18 December 2006.[18] Altogether, fifteen States parties nominated a total of fifteen candidates, all of whom were nationals of the nominating State.[19]

16 In accordance with Article 9 OP, the term of half of the members elected in December 2006 was about to expire at the end of 2008. Thus, in a *note verbale* of 15 May 2008, the Secretary-General invited the States parties to submit their nominations for the elections of five members of the SPT (replacing those whose terms were due to expire on 31 December 2008) by 14 August 2008.[20] Out of seven candidates that had been nominated within this deadline, five had been renominated by the respective States parties.

17 In 2010, five members had to be elected to fill the vacancies of those whose terms of office was about to expire on 31 December 2010. Moreover, in conformity with Article 5(1) OP, fifteen new members were to be elected following the fiftieth ratification, which took place in September 2009. Once more, out of seventeen nominees by 11 August 2010, all five candidates, whose terms were about to expire at the end of 2010 had been

[13] Arts 8(2) CERD, 17(2) CEDAW, and 17(2) CAT provide for the nomination of only one candidate per State party.

[14] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) (*CCPR Commentary*) 672.

[15] See Secretary-General, 'Election of 12 members of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—Addendum' (2016) UN Doc CAT/OP/SP/14/Add.1.

[16] Until 2017, none of the States parties had ever nominated nationals of another State party.

[17] See Nowak, *CCPR Commentary* (n 14) 677.

[18] See Secretary-General, 'Election of 10 members of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in accordance with article 7 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) UN Doc CAT/OP/SP/1 and Adds 1 and 2.

[19] UN Doc CAT/OP/SP/1, para 4; CAT/OP/SP/1/Add.1, para 2; CAT/OP/SP/1/Add.2, para 2. For the composition of the SPT, see above Art 5, 3.2.

[20] See Secretary-General, 'Election, in Accordance with Articles 7 and 9 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of Five Members of the Subcommittee on Prevention to Replace Those Whose Terms Are due to Expire on 31 December 2008' (2008) UN Doc CAT/OP/SP/5.

nominated for re-election.[21] By 11 September 2010, another ten candidates had been nominated for the upcoming elections.[22]

18 Preparation and documentation for the submission of nominations for the elections in 2014 were done in compliance with the respective paragraphs of GA Resolution 68/268.[23]

KERSTIN BUCHINGER

[21] See Secretary-General, 'Election, in Accordance with Articles 7 and 9 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of Five Members of the Subcommittee on Prevention to Replace Those Whose Terms Are due to Expire on 31 December 2010, and 15 Additional Members to the Subcommittee on Prevention in Accordance with Article 5' (2010) UN Doc CAT/OP/SP/8 3 Annex I.

[22] See Secretary-General, 'Election, in Accordance with Articles 7 and 9 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of Five Members of the Subcommittee on Prevention to Replace Those Whose Terms Are due to Expire on 31 December 2010, and 15 Additional Members to the Subcommittee on Prevention in Accordance with Article 5 - Addendum' (2010) UN Doc CAT/OP/SP/8/Add.1.

[23] See also above Art 5 OP, para 27.

Article 7

Election of the Subcommittee

1. The members of the Subcommittee on Prevention shall be elected in the following manner:

(a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;

(b) The initial election shall be held no later than six months after the entry into force of the present Protocol;

(c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;

(d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:

(a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;

(b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;

(c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

1. Introduction	774
2. Travaux Préparatoires	774
2.1 Chronology of Draft Texts	774
2.2 Analysis of Working Group Discussions	778
3. Issues of Interpretation	779

1. Introduction

1 As noted above,[1] the *members of the SPT*, despite its nature as a subsidiary body of the CAT Committee, are *nominated and directly elected by the States parties to the OP without any involvement of its parental body*. This was not uncontroversial during the drafting of the OP. However, ultimately the delegates of States prevailed who argued that the usual procedure of nominating and electing UN human rights treaty monitoring bodies should also be followed with regard to the case of the SPT.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Original Costa Rica Draft (6 March 1980)*[2]

Article 5

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 4 and nominated for the purpose by the States Parties to the present Protocol.

3 *Revised Costa Rica Draft (15 January 1991)*[3]

Article 5

1. The members of the Subcommittee shall be elected by the Committee against Torture by an absolute majority of votes from a list of persons possessing the qualifications prescribed in article 4 and nominated by the States Parties to the present Protocol.

4 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[4]

Article 5

1. The members of the Sub-Committee shall be elected by [the States Parties] [the Committee against Torture] by secret ballot [from a list of recommended candidates prepared by the Committee against Torture].

2. Elections of the members of the Sub-Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Sub-Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than [to be determined] after the date of the entry into force of the present Protocol. At least four months before the date

[1] See Art 6(1) OP.

[2] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[3] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1995) UN Doc E/CN.4/1996/28, Annex I; see also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25, Annex.

of the meeting of the Committee against Torture which precedes the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States parties which have nominated them [and shall submit it to the Chairman of the Committee against Torture]. [The Chairman of the Committee against Torture shall submit to the Secretary-General the list of recommended candidates prepared in accordance with paragraph 1 (b) of this article.] [The Secretary-General shall submit this list of recommended candidates to the States Parties.]

4. In the election of the members of the Sub-Committee, eligible for election in accordance with article 4, consideration shall be given to equitable geographical distribution of membership, to a proper balance among the various fields of competence referred to in article 4 and to the representation of different forms of civilization and of the principal legal systems.

Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

5. If a member of the Sub-Committee dies or resigns or for any other cause can no longer perform the member's Sub-Committee duties, [the Committee against Torture shall, after having consulted the State Party of which the member was a national,] [the State Party which nominated the member shall] appoint another person of the same nationality possessing the qualifications and meeting the requirements set out in article 4 to serve for the remainder of the member's term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

5 *Text of the Articles which Constitute the Outcome of the Second Reading (26 March 1999)*[5]

Article 6

The members of the Subcommittee shall be elected in the following manner:

1. Elections of the members of the Subcommittee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

2. The initial election shall be held no later than six months after the date of the entry into force of the present Protocol.

3. The States Parties shall elect the members of the Subcommittee by secret ballot.

4. In the election of the members of the Subcommittee, primary consideration shall be given to the fulfilment of the requirements and criteria of article 4. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 4, to equitable geographical distribution of membership and to the representation of different forms of civilization and legal systems of the States Parties.

5. Consideration shall also be given to a balanced representation of women and men on the basis of the principles of equality and non-discrimination.

[5] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session (1998) UN Doc E/CN.4/1999/59, Annex I.

6. If, during the election process, two nationals of a State Party have become eligible to serve as members of the Subcommittee, the membership of the Subcommittee shall be resolved in the following manner in conformity with article 4, paragraph 3:

(a) The candidate receiving the higher number of votes shall serve as the member of the Subcommittee.

(b) Where the nationals have received the same number of votes, the following procedure applies:

(i) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee;

(ii) Where both nationals have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall be the member;

(iii) Where neither national has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which national shall be the member.

6 *Mexican Draft (13 February 2001)*[6]

Article 11 (former Article 6)

1. The members of the Sub-Committee shall be elected in the following manner:

(a) Elections of members of the Sub-Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Sub-Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting;

(b) The initial election shall be held no later than six months after the date of the entry into force of the present Protocol;

(c) The States Parties shall elect the members of the Sub-Committee by secret ballot;

(d) In the election of the members of the Sub-Committee, primary consideration shall be given to the fulfillment of the requirements and criteria of article 9. Furthermore, due consideration shall be given to the equitable geographical distribution of membership and to the representation of the different forms of civilization and legal systems of the States Parties.

2. Consideration shall also be given to the balanced representation of women and men on the basis of the principles of equality and non-discrimination.

3. If, during the election process, two nationals of a State Party have become eligible to serve as members of the Sub-Committee, the candidate receiving the higher number of votes shall serve as the member of the Sub-Committee.

7 *EU Draft (22 February 2001)*[7]

Article 7 (old 6)

The members of the Sub-committee shall be elected in the following manner:

1. Elections of the members of the Sub-Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At

[6] E/CN.4/2001/WG.11/CRP.1. [7] E/CN.4/2001/WG.11/CRP.2.

those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Sub-Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

2. The initial election shall be held no later than six months after the date of entry into force of the present Protocol.

3. The States Parties shall elect the members of the Sub-Committee by secret ballot.

4. In the election of the members of the Sub-Committee, primary consideration shall be given to the fulfilment of the requirements and criteria of article 5. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 5, to equitable geographical distribution of membership and to representation of the different forms of civilization and legal systems of the States Parties.

5. Consideration shall also be given to balanced representation of women and men on the basis of the principles of equality and non-discrimination.

6. If, during the election process, two nationals of a State Party have become eligible to serve as members of the Sub-Committee, the membership of the Sub-Committee shall be resolved in the following manner, in conformity with article 5, paragraph 3:

(a) The candidate receiving the higher number of votes shall serve as the member of the Sub-Committee;

(b) Where the nationals have received the same number of votes, the following procedure applies:

(i) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Sub-Committee;

(ii) Where both nationals have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall be the member;

(iii) Where neither national has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which national shall be the member.

8 *US Draft (16 January 2002)*[8]

Article 5

The members of the Subcommittee on Prevention shall be elected in the same manner as members of the Committee referred to in paragraphs 2 to 6 of Article 17, consideration being given to equitable geographical distribution and to the usefulness of the participation of persons having professional experience in the field of the administration of justice, criminal law, prison or police administration, or in the various medical fields relevant to the treatment of persons deprived of their liberty.

[8] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session (2002) UN Doc E/CN.4/2002/78, Annex II E.

2.2 Analysis of Working Group Discussions

9 During the first session of the Working Group, held from 19 to 30 October 1992, the election procedures were discussed under the basket of issues called 'Composition and Structure of the Subcommittee'.[9] During the discussions, some delegations considered that the proposed model of election was a desirable approach, as it gave States parties the right to nominate candidates while leaving the CAT Committee the power to make the final selection from the list of qualified candidates. It was argued that an indirect election would be most conducive to the essential attributes of impartiality, independence, and objectivity.[10] Other delegations took the view that a direct election by States parties was more in line with other precedents, including that of the ECPT. In addition, the point was made that the CAT Committee is composed of persons acting in their personal capacity and that electoral responsibilities would subject them to undue political influence. It was also argued that a direct election could best ensure the recognition of important factors, including equitable geographical distribution, which might not be given adequate weight by the CAT Committee. It would also serve to bolster the prestige and credibility of the members in their dealings with representatives of national administrations. One delegate stressed that the key point was a system of election that would best promote such matters as competence, regional and other balance in representation, and thus enhance the State confidence in the integrity of the system.[11]

10 During the second session of the Working Group from 25 October to 5 November 1993, the electoral issues under Article 5 were further discussed.[12] With respect to subparagraphs (b) and (c), it was decided to reflect the different views of the delegations by inserting square brackets where appropriate. Several delegations were in favour of States parties to the Protocol directly electing members of the envisaged body. Other delegations proposed that the members of the SPT shall be elected by the CAT Committee, as this would depoliticize the election and guarantee the essential attributes of impartiality, independence, and objectivity. Moreover, some delegations asked for clarification of the possible voting procedures (ie, secret ballot, roll-call, etc). In regard to subparagraph (c), one delegation suggested inserting, after the word 'ballot', the words 'taking due account of the principle of equitable geographical distribution'. Referring to Article 17(3), (4) and (6) CAT, the Working Group agreed on the texts for Article 5(1), (2), (3), (4) and (5).

11 During the fifth session from 14 to 25 October 1996, several delegations made general comments on Article 5. The representative of China stated that the method of election of the proposed body should adhere to the general procedures followed by other human rights bodies. The representative felt that it was not appropriate for the CAT Committee to be involved in the composition of the SPT.[13]

12 In the following drafts, including the proposal presented by the Chairperson-Rapporteur of 22 January 2002, the election of its members followed the procedures contained in other UN human rights instruments very closely.

[9] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28 para 26.

[10] ibid, para 62.

[11] ibid, para 63.

[12] E/CN.4/1994/25 (n 4) paras 37ff.

[13] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fifth session (1996) UN Doc E/CN.4/1997/33, para 57.

3. Issues of Interpretation

13 The *election procedure*, by and large, follows the procedures contained in Article 17 CAT[14] and in other human rights treaties.[15] According to Article 7(1)(a) OP, primary consideration shall be given to the fulfilment of the *requirements and criteria* for an ideal composition of the SPT *set out in Article 5 OP*,[16] namely gender balance, equitable geographic distribution, the representation of different forms of civilization and legal systems, a good mix of different professional backgrounds, and the individual qualification of the candidates as independent and impartial experts of high moral character with enough free time to serve the SPT efficiently. Since elections are held by *secret ballot*[17] it is, however, difficult to ensure that all these criteria are in fact complied with. As the composition of the SPT during its initial phase showed, at least gender balance as well as equitable geographic and cultural distribution had not been achieved then. However, strong efforts were taken in this direction during recent years, and after the elections of 27 October 2016, thirteen out of twenty-five present SPT members are female and the geographical distribution of members seems to be quite balanced.

14 According to Article 7(1)(b) OP, the *initial election* had to be conducted no later than six months after the entry into force of the Protocol, ie no later than 22 December 2006. In fact, the *first elections* took place at the *UN Office in Geneva* on 18 December 2006.[18]

15 According to Article 7(1)(d) OP, elections shall be held at *biennial meetings of States parties* in Geneva. The presence of delegates from two-thirds of all States parties constitutes the required *quorum*, otherwise elections cannot take place.

16 From all the candidates nominated, those who obtain the *largest number of votes* and an *absolute majority* of the votes of the representatives of the States parties present and voting are elected. Each State party may vote for as many candidates as there are seats to be filled. If more than twenty-five candidates receive an absolute majority, only those who receive the largest number of votes are elected. If fewer than twenty-five candidates receive an absolute majority, additional balloting is required.[19] If it should ever happen that two nationals of a State party receive an absolute majority, Article 7(2) provides, in a detailed manner, how this situation should be solved. It seems a little odd that this question has received so much attention in the text of Article 7 OP, whereas other more important questions such as how draws shall be resolved and whether abstentions shall be considered as voting or non-voting, were left open. Unfortunately, the RoP of States parties to the OP do not further elaborate on these issues.[20]

[14] cf above Art 17 CAT.

[15] eg Arts 8 CERD, 30 CCPR, 17 CEDAW; see also OHCHR, 'Human Rights Treaty Bodies and Election of Treaty Body Members: A Guide for United Nations Delegates Based in New York' (2013) <https://www.ohchr.org/Lists/MeetingsNY/Attachments/38/treaty-body-elections-guide.pdf> accessed 2 November 2017; OHCHR, 'Handbook for Human Rights Treaty Body Members' (2015) <https://www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf> accessed 3 November 2017.

[16] See Art 5, paras 2–6 OP.

[17] cf Art 7(1)(c) OP.

[18] See Secretary-General, 'First Meeting of the States Parties—Summary Record' (2006) UN Doc CAT/OP/SP/SR.1, paras 21–31.

[19] For problems related to additional balloting, see above Art 17 CAT.

[20] The final version of the RoP of States parties to the OP was made public on 22 February 2013 (CAT/OP/3). For various issues of interpretation in connection with elections see above Art 17 CAT, and Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 678.

17 On 18 *December 2006, the election of the first ten members* of the SPT took place at the UN Office in Geneva. Exactly ten of the fourteen candidates received the required absolute majority at the first ballot, whereas the remaining four candidates missed this requirement. Consequently, these ten candidates were elected and no further ballot was required. The States parties decided that the SPT would assume office on *1 January 2007*. It was further decided by lot that Ms *Casale*, Mr *Coriolano*, Mr *Hájek*, Mr *Lasocik*, and Mr *Rodriguez Rescia* would serve for a term of two years (until 31 December 2008). The four-year terms of the other members were about to expire on 31 December 2010.[21]

18 At the third meeting of States parties on 28 October 2010, five members were to be elected to fill the vacancies of those members whose terms of office were about to expire on 31 December 2010. In addition, fifteen new members were to be elected in conformity with Article 5(1) OP, following the fiftieth ratification, which took place in September 2009. The OP itself does not stipulate any special *election procedure for the election of the additional fifteen members*. Accordingly, the regular provisions (Articles 5 to 9 OP) were applied and the election of the fifteen additional members coincided with the regular biennial elections to fill the vacancies of those experts whose mandates were about to expire at the end of 2010. Hence, the third meeting of States parties began first with the regular biannual election of the five members who were about to fill the upcoming vacancies; then it followed a second round of elections in order to elect the fifteen additional members. Pursuant to Article 9 OP,[22] the five members elected at the first round were elected for a term of four years. The election of the additional fifteen members followed the manner in which the first ten members of the SPT were elected in 2006, also with regard to their terms of office. This was found to ensure the requirements set out in Article 7(1)(d) OP.

19 Thirty-one candidates had been nominated and accepted by the States parties. At the first ballot, none of the candidates had obtained an absolute majority. Thus, a second ballot became necessary. The voting was restricted to the candidates who had obtained the largest number of votes in the previous ballot, with the number of candidatures being limited to not more than twice the number of places remaining to be filled.[23] The ten candidates who had obtained the largest number of votes in the first ballot were: Ms *Definis-Gojanovic* (16 votes), Mr *Ginés Santidrián* (21 votes), Mr *Lam Shang Leen* (11 votes), Ms *Muhammad* (14 votes), Mr *Obrecht* (13 votes), Mr *Petersen* (17 votes), Mr *Pross* (18 votes), Mr *Sarre Iguíniz* (17 votes), Mr *Taylor Souto* (19 votes), and Mr *Villavicencio Terreros* (12 votes).[24] Having obtained the required majority at the second ballot, Mr *Ginés Santidrián*, Mr *Obrecht*, Mr *Peterson*, and Mr *Taylor Souto* were elected members of the SPT for a term of four years (until 31 December 2014). Since the number of candidates who had obtained the required majority was less than the number of members to be elected, a third ballot was to be held to fill the last remaining vacancy. The voting

[21] See CAT/OP/SP/SR.1 (n 18) paras 21–31.

[22] See also Art 9 OP, para 13 stipulating a four-year term of office and the principle of partial renewal with 'staggering' elections every two years.

[23] See Secretary-General, 'Provisional Rules of Procedure of the Meetings of the States Parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) UN Doc CAT/OP/SP/3 r 15.

[24] See Secretary-General, 'Third Meeting of the States Parties—Summary Record of the 3rd Meeting' (2011) UN Doc CAT/OP/SP/SR.3, para 17.

had been restricted to the two candidates[25] who had obtained the largest number of votes in the previous ballot.[26] With regard to the vote for the fifth replacement member of the SPT, fifty-six representatives of States parties to the OP had voted and fifty-three valid ballot papers had been counted. The representative of Mexico, supported by the representative of Germany, found that the *phrase 'representatives present and voting'* in Rules 11 and 12 of the provisional RoP[27] meant representatives who had cast valid votes. Thus, he thought that Mr *Sarre Iguíniz*, having obtained twenty-eight votes, should have been elected member of the SPT. Although the present Senior Legal Adviser to the UN Office at Geneva stated that the secretariat did not share this interpretation, the (majority of) the representatives of States parties had wished to proceed in this manner. Thus, Mr *Sarre Iguíniz* had been elected the fifth replacement member of the SPT.[28] Despite this, the representatives of States parties agreed that the standard procedure should be applied again in forthcoming rounds.[29] In our opinion, the chosen approach did not correspond to the meaning of Article 7(1)(d) OP, as the term 'present and voting' clearly does not postulate valid, but *cast votes*.

20 Given that Article 6(1) and (2) OP encourages States parties to nominate up to two candidates, including one national of another State party, the election procedure outlined in Article 7(2) OP seems a little complicated, yet this provision will hardly ever be applied in practice.

KERSTIN BUCHINGER

[25] Mr Pross (Germany) had obtained 26 votes during the second ballot and Mr Sarre Iguíniz (Mexico) had obtained 27 votes.

[26] CAT/OP/SP/3 (n 23) r 15.

[27] See CAT/OP/12/3.

[28] See Secretary-General, 'Fourth Meeting of the States Parties—Summary Record of the 4th Meeting' (2010) UN Doc CAT/OP/SP/SR.4, para 2.

[29] ibid, paras 9–12.

Article 8

Filling of Vacancies

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

1. Introduction	782
2. Travaux Préparatoires	782
2.1 Chronology of Draft Texts	782
2.2 Analysis of Working Group Discussions	783
3. Issues of Interpretation	784

1. Introduction

1 The procedure of *filling vacancies* following the death, resignation or incapacity of SPT members is based to a large extent on Article 17(6) CAT. This procedure, which differs from Article 34 CCPR, has the disadvantage of giving a certain State party an almost exclusive right to have a national of its choice on the SPT.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[1]

Article 5

> 5. If a member of the Sub-Committee dies or resigns or for any other cause can no longer perform the member's Sub-Committee duties, [the Committee against Torture shall, after having consulted the State Party of which the member was a national,] [the State Party which nominated the member shall] appoint another person

[1] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1995) UN Doc E/CN.4/1996/28, Annex I; see also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25, Annex.

of the same nationality possessing the qualifications and meeting the requirements set out in article 4 to serve for the remainder of the member's term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

3 *Text of the Articles which Constitute the Outcome of the Second Reading (26 March 1999)*[2]

Article 7

If a member of the Subcommittee dies or resigns or for any other cause can no longer perform the member's Subcommittee duties, the State Party which nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in Article 4, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the State Parties, subject to approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

2.2 Analysis of Working Group Discussions

4 During the first four sessions of the Working Group, the issue of how to deal with vacant seats within the SPT was not discussed separately.

5 In the course of the fifth session from 14 to 25 October 1996, the Chairperson of the drafting group presented the considerations on the relevant articles and referred to the outcome of the second reading.[3] With respect to the new Article 7, the Chairperson stated that the agreed text had been adopted by the drafting group to be presented to the plenary meeting, despite the different views among some delegations. She explained that they would have preferred to establish a more transparent method of replacing a member of the Sub-Committee who could no longer perform his or her duties before expiry of the term, but that all delegations had finally agreed on the text of Article 7 as contained in Annex I.[4]

6 The proposal presented by the Chairperson-Rapporteur, in January 2002, is almost identical with the 1999 draft and follows very closely the procedures contained in other UN human rights instruments.

7 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[5]

[2] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session (1998) UN Doc E/CN.4/1999/59, Annex I. Similar provisions are contained in the Mexican Draft of 13 February 2001 (E/CN.4/2001/WG.11/CRP.1, Art 12, former Art 7); the EU Draft of 22 February 2001 (E/CN.4/2001/WG.11/CRP.2, Art 8, former Art 7); and the Proposal by the Chairperson-Rapporteur of 17 January 2002 (E/CN.4/2002/CRP.1, Art 8).

[3] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fifth session (1996) UN Doc E/CN.4/1997/33 paras 49ff.

[4] ibid, para 65.

[5] CHR Res 2002/33 of 22 April 2002. See above Art 1 OP, 2.2.

3. Issues of Interpretation

8 Since Article 8 OP largely follows the procedure for the *filling of vacancies* of the CAT Committee, reference shall be made to the issues discussed in relation to *Article 17(6) CAT*.[6] Vacancies may arise if a member of the SPT dies or resigns or can no longer perform his or her duties for any other cause. The term '*any other cause*' relates to the personal circumstances of a SPT member to be replaced,[7] eg if a member is seriously ill or refrains from participating in the SPT's sessions without any proper excuse. There are, however, a few differences in the wording of the articles designed to avoid the situation whereby States have the right simply to appoint one of their own nationals. First, the word '*appoint*' in Article 17(6) CAT was replaced by 'nominate'. Second, the nominated candidate must possess the respective qualifications and meet the requirements set out in Article 5 OP, ie *independence, impartiality, availability, morality*, and a relevant *professional experience*. Third, States parties shall take into account the 'need for a proper balance among the various fields of competence'. If, for example, the variety of professions represented was not satisfactory before the resignation of a member, the State party shall take this factor into consideration. For instance, a State party should obviously not nominate another prison manager, if there is a lack of medical experts on the SPT. Finally, the person nominated to fill a vacancy shall not serve for the remainder of the term of his or her predecessor, but only until the next meeting of the States parties. If a member resigns during the first year after his or her election, the successor shall only fill this vacancy until the next biennial meeting of States parties, rather than for the remaining three years, as provided for by Article 17(6) CAT. These changes to the OP definitely *improve the method of filling vacancies*.

9 Thus far the *procedure stipulated in Article 8 OP and specified in Rule 8* has only been applied four times. Due to the fact that Ms *Casale* (UK) and Mr *Torres Boursault* (Spain), two of the original ten experts who had been elected members of the SPT, had resigned in 2009, Mr *Evans* (UK) and Mr *Ginés Santidrián* (Spain) were appointed in order to fill the vacancies in mid-2009.[8] After Mr *Pross* (Germany) and Mr *Obrecht* (France), who had been elected members of the SPT since 2010, had laid down their duties under the OP, Ms *Osterfeld* (Germany) and Ms *Paulet* (France) succeeded to the places vacated in January 2014.

10 All four experts that followed those who had resigned from their duties under the OP earlier had later become elected members of the SPT following the elections that took place past their respective appointments (in autumn 2010, 2012, 2014, and 2016).[9]

11 By referring to Article 5, Article 8 again stipulates the need for a *proper balance among the various fields of competence*. So far, all outgoing experts had been replaced by

[6] Cf above Art 17 CAT. [7] cf CAT/C/SR.5, paras 33–44.

[8] Another of the initial SPT members, Mr *Coriolano* (Argentina), resigned from his duties on 1 October 2012 following the election as a member of the United Nations Human Rights Council Advisory Committee. He was followed by Mr *Font* (Argentina) from 1 January 2013 who had been elected member on 25 October 2012; thus, the procedure set out in Article 8 OP had not been applied in this case.

[9] See Secretary-General, 'Fourth Meeting of the States Parties—Summary Record of the 4th Meeting' (2010) UN Doc CAT/OP/SP/SR.4, para 17; Secretary-General, 'Fourth Meeting of the States Parties—Summary Record of the 1st Meeting' (2012) UN Doc CAT/OP/SP/4/SR.1, para 16; Secretary-General, 'Fifth Meeting of the States Parties—Summary Record of the 1st Meeting' (2014) UN Doc CAT/OP/SP/5/SR.1, para 18; Secretary-General, 'Sixth Meeting of the States Parties—Summary Record of the 1st Meeting' (2016) UN Doc CAT/OP/SP/6/SR.1, para 19.

experts who more or less show the same professional backgrounds as their predecessors.[10] Thus, the opportunity to increase the non-legal expertise among SPT members was missed also with regard to the filling of vacancies following the procedure set out in Article 8 of the OP.[11]

KERSTIN BUCHINGER

[10] Mr *Torres Boursault* and Ms *Casale* have a legal background and had been members of the CPT. Mr *Ginés Santidrián* and Mr *Evans*, their successors, are both legal experts with a particular focus on the prevention of torture. Mr *Pross* is a medical doctor and psychotherapist specialized in psychotraumatology; Ms *Osterfeld* is a psychiatrist and psychotherapist as well as a member of the German National Agency for the Prevention of Torture (NPM). Mr *Obrecht* and Ms *Paulet* also have an established medical background, Ms *Paulet* also having been member of the CPT since 1999.

[11] See Antenor Hallo de Wolf, 'Visits to Less Traditional Places of Detention: Challenges under the OPCAT' (2009) 6 EHRLR 73, 89.

Article 9

Term of Office

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1(d).

1. Introduction	786
2. Travaux Préparatoires	786
2.1 Chronology of Draft Texts	786
2.2 Analysis of Working Group Discussions	788
3. Issues of Interpretation	789

1. Introduction

1 Article 9 OP is a standard provision in UN human rights treaties providing for a *four-year term of office* and the principle of *partial renewal* with *'staggering' elections* every two years. However, for the first time in a human rights treaty, Article 9 OP restricts the *re-election of members* to once only. This restriction of the possibility for a continuing membership of some members of the SPT for more than two terms served as a model for later treaties, such as the CED and CRDP.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Original Costa Rica Draft (6 March 1980)*[1]

Article 5

3. A person shall be eligible for renomination.

Article 6

1. The members of the Committee shall be elected for a term of four years. However, at the first election half of the members shall be elected for two years. Thereafter, elections shall be held every two years for half of the members of the Committee.

[1] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

3 *Revised Costa Rica Draft (15 January 1991)*[2]

Article 5

4. A member shall be eligible for re-election if renominated.

Article 6

1. The members of the Subcommittee shall be elected for a period of four years. However, among the members elected at the first election, the terms of five members, to be chosen by lot, shall expire at the end of two years.

4 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[3]

Article 6

The members of the Sub-Committee shall be elected for a term of four years. They shall be eligible for re-election [once] [twice] if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in Article 5, paragraph 2.

5 *Text of the Articles which Constitute the Outcome of the Second Reading (2 December 1999)*[4]

Article 9 (6)

The members of the Subcommittee shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in Article 6, paragraph 1.

6 *Mexican Draft (13 February 2001)*[5]

Article 13 (former Article 9 [6])

The members of the Sub-Committee shall be elected for a term of four years. They shall be eligible for re-election once if re-nominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these members shall be chosen by lot by the Chairman of the meeting referred to in Article 11, paragraph 1.

7 *EU Draft (22 February 2001)*[6]

Article 10 (former Article 9)

The members of the Sub-Committee shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the

[2] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[3] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995) UN Doc E/CN.4/1995/38, Annex; Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1996) UN Doc E/CN.4/1996/28, Annex I.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session (1999) UN Doc E/CN.4/2000/58, Annex II.

[5] E/CN.4/2001/WG.11/CRP.1. [6] E/CN.4/2001/WG.11/CRP.2.

first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in Article 7, paragraph 1.

2.2 Analysis of Working Group Discussions

8 During the first session of the Working Group, held from 19 to 30 October 1992, the election procedures and related issues were discussed under Article 5 and within the basket of issues called 'Composition and structure of the Subcommittee'.[7]

9 With regard to Article 5(4) of the Costa Rica Draft of 1991, the general sense of the debate concerned the notion that the possibility of *indefinite re-election* should be subject to some appropriate *limitation*. A number of delegations considered that the given concept of re-election was not conducive to renewal and dynamism in the body and that a limit on re-election for one additional term was more suitable. In addition, differences existed regarding the eligibility for re-election for more than one term. Moreover, it was further indicated that re-election to the CPT was only possible once.[8]

10 Concerning Article 6(1), one delegation indicated that the proposed procedures for *'staggering' elections* (to have half the members' terms expiring at different times) might have some unintended consequences due to the operation of Articles 4(1), 5(3) and (6). Furthermore, several speakers felt that the transitional arrangements for entry into force would give rise to technical concerns about the periodicity of elections.

11 During its second session from 25 October to 5 November 1993, the Working Group agreed on the text for Article 5(4).[9] With regard to Article 6 and the issue of re-election, however, no consensus could be reached in the course of the second session. Some delegations, again, considered that a limit on re-election to one additional term was more suitable, while other representatives supported two re-elections in order to ensure continuity, which would also take into account the experience of the CPT.[10]

12 In the sixth session, held from 13 to 24 October 1997, the delegates continued to discuss Article 6.[11] The representative of *Cuba* expressed the view that Article 6 should not specify the number of times that a member of the SPT would be eligible for re-election, arguing that such limitations were not laid out in other conventions. Therefore, the words 'once' and 'twice' in brackets should be deleted. This proposal was supported by the representative of the *Netherlands*. The delegation of the *Dominican Republic* also supported the delegation of Cuba, but suggested that a re-elected member might be allowed to stand for re-election again after a certain period of time. In contrast, the delegations of *Brazil* and *Canada* and the observers for *Australia, Sweden, Switzerland*, and the *APT* preferred to limit the possibility for re-election of experts to once. The observer for the APT stated that States parties to other conventions regretted the absence of limitations with regard to the number of times that a committee member could serve. At the reconvening of the second plenary meeting on 13 October 1997, the Chairperson-Rapporteur of the drafting group reported that the drafting group had decided that members of the SPT 'shall be

[7] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28 para 26.

[8] ibid, para 67.

[9] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25 para 45.

[10] ibid, para 51.

[11] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42 paras 19ff.

eligible for re-election once if renominated', as it was felt that this would ensure a balance between continuity and the need for diversity. Consequently, Article 6 was adopted and renumbered as Article 9.[12] Moreover, later drafts repeated the agreement reached in 1997.

3. Issues of Interpretation

13 Article 9 OP covers three different issues: the term of office, the question of re-election and the principle of partial renewal. The *term of office* of members of the SPT is *four years*, which is in line with the term of office of the Committee against Torture and other UN human rights treaty monitoring bodies.[13] Similarly, all relevant treaties provide for the system of *partial renewal*.[14] This means a system of '*staggering*' *elections*: after the first election, the Chairperson of the meeting of States parties shall choose by lot those five members whose term of office shall expire after two years. At the next elections, these five members may be re-elected, if again nominated by their respective State party. On 18 December 2006, the following five newly elected members of the SPT were chosen by lot: Ms *Casale*, Mr *Coriolano*, Mr *Hájek*, Mr *Lasocik*, and Mr *Rodriguez Rescia*.[15] Their first term of office ended at 31 December 2008. All of these experts, however, had been re-elected for a period of four years (until 31 December 2012) at the elections held during the second meeting of States parties on 30 October 2008.

14 As for the additional fifteen members of the SPT that had to be elected in 2010 to bring the total number of members to twenty-five, it was decided to follow the manner in which the original ten members were first elected, also with regard to their terms of office. Thus (and as fifteen is not divisible by two), seven of the additional fifteen members were about to be selected by the drawing of lots to serve a two-year term of office.[16]

15 Both Costa Rica Drafts had provided for the possibility of *unrestricted renomination and re-election*. During the discussions in the Working Group, many delegations felt that there should be some appropriate limitation, as the concept of unlimited re-election was not conducive to renewal and dynamism. The text reflecting the outcome of the first reading in 1996 provided that re-election should only be possible once or twice.[17] In October 1997, an interesting debate took place in the Working Group:[18] while Cuba, the Netherlands, and the Dominican Republic pleaded for unlimited re-election, the delegations of Brazil, Canada, Australia, Sweden, and Switzerland, as well as NGOs, such as APT, argued in favour of only *one possibility of re-election*. Unfortunately, the latter view prevailed, and even the compromise of two re-elections, as also laid down in the Second Protocol to the ECPT, has not been further pursued.

16 In some of the older human rights treaties, the question of re-election is not addressed at all, which means that, in the absence of any restriction, members can be re-elected without limitation.[19] Most of the other human rights treaties, including the

[12] ibid, para 23.

[13] cf Art 8(5)(a) CERD; Art 32 CCPR; Art 17(5) CEDAW; Art 17(5) CAT; Art 43(6) CRC; Art 72(5)(a) CMW; Art 26(4) CED; Art 34(7) CRPD .

[14] ibid.

[15] See Secretary-General, 'First Meeting of the States Parties—Summary Record' (2006) UN Doc CAT/OP/SP/SR.1.

[16] See Secretary-General, 'Elections of Members of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/SP/7 paras 15–16.

[17] cf above para 4. [18] See above 2.2. [19] cf eg art 8 CERD and art 17 CEDAW.

CAT, provide explicitly for the possibility of (unlimited) re-election.[20] However, some of the recently adopted treaties, such as the Convention on Enforced Disappearance and the Convention on the Rights of Persons with Disabilities, limit the possibility of re-election to once.[21] Article 9 OP was the first provision in an UN human rights treaty to this effect.

17 In this respect, it is interesting to look at the *experience of the CPT*. Article 5(3) ECPT, which was adopted in 1987 and entered into force in 1989, provides that the members of the CPT 'may only be re-elected once'. This provision caused a variety of problems to the professionalism and continuity of the work of the CPT in its early stages of developing its methods of work, including the methodology of country missions, such that, in 1993, a *Second Protocol* was adopted which amended Article 5(3) and allows for *two re-elections*. This Protocol entered into force on 1 March 2002.

18 It is doubtful whether the decision to limit the possibility of re-election was a wise one. The experience of the *Human Rights Committee* and the respective renewal and re-election of its members shows a good *balance between the principles of continuity and dynamism*. While many members were never re-elected or only re-elected once, some members served for almost twenty years.[22] It is up to the States parties to decide whether they wish to renominate a particular expert and whether this person is in fact elected. If an expert provides an excellent contribution to the respective treaty body and all stakeholders involved are in favour of another re-election, it is regrettable if this cannot be achieved because of a restrictive provision in the respective treaty. The 'institutional memory' of some experts is indeed highly valuable in order to avoid certain un-reflected changes in the practice of treaty bodies. This certainly also applies to the methodology of country missions to be developed by the SPT. As the experience of the CPT clearly shows, a certain continuity of members would be highly welcome. In fact, a *combination of rotation and continuity* of specially qualified experts has to be found in order to achieve the best results as regards the object and purpose of the treaty.

19 The question remains, then, whether the principle of only one re-election also applies to those *experts whose first term of office had been reduced by lot to two years*. Strictly speaking, they may be re-elected only once, which means that their maximum term of office would be six (instead of eight) years. In light of the *object and purpose of the treaty* and a certain need for continuity, one might also argue that this limitation does not apply to these particular members, as their right to two terms of office, if renominated and re-elected, would have been diminished arbitrarily. In our opinion, these experts may be re-elected twice, i.e. for a maximum of ten years. In practice, this has never happened.

20 An interesting case is shown by the example of one the SPT members: Ms *Definis-Gojanović* (*Croatia*) had been one of the ten original experts of the SPT having been elected for a period of four years (ie, until 31 December 2010). On 28 October 2010, she

[20] cf eg art 32 CCPR, art 17(5) CAT, art 43(6) CRC, art 72(5)(c) CMW.

[21] cf eg art 26(4) CED and art 34(7) CRPD.

[22] See the list of all Committee members and their respective terms of office in Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 1227.

had been re-elected, and it was decided by lot that she would now only serve for a term of two years (until 31 December 2012).[23] In our opinion, the limitation of her term of office after re-election to two years *violated the clear wording of Article 9 OP*, as only those members who have been elected at the first election may be chosen by lot to serve for a period of two years.

KERSTIN BUCHINGER

[23] See Secretary-General, 'Fourth Meeting of the States Parties—Summary Record of the 4th Meeting' (2010) UN Doc CAT/OP/SP/SR.4 para 27.

Article 10

Rules of Procedures

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.

2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:

(a) Half the members plus one shall constitute a quorum;

(b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;

(c) The Subcommittee on Prevention shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

1. Introduction	792
2. Travaux Préparatoires	793
2.1 Chronology of Draft Texts	793
2.2 Analysis of Working Group Discussions	794
3. Issues of Interpretation	796
3.1 The Bureau of the SPT	796
3.2 The Conduct of Business	797
3.3 Meetings *in camera*	797
3.4 The Rules of Procedure	797
3.5 Sessions of the SPT	798

1. Introduction

1 Article 10 OP is modelled on Article 18 CAT, which itself is based on Articles 35 to 39 CCPR.[1] It requires the SPT, as the CAT Committee, to elect its officers, ie one chairperson, three (originally two) vice-chairpersons, and one rapporteur, for a term of two years, and to establish its own rules of procedure which shall provide that, at the beginning, six (now fourteen) members shall constitute a quorum[2] and that decisions shall be made by a majority vote of the members present. Although the SPT, as with the CAT Committee, is free to decide the number of its annual sessions, both bodies must hold one at the same time, and all meetings shall be confidential.

[1] cf above Art 18 CAT. [2] See SPT, 'Rules of Procedure', UN Doc CAT/OP/3, r 25.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Original Costa Rica Draft (6 March 1980)*[3]

Article 7

1. The Committee shall meet for regular sessions twice a year, and for special sessions at the initiative of its Chairman or at the request of not less than one third of its members.

2. The Committee shall adopt its own rules of procedure. Its decisions shall be taken by a majority of its members present and voting.

3. Half of the members shall constitute a quorum.

3 *Revised Costa Rica Draft (15 January 1991)*[4]

Article 7

1. The Subcommittee shall meet for a regular session at least twice a year; for special sessions at the initiative of its Chairman or at the request of not less than one third of its members.

2. The Subcommittee shall meet in camera. Half of the members shall constitute a quorum. The decisions of the Subcommittee shall be taken by a majority of the members present, subject to Article 14, paragraph 2.

3. The Subcommittee shall draw up its own rules of procedure.

4. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee against Torture and the Subcommittee under this Protocol.

4 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[5]

Article 7

1. The Sub-Committee shall elect its officers for a term of two years. They may be re-elected [once].

2. The Sub-Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

   (a) Half plus one member shall constitute a quorum;

   (b) Decisions of the Sub-Committee shall be made by a majority vote of the members present;

   (c) The Sub-Committee shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Sub-Committee. After its initial meeting, the Sub-Committee shall meet at such

[3] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[4] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[5] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1996) UN Doc E/CN.4/1996/28, Annex I; see also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25, Annex.

times as shall be provided in its rules of procedure [, but it shall meet for a regular session at least twice a year.]

4. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of [the Committee against Torture and] the Sub-Committee under this Protocol.

5 *Text of the Articles which Constitute the Outcome of the Second Reading (2 December 1999)*[6]

Article 10 [7]

1. The Sub-Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Sub-Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Half plus one member shall constitute a quorum;

(b) Decisions of the Sub-Committee shall be made by a majority vote of the members present;

(c) The Sub-Committee shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Sub-Committee. After its initial meeting, the Sub-Committee shall meet at such times as shall be provided in its rules of procedure.

6 *US Draft (16 January 2002)*[7]

Article 6

The Committee shall establish rules of procedure for the Subcommittee on Prevention, but these rules shall provide, inter alia, that:

(a) [Four] members shall constitute a quorum;

(b) Decisions of the Subcommittee shall be made by a majority of the members present.

Article 7

The Committee shall convene the initial meeting of the Subcommittee. After its initial meeting, the Subcommittee shall meet at such times as shall be provided in its rules of procedure.

2.2 Analysis of Working Group Discussions

7 During the first session of the Working Group, held from 19 to 30 October 1992, the then Article 7 of the revised Costa Rica Draft was discussed within the third basket of issues, 'Composition and structure of the Subcommittee'.[8] Concerning Article 7(1),

[6] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session (1999) UN Doc E/CN.4/2000/58, Annex II. Similar provisions are contained in the Mexican Draft of 13 February 2001 (E/CN.4/2001/WG.11/CRP.1, Art 14, former Art 10 [7]) and the EU Draft of 22 February 2001 (E/CN.4/2001/WG.11/CRP.2, Art 11, former Art 10).

[7] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session (2002) UN Doc E/CN.4/2002/78, Annex II E.

[8] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28, para 26.

the capacity to convoke special sessions of the body at the request of only one third of the members was questioned by certain delegations. They considered that this had both financial and other implications and that it would be preferable to have a majority of the members make such a determination. With regard to paragraph 2, some delegations considered that a majority of the SPT should constitute a quorum rather than one half the members. Regarding paragraph 4, one representative inquired whether this provision regarding the staff and the facilities required to service the needs of the body would be more logically placed with the other articles dealing with financial matters. The Representative of the Secretary-General indicated that the substance of this paragraph was a standard provision which should be retained, but that the location of the provision was not a significant issue.

8 In the course of its second session from 25 October to 5 November 1993, the Working Group continued to consider Article 7.[9] After an extensive debate, the Working Group decided to redraft this Article on the basis of Article 18 CAT and a text that had been additionally proposed by certain delegations. The Working Group then agreed on the text. As to paragraph 1, there was consensus that the new wording should follow paragraph 1 of Article 18 CAT. One delegation proposed to add the word 'once' at the end of the second sentence of this paragraph. Concerning paragraph 3, there was consensus that the wording of the paragraph should follow Article 18(4) CAT. Some delegations, however, felt that a minimum number of regular sessions per year should be stated in order to guarantee sufficient funding. In order to meet this purpose, it was agreed to add the following wording at the end of the second sentence: 'but it shall meet for a regular session at least twice a year.' With regard to paragraph 4, there was consensus that the wording should follow Article 18(3) CAT, although one delegation felt that the reference to the CAT Committee should be deleted. Thus, the Working Group decided to put the reference in square brackets.

9 At the sixth session, held from 13 to 24 October 1997, a general discussion of Article 7 was reopened.[10] The observer for *Sweden* expressed the view that the rules of procedure referred to in paragraph 2 should apply also to the missions of the SPT. It was suggested to add a subparagraph, stating that the rules of procedure shall also be applied, *mutatis mutandis*, to delegations of the SPT on missions. Although the Working Group decided not to include the Swedish proposal in the text of the Article, it was recommended that the SPT should be advised to take the proposal into account in drafting its rules of procedure. The representative of *China* found that the words 'the Committee against Torture and' in brackets should be deleted from Article 7(4). The Chairperson of the drafting group reported that it had been decided that the contents of the brackets in paragraphs 1, 3, and 4 should be deleted. Paragraph 2 would remain as it stood. Regarding paragraph 4, the relationship between the CAT Committee and the SPT had not yet been completely agreed upon and a review of the paragraph might become necessary at a later stage in order to ensure consistency.[11] Consequently, Article 7 (then Article 10) was adopted on 13 October 1997.[12] On 14 October 1997, the Working Group decided to

[9] See E/CN.4/1994/25 (n 5) paras 53ff.

[10] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42, paras 24ff.

[11] cf below Arts 25 and 26 OP. [12] See E/CN.4/1998/42 (n 10) para 30.

delete paragraph 4 as it was felt to be redundant, especially since Article 16(2) referred to the same issue.[13] This version was retained in all later drafts. In the final proposal, the Chairperson-Rapporteur added a sentence to the effect that the CAT Committee and the SPT shall hold at least one annual session simultaneously.[14]

3. Issues of Interpretation

10 While the revised Costa Rica Draft of 1991 had provided for two regular *annual sessions* and *special sessions* at the request of one-third of the SPT's members, as well as for a quorum of half of the members,[15] the Working Group agreed that Article 10 OP shall be based, as far as possible, on Article 18 CAT.[16] Literally, Article 10(1) corresponds to Article 18(1) CAT.

3.1 The Bureau of the SPT

11 The SPT shall elect its officers, who may be re-elected, for a term of two years. Ms *Casale* was elected as first Chairperson in February 2007, Mr *Petersen* and Mr *Rodríguez-Rescia* served as the two first Vice-Chairpersons. From February 2009 to February 2011, Mr *Rodríguez-Rescia* was elected Chairperson, and Mr *Coriolano* and Mr *Petersen* acted as Vice-Chairpersons. In view of the (then) forthcoming expansion, the SPT decided at its twelfth session to *expand the bureau* to five members at its thirteenth session.[17] Thus, the bureau, which was elected in February 2011, comprised Mr *Evans* as Chairperson and Mr *Coriolano*[18], Mr *Hajek*, Ms *Jabbour*, and Ms *Muhammad* as Vice-Chairpersons.[19] It was agreed that each of the bureau members should also have distinct responsibilities in order to reach a high level of effectiveness and efficiency within the enlarged SPT.[20] At its nineteenth session, the SPT elected its bureau for the period until February 2015. Mr *Evans* was re-elected as *Chairperson*. The four elected Vice-Chairpersons and their areas of primary responsibilities were Ms *Jabbour* (NPMs), Ms *Muhammad* (jurisprudence), Mr *Tayler Souto* (SPT visits), and Mr *Zongo* (external relations). Again, Ms *Muhammad* served as the SPT's Rapporteur.[21] A partly new composition of the bureau arose from the elections held at the twenty-fifth session of the SPT. While Mr *Evans* continues to be Chairperson and Ms *Mohammad* is still SPT Rapporteur responsible for matters relating to jurisprudence, the three other Vice-Chairpersons and their primary responsibilities to

[13] ibid, para 31.
[14] See E/CN.4/2002/WG.11/CRP.1, Art 10(3).
[15] See ibid, Art 10.
[16] See above 2.2 and Art 18 CAT.
[17] See SPT, 'Forth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/C/46/2, para 11.
[18] On 1 October 2012, Mr Coriolano resigned due to his election as a member of the Human Rights Council Advisory Committee.
[19] See SPT, 'Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc CAT/C/48/3, para 8.
[20] Mr Coriolano was primarily responsible for the issue of NPMs, Mr Hajek was responsible for the issue of SPT visits, Ms Jabbour was responsible for the SPT's external relations, and Ms Muhammad (being also the SPT Rapporteur) for the issue of jurisprudence; see CAT/C/48/3 (n 19) para 9; Ms Muhammad was at the same time Vice-Chairperson and Rapporteur of the SPT; this practice, stipulated in Rule 10 para 1 of the SPT's RoP is different from all the other treaty bodies.
[21] See SPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc CAT/C/52/2, para 7.

date are Mr *Font* (SPT visits), Ms *Jabbour* (external relations), and Mr *Lam Shang Leen* (NPMs).[22]

3.2 The Conduct of Business

12 Article 10(2) OP corresponds almost literally to Article 18(2) CAT. The SPT, as the CAT Committee, is free to *establish its own RoP*, with only a few general rules that have to be contained therein. As in Article 18(2)(a) CAT, the *quorum* shall be *half the members plus one*. When the SPT was first set up and comprised ten members, six members constituted a quorum. As the number of SPT members was soon to be increased from ten to twenty-five according to Article 5(1) OP, the SPT decided that fourteen (instead of only thirteen) members shall constitute a quorum.[23] Decisions of the SPT shall be made by a majority vote of the members present. If only fourteen members are present, at least eight members must vote in favour.

3.3 Meetings *in camera*

13 While Rule 31 of the RoP of the CAT Committee provides that all meetings of the CAT Committee shall be held in public, unless decided or required otherwise, Article 10(2)(c) OP stipulates that the SPT shall meet *in camera*. This strict requirement of *confidentiality* was already contained in Article 7(2) of the revised Costa Rica Draft of 1991 and is based on Article 6(1) ECPT. It results from the highly confidential and sensitive nature of country missions,[24] which constitute the main task of the SPT. Nevertheless, it might have been useful to allow the SPT also to hold public meetings when it discusses general issues, such as its methodology of conducting preventive visits to places of detention or general conclusions based on its experience in the field. Moreover, the SPT shall, in accordance with Article 16(3) OP, present a *public report on its activities to the CAT Committee*. It might be useful to discuss this report at a *joint public session* of the CAT Committee, ie with the members of the SPT present at a public session of the CAT Committee in accordance with Article 10(3) OP (last sentence) and Rule 31 of the CAT Committee's RoP. Finally, the CAT *Committee*, pursuant to Article 16(4) OP, is authorized to make a *public statement* or to publish a country-specific mission report of the SPT if the State party concerned refuses to cooperate or to take steps to improve the situation in the light of the Subcommittee's recommendations.[25]

3.4 The Rules of Procedure

14 For quite some time the SPT decided to keep its RoP as one of its 'key internal working documents'.[26] It was only in 2010 that the SPT decided to make them public, stating that—while fully respecting the *principle of confidentiality* embodied in Article 2(3) OP—it did not consider either its activities or the approaches that it takes to its work

[22] See SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, para 7.

[23] See also r 25. [24] cf also above Art 20(5) CAT. [25] See below Art 16 OP.

[26] See SPT, 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc CAT/C/40/2, para 60; see also Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 96.

to be confidential as such.[27] Consequently, the RoP were published on 5 January 2011.[28] They have been revised and newly adopted at the SPT's eighteenth session (from 12 to 16 November 2012).[29]

15 The RoP, consisting of thirty-four Rules, are composed of *four parts*. Part one (General Rules) (Rules 1 to 29) elaborates on the sessions of the SPT, its members, bureau, secretariat, communications, languages, confidentiality, the documents of the SPT, its conduct of business, and the co-operation with UN organs and mechanisms as well as other international, regional, and national institutions or organizations. Part two (Rule 30) relates to the NPMs, Part three (Rule 31) to interpretation. Part four (Rules 32 to 34) addresses the issues of suspension, amendment, and additions.

3.5 Sessions of the SPT

16 Article 10(3) OP is based on Article 18(4) CAT. After the initial meeting is convened by the UN Secretary-General, the SPT is itself responsible for deciding the number and dates of its meetings, subject of course to its financial resources and the availability of UN conference services, and to convene its meetings accordingly. The first session of the SPT was held at the OHCHR (Palais Wilson) in Geneva from 19 to 23 February 2007.[30] It decided to hold *three annual sessions in Geneva*. These *regular sessions*, each lasting one week, are held in February, June, and November each year. According to Rule 1(4), *special sessions* shall be held in addition to regular sessions at dates agreed by the SPT in consultation with its Secretariat.

17 The last sentence of Article 10(3) OP was not contained in any of the various drafts submitted to the Working Group, but was added only in the final proposal of the Chairperson-Rapporteur of 17 January 2002.[31] It provides that, at least once a year, the CAT Committee and the SPT shall hold their *sessions simultaneously*. This does not mean that the entire session must be held jointly by both bodies. It only requires both bodies to find suitable common dates for at least one session per year in order to enable them to meet jointly and/or to hold informal meetings together. When deciding on the dates of its sessions, the SPT takes into account that these dates coincide with those of the CAT Committee. In practice, the joint meetings are held in the course of each year's November session. For these joint meetings, the RoP of the CAT Committee as the parent body shall apply. Since Rule 31 of the CAT Committee's RoP contains the principle of public meetings, such *joint meetings shall be held in public* unless the CAT Committee decides otherwise. It has proven to be useful to hold joint public sessions on general issues, such as the methodology of country missions or general conclusions based on the experience of country missions. Thus, the simultaneous meetings are used to discuss a range of issues of mutual concern (both substantive and procedural), such as the concept of torture and other forms of ill-treatment; the SPT's strategic focus, the methodology of information sharing between the two bodies, etc.[32]

[27] See CAT/C/46/2 (n 17) para 48.

[28] See SPT, '(Former) Rules of Procedure of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/OP/12/3.

[29] See SPT, 'Rules of Procedure' (2013) UN Doc CAT/OP/3.

[30] See SPT, 'Summary Record of the 1st Part (Public) of the 1st Meeting' (2007) UN Doc CAT/OP/1/SR.1.

[31] See E/CN.4/2002/WG.11/CRP.1, Art 10(3).

[32] See CAT/C/48/3 (n 19) para 29.

18 The revised Costa Rica Draft also contained provisions requiring the UN Secretary-General to provide the *necessary staff and facilities* for the effective performance of both the CAT Committee's and the SPT's functions under this Protocol. In fact, the funding of the SPT, including its staff and facilities, out of the regular UN budget is included in Article 25. In addition, Article 26 provides for a *Special Fund* financed through voluntary contributions.[33]

KERSTIN BUCHINGER

[33] See below Arts 25 and 26 OP.

PART III

MANDATE OF THE SUBCOMMITTEE ON PREVENTION

Article 11

Mandate of the Subcommittee

The Subcommittee on Prevention shall:

(a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(b) In regard to the national preventive mechanisms:

- **(i) Advise and assist States Parties, when necessary, in their establishment;**
- **(ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;**
- **(iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;**
- **(iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;**

(c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

1. Introduction	803
2. Travaux Préparatoires	804
2.1 Chronology of Draft Texts	804
2.2 Analysis of Working Group Discussions	809
3. Issues of Interpretation	810
3.1 Country Missions and Preventive Visits to Places of Detention	811
3.2 Advice to States Parties	812
3.3 Advice to NPMs	814
3.4 Recommendations and Observations	816
3.5 Cooperation	817
3.6 Budgetary Issues	818

1. Introduction

1 Article 11 OP defines the *core preventive mandate* of the SPT as follows:

- Conducting country missions and preventive visits to places of detention.
- Advising and assisting States parties and NPMs.

- Cooperating with relevant international, regional, and national organizations and institutions in the field of torture prevention.

2 While the first 'operational' function of the SPT, ie monitoring places of detention in order to issue recommendations with regard to an improvement of systems of deprivation of liberty, was introduced to the drafting process by the Costa Rica Draft and is based on the respective competence of the CPT, the second 'advisory' function was introduced by the Mexican Draft in 2001.[1] The SPT's advisory role in respect of NPMs is another key element of its mandate. In practice, the SPT first tended to make references to the establishment and/or effective functioning of NPMs in its visit reports published after regular country missions. In 2011, however, it decided to conduct special 'NPM advisory visits' in order to be able to fulfil its mandate under Article 11(b) OP in a more adequate manner.[2] Although funds for implementation may be made available through the Special Fund set up in accordance with Article 26 OP, the question of funding with regard to the SPT's advisory function has remained an issue of major concern. The task of cooperating with other relevant international, regional, and national bodies, particularly with the CPT and similar regional mechanisms, can be found in most drafts. It aims at encouraging cooperative efforts between a wide range of actors in the field of torture prevention in order to achieve the most effective outcomes as well as integrated and consistent preventive strategies.[3] The competences of the SPT and the corresponding obligations of States parties in relation to country missions are further defined in Articles 12 to 16 OP, while the respective provisions for NPMs are set out in Articles 17 to 23 OP.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[4]

Article 8

1. The Committee shall be responsible for arranging visits to places of detention subject to the jurisdiction of the States Parties to the present Convention.

2. The Committee shall establish a programme of regular visits to each of the said States Parties and shall arrange such further visits as may appear necessary from time to time.

4 *Revised Costa Rica Draft (15 January 1991)*[5]

Article 8

1. The Subcommittee shall establish a programme of regular missions to each of the State Parties. Apart from regular missions, it shall also undertake such other missions as appear to it to be required in the circumstances.

[1] See below 2.1.

[2] See SPT, 'Forth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011), UN Doc CAT/C/46/2 para 45.

[3] APT and IIDH, *Optional Protocol to the UN Convention against Torture: Implementation Manual* (2nd rev edn, APT and IIDH 2010) 71.

[4] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[5] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

2. The Subcommittee shall postpone any such mission of the State Party concerned has agreed to a visit to its territory by the Committee against Torture pursuant to Article 20 paragraph 3 of the Convention.

Article 9

1. If, on the basis of a regional convention, a system of visits to places of detention similar to the one of the present Protocol is in force for a State Party, the Subcommittee shall only in exceptional cases, when required by important circumstances, send its own mission to such a State Party. It may, however, consult with the organs established under such regional conventions with a view to coordinating activities including the possibility of having one of its members participate in missions carried out under the regional conventions as an observer. Such an observer shall report to the Subcommittee. This report shall be strictly confidential and shall not be made public.

2. The present Protocol does not affect the provisions of the Geneva Conventions of 12 August 1949 for the protection of victims of war and their Additional Protocols of 8 June 1977 by which the Protecting Powers and the International Committee of the Red Cross visit places of detention, or the right of any State Party to authorize the International Committee to visit places of detention in situations not covered by international humanitarian law.

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[6]

Article 8

The Sub-Committee shall [undertake missions] [establish a programme of missions] to States Parties [based on the criteria capable of guaranteeing the principles of non-selectivity, impartiality, objectivity, transparency and universality] [based on criteria consistent with the principles set out in Article 3] [Apart from programmed missions, it shall also undertake other missions as appear to it to be appropriate].

[Those missions shall be] [mutually agreed between the Sub-Committee and the State Party concerned, in a spirit of cooperation] [undertaken by the express consent of the State Party concerned].

[Without prejudice to the provisions of Article 1], [the modalities for carrying out each mission shall be mutually agreed between the Sub-Committee and the State Party concerned, in a spirit of cooperation] [the Sub-Committee and the State Party concerned shall engage in consultation in order to determine the modalities of the mission].

[In preparation for such a mission], the Sub-Committee shall send a written notification to the Government of the State Party concerned of its intention to organize a mission [together with a detailed plan of the mission] [and after consultations with the State Party on the modalities of the mission]. [After such notification], the Sub-Committee may at any time visit any place referred to [in its detailed plan after a written agreement is given by the said Government] [in Article 1 paragraph 1].

[6] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1996) UN Doc E/CN.4/1996/28, Annex I.

Article 9

1. The Sub-Committee [shall] [may] decide to postpone a mission to a State Party if the State Party concerned has agreed to a scheduled visit to its territory by the Committee against Torture, pursuant to Article 20 paragraph 3 of the Convention.

2. The Sub-Committee, while respecting the principles set out in Article 3, is encouraged to cooperate with relevant United Nations organs and mechanisms as well as international, regional and national institutions or organizations working towards strengthening the protection of persons from torture and other cruel, inhuman or degrading treatment or punishment.

3. If, on the basis of a regional Convention, a system of visits to places of detention similar to the one under the present Protocol is in force for a State Party, the Sub-Committee shall still be responsible for missions/visits to such a State Party under this Protocol assuring its universal application. However, the Sub-Committee and the bodies established under such regional conventions are encouraged to [cooperate] [consult] with a view to promote the objectives of this Protocol [and avoid duplication of work and missions/visits].

Such cooperation may not exempt the States Parties belonging also to such conventions from cooperating fully with the Sub-Committee, nor [exempt] [preclude] the Sub-Committee from carrying out missions/visits to the territories of those States in the fulfilment of its mandate.

[Each State Party belonging also to such regional conventions is encouraged to submit to the Sub-Committee, on a confidential basis, visit reports drawn up by the regional body in respect of that country and response of the State Party to it.]

4. The provisions of the present Protocol do not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, or the possibility for any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

6 *Text of the Articles which Constitute the Basis for Future Work after the Second Reading (2 December 1999)*[7]

Article 8

1. The Subcommittee:

   (a) Shall establish, on the basis of a transparent and impartial procedure, a programme of regular [missions] [visits] to all States Parties [A reasonable frequency for the [missions] [visits] shall be decided by agreement with State(s) Party[ies]];

   [these regular [missions] [visits] include follow-up missions;

   (b) Shall also undertake such other [missions] [visits] as appear to it to be required in the circumstances and based on reliable information, [determined as described in Article 1 of the Protocol] with a view to furthering the aims of this Protocol:

[7] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session (1999) UN Doc E/CN.4/2000/58, Annex II.

2. (a) The Subcommittee shall send a written notification to the Government of the State Party concerned of its [intention] [request] to organize a [mission] [visit], [followed by] [including] a list of places to be visited and the composition of the delegation. [The Subcommittee may also visit other places as needed during its mission];

[(b) Those [missions] [visits] shall be conducted after the consent of the State concerned and shall be mutually agreed upon between the Subcommittee and the State Party in a spirit of cooperation];

(c) [Missions] [visits] shall be organized and carried out in accordance with the principles set out in Article 3 of the Protocol;

3. [(a)] [Six months] Before a [mission] [visit] is carried out, the Subcommittee and the State Party concerned shall, [if either of them so requests,] enter into consultations with a view to agreeing [without delay on the practical arrangements] [on the modalities] of the [mission] [visit];

[(b) Such consultations on the practical arrangements for the [mission] [visit] may not include negotiations on the obligations of a State Party under Article 1 of the Protocol].

7 *Mexican Draft (13 February 2001)*[8]

Article 15

The Sub-Committee shall have as its mandate to:

1. Advise and assist States Parties, when necessary, in the establishment of national mechanisms;

2. Maintain close contact with national mechanisms and provide them with training and advice with a view to strengthening their capacities;

3. Provide national mechanisms with assistance and advice in assessing needs and measures in order to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

4. Supervise the functioning of national mechanisms;

5. Make recommendations to national mechanisms and to States Parties on measures to strengthen, if necessary, the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

6. Make recommendations and observations to States Parties with a view to strengthening the capacities and mandate of national mechanisms for the prevention of torture.

Article 18

1. The Sub-Committee and the State Party concerned shall cooperate with each other in the implementation of this Protocol (former Article 3 paragraph 1).

2. The Sub-Committee should cooperate in the prevention of torture with all bodies and mechanisms and with all international or regional mechanisms working to strengthen the protection of persons deprived of their liberty against torture and other forms of cruel, inhuman or degrading treatment or punishment.

[8] E/CN.4/2001/WG.11/CRP.1.

8 *EU Draft (22 February 2001)*[9]

Article 9 (old 8 revised)

1. The Sub-Committee:

   (a) Shall establish on the basis of a transparent procedure, a programme of regular missions to all States Parties. These missions may also include follow-up missions;

   (b) Shall also undertake such visits or missions as appear to be required in the circumstances and based on information received by the Sub-Committee and assessed by it as credible, with a view to furthering the aims of this Protocol;

   (c) Shall after a mission or a visit advise and assist the State Party in assessing the needs and appropriate measures for strengthening the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment;

   (d) May make recommendations to the State Party on the mandate, the competence and the effective functioning as well as other relevant activities of an established national mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Article 15;

   (e) Shall transmit requests from a State Party for technical assistance and technical cooperation as well as facilitate the provision of such cooperation from the relevant United Nations bodies such as UNHCR, UNDP, ODCCP, UNICEF and UNIFEM.

2. The Sub-Committee shall send a written notification to the Government of the State Party concerned of its intention to organize a mission.

3. Before a mission is carried out, the Sub-Committee and the State Party concerned shall, if either of them so requests, enter into consultations with a view to agreeing without delay on the practical arrangements for the mission. Such consultations on the practical arrangements for the mission may not include negotiations on the obligations of a State Party under Articles 3 or 13.

9 *US Draft (16 January 2002)*[10]

Article 2

The Subcommittee on Prevention, under the direction of the Committee, shall:

(a) Assist members of the Committee with respect to the Committee's functions under the Convention, including, in particular, the making of confidential inquiries in accordance with paragraphs 1–5 of Article 20, as well as with voluntary visits the Committee may propose to States Parties that may be made in agreement with them;

(b) Assist, upon request, States Parties in setting up national mechanisms;

(c) Respond to requests for technical advice designed to assist States Parties with the operation of national mechanisms, as well as with the effective implementation of their obligations under Articles 2 and 16 of the Convention;

(d) Serve as a resource for technical information and advice to promote safe, humane, cost-efficient and appropriately secure facilities for detention or imprisonment.

[9] E/CN.4/2001/WG.11/CRP.2.

[10] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session (2002) UN Doc E/CN.4/2002/78, Annex II E.

2.2 Analysis of Working Group Discussions

10 During the first session of the Working Group, held from 19 to 30 October 1992, Article 8 was discussed within the fourth basket titled 'Operation of the system' and Article 9 was considered within the fifth basket of issues called 'Relationships between the SPT and other institutions'.[11]

11 The general approach of participants who were in the process of considering Article 8 of the revised Costa Rica draft was to support the concept of a programme of regular missions of a preventive character to States parties, which was to be supplemented as required by the circumstances.[12]

12 With regard to Article 9, most participants in the debate considered that a balanced relationship between the SPT and other bodies, including regional bodies and the International Committee of the Red Cross, was a very important element in the credibility and the administration of the system of visits. In addition, numerous questions were raised about the approach taken by the present text to address the issue of relations between regional and universal systems.[13]

13 The Working Group held its second session from 25 October to 5 November 1993. During the discussions on Article 9, the need for appropriate measures of coordination in order to avoid duplication with other bodies and to enhance complementarity were considered as vital requirements of the OP. It was felt that the Protocol's provisions should be universal in scope and not exclude any region, including areas where relevant regional agreements already existed.[14]

14 It was stated that the relationship between the SPT and other bodies, such as the Committee against Torture, regional bodies and the Special Rapporteur on Torture of the Commission on Human Rights, must be made clear. The need was also seen for a revision of the conditions for the establishment of cooperation with regional organizations, particularly with regional agreements. Moreover, it was proposed that a possible solution to the concern expressed above might be found in the principle of reciprocal cooperation between the bodies.[15]

15 The Working Group held its third session from 17 to 28 October 1994. At this session, the informal drafting group submitted the generally-accepted text of Article 9 to the plenary meeting of the Working Group. It was pointed out that paragraph 4 of that Article accommodated the balance in the relationship between the SPT and bodies established under other conventions.[16]

16 During the ninth session from 12 to 23 February 2001, the Working Group held a general debate on the alternative draft, introduced at the second meeting of the Working Group on 13 February 2001, submitted by the delegation of *Mexico* with the support of GRULAC. The draft proposed that States parties to the OP should create *national mechanisms* for the prevention of torture, which was strongly supported by most of the

[11] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28 para 26.

[12] ibid, para 74. See also below Art 13 OP.

[13] ibid, para 96.

[14] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25 para 69.

[15] ibid, para 73.

[16] See Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995) UN Doc E/CN.4/1995/38, para 31.

delegations.[17] The majority of delegations in favour of the alternative draft stressed the supervisory role of the SPT vis-à-vis the national mechanisms and stated that 'supervision' had to be understood in a broad sense. Supervisory functions could be carried out through a permanent exchange of information and the submission of periodic and/or ad hoc reports by the national mechanisms. Other delegations, however, expressed their concern that the SPT would be reduced to serving merely as an advisory and technical assistance body. They insisted that the SPT should have visiting powers in addition to its role of monitoring the activities of the national mechanisms.[18]

17 During the tenth session of the Working Group from 14 to 25 January 2002, after a general debate was held on the proposed *two-pillar system*, which would involve combining an international visiting mechanism with national mechanisms in each participating State, the delegations discussed the international mechanism and its relationship with the Committee and the national mechanisms.[19] The delegation of *Spain*, on behalf of the European Union and supported by the delegations of Argentina, the Czech Republic, Guatemala, Mexico, Canada, Sweden, Slovenia, New Zealand, Denmark, El Salvador, the Netherlands, Georgia, Germany, the United Kingdom, Norway, Latvia, France, Ecuador, Portugal, the Republic of Korea, Switzerland, Poland, Austria, and South Africa, had a preference for an international visiting mechanism which would not only provide technical assistance to the national mechanisms but also have very extensive visiting functions in connection with any place where people were deprived of their liberty. For the delegations of China, Cuba, Egypt, and the Syrian Arab Republic, the main function of the international mechanism was, however, to provide technical and financial support to the national mechanisms, whereas the visiting functions should mainly be entrusted to the national mechanisms.[20]

18 On 17 January 2002, the Chairperson-Rapporteur presented her proposal for an OP.[21] Part III of her draft described the mandate of the SPT which included three main areas: visits to places of detention, technical assistance, and cooperation for the prevention of torture with relevant UN organs as well as international, regional, and national institutions.[22]

19 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[23]

3. Issues of Interpretation

20 According to the revised *Costa Rica Draft* of 1991, the main function of the SPT was to establish and carry out a programme of *regular missions* to each of the States parties and to undertake ad hoc *missions*, if required.[24] The *Mexican Draft* of 2001, on the other hand, focused on the advice, assistance, cooperation and supervision of *NPMs*. Article 11 OP reflects a *compromise* between both approaches. *Country missions*,

[17] See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session (2001) UN Doc E/CN.4/2001/67 , paras 19ff. See above para 7.
[18] ibid, para 40. [19] See E/CN.4/2002/78 (n 10) paras 19ff. [20] ibid, para 21.
[21] See E/CN.4/2002/WG.11/CRP.1. [22] See E/CN.4/2002/78 (n 10) para 49.
[23] See CHR Res 2002/33 of 22 April 2002. See above Art 1 OP, 2.2. [24] See above 2.1.

visit places of detention and making respective recommendations to States parties (as stipulated in Article 11(a) OP) remain the primary tasks of the SPT, which are further defined in the following Articles.[25]

3.1 Country Missions and Preventive Visits to Places of Detention

21 Conducting visits to places of deprivation of liberty is one of the crucial components of the SPT's country missions. It ensures that one of the core parts of SPT's mandate, namely its 'operational function' in order to improve systems of deprivation of liberty,[26] is fulfilled on a regular and sustainable basis, and is in fact 'the whole *raison d'etre* of OPCAT'.[27] A corresponding duty for States parties to allow such visits and consider the SPT's recommendations is contained in Article 12(a) OP. During the last reporting period,[28] the SPT undertook ten official country missions in accordance with its mandate under Articles 11 to 13 OP,[29] visited places of deprivation of liberty and made respective recommendations to the States parties concerned with regard to the protection of persons deprived of their liberty against torture and other forms of ill-treatment.

22 In practice, the SPT has—from the beginning—chosen a broad and forward-looking approach to its mandate with regard to strengthening the protection of persons deprived of their liberty. Already during its first years of operation, it noted that the *scope of its preventive mandate*[30] was broad, encompassing factors such as

> any relevant aspect of, or gaps in, primary or secondary legislation and rules or regulations in force; any relevant elements of, or gaps in, the institutional framework or official systems in place; and any relevant practices or behaviors which constitute or which, if left unchecked, could degenerate into, torture or other cruel, inhuman or degrading treatment or punishment … In examining examples of both good and bad practice, the SPT seeks to build upon existing protections, to close the gap between theory and practice and to eliminate, or reduce to a minimum, the possibilities for torture and other cruel, inhuman or degrading treatment or punishment.[31]

23 In its third Annual Report, it elaborated quite extensively on its *preventive approach*, stating that

> [t]he process of prevention of torture and other cruel, inhuman or degrading treatment or punishment ranges from the analysis of international instruments on protection to the examination of the material conditions of detention, taking in along the way public policy, budgets, regulations, written guidelines and theoretical concepts explaining the acts and omissions that impede the application of universal standards to local conditions.[32]

[25] See below Arts 12 OPff. [26] See APT and IIDH (n 3) 67.

[27] Elina Steinerte, 'The Changing Nature of the Relationship between the United Nations Subcommittee on Prevention of Torture and National Preventive Mechanisms: In Search for Equilibrium' (2013) 31(2) NQHR 132, 142.

[28] From 1 January to 31 December 2016, see CAT/C/60/3.

[29] For the selection of countries (criteria, types of visits, and frequency) see Art 13 OP below.

[30] See also Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 103ff.

[31] See SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, paras 12ff.

[32] See SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 16.

24 By the end of 2010, the SPT published its approach to the concept of prevention of torture and other forms of ill treatment under the OP in a separate document.[33] There, it stated that it did not seek to strengthen the protection of persons deprived of their liberty by setting out additional substantive preventive obligations 'but … by establishing, at both the international and national levels, a preventive system of regular visits and the drawing up of reports and recommendations based thereon'.[34]

25 Thus, the SPT had elaborated 'a number of key principles which guide [its] approach to its preventive mandate'.[35] First of all, the SPT pointed out its interest 'in the general situation within a country concerning the enjoyment of human rights and how this affects the situation of persons deprived of their liberty'. Second, it stated that it must engage with the broader regulatory and policy frameworks relevant to the treatment of persons deprived of their liberty and with those responsible for them in each country. Moreover, it stressed the importance of a wide variety of procedural safeguards. It emphasized that recommendations regarding conditions of detention play a crucial role in effective prevention. Also, visits to States parties and to particular places of detention should—in the SPT's view—be carefully prepared in advance, 'as the manner in which visits are conducted, their substantive focus and the recommendations which flow from them may vary … in the light of the situations encountered in order to best achieve the overriding purpose of the visit, this being to maximize its preventive potential and impact'.[36] The SPT noted that reports and recommendations should be based on rigorous analysis and be factually well grounded. Furthermore, it stated that '[e]ffective domestic mechanisms of oversight, including complaints mechanisms, form an essential part of the apparatus of prevention'.[37] The SPT stressed the importance of a system of detention to be open to scrutiny. Moreover, it found that prevention was a 'multifaceted and interdisciplinary endeavour'.

26 Last but not least, the SPT noted that in order to minimize the likelihood of torture or other forms of ill-treatment, respective expertise was needed in relation to all different kinds of groups, including women, juveniles, members of minority groups, foreign nationals, persons with disabilities, and persons with acute medical or psychological dependencies or conditions.[38]

27 In 2016, the SPT adopted an approach regarding the rights of persons institutionalized and treated medically without informed consent.[39] In addition, it issued a specific document on the prevention of torture and other forms of ill-treatment of women deprived of their liberty.[40]

3.2 Advice to States Parties

28 The equally important task of *cooperation with NPMs* is defined in more detail in Article 11(b) OP. First, under Article 11(b)(i) the SPT shall advise and assist States parties in

[33] See SPT, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/12/6 .

[34] ibid, para 4. [35] ibid, paras 5ff.

[36] ibid, II (e). [37] ibid, II (g). [38] ibid, II (j).

[39] See SPT, 'Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Regarding the Rights of Persons Institutionalized and Treated Medically without Informed Consent' (2016) UN Doc CAT/OP/27/2.

[40] See SPT, 'Prevention of Torture and Ill-Treatment of Women Deprived of Their Liberty' (2016) UN Doc CAT/OP/27/1.

their efforts to establish, designate, or maintain an NPM.[41] Since States, according to Article 17 OP, have one year after having become parties to the Protocol to achieve this task,[42] this time span was used for conducting seminars in the respective countries or providing other forms of advice and assistance in order to ensure that the NPMs are truly independent, effective, and professional bodies which satisfy the criteria laid out in Articles 17 to 23 OP.

29 From the very beginning, the SPT was well aware of the important role it played in the process of developing NPMs. Thus, it requests States parties to send detailed information concerning the establishment of such mechanisms, containing information on their legal mandate, size, composition, expertise, financial resources, and frequency of visits.[43] Already during its first years, however, the SPT was concerned about the lack of progress in many States parties with regard to the required process of installing appropriate and effective NPMs and the 'noticeable gaps as regards the required process of consultation for the establishment of NPMs, the necessary legislative foundation and the practical provision, including human and budgetary resources, to enable the NPMs to work effectively'.[44] Thus, the members of the SPT continue to take part in numerous meetings at national, regional and international levels, in order to advise and assist States parties in the establishment and/or designation of NPMs. Moreover, the SPT maintains contacts with various organizations involved in the development of NPMs in all the regions falling under the OPCAT mandate. Nonetheless, as at 31 December 2015, nineteen States parties still had not complied with their obligations under Article 17 of the OP.[45]

30 The SPT raised certain issues in relation to the establishment of NPMs. It stated that States parties had to consider various factors such as the complexity of the country, its administrative and financial structure and its geography. The NPMs should possibly complement existing systems of protection against torture and other forms of ill-treatment instead of replacing or duplicating any existing bodies.[46]

31 In order to facilitate the development of NPMs, the SPT set up *Preliminary Guidelines concerning the development of NPMs* already in its First Annual Report.[47] In December 2010, it issued a revised set of Guidelines on NPMs 'to add further clarity regarding the expectations of the SPT regarding the establishment and operation of NPMs'.[48] These guidelines contain a number of 'Basic Principles' (Section I), informing on all aspects of the work of an NPM. Section II comprises 'Basic issues regarding the establishment of an NPM' and is addressed to States parties. Section III contains guidelines to both the State and the NPM 'concerning the practical functioning of an NPM'.[49] With regard to various different forms that NPMs may take, the SPT indicated that '[their] form and structure … is likely to reflect a variety of factors which are particular to the country concerned'. Consequently, 'the SPT does not formally 'assess' or 'accredit' NPMs as being in compliance with the criteria set forth in the OP'.[50]

[41] See also Murray and others (n 30) 108.

[42] In accordance with Art 24 OP, this one-year time limit may be extended for another three or even five years. See below Art 24 OP.

[43] See SPT, 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc CAT/C/40/2, para 24.

[44] CAT/C/42/2/Corr.1 (n 31) para 35.

[45] See SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, para 22.

[46] CAT/C/44/2 (n 32) paras 49ff; see Art 17 OP below.

[47] CAT/C/40/2 (n 43) 10–11.

[48] See SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5.

[49] ibid, para 3.

[50] CAT/C/46/2 (n 2) para 62.

32 In 2011, the SPT sought for a different approach in order to offer advice and assistance regarding the establishment of NPMs.[51] Thus, it decided 'to visit States parties as soon as possible following their ratification of the Optional Protocol' and undertake such visits, which 'need not necessarily include visits to places of detention … as an addition to its current regular programme'.[52] In 2012, the SPT for the first time conducted such special visits, so-called *NPM advisory visits*, to Honduras (April/May), the Republic of Moldova (October), and Senegal (December).[53] After such NPM advisory visits, the SPT issues two reports, one to the NPM and one to the State party concerned. Each of these reports remains confidential to the recipient unless the NPM or State party gives its consent to publish.[54] During 2013, NPM advisory visits were undertaken to Germany (April) and Armenia (September),[55] and the SPT consolidated its practice in conducting such visits.[56] As the regular NPM advisory visits by nature require that NPMs are already in place and operational, the SPT decided in 2014 to vary its methodology by introducing so-called '*Optional Protocol advisory visits*'. Such visits were planned to be short and 'focused on meeting with the relevant authorities in the State party in order to assist them in fulfilling their obligations under part IV of the Optional Protocol'.[57] In the same year, the SPT made an advisory visit to Nigeria in order to 'fill the 'Optional Protocol engagement gap'.[58] In the course of 2015, however, the SPT decided 'to cease categorizing its visits and to formulate, from 2016, a plan best suited to the exigencies of each visit'.[59]

3.3 Advice to NPMs

33 After an NPM has been established or designated, the SPT shall establish and maintain direct contact and offer the domestic body *training* and *technical assistance*. The explicit reference in Article 11(b)(ii) to confidential contacts between both bodies underlines and strengthens the independence of both bodies. After having received requests from some NPMs for assistance, the SPT developed a pilot programme for assistance in 2009, based on a combination of workshops and observation of NPM visits in action, framed by subsequent feedback and exchange of views.[60]

34 Following its enlargement after the elections in 2010, the SPT had established *regional task forces* 'to enable more meaningful and structured engagement with NPMs' and to 'make its work with NPMs more constructive and active'. Therefore, the SPT divided the States parties to the OP into four regions (Africa, Latin America, Asia–Pacific, and Europe). Each of the task forces was headed by a *regional focal point* and assisted by an *NPM team*, being composed of SPT members from within the region and from other regions.[61] The role of the focal points, leading the work of each of the regional NPM task

[51] See Steinerte, 'The Changing Nature' (n 27) 135. [52] CAT/C/46/2 (n 2) para 45.
[53] See SPT, 'Sixth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc CAT/C/50/2 para 16.
[54] ibid, para 52.
[55] See SPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc CAT/C/52/2 para 13.
[56] ibid, para 44. [57] ibid, para 45.
[58] SPT, 'Eighth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment' (2015) UN Doc CAT/C/54/2, para 47.
[59] CAT/C/57/4 (n 45) para 40. [60] CAT/C/42/2/Corr.1 (n 31) para 37.
[61] See SPT, 'Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc CAT/C/48/3, para 40.

forces was to undertake liaison activities and to facilitate the coordination of the SPT's engagement within their respective regions.[62] They met in parallel during plenary sessions and report back to the plenary, giving recommendations concerning plans for further engagement. Each year, they made recommendations for the upcoming visiting programme and make sure that it is generated 'in accordance with strategic operational criteria'.[63] However, even after the regional task forces had been successful in their engagement with NPMs, working with these mechanisms had not always proven to be productive.[64] Thus, the SPT, inter alia, established an ad hoc working group to consider systematic issues related to the interaction of the SPT with NPMs and issue applicable recommendations.[65]

35 As the role of regional focal points and NPM teams largely overlapped in practice, the SPT decided to replace them with *four regional teams*, each led by a head, in the course of 2013.[66] Their main task is 'to undertake and coordinate the NPM related activities of the Subcommittee within each region'.[67] Every member of the SPT is assigned to a certain regional team, being also appointed country rapporteur for a number of States. The task of the country rapporteurs is 'to direct and coordinate the activities of the team, under the overarching direction of the Subcommittee Bureau, led by the Vice-Chairperson for NPMs in conjunction with the Subcommittee Chairperson'.[68] This merge had proven to be beneficial, especially with regard to the number and intensity of contacts as well as with regard to the exchange of information and advice.[69] Moreover, the SPT adopted *new guidelines* on its work with NPMs, which also establish the framework in which the SPT may develop its relations with other bodies and stakeholders regarding NPM activities.[70]

36 A major step with regard to enhancing the cooperation between the SPT and NPMs can be seen in the development of the so-called 'European NPM Project'.[71] It was developed by the Council of Europe and aims to create an active network of CoE NPMs to foster peer exchange, promote CPT and SPT standards and working methodologies, and provide a forum for the promotion of cooperation between the SPT, CPT, and NPMs.[72] Since the start of the project, several thematic workshops had been organized. During in-country engagements, for example, members of the CPT and/or SPT together with international experts in the field of torture prevention 'shadow' NPM visits and provide practical feedback.[73]

37 In addition to training and technical assistance, the SPT is also mandated by Article 11(b)(iii) to advise and assist NPMs in the evaluation of the needs and the means necessary to strengthen the protection of detainees against torture and ill-treatment. This far-reaching possibility of *cooperation between both mechanisms* was first introduced by Article 15(3) of the Mexican Draft of 2001.[74] In practice, such a form of technical assistance can only be provided by the SPT in any meaningful manner after having carried out a country mission and informed itself of the situation of detainees in the country concerned. It might also be financed by the *Special Fund* established under Article 26 OP. However, it is important to note that the assistance envisaged in Article 11(b)(iii)

[62] See CAT/C/50/2 (n 53) 410. [63] ibid, para 10. [64] ibid, para 54.
[65] ibid, paras 60ff. [66] CAT/C/52/2 (n 55) para 50. [67] ibid, para 70.
[68] ibid, para 70. [69] CAT/C/54/2 (n 58) para 53.
[70] CAT/C/52/2 (n 55) paras 69 and 71. [71] See Steinerte, 'The Changing Nature' (n 27) 147.
[72] See Debriefing Paper, The European NPM Project, First Meeting of the European NPM Network, Strasbourg, 5 November 2009 <https://www.coe.int/t/democracy/migration/Source/nhrs/debriefingPaper_051109.doc> accessed on 22 November 2017.
[73] See Steinerte, 'The Changing Nature' (n 27) 147 with further evidence. [74] See above para 7.

is provided to the independent NPM and not to the Government concerned. At a quite early stage, the SPT recognized that '[u]nless the mechanisms are able to fulfil their role as the on-the-spot visiting mechanisms for the prevention of ill-treatment, the work of the Subcommittee will be seriously limited and adversely affected'. Thus, the SPT was keen to continue and intensify its direct contact with NPMs and looking forward to being able to devote more resources to this important part of its mandate.[75]

38 In February 2012, the SPT published a *preliminary guide regarding the functioning of NPMs*[76] as well as an *analytical self-assessment tool for NPMs*.[77] The tool states that each NPM should

> develop a strategy for its work in order to achieve the maximum impact on problems and challenges relevant to its mandate in the local context. Activities and their outcomes should be monitored and analyzed on an ongoing basis and the lessons learnt should be used to develop its practices. Such an assessment could be based on a framework, starting with existing challenges, such as resourcing issues, and an assessment of activities currently undertaken and moving through … a range of additional factors …[78]

The factors mentioned are criteria for the selection of planned activities, criteria for the composition of working groups and other teams, an analysis of problems and challenges, cooperation with different actors, budgeted and spent resources, strategies and working methods, recommendations submitted to authorities, follow-up activities on recommendations issued, an assessment of implementation of recommendations, a systematization of observations, recommendations issued and the responses received thereto, an analysis of how and why both successes and failures in effecting change have occurred, as well as consideration for the need to develop alternative strategies and/or approaches.[79]

39 Moreover, and in order to keep up to its mandated activities set out in Articles 11(a) and (b), the SPT adopted a decision on the need for *additional meeting time*. Therein it expressed its need for 'at least one additional week of meetings a year and a corresponding increase in staff and other resources', which would enable the SPT to continue to undertake more visits, adopt more reports and 'assist States parties in establishing and operating national preventive mechanisms in accordance with the Optional Protocol and … the Paris Principles …'[80] Until April 2017, this request had not been positively answered. Consequently, the SPT had to reiterate its request for more plenary meeting time in its tenth Annual Report.[81]

3.4 Recommendations and Observations

40 The SPT, usually after a respective country mission, is also mandated to make *recommendations and observations to the State party concerned*, with a view to strengthening the capacity and the mandate of the NPM.[82] Such recommendations are of particular

[75] CAT/C/40/2 (n 43) para 29.

[76] See SPT, 'Analytical Self-Assessment Tool for National Prevention Mechanisms (NPM): A Preliminary Guide by the Subcommittee on Prevention of Torture Regarding the Functioning of an NPM' UN Doc CAT/OP/1 .

[77] ibid. [78] ibid, para 5. [79] ibid.

[80] See SPT, 'Decision on the Need for Additional Meeting Time for the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/OP/28/1.

[81] See SPT, 'Tenth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) UN Doc CAT/C/60/3, para 65.

[82] See Elina Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention' (2014) 14 HRLR 23.

importance if the SPT comes to the conclusion that the respective national body lacks the independence, professionalism or the necessary resources to carry out its tasks in an efficient manner. In practice, the SPT includes references to the effective functioning and/or establishment of NPMs in the recommendations and observations in its visit reports. In its Second Annual Report, the SPT already noted that 'most, if not all, of its recommendations and observations would be relevant to national preventive mechanisms'.[83] The Special Fund under Article 26 OP provides certain financial resources to implement the respective recommendations of the SPT.

3.5 Cooperation

41 In addition to cooperating with States parties and NPMs, the SPT shall also *cooperate* with the relevant UN organs and mechanism and other international, regional, and national institutions and organizations. This provision in Article 11(c) goes back to Article 9 of the revised Costa Rica Draft of 1991, which only related to regional mechanisms, particularly the CPT, conducting preventive visits to places of detention.[84] The idea behind it was that the SPT should have sent its own mission to a country regularly visited by the CPT or a similar body only in exceptional cases. Yet, it still might have participated in such a regional mission by sending one member. During the discussions in the Working Group, many delegations stressed, however, that the Protocol's provisions should be universal in scope and not exclude any region, even where relevant regional agreements already existed.[85] This concept was reflected in the text of the Articles on 25 January 1996 which provided that the SPT, even with respect to States parties regularly visited by a regional mechanism, 'shall still be responsible for missions/visits to such a State Party under this Protocol assuring its universal application'.[86] The final version of Article 11(c) OP deleted any specific reference to any regional preventive mechanism or the ICRC and requires the SPT to *cooperate*, in general terms, *with all relevant international, regional, and national institutions and organizations*. This '*catch-all' provision*[87] is, however, complemented by specific provisions relating to *regional preventive mechanisms*[88] and the *ICRC*.[89] At the UN level, the SPT shall, in particular, cooperate with the CAT Committee, the Human Rights Committee, and the Special Rapporteur on Torture, as well as with relevant UN bodies providing technical assistance, including UNDP, UNICEF, and ODCCP.[90] At the regional level, the SPT, in addition to the CPT,[91] established close cooperation with the respective special rapporteurs and working groups of the Inter-American Commission on Human Rights[92] and of the African Commission on Human and Peoples' Rights.[93] At the national level, close cooperation with NHRIs, Ombudsman institutions, but also with relevant NGOs, has repeatedly proven to be useful.

[83] CAT/C/42/2/Corr.1 (n 31) para 42.
[84] See above 2.1. [85] E/CN.4/1994/25 (n 14) para 69. See above 2.2.
[86] Art 9(3) of the Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996), E/CN.4/1996/28, Annex I: see above para 5.
[87] See APT and IIDH (n 3) 86. [88] See below Art 31 OP. [89] See below Art 32 OP.
[90] cf also Art 9(1)(e) of the EU Draft of 2001: E/CN.4/2001/WG.11/CRP.2. See above para 8.
[91] See below Art 31 OP. Some of the CPT's members also serve on the Subcommittee.
[92] See eg the Special Rapporteur on the Rights of Persons Deprived of their Liberty in the Americas.
[93] See eg the Special Rapporteur on Prisons and Conditions of Detention in Africa or the Working Group on the Robben Island Guidelines.

42 With regard to the cooperation with the CAT Committee, a contact group made up of two members from each treaty body had been created in order to facilitate contacts.[94]

43 In practice, the SPT is constantly involved in the annual meetings of the Chairs of the human rights treaty bodies and participates in numerous other activities of the OHCHR. It strives for a systematic cooperation with various mechanisms at all levels. As there are points of common interest, the SPT is represented at the Inter Committee Meetings of the UN human rights treaty bodies in order to exchange views with experts whose mandates intersect substantively with the SPT's mandate. In 2012, the SPT adopted a statement on the treaty body strengthening process. It endorsed the Addis Ababa Guidelines[95] and adapted its rules of procedure accordingly.[96] In recent years, it took part in numerous discussions on the implementation of UNGA resolution 68/268. Moreover, it renewed and revised its policy on reprisals (UN Doc CAT/OP/6) in the light of the San José Guidelines,[97] which the Chairs of the human rights treaty bodies had endorsed in June 2015, and adopted revised SPT guidelines.[98]

44 Moreover, the SPT immensely benefits from the *support of civil society*, particularly the APT and several *academic institutions*,[99] including the Ludwig Boltzmann Institute of Human Rights. Already at an early stage, a number of organizations (Amnesty International, Association for the Prevention of Torture, Action by Christians for the Abolition of Torture, Bristol University OPCAT project, International Committee of the Red Cross, Mental Disability Advocacy Centre, Penal Reform International, Rehabilitation and Research Centre for Torture Victims and World Organization against Torture) came together as the *Optional Protocol Contact Group*.[100]

3.6 Budgetary Issues

45 As far as funding is concerned, no provision in the UN regular budget is foreseen for SPT activities related to NPMs. Consequently, the SPT experts had to make great efforts in being able to come up to their mandate in this regard. Among other things, an Optional Protocol Contact Group had been created. This involves various organizations[101] that sponsored the participation of members of the SPT in a range of important meetings and assisted the SPT in the development of its working methods.[102]

46 Although with the establishment of each new NPM the workload of the SPT increases, the level of core-funded support for the SPT does not increase accordingly. Unfortunately, the GA resolution 68/268, which refers to an adequate allocation of financial and human resources to those treaty bodies whose main mandated role is to carry

[94] See CAT/C/40/2 (n 43) para 33.

[95] Report of the Chairs of human rights treaty bodies on their twenty-fourth meeting (2012) UN Doc A/67/222 and Corr.1, Annex I.

[96] cf UN Doc CAT/C/50/2 (n 53) para 42.

[97] Guidelines against Intimidation or Reprisals (San José Guidelines) (2015) UN Doc HRI/MC/2015/6.

[98] See CAT/C/57/4 (n 45) para 31.

[99] See CAT/C/57/4 (n 45) para 36.

[100] See CAT/C/40/2 (n 43) para 43.

[101] Amnesty International (AI), Association for the Prevention of Torture (APT), Action by Christians for the Abolition of Torture (FIACAT), Bristol University OPCAT project, International Committee of the Red Cross (ICRC), Mental Disability Advocacy Centre (MDAC), Penal Reform International (PRI), Rehabilitation and Research Centre for Torture Victims (RCT), and World Organization against Torture (OMCT).

[102] See CAT/C/40/2 (n 43) para 27.

out field visits,[103] did not lead to an increase of funding for in-country activities of the SPT either.[104]

47 Since the SPT only has limited financial means of technical assistance at its disposal, Article 26 OP provides for the establishment of a *Special Fund* with the explicit task of financing 'education programmes of the national preventive mechanisms'.[105] Support provided through this Fund is directed towards projects aimed at establishing or strengthening NPMs. In 2016, grants amounting to $240,000 were awarded through the Fund to support several torture prevention projects in seven States parties.[106]

KERSTIN BUCHINGER

[103] GA Res 68/268 of 9 April 2014, para 26 (d).
[104] See CAT/C/57/4 (n 45) para 85.
[105] See below Art 26 OP.
[106] See CAT/C/60/3 (n 81) paras 32ff; for more details see Art 26 OP below.

Article 12

Obligations of States Parties to Cooperate with the Subcommittee

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

(a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;

(b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;

(d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

1. Introduction	820
2. Travaux Préparatoires	822
2.1 Chronology of Draft Texts	822
2.2 Analysis of Working Group Discussions	825
3. Issues of Interpretation	828
3.1 The Controversial Nature of Article 12 OP	828
3.2 Obligation of States Parties to Allow Country Missions and Unannounced Visits to Places of Detention	830
3.3 Obligation of States Parties to Provide Information	831
3.4 Obligation of States Parties to Facilitate Contacts with NPMs	831
3.5 Obligation of States Parties to Enter into Dialogue with the SPT on Possible Implementation Measures	832

1. Introduction

1 Article 2(4) OP stipulates that the SPT and the States parties 'shall cooperate in the implementation of the present Protocol'. This *principle of cooperation* constitutes one of the main pillars of the Protocol[1] and creates rights and corresponding duties for both the SPT and States parties. While the duties of the SPT are spelled out primarily in Articles 2, 11, 13, and 16 OP, the corresponding obligations of States parties can be found, above all, in Articles 4, 12, 14, and 15 OP. These mutual rights and obligations are, of course, interdependent and should be interpreted correspondingly. The principle duty of

[1] See above Art 2 OP.

governments is to allow country missions, without prior consent, and visits by the SPT to all places of detention, to all installations and facilities within such places of detention, and, above all, to grant the SPT the opportunity to conduct private interviews with all detainees, their family members, witnesses, lawyers, NGOs, and any other persons with whom it wishes to speak.[2] This obligation corresponds to Articles 2 and 8 ECPT, and to the practice of similar bodies carrying out country missions, such as special procedures of the UN.[3] As the UN Special Rapporteur on Torture (SRT) has underlined, these *terms of reference* are 'fundamental, common-sense considerations that are essential to ensure an objective, impartial and independent assessment of torture and ill-treatment during country visits'.[4]

2 The object and purpose of preventive visits to places of detention differs from fact-finding missions by the SRT or the CAT Committee in the context of the inquiry procedure under Article 20 CAT. But, in addition to the fact that unannounced visits to places of detention usually by itself have a preventive effect, the SPT is explicitly entrusted by Article 16(1) to communicate its recommendations and observations to the State party and to advise it and the NPM, respectively, on the needs and the measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and ill-treatment.[5] In order to advise States parties accordingly, the SPT must first carry out an independent assessment of the conditions of detention and the extent of torture and ill-treatment of detainees.

3 The best method of assessing the situation in the country concerned is to carry out unannounced visits to places of detention and to speak in private with all stakeholders involved, ie Government officials, NGOs, detainees, witnesses, etc. Consequently, such country missions and visits to places of detention serve different purposes: prevention, fact-finding, and cooperation with the Government concerned. On the other hand, the country missions of the *SRT* also aim at both *fact-finding* and *cooperation* with governments.[6] A closer analysis, therefore, shows that the object and purpose of these country missions is not as different as it may seem at first.[7]

4 Since the obligation to allow visits by an international monitoring body to its territory without prior consent constitutes a fairly far-reaching waiver of a sovereign right of States by the mere fact of becoming party to the Protocol, Article 24 OP provides States parties with the possibility, upon ratification, to make a declaration postponing the implementation of Part III of the Protocol for a maximum of three years, and the CAT Committee may extend that period for an additional two years.[8]

[2] See below Art 14(1)(c), (d), and (e) OP.

[3] cf the terms of reference for fact-finding missions by the Special Rapporteurs or Representatives of the Commission on Human Rights as approved by the UN Commission on Human Rights: E/CN.4/1998/45, Appendix V.

[4] See UNSRT (Nowak) 'Report of the Special Rapporteur on the Question of Torture' (2005) UN Doc E/CN.4/2006/6 summary and para 26.

[5] cf Arts 11(b)(ii) and 12(b) OP.

[6] See eg his reports on his missions to Georgia (E/CN.4/2006/6/Add.6/Add.3); Mongolia (E/CN.4/2006/6/Add.4); Nepal (E/CN.4/2006/6/Add.5); China (E/CN.4/2006/6/Add.6).

[7] See Manfred Nowak, 'Die Europäische Konvention zur Verhütung der Folter: Ab 1989 regelmäßige Besuche von Haftanstalten durch Europäisches Komitee zur Verhütung der Folter' (1988) 15 EuGRZ 540.

[8] See below Art 24 OP.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

5 *Original Costa Rica Draft (6 March 1980)*[9]

Article 10

1. Subject to the provisions of Article 9 paragraph 3, when the Government of a State Party to the present Protocol has been informed of a mission assigned to one or more delegate(s), the latter shall be authorised to visit in all circumstances and without previous notice any place of detention within the jurisdiction of the State Party.

2. The delegates shall receive from the State Party concerned all facilities for the accomplishment of their task. They may, in particular, obtain all information about the places where there are persons deprived of their liberty and interview them there without witnesses and at leisure.

3. Delegates may enter into contact with the families, friends and lawyers of persons deprived of their liberty.

4. During each visit, the delegates shall verify that persons deprived of their liberty are being treated in conformity with the provisions of the Convention.

5. If appropriate, they shall at once submit observations and recommendations to the competent authorities of the State Party concerned.

6. They shall submit a full report on their mission, with their observations and recommendations, to the Committee.

6 *Revised Costa Rica Draft (15 January 1991)*[10]

Article 12

1. The Subcommittee shall notify the Government of the State Party concerned of its intention to organize a mission. After such notification, it may at any time visit any place referred to in Article 1 paragraph 1.

2. The State Party within whose jurisdiction a mission is to take place or is being carried out shall provide the delegation with all the facilities necessary for the proper fulfilment of their tasks and shall not obstruct by any means or measures the programme of visits or any other activities which the delegation is carrying out specifically for or in relation to the visits. In particular, the State Party shall provide the delegation with the following facilities:

(a) access to its territory and the right to travel without restrictions;

(b) full information on the places referred to in Article 1 paragraph 1, including information requested about specific persons;

(c) unlimited access to any place referred to in Article 1 paragraph 1, including the right to move inside such places without restriction;

(d) assistance in gaining access to places where the delegation has reason to believe that persons may be deprived of their liberty;

(e) producing any person deprived of his liberty whom the delegation wishes to interview, at the request of the delegation and at a convenient location;

[9] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[10] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

(f) other information available to the State Party which is necessary for the delegation to carry out its task.

3. Members of the delegation may interview in private, inside or outside his place of detention, without witnesses, and for the time they deem necessary, any person deprived of his liberty under the terms of Article 1. They may also communicate without restriction with relatives, friends, lawyers and doctors of persons who are or have been deprived of their liberty, and with any other person or organization that they think may be able to provide them with relevant information for their mission. In seeking such information, the delegation shall have regard to applicable rules of national law relating to data protection and principles of medical ethics.

4. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee or to the delegates any information whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

5. In urgent cases the delegation shall at once submit observations and recommendations either of general or specific nature to the competent authorities of the State Party concerned.

7 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[11]

Article 12

[1, 6] [Members of the delegation shall respect the national laws and regulations while undertaking the visits in the territory of the State Party concerned.] [National laws and regulations may not be used or interpreted as means or measures contravening the programme and purpose of the visits.]

2. The State Party within whose jurisdiction a mission is to take place or is being carried out shall provide the delegation with all the facilities necessary for the proper fulfilment of their tasks and promote the full cooperation of all competent authorities. In particular, the State Party shall provide the delegation [in accordance with national laws and regulations] with the following:

(a) Access to its territory [and the right to travel without restriction] [for the purposes of the mission], [to freely visit places and persons referred to in Article 1];

(b) All relevant information on the places referred to [in Article 1], [in the detailed plan] including information requested about specific persons;

[(c) Unlimited access to any place referred to [in Article 1], [in the detailed plan], including the right to move inside such places without restrictions];

(d) Assistance in gaining access to places where the delegation has reason to believe, [on the basis of well-founded and reliable information] that persons may be in situations referred to [in Article 1] [and providing a convenient place for private interview];

(e) Providing access to, [and private interview with] any person in situations referred to [in Article 1,] whom the delegation wishes to interview, at the request of the delegation and at a convenient location;

(f) Other information available to the State Party which is necessary for the delegation to carry out its task.

[11] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session (1996) UN Doc E/CN.4/1996/28, Annex I.

3. [Members of the delegation, [the Sub-Committee] may interview in private [at a convenient location to be provided by the competent authorities without being overheard], [without witnesses], and for the time they deem necessary, any person in situations referred to [in Article 1]. They may also communicate without restriction with relatives, friends, lawyers and doctors of persons who are or have been in situations referred to [in Article 1] and with any other person or organization that they think may be able to provide them with relevant information for their mission.]

[The members of the Sub-Committee] [where necessary, with the assistance of their advisors] may interview in private, persons in situations referred to [in Article 1,] and may communicate with any person whom they believe, on the grounds of reliable information, can supply relevant information.]

8 *Text of the Articles which Constitute the Basis for Future Work after the Second Reading (2 December 1999)*[12]

Article 12

[1. The Subcommittee and the State Party shall cooperate with a view to the effective fulfilment of the [mission] [visit]. In particular, the State Party shall provide:

(a) The delegation with access to, and freedom of movement within, any territory under its jurisdiction [and control] for the conduct of the [mission] [visit];

(b) The Subcommittee or its delegations with all information relevant to the effective conduct of the [mission] [visit], including in particular on any person or places referred to in Article 1 of the Protocol;

(c) The delegation with access to and within any place referred to in Article 1 of the Protocol;

(d) The delegation with access to persons referred to in Article 1 of the Protocol, and the opportunity for private interviews with them;

(e) The Subcommittee and its delegation with the opportunity to communicate freely with any other person who is in a position to supply relevant information.

[2. The obligations referred to above shall be subject to any arrangements that the State Party concerned considers necessary for:

[(a) The protection of sensitive areas [equipment] or information [based on imperative ground of national security] [or economic, technological or scientific secrets];]

[(b) The protection of any constitutional obligations the State Party concerned may have with regard to proprietary rights, searches and seizures, or other constitutional rights [of individuals];]

[(c) The physical protection and safety of persons, including the members of the Subcommittee; and]

[(d) The protection of personal data of individuals as required by national legislation [consistent with human rights principles]].

If the State Party is unable to provide full access to places, information or persons, the State Party shall make every reasonable effort to demonstrate to the Subcommittee, through alternative means, its compliance with this Protocol]].

[12] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session (1999) UN Doc E/CN.4/2000/58, Annex II.

9 *Mexican Draft (13 February 2001)*[13]

Article 16

1. In order to enable the Sub-Committee to fulfil its mandate as set out in Article 15, States Parties undertake to:

(a) Facilitate contact between the Sub-Committee and national mechanisms;

(b) Receive the Sub-Committee in their territory when required;

(c) Implement the recommendations of the Sub-Committee.

2. The Sub-Committee may request any information from national mechanisms that may enable it to assess needs and the measures to be taken to strengthen the protection of persons deprived of their liberty against torture and other forms of cruel, inhuman or degrading treatment or punishment, including information concerning the number and location of places of detention, the persons deprived of their liberty and their treatment.

10 *EU Draft (22 February 2001)*[14]

Article 13 (old 12 revised)

1. The Sub-Committee and the State Party shall cooperate with a view to the effective fulfilment of the mission. In particular, the State Party shall provide the Sub-Committee with:

(a) Unrestricted access to all information, deemed relevant by the Sub-Committee, concerning the number of persons deprived of their liberty, in accordance with Article 16 of the Convention, as well as the number of places and their location;

(b) Unrestricted access to all information, deemed relevant by the Sub-Committee, concerning the treatment and the conditions of detention;

(c) Access to and freedom of movement within any territory under its jurisdiction and control for the conduct of the mission;

(d) All information deemed relevant by the Sub-Committee to the effective conduct of the mission, including in particular on any person or places referred to in Article 3 of the Protocol;

(e) Access to and within any place referred to in Article 3 of the Protocol;

(f) Access to persons referred to in Article 3 of the Protocol, and the opportunity for private interviews with them;

(g) The opportunity to communicate freely with any person whom they believe can supply relevant information.

2. With regard to a particular visit, the obligations referred to under paragraph 1 shall be implemented in a manner consistent with national law and professional ethics complimentary to international human rights standards.

2.2 Analysis of Working Group Discussions

11 During the first session of the Working Group, held from 19 to 30 October 1992, Article 12 was discussed under the fourth basket of issues 'Operation of the system'.[15] One of the issues raised during the discussion was the *access to information*. Several delegates

[13] E/CN.4/2001/WG.11/CRP.1. [14] E/CN.4/2001/WG.11/CRP.2.

[15] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28 paras 26ff.

noted that information on specific persons might be subject to laws on privacy and data protection or the rules of professional ethics. Some felt that these paragraphs (paragraphs 2 (b), (f), and 3) should be redrafted to reflect the corresponding principles of the ECPT. One delegation was of the opinion that the consent of the person to be interviewed was essential, although a presumption of consent might be created except where the person specifically refused consent. It also noted particular concerns about the legal capacity of minors and mental patients to consent. Another delegation indicated that the aim of the provision was to protect the individual against abuse of private or personal information, rather than the State or public authority, and the provision should state the right to privacy and international standards relating thereto.[16]

12 At its third session from 17 to 28 October 1994, the Working Group continued to consider Article 12. During the discussions, the need to provide a delegation of the SPT with unrestricted access to the places of detention was once again strongly emphasized.[17]

13 During the sixth session of the Working Group from 13 to 24 October 1997, the Chairperson-Rapporteur once again invited delegations to discuss Article 12.[18]

14 The representative of the *Netherlands* pointed out that the article in question dealt with operational guidelines and not with questions of principle and, as such, should neither contain too many details nor refer to the issue of prior consent to receive missions. The representative of China expressed full support for the given proposal, stating that nothing should interfere with State sovereignty. The observer for the *APT* favoured a text drafted in language as close as possible to that of Article 12 as contained in the Costa Rica Draft of 1991. He pointed out that Article 12 would be one of the cornerstones of the new instrument and would allow the SPT to gain a full and clear understanding of the situation in the country visited, without which no helpful recommendations could be made. As a matter of fact, the visiting delegation must have the rights to travel without restriction to any place of detention, to enjoy unlimited access to such places and to interview detainees without witnesses. In his opinion, legitimate interests of States to restrict visits should be addressed in Article 13. Furthermore, he cautioned against lowering existing international humanitarian standards, such as the Third and Fourth Geneva Conventions. He opposed the granting of such rights in accordance with national laws, because every country had laws limiting access to detainees and providing, at least for certain categories of persons, that visits must be supervised. The observer for *AI* found that Article 12 was one of the most essential Articles and that the preventive effect of the OP could only be maximized if the SPT was able to visit any part of any detention facility and speak privately with detainees. The observer for the ICRC stated that access to all places and persons, together with the possibility of private talks and repeated visits, were essential conditions for a visit by his organization.

15 In the course of the discussion, the observer for *Sweden* proposed that the drafting group should return to the original version of Article 12 as proposed by Costa Rica in 1991. This view was supported by the representatives of Argentina, Brazil, Canada,

[16] ibid, para 83.

[17] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995) UN Doc E/CN.4/1995/38, para 49.

[18] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42 paras 67ff.

Denmark, Dominican Republic, France, Italy, South Africa, Uruguay, and the observers for Australia, Finland, Norway, and Switzerland as well as for AI and the ICRC.[19]

16 At the tenth plenary meeting on 22 October 1997, the Chairperson of the drafting group reported on the group's attempt to finalize Article 12, which—unfortunately—could not be done until the end of the sixth session of the Working Group.[20] Upon the proposal by the Chairperson-Rapporteur, the Working Group decided to continue its work on the draft OP by considering Article 12 at its seventh session from 28 September to 9 October 1998.[21]

17 It was generally felt that Article 12 was of crucial importance to the whole document since it contained references to the basic commitments that States would accept by ratifying the OP. The purpose of this article was therefore to define what host governments should offer the SPT in terms of cooperation, information, and assistance. The general approach of all delegations was that the contents of the present Article 12 could be reduced to several core elements of the visits, including *access to the territory*, provisions of *information, access to places of detention*, and access to individual persons, as well as the opportunity for *private interviews* with such individuals and the opportunity to communicate with persons who were in a position to supply relevant information.

18 Regarding the issue of *domestic laws and regulations*, it was the common understanding that all visits should be effected in the framework of or in accordance with the national legislation of host countries. However, this legislation should be consistent with international law. It was emphasized that national law or regulations should not be used in order to hinder the fulfilment of the missions or visits. It was, therefore, felt that the drafting of a reference to domestic law, if needed, should be made in a balanced way.

19 However, the delegations had still failed to arrive at a final text of Article 12. Thus, the text of Article 12 was included in Annex II to the seventh report of the Working Group to serve as a basis for future work.[22] In addition, the Chairperson of the Working Group also referred to three *nota benes*. First, there was an understanding that Article 12 has a close relationship with Article X[23] dealing with national legislation, inter alia, with regard to issues of safety and privacy. It was understood that Article 12 may have to be modified based on the terms of Article X. Second, the issue was raised about gaining access to territory which is not under a State party's jurisdiction but under its de facto *control*. Third, the protection of persons who have communicated with the SPT will be addressed in a separate Article.[24] The question of where to place the reference to national legislation—in Article 12 or elsewhere in the text—had not been definitively settled during the discussions at the seventh session.

20 During the eighth session of the Working Group from 4 to 15 October 1999, the scope of cooperation envisaged between the States parties and the SPT was discussed under Article 12. Some delegations pointed out that their constitutional requirements

[19] ibid, para 77. [20] E/CN.4/1998/42 (n 18) para 79.

[21] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session (1998) UN Doc E/CN.4/1999/59 paras 23ff.

[22] ibid, para 30.

[23] The representative of China proposed the following text as Article 'X' relating to national legislation: 'The provisions of this Protocol shall be applied in accordance with domestic law consistent with the international obligations of the State.'

[24] E/CN.4/1999/59 (n 21) para 31. See below Art 15 OP.

and/or their national legislation could prevent them from giving the SPT free access to all types of information or places. Restrictions in national legislation could also limit the possibility of the SPT to require testimony from detained persons or to interview prisoners 'without witnesses'.[25] It was emphasized by some delegations that it was a prerequisite to establish a framework for the normal work of the SPT, including such elements as freedom of movement and access to all relevant information, places, and persons.

21 In the course of the Working Group's considerations on Article 12, some delegations insisted that if an Article X on national legislation were included in the Protocol, they might be able to accept Article 12(1) as drafted. A number of others indicated that they opposed a separate Article X as it would undermine the objectives of the Protocol. All delegations agreed that paragraph 2 required further development, and as many divergent views had been expressed so far, the whole texts of Articles 12 and X were put in square brackets.[26]

22 In the proposal presented by the Chairperson-Rapporteur, the mandate of the SPT was described in Part III, including three main areas: visits to places of detention, technical assistance, and cooperation for the prevention of torture with relevant UN organs as well as international, regional, and national institutions. Article 12 set out the obligations of States vis-à-vis the SPT.[27] During the debate on the proposal, several delegations, among them the delegation of the *United States*, found that the foreseen global reach of the SPT was impractical. Moreover, it stated that constitutional considerations such as appropriate restrictions on grants of authority for access to persons and places had not been accommodated.[28] The delegation of Japan questioned why the article regarding so-called 'unrestricted access' had been kept in the proposal.[29] Similarly, the *Arab Group* was not in favour of a SPT endowed with mandatory authority to visit States without their explicit consent.[30] However, most of the delegations supported the Chairperson-Rapporteur's proposal.

23 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[31] The fairly far-reaching obligations of States parties under Article 12 certainly contributed to the fact that so many States voted against the draft OP in the Working Group, the Commission, and ECOSOC.[32]

3. Issues of Interpretation

3.1 The Controversial Nature of Article 12 OP

24 The *travaux préparatoires* reveal that *Article 12 OP was one of the most controversial provisions during the drafting of the Protocol*. The discussions primarily concentrated on the question of *prior consent to country missions,*[33] *unannounced visits to places of detention*, and *private interviews with detainees*. Article 10(1) of the original Costa Rica Draft of 1980 had explicitly provided for the right of the visiting body 'to visit in all circumstances and without previous notice any place of detention within the jurisdiction of the State Party'.[34]

[25] E/CN.4/2000/58 (n 12) paras 36 and 40. [26] ibid, para 58.
[27] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session (2002) UN Doc E/CN.4/2002/78 para 49.
[28] ibid, paras 57 and 60. [29] ibid, para 82. [30] ibid, para 108.
[31] CHR Res 2002/33 of 22 April 2002. [32] See above Art 1 OP, 2.2.
[33] See above Art 4 OP. [34] See above para 5.

The ECPT does not contain an explicit provision for unannounced visits, but Article 8(2)(b) requires States parties to provide the CPT with 'unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction'. This provision has been interpreted by the CPT as authorizing it to carry out both announced and unannounced visits.[35] That the CPT may 'at any time visit any place', a formulation to be found both in Article 8(1) ECPT and in Article 12(1) of the revised Costa Rica Draft 1991, underlines this interpretation.

25 In the Working Group, *two different views emerged*. One group of States argued, in line with the ECPT, that Articles 12 and 14 were of crucial importance to the entire Protocol, as they contained basic commitments of States necessary for the effective implementation of the SPT's tasks. Other delegations argued, however, that the SPT was always bound to comply with relevant domestic laws and regulations which might restrict unlimited access to places of detention, unannounced visits, and private interviews with detainees.[36] Since domestic laws usually contain limits of the general public to visit places of detention and provide for supervision of any communication with detainees, above all with pre-trial detainees, the mere existence of such laws might be misused by governments seriously to restrict the fact-finding by the SPT.[37] Governments could always refer to their obligation under domestic law to provide for the security of the visiting delegation and to ensure that its data protection laws are not violated in the course of private interviews. On the other hand, to visit a detention facility without being able to speak in private with detainees who, if they actually were subject to torture before, would always be afraid of reprisals if prison guards or any other public officials were present during the interview, simply does not make much sense. It would, in effect, be counterproductive as the fact-finding would reveal a distorted picture.[38]

26 Nevertheless, no consensus could be reached between these different views, and the relevant provisions in Articles 12 and 14 OP are, therefore, unclear and in need of interpretation, taking into account the object and purpose of the Protocol, and the experience of the CPT, the ICRC, and similar visiting bodies, as well as the fact that no reference to national laws and regulations was included in the OP, as proposed by some delegations. On the other hand, Article 36(a) OP, which is related to the special privileges and immunities accorded to members of the SPT, contains an explicit obligation of SPT members to respect the laws and regulations of the visited State.[39]

[35] See Ursula Kriebaum, *Folterprävention in Europa: Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung*' (Verlag Österreich 2000) 181ff; Malcolm D Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press/OUP 1998) 192ff.

[36] See above 2.2. See also below Art 36 OP.

[37] See, in this respect, eg the efforts of the Government of the Russian Federation to require the Special Rapporteur on Torture to comply with domestic laws during his country mission: UNSRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2007) A/HRC/4/33, para 8.

[38] This is the main reason why the Special Rapporteur on Torture was not in a position to accept the invitations of the Government of the United States to visit the Guantánamo Bay detention facilities and of the Russian Government to visit its territory, including four North Caucasus Republics. See his reports in A/HRC/4/33 (n 37) para 8; UNSRT (Nowak) 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2006) UN Doc A/61/259, para 2; E/CN.4/2006/6 (n 4) paras 20–27.

[39] See below Art 36 OP.

3.2 Obligation of States Parties to Allow Country Missions and Unannounced Visits to Places of Detention

27 Article 12(a) only repeats the obligation of States parties under Article 4 OP to allow missions to their territory, to receive the SPT, and to 'grant it access to the places of detention', as defined in Article 4. Whether these missions may be unannounced, is not explicitly spelled out in Article 12. It is quite clear, however, that country missions to States parties have to be announced beforehand in order to make all necessary arrangements (like for example prepare for visas or visa waivers).[40] Article 14(1)(c) OP requires States parties to grant the SPT 'unrestricted access to all places of detention', subject only to certain objections in exceptional circumstances, as spelled out in Article 14(2) OP. In light of the object and purpose of the Protocol, taking into account the relevant practice of the CPT, we are of the opinion that '*unrestricted access*' also includes the right of the SPT to conduct *unannounced visits to any place of detention*. If the SPT had to announce in advance which places of detention it was to visit, both the preventive effect and the fact-finding purpose would be lost, because the authorities would be enabled to prepare the respective places of detention, remove detainees to other places,[41] instruct detainees and prison guards what to tell to the visiting delegation, clean up dirty and overcrowded detention facilities, destroy or remove documents, etc.[42]

28 According to the SPT's mission reports that have been published so far, the SPT delegations in some cases have been granted unrestricted access to all the places, installations, and facilities they wanted to visit as well as to all information they requested; at the same time they have been given the opportunity to interview all persons deprived of their liberty in private, all in full accordance with the Protocol.[43] Certain problems with regard to access were faced mainly due to a lack of communication or prior information regarding the SPT's mandate and could, thus, have been solved on a reasonable basis, eg thanks to the cooperation of the focal points or in the course of a short follow-up missions.[44] In some cases, however, the SPT delegations encountered a number of problems

[40] See Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 49.

[41] In one of its early General Reports, the CPT, eg, pointed out that it was 'very disturbed by a few clear instances of the movement of persons deprived of their liberty just prior to a delegation's visit, leaving normally busy places empty': CPT/Inf (92) of 13 April 1992, para 22.

[42] See APT and IIDH, *Optional Protocol to the UN Convention against Torture: Implementation Manual* (2nd rev edn, APT and IIDH 2010) 78.

[43] See SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden' (2008) UN Doc CAT/OP/SWE/1, para 12; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay' (2010) UN Doc CAT/OP/PRY/1, paras 17–20; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras' (2010) UN Doc CAT/OP/HND/1, para 23.

[44] See SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives' (2009) UN Doc CAT/OP/MDV/1, paras 255–58; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico' (2010) UN Doc CAT/OP/MEX/1, paras 20–23; SPT, 'Report on the Visit Made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Italy' (2016) UN Doc CAT/OP/ITA/1, paras 7–11; SPT, 'Visit to Brazil Undertaken from 19 to 30 October 2015: Observations and Recommendations Addressed to the State Party' (2016) UN Doc CAT/OP/BRA/3, paras 10–11.

relating to access and therefore determined serious breaches of the States parties obligations under Article 12 OP.[45]

29 Moreover, the SPT had to suspend three missions (to Azerbaijan, the Ukraine, and Rwanda) until the end of 2017 due to a lack of official cooperation and grave limitations that had been imposed on granting access to certain places of detention.

3.3 Obligation of States Parties to Provide Information

30 Article 12(b) requires governments to provide all relevant *information* which the SPT may need to assess the situation and evaluate the needs and measures that should be adopted to strengthen the protection of detainees against torture and ill-treatment. This provision was not controversial and is supplemented by the obligation under Article 14(1)(a) and (b) to grant the SPT unrestricted 'access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location', as well as to 'all information referring to the treatment of those persons as well as their conditions of detention'.[46] As with the CPT, the SRT, and similar bodies, the Government shall provide the SPT in advance of the mission with a full list of all places of detention, their precise location, and the total number of detainees in each facility. Should there have been any major incidents in the more recent past, such as prison riots, deaths or suicides in custody, allegations and/or findings of torture and ill-treatment in custody, etc, this information shall also be provided to the SPT in advance of the mission in order to enable it to prepare the mission accordingly. The obligation to provide information, of course, also applies during the mission and/or visits to detention facilities. First, the authorities shall provide the prison register, information on disciplinary punishments, the register of punishment cells, and similar information. If a detainee alleges, for instance, that he or she was recently subjected to torture by the police or prison guards, the SPT has the right to request the case file of the person concerned, medical records, the results of investigations conducted, and other information relevant for the assessment of the accuracy of such allegations.

3.4 Obligation of States Parties to Facilitate Contacts with NPMs

31 States parties, in accordance with Article 12(c) OP, shall also *encourage and facilitate contacts between the SPT and the NPMs*. This obligation shall enable the SPT to fulfil its task of advising and assisting NPMs in accordance with Article 11(b) OP. The SPT is also explicitly authorized by Article 11(b)(ii) to maintain confidential contact with the NPM.[47] In other words, the duty to 'facilitate' contacts shall not be misused to deny or obstruct confidential meetings between both bodies.

[45] See SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Benin' (2011) UN Doc CAT/OP/BEN/1, paras 304–09; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mali' (2014) UN Doc CAT/OP/MLI/1, paras 6–12; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Kyrgyzstan' (2014) UN Doc CAT/OP/KGZ/1, paras 10–11; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Gabon' (2015) UN Doc CAT/OP/GAB/1, paras 11–14.

[46] See below Art 14 OP.

[47] See above Art 11 OP; see Elina Steinerte, 'The Changing Nature of the Relationship between the United Nations Subcommittee on Prevention of Torture and National Preventive Mechanisms' (2013) 31 (2) NQHR 149ff;

32 In practice, the SPT faced certain difficulties when trying to contact the NPM of Mali during its regular country mission in December 2011. The SPT considered the structure of the NPM in question 'to be unsatisfactory, particularly due to its lack of independence and the absence of funding'. As a result, the NPM was unable to arrange visits to places of detention outside the district of Bamako. The SPT emphasized that it tried to contact the NPM 'to follow up its visit, notably regarding the question of possible reprisals, but received no response'.[48]

33 In 2011, the SPT decided to develop a new tool in order to facilitate its contacts with NPMs: the 'NPM advisory visits'.[49] Although this type of visits is not explicitly foreseen in the text of the OP, the SPT conducted eleven such visits between January 2012 and December 2016.[50] Besides, certain procedures have been installed by the SPT in order to foster cooperation and communication with NPMs apart from its visiting mandate, such as the establishment of regional teams, which act as focal points for NPMs, as well as the identification of specific SPT members for each of the States parties.[51]

3.5 Obligation of States Parties to Enter Into Dialogue with the SPT on Possible Implementation Measures

34 Finally, Article 12(d) contains an obligation of States parties to 'examine the recommendations of the SPT and enter into *dialogue* with it *on possible implementation measures*'.[52] This duty to take the observations and recommendations of the SPT seriously is an important aspect of the general principle of cooperation. If a Government permits unrestricted access to all places of detention, documents, and detainees but refuses to consider and implement any of the SPT's recommendations, then the situation will not improve and the object of the country mission, namely to prevent torture and improve conditions of detention, was missed. Consequently, Article 16(4) OP contains a sanction against States parties which refuse to cooperate with the SPT and/or to take steps to improve the situation. At the request of the SPT, the CAT Committee may publish the report of the SPT or make a public statement.[53] The SPT may also propose and carry out a short *follow-up visit* after a regular visit.[54]

35 Already after its second year of operation, the SPT pointed out that any responses to its recommendations received from a State before the adoption of the respective mission report in plenary would form an important part in the ongoing preventive dialogue between the SPT and the State party concerned.[55]

Moritz Birk and others, *Enhancing Impact of National Preventive Mechanisms, Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward* (Ludwig Boltzmann Institute of Human Rights 2015) 75ff.

[48] CAT/OP/MLI/1 (n 45) para 14. [49] See Art 11 OP above.

[50] 2012: Honduras, Moldova, Senegal; 2013: Armenia, Germany; 2014: Ecuador, Malta; 2015: The Netherlands, Turkey; 2016: Cyprus, Tunisia.

[51] See Art 11 OP above; cf Birk and others (n 47) 75; Steinerte (n 47) 155.

[52] See Birk and others (n 47) for basis and tools for an effective follow-up and implementation.

[53] See below Art 16 OP. [54] See below Art 13(4) OP.

[55] See SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, para 26.

36 At its twenty-fourth session in November 2014, the SPT adopted a *statement regarding obligations of States parties to the OP*.[56] In this statement it emphasized that States parties are obliged to ensure that the SPT is able to fully carry out its visiting mandate in accordance with Articles 12 and 14 OP. In the SPT's view, this comprises the States party's obligation to provide the SPT with all necessary information, including all documentation required (both prior and during a visit), to grant it unhindered access to all places under its jurisdiction where people are or may be deprived of their liberty (as defined in Article 4 of the OP), and to grant it the opportunity to have private interviews with persons deprived of their liberty. Should a State party refuse to cooperate fully, to the extent that the SPT considers the success of its mission to be in jeopardy, it may suspend or terminate its visit (as stipulated in paragraph 27 of the guidelines of the SPT in relation to visits to States parties).[57] Later on, these guidelines have been revised,[58] so that if a State party refuses to cooperate, the SPT may now choose to use all available measures to address such a lack of cooperation.[59]

KERSTIN BUCHINGER

[56] SPT, 'Obligations of States Parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Facilitate the Visits of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc CAT/OP/24/1.

[57] See SPT, '(Former) Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Visits to States Parties' (2011) UN Doc CAT/OP/12/4, para 27.

[58] SPT, 'Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Visits to States Parties under Article 11 (a) of the Optional Protocol' (2015) UN Doc CAT/OP/5 .

[59] ibid, Guideline 9.

Article 13

Obligations of the Subcommittee Concerning Country Missions

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.

2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.

3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.

4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

1. Introduction	834
2. Travaux Préparatoires	835
2.1 Chronology of Draft Texts	835
2.2 Analysis of Working Group Discussions	840
3. Issues of Interpretation	843
3.1 Types of Country Missions	843
3.2 Programme of Country Missions	843
3.3 Unannounced Visits to Places of Detention	844
3.4 Composition of SPT Delegations and Conduct of Country Missions	845
3.5 Follow-up Missions	847

1. Introduction

1 While Articles 12 and 14 contain obligations of States parties to facilitate country missions and visits to places of detention by the SPT, Article 13 OP contains corresponding SPT obligations regarding the conduct of missions and visits. Taking into account the main objective of the Protocol, namely to establish a system of regular and preventive visits to places of detention,[1] and the guiding principles of impartiality,

[1] See above Art 1 OP, 3.

non-selectivity, universality, and objectivity,[2] the SPT shall establish a *programme of regular missions*,[3] at first by lot. It shall notify the States parties of this programme in order to enable the governments concerned to make the necessary practical and logistical arrangements for the country missions. The fact that country missions are not unannounced is not only a concession to the Member States, but also constitutes a practical precondition for the smooth operation of such a mission, as is also the practice of the CPT.

2 In addition to *regular missions*, the SPT may also conduct *follow-up missions*. As a general rule, which is also contained in Article 7(2) ECPT, missions shall be conducted by at least two members of the SPT and, if needed, by experts selected from a *roster* which is kept by the Office of the UN High Commissioner for Human Rights. The State party concerned may oppose the inclusion of a specific expert in the delegation, but not of a member of the SPT.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[4]

Article 8

1. The Committee shall be responsible for arranging visits to places of detention subject to the jurisdiction of the States Parties to the present Protocol.

2. The Committee shall establish a programme of regular visits to each of the said States Parties and shall arrange such further visits as may appear necessary from time to time.

Article 9

1. The Committee may nominate as its delegates to carry out such visits one or more persons being members of the Committee or members of a panel of qualified persons chosen by the Committee from among the nationals of the States Parties to the present Protocol.

2. Members of the said panel shall be nominated for periods of three years. Their names shall be communicated to the States Parties to the present Protocol.

3. A State Party may exceptionally and for confidential reasons given confidentially to the Committee declare that a particular delegate will not be acceptable as a visitor to its territory.

Article 10

1. Subject to the provisions of Article 9 paragraph 3, when the Government of a State Party to the present Protocol has been informed of a mission assigned to one or more delegate(s), the latter shall be authorized to visit in all circumstances and without previous notice any place of detention within the jurisdiction of the State Party.

[2] See above Art 2 OP, 3.

[3] On the confusion created by using the term 'visit' for both country missions and visits to particular places of detention see above Art 4 OP.

[4] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

4 *Revised Costa Rica Draft (15 January 1991)*[5]

Article 8

1. The Subcommittee shall establish a programme of regular missions to each of the States Parties. Apart from regular missions, it shall also undertake such other missions as appear to it to be required in the circumstances.

2. The Subcommittee shall postpone any such mission if the State Party concerned has agreed to a visit to its territory by the Committee against Torture pursuant to Article 20 paragraph 3 of the Convention.

Article 10

1. As a general rule, the missions shall be carried out by at least two members of the Subcommittee, assisted by experts and interpreters if necessary.

2. No member of a delegation shall be a national of the State to be visited.

Article 11

1. Experts shall act on the instructions and under the authority of the Subcommittee. They shall have particular knowledge and experience in the areas covered by this Protocol and shall be bound by the same duties of independence, impartiality and availability as the members of the Subcommittee.

2. A State Party may exceptionally and for reasons given confidentially declare that an expert or other person assisting the Subcommittee may not take part in a mission to its territory.

Article 12

1. The Subcommittee shall notify the Government of the State Party concerned of its intention to organize a mission. After such notification, it may at any time visit any place referred to in Article 1 paragraph 1.

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[6]

Article 8

The Sub-Committee shall [undertake missions] [establish a programme of missions] to States Parties [based on the criteria capable of guaranteeing the principles of non-selectivity, impartiality, objectivity, transparency and universality] [based on criteria consistent with the principles set out in Article 3] [Apart from programmed missions, it shall also undertake other missions as appear to it to be appropriate].

[Those missions shall be] [mutually agreed between the Sub-Committee and the State Party concerned, in a spirit of cooperation] [undertaken by the express consent of the State Party concerned].

[Without prejudice to the provisions of Article 1], [the modalities for carrying out each mission shall be mutually agreed between the Sub-Committee and the State Party concerned, in a spirit of cooperation] [the Sub-Committee and the State Party

[5] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[6] E/CN.4/1996/28, Annex I.

concerned shall engage in consultation in order to determine the modalities of the mission].

[In preparation for such a mission], the Sub-Committee shall send a written notification to the Government of the State Party concerned of its intention to organize a mission [together with a detailed plan of the mission] [and after consultations with the State Party on the modalities of the mission]. [After such notification], the Sub-Committee may at any time visit any place referred to [in its detailed plan after a written agreement is given by the said Government] [in Article 1 paragraph 1].

Consolidated Articles 10 and 11

[1. The missions/[visits] shall be carried out by at least two members of the Sub-Committee. [As a general rule] members of the Sub-Committee shall conduct their missions/[visits] to the State Party concerned [with] [without] the assistance of experts.

2. [In exceptional cases] the Sub-Committee may, if it considers it necessary in order to carry out its tasks efficiently, be assisted by experts known for their professional knowledge and experience in the areas covered by this Protocol.

[Those missions shall be] [mutually agreed between the Sub-Committee and the State Party concerned, in a spirit of cooperation] [undertaken by the express consent of the State Party concerned]. (From Article 8 paragraph 2)

[Without prejudice to the provisions of Article 1], [the modalities for carrying out each mission shall be mutually agreed between the Sub-Committee and the State Party concerned in a spirit of cooperation] [the Sub-Committee and the State Party concerned shall engage in consultation in order to determine the modalities of the mission.] (From Article 8 paragraph 3)

[3. In order to establish a pool of experts available to the Sub-Committee, each State Party may propose to the Sub-Committee a list of [no more than five] persons who [may] [shall] be its nationals.]

[4. When preparing a mission the Sub-Committee will select experts from this pool and [may] complete the delegation with experts proposed by the United Nations Centre for Human Rights and/or the United Nations Crime Prevention Branch or from amongst the existing staff of the United Nations and its specialized agencies.]

5. No member of the delegation, with the exception of interpreters, may be a national of the State to be visited. The conduct of the delegation and of all of its members, shall be bound by the criteria of independence, impartiality, objectivity and confidentiality.

6. Experts to a mission shall be subordinate to and assist the Sub-Committee. They shall in all respects act on the instructions and under the authority of the Sub-Committee. [They shall in no case undertake any missions by themselves under this Protocol.]

7. The names of the experts and interpreters selected by the Sub-Committee to assist a particular mission shall be specified in the notification under [Article 12 paragraph 1] [Article 8 paragraph 1].

8. A State Party may, [exceptionally] [and for reasons given confidentially], [declare] [decide] that an expert or interpreter assisting the Sub-Committee may not take part in the mission to the territory under its jurisdiction.]

6 *Text of the Articles which Constitute the Outcome of the Second Reading (2 December 1999)*[7]

Article 13 [consolidated 10 and 11]

1. Missions should be carried out by at least two members of the Subcommittee, assisted by interpreters if necessary. If needed, the Subcommittee may be assisted by experts.

2. The Subcommittee shall upon deciding the composition of the mission take into account the particular objectives of the mission.

3. (a) The Subcommittee shall consult confidentially the State Party concerned, in particular regarding the composition and size of the mission other than with regard to the participating members of the Subcommittee.

(b) The State Party concerned may oppose the inclusion of an expert or interpreter in the mission to the territory under its jurisdiction, whereupon the Subcommittee shall propose alternatives.

4. No member of the delegation, with the exception of interpreters, may be a national of the State to be visited. The conduct of the delegation and of all of its members shall be bound by the criteria of independence, impartiality, objectivity and confidentiality.

5. Experts shall be subordinate to and assist the Subcommittee. With regard to a mission, they shall in all respects act on the instruction of and under the authority of the Subcommittee. They shall in no case undertake any missions by themselves under the present Protocol.

Article 14

1. In order to establish a list of experts available for the Subcommittee, each State Party may propose no more than five national experts, qualified in the areas covered by the present Protocol, giving due consideration to gender balance.

2. As needed, the United Nations and specialized agencies may also propose experts to be included on that list.

3. The Subcommittee will annually notify the States Parties of the comprehensive list of experts.

4. In special cases, where specific knowledge or experience is required for a particular mission, and such knowledge or experience is not available on the list of experts, the Subcommittee may include in a mission an expert who is not on the list.

5. In selecting experts for a mission, the Subcommittee shall give primary consideration to the professional knowledge and skills required, taking into account regional and gender balance.

7 *Mexican Draft (13 February 2001)*[8]

Article 23

1. A State Party to the present Protocol may at any time declare under this Article that it agrees to receive a delegation of the Sub-Committee to carry out, in accordance with the present Protocol, visits to any territory under its jurisdiction where persons

[7] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session (1999) UN Doc E/CN.4/2000/58, Annex II.

[8] E/CN.4/2001/WG.11/CRP.1.

deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are or may be held.

2. The Sub-Committee shall establish, by lot, a programme of visits to all States Parties making the declaration provided for in the preceding paragraph.

3. Such visits may be conducted jointly with the national mechanism.

4. Visits shall be conducted by at least two members of the Sub-Committee. They may be accompanied by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol and shall be selected by consensus from a roster of experts prepared on the basis of proposals made by the States Parties that have made the declaration provided for in paragraph 1 of this Article, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for Crime Prevention. In preparing the roster of experts, the States Parties concerned shall propose no more than five national experts.

5. The delegation making the visits and its members shall enjoy the same powers and duties conferred on the national mechanism under Articles 5, 6 and 7 paragraphs 1 (a) and 2.

6. The provisions of this Article shall enter into force when five States Parties to the present Protocol have made the declaration provided for in paragraph 1 of this Article. such declarations must be deposited by States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such declarations shall not become effective until six months after their notification.

8 *EU Draft (22 February 2001)*[9]

Article 9 (old 8 revised)

1. The Sub-Committee:

   (a) Shall establish on the basis of a transparent procedure, a programme of regular missions to all States Parties. These missions may also include follow-up missions;

   (b) Shall also undertake such visits or missions as appear to be required in the circumstances and based on information received by the Sub-Committee and assessed by it as credible, with a view to furthering the aims of this Protocol;

   (c) Shall after a mission or a visit advise and assist the State Party in assessing the needs and appropriate measures for strengthening the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment;

   (d) May make recommendations to the State Party on the mandate, the competence and the effective functioning as well as other relevant activities of an established national mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Article 15;

   (e) Shall transmit requests from a State Party for technical assistance and technical cooperation as well as facilitate the provision of such cooperation from the relevant United Nations bodies such as UNHCR, UNDP, ODCCP, UNICEF and UNIFEM.

2. The Sub-Committee shall send a written notification to the Government of the State Party concerned of its intention to organize a mission.

[9] E/CN.4/2001/WG.11/CRP.2.

> 3. Before a mission is carried out, the Sub-Committee and the State Party concerned shall, if either of them so requests, enter into consultations with a view to agreeing without delay on the practical arrangements for the mission. Such consultations on the practical arrangements for the mission may not include negotiations on the obligations of a State Party under Articles 3 or 13.

2.2 Analysis of Working Group Discussions

9 During the first session of the Working Group, held from 19 to 30 October 1992, the then Articles 8, 10, 11, and 12 of the revised Costa Rica Draft of 1991 were discussed within the fourth basket of issues, 'Operation of the system'.[10]

10 As to Article 8, and specifically the question of which kinds of visits the SPT should conduct, some delegates found that the programme of regular, preventive visits was the primary aim of consideration. However, it was felt that such a system was not enough by itself and that specific or ad hoc visits should be foreseen. Others felt that a clearer textual distinction should be drawn between the regular and the specific visits.[11]

11 One delegate distinguished between the words '*visit*' and '*mission*', on the basis that a visit was restricted to places of detention, while a mission might have other purposes to accomplish in a State. Another point was made that the programme of regular or fixed visits might lack responsiveness to changing circumstances and resource needs and that flexibility of administration could be an important attribute. A final suggestion was that notification of visits should be required.

12 As to Article 10, another issue raised during the discussions was the *composition of the missions* as such. Some delegations found that the need for experts to assist the mission was debatable, given that the members of the SPT themselves were to be experts in the relevant fields. Various other comments were raised regarding the rights and duties of such experts; the need to clarify the way in which they would be identified and selected, as well as what their specific functions would be.

13 With regard to Article 11, one delegation felt that care must be given when selecting the experts in order to assess their qualifications in such a way as to complement the qualifications represented by the members of the SPT. Several members of the Working Group questioned the authority given to a State party, by virtue of Article 11(2), to exclude a person from taking part in a mission.

14 Regarding Article 12, the issue of *notification* was heavily discussed. Several delegations made the point that a notification to a State of an upcoming mission might not be adequate in that it would not permit the State, as required by the OP, to ensure the availability of all facilities required for the mission. It was discussed whether such a notification should remain indefinitely valid or be limited to a certain period of time. Some delegations were concerned that specific notice of the time and places of a visit might be conducive to abuse. One delegation found that agreement of the State concerned should be required for each visit of the SPT, while others were of the opinion that this would undermine the purpose of the Protocol as such. However, the observation was made that a lack of notice could generate delay and difficulties in ensuring access to the places to be visited.

[10] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28 para 26.

[11] ibid, para 75.

15 In the course of its second session from 25 October to 5 November 1993, the Working Group continued to consider Article 8. As to its paragraph 1, some delegations, referring to the ECPT, were in favour of replacing the word '*missions*' with the word 'visits'. Most delegations, however, preferred to maintain the distinction between the two notions, as it was CPT practice to refer to the word 'mission' in the case of a CPT-delegation entering a State territory and to refer to the notion '*visit*' in the case of such a delegation visiting any one place of detention.[12]

16 With regard to the different kinds of missions, a number of delegations were in favour of inserting a provision allowing for non-regular and ad hoc missions. Some felt the need to specify the circumstances that could give rise to such other missions, while others found that this should be left to the discretion of the SPT.

17 As to Article 10, some delegations stated that the need for *experts* to assist the mission was not clearly established and there was a need to clarify the way in which they would be selected. Others felt that the presence of experts was necessary because of the workload to be carried and the flexibility required.

18 At the third session from 17 to 28 October 1994, it was felt that the issue dealt with in Article 12(1) should be addressed in the context of Article 8. Some delegations were of the opinion that consent or agreement of the State concerned should be required for each visit of a delegation of the SPT.[13] Others pointed out that this would greatly diminish the preventive character of the new system and that such consent or agreement was already implied in the ratification of the Protocol.

19 With regard to the issue of notification, one delegation, supporting the delegation of *Egypt*, found that the OP should explicitly provide for a 'reasonable interval of time' between the notification of a State concerned and the dispatch of the SPT's mission.

20 Articles 10 and 11 were commonly considered during the third session of the Working Group. Once again, the need for additional experts to assist a delegation's mission was doubted by several delegations. Many delegations stressed the need to have clear criteria for the selection of such experts. Some proposed that the States parties should draw up a list of experts from which the SPT could make its choice. One delegation put forward a proposal to combine Articles 10 and 11 in a single article, another one put forward a proposal to amend the two articles in order to define the functions of advisers and the circumstances in which they might be employed.

21 During the fourth session of the Working Group, held from 30 October to 10 November 1995, Articles 10 and 11 were reconsidered. The representative of the Committee against Torture emphasized the importance of having experts in a delegation. In his opinion, the selection of experts should be performed by a delegation of the SPT that was to carry out a mission to a State party, and the main criterion for their selection should be their competence. An expert should not visit his or her own country and a Government should be able to object to the visit of one or another expert without giving reasons therefor.[14]

[12] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25, paras 59ff.

[13] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995) UN Doc E/CN.4/1995/38, paras 25ff.

[14] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Fourth Session (1996) UN Doc E/CN.4/1996/28 para 23.

22 At its seventh plenary meeting, the Chairperson of the informal drafting group proposed a consolidated text for Articles 10 and 11 to serve as a basis for the second reading of the draft OP. This text had originally been proposed by the delegation of El Salvador, and had subsequently been amended to include all the views expressed during the informal drafting process.[15]

23 At the Working Group's sixth session, held from 13 to 24 October 1997, a general discussion on consolidated Articles 10 and 11 was opened.[16] On 16 October 1997, the observer for *Sweden* submitted a proposal on Article 10, having taken into account the various proposals on consolidated Articles 10 and 11 submitted at earlier sessions, the discussions held on the issues, and the original text as submitted by Costa Rica in 1991. It contained the 'general rule' that missions would be carried out by at least two members of the SPT, a method by which a transparent roster of experts would be established and a safeguard ensuring the integrity and impartiality of experts. It foresaw that experts were subordinate to the SPT and that a State party could exclude an expert or interpreter from taking part in a mission to territory under its jurisdiction.

24 The representative of *China* also submitted a proposal on Articles 10 and 11, limiting the number of experts and stating that experts should be used only in exceptional cases subsequent to permission of the State concerned. The observer for the Committee against Torture shared his experience as a member of the CPT, where at least two CPT-members had taken part in visits, always with the assistance of experts who rendered technical assistance and had no political influence.

25 On 20 October 1997, a new text of Article 10 was submitted to the Working Group by the Chairperson of the drafting group.[17] In this proposal, the already proposed roster of experts was missing. Finally, Article 10 was adopted and the matter of a roster of experts was included in a new Article 10 bis. The text of the proposed Article 10 bis was then adopted by the Working Group as new Article 14.[18]

26 The Working Group then held its eighth session from 4 to 15 October 1999. On 14 October 1999, the Working Group had before it the consolidated texts of various proposals relating to Articles 1, 8, 12, and 13, which—after some consideration—were then accepted to serve as a basis for future discussions.[19]

27 During the ninth session from 12 to 23 February 2001, the issues in question were discussed with regard to the alternative draft submitted by the delegation of *Mexico* with the support of GRULAC contained in its Article 23. It was felt, in particular, that the frequency of visits to be carried out by the SPT and whether they should be periodical, ad hoc or both, should be subject of further considerations.[20]

28 In the proposal presented by the Chairperson-Rapporteur, the mandate of the SPT was discussed in Part III, where Article 13 established the different types of visits that the SPT would undertake.[21]

[15] ibid, para 30.

[16] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42 paras 40ff.

[17] ibid, para 51. [18] ibid, para 66. [19] E/CN.4/2000/58 (n 7) para 54.

[20] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Ninth Session (2001) UN Doc E/CN.4/2001/67, para 33.

[21] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Tenth Session (2002) UN Doc E/CN.4/2002/78, para 49.

29 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights basically adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[22]

3. Issues of Interpretation

3.1 Types of Country Missions

30 The practice of the *CPT served as a model* for the drafting of Article 13 OP, which distinguishes between regular missions and follow-up missions.

31 In practice, the SPT (originally) referred to four types of missions: (regular) country missions, country follow-up missions, NPM advisory missions,[23] and OPCAT advisory missions. While NPM advisory missions had a strong focus on assisting the NPM and/or the State party concerned regarding the establishment/designation and effective functioning of the preventive mechanism through practical capacity-building activities, the OPCAT advisory missions were addressed to help States parties in implementing their (other) obligations set out in the Protocol. The latter were short missions, focusing on high-level talks with senior Government officials of the relevant ministries and bodies, as well as civil society representatives and any other relevant entities. However, in the course of 2015 the SPT found that 'such categorization has at times proved limiting and has hindered [it] in the full and robust exercise of its mandate'. It therefore 'decided to cease categorizing its visit and to formulate, from 2016, a plan best suited to the exigencies of each visit'.[24] Consequently, in 2016 each country mission addressed all aspects of the SPT's preventive mandate, in particular its two primary responsibilities of visiting places of detention and advising on the establishment or operation of the NPMs. In the view of the SPT, 'the new methodology magnified the practical impact of the visits, enabling the Subcommittee to better fulfil its mandate under Article 11 (1) (b) of the Optional Protocol'.[25]

3.2 Programme of Country Missions

32 That the first programme of *regular missions* was to be established by lot was even included in Article 13(1) OP in order to underline the non-selectivity of the SPT. However, this only applied to the initial (annual) programme. *Non-selectivity* and *impartiality* does not mean that there must be an equal number of regular missions to each State party, irrespective of its size, the number of places of detention, and the conditions therein. On the contrary, to decide the frequency of missions on an equitable basis and in a non-selective manner means precisely to take these criteria into consideration, but not to target specific countries on arbitrary grounds. Moreover, the SPT shall take into account that under the Protocol, regular preventive visits are primarily the responsibility of NPMs, and that the experience of such mechanisms shall also be taken into consideration when deciding about further annual programmes of country missions.

[22] CHR Res 2002/33 of 22 April 2002. See above Art 1 OP, 2.2.

[23] See Art 11 OP above.

[24] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, para 40.

[25] SPT, 'Tenth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) UN Doc CAT/C/60/3, para 45.

32 The Maldives, Mauritius, and Sweden were the first three countries drawn by lots that should be visited by the SPT; they had been visited by the SPT during 2007 and early 2008. Already in the course of its initial period of work, the SPT began to develop certain guidelines on country missions. Consequently, it selected the States to be visited by a reasoned process, with reference to the principles laid down in Article 2 OP, taking into account various factors like the date of ratification of the Protocol, the establishment of a NPM, the geographical distribution of countries, the size and complexity of a State, and regional preventive monitoring as well as urgent issues reported.[26] Due to serious budgetary constraints, however, the SPT had to limit its programme of visits to three per year during its first years. On 18 January 2011, the SPT finally published its first Guidelines in relation to visits to States parties,[27] which had been revised later on in 2014.[28]

33 According to Article 13(2), the SPT 'shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted'. The requirement of *prior notification of a country mission* is the result of a compromise during the drafting process; however, it should not be confused with the requirement of prior consent as demanded by some governments. Apart from constituting a certain concession to the Member States prior notification is necessary for the smooth functioning of the mission.

34 In practice, the *programme of missions* is being determined by the SPT in plenary on the advice of its regional teams. Until 2016, the programme was published afterwards without specifying any concrete dates of missions. In the course of 2016, the SPT decided 'that it will no longer produce annual visiting programmes', but rather announce on a periodic basis the next countries to be included in its programme of missions.[29] In order to enable the States parties to make the necessary practical arrangements for the missions to be carried out effectively, the SPT 'may inform' the State party concerned of its intention to undertake a mission to it. The dates of each mission are being made public one week after the notification to the respective State party.[30] In its first years of practice, the SPT also carried out preliminary missions shortly before the planned regular country missions in order to initiate the process of dialogue with the authorities. Such preliminary meetings in the view of the SPT 'proved to be an important part of preparation for the visits, representing an opportunity to fine-tune the programme and enhance facilitation of the work of the delegation'.[31]

3.3 Unannounced Visits to Places of Detention

35 Since the SPT, as the CPT, is authorized to conduct *unannounced visits to places of detention*, it shall not provide the authorities with a list of places of detention which it

[26] See SPT, 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc CAT/C/40/2, para 7.

[27] SPT, '(Former) Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Visits to States Parties' (2011) UN Doc CAT/OP/12/4.

[28] SPT, 'Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Visits to States Parties under Article 11 (a) of the Optional Protocol' (2015) UN Doc CAT/OP/5.

[29] See CAT/C/60/3 (n 25) para 64.

[30] See CAT/OP/5 (n 28) paras 2–6.

[31] SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, para 21.

intends to visit. Article 13(2) OP only obliges the SPT to notify States of its programme of country missions but not of its programme of visits to places of detention during a particular country mission.[32] The notification of all the members of the delegation is not only required for the purpose of obtaining visas or other travel permits, but also because the State party is entitled to oppose the inclusion of a specific expert.

36 Pursuant to its policy on reprisals[33] in relation to its visiting mandate, the SPT decided to implement specific measures prior to conducting a country mission in addition to the general notification of a mission.[34] In future, it will communicate this policy document to the States parties together with the notification of its mission programme, and States parties are requested to inform all those with whom the SPT may come into contact during (or after) its visit. During its *preparations for a specific country mission*, the SPT will examine all relevant information with regard to the occurrence of reprisals in the country to be visited. One of the SPT's members will be appointed focal point on reprisals. In case the issue of potential reprisals becomes a matter of concern, the SPT may contact the respective State party in order to alert it to the SPT's concern; it may also request a meeting with the State party's Permanent Mission to the UN Office or other international organizations in Geneva.[35]

3.4 Composition of SPT Delegations and Conduct of Country Missions

37 A country mission shall be conducted by a *delegation of the SPT* consisting of no less than two members, the necessary staff from the OHCHR, interpreters, possibly security staff, and, if needed, '*experts* of demonstrated professional experience and knowledge in the fields covered by the present Protocol'. In practice, SPT delegations are composed of two (to four) experts. As a general rule, although not stipulated in the Protocol, members of the delegation shall, with the exception of interpreters, not be nationals of the country to be visited, in order not to imply a conflict of interest with their capacity as independent and impartial members of the SPT.[36]

38 The possibility to include experts in country missions of the SPT was highly controversial during the drafting of this provision.[37] Some delegations found that the need for experts to assist the mission was dubious, in view of the fact that the members of the SPT themselves were to be experts in the relevant fields. Taking into account, however, that even the CPT with more than forty members includes experts in its missions, such assistance may be crucial for the proper and professional implementation of country missions. Moreover, the inclusion of additional experts is an effective way to meet the requirements set out in Article 5 of the OP. In our opinion, it is, for instance, absolutely essential that *forensic experts* assist the SPT members on every country mission. Furthermore, it is advisable that the members conducting a mission, as far as possible, speak the language of

[32] For more details on the issue of *unannounced visits to places of detention* see above Art 12 OP.

[33] cf. Art 15 OP below.

[34] SPT, 'Revised Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on Reprisals in Relation to Its Visiting Mandate' (2016) UN Doc CAT/OP/6/Rev.1 para 27.

[35] ibid.

[36] cf CAT/OP/5 (n 28) Guideline 3; see also Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 95 with further references.

[37] See above 2.2.

the country to be visited in order to be able to communicate with Government officials, detainees, and others, without interpreters. If the two SPT members who speak the language of the country concerned, have the same professional background, the multidisciplinary composition of the delegation, which is of utmost importance, would not be guaranteed. The same applies to *gender balance*, as it is absolutely essential that enough women are included in the delegation, since interviews with female detainees should be conducted, as far as possible, by women.

39 Article 13(3) constitutes a compromise between the different views expressed during the drafting process. The possibility of being accompanied by experts was maintained, but the *selection of experts* was made subject to the following procedure. On the basis of proposals by States parties, the OHCHR and the UN Centre for International Crime Prevention in Vienna, a *roster of experts* shall be established. While States parties are prevented from proposing more than five national experts, such limitation does not apply to the two UN offices. As the OHCHR is providing staff and facilities to the SPT, this roster of experts shall be maintained there. In preparing for a particular country mission, the SPT shall, if needed, select experts from this roster and notify the Government of the country to be visited accordingly. The State party concerned may oppose the inclusion of a specific expert in the mission, whereupon the SPT shall propose another expert.

40 As the *roster of experts* is still in preparation, the SPT tends to select 'experts from the list of names proposed by States parties and from among experts widely recognized as having the required relevant expertise'.[38] According to the public reports on SPT missions, the SPT members so far have only been accompanied by external experts on three occasions (namely on its visits to the Maldives, Sweden, and Benin).[39]

41 The SPT delegations carry out the missions in line with the principles laid down in Article 2 OP. During the missions, the delegations meet with representatives of the respective State authorities as well as with members of the NPMs, if already set up, and various other actors like experts from human rights and/or academic institutions and non-governmental organizations.[40]

42 At the end of a visit to a specific place of detention, the delegation may provide the relevant authorities with *preliminary oral feedback*. Such feedback is aimed at highlighting 'generic and systemic issues', giving room for confidential discussions on the outcomes of the visit.[41] Moreover, it gives an opportunity to communicate issues and situations requiring immediate action.

43 At the end of a country mission, the SPT delegation may then communicate *preliminary observations* to the authorities of the State party concerned. These preliminary observations may also be communicated to the NPMs, which may also take part in the final (or any other) meeting (if the State party in question approves).[42] The delegation may raise any urgent issues requiring immediate action as well as seek to 'explore

[38] See SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 34.

[39] See SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives' (2009) UN Doc CAT/OP/MDV/1, para 8; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden' (2008) UN Doc CAT/OP/SWE/1, para 8; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Benin' (2011) UN Doc CAT/OP/BEN/1, para 8.

[40] See CAT/OP/5 (n 28) para 3. [41] ibid, para 23. [42] ibid, para 24.

potential preventive measures in dialogue with the State party' (and other actors) and to 'establish an agreed framework for securing an effective post-visit continuous dialogue'.[43] Moreover, the delegation may as well raise individual cases with the State party in order to achieve the necessary protection of the person(s) concerned, taking into account of course the risk of possible reprisals.[44]

3.5 Follow-up Missions

44 Article 13(4) OP also provides for the possibility of *follow-up missions*. Although the text authorizes the SPT only to 'propose a short follow-up visit to a regular visit', the decision to conduct a follow-up mission due to, for example, certain problems encountered during the regular mission, is the exclusive competence of the SPT, subject only to the possibility of objections in exceptional circumstances, as spelled out in Article 14(2) OP. Crucially, States are not allowed to object to a follow-up mission as such, only to visits to a particular place of detention.[45] Follow-up missions might also be used as a means to assess whether particular projects financed by the Special Fund established in accordance with Article 26 OP in fact contribute to the implementation of its recommendations after a regular country mission.[46] According to Guideline 1, the SPT may, if it considers it appropriate, decide to carry out a short follow-up mission as provided for in Article 13(4) OP.[47] Until the end of 2017, the SPT conducted only six follow-up missions (to Paraguay, Cambodia, the Maldives, Benin, Mexico, and Bolivia). While reports on the respective missions to Cambodia, the Maldives, Benin, Mexico, and Bolivia were not made public until November 2017, it can be drawn from the report on the SPT's follow-up mission to Paraguay, that '[t]he purpose of this visit was to follow-up on the observations and recommendations issued by the Subcommittee in its report on its first regular visit to the country, which took place on 10–16 March 2009'. During this mission, the SPT focused on follow-up to its recommendations, particularly those regarding the NPM and the situation of persons deprived of their liberty at the Tacumbú National Prison in Asunción and at police stations. In addition to visiting places of detention, the representatives of the SPT met with a number of officials and with members of civil society.[48] Due to the serious budgetary constraints, however, follow-up missions had not been a priority of the SPT, given the fact that still not all the States parties to the Protocol have been visited until the end of 2017.

KERSTIN BUCHINGER

[43] ibid, para 25. [44] ibid, para 26; for the post-mission procedure see Art 16 OP below.
[45] See below Art 14 OP, 3. [46] See below Art 26 OP, 3.
[47] cf CAT/OP/5 (n 28) Guideline 1.
[48] See SPT, 'Report on the Follow-up visit to the Republic of Paraguay' (2011) UN Doc CAT/OP/PRY/2, paras 2ff.

Article 14

Obligation of States Parties to Facilitate Visits by the Subcommittee to Places of Detention

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:

(a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;

(e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

1. Introduction	848
2. Travaux Préparatoires	849
2.1 Chronology of Draft Texts	849
2.2 Analysis of Working Group Discussions	854
3. Issues of Interpretation	856
3.1 Unrestricted Access to Places of Detention, Information, and Documentation	856
3.2 Private Interviews with Detainees and Any Other Person Who the SPT Believes May Supply Relevant Information	857
3.3 Objections by States to a Particular Visit	859

1. Introduction

1 Article 14 OP is closely related to Article 12 OP and further defines the obligation of States parties to cooperate with the SPT in facilitating its preventive visits to places of detention. During the discussions in the Working Group, this Article proved to be just

as controversial as Article 12 OP.[1] In particular, certain States objected to the right of the SPT to conduct unannounced visits to places of detention and private interviews with detainees. Since their attempts to make access of the SPT to places of detention and its right to conduct private interviews with detainees subject to national laws and regulations failed, they finally voted against the OP in the Working Group, the Commission on Human Rights, and ECOSOC.[2] On the other hand, no explicit reference to unannounced visits to places of detention is included in Articles 12 or 14 OP, and Article 14(2) contains the right of States parties to object to a visit of a particular place of detention on certain urgent and compelling grounds, similar to Article 9 ECPT.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Original Costa Rica Draft (6 March 1980)*[3]

Article 10

1. Subject to the provisions of Article 9 paragraph 3, when the Government of a State Party to the present Protocol has been informed of a mission assigned to one or more delegate(s), the latter shall be authorised to visit in all circumstances and without previous notice any place of detention within the jurisdiction of the State Party.

2. The delegates shall receive from the State Party concerned all facilities for the accomplishment of their task. They may, in particular, obtain all information about the places where there are persons deprived of their liberty and interview them there without witnesses and at leisure.

3. Delegates may enter into contact with the families, friends and lawyers of persons deprived of their liberty.

4. During each visit, the delegates shall verify that persons deprived of their liberty are being treated in conformity with the provisions of the Convention.

5. If appropriate, they shall at once submit observations and recommendations to the competent authorities of the State Party concerned.

6. They shall submit a full report on their mission, with their observations and recommendations, to the Committee.

3 *Revised Costa Rica Draft (15 January 1991)*[4]

Article 12

1. The Subcommittee shall notify the Government of the State Party concerned of its intention to organize a mission. After such notification, it may at any time visit any place referred to in Article 1 paragraph 1.

2. The State Party within whose jurisdiction a mission is to take place or is being carried out shall provide the delegation with all the facilities necessary for the proper fulfilment of their tasks and shall not obstruct by any means or measures the programme of visits or any other activities which the delegation is carrying out specifically for or

[1] See above Art 12 OP, 2.2. [2] See above Art 1 OP, 2.2; but see below Art 36(a) OP.

[3] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[4] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

in relation to the visits. In particular, the State Party shall provide the delegation with the following facilities:

(a) access to its territory and the right to travel without restrictions;

(b) full information on the places referred to in Article 1 paragraph 1, including information requested about specific persons;

(c) unlimited access to any place referred to in Article 1 paragraph 1, including the right to move inside such places without restriction;

(d) assistance in gaining access to places where the delegation has reason to believe that persons may be deprived of their liberty;

(e) producing any person deprived of his liberty whom the delegation wishes to interview, at the request of the delegation and at a convenient location;

(f) other information available to the State Party which is necessary for the delegation to carry out its task.

3. Members of the delegation may interview in private, inside or outside his place of detention, without witnesses, and for the time they deem necessary, any person deprived of his liberty under the terms of Article 1. They may also communicate without restriction with relatives, friends, lawyers and doctors of persons who are or have been deprived of their liberty, and with any other person or organization that they think may be able to provide them with relevant information for their mission. In seeking such information, the delegation shall have regard to applicable rules of national law relating to data protection and principles of medical ethics.

4. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee or to the delegates any information whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

5. In urgent cases the delegation shall at once submit observations and recommendations either of general or specific nature to the competent authorities of the State Party concerned.

Article 13

1. In the context of a mission, the competent authorities of the State Party concerned may make representations to the Subcommittee or its delegation against a particular visit if urgent and compelling reasons relating to serious disorder in the particular place to be visited temporarily prevent the carrying out of the visit.

2. Following any such representation, the Subcommittee and the State Party shall immediately enter into consultations in order to clarify the situation and seek agreement on arrangements to enable the Subcommittee to exercise its functions expeditiously. Such arrangements may include the transfer to another place of any person whom the Subcommittee proposed to visit. Until the visit takes place, the State Party shall provide information to the Subcommittee about any person concerned.

4 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[5]

Article 12

[1, 6] [Members of the delegation shall respect the national laws and regulations while undertaking the visits in the territory of the State Party concerned.] [National

[5] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Fourth Session (1996) UN Doc E/CN.4/1996/28, Annex I.

laws and regulations may not be used or interpreted as means or measures contravening the programme and purpose of the visits.]

2. The State Party within whose jurisdiction a mission is to take place or is being carried out shall provide the delegation with all the facilities necessary for the proper fulfilment of their tasks and promote the full cooperation of all competent authorities. In particular, the State Party shall provide the delegation [in accordance with national laws and regulations] with the following:

(a) Access to its territory [and the right to travel without restriction] [for the purposes of the mission], [to freely visit places and persons referred to in Article 1];

(b) All relevant information on the places referred to [in Article 1], [in the detailed plan] including information requested about specific persons;

[(c) Unlimited access to any place referred to [in Article 1], [in the detailed plan], including the right to move inside such places without restrictions];

(d) Assistance in gaining access to places where the delegation has reason to believe, [on the basis of well-founded and reliable information] that persons may be in situations referred to [in Article 1] [and providing a convenient place for private interview];

(e) Providing access to, [and private interview with] any person in situations referred to [in Article 1,] whom the delegation wishes to interview, at the request of the delegation and at a convenient location;

(f) Other information available to the State Party which is necessary for the delegation to carry out its task.

3. [Members of the delegation, [the Sub-Committee] may interview in private [at a convenient location to be provided by the competent authorities without being overheard], [without witnesses], and for the time they deem necessary, any person in situations referred to [in Article 1]. They may also communicate without restriction with relatives, friends, lawyers and doctors of persons who are or have been in situations referred to [in Article 1] and with any other person or organization that they think may be able to provide them with relevant information for their mission.]

[The members of the Sub-Committee] [where necessary, with the assistance of their advisors] may interview in private, persons in situations referred to [in Article 1,] and may communicate with any person whom they believe, on the grounds of reliable information, can supply relevant information.]

Article 13

1. In exceptional circumstances, in the context of a mission the competent authorities of the State Party concerned may make representations to the Sub-Committee or its delegation against a particular visit. Such representations with respect to the particular place to be visited may only be made on the grounds that [serious] disorder, [national defence, public safety, medical condition of a person and/or urgent interrogation relating to a serious crime is in progress] temporarily prevent the carrying out of the visit. The existence or [formal] declaration of a State of Emergency as such shall not be invoked by a State Party as a reason to object to a visit.

2. Following any such representation, the Sub-Committee and the State Party shall immediately enter into consultations regarding the circumstances and seek agreement on arrangements to enable the Sub-Committee to exercise its functions expeditiously. [Such arrangements may include the transfer to another place of any person whom

the Sub-Committee proposed to visit.] Until the visit takes place, the State Party shall provide information to the Sub-Committee about any person concerned.

5 *Text of the Articles which Constitute the Basis for Future Work after the Second Reading (2 December 1999)*[6]

Article 12

[1. The Subcommittee and the State Party shall cooperate with a view to the effective fulfilment of the [mission] [visit]. In particular, the State Party shall provide:

(a) The delegation with access to, and freedom of movement within, any territory under its jurisdiction [and control] for the conduct of the [mission] [visit];

(b) The Subcommittee or its delegations with all information relevant to the effective conduct of the [mission] [visit], including in particular on any person or places referred to in Article 1 of the Protocol;

(c) The delegation with access to and within any place referred to in Article 1 of the Protocol;

(d) The delegation with access to persons referred to in Article 1 of the Protocol, and the opportunity for private interviews with them;

(e) The Subcommittee and its delegation with the opportunity to communicate freely with any other person who is in a position to supply relevant information.

[2. The obligations referred to above shall be subject to any arrangements that the State Party concerned considers necessary for:

[(a) The protection of sensitive areas [equipment] or information [based on imperative ground of national security] [or economic, technological or scientific secrets];]

[(b) The protection of any constitutional obligations the State Party concerned may have with regard to proprietary rights, searches and seizures, or other constitutional rights [of individuals];]

[(c) The physical protection and safety of persons, including the members of the Subcommittee; and]

[(d) The protection of personal data of individuals as required by national legislation [consistent with human rights principles]].

If the State Party is unable to provide full access to places, information or persons, the State Party shall make every reasonable effort to demonstrate to the Subcommittee, through alternative means, its compliance with this Protocol]].

Article 13

1. In exceptional circumstances, [in the context of a mission,] the competent authorities of the State Party concerned may make objections to the Sub-Committee [or its delegation] against a particular visit [or a mission]. Objections may only be made on [urgent and compelling] grounds of national defence, public [or individual] safety, natural disasters, serious disorder in [the place to be visited] [places where persons are detained,] [the medical condition of a person] [or that an urgent interrogation relating to a serious crime is in progress] [which temporarily prevent the carrying out

[6] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Eighth Session (1999) UN Doc E/CN.4/2000/58, Annex II.

of a visit. The existence of a state of emergency as such shall not be invoked by a State Party as a reason to object to a visit].

2. Following any such objections, the Sub-Committee and the State Party shall [immediately] enter into consultations regarding those circumstances and seek agreement on arrangements to enable the Sub-Committee to exercise its functions [expeditiously]. [Until the [mission or] visit takes place, the State Party shall provide information to the Sub-Committee about persons or places relevant to its [mission or] visit.]

6 *Mexican Draft (13 February 2001)*[7]

Article 16

1. In order to enable the Sub-Committee to fulfil its mandate as set out in Article 15, States Parties undertake to:

(a) Facilitate contact between the Sub-Committee and national mechanisms;

(b) Receive the Sub-Committee in their territory when required;

(c) Implement the recommendations of the Sub-Committee.

2. The Sub-Committee may request any information from national mechanisms that enable it to assess needs and the measures to be taken to strengthen the protection of persons deprived of their liberty against torture and other forms of cruel, inhuman or degrading treatment or punishment, including information concerning the number and location of places of detention, the persons deprived of their liberty and their treatment.

Article 23

1. A State Party to the present Protocol may at any time declare under this Article that it agrees to receive a delegation of the Sub-Committee to carry out, in accordance with the present Protocol, visits to any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are or may be held.

2. The Sub-Committee shall establish, by lot, a programme of visits to all States Parties making the declaration provided for in the preceding paragraph.

3. Such visits may be conducted jointly with the national mechanism.

4. Visits shall be conducted by at least two members of the Sub-Committee. They may be accompanied by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol and shall be selected by consensus from a roster of experts prepared on the basis of proposals made by the States Parties that have made the declaration provided for in paragraph 1 of this Article, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for Crime Prevention. In preparing the roster of experts, the States Parties concerned shall propose no more than five national experts.

5. The delegation making the visits and its members shall enjoy the same powers and duties conferred on the national mechanism under Articles 5, 6 and 7 paragraphs 1 (a) and 2.

6. The provisions of this Article shall enter into force when five States Parties to the present Protocol have made the declaration provided for in paragraph 1 of this Article. Such declarations must be deposited by States Parties with the Secretary-General of

[7] E/CN.4/2001/WG.11/CRP.1.

the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such declarations shall not become effective until six months after their notification.

7 *EU Draft (22 February 2001)*[8]

Article 13 (old 12 revised)

1. The Sub-Committee and the State Party shall cooperate with a view to the effective fulfilment of the mission. In particular, the State Party shall provide the Sub-Committee with:

(a) Unrestricted access to all information, deemed relevant by the Sub-Committee, concerning the number of persons deprived of their liberty, in accordance with Article 16 of the Convention, as well as the number of places and their location;

(b) Unrestricted access to all information deemed relevant by the Sub-Committee, concerning the treatment and the conditions of detention;

(c) Access to and freedom of movement within any territory under its jurisdiction and control for the conduct of the mission;

(d) All information deemed relevant by the Sub-Committee to the effective conduct of the mission, including in particular on any person or places referred to in Article 3 of the Protocol;

(e) Access to and within any place referred to in Article 3 of the Protocol;

(f) Access to persons referred to in Article 3 of the Protocol, and the opportunity for private interviews with them;

(g) The opportunity to communicate freely with any person whom they believe can supply relevant information.

2. With regard to a particular visit, the obligations referred to under paragraph 1 shall be implemented in a manner consistent with national law and professional ethics complimentary to international human rights standards.

2.2 Analysis of Working Group Discussions

8 During the first session of the Working Group, held from 19 to 30 October 1992, the issues were discussed under the then Article 12 and within the fourth basket of issues 'Operation of the system'.[9]

9 One of the issues raised during the discussion was *access to information*. Several delegates noted that information on specific persons might be subject to laws on *privacy* and *data protection* or the rules of professional ethics. Some felt that these paragraphs (paragraphs 2(b), (f), and 3) should be redrafted to reflect the corresponding principles of the ECPT. One delegation was of the opinion that the *consent of the person to be interviewed* was essential, although a presumption of consent might be made for cases lacking an explicit refusal of consent. The delegation also noted particular concerns regarding the legal capacity of minors and mental patients to declare their consent. Another delegation pointed out that the aim of the provision was to

[8] E/CN.4/2001/WG.11/CRP.2.

[9] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28 para 26.

protect the individual against abuse of private or personal information, rather than the State or public authority, and the provision should state the right to privacy and international standards relating thereto.[10]

10 With regard to Article 13 of the revised Costa Rica Draft, it was generally considered that the declaration of a '*state of emergency*' or similar derogation from legal regularity for an extended period should not, by itself, justify the suspension of a visit under the OP. A reference was made to the corresponding Article 9 ECPT, which is more detailed in this regard and covers 'public safety' as a safeguard for such interests. In the course of the discussion, the observation was made that this article was in the nature of a 'negotiated reservation' to the Protocol, and that such reservations must be as limited as possible in order to avoid abuse. It was further suggested that the circumstances in which suspension would be possible should be limited and carefully detailed in the Protocol in order to avoid problems that could diminish the body's effectiveness.

11 At its third session from 17 to 28 October 1994, the Working Group continued to consider Article 12.[11] During the discussions, the need to provide a delegation of the Subcommittee with unrestricted access to the places of detention was once again strongly emphasized. As to Article 13, most delegations found that the conditions under which a State party might object to a visit should be explicitly defined. It was proposed that a State could only in exceptional circumstances deny the SPT access to detention facilities. These circumstances would include, for example, national security concerns, public safety, the medical condition of a person, disorder in the detention facilities, or if the visit were to coincide with an urgent interrogation relating to a serious crime.

12 During the sixth and seventh sessions (13 to 24 October 1997, 28 September to 9 October 1998) the Working Group primarily discussed Article 12.[12] Regarding Article 13, it was again emphasized that representations could only be made in exceptional circumstances and with a view to a specific visit or a specific interview, not to a mission as a whole. In this regard, references were often made to Article 9 ECPT.[13] As it was stated that torture was most often practised in precisely the circumstances that were listed as exceptional in Article 13, several delegations felt that if Article 13 was to be kept in the Protocol, the list of circumstances contained therein should be extremely narrow. Moreover, it was proposed to replace the term 'may make representations' by the term '*may object*'.

13 Upon the proposal of the Chairperson-Rapporteur, Article 13 was referred to the drafting group for further examination. As no consensus had been reached on any of the possible approaches, the drafting group had finally decided to submit to the plenary the revised text of Article 13 as proposed by the Chairperson.[14] This text was based on the understanding that it was essential for some delegations to point to a close relationship between Article 13 and Article 12, in particular relating to the issue of national legislation.

[10] ibid, para 83.

[11] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995) UN Doc E/CN.4/1995/38, paras 45ff.

[12] See above Art 12 OP, 2.2.

[13] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Seventh Session (1998) UN Doc E/CN.4/1999/59 paras 53ff.

[14] ibid, para 66.

14 In the course of the following discussions, some delegations stated that they could only accept this proposal if their view was put on record regarding the similarity in content between Article 13 and Article 12, including the *nota bene*.[15] On this understanding, the Working Group decided to add Article 13 to the text of Articles which constituted the basis for future work.[16]

15 In the proposal presented by the Chairperson-Rapporteur, the mandate of the SPT was described in Part III, including three main areas: visits to places of detention; technical assistance; and cooperation for the prevention of torture with relevant UN organs as well as international, regional and national institutions. Article 12 set out the obligations of States vis-à-vis the SPT, whereas Article 14 listed the obligations of States regarding visits and referred to the situations in which visits could be objected to.[17]

16 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[18]

3. Issues of Interpretation

3.1 Unrestricted Access to Places of Detention, Information, and Documentation

17 Article 14 OP has to be read in conjunction with Article 12 and the overall principle of cooperation between the SPT and States parties, as stipulated in Article 2(4) OP.[19] The general duty of States parties under Articles 4 and 12(1) to allow missions of the SPT on their territory and to grant it access to all places of detention is further defined by the obligation to grant the SPT *unrestricted access to all relevant information and documentation*. Among the documentation is included a full list of all places of detention and their precise location, the number of detainees in each place of detention, prison registers, incidents of torture, ill-treatment and deaths in custody, individual case files, and medical documentation.[20] This duty to provide information to the SPT in advance and during its country missions derives from Articles 12(b) and 14(1)(a) and (b) OP.

18 In accordance with Article 13(2), the SPT shall notify the State party concerned of its intention to carry out a mission in order for the Government to make the necessary practical arrangements. But the Protocol, as the ECPT, does not contain any provision requiring any prior notification of the precise places of detention the SPT wishes to visit.[21] Article 14(1)(e) clearly emphasizes the liberty of the SPT to choose the places it wants to visit, and Article 14(1)(c) establishes an explicit obligation of States parties to grant the SPT '*unrestricted access to all places of detention* and their installations and facilities', subject only to the possibility of objections in exceptional circumstances under Article 14(2). Taking into account the object and purpose of preventive visits to places of

[15] ibid, paras 30ff. See above Art 12 OP, para 19.

[16] E/CN.4/1999/59, para 69.

[17] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Tenth Session (2002) UN Doc E/CN.4/2002/78, para 49.

[18] CHR Res 2002/33 of 22 April 2002. See above Art 1 OP, 2.2.

[19] See above Art 2 OP.

[20] See above Art 12 OP, 3.

[21] See APT and IIDH, *Optional Protocol to the UN Convention against Torture: Implementation Manual* (2nd rev edn, APT and IIDH 2010) 78.

detention, the respective practice of the CPT,[22] and the discussion of Article 4 and 12 OP above, the term 'unrestricted access' must be interpreted as permitting *unannounced visits at all times*, irrespective of any national laws and regulations to the contrary.[23] In fact, this is the only interpretation that is in line with the object and purpose of the Protocol as such.[24] States parties have to ensure that the respective laws are modified for the purpose of granting the SPT such unrestricted access.

19 With regard to methodology and logistics, 'the Subcommittee requests information from the State party to be visited concerning the legislation and institutional and system features related to deprivation of liberty, as well as statistical and other information concerning their operation in practice'. The information gathered is summarized in a *country brief* prepared by the SPT.[25] Shortly before a planned country mission, the SPT tries to carry out so-called preliminary missions for preparatory purposes as often as possible and to initiate the process of dialogue with the respective authorities.[26] In practice, such initial missions to States parties, conducted by some SPT members, have proven to be best suited to deliver important information about the SPT and its mandate in general as well as to stress the confidential nature of its work.[27]

20 Within the respective places of detention, the SPT enjoys the right of *unrestricted access to all installations and facilities* in accordance with Article 14(1)(c). This includes all buildings belonging to a detention facility, the cells and living quarters of detainees, isolation and punishment cells, courtyards, exercise areas, kitchens, workshops, educational and medical facilities, sanitary installations, staff quarters, etc.[28] It is important that the delegation can move freely around within the place of detention and choose the rooms and facilities it wishes to see, without any surveillance by prison staff.

3.2 Private Interviews with Detainees and Any Other Person Who the SPT Believes May Supply Relevant Information

21 Most importantly, the SPT, pursuant to Article 14(1)(e), may choose the persons, including detainees, witnesses, and prison staff, it wants to interview. Under Article 14(1)(d), States parties shall grant the SPT not only the right, but the practical 'opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee believes may supply relevant information'. These other persons may be alleged victims who are no longer detained, family members of detainees, witnesses,

[22] See Ursula Kriebaum, *Folterprävention in Europa: Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung* (Verlag Österreich 2000) 181; Malcolm D Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press/OUP 1998) 193.

[23] See Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 50.

[24] See also APT and IIDH (n 21) 78; for more details on unannounced visits to places of detention see Art 12 OP above.

[25] See SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1 para 19.

[26] ibid para 21; SPT, 'Forth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/C/46/2, para 51.

[27] See SPT, 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc CAT/C/40/2, para, 20.

[28] See APT and IIDH (n 21) *77*.

lawyers, doctors, prison staff, NGO and media representatives, or anybody who wishes to provide the SPT with information. However, the SPT may only conduct an interview if the *detainee or other person concerned voluntarily agrees to speak with the delegation* after he or she has been fully informed of the reasons for the interview and the potential risks involved. Although not mentioned in the OP, this is an important limitation on the SPT's right to conduct interviews, which is a general rule of professional fact-finding based on the *right to privacy* of the person concerned and the obligation of visiting bodies to protect detainees and other interview partners against potential *reprisals* by police or prison staff.[29] Often detainees are afraid of reprisals, and the delegation must respect such fears and refrain from putting any pressure on the person concerned. In practice, the SPT's visiting delegations regularly enter into 'empirical fact-finding and discussions' not only with detainees but with various stakeholders, including officials of ministries and other governmental institutions, members of judicial or prosecutorial authorities, national human rights institutions, professional bodies, and representatives of civil society. In countries where NPMs are already existent, their members are important interlocutors as well of course.[30] It gathers its information independently from various sources, 'including direct observation, interviews, medical examination and perusal of documentation'.[31]

22 The term '*private interviews*' means that no public official of the State concerned is allowed to watch the persons involved in the interview and/or to listen to their conversations. It is important that the delegation chooses a room in which the detainee feels comfortable and where the risk of being monitored is as low as possible. Usually, it is detainees themselves who know best where they feel safe to conduct the interview. Rooms provided by the prison administration for such interviews shall only be accepted if no other place is available and if the detainee voluntarily agrees. Private interviews should be conducted with individual detainees and, as far as possible, not with a group of detainees. The person conducting the interview shall not be alone with the detainee, but be assisted at least by one person taking the notes and, if necessary, by an interpreter. If a detainee alleges to have been subject to torture, it is always advisable to conduct a *forensic examination*. Signs of torture, such as scars and wounds inflicted should, when possible, be documented by *photographic means*, provided that the person concerned agrees.

23 Private interviews with detainees are indispensable for an objective assessment of practices of torture and ill-treatment. After all, torture usually takes place behind closed doors, and the authorities regularly try to conceal the evidence. Since there are usually few witnesses or other available evidence, it is extremely difficult to prove torture. Detainees who allege they were subjected to torture, and who are still detained in the place of the alleged torture, are often, and with good reason, afraid of *reprisals*.[32] As such, they would never speak openly about their experiences unless sure that their testimony was not monitored by prison staff. It is, therefore, of utmost importance that the person conducting the interview asks the detainee whether his or her allegations should be kept strictly confidential or whether they can be raised with the authorities and included in the mission report. Any agreement made regarding the extent to which allegations of torture may be made public must be voluntary and based on informed consent. No pressure, whatsoever, shall be put on the detainee. In case of doubt, the testimony shall be kept confidential.

[29] On the issue of reprisals see Art 15 OP below.
[30] See CAT/C/42/2/Corr.1 (n 25) para 22. [31] ibid, para 23. [32] cf Art 15 OP below.

24 In September 2014, the SPT suspended its mission to Azerbaijan due to heavy difficulties encountered in carrying out its mandate under the Protocol. The delegation had been unable to visit several places of detention due to a *lack of co-operation* of the respective Azerbaijan authorities. Thus, given the serious breaches of the OP, the delegation found that the integrity of its visit had been impaired to such an extent that the visit had to be suspended.[33] After having been denied access to places in several parts of the country where it suspected people to be deprived of their liberty by the national Security Service, the Subcommittee suspended its mission to Ukraine in May 2016. Again, the SPT delegation concluded that the integrity of the mission had been compromised to such an extent that it had to be suspended, as the SPT mandate could not be fully carried out.[34] In October 2017, the SPT suspended a mission to Rwanda due to a series of obstructions imposed by authorities, such as accessing some places of detention, confidentiality of certain interviews, and over concerns that some interviewees could face reprisals.

3.3 Objections by States to a Particular Visit

25 The only reason to deny the SPT access to a particular place of detention is an objection by the State party on the basis of Article 14(2) OP. During the discussions in the Working Group, delegates often referred to *Article 9 ECPT as a model* for an exception to the obligation to allow visits at any time to any place. According to this provision, the authorities 'may make representations to the Committee against a visit at the time or to the particular place proposed by the Committee'. Such representations may be made only in *exceptional circumstances* on grounds of national defence, public safety, serious disorder in a place of detention, the medical detention of a detainee, or an ongoing interrogation relating to a serious crime. Following such representations, the CPT and the State party shall immediately enter into consultations in order to seek agreement on arrangements to enable the CPT to exercise its functions expeditiously.[35] Article 13 of the Costa Rica Draft contained a similar provision,[36] but many delegations felt the need to formulate such a provision as limited in nature as possible to avoid abuse.[37] It was also stressed that objections could only be made in exceptional circumstances and with a view to a *specific visit* or a *specific interview*, not to a mission as a whole.[38]

26 Compared to its model, Article 14(2) OP is formulated in narrower and somewhat more cautious terms. The reasons for an objection to a visit are based on Article 9(1) ECPT, but do not contain ongoing interrogations or the medical condition of detainees. The ground of natural disaster has been added, however, because it is regarded as having the least potential for misuse. Instead of 'exceptional circumstances', the Protocol speaks about '*urgent and compelling grounds*'. Article 14(2) is clear that States parties may only object 'to a visit to a particular place of detention' and not to the mission as a whole. This

[33] See SPT, 'Eighth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment' (2015) UN Doc CAT/C/54/2, para 46.

[34] See SPT, 'Tenth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) UN Doc CAT/C/60/3, para 17.

[35] See Kriebaum (n 22) 166; Evans and Morgan (n 22) 128ff.

[36] See above para 3.

[37] See above para 10.

[38] Art 9(1) ECPT is a little ambiguous in this respect, as the ECPT generally uses the term 'visit' for both visits to a particular place of detention and a country mission as a whole. But the provision has rightly been interpreted as only referring to a visit to a particular place or at a particular time, not to a mission as a whole: see Kriebaum (n 22) 114ff, with further references.

right is further limited as States may also not, as Article 9(1) ECPT provides, object to 'a visit at the time'. The word 'representations' was replaced by 'objection' and the consultation process in Article 9(2) was deleted. But Article 14(2) spells out that an objection is always related to only *temporarily* preventing the carrying out of such a visit. This means that the State party must, in principle, find a solution while the mission is ongoing. Of course, a natural disaster might be so grave or a prison riot might last for such an extended period of time that the delegation is prevented from visiting a particular place of detention for the entire time of the mission. However, such cases are clearly very exceptional and shall be solved by invoking the principle of cooperation in Article 2(4) OP. Until the end of 2017, no such objection had been made by any State party. In the case of Honduras for example, where a grave political and social crisis was going on during the SPT's mission in 2009, the SPT itself decided to focus on the prevention of torture and other forms of ill-treatment in the context of the protest movement and at the same time expressed its gratitude to the Honduran authorities who facilitated the mission.[39]

27 The final sentence of Article 14(2) provides that the 'existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit'. This provision has been interpreted as prohibiting a State party to 'declare a state of emergency in order to avoid a visit'.[40] In our opinion, States are not prevented from declaring a state of emergency, but from invoking an already declared state of emergency as a reason to object to a visit. This means that under Article 14(2) even the fact of a declared state of emergency on the grounds of a natural disaster or an armed conflict shall not be used as a reason for objecting to a visit to, eg, a camp of internally displaced persons or to a prisoners of war camp.[41] A State party may only object to a visit if, in addition to the ongoing armed conflict or natural disaster, there are urgent or compelling grounds of a temporary nature which are invoked for postponing the visit for a day or two. The last sentence, therefore, serves as an important safeguard against any abuse of this exceptional clause by a State party.

KERSTIN BUCHINGER

[39] See SPT, 'Report on the Visit to Honduras' (2010) UN Doc CAT/OP/HND/1, paras 21ff.
[40] APT and IIDH (n 21) 79ff. [41] See also below Art 32 OP.

Article 15

Prohibition of Sanctions against any Source of Information of the Subcommittee

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

1. Introduction	861
2. Travaux Préparatoires	863
2.1 Chronology of Draft Texts	863
2.2 Analysis of Working Group Discussions	863
3. Issues of Interpretation	864

1. Introduction

1 Torture usually takes place behind closed doors in a situation of powerlessness of the victim, without witnesses. Apart from the results of a forensic investigation, which are usually not available to detainees, there is hardly any evidence which the victim can use to prove that he or she had been subjected to torture. After having made a confession or provided information under torture, victims are often threatened to not report on their experience and even forced by their tormenters to sign a written statement to the effect that they had not been subjected to any form of torture or ill-treatment.

2 As torture constitutes one of the most serious human rights violations, which is absolutely prohibited even in the most exceptional circumstances, the authorities responsible as well as States in general have a strong interest in denying practices of torture. According to our experience, even democratic governments with a highly developed human rights culture prefer to believe their law enforcement agencies rather than to investigate seriously allegations of torture. If accused of torture before an international body, they often react as strongly against such allegations as governments responsible for a systematic practise of torture.

3 This combination of factors, ie the powerlessness of the victim and the difficulties in proving torture on the one hand, and the strong interest of States to deny torture on the other, leads to another form of *victimization*. If a person alleges torture before any domestic or international body, the authorities directly accused, and often even the highest authorities of the country, not only deny these allegations but also accuse the claimant, who often is detained because of being accused of having committed a crime, as not trustworthy, as defamatory, as only wishing to avoid a criminal conviction by alleging that the

confession he or she made before the police was made under torture. In addition, such persons are often threatened, harassed, or even again subjected to torture or killed.

4 This short analysis of a *vicious circle*, which can be confirmed by most organizations and monitoring bodies active in the field of torture prevention and/or assistance of torture victims, leads to three major conclusions:

- Efforts of combating torture must break through this vicious circle by *unveiling the secrecy around torture and detention*. The most effective means is by opening the doors of detention centres to independent scrutiny, monitoring, and preventive visits.
- Monitoring bodies which conduct prison visits must ensure that *interviews* with detainees are made on a strictly *voluntary* basis and are conducted in an atmosphere of mutual trust and respect, and that the information received from detainees is kept strictly *confidential*, unless the person concerned, on the basis of the principle of informed consent, voluntarily agrees to any form of publication.
- Detainees, witnesses, and other persons who provide any form of information to a visiting body must be protected, as far as possible, against any form of reprisals or revictimization because of having agreed to provide evidence.

5 The need to protect detainees and other sources of information against reprisals has been recognized, eg in *the terms of reference for fact-finding missions by UN special procedures* which provide for guarantees by the Government that invited them to visit its country to the effect that 'no persons, official or private individuals who have been in contact with the special rapporteur/representative in relation to the mandate will for this reason suffer threats, harassment or punishment or be subjected to judicial proceedings'.[1] In our experience, the protection of interview partners in custody or human rights defenders against reprisals is the most difficult aspect of conducting country missions, visits to places of detention, and private interviews with detainees. Even if all precautionary measures in relation to the privacy of the interview and confidentiality of the information received have been fully complied with, the very fact that a particular individual was willing to speak to the Special Rapporteur can usually not be disguised from the staff of the place of detention or other State authorities concerned. After the Special Rapporteur leaves a particular detention facility or the country in general, he has only very limited means of monitoring whether the assurances received by the Government have in fact been complied with or not.

6 The ECPT does not contain a specific provision aimed at protecting detainees and other sources of information provided to the CPT during country missions against reprisals. But such an obligation of States parties can, of course, be derived from their obligation under Article 3 ECPT to cooperate with the CPT, and the practice of the CPT, the ICRC, and similar bodies carrying out visits to places of detention reflects their concern for the protection of their sources of information against reprisals and victimization.[2]

7 Article 15 OP, therefore, constitutes the first explicit provision in a human rights treaty which aims at protecting detainees and other persons or organizations against any

[1] Note by the OHCHR transmitting report of the Meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme of 20–23 May 1997 (1997) E/CN.4/1998/45 of 20 November 1997, Appendix V.

[2] See APT and IIDH, *Optional Protocol to the United Nations Convention against Torture: Implementation Manual* (2nd rev edn, APT and IIDH 2010) 80ff.

factual sanction or judicial proceedings for having communicated to the visiting body any information, whether true or false.[3] Similar provisions of *victim and/or witness protection* can be found, eg in Article 34 ECHR[4] and in Article 68 of the Rome Statute of the International Criminal Court.[5]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

8 *Revised Costa Rica Draft (15 January 1991)*[6]

Article 12

> 4. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee or to the delegates any information whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

9 *Text of the Articles which Constitute the Outcome of the Beginning of the First Reading (12 December 1994)*[7]

Article 12

> 4. No authority or official, on the basis of [any] [well-founded and reliable] information [regarding torture and other cruel, inhuman or degrading treatment or punishment,] provided to the Sub-Committee or its delegations, shall order, apply, permit or tolerate any sanctions against any person or [national legal] organisation who provided that information, [and no such person or organisation shall be otherwise prejudiced in any way].

2.2 Analysis of Working Group Discussions

10 During the first session of the Working Group, held from 19 to 30 October 1992, Article 12 of the revised Costa Rica Draft of 1991 was discussed under the fourth basket of issues 'Operation of the system'.[8] Regarding Article 12(4), concern was expressed that this provision might, inter alia, have the effect of preventing recourse to domestic remedies for false or defamatory statements or breaching duties of confidence. One delegation

[3] Similar provisions have now been included in other Optional Protocols (cf Art 11 OP-CEDAW, Art 13 OP-ICESCR, and Art 4 OP3-CRC). For more detailed information on provisions on reprisals in human rights treaties and their optional protocols cf. Reprisals in the Context of United Nations Human Rights Mechanisms (2015) UN Doc HRI/MC/2015/3 of 13 April 2015, Annex I.

[4] The last sentence of Art 34 ECHR, which provides for the mandatory right of victims to submit individual complaints to the European Court of Human Rights, reads as follows: 'The High Contracting Parties undertake not to hinder in any way the effective exercise of this right'. In practice, the Court has found violations of this right, eg in *Paladi v Moldova* [GC] App No 39806/05 (ECtHR, 10 July 2007); *Nurmagomedov v Russia* App No 30138/02 (ECtHR, 7 June 2007); *Mamatkulov and Askarov v Turkey* App Nos 46827/99 and 46951/99 (ECtHR, 4 February 2005).

[5] Art 68 ICC Statute deals explicitly with the protection of the victims and witnesses and their participation in the proceedings before the ICC.

[6] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[7] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995) UN Doc E/CN.4/1995/38, Annex.

[8] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28, para 26.

considered that the principle of confidentiality should alleviate any legitimate concerns of this nature. It was argued, furthermore, that this degree of immunity from civil liability was excessive and unnecessary. Consequently, the issues addressed in Article 12(4) of the then draft text were not included in any of the following proposals.

11 At the Working Group's seventh session from 28 September to 9 October 1998, it was generally felt that Article 12 was of crucial importance to the whole document since it contained references to the basic commitments that States would accept by ratifying the OP. The purpose of this Article was therefore to define what host governments should offer the SPT in terms of cooperation, information, and assistance. The general approach of all delegations was that the contents of the present Article 12 could be reduced to several core elements of the visits, including access to the territory, provisions of information, access to places of detention, and access to individual persons, as well as the opportunity for private interviews with such individuals and the opportunity to communicate with persons who were in a position to supply relevant information.[9] Still, the delegations had failed to arrive at a final text of Article 12. Thus, its text was included in Annex II to the seventh report of the Working Group to serve as a basis for future work.[10] However, there was an understanding reached in the Working Group, which was reflected in one of three notes, stating: 'The protection of persons who have communicated with the Subcommittee will be addressed in a separate Article.'[11]

12 At the tenth session of the Working Group, held from 14 to 25 January 2002,[12] the issue of so-called *victimization* was taken up again by the Chairperson-Rapporteur in her draft in a new Article 15.[13]

3. Issues of Interpretation

13 Article 15 OP is identical to Article 12(4) of the revised *Costa Rica Draft* of 1991.[14] This does not mean, however, that this provision was not controversial. On the contrary, delegates in the Working Group had expressed strong concerns that this provision might have the effect of preventing recourse to domestic remedies for false or defamatory statements and would in fact provide for immunity from civil liability, which was considered excessive and unnecessary.[15] After the respective provision was deleted from the various drafts, the Chairperson-Rapporteur in her draft of January 2002 reintroduced it again in the version as originally proposed by Costa Rica.

14 The word '*sanction*' is more formal than mere factual *reprisals* and includes civil liability and criminal sanctions. The term 'reprisals' is often used to describe punishment practices inflicted by guards or detaining authorities against detainees who have reported to independent monitors. Being defined as an act of revenge or retaliation, the term 'reprisal' is neither exact nor precise, since the effects suffered by individuals subjected to torture and other forms of ill-treatment do not result from committing an 'offence'

[9] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Seventh Session (1998) UN Doc E/CN.4/1999/59 para 25. See above Art 12 OP.

[10] ibid, para 30. [11] ibid, para 31.

[12] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Tenth Session (2002) UN Doc E/CN.4/2002/78.

[13] See E/CN.4/2002/CRP.1. [14] See above para 8. [15] See above para 10.

justifying revenge or punishment. Therefore, the more generic term 'sanction', also used in Articles 15 and 21 OP, describing any punishment resulting from mere contact with an independent monitor, seems to be more adequate.[16] In addition, the phrase '*whether true or false*' indicates that even completely false and slanderous accusations against particular individuals of having committed the crime of torture are immune from civil or criminal liability. This is indeed a fairly far-reaching protection of all persons and organizations for having provided relevant information to the SPT, and States parties are under a respective obligation to provide for specific immunities in their civil and criminal codes. But in view of the object and purpose of the Protocol and the danger in which detainees and other persons providing respective information concerning torture to international monitoring bodies often find themselves,[17] such a far-reaching protection seems justified. On the other hand, in assessing the facts and in making reports public in accordance with Article 16(2) and (4) OP, both the CAT Committee and the SPT also have a specific responsibility vis-à-vis police officers, prison guards, and other individuals who might have been falsely accused of torture. This is underlined by the SPT's duty of confidentiality under Article 2(3) OP.[18]

15 On 23 March 2012, France was the first State party issuing a declaration relating to Article 15. It declared that

> [p]ursuant to articles 15 and 21 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, no French authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the SPT or to its delegates or to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way, provided that, in the case of false information, the person or organization in question was unaware of the false nature of the information at the time of its communication and, moreover, without prejudice to the legal remedies that persons who are implicated may invoke for harm suffered as a result of the communication of false information about them.

16 Already in its second Annual Report, the SPT expressed its concerns about the possibility of reprisals after its visits.[19] Persons deprived of their liberty who had been interviewed by members of the SPT may have been threatened if they did not reveal the content of their interviews or may have been punished for having spoken with the delegation. Also, the SPT had been informed about the fact that some interviewees might have been warned in advance not to say anything to the SPT experts. Thus, the SPT called on the authorities of each State visited to verify whether reprisals had in fact occurred and 'to take urgent action to protect all persons concerned'.[20] Later on, it stressed the importance of NPMs in this context,[21] as '[e]arly follow-up visits by NPMs and/or civil society . . . may offer a potential safeguard'.[22]

[16] See APT, 'Briefing No 4: Mitigating the Risks of Sanctions related to Detention Monitoring' (January 2012) <https://www.apt.ch/content/files_res/Briefing4_en.pdf> accessed 21 November 2017.

[17] See above para 1. [18] See above Art 2 OP, 3.

[19] See SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, para 31.

[20] ibid, para 32.

[21] See SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 36.

[22] SPT, 'Forth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/C/46/2, para 56.

17 During 2012, the SPT had established (among others) an ad hoc working group on reprisals[23] in order to develop a proactive policy asserting the SPT's strong commitment to preventing reprisals.[24] The working group concluded its work in 2014, having drafted an interim working tool for the SPT, which was adopted by the SPT at its twenty-fifth session (in February 2015).[25] A revised version of this policy was adopted at the SPT's twenty-eighth session (in February 2016).[26]

18 The policy as such contains general principles (I) as well as a general operational practice (II), subdivided into specific (III) and protective measures (IV) or rather awareness-raising elements in order to avoid reprisals.

19 The SPT decided to appoint one of its members to be a rapporteur on reprisals in order to monitor the implementation of the SPT's policy in accordance with the San José Guidelines,[27] coordinate its activities relating to reprisals, and keep in contact with all the relevant bodies in order to avoid reprisals at any level. Where appropriate, the SPT decided to discuss issues concerning reprisals with States parties either collectively or in the course of bilateral meetings. Moreover, it announced to agree upon procedures for NPMs concerning responses to reprisals, taking into account the specific country needs depending on the respective situations.[28]

20 In specific, the SPT will raise any concerns regarding reprisals confidentially with State party authorities. It will 'contact the State party to request information, express its concerns and request an investigation and the immediate cessation of the intimidation or reprisals'. When appropriate, the SPT may 'issue statements on specific incidents or generalized practices of intimidation or reprisals and circulate them to international and national media outlets, or make comments to the media and on social media'. Moreover, it may request the assistance of the OHCHR and its secretariat may inform individuals or groups (making allegations of intimidation or reprisals) 'that they may submit an urgent communication to the special procedure mandate holders of the Human Rights Council'.[29]

21 In its communications, reports, and follow-up requests, the SPT will demand States parties 'to take the measures necessary to protect individuals and groups from intimidations or reprisals'.[30]

KERSTIN BUCHINGER

[23] See SPT, 'Sixth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc CAT/C/50/2, para 60.

[24] See SPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc CAT/C/52/2, paras 64–68.

[25] SPT, 'Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on Reprisals in Relation to Its Visiting Mandate' (2015) UN Doc CAT/OP/6.

[26] SPT, 'Revised Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on Reprisals in Relation to Its Visiting Mandate' (2016) UN Doc CAT/OP/6/Rev.1.

[27] Guidelines against Intimidation or Reprisals ('San Jose Guidelines') (2015) UN Doc HRI/MC/2015/6.

[28] CAT/OP/6/Rev.1 (n 26) I para 8; see Art 21 OP below. [29] ibid, III. [30] ibid, para 26.

Article 16

Reports of the Subcommittee

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.

2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.

3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.

4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the Subcommittee's recommendations, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee.

1. Introduction	867
2. Travaux Préparatoires	868
2.1 Chronology of Draft Texts	868
2.2 Analysis of Working Group Discussions	872
3. Issues of Interpretation	874
3.1 Confidentiality of Mission Reports	874
3.2 Publication as a Sanction	876
3.3 Annual Reports of the SPT	877

1. Introduction

1 After every country mission, the SPT shall draw up a report, including its recommendations and observations to the State party concerned. Despite the fact that the principle of confidentiality laid down in Article 2(3) OP constitutes one of the main principles of the Protocol,[1] the drafters of Article 16 OP attempted to strike a *fair balance between the principle of confidentiality and the need for transparency and publicity* of its activities, taking into account the respective provisions of the ECPT.[2]

[1] See above, Art 2 OP, 3.

[2] Arts 10 to 13 ECPR; See Ursula Kriebaum, *Folterprävention in Europa: Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung* (Verlag Österreich 2000) 135ff; Malcolm D Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press/OUP 1998) 198.

A country-specific *mission report may be published* in any of the following four circumstances:

- if the State party explicitly requests publication;
- if the State party makes part of the report public;
- if the State party refuses to cooperate with the Subcommittee;
- if the State party refuses to take steps to improve the situation in the light of the SPT's recommendations.

2 In the first two cases mentioned above, the *decision to publish the report* is made by the *SPT* itself. This is done either in accordance with a request of the State party or as a reaction to a partial publication of the report which may present a distorted picture. The SPT shall decide whether it wishes to publish only another part of the report in order to present a more accurate picture of the facts, observations, and recommendations, or whether it prefers to publish the entire report.

3 In the second set of cases, the decision to publish the report constitutes a *sanction* against the violation of the principle of cooperation by the State party concerned. Such decision is taken by the *CAT Committee*, at the request of the SPT and after the State party has had an opportunity to make its views known. Instead of publishing the report as a whole, the CAT Committee may also decide to make a public statement only.

4 In addition to country-specific mission reports, the SPT shall also present a *public annual report* on its activities to the Committee against Torture. No confidential country-specific information shall be included in such annual reports, unless it has been made public before in accordance with the different rules contained in Article 16 OP.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

5 *Original Costa Rica Draft (6 March 1980)*[3]

> Article 11
>
> 1. The Committee, after considering a report of its delegates, shall inform the State Party concerned in confidence of its findings and, if necessary, make recommendations. It may initiate consultations with the State Party with a view to furthering the protection of persons deprived of their liberty.
>
> 2. With the consent of the State Party concerned the Committee may publish its findings and recommendations in whole or in part.
>
> 3. In the event of a disagreement between the State Party concerned and the Committee as to the Committee's findings or as to the implementation of its recommendations, the Committee may at its discretion publish its findings or recommendations or both in whole or in part.
>
> 4. The Committee shall submit to the annual Assembly a general report which shall be made public.

[3] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

6 *Revised Costa Rica Draft (15 January 1991)*[4]

Article 14

1. After each mission, the Subcommittee shall draw up a report on the facts found during the mission, taking account of any observations which may have been submitted by the State Party concerned. It shall transmit to the latter its report containing any recommendations it considers necessary and may consult with the State Party with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty.

2. If the State Party fails to cooperate or refuses to improve the situation in the light of the Subcommittee's recommendations, the Committee against Torture may at the request of the Subcommittee decide by a majority of its members, after the State Party has had an opportunity to make known its views, to make a public statement on the matter or to publish the Subcommittee's report.

3. The Subcommittee shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.

4. In all other respects, the information gathered by the Subcommittee and its delegation in relation to a mission, its report and its consultation with the State Party concerned shall remain confidential. Members of the Committee against Torture, the Subcommittee, its delegations and their staff are required to maintain confidentiality during and after their terms of office.

Article 15

1. The Committee against Torture shall examine the reports and recommendations which may be submitted to it by the Subcommittee. It shall keep them confidential as long as no public statement in accordance with Article 14 paragraph 2 has been made or as long as they have not become public in accordance with Article 14 paragraph 3 of this Protocol.

2. Subject to the rules of confidentiality, the Subcommittee shall every year submit a general annual report on its activities to the Committee against Torture, which shall include information on the activities under this Protocol in its annual report to the General Assembly of the United Nations in accordance with Article 24 of the Convention.

7 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[5]

Article 14

1. After each mission, the Sub-Committee shall draw up a report which shall be submitted to the State Party concerned. The Sub-Committee shall finalize its report after fair consideration is given to comments submitted, within a reasonable time, by the State Party concerned. If the State Party so wishes, its comments shall form an annex to the report. The Sub-Committee shall transmit to the State Party its report

[4] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[5] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Fourth Session (1996) UN Doc E/CN.4/1996/28, Annex I.

containing any [feasible] recommendations it considers necessary to improve the protection of persons deprived of their liberty. To this effect, the Sub-Committee and the State Party may consult on the implementation of the recommendations, including on ways and means in which the State Party can be assisted.

2. Except as otherwise specified in this Article, the information gathered by the Sub-Committee and its delegation in relation to a mission, its report and its consultation [and cooperation] with the State Party concerned shall remain confidential. Members of [the Committee against Torture,] the Sub-Committee and other persons assisting the Sub-Committee are required during and after their terms of office, to maintain the confidentiality of the facts or information of which they have become aware during the discharge of their functions.

3. At the request of the State Party concerned, the Sub-Committee shall publish its report. By agreement between the Sub-Committee and the State Party, the report may be published or made public in part. If the State Party decides to make part of the report public, the Sub-Committee may, after consultation with the State Party concerned [and with the consent of the latter], make a public statement or publish the report in whole or in part in order to ensure a balanced presentation of the contents of the report.

4. [If the State Party fails to cooperate or refuses to improve the situation in the light of the Sub-Committee's recommendations, the Committee against Torture may at the request of the Sub-Committee decide by a majority of its members, after the State Party has had an opportunity to make known its views, to make a public statement on the matter or to publish the Sub-Committee's report.]

5. No personal data shall be published without the express consent of the person concerned.

Article 15

1. The Committee against Torture shall examine the reports and recommendations which may be submitted to it by the Sub-Committee. It shall keep them confidential as long as no public statement in accordance with Article 14 paragraph 4 has been made or as long as they have not become public in accordance with Article 14 paragraph 3 of this Protocol.

2. The Sub-Committee shall submit every year a general confidential report on its activities to the Committee against Torture, including a list of States Parties visited, the composition of the visiting delegations and the places visited. Furthermore, the Sub-Committee shall submit every year a public report, including the countries visited, and may include any general recommendations on ways of improving the protection of persons deprived of their liberty. The Committee against Torture shall include non-confidential information on the activities under this Protocol in its annual report to the General Assembly of the United Nations in accordance with Article 24 of the Convention.

8 *Mexican Draft (13 February 2001)*[6]

Article 17

1. The Sub-Committee shall inform the Committee against Torture and the State Party concerned of its recommendations and observations.

2. The Sub-Committee shall submit an annual report of its activities to the Committee against Torture.

[6] E/CN.4/2001/WG.11/CRP.1.

9 *EU Draft (22 February 2001)*[7]

Article 14

1. After each mission or visit, the Sub-Committee shall draw up a report on the mission or visit and any recommendations it considers necessary, which shall be submitted to the State Party concerned. The Sub-Committee shall finalize its report after fair consideration is given to comments submitted, within a reasonable time, by the State Party concerned. If the State Party so wishes, its comments shall form an annex to the report.

2. The Sub-Committee shall transmit to the State Party its report containing any recommendations it considers necessary to improve the protection of persons deprived of their liberty. To this effect, the Sub-Committee and the State Party may consult on the implementation of the recommendations, including on ways and means in which the State Party can be assisted, as well as the submission of a request for technical cooperation as referred to in Article 9 paragraph 1 (e).

3. The information gathered by the Sub-Committee in relation to a visit, its report and its consultations with the State Party concerned shall be confidential. Members of the Sub-Committee and other persons assisting the Sub-Committee are required, during their terms of office, to maintain the confidentiality of the facts or information of which they have become aware during the discharge of their functions.

4. At the request of the State Party concerned, the Sub-Committee shall publish its report on a visit. By agreement between the Sub-Committee and the State Party, the report on a visit may be published or made public in part. If the State Party decides to make part of the report on a visit public, the Sub-Committee may make a public statement or publish the report in whole or in part in order to ensure a balanced presentation of the contents of the report.

5. If a State Party fails to cooperate or refuses to improve the situation in the light of the Sub-Committee's recommendations, the Committee against Torture may at the request of the Sub-Committee decide by a majority of its members, after the State Party has had an opportunity to make known its views, to make a public statement on the matter or to publish the report.

6. No personal data shall be published without the express consent of the person concerned.

7. Subject to the rule of confidentiality under paragraph 3, the Sub-Committee shall every year submit an annual report to the Committee against Torture on its activities, which shall be public.

10 *US Draft (16 January 2002)*[8]

Article 4

1. The Subcommittee on Prevention shall submit an annual report of its activities to the Committee which shall be made available to States Parties. National mechanisms which may be established, maintained or provided for in accordance with the Protocol shall be provided with such reports.

2. States Parties shall permit direct contact between such national mechanisms and the Subcommittee on Prevention.

[7] E/CN.4/2001/WG.11/CRP.2.

[8] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Tenth Session (2002) UN Doc E/CN.4/2002/78, Annex II E.

2.2 Analysis of Working Group Discussions

11 During the first session of the Working Group, held from 19 to 30 October 1992, the issues in question were discussed under Articles 14 and 15 of the revised Costa Rica Draft of 1991 and within the fourth basket of issues 'Operation of the system'.

12 With regard to Articles 14 and 15, most delegations recognized that these articles were based upon the *principle of confidentiality*. There was general acceptance of the importance of that principle, and most speakers addressed specific aspects which needed clarification.[9]

13 One of the trends of the discussion related to the relationship between the SPT and the CAT Committee, and the need for strict confidentiality, which Articles 14 and 15 represented. One tendency was that confidentiality could be maintained by requiring the CAT Committee to respect the same conditions as the SPT. Another tendency was that the operation of a system of preventive visits depended on the body establishing relationships of confidence with States parties and national administrators. Cooperation would inevitably be difficult to establish and maintain if another body, with jurisdictional responsibilities, had the full details of specific findings by the SPT. Providing specific information to the CAT Committee in this regard could also affect the nature of its supervisory and monitoring duties in respect of particular States under the Convention. One delegation indicated that the operation of Articles 14 and 15 represented something of a compromise between the two tendencies.

14 Regarding the *publication of information*, several delegations found that the possibility of publication should not be used as a tool of compulsion but should be regarded as an element of the *principle of cooperation*. Some stated that the decision to make a public statement or to publish a report should be taken by a qualified majority of the members. It was emphasized by a number of delegations that both articles should be redrafted and a cooperative relationship between the two bodies should be developed.

15 At its fourth session from 30 October to 10 November 1995, Article 14 was reconsidered by the delegations of the Working Group.[10] The importance of the principle of confidentiality was broadly recognized by the delegations, although opinions were divided over the extent of this principle and the exceptions thereto. It was agreed to change the order of the paragraphs in the original draft, so as first to state the general principle and then refer to the relevant exceptions to it. Furthermore, the *principle of cooperation* was recognized as an important principle. All delegations agreed that the SPT should consider the views of the State party in the preparation of its report. It was commonly felt that this Article should be based on recognition of good faith on the part of both the States parties and the SPT, without the Protocol losing its effectiveness to achieve its purpose. The representative of *Australia* stated that the CAT Committee rather than the SPT might be the appropriate body to make a public statement.

16 After various proposals had been discussed in the informal drafting group, its Chairperson introduced a revised draft of Article 14 which took into account the divergent views presented during the drafting group's meetings. The new article contained

[9] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28, paras 89ff.

[10] E/CN.4/1996/28 (n 5) paras 34ff.

five paragraphs instead of four, paragraphs 2 and 4 had changed places, and a separate paragraph 5 had been added about the publication of personal data. At its next plenary meeting, the Working Group then adopted the Article as submitted by the informal drafting group in first reading.

17 The provisions of Article 15 were examined by the Working Group in conjunction with Article 14, and many of the considerations raised were inseparable from that article. The Working Group decided to retain Article 15(1) as contained in the Costa Rica Draft. Submitting the results of the considerations by the informal drafting group of Article 15 as a whole, its Chairperson stated that the group had decided to recommend that the SPT should include specific facts in its annual confidential report to the CAT Committee. The group also proposed that the SPT should submit every year a public report to the CAT Committee, including the countries visited and any general recommendations. The CAT Committee should include non-confidential information on the activities of the SPT in its annual report to the General Assembly. The proposals submitted by the informal drafting group were then approved by the Working Group.

18 The Chairperson-Rapporteur invited the Working Group to discuss Article 14 as adopted at first reading at its seventh session from 28 September to 9 October 1998.[11] In the course of the discussions, the observer for the *Netherlands* suggested a new text for this Article, replacing paragraphs 1 to 3 of Article 14. Moreover, he proposed replacing paragraphs 4 and 5 of Article 14 by new Articles 14 bis and ter. In the general discussion that followed this, it was emphasized that Article 14 was one of the key articles and no hasty decisions should be taken concerning it. Thus, the Chairperson-Rapporteur suggested that both the first reading of Article 14 and the proposal of the Netherlands should be used as a basis for future drafting.

19 During the eighth session of the Working Group from 4 to 15 October 1999, the nature and implementation of recommendations was addressed in the general discussion on Article 14. It was felt that the concept of technical assistance and cooperation should be duly highlighted in Article 14.[12]

20 On the question of public statements by the SPT or the publication of its reports, it was widely felt that such 'going public' would be an exceptional measure; the reports would normally be confidential unless the State concerned manifestly refused to cooperate.

21 Other issues raised in connection with Article 14 included the contents of the reports of the SPT, the feasibility of implementing its recommendations, the relationship between the SPT and the CAT Committee, the time frame for the implementation of the SPT's recommendations, and the question of how the special fund to be established under Article 17 would be informed of the SPT's recommendations.

[11] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Seventh Session (1998) UN Doc E/CN.4/1999/59, paras 70ff.

[12] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Eighth Session (1999) UN Doc E/CN.4/2000/58, paras 44ff.

3. Issues of Interpretation

3.1 Confidentiality of Mission Reports

22 Articles 14 and 15 of the revised Costa Rica Draft of 1991 were based almost literally on Articles 10 to 13 ECPT.[13] But the OP differs from the ECPT in so far as the OP also has to take into account the *relationship between two bodies, the SPT and the CAT Committee*. Much of the discussion in the Working Group focused on this relationship.[14] Delegates were afraid that the SPT would provide confidential information on country missions to the CAT Committee, which would use such information in the public State reporting or a quasi-judicial complaints or inquiry procedure. On the other hand, since the SPT is a subsidiary body of the CAT Committee, delegates proposed that the SPT should also submit its reports to the CAT Committee. Finally, the cooperative relationship between the SPT and the NPMs required that both bodies inform each other of their respective findings and recommendations. In general, the drafters of Article 16 OP achieved a *fair balance between the principles of confidentiality and publicity*, taking into account the legitimate interests of all stakeholders involved.

23 According to its guidelines in relation to missions to States parties under Article 11(a) OP, the members of a SPT delegation prepare a note summarizing their *principle observations*, which is then circulated among all members of the delegation in order to facilitate the drafting of the report. The *draft report* is prepared with the help of the secretariat. After having been approved by the head of the delegation, the draft report is circulated among the SPT members who had been participating in the mission and is revised accordingly. After the members of the delegation agreed upon a final draft, the draft report is sent to all SPT members for consideration and adoption.[15]

24 After every country mission, the SPT shall submit the adopted *mission report confidentially to the State party* concerned. Although Article 16(1) OP only speaks about 'recommendations and observations', there can be no doubt that the report as a whole shall be communicated to the respective Government, similar to Article 10(1) ECPT. At this time the mission report is not communicated to the CAT Committee but, 'if relevant, to the national preventive mechanism'. The *travaux préparatoires* give no indication when the submission of the report to the NPM is 'relevant'. The decision rests with the SPT, which generally makes it dependent on the level of cooperation with its domestic counterpart and on its duty of confidentiality.

25 If the State party concerned neither makes part of the report public nor requests the publication of the report, it shall remain confidential. This is in line with the practice under the ECPT.[16] However, *States parties to the ECPT have developed from the very beginning a culture of transparency* by regularly requesting the CPT to publish the respective mission reports.[17] As of 16 November 2017, a total of 419 missions have been concluded

[13] See above para 6. [14] See above 2.2.

[15] See SPT, 'Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Visits to States Parties under Article 11 (a) of the Optional Protocol' (2015) UN Doc CAT/OP/5, para 29.

[16] The ECPT lacks, however, a provision similar to Art 16(2) OP which would entrust the CPT to publish the report as a whole if parts have been made public by the State party concerned. But see r 42(2) of the CPT's RoP which stipulates as well that the CPT may publish the entire report if the State party concerned made only parts of it public: see CPT/Inf/C (89) 3 rev. 1.

[17] See Kriebaum (n 2) 135ff; Evans and Morgan (n 2) 200.

by the CPT, ie 247 periodic missions and 172 ad hoc missions. So far, 368 reports have been published at the request of the governments concerned. Only a small minority of States parties, above all *Azerbaijan and the Russian Federation* still tends to be restrictive in giving its authorization to publish reports.[18] This practice of transparency has contributed significantly to a culture of gradually opening up closed institutions in the member States of the Council of Europe to public scrutiny, which by itself is a major factor in preventing torture and other forms of ill-treatment. It remains to be seen whether other States will follow in this respect the practice of European States. Similarly, the SPT noted already at quite an early stage that the '[p]ublication of an SPT visit report and the response from the authorities concerned is a sign of the *commitment of the State party* to the objectives of the OPCAT' and '[e]nables civil society to consider the issues addressed in the report and to work with the authorities on implementation of the recommendations to improve the protection of people deprived of their liberty.'[19]

26 In 2010, the SPT summarized certain recommendations from the reports that had been published at that time (on Honduras, the Maldives, and Sweden) as it found that 'they may be useful for other States in the area of prevention of torture'. These recommendations related to NPMs, the legal and institutional framework, and places of deprivation of liberty.[20]

27 Moreover, the SPT established a *follow-up procedure* to its mission reports, requesting States parties to provide 'a response giving a full account of actions taken to implement the recommendations contained in the … report within a period of six months'.[21] This procedure underwent an innovation, as in 2012 the SPT allowed the participation of the Mexican NPM at a private meeting with the Mexican authorities on the State party's reply to the SPT's mission report. The participation enabled the NPM to provide oral comments on the report which had been made available to it in advance according to Article 16(1) OP.[22] In 2013, the SPT started to issue *confidential written responses* to all replies it receives,[23] which were open for replies by States parties.[24] Later on, the SPT decided to end this approach and to initiate a more focused *post-mission dialogue process* by inviting States parties to discuss and agree upon the most effective means of entering into dialogue with the SPT at the end of each mission.[25]

[18] See the Twenty-sixth General Report on the CPT's activities of April 2017, CPT/Inf 2017/5, para 23: so far, only two out of the ten reports on the CPT's missions to Azerbaijan have been made public. In 2013, the Russian Federation agreed to the publication of the mission reports on the CPT's 2011 ad hoc mission to the North Caucasian region, as well as on the 2012 periodic mission to the Russian Federation, while out of the remaining twenty mission reports, nineteen have not yet been published.

[19] SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, para 29.

[20] See SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 31.

[21] See SPT, 'Forth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/C/46/2, para 19.

[22] See SPT, 'Sixth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc CAT/C/50/2, para 23.

[23] See SPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc CAT/C/52/2, para 18.

[24] In 2014, Brazil was the first State that replied to the Subcommittee's response. Both documents (response and reply) have been made public.

[25] See SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, para 18.

28 By the end of 2016, the SPT had issued a total of fifty-one mission reports to States parties and NPMs; twenty-four reports had been made public following requests from their recipients.[26] In its tenth Annual Report, the Subcommittee once again noted that 'publication of its visit reports reflects the *spirit of transparency* on which preventive visiting is based' and at the same time encouraged States parties and NPMs to authorize their publication.[27]

3.2 Publication as a Sanction

29 If the State party concerned makes part of the SPT's report public, the latter may publish the report in whole or in part in accordance with Article 16 OP. This provision has no counterpart in the ECPT.[28] It constitutes a useful measure to prevent a practice of unilaterally publishing only those parts of a report which are favourable to the Government concerned. The question arises whether the SPT is also authorized to publish its report if parts of it have been published by others, including the NPM which may receive the confidential report in accordance with Article 16(1) without being bound by the same duty of confidentiality. If the parts published by the NPM present a distorted picture in favour of the Government, the SPT, in our opinion, may decide to use its authority under Article 16(2) to publish the report in order to present a more accurate picture. If the NPM only publishes the most critical parts of the report, it is up to the Government concerned to request the entire report to be published. But the SPT has to be careful not to contribute to a situation in which parts of the report are deliberately leaked to the public by whomever in order to achieve its publication by a decision of the SPT or of the Government. In any case, the SPT, when preparing and publishing its reports, must comply with the *prohibition on publishing personal data without express consent* of the person concerned, which constitutes a generally accepted rule of professional fact-finding based on the human right of *privacy* and *data protection* of all persons interviewed.[29]

30 Similarly, the authority of the SPT under Article 16(4) to request the CAT Committee to publish the SPT's report or to make a public statement on the situation in a given country shall be exercised with caution. The same holds true for the *power of the CAT Committee to 'go public' as a sanction against a non-cooperative State party*. These powers of both the CAT Committee and the SPT, which go beyond those of the CPT under Article 10(2) ECPT,[30] should only be invoked against governments that clearly refuse any meaningful cooperation, obstruct the work of the SPT, and/or do nothing to implement the respective recommendations of the SPT in clear violation of their obligations under Articles 2(4), 12, 14, and/or 15 OP. In any case, before 'going public', the CAT Committee shall provide the State party with an opportunity to make its views known. The respective Government shall be granted sufficient time to submit its views[31]

[26] See SPT, 'Tenth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) UN Doc CAT/C/60/3 para 20.

[27] ibid, para 20. [28] But see r 42(2) of the CPT's RoP (n 15) above.

[29] See above Art 15 OP, 1; cf also Art 11(3) ECPT.

[30] The CPT needs a decision by a majority of two-thirds of its members to make a public statement, whereas the CAT Committee may decide by simple majority to make a public statement or to publish the report as a whole. Until the end of 2017, the CPT issued eight public statements under Art 10(2) ECPT. See also Kriebaum (n 2) 138ff; Evans and Morgan (n 2) 201.

[31] See Manfred Nowak, 'Die Europäische Konvention zur Verhütung der Folter: Ab 1989 regelmäßige Besuche von Haftanstalten durch Europäisches Komitee zur Verhütung der Folter' (1988) 15 EuGRZ 537, 542.

which, according to the principles of objectivity and impartiality, should be included in the public statement of the CAT Committee. Until the end of 2017, publication had not been used as a sanction.

3.3 Annual Reports of the SPT

31 In accordance with Article 16(3) OP, the SPT shall present a *public annual report* on its activities to the CAT Committee. This provision, which corresponds to Article 12 ECPT, ensures a minimum of transparency about the activities of the SPT even if the country-specific mission reports are not made public. Article 16(3) contains no further guidelines as to which information shall be included in the SPT's annual report. But Article 15(2) of the draft which constituted the outcome of the first reading in January 1996 specified that the annual report should include the countries visited and any general recommendations on ways of improving the protection of persons deprived of their liberty.[32] In any case, the principle of confidentiality requires that *no confidential country-specific information* shall be included in the annual reports, unless the respective country mission reports have been made public or a respective public statement has been made by the CAT Committee in accordance with Article 16(4) OP. A summary of the SPT's annual reports shall also be reflected in the annual reports of the CAT Committee, which are submitted to the States parties and the General Assembly in accordance with Article 24 CAT.[33]

32 In practice, the SPT uses its annual reports to reflect on its work and to put its thoughts on various issues of substance into public domain. After an introduction and overview of the respective year in review, including eg information on the developments concerning NPMs, the SPT regularly reported on issues arising from its work, the *development of its working practices* (for example, the establishment of certain ad hoc working groups), and certain *substantive issues*[34] that were of prior concern within the respective reporting period. The SPT also uses its annual reports to expand on certain issues relating to the outcome of its visits and to address States parties apart from concrete country missions. It has, for example, repeatedly addressed the issue of reprisals[35] and called on the authorities of all States parties to take urgent action measures in order to avoid reprisals after country missions.[36]

KERSTIN BUCHINGER

[32] E/CN.4/1996/28 (n 5) Annex I: see above para 7.

[33] See above Art 24 CAT.

[34] Such substantive issues eg concerned the SPT's guidelines on NPMs or its approach to the concept of prevention of torture and other forms of ill-treatment (cf. CAT/C/46/2 (n 21)).

[35] See Art 15 OP above.

[36] See eg CAT/C/42/2 (n 19) paras 31ff; CAT/C/44/2 (n 20), paras 35ff; CAT/C/46/2 (n 21) paras 55ff, CAT/C/52 (n 23) paras 63ff.

PART IV

NATIONAL PREVENTIVE MECHANISMS

Article 17

Establishment of National Preventive Mechanisms

Each State party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

1. Introduction	881
2. Travaux Préparatoires	882
2.1 Chronology of Draft Texts	882
2.2 Analysis of Working Group Discussions	882
3. Issues of Interpretation	883
3.1 Organizational Form of the NPM	
3.1.1 Meaning of 'one or several independent national preventive mechanisms'	883
3.1.2 Meaning of 'decentralized units'	884
3.2 Modes of Creating an NPM	884
3.2.1 Meaning of 'maintain'	884
3.2.2 Meaning of 'designate'	884
3.2.3 Meaning of 'establish'	885
3.3 Open, Transparent, and Inclusive Process	885
3.4 Operational Autonomy	886
3.5 Deadline	888

1. Introduction

1 Article 17 OP repeats the obligation of States parties under Article 3 OP to maintain, designate, or establish one or several independent national mechanisms for the prevention of torture at the domestic level. The two pillar-system, which was introduced in 2001 by Mexico at a time when the discussions in the Working Group had reached a dead end, corresponds to a general rule that States have the primary responsibility under international law to respect, protect, and ensure the human rights of all people subject to their jurisdiction, whereas monitoring by international bodies of States' compliance with their international human rights obligations is only of a complementary nature. As with its international counterpart, the Subcommittee on Prevention, the main function of NPMs consists of conducting preventive visits to all places of detention in the territory of the State party concerned and making recommendations to the relevant authorities with the aim of improving prison conditions and preventing torture and ill-treatment of detainees.

2 Further provisions on the independence and efficiency of the NPMs are contained in Article 18 OP, on the mandate and powers of the NPM in Article 19 OP, and on the corresponding obligations of States parties to facilitate preventive visits to places of detention, to implement the respective recommendations of NPMs, and to publish its annual reports in Articles 20 to 23 OP.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Mexican Draft (13 February 2001)*[1]

Article 3

> Each State Party shall establish a national mechanism at the highest possible level within one year of the entry into force of, or of its accession to, the present Protocol.

4 *Proposal by the Chairperson-Rapporteur (17 January 2002)*[2]

Article 17

> Each State party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol, if they are in conformity with its provisions.

2.2 Analysis of Working Group Discussions

5 On 13 February 2001, at the second meeting of the Working Group during its ninth session from 12 to 23 February 2001,[3] the delegation of *Mexico* introduced its alternative draft, prepared with the support of GRULAC.[4]

6 There was no real discussion focusing on Article 17 (Article 3 OP) in the Working Group. However, at its third meeting, on 14 February 2001, the Working Group held a general discussion on the Mexican draft. Some delegations strongly supported the draft, emphasizing the complementary nature of the proposed national and international mechanisms. Others, however, found that no proper balance was struck between the national and the international level and feared that the latter might become subsidiary to the former. The delegations who supported the draft underlined that it constituted an improvement of the original draft by installing a two pillar-system. Being on the spot, national mechanisms would be in a better position to prevent torture and to visit facilities all over a country.[5]

[1] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

[2] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I.

[3] E/CN.4/2001/67 (n 1).

[4] See above Art 3 OP, 2.1. For the analysis of Working Group discussions see above Art 3 OP, 2.2.

[5] E/CN.4/2001/67 (n 1) paras 20ff.

3. Issues of Interpretation

3.1 Organizational Form of the NPM

7 The organizational form of an NPM is not provided for in the OPCAT. Hence, States have much freedom on the model they chose as long as they respect the minimum requirements of the OPCAT.

8 In the course of its mission reports, the SPT has consistently referred to the flexible approach of the OP regarding the format and structure of the NPM, but the subsequent formulation of the obligations for the States parties have become increasingly demanding: the SPT has stated that, although the OP leaves the institutional format of the NPM to the States Parties' discretion, 'it is imperative that the mechanism be structured and that it carries out its mandate in accordance with the Optional Protocol, as reflected in the SPT "Guidelines on national preventive mechanis'ms".[6] The SPT later added that it is imperative that the NPM's 'functional and operational independence is guaranteed, taking account of the Principles relating to the Status of National Institutions ("the Paris Principles")'.[7]

9 According to the SPT, States parties 'must choose the model they find most appropriate, taking into account the complexity of the country, its administrative and financial structure and its geography'.[8] Beyond independence, the SPT 'looks at NPMs from a functional perspective, and recognizes that just because one model works well in one country does not mean it will work well in another. What is important is that the model adopted works well in its country of operation.'[9] Effective operation of the NPM is, therefore, a relevant characteristic for compliance with the Optional Protocol.

3.1.1 Meaning of 'one or several independent national preventive mechanisms'

10 According to Article 17 OP, States Parties can also aim to have 'several' NPMs in place. Multiple NPMs may be based on thematic, geographic, and/or jurisdictional divisions, eg the NPMs in the United Kingdom, the Netherlands, New Zealand, and Sweden.[10]

[6] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to State Party' (2013) UN Doc CAT/OP/DEU/1, para 19; SPT 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to the National Preventive Mechanism' (2013) UN Doc CAT/OP/DEU/2, para 18; SPT, 'Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism, Report to the National Preventive Mechanism' (2017) UN Doc CAT/OP/ARM/2, para 22.

[7] SPT 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Malta, Report to State Party' (2016) UN Doc CAT/OP/MLT/1, para 18; in this sense, SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Netherlands, Report to State Party' (2016) UN Doc CAT/OP/NLD/1, para 23; SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Armenia, Report to State Party' (2015) UN Doc CAT/OP/ARM/1, para 26.

[8] SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 49.

[9] SPT, 'Fourth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/C/46/2, para 62; Rachel Murray, 'National Preventive Mechanisms Under the Optional Protocol to the Torture Convention: One Size Does Not Fit All' (2008) 26 Netherlands Quarterly of Human Rights 485.

[10] APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, 2010) 217–18.

3.1.2 Meaning of 'decentralized units'

11 For the case of jurisdictional division, the last sentence of Article 17 OP explicitly provides for the possibility that mechanisms established by decentralized units 'if they are in conformity with the provisions of the Protocol'.[11] This decentralized structure was opted for by, for example, Brazil and Argentina. Furthermore, the mechanisms must together fulfil the mandate of NPMs according to Articles 19 OP and 22 OP. This means foremost that every place of deprivation of liberty is subject to the monitoring of at least one NPM. Article 29, furthermore, ensures that the OPCAT is applied 'to all parts of federal States without any limitations or exceptions'. In addition, the system of several NPMs must function in a way to ensure that recommendations are made regarding the whole system and that proposals are made to existing or draft legislation.[12]

3.2 Modes of Creating an NPM

12 While Article 3 OP obliges States parties to 'set up, designate or maintain' such a mechanism, the verbs 'maintain, designate or establish' are used in Article 17 OP.

3.2.1 Meaning of 'maintain'

13 As the term 'set up' is synonymous with the term 'establish', no conflict arises. The inclusion of the term 'maintain' intended to cover States parties with monitoring bodies that already existed at the time of entry into force and carry out functions equivalent to those of NPMs.[13] While the term 'designate' covers instances when the State party builds the NPM upon existing institutions, the term 'establish' covers a situation in which a State party creates an entirely new body to undertake NPM functions.[14]

3.2.2 Meaning of 'designate'

14 To date, the majority of the States parties to the OPCAT has designated an existing institution as NPM. The majority of the latter has chosen to give this mandate to a National Human Rights Institution (NHRI).[15] According to the Paris Principles, an NHRI is an institution 'vested with competence to promote and protect human rights'.[16] NHRIs have been designated as NPMs in different formats such as ombuds-institutions and human rights commissions. Some countries created a new NHRI and designated it as NPM.[17]

[11] APT, 'OPCAT Briefings, Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and Other Decentralised States' (2011) <https://www.apt.ch/content/files_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf> accessed 12 December 2018.

[12] SPT, 'Report on the Visit to Brazil' (2012) UN Doc CAT/OP/BRA/1, paras 92 and 94; see also Art 29 OP.

[13] APT and IIDH (n 10) 86. [14] ibid.

[15] Out of a total number of sixty-five designated NPMs, forty-seven involve NHRIs, either as the sole NPM institution or with other bodies.

[16] UNGA, 'Principles Relating to the Status of National Institutions', Res 48/134 of 20 December 1993 (Paris Principles), Principle 1 (Competence and responsibilities).

[17] eg Chile, Uruguay, Turkey, and Lebanon.

3.2.3 Meaning of 'establish'

15 To date, only some States parties to the OP have established an NPM as an entirely new institution in the country.[18]

3.3 Open, Transparent, and Inclusive Process

16 While there is no explicit requirement under the OP as to how States should deal with the national designation procedure, the SPT clarified quite early in its 2010 Guidelines that '[t]he NPM should be identified by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society'.[19] According to the SPT, the selection process should also preferably be prescribed in the governing NPM legislation.[20] The Paris Principles also additionally foresee that there should be a transparent process that includes civil society.[21] Indeed, an open, transparent, and inclusive process enhances the credibility of the future NPM and hence its effectiveness.

17 When the process is not driven by civil society,[22] but initiated by State authorities/the Government, civil society should be consulted on the choice of which organizations or individuals represent its position.[23] For the future independence (especially perceived independence) and effectiveness of the body, it should aim for the participation of a wide range of stakeholders, namely representatives of the political leadership of the executive Government and relevant members of the permanent administration with technical expertise (at all applicable levels: municipal, provincial, and/or national), members of the legislature representing both Government and opposition parties, NHRIs, organizations that already carry out visits to places of detention, and national NGOs and other civil society groups.[24] The broad scope of places falling under the OPCAT necessitates the inclusion of organizations working with persons in a situation of vulnerability, such as migrants, asylum-seekers, refugees, children, women, ethnic and cultural minorities, and persons with disabilities.[25]

18 The SPT expressed its satisfaction with the process that led to the adoption of the draft legislation setting up the NPM of *Paraguay*, that has been described 'as a model for the open, transparent and inclusive participation of a wide range of stakeholders'.[26]

[18] New specialized institutions have been created by: Paraguay, Bolivia, Honduras, Senegal, Liechtenstein, Guatemala, France, Germany, Kyrgyzstan, Nigeria, Switzerland, Burkina Faso, Tunisia, Mauritania, and Italy; APT List of Designated NPM by Type <https://www.apt.ch/en/by-type/> accessed 11 February 2018.

[19] SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 16.

[20] SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1, para 13.

[21] Paris Principles (n 16) Principle 1 (Composition and guarantees of independence and pluralism).

[22] In Peru, the NGOs have been leading the discussion on the appropriate NPM, suggesting that the Ombudsman's office be designated as an NPM. The Ombudsman's office has been taking active part in such discussions and draft legislation has been submitted: see APT, 'National Preventive Mechanisms: Country-By-Country Status: under the Optional Protocol to the UN Convention against Torture ("OPCAT")' (2007) 38–39 <https://www.files.ethz.ch/isn/55782/070607_NPM%20Status.pdf> accessed 18 July 2019.

[23] APT (ed), *Establishment and Designation of National Preventive Mechanisms* (APT 2006) 8–9.

[24] ibid.

[25] See APT and IIDH (n 10) 203–06.

[26] SPT, 'Report on the Visit to the Republic of Paraguay' (2010) UN Doc CAT/OP/PRY/1, para 56; SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, para 38.

3.4 Operational Autonomy

19 The SPT stated in its Guidelines that '[t]he operational independence of the NPM should be guaranteed'[27] and '[t]he NPM should enjoy complete financial and *operational* autonomy when carrying out its functions under the Optional Protocol'.[28] With reference to these paragraphs, the SPT noted in its Compilation of Advice on 'organizational issues regarding national preventive mechanisms that form part of a national human rights institution' that 'Article 18 (1) of the Optional Protocol is unequivocal on the need for the State party to allocate specific resources to national preventive mechanism work, so as to guarantee the operational independence of the mechanism'.[29] It further stated that 'this implies that national preventive mechanisms must be capable of acting independently, not only from the State but also from the national human rights institution'.[30]

20 In its Guidelines, the SPT stated that, '[w]here the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located *within a separate unit or department, with its own staff and budget*.'[31] In its Third Annual Report, the SPT argued similarly, stating that '[w]here existing institutions such as the Ombudsman or the national human rights institution (NHRI) are designated as national preventive mechanisms, a clear distinction should be made between such bodies, which generally act in response to specific situations, and national preventive mechanisms, which have preventive functions',[32] making the creation of a subunit necessary.[33]

21 For the sake of institutional visibility, the SPT also recommended that the activities of the NPM be clearly separated from those of the NHRI.[34] When the NHRI implements activities under the NPM mandate, it 'should be clearly stated as such in all visits, meetings, written communications with the authorities, penitentiary and other institutions

[27] CAT/OP/12/5 (n 19) para 8.

[28] CAT/OP/12/5 (n 19) para 12; the SPT has stated in its visit reports that, although the Optional Protocol leaves it up to the State Party's discretion in which institutional format the NPM should be set up, it is imperative that the NPM's 'functional and operational independence is guaranteed', taking account of the Paris Principles, in CAT/OP/MLT/1 (n 7) para 18; CAT/OP/MLT/1 (n 7) para 26: The SPT recommended that 'the State party incorporate the OPCAT into domestic law; amend and enhance the existing legal framework providing for the establishment of the NPMs by enacted specific legislative provisions setting out their mandate, institutional and operational independence, appointment criteria and membership processes, functions and powers in a way which fully reflects the OPCAT, the NPM Guidelines and the Paris Principles'; CAT/OP/ARM/1 (n 7) para 26: In a subsequent visit report, the SPT stated that 'it is imperative that the NPM law ensures full compliance with OPCAT and the SPT 'Guidelines on national preventive mechanisms' as well as the functional and operational independence of the NPM, also taking into consideration the Paris Principles'; CAT/OP/ARM/1 (n 7) para 27: and that '[i]t is furthermore important that the NPM is funded through a separate budget line in the State budget, and be assured complete financial and operational autonomy'. Finally, in the report of the SPT on its visit to the Netherlands, the SPT encouraged 'the enactment of legislation that ensures the functional and operational independence of the NPM, with due consideration to the Paris Principles', in CAT/OP/NLD/1 (n 7) para 39.

[29] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, Annex on 'Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms', para 11.

[30] ibid, para 12.

[31] CAT/OP/12/5 (n 19) para 32; see also CAT/C/44/2 (n 8) para 51.

[32] CAT/C/44/2 (n 8) para 51.

[33] The SPT highlighted, for example, that '[w]ithin Ombudsman Plus model freely chosen by the State party, a specialized subunit dedicated only and exclusively to the preventive mandate of the NPM shall be created': see SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report to State Party' (2013) UN Doc CAT/OP/MDA/1, para 17.

[34] CAT/OP/ARM/2 (n 6) para 26; CAT/OP/PRY/1 (n 26) para 17.

and individuals'.[35] The SPT further recommended that, to the greatest extent possible, the NPM 'be represented in its own right at institutional meetings that concern its mandate so that it may bring to bear its experience and the preventive focus of its work'.[36]

22 Indeed, the OP and SPT Guidelines 'foresee two different and separate structures serving two different mandates and preserving a level of autonomy'.[37] The SPT added in its Compilation of Advice:

> While the national preventive mechanism is charged with the core national preventive mechanism functions, this does not preclude other departments or staff of the national human rights institution from contributing to its work, as that cooperation might lead to synergies and complementarity. For instance, the number of complaints received by the institution in relation to a specific place of detention may inform the work of the mechanism. Similarly, the mechanism could refer some cases to the institution for litigation or other action.[38]

Indeed, the advantages of NHRIs as NPMs are the availability of broader expertise and a human rights-based approach within the institution as well as the number or type of complaints received by the NHRI as a possible criterion for the NPM's prioritization of visits.[39]

23 In order to guarantee operational independence of an NPM that is part of a larger organization, '[t]he relationship between the national preventive mechanism function and the rest of the organization, the working methods and the safeguards applicable to preserve the independence of that function should be clearly set out in the relevant internal regulations.'[40]

24 The autonomy of the NPM unit does not change the fact that the final decision-making power for the NPM often rests with the Ombudsman/deputy Ombudsman, the Human Rights Commission, or a human rights commissioner.[41] However, even when the NPM has a proper head, the SPT has encountered situations in which placement of an NPM as a section, for instance under a legal department, has jeopardized the autonomy of the mechanism's decision-making process.[42] Therefore, the SPT recommends in its Compilation of Advice that,

> [i]n order to guarantee the operational autonomy of the national preventive mechanism and a 'flat' relationship between the national human rights institution and the national preventive mechanism, the Subcommittee would recommend placing the mechanism as a parallel structure at the level of the head of the institution and abstaining from situations in which the mechanism is placed under several departments, which diminishes its visibility.[43]

[35] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/MDA/2, para 17.

[36] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Ecuador, Report to the National Preventive Mechanism' (2014) UN Doc CAT/OP/ECU/2, para 27.

[37] CAT/C/57/4 (n 29) Annex, para 18.

[38] CAT/C/57/4 (n 29) Annex, para 19.

[39] APT, 'APT Briefing series, National Human Rights Institutions as National Preventive Mechanisms: Opportunities and Challenges' (2013) 10 <https://www.apt.ch/content/files_res/apt-briefing-on-nhris-as-npms-en.pdf> accessed 18 July 2019; see on prioritization of visits below Art 20 OP, 3.2.4.1.

[40] CAT/OP/1/Rev.1 (n 20) para 14.

[41] APT (n 39) 10.

[42] CAT/C/57/4 (n 29) Annex, para 16, with reference to; CAT/OP/ECU/2 (n 36) para 24: important decisions taken by the national preventive mechanism in fulfilment of its mandate require the approval of the Directorate-General for Protection, the Deputy Ombudsman and the Ombudsman'. The Subcommittee voiced its concern that 'this procedure may stand in the way of its effectiveness in terms of, for example time management and the autonomy to which the national preventive mechanism is entitled in matters within its area of competence'.

[43] CAT/C/57/4 (n 29) Annex, para 15.

25 However, this raises more issues of concern: the SPT found that when the NPM is legally placed under the Ombudsman, the support team—employed by the Ombudsman's office—is dependent on his/her instructions and not on the collegial body of the NPM. This controverts, according to the SPT, Article 18(1) OP, which states that States parties shall guarantee the independence of the NPM personnel.[44]

26 As to the content of the autonomous decision-making, the SPT concretized in its Compilation of Advice that '[u]ltimately, the organizational chart should reflect the requirements of the Optional Protocol, which specify that the national preventive mechanism should have operational autonomy with regard to its resources, workplan, findings, recommendations and direct, and, if needed, confidential contact with the Subcommittee.'[45] Regarding resources, the SPT recommends providing the NPM with 'operational' discretion regarding the use of appropriate financial, human, and logistical resources.[46]

27 Also, as a result of the interpretation of the Paris Principles, the NPM should 'have authority to choose and employ its own staff based on requirements and criteria it alone determines'.[47] Furthermore, to ensure operational autonomy, the NPM should 'also have exclusive authority to develop its own rules of procedure without external modification'.[48]

3.5 Deadline

28 According to Article 17 OP, the State party must designate or establish one or several NPMs 'at the latest one year after the entry into force of the present Protocol or of its ratification or accession'. The twenty States that became parties to the Protocol before its international entry into force on 22 June 2006[49] must have had established an NPM at the latest by 22 June 2007.[50] For the other States that ratified or acceded to the Protocol at a later date, '[t]he NPM should be established within one year of the entry into force of the Optional Protocol for the State concerned, unless at the time of ratification a declaration has been made in accordance with Article 24 of the Optional Protocol.'[51] Article 24 OP enables the States parties to postpone the implementation of this obligation for a maximum of three years, and the CAT Committee may extend that period for another two years.[52]

[44] CAT/OP/MDA/1 (n 33) para 18.

[45] CAT/C/57/4 (n 29) Annex, para 16.

[46] CAT/OP/MLT/1 (n 7) para 32.

[47] International Council on Human Rights Policy (ICHRP) and Office of the High Commissioner for Human Rights (OHCHR) (eds), *Assessing the Effectiveness of National Human Rights Institutions* (ATAR Roto Presse SA 2005) 13.

[48] See UN Centre for Human Rights, *Professional Training Series No 4: National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (HR/P/PT/4, UN Publication 1995) 11, para 71.

[49] In chronological order: Malta, Albania, United Kingdom of Great Britain and Northern Ireland, Denmark, Liberia, Argentina, Mexico, Croatia, Mali, Mauritius, Georgia, Poland, Sweden, Costa Rica, Paraguay, Uruguay, Maldives, Plurinational State of Bolivia, Honduras, and Estonia.

[50] The drafters of the Protocol obviously wished to encourage a quick entry into force of this innovative mechanism of preventing torture and ill-treatment by according time to States parties to comply with their respective obligations of setting up an NPM even after the entry into force of the Protocol for the State party concerned.

[51] CAT/OP/12/5 (n 19) para 21.

[52] See below Art 24 OP.

29 The OPCAT does not specify any procedure for the act of international designation. In practice, many States parties have provided a list of their NPMs to the UN.[53] Other States parties have notified the SPT of their NPM choice through direct correspondence.[54] While the OP is silent on the point of whether the State has an obligation to inform the SPT that it has designated a NPM,[55] the SPT noted that it should be 'promptly' notified by the State party of the body which has been designated as the NPM.[56] Indeed, States should view the obligation to inform the SPT of the choice of their NPM as part of maintenance of an on-going relationship between the SPT, the State, and the NPM.[57]

30 Contact with the SPT is also of relevance in the time available until the end of the one-year deadline for the SPT to provide advice and assistance on NPM establishment according to Article 11(b)(i) OP. At each Subcommittee session, the regional teams review progress towards the fulfilment of each State party's obligation, making appropriate recommendations to the plenary on how the Subcommittee can best advise and assist the States parties concerned.[58] In its Annual Reports, the SPT has become increasingly concerned regarding the number of States parties that have not complied with the deadline under Art 17 OP.[59] In its twenty-ninth session in June 2016, the SPT publicized a list of States parties whose compliance with obligations set out in Article 17 OP is substantially overdue.[60]

STEPHANIE KRISPER

[53] Starting with Declarations designating NPMs at the time of ratification have been made by Azerbaijan, Slovenia, and the Former Yugoslav Republic of Macedonia <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9-b.en.pdf> accessed 11 February 2018.

[54] Elina Steinerte and Rachel Murray, 'Same but Different? National Human Rights Commissions and Ombudsman Institutions as National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture' (2009) Special Issue 2009 Essex Human Rights Review 54, 57.

[55] Murray (n 9) 493.

[56] CAT/OP/12/5 (n 19) para 23.

[57] Murray (n 9) 493–4, referring to Arts 24, 12(d), and 11(b)(i).

[58] CAT/C/57/4 (n 29) para 22.

[59] SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2009) UN Doc CAT/C/42/2, para 33: 'The Optional Protocol sets a time limit for this provision no later than one year from ratification. Most States parties have not met this obligation'; CAT/C/44/2 (n 8) para 38: 'Of the 21 States that have not designated a national preventive mechanism, 14 are in breach of their obligation to set up or designate a national preventive mechanism, taking into account dates of ratification and declarations made under article 24 of the Optional Protocol'; SPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc CAT/C/52/2, para 24: 'As at 31 December 2013, therefore, 20 States parties had not formally complied with their obligations under article 17 of the Optional Protocol. Whilst this marks an improvement in the overall position compared to 2012, it remains a matter of major concern'; CAT/C/57/4 (n 29) para 22: 'As at 31 December 2015, 19 States parties had not complied with their obligations under article 17 of the Optional Protocol. That is the same number as at the end of 2014. It is a matter of great concern to the Subcommittee, particularly since some States parties appear to be making little progress in fulfilling their obligations. At each Subcommittee session, the regional teams review progress towards the fulfillment of each State party's obligation, making appropriate recommendations to the plenary on how the Subcommittee can best advise and assist the States parties concerned, in accordance with its mandate under article 11 (b) (i) OP. At its twenty-seventh session, the Subcommittee decided to ask its regional teams to identify those States parties that appeared to be making little real progress and report back to the plenary at the twenty-eighth session, with a view to the Subcommittee making its concerns public.'

[60] SPT, 'Decision on States Parties Whose Compliance with the Obligations Set out in Article 17 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Is Substantially Overdue' (2016) UN Doc CAT/OP/29/1, para 5: Compliance with the obligations set out in article 17 of the Optional Protocol is substantially overdue for the following States parties: (a) Argentina, (b) Benin, (c) Burkina Faso, (d) Cambodia, (e) Chile, (f) The Democratic Republic of the Congo, (g) Gabon, (h) Lebanon, (i) Liberia, (j) Nigeria, (k) Panama.

Article 18

Independence, Pluralism, and Efficiency of National Preventive Mechanisms

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanisms have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.

3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.

4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

1. Introduction	890
2. Travaux Préparatoires	891
2.1 Chronology of Draft Texts	891
2.2 Analysis of Working Group Discussions	892
3. Issues of Interpretation	893
3.1 Functional Independence of NPMs	894
3.1.1 Establishment by Law	894
3.1.2 Financial Independence: 'necessary resources for the functioning'	899
3.1.2.1 Financial Autonomy	899
3.1.2.2 Adequate Budget	901
3.1.3 Period of Office and Protection From Removal	902
3.2 Independence of the NPMs' Personnel	903
3.2.1 'personnel'	903
3.2.2 'independence'	903
3.2.3 Procedure for Selection of NPM Members	904
3.3 Expertise and Pluralism	906
3.3.1 'required capabilities and professional knowledge'	906
3.3.2 Composition of the Membership	908
3.3.3 'adequate representation of ethnic and minority groups'	908
3.4 Due Consideration of the Paris Principles	909

1. Introduction

1 The role of NPMs within the universal system of torture prevention is of special significance, especially as the novelty of the whole system 'lies in requiring states to utilize such mechanisms in combating torture as a matter of international legal obligation'.[1]

[1] Malcolm D Evans, 'The Place of the Optional Protocol in the Scheme of International Approaches to Torture and Torture Prevention and Resulting Issues' in Herald c Scheu and Stanislava Hýbnerová

In 2009, the General Assembly called on States parties to the OP to fulfil their obligation to designate or establish '*truly independent* and effective national preventive mechanisms for the prevention of torture'.[2] Indeed, the provision of independence 'lies at the heart of the OPCAT and is the most important characteristic that an NPM must possess'.[3] The need for ensuring its independence was identified as one of the key issues during the OPCAT's drafting process and also one of the key reasons why the original Mexican proposal was not acceptable to many states who feared 'puppet' NPMs and why a counter-proposal to strong SPT emerged.[4]

2 Article 18(4) OP explicitly refers to the Principles relating to the status of national institutions for the promotion and protection of human rights ('Paris Principles') that States shall only give 'due consideration' to when establishing NPMs.[5] Hence, the provisions of Article 18 OP shall be interpreted in light of the *travaux préparatoires* and the Paris Principles.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Mexican Draft (13 February 2001)*[6]

Article 4

1. When setting up a national mechanism, each State Party shall guarantee its functional independence and the independence of its staff.

(eds), *International and National Mechanisms against Torture* (University Karlova Law School Publication 2004) 41.

[2] UNGA Res 64/153 of 18 December 2009.

[3] E Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention' (2014) 14 Human Rights Law Review 1, 6–7; see also Elina Steinerte and Rachel Murray, 'Same but Different? National Human Rights Commissions and Ombudsman Institutions as National Preventive Mechanisms Under the Optional Protocol to the UN Convention Against Torture' (2009) Special Issue 2009 Essex Human Rights Review 54, 60.

[4] Steinerte (n 3) 6.

[5] The formulation has its good reason. First, some provisions of the Paris Principles are owed to the broad mandate of the NHRIs to protect and promote the broad spectrum of human rights by numerous responsibilities (UNGA, 'Principles Relating to the Status of National Institutions' Res 48/134 of 20 December 1993 (Paris Principles), Principle 3 (Competence and responsibilities)) and, hence, are not suited to the NPM's specific preventive mandate with the main responsibility to carry out visits to places of deprivation of liberty and provide reports and recommendations to the authorities. Therefore, provisions may not be relevant at all or may be 'superseded by more detailed provisions within the OPCAT' (APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010) 91, referring to APT (ed), *Guide: Establishment and Designation of National Preventive Mechanisms* (APT 2006) 38). Second, the Paris Principles focus more on the establishment and creation of bodies and less on their actual practice and effectiveness once they are operational; see Rachel Murray, 'National Preventive Mechanisms Under the Optional Protocol to the Torture Convention: One Size Does Not Fit All' (2008) 26 Netherlands Quarterly of Human Rights 485 ('One Size Does Not Fit All'), 489. Also some other authors have challenged the usefulness of the instrument, arguing that the Paris Principles pay more attention to formal requirements and fail to examine the actual effectiveness of NHRIs on the ground: see Obiora Chinedu Okafor and Shedrack C Agbakwa, 'On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context' (2002) 24 Human Rights Quarterly 662; SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1, para 3; see more under para 65.

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

2. Each State Party shall take the necessary measures to ensure that the members of the national mechanism have the professional knowledge and skills required. It shall also take account of the gender balance and the need to ensure that ethnic groups and minorities are adequately represented.

3. The members shall be chosen from among persons of high moral character having proven professional experience in the field of the practice of law and the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

4 *EU Draft (22 February 2001)*[7]

Article 15 (new)

For the purpose of this Protocol, a State Party wishing to establish a national mechanism undertakes to ensure that:

(a) The national mechanism will be composed of independent experts fulfilling the requirements set out in Articles 4 paragraph 3 and 5 paragraph 2;

(b) It has full powers to issue recommendations to the concerned authorities;

(c) It has unrestricted access to all places where persons are deprived of their liberty under all situations, including in peacetime, times of public disorder or states of emergency and during war in accordance with international humanitarian law;

(d) Unrestricted access to persons deprived of their liberty;

(e) Full freedom to interview the persons deprived of their liberty without witnesses, with the assistance of interpreters, if required, as well as all relevant personnel or persons;

(f) Unrestricted liberty to contact, inform and meet with the Sub-Committee with a view to implementing Article 9 paragraph 1 (d);

(g) The reports on its visits shall be public.

2.2 Analysis of Working Group Discussions

5 On 13 February 2001, at the second meeting of the Working Group during its ninth session from 12 to 23 February 2001,[8] the delegation of *Mexico* introduced its alternative draft (prepared with the support of GRULAC) proposing the obligation for the States parties to the Protocol to establish national mechanisms for the prevention of torture.[9]

6 During the discussion, it was recalled that in order to ensure, as much as possible, the effectiveness of national mechanisms, it was important that the Protocol identified the principles on which they should be based. Thus, the Working Group considered related issues, such as the NPMs' mandate, independence, degree of effectiveness, links with other national institutions, governmental and non-governmental status, the importance of flexibility, and the impact of their recommendations.[10]

[7] ibid, Annex II.
[8] E/CN.4/2001/67 (n 6).
[9] See above Arts 3 and 17 OP.
[10] E/CN.4/2001/67 (n 6) para 28.

7 Some delegations stated that, in some countries, national institutions for the protection of human rights clearly lacked independence and effectiveness, and expressed concern about the ability of such institutions to reach the goals set forth in the Protocol.

8 During the tenth session of the Working Group from 14 to 25 January 2002, the concept of NPMs was further elaborated.[11] Many delegations, including those of Spain (on behalf of the European Union), Argentina, Egypt, Georgia, El Salvador, the Republic of Korea, Poland, and South Africa, made statements regarding the ways and means of ensuring the independence of the national mechanisms. It was emphasized that these mechanisms should be established on the basis of the Paris Principles, that they should be independent from any other national authority, able to issue recommendations to the concerned authorities, and be adequately funded.

9 In the compromise proposal presented by the Chairperson-Rapporteur, the concept of national preventive mechanisms was described in Part IV, where it was stated that States would be required to maintain, designate or establish national mechanisms, based on the Paris Principles, to work in close cooperation with the Subcommittee.[12]

3. Issues of Interpretation

10 While States parties enjoy a certain flexibility on the structure of their single or several NPMs according to Article 17 OP, they are obliged by Article 18 OP to guarantee the existence of an NPM with minimum guarantees, the most important of which is independence. In this sense, the SPT stated that 'it is not for the Subcommittee to say in the abstract what may or may not be appropriate. *All NPMs must of course be independent*.'[13] This em phasis that the SPT places on the characteristic of independence is also reflected in the fact that nearly every SPT's mission report reiterates that 'one of the crucial factors inhibiting ill-treatment is the existence of a fully functioning system of *independent* visits to monitor all places where persons may be deprived of their liberty'.[14] Indeed, '[t]he linchpin for assessing the appropriateness of the choice of a particular institution as an NPM as well as what is seen as a factor in their effectiveness is independence'.[15]

11 Surprisingly, although it is the central requirement for NPMs and is, thus, mentioned often in the OPCAT (Articles 1, 17, 18, and 35), independence is not precisely defined, but is in fact formulated quite broadly, leaving terms open for interpretation. The provisions of Article 18 OP must be read together in order to ensure the full independence of NPMs in their different aspects.[16] On the issue of establishment of the

[11] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, paras 37ff.

[12] ibid, para 50.

[13] SPT, 'Forth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/C/46/2, para 62.

[14] See SPT, 'Report on the Visit to the Maldives' (2009) UN Doc CAT/OP/MDV/1, para 15. Nearly verbatim the same appears in a number of other SPT visit reports: see SPT, 'Report on the Visit to Sweden' (2008) UN Doc CAT/OP/SWE/1, para 16; SPT, 'Report on the Visit to Benin' (2011) UN Doc CAT/OP/BEN/1, para 14; SPT, 'Report on the Visit to Mexico' (2010) UN Doc CAT/OP/MEX/1, para 12.

[15] Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 119.

[16] This can be exemplified by the following statement of the SPT: 'Article 18 (1) of the Optional Protocol [on functional independence of the NPM and independence of its personnel] is unequivocal on the need for the State party to allocate specific resources to national preventive mechanism work, so as to guarantee

NPM, Article 18 (4) OP contains a specific reference to the 'Principles relating to the status of national institutions for the promotion and protection of human rights' (the 'Paris Principles').[17]

3.1 Functional Independence of NPMs

12 Article 18(1) OP requires States parties to guarantee the independence of NPMs. Independence is defined as 'functional independence', meaning that NPMs must enjoy independence from all State authorities (the legislative, executive, and judicial branches of Government),[18] as well as from the authorities responsible for places of detention, civil administration, and party politics.

13 Functional independence is highly important for the effectiveness of NPMs,[19] including several aspects. The first way to ensure functional independence is that the NPMs are based in a clear constitutional or at least legislative framework. Secondly, NPMs shall enjoy financial independence from the executive branch and dispose of a sufficient budget allocated by parliament that they are able to utilize as they wish. Furthermore, the members and staff of NPMs shall be appointed for a minimum period of office and be protected against any arbitrary removal during their term of office.

3.1.1 Establishment by Law

14 While the OP is silent on this issue, the Subcommittee elaborated also in its Analytical Assessment Tool for NPMs that it should be clearly set forth in a new or existing constitutional or legislative text 'that the national preventive mechanism is to be given a preventive mandate and powers in accordance with the Optional Protocol'.[20] The SPT has further reiterated that having a legal basis for an NPM is 'a prerequisite for its institutional stability and functional independence'.[21] Also the SRT demands for a clear legal basis.[22]

the operational independence of the mechanism': see SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, Annex on 'Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms', para 11.

[17] Paris Principles (n 5).

[18] Steinerte (n 3) referring to Richard Carver, *Performance & Legitimacy: National Human Rights Institutions* (2nd edn, International Council on Human Rights Policy 2004) 58.

[19] APT and IIDH (n 5) 89.

[20] CAT/OP/1/Rev.1 (n 5) para 10, referring to Paris Principles (n 5) and SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 7. Still more vague in SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 52: 'The Subcommittee wishes to reiterate the provisions of its preliminary guidelines to the effect that the national preventive mechanism should *preferably* be established by law or by the Constitution.'

[21] SPT, 'Report on the Visit to Honduras' (2010) UN Doc CAT/OP/HND/1, para 262; in cases where States parties designated the NPM or intended to define its modalities of work in a decree, the SPT either urged the drafting of legislation to consolidate and reinforce the original decree creating the NPM or recommended that the modalities of work of the NPM be spelt out clearly in the draft NPM law: see CAT/OP/MEX/1 (n 14) para 30 and CAT/OP/BEN/1 (n 14) para 22. Designation of bodies as NPM by Legal Notices, ie regulations, led the SPT to voice concern 'at the weakness of the legal framework providing for the independent and effective functioning of the NPMs'; see SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Malta, Report to State Party' (2016) UN Doc CAT/OP/MLT/1, para 25.

[22] SRT (Nowak), 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/65/273, para 82: 'Most fundamentally, States should provide their national preventive mechanism with a clear legal basis specifying its powers and ensuring its complete independence from the State authorities.'

15 A clear constitutional or legislative basis specifying the NPM's mandate and powers guarantees that an NPM has structural independence from all branches of state,[23] above all from the executive branch,[24] including the police, military, and other security forces. Hence, an NPM placed under the authority of a Ministry or administratively attached to a Ministry raises questions about its functional independence. While, in practice, this link can be purely formal and the NPM can act truly independently in reality, it puts the NPM in a situation of vulnerability. The SPT for example expressed concern about the office of one NPM being within the Ministry of Justice, from which it derives the human resources for its operation.[25]

16 The SPT envisages the provisions on the NPM to be found in a clear legal basis, may it be a separate law[26] or clear provisions in existing legislation. A separate law is especially important for the perceived independence of an NPM that is part of an institution with an additional mandate, as appearance of partiality can be exacerbated by the lack of a separate legal basis.[27] The Paris Principles[28] have been interpreted by the OHCHR and ICHR to require a separate law,[29]and the SRT supported this solution.[30]

17 As to the content of legislation establishing the NPM, it is of fundamental importance that the requirement for an NPM's legal basis includes 'the fact of designating an existing institution to carry out the NPM mandate'.[31] Such 'anchoring' of the NPM in legislation guarantees that the only authority with the ability to alter the existence of the

[23] Steinerte (n 3) referring to Carver (n 18) 58.

[24] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Senegal, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/SEN/2, para 17; ibid, para 15: the Subcommittee noted in particular 'the placing of the Observatory in the Ministry of Justice under "Other offices" ' by decree.

[25] SPT, 'Report on the Visit to Italy' (2016) UN Doc CAT/OP/ITA/1, para 13.

[26] In its mission reports, the SPT deemed 'the adoption of a separate NPM law as a crucial step'—eg in SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Armenia, Report to State party' (2015) UN Doc CAT/OP/ARM/1, para 26. It furthermore stated that '[w]hile the institutional format of the NPM is left to the State Party's discretion, it is imperative that the State party enact NPM legislation which guarantees an NPM in full compliance with OPCAT and the NPM Guidelines. Indeed, the SPT deems the adoption of a separate NPM law as a crucial step to guaranteeing this compliance': see SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Netherlands: Recommendations and Observations Addressed to the State Party' (2016) UN Doc CAT/OP/NLD/1, para 26; ibid, para 24: 'While acknowledging the existence of legal provisions providing the foundational basis for each individual institution within the NPM, a striking weakness in the current functioning of the NPM is the absence of a separate legislative text regulating NPM-specific functions, an NPM mandate, the relationship between NPM members and other bodies, such as observer institutions and the Netherlands Institute for Human Rights, and other issues that ought to be regulated, in line with part IV of the OPCAT.'

[27] CAT/OP/NLD/1 (n 26) para 37.

[28] The Paris Principles state: 'A national institution shall be given as broad a *mandate* as possible, which shall be clearly *set forth in a constitutional or legislative text*, specifying its composition and its sphere of competence': see Paris Principles (n 5) Principle 2 (Competence and responsibilities).

[29] ibid. The Paris Principles have been interpreted by OHCHR and ICHR as demanding for NHRIs that '[a]n institution's organic law should set out its appointment mechanisms, terms of office, mandate, powers, funding and lines of accountability': see International Council on Human Rights Policy (ICHRP) and Office of the High Commissioner for Human Rights (OHCHR) (eds), *Assessing the Effectiveness of National Human Rights Institutions* (ATAR Roto Presse 2005) 12–13.

[30] SRT (Nowak) A/65/273 (n 22) para 82: 'In order to provide the national preventive mechanism with the stability and authority needed for the execution of its difficult tasks, States parties should enact a specific national law establishing the mechanism … That law must be in strict compliance with the Optional Protocol. This includes ensuring its complete functional independence and the complete independence of its staff, which implies that members of the national preventive mechanism must not be representatives of the Government … and must maintain no close personal ties to the authorities to be inspected'.

[31] Steinerte (n 3) 12.

NPM is the legislature itself[32] while it cannot guarantee freedom from abuse, namely by the legislature.[33] When the body designated as the NPM performs other functions in addition to those under the OP, an explicit designation of the body carrying out the NPM, eg the entire NHRI or the ombudsperson, prevents uncertainty regarding which institution fulfils the mandate of the NPM and hence inhibits weakening the efficiency and the institutional credibility of the NPM.[34] Further, the relationship between the NPM function and the rest of the organization, the working methods and the safeguards applicable to preserve the independence of that function should be clearly set out in internal regulations.[35]

18 What clearly has to be set out in a constitutional or legislative text is the mandate and powers of the NPM.[36] According to the SPT, this is to be done by 'specifying the composition of the mechanism and its sphere of competence'.[37] The SPT further elaborated in its Assessment Tool that, first, '[s]uch legislation should extend the visiting mandate to all places where people are or may be deprived of their liberty, as set out in article 4 of the Optional Protocol'.[38] This wording should be taken over and an exhaustive list avoided as it could exclude certain new types of places of detention.

19 Second, with reference to Articles 19 and 20 OP, the SPT states that the legislative text should grant the NPM at minimum:[39]

(a) The power to freely select the places of deprivation of liberty in which visits are to be carried out; to regularly examine the treatment of persons deprived of their liberty in those places; to select the timing of such visits and determine whether they are to be announced or unannounced; and to choose the persons to be interviewed;
(b) Access to all information, including personal and sensitive information, premises and persons necessary for pursuing its mandate;
(c) The power to make recommendations to the relevant authorities;[40]
(d) The power to submit proposals and observations concerning existing or draft legislation;[41]
(e) The right to have contact with the Subcommittee.[42]

[32] APT, *Guide* (n 5) 39, referring to ICHRP and OHCHR (n 29) 12–14.

[33] Steinerte (n 3) 12.

[34] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/MDA/2, paras 11–12; SPT, 'Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism, Report to the National Preventive Mechanism' (2017) UN Doc CAT/OP/ARM/2, para 24; APT, 'APT Briefing Series, National Human Rights Institutions as National Preventive Mechanisms: Opportunities and Challenges' (APT 2013) ('Opportunities and Challenges') 8.

[35] CAT/OP/1/Rev.1 (n 5) para 14. See Article 18 OP under operational independence, paras 25, 29, 30.

[36] CAT/OP/12/5 (n 20) para 7. Again, the SPT elaborated in its Analytical Assessment Tool for NPMs that it should be clearly set forth in a new or existing constitutional or legislative text that 'the national preventive mechanism is to be given a preventive mandate and powers in accordance with the Optional Protocol'; see CAT/OP/1/Rev.1 (n 5) para 10.

[37] CAT/OP/1/Rev.1 (n 5) para 10, referring to Paris Principles (n 5) and CAT/OP/12/5 (n 20) para 7. The SPT hence mirrored the Paris Principles which state: 'A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.'

[38] CAT/OP/1/Rev.1 (n 5) para 10, referring to CAT/OP/12/5 (n 20) para 10. See also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Ecuador, Report for the National Preventive Mechanism' (2015) UN Doc CAT/OP/ECU/2, para 27.

[39] CAT/OP/1/Rev.1 (n 5) para 12.

[40] See also CAT/OP/NLD/1 (n 26) para 27.

[41] ibid.

[42] CAT/OP/1/Rev.1 (n 5) para 12; see also CAT/OP/ECU/2 (n 38) para 16 and CAT/OP/ITA/1 (n 25) para 14.

20 Third, as to the NPM's mandate under Article 22 OP, the SPT notes that '[l]egislation should clearly state the obligation of competent authorities to examine the recommendations of the national preventive mechanism and to enter into a dialogue with it regarding the implementation of its recommendations'.[43]

21 Fourth, as to the obligation of the States parties to guarantee the functional independence of the NPMs according to Article 18(1) OP, the SPT notes that '[t]he relevant legislation should specify the period of office, whether determined or open-ended, of the members of the national preventive mechanism and any grounds for their dismissal'.[44]

22 Fifth, regarding the obligation of the States parties to guarantee the independence of the NPMs' personnel according to Article 18(1) OP, the SPT states that

> the legal basis should guarantee that the members of the national preventive mechanism and its staff enjoy such privileges and immunities as are necessary for the independent exercise of their functions,[45] and should address the issue of reprisals and other such actions against members of the mechanism,[46] their partners and any person who has communicated with the mechanism.[47]

The selection process for the members of the NPM should, according to the SPT, 'preferably be prescribed in the governing NPM legislation'.[48]

23 When criticizing States parties for the lack or weak legal basis, the SPT has stipulated further recommendations on the content of NPM law. Regarding NPM membership, the SPT specifically recommended that the State party should enact specific legislative provisions setting out 'appointment criteria and membership processes'.[49] In another case, the SPT recommended that the law on the NPM 'provide that membership of the NPM is incompatible with any other function which could affect its independence and impartiality'.[50]

24 Regarding the visits of NPMs, the SPT urged the State Party to ensure that the legal framework provides for '*unrestricted* access to all places of detention'.[51] Moreover, 'the State party should guarantee in law and in practice the full mandate of the NPM, in particular its right to conduct private interviews with persons deprived of liberty'.[52] The NPM's legal framework should also outline privileges and immunities of 'those who contribute to the NPM, including experts and civil society'.[53] The legal framework should furthermore guarantee 'protection for persons who provide information to the NPM'.[54]

[43] CAT/OP/1/Rev.1 (n 5) para 41; see also CAT/OP/ECU/2 (n 38) para 16 (long); for further possible legislative provisions, see Art 19, paras 22ff.

[44] CAT/OP/1/Rev.1 (n 5) para 10, referring to CAT/OP/12/5 (n 20) para 9.

[45] CAT/OP/NLD/1 (n 26) para 27.

[46] See CAT/OP/ECU/2 (n 38) para 16 (long): 'The Subcommittee also considers it important to add a provision in line with paragraph 27 of the Guidelines, according to which '[t]he State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organisation for having communicated with the national preventive mechanism or for having provided the national preventive mechanism with any information, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way.' See also CAT/OP/ITA/1 (n 25) para 14.

[47] CAT/OP/1/Rev.1 (n 5) para 10, referring to Article 21(1) OP and CAT/OP/12/5 (n 20) paras 26–27.

[48] CAT/OP/1/Rev.1 (n 5) para 13.

[49] CAT/OP/MLT/1 (n 21) para 26.

[50] CAT/OP/BEN/1 (n 14) para 20.

[51] CAT/OP/ITA/1 (n 25) para 14.

[52] ibid.

[53] CAT/OP/NLD/1 (n 26) para 27.

[54] ibid.

25 Budgetary issues should also be regulated directly in the NPM law. As to Article 18 OP, the NPM's legal framework should, in order to ensure its continuous financial and operational autonomy, 'require a separate budget line in the State budget for the funding of the NPM'.[55] On budgetary issues, the SPT deems it important to specify in the legislative provisions that the NPM will be allocated sufficient additional resources to enable it to fulfil its functions.[56] It is also suggested that the source and nature of the NPMs' funding be specified in their founding instruments.[57]

26 Similarly, the SPT suggested that the NPM law should mention the obligations of the State party to present and discuss the annual reports in the national legislative assembly.[58]

27 Finally, the SPT noted that the State party should 'guarantee in law and in practice the full mandate of the NPM, in particular … to maintain *direct* contact with the SPT, in order, inter alia, to follow up on compliance with the present recommendations'.[59]

28 The NPM legislation has to be adapted to the national circumstances with the aim of an effectively functioning NPM.[60] The SPT's satisfaction with the NPM law in Paraguay[61] and Honduras[62] may be referred to here. Also some other NPM laws provide models on certain provisions, eg giving broader powers than required by the OPCAT[63] or containing a provision that resemble the provisions of the OPCAT.[64]

[55] ibid.

[56] CAT/OP/ECU/2 (n 38) para 16; Steinerte (n 3): 'it may have been the lack of a clear formulation of an obligation of adequate funding in the OP that have led governments to claim, when existing institutions were designated to undertake NPM functions, that such undertaking does not require extra funding.' This is the case in many States Parties, like The Netherlands, where no additional funding has been allocated to institutions designated as part of the Dutch NPM; see Inspectorate of Security and Justice, 'Monitoring Places of Detention: National Preventive Mechanisms, First Annual Report' (2011) 15 <https://www.rsj.nl/binaries/annual-report-2011-npm-the-netherlands_tcm26-27588.pdf> accessed 11 November 2017; see also Murray, 'One Size Does Not Fit All' (n 5) 496, referring to, eg, Denmark and the UK.

[57] APT and IIDH (n 5) 91; see also APT, *Guide* (n 5) 46.

[58] CAT/OP/ECU/2 (n 38) para 16; see also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report for State Party' (2014) UN Doc CAT/OP/MDA/1, para 31(i).

[59] CAT/OP/ITA/1 (n 25) para 14.

[60] In this sense, on the issue of templates for legislation where NHRIs were designated as NPMs, the SPT voiced the view that 'there is no "one size fits all" legislation for States parties in which national human rights institutions are designated as national preventive mechanisms, as the legislation should take into account the idiosyncrasies of national realities. However, public Subcommittee reports could be used and contact with similar institutions could be sought for the purpose of comparison': see CAT/C/57/4 (n 16) Annex, para 17.

[61] SPT, 'Report on the Visit to the Republic of Paraguay' (2010) UN Doc CAT/OP/PRY/1, para 56: The law 'meets the minimum requirements of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), including financial independence of the MNP.'

[62] CAT/OP/HND/1 (n 21) para 262 and 263: 'The Subcommittee is also satisfied with the current content of the National Preventive Mechanism Act, as adopted, in that it meets most of the minimum requirements of the Optional Protocol, including: a broad definition of deprivation of liberty; equitable composition of the preventive mechanism in terms of gender balance and representation of ethnic and minority groups; and an obligation on the part of the authorities to cooperate with the preventive mechanism.'

[63] The Prevention of Crimes of Torture Act in New Zealand, for example, was amended to provide for the NPM to 'make any recommendations it considers appropriate to the person in charge of a place of detention' to improve the conditions, treatment or for prevention: see Crimes of Torture Act 1989 (NZ) s 27(b) as amended. Murray, 'One Size Does Not Fit All' (n 5) 491–92.

[64] See Article 6 of the Law on the National Mechanism for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment/Ley del Mecanismo Nacional de Prevención Contra la Tortura y Otros Tratos Crueles, Inhumanos o Degradantes (Decree/Decreto no 136-2008), adopted by the Parliament of Honduras on 31 October 2008. Similarly, the French legislation establishing the Inspector General for Places of Detention states that visits may take place to any place within French territory where persons are deprived

3.1.2 Financial Independence: 'necessary resources for the functioning'

29 Financial independence is not expressly mentioned in the text of the OP. However, it is a very important aspect of functional independence and implied by the obligation of States parties under Article 18(3) 'to make available the necessary resources for the functioning of the national preventive mechanisms'. In this sense, the SPT has stressed that 'only financial autonomy of the NPM can guarantee its functional independence'.[65] The SPT stated clearly in its Guidelines that '[t]he NPM should enjoy complete *financial* and operational autonomy when carrying out its functions under the Optional Protocol.'[66] The Paris Principles state that '[t]he national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding.'[67] Financial independence thus has two aspects: autonomy on budgetary issues and disposal of an adequate budget.

3.1.2.1 Financial Autonomy

30 For the SPT, the NPM should enjoy complete financial autonomy when 'carrying out its functions' under the OP.[68] Also the Paris Principles make clear that financial autonomy is a fundamental requirement of independence: without it NPMs 'cannot exercise operational autonomy or independence in decision-making'.[69] Hence, the NPM should be able to make decisions on how best to allocate funding for specific aspects of its work free from both governmental control and the need for governmental authorization or approval.[70]

31 As to the *source of funding*, ie the body determining the funding, the Paris Principles formulate an aim of funding 'to be independent of the Government and not be subject to financial control'.[71] The implicitly suggested solution that funding be provided by the legislature has also been foreseen for NHRIs to assure their overall

of their liberty by virtue of a decision of a public authority, although it hurries to clarify that any health establishment entitled to receive patients who are hospitalised without their consent, as provided for in public health legislation, will also be visited; see Loi no 2007-1545 du 30 octobre 2007 instituant un Controleur général des lieux de privation de liberte (FR), Art 8. And in some countries, in the Former Yugoslav Republic (FYR) of Macedonia, eg, legislation includes the mandate and detailed powers of the NPM, as recommended by the SPT: 'a legal amendment to the Ombudsman's legislation provides for specific powers to bring the institution in line with OPCAT requirements. These include that the Ombudsman will conduct regular unannounced visits to all places of detention and will be given access to all information in these places. The law also states that officials are responsible for informing the Ombudsman of how they have implemented its recommendations within 30 days of receiving its reports': see APT, 'Opportunities and Challenges' (n 34) 7.

[65] CAT/OP/MDA/1 (n 58) para 16.

[66] CAT/OP/12/5 (n 20) para 12.

[67] Paris Principles (n 5) Principle 2 (Composition and guarantees of independence and pluralism). It continues: 'The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.' The SPT referred to the Paris Principles on the question of resources as offering 'an adequate set of standards to ensure the genuine functional independence of the NPMs and the persons who form part of it': see CAT/OP/SWE/1 (n 14) para 38.

[68] CAT/OP/12/5 (n 20) para 12. In its mission reports, the SPT recommended that the States parties 'allow the NPM as a collegial body to have budgetary independence by ensuring access to a budget of its own' and ensure that the NPMs 'are able to freely determine how to use the resources available to them': see CAT/OP/MDA/1 (n 58) para 20(b); SPT, 'Report on the Visit to New Zealand' (2014) UN Doc CAT/OP/NZL/1, para 14.

[69] APT and IIDH (n 5) 91.

[70] Murray and others (n 15) 123. APT and IIDH (n 5) 91; see also APT, *Guide* (n 5) 46.

[71] Paris Principles (n 5) Principle 2 (Composition and guarantees of independence and pluralism); International Coordinating Committee of National Institutions for the Promotion and Protection of human Rights (ICC), 'General Observations of the Subcommittee on Accreditation' (as updated May 2013) 45.

greater independence from the executive,[72] an issue that is even more crucial for NPMs.[73] However, even funding by the legislative may not be without problems.[74] The NPM's founding law should specify the source and nature of funding.[75] Financial autonomy implies also that the NPM is funded through a *separate budget line*.[76]

32 In practice, most NPMs receive their funding from the State budget[77] or from the same source as the institution the NPM has been established from or has become

[72] Rachel Murray, 'National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness' (2007) 25 Netherlands Quarterly of Human Rights 189, 202; Steinerte (n 3) 15, referring to Joint Committee on Human Rights, *Sixth Report: The Case for a Human Rights Commission* (2002–03, HL 67-I, HC 489-I) para 225. However it must be noted that, in itself, receiving funds from the legislature is not sufficient to guarantee adequate funding: eg, the South African Human Rights Commission receives its funding from Parliament as well as reports to it on a regular basis, but the interest from the parliamentarians has been at times minimal and repeated calls for in- crease in funding have fallen on deaf ears: see South African Human Rights Commission (SAHRC), 'Thirteenth Annual Report' (SAHRC 2009).

[73] ICC, General Observations (n 71) 46. On the Protector of Human Rights and Freedoms (PHRF) in Montenegro: 'The SCA notes that the mandate of the PHRF has expanded in recent years to include responsibility as the NPM under OPCAT and to provide for an anti-discrimination mandate. While the PHRF has some additional funding for these mandates, the SCA is concerned that the budgetary resources allocated to the PHRF are insufficient for it to effectively carry out its mandate': see Global Alliance of National Human Rights Institutions (GANHRI) 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)' (Geneva 2016), <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20MAY%202016-English.pdf> accessed 12 December 2018.

[74] Murray and others (n 15) 123. It may be noted that the SPT recommends in its Compilation of Advice on financial autonomy of the NPM with respect to the budget of the NHRI: 'A request for the national preventive mechanism budget should be drafted by the mechanism itself … and submitted to the State authorities and/or legislative power … In case of a public hearing or audience in the National Assembly/Congress, the Subcommittee is of the view that the head of the national preventive mechanism should present the draft budget and respond to any related questions. Once the budget is approved, decision-making regarding the use of specific mechanism resources remains the prerogative of the mechanism itself.' The method of funding should not affect the perceived independence of the NPM, neither by the source of funding nor by emergency solutions. See SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to State Party' (2013) UN Doc CAT/OP/DEU/1, para 37: 'the SPT notes that some federal institutions have tried to support the mechanism by providing, for example, logistical support and transportation. While the SPT understands the good intentions of those federal institutions in doing so, such activities could affect the perceived independence of the NPM by making it dependent on the practical support provided by the administration'.

[75] APT and IIDH (n 5) 91; see also APT, *Guide* (n 5) 46.

[76] Regarding NHRIs, the SPT elaborates in its Compilation of Advice on the issue of 'financial autonomy of the national preventive mechanism with respect to the budget of the national human rights institution' that this implies that 'national preventive mechanisms must be capable of acting independently, not only from the State but also from the national human rights institution. For that purpose, the State party should ensure a specific allocation of funds to the national preventive mechanism': in CAT/C/57/4 (n 16) Annex, para 12. The SPT saw the absence of a separate structure and a distinct budget line for the functions of the NPM within an Ombudsmen institution to 'undermine the functional independence of the NPM and thus place the State party in conflict with Article 18(1) and (3) OP' and recommended that the State party 'allocate to the NPM a separate and adequate budget to allow' for such financial autonomy. The SPT emphasized the importance 'that the NPM is funded through a separate budget line in the State budget, and be assured complete financial and operational autonomy' and noted that the State party 'should ensure funding to the NPM through a separate line in the national annual budget referring specifically to the NPM'. This also applies to NPMs that are standalone bodies. In fact, in order to ensure the NPM's continuous financial and operational autonomy, the SPT noted that its legal framework should … require a separate budget line in the State budget for the funding of the NPM': see CAT/OP/MDA/1 (n 58) para 13, 20(b); CAT/OP/ARM/1 (n 26) 27, 32; see also SPT, 'Report on the Visit to Brazil' (2012) UN Doc CAT/OP/BRA/1, para 86; CAT/OP/NLD/1 (n 26) para 27, 48.

[77] Steinerte (n 3): eg, the German National Agency for the Prevention of Torture, the German NPM, receives its funding from the Federal Ministry of Justice of Germany: see Federal Agency for the Prevention of Torture, 'Annual Report 2009/2010' (Federal Agency for the Prevention of Torture 2011) 12.

part of.[78] In fact, the source of funding has not so often been an issue of concern as the level of funding.[79]

3.1.2.2 Adequate Budget

33 While Article 18(3) OP requires States parties only to make the resources necessary for 'the functioning' of an NPM available, the SPT Guidelines state that '[t]he necessary resources should be provided to permit the effective operation of the NPM in accordance with the requirements of the Optional Protocol'.[80]

34 Resources for an effective functioning include human, material and financial resources.[81] Material resources include, inter alia, vehicles, interpretation, and working spaces.[82] As to human resources, the NPM must have sufficient personnel and financial means to remunerate experts to visit the number of places of detention covered by the NPM's mandate effectively.[83] The budget should be sufficient to leave the NPM the decision on frequency and manner of the visits and follow-up visits[84] as well as enable the NPM to fulfil its other functions, ie write visit reports and annual reports including recommendations, and submit proposals on legislation.[85]

[78] Steinerte (n 3): This is the case in the UK where the Ministry of Justice provided some additional funding to Her Majesty's Inspectorate for Prisons to undertake the UK NPM coordinating role; see National Preventive Mechanism of the UK, *Monitoring Places of Detention: Second Annual Report of the United Kingdom's National Preventive Mechanism: 2010–11* (Cm 8282, 2012) 11.

[79] Steinerte (n 3) 16; see above para 29 on adequate funding.

[80] CAT/OP/12/5 (n 20) para 11. In this sense CAT/OP/ARM/1 (n 26) para 34. Referring to Article 18(3) OP, the SPT elaborated on the importance of the principle of *effectiveness* on this issue of budget in its NPM Assessment Tool by stating that States parties 'should make available the resources necessary for the effective functioning of national preventive mechanisms' and that the NPM 'should advocate for the provision of the resources necessary for the effective exercise of its mandate, with the assistance of the Subcommittee and/or other relevant actors if necessary'; see CAT/OP/1/Rev.1 (n 5) para 15. The SPT has noted in its reports that 'the provision of *adequate financial and human resources* constitutes a legal obligation of the State Party' under Article 18(3) OP.

[81] The SPT concretized that an NPM 'must have structures equipped with the human, material and financial resources which will enable it to function satisfactorily': see CAT/OP/SWE/1 (n 14) para 38.

[82] CAT/OP/MLT/1 (n 21) para 32.

[83] The SPT specifies that this obligation also entails enabling the NPM to have a sufficient number of staff (CAT/OP/NZL/1 (n 68) para 14), including secretariat and external experts (CAT/OP/MLT/1 (n 21) para 32). The SPT recommends that the State party provide the NPMs 'with the means to ensure that they have access to the full range of relevant professional expertise, as required by OPCAT' (CAT/OP/NZL/1 (n 68) para 14). A 'sufficient number' of personnel is for the SPT such as to ensure that the NPM's 'capacity reflects the number of places of detention within its mandate, as well as being sufficient to fulfil its other essential functions under the Optional Protocol': see CAT/OP/NZL/1 (n 68) para 14(c); CAT/OP/ARM/1 (n 26) para 36; CAT/OP/DEU/1 (n 74) para 26.

[84] While the SPT argued in its first report that it is sufficient to provide the NPM with the resources it needs to merely function satisfactorily 'in the light of the number and distribution of places of detention … and the numbers of persons to be visited regularly and with a periodicity which is reasonable for adequate monitoring' (CAT/OP/SWE/1 (n 14) para 39), it has since increased its demands: it recommended that the respective State party ensure that the NPM 'is able to carry out visits in the manner and frequency that the NPM itself decides' (CAT/OP/ARM/1 (n 26) para 34; CAT/OP/NLD/1 (n 26) para 49), has the funds allowing the NPM to 'draw up annual work plans for visits' (CAT/OP/ARM/1 (n 26) para 32; CAT/OP/NLD/1 (n 26) para 48; see also CAT/OP/BRA/1 (n 76) para 86) and is able 'to carry out its visiting programme in all regions of the State party and to conduct follow-up visits'; see CAT/OP/DEU/1 (n 74) para 38; CAT/OP/ARM/1 (n 26) para 32.

[85] Furthermore, funding should allow the NPM to 'systematically enlist the support of other bodies with whom it wishes to cooperate' (CAT/OP/NLD/1 (n 26) para 48; CAT/OP/ARM/1 (n 26) para 32; CAT/OP/BRA/1 (n 76) para 87) and suffice for the logistical and other infrastructure related needs, including 'publication of its reports and relevant dissemination tools' (CAT/OP/ARM/1 (n 26) para 32; CAT/OP/NLD/1 (n 26) para 48).

35 Clearly, the mandate of NPMs is very cost-intensive. After all, to conduct regular visits to all places of detention by a sufficient number of qualified staff, to examine regularly the treatment of persons detained therein and to make recommendations to the relevant authorities is a highly professional, time consuming, responsible, and emotionally demanding task. Such positions are only attractive for the most competent and professional individuals when an adequate *honorarium* is provided if they exercise this function on a part-time basis.[86] Thus, in the mission report on Malta, the SPT recommended that the State party 'consider making membership of the NPMs a full-time and remunerated position'.[87] In its mission reports to Germany, the SPT voiced concrete concern that there was only one honorary member with a mandate extending to some 370 institutions[88] and four honorary members for the Joint Commission responsible for monitoring some 13,000 places of detention.[89] Indeed, it must be underlined: it is 'by the allocation of adequate resources that States parties demonstrate their genuine commitment to the prevention of torture'.[90] If not, a consequently low quality of work will decrease the overall deterrent effect of the NPM's work and thereby negatively affect its preventive function.[91]

3.1.3 Period of Office and Protection From Removal

36 The third aspect of functional independence is that the members and staff of NPMs shall be appointed for a minimum period of office. The SPT noted that '[p]eriods of office, which may be renewable, should be sufficient to foster the independent functioning of the NPM.'[92] When the period of office of NPM members is determined,[93] it seems reasonable that the members and staff of NPMs be *appointed for a minimum period of four to six years*.[94]

[86] APT and IIDH (n 5) 250.

[87] CAT/OP/MLT/1 (n 21) para 30.

[88] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to the National Preventive Mechanism' (2013) UN Doc CAT/OP/DEU/2, para 42.

[89] CAT/OP/DEU/1 (n 74) para 25; CAT/OP/DEU/2 (n 88) para 46.

[90] SRT (Nowak) A/65/273 (n 22) para 83. Apart from a few cases of good practice ('[a] minority of NHRIs have received extra resources explicitly aimed at funding the NPM work. This is the case for example in Montenegro, Georgia, Austria and Sweden': see APT, 'Opportunities and Challenges' (n 34) 12), many governments have claimed, when existing institutions were designated to undertake NPM functions, that such undertaking does not require extra funding (Steinerte (n 3); this is the case in many States Parties, like The Netherlands, where no additional funding has been allocated to institutions designated as part of the Dutch NPM: Inspectorate of Security and Justice (n 56) 15; see also Murray, 'One Size Does Not Fit All' (n 5) 496, referring to, eg, Denmark and the UK) aiming perhaps for a 'cost-saving' option: Steinerte and Murray (n 3) 61–62. This approach is apparent in relation to both ombudspersons and HRCs, and poses significant problems for both: see Steinerte and Murray (n 3) 62. For example, in relation to the Costa Rican Ombudsman, see examination of the State report by the Committee Against Torture, including CAT, 'List of Issues to be Considered During the Examination of the Second Periodic Report of Costa Rica' (2008) UN Doc CAT/C/CRI/Q/2, para 28; see also CAT, 'Conclusions and Recommendations of the Committee against Torture: Costa Rica' (2008) UN Doc CAT/C/CRI/CO/2, para 26; New Zealand Human Rights Commission, 'Report of the Ombudsman 2008/2009' (2009) <http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/372/original/ar_2008-09.pdf?1348524067> accessed 11 November 2017; see also New Zealand Human Rights Commission, *First Annual Report of Activities Under the Optional Protocol to the Convention Against Torture (OPCAT): 1 July 2007 to 30 June 2008* (Human Rights Commission 2008) 24.

[91] As the SPT stated, insufficient budget, lack of *honoraria* for members of the NPM, and absence of support from an administrative team may jeopardize the 'quality of reports, the motivation of the members and, in the long term, the credibility of the NPM as a whole': in CAT/OP/MDA/1 (n 58) para 14.

[92] CAT/OP/12/5 (n 20) para 9.

[93] CAT/OP/1/Rev.1 (n 5) para 10, referring to CAT/OP/12/5 (n 20) para 9.

[94] Although NPMs are non-judicial institutions, the relevant provisions of international human rights law guaranteeing the independence of the judiciary, above all Art 14 CCPR (International Covenant on Civil and Political Rights, 999 UNTS 171) and the respective jurisprudence of the Human Rights Committee, may be

37 As with the members of the SPT, staggering the end-date of terms of office of the NPM members ensures that there is continuity in the membership and institutional knowledge. The relevant legislation should specify the period of office.[95]

38 The issue of dismissal is crucial for the independence of the NPM. The members and staff of the NPM shall be protected against any arbitrary removal during their term of office. Grounds for dismissal shall be specified in the relevant legislation.[96]

3.2 Independence of the NPMs' Personnel

39 Besides independence of the NPM, Article 18(1) OP obliges the States Parties to guarantee that their 'personnel' is 'independent'. To reach this aim of independence for NPM members, the procedure for their selection has to fulfil certain criteria.

3.2.1 'personnel'

40 An NPM's independence is affected by how individuals carry out the day-to-day work, the manner in which they operate, including their experience, as well as their ability to keep certain distance and not to be influenced by others.[97] Hence, 'personnel' is to be understood as every person involved in the substantive work of the NPM: members of the NPM (ie, persons officially appointed to the institution),[98] staff (ie, persons hired by NPM members to support their work),[99] as well as external experts and other potential contributors.[100]

3.2.2 'independence'

41 According to the SPT's Guidelines, '[m]embers of NPMs should . . . ensure that they do not hold or acquire positions which raise questions of conflicts of interest'.[101]Hence, the NPM's independence and impartiality stand and fall with the personnel carrying out the NPM's mandate. Conflicts of interest should, therefore, be avoided by all personnel of the NPM.[102]

taken into account. cf Manfred Nowak, *UN Covenant of Civil and Political Rights: CCPR Commentary* (2nd rev edn, N.P. Engel 2005) 319ff. The SPT recommends that the State 'ensure that the NPMs have a . . . membership with sufficiently long terms of membership' (CAT/OP/MLT/1 (n 21) para 28), finding that the practice in one country of a one-year term of membership does not conform with the NPM Guidelines and the OPCAT (CAT/OP/MLT/1 (n 21) para 27). Regarding a draft law providing for a length of mandate of three years, the SPT suggests adding the possibility of reappointment for a second and last mandate 'in order to retain persons with accumulated experience in the field of prevention of torture' (CAT/OP/MDA/1 (n 58) para 31(d)). The Paris Principles only define the following requirements: 'In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the *specific duration of the mandate*. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured' (Paris Principles (n 5) Principle 3 (Composition and guarantees of independence and pluralism)). One suggestion for NHRIs is that 'five years is a reasonable period within which members can be effective but not too influenced by concerns about future job prospects'; ICHRP and OHCHR (n 29) 12.

[95] CAT/OP/1/Rev.1 (n 5) para 10, referring to CAT/OP/12/5 (n 20) para 9.

[96] ibid.

[97] Murray, 'One Size Does Not Fit All' (n 5) 501.

[98] APT and IIDH (n 5) 249.

[99] ibid.

[100] The SPT stated that '[p]ursuant to article 18 of the Optional Protocol, the State must guarantee the functional independence of the national preventive mechanism as well as the *independence of its staff*': CAT/OP/ECU/2 (n 38) para 16.

[101] CAT/OP/12/5 (n 20) para 19. In one case, the SPT recommended that the NPM law 'provide that membership of the NPM is incompatible with any other function which could affect its independence and impartiality': CAT/OP/BEN/1 (n 14) para 20.

[102] For definition of the term 'personnel', see para 41.

42 Conflicts of interest can only be prevented if individuals are institutionally and personally independent. Institutional independence leads to the situation that neither the members nor the staff of the NPM may be subject to any orders or instructions by any State authority or other stakeholder. Hence, due to potential conflict of interest, persons holding a position in the branches of state,[103] above all from the executive branch,[104] including the police, military, and other security forces, are precluded from the position as NPM members or other personnel.[105] Civil servants should not be appointed as members or staff of an NPM; also if they are not subject to any orders or instructions during their terms of office, perceived independence would suffer inappropriately.

43 *Personal independence* is more difficult to grasp. It has been seen as lack of close friendships, political allegiances or pre-existing professional relationships vis-à-vis leading figures in the respective areas, with focus on the executive branch.[106]

44 Even if a person working for an NPM acts in an impartial manner despite existing institutional or personal dependence, perceived independence is at stake. The loss of this valuable characteristic can seriously compromise the work of the NPM.

45 *Privileges and immunities* are crucial for independence. Article 35 OP provides further details in this regard.

46 Independence of the NPMs` personnel is assured by a certain selection procedure and period of office.

3.2.3 Procedure for Selection of NPM Members

47 According to the SPT and with reference to Article 18(1) and (2) OP, members of the NPM should be selected through an '*open, transparent and inclusive process*'.[107] The head of the NPM should also be appointed by such a procedure.[108] This selection process should preferably be prescribed in the governing NPM legislation.[109] Such legislation should also specify the period of office of the members of the NPM as well as any grounds for their dismissal[110] and set out 'appointment criteria and membership processes'.[111]

48 The State party should advertise publicly posts becoming vacant within the NPM.[112] The published criteria should aim to select the most competent[113] and independent[114] persons. A public nomination process is highly important as it also guarantees the other qualities

[103] Steinerte (n 3) referring to Carver (n 18) 58.

[104] CAT/OP/SEN/2 (n 24) para 17; ibid, para 15: the Subcommittee noted in particular 'the placing of the Observatory in the Ministry of Justice under "Other offices" ' by decree.

[105] APT and IIDH (n 5) 90.

[106] APT, *Guide* (n 5) 40.

[107] CAT/OP/1/Rev.1 (n 5) para 13 ; see also CAT/OP/MDA/1 (n 58) para 20(c).

[108] CAT/OP/SEN/2 (n 24) para 17. UNGA, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', Res 43/173 of 9 December 1988 (Body of Principles), Principle 29 requires that '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.'

[109] CAT/OP/1/Rev.1 (n 5) para 13.

[110] CAT/OP/12/5 (n 20) para 9.

[111] CAT/OP/MLT/1 (n 21) para 26.

[112] CAT/OP/DEU/1 (n 74) para 32.

[113] While the SPT has rarely identified a lack of legal experts, it has noted the lack of or underlined the importance of the expertise of health professionals (CAT/OP/SWE/1 (n 14) para 36; CAT/OP/MEX/1 (n 14) para 30; CAT/OP/DEU/1 (n 74) para 33; CAT/OP/NZL/1 (n 68) para 13), especially on mental health issues (CAT/OP/NZL/1 (n 68) para 13) and psychologists (CAT/OP/SWE/1 (n 14) para 36; CAT/OP/MEX/1 (n 14) para 30; CAT/OP/DEU/1 (n 74) para 33; CAT/OP/ARM/1 (n 26) para 36).

[114] See para 42.

envisaged by the SPT: an open, inclusive, and public appointment procedure of competitive character.[115]Additionally, it is suggested that interviews be held in public.[116] Public can also keep an eye on the aim that the *selection* is in accordance with published criteria.[117]

49 The consultation process of the State party should be very inclusive, involving *civil society organizations* such as NGOs, social and professional organisations, and universities, as well as other experts.[118] The process can be led by an independent judicial appointments commission[119] or in case of an institutional and political separation between the executive Government and the parliament, a Parliamentary Committee.[120]

50 The *selection body* taking the substantive decision (ie, appointing the NPM members) must be free from any perceived or real conflict of interests.[121]

51 There are no prerogatives regarding the *formal appointment*, but direct appointment by the executive branch of Government is incompatible with the Paris Principles.[122]

[115] CAT/OP/MLT/1 (n 21) para 28; see also CAT/OP/MDA/1 (n 58) para 19: 'a limited number of candidatures was received which indicates that more efforts need to be made to publicly announce the vacancies, disseminate information and raise visibility of the selection process'; see also para 20(c).

[116] Murray and others (n 15) 121.

[117] CAT/OP/12/5 (n 20) para 16.

[118] ICHRP and OHCHR (n 29) 14. The Paris Principles (n 5), which leave open the process through which appointments can be made to beyond elections, require for the procedure of selection; Principle 1 (Composition and guarantees of independence and pluralism): 'The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
(b) Trends in philosophical or religious thought;
(c) Universities and qualified experts;
(d) Parliament;
(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).'

See also CAT/OP/MLT/1 (n 21) para 28; CAT/OP/DEU/1 (n 74) para 32.

[119] APT, *Guide* (n 5) 41.

[120] ICHRP and OHCHR (n 29) 14.

[121] The SPT has only voiced its concern with selection by the President and/or the executive of the State party (CAT/OP/BRA/1 (n 76) para 16: The SPT voiced concern with a draft NPM law proposing as method for selecting NPM members a system whereby the President of the State selects 'NPM members from a list of candidates prepared by [a body], whose members, in turn, are selected and appointed by the President.' The SPT found stronger words in the case of 'appointments being made at the sole discretion of the Minister for Home Affairs and National Security'. It reminded the State Party that its current practice is not in conformity with the NPM Guidelines and the OPCAT (CAT/OP/MLT/1 (n 21) para 27). And the fact that the relevant law provides that the NPM 'will be a collegial body, comprised of one President and two members [who are] to be appointed by the President of the Republic, following a decision of the Council of Ministers and the opinion of the relevant Parliamentary Commissions' seems to have been one reason for the SPT to note that the legislation does not 'clearly provide for sufficient functional, personal and financial independence required for a NPM to be in compliance with OPCAT (Article 18)'; CAT/OP/ITA/1 (n 25) para 13) and noted that 'any perceived or real conflict of interests of the selection panel could cause damage to the legitimacy of the elections and, thus, should be avoided' (CAT/OP/MDA/1 (n 58) para 19). Therefore, the manner of selection is central, namely because it 'gives [the NPM members] independence from influence or control by the arm of Government the office is designed to investigate - the executive/administrative branch'—and other governmental and non-governmental bodies that could influence its activities. See Linda C Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 Harvard Human Rights Journal Spring 1, 25.

[122] ICHRP and OHCHR (n 29) 14.

3.3 Expertise and Pluralism

3.3.1 'required capabilities and professional knowledge'

52 For the NPM to be effective, professional work is necessary when exercising its mandate by conducting visits[123] or issuing recommendations.[124] An NPM can only have a deterrent, ie preventive, effect in the long run if visits are conducted professionally and the recommendations are of a certain quality. Hence, the prerogative for expertise and pluralism concerns the same persons that Article 18(1) OP demands independence for the personnel of the NPM, ie the NPM's members, staff,[125] external experts, and other potential contributors.

53 The NPM should dispose over an adequate range of expertise within its membership which should only occasionally, but not regularly, be supplemented by engaging outside experts.[126] Adequate expertise among the NPM members is also a prerogative as decision-making should be in the hand of a collegial body reflecting expertise and pluralism.[127]

54 The expertise of the NPM should be manifold to enable a multidisciplinary approach[128] and to be able to adequately deal with the numerous issues covered by the broad mandate provided by the OP.[129] Also Principle 29 of the Principles for the Protection of

[123] It may be referred to Principle 29 of the Body of Principles (n 108), which requires that '*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'; see also Joint Committee on Human Rights, *UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq (twenty-eighth report); Memorandum from Rachel Murray, Director of the OPCAT Project Team, University of Bristol, dated 3 April 2008* (2007-08, HL 157, HC 527). See also Murray, 'One Size Does Not Fit All' (n 5).

[124] APT, 'Opportunities and Challenges' (n 34) 10.

[125] According to the SPT, inadequate in-house-expertise 'limits the NPM capacity to carry out its work effectively'—moreover, if the NPM can only occasionally engage external experts, primarily due to limited resources: CAT/OP/DEU/1 (n 74) para 33; in this sense, CAT/OP/DEU/2 (n 88) para 28.

[126] In its Guidelines and Assessment Tool the SPT notes that, '[b]earing in mind the requirements of Article 18 (1) and (2) of the Optional Protocol', '*members* of the [NPM] should collectively have the expertise and experience necessary for [its] effective functioning': CAT/OP/12/5 (n 20) para 17; CAT/OP/1/Rev.1 (n 5) para 13. However, in its Guidelines, it states that 'the NPM should ensure that *its staff* have between them the diversity of background, capabilities and professional knowledge necessary to enable it to properly fulfil its NPM mandate': CAT/OP/12/5 (n 20) para 20. In the Assessment Tool, the SPT adds that the NPM should 'ensure that its *team* has the *diversity* of background, … capabilities and professional knowledge, necessary to enable it to properly fulfil its mandate': CAT/OP/1/Rev.1 (n 5) para 13, referring to CAT/OP/12/5 (n 20) paras 17 and 20. Concretely, the SPT recommends 'enabling candidates of different backgrounds to be considered for *membership* in the NPM, in order to increase the likelihood of a variety of professions and experience, including greater gender and ethnic balance and adequate representation of minority groups within the NPM and its visiting teams': CAT/OP/DEU/1 (n 74) para 32. In another report, the SPT recommends that the State party 'ensure that the NPMs have a multi-disciplinary, independent, impartial and competent *membership* with sufficiently long terms of membership': CAT/OP/MLT/1 (n 21) para 28, emphasis added.

[127] APT, *Guide* (n 5) 51. In fact, the SPT stated clearly in its ninth Annual Report that '[w]hen power is vested in one individual, such as an Ombudsperson, the requirements of a plurality and a multidisciplinary approach are by definition impossible': CAT/C/57/4 (n 16) para 15. In such a case, these requirements are transferred to the NPM's staff; APT and IIDH (n 5) 250.

[128] In its first report, the SPT elaborated that '[p]revention necessitates the examination of rights and conditions of deprivation of liberty', and such examination should 'take a *multi-disciplinary approach*', in CAT/OP/SWE/1 (n 14) para 36; see also CAT/OP/MLT/1 (n 21) para 28; SPT, 'Report on the Visit to Kyrgyzstan' (2014) UN Doc CAT/OP/KGZ/1, para 18; CAT/OP/ECU/2 (n 38) para 38.

[129] The SPT notes in its Assessment Tool that the NPM should 'ensure that its team has the *diversity* of background … capabilities and professional knowledge, necessary to enable it to properly fulfil its mandate': in CAT/OP/1/Rev.1 (n 5) para 13, referring to CAT/OP/12/5 (n 20) paras 17 and 20. In one mission report,

All Persons under Any Form of Detention or Imprisonment requires that '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'.[130]

55 The SPT places a different emphasis than that foreseen in Article 5(2) OP relating to the Subcommittee on Prevention.[131] Pursuant to the SPT Guidelines, 'inter alia, relevant legal and health-care expertise' should be included.[132] In order to lessen the likelihood of ill-treatment, the SPT notes the need of expertise in relation to persons in a situation of vulnerability, such as women, juveniles, members of minority groups, foreign nationals, persons with disabilities, and persons with acute medical or psychological dependencies or conditions.[133]

56 Hence, the NPM's team should include professionals from the medical, psychiatric, legal, and psychosocial fields[134] as well as experts relating to indigenous peoples,[135] children and adolescents,[136] women's rights[137] and gender,[138] social work, security, and pedagogy.[139] International expertise is also relevant, namely in human rights legal standards, especially in view of the human rights-based approach of the NPM's work.[140]

57 The obligation for multidisciplinary expertise among the membership of the NPM requires of NHRIs and in particular Ombudsman's offices, who are predominantly made up of lawyers to draw on additional expertise. Solutions can be the formal inclusion of civil society representatives by the 'Ombudsman plus' model,[141] or the involvement of specific experts in particular visits.[142] In some smaller States that have difficulties finding available local expertise, hiring experts from neighbouring States has been considered.[143]

the SPT recommended 'enabling candidates of different backgrounds to be considered for membership in the NPM, in order to increase the likelihood of a *variety of professions and experience* … within the NPM and its visiting teams', in compliance with Article 18(2) OP: in CAT/OP/DEU/1 (n 74) para 32.

[130] Body of Principles (n 108) Principle 29.

[131] See above Art 5 OP. Art 4(3) of the Mexican Draft (E/CN.4/2001/67 (n 6) Annex I) contained a similar provision for the composition of NPMs (see para 3 above), but this provision was not included in the final text.

[132] CAT/OP/12/5 (n 20) para 20.

[133] SPT, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/12/6, para 5(j).

[134] CAT/OP/ECU/2 (n 38) para 38.

[135] CAT/OP/MEX/1 (n 14) para 30.

[136] ibid; see also CAT/OP/SWE/1 (n 14) para 36.

[137] CAT/OP/MEX/1 (n 14) para 30.

[138] ibid; CAT/OP/SWE/1 (n 14) para 36.

[139] CAT/OP/DEU/1 (n 74) para 33.

[140] Murray and others (n 15) 135; APT and IIDH (n 5) 50; see also CAT/OP/KGZ/1 (n 128) para 18: 'The SPT urges the State Party to ensure that the composition of the NPM includes multidisciplinary expertise in torture prevention and adequately represents the country's key ethnic and minority groups.' See Article 19 OP, 3.1.

[141] APT, Opportunities and Challenges (n 34) 14, fn 65; Murray and others (n 15) 135. For this model, clear division of work and clarification of responsibilities are crucial for the maintenance of independence, especially perceived independence; Steinerte (n 3) 22.

[142] Murray and others (n 15) 135. In this sense, the SPT states in its Assessment Tool that in its activities the NPM 'should also take benefit from cooperation with civil society, universities and qualified experts, Parliament and Government departments, among others. Special attention should be paid to developing relations with civil society members dedicated to working with vulnerable groups.'

[143] Murray and others (n 15) 135.

58 To make their work most efficient, the NPM's staff and members should be regularly trained and review their working methods.[144]

59 The OP envisages that the NPM should function as a soft-power instrument, using recommendations and constructive exchange to fulfil its task. Therefore, capabilities that are also necessary for the NPM personnel are, as demanded for the members of the SPT by Article 5(2) OP, high moral character or integrity[145] 'and *respect within society*. Members should also have demonstrated a *personal commitment to the prevention of torture* and ill-treatment and improvement of conditions in places of detention.'[146]

3.3.2 Composition of the Membership

60 Article 18(2) OP explicitly provides that States parties, in establishing NPMs, shall 'strive for a *gender balance* and the adequate representation of ethnic and minority groups in the country'. While an NPM membership with expertise in gender issues and minority rights could already guarantee sensitivity for special issues regarding these groups, personal representation would guarantee it further. More importantly, the principle of pluralism ensures the NPM to have the knowledge and the ability to gather the information necessary to make effective recommendations.[147] Sensitivity to different groups will help the NPM to fulfil its mandate more effectively, as it may make it possible to obtain better information from interviewees when they can talk about their treatment with someone of their ethnic or minority group, can communicate directly in the same language of a linguistic minority, or can share extremely intimate issues with a person of the same gender.[148]

3.3.3 'adequate representation of ethnic and minority groups'

61 While the term 'ethnic and minority groups' *can be understood as referring* to 'national, ethnic, religious and linguistic minorities',[149] in line with international human rights law, the phrase could be interpreted in a broader manner in the context of the OP, including members of other groups in a situation of vulnerability such as migrants,

[144] The SPT considers it 'to be essential that the NPMs, as a first priority, educate their members and staff concerning the role and functioning of NPMs under the OPCAT and the Guidelines on national preventive mechanisms'; in CAT/OP/MLT/1 (n 21) para 20. The SPT also recommends that the State party increase the capacity of newly appointed NPM staff members and facilitate and intensify training of members and staff of the NPM; see CAT/OP/BRA/1 (n 76) para 88; CAT/OP/DEU/1 (n 74) para 40. Once it is operational, the NPM, its members and its staff should, according to the SPT Guidelines, be required to 'regularly review their working methods and undertake training in order to enhance their ability to exercise their responsibilities under the Optional Protocol'; CAT/OP/12/5 (n 20) para 31; CAT/OP/DEU/1 (n 74) para 14; see also CAT/OP/ECU/2 (n 38) para 70. The SPT specified that in order to ensure consistency of working methods and transfer of knowledge among all, adequate training on standard operating procedures for all persons participating in visits, including associated experts, is essential and should be sought, including through the development of handbooks and assistance of international partners; in CAT/OP/ARM/2 (n 34) para 44. Finally, the SPT recommended a NPM to provide its staff with security training; in CAT/OP/ECU/2 (n 38) para 58. The SPT also recommends that the NPM continue to develop its capacity through increasing cooperation with the Subcommittee, as well as through engagement with other NPMs and state preventive mechanisms; in CAT/OP/BRA/1 (n 76) para 88.

[145] Murray, 'One Size Does Not Fit All' (n 5) 501.

[146] APT, Guide (n 5) 51.

[147] ibid.

[148] ibid, 51-52.

[149] See, above all, Art 27 CCPR (International Covenant on Civil and Political Rights, 999 UNTS 171) and UNGA, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', Res 47/135 of 18 December 1992. Also cf Nowak, CCPR-Commentary (n 94) 642ff.

persons with special needs, or being LGBTI.[150] The 'adequate representation' of the respective country's minority groups is of relevance here. Hence, the SPT urged a State party to ensure that the composition of the NPM 'adequately represents the country's key ethnic and minority groups'.[151] In this sense, while the OPCAT does not specifically specify the need for the inclusion of indigenous communities, this is an issue to be considered in countries with indigenous inhabitants.

62 The principle of pluralism in the composition of national human rights institutions plays an important role in the Paris Principles and is also appropriate for NPMs.[152]

63 Due to its importance, the SPT also recommends that provision be made for gender balance and ethnic and minority representation in the NPM composition.[153]

3.4 Due Consideration of the Paris Principles

64 Article 18(4) OP explicitly refers to the Paris Principles that States parties 'shall give due consideration' to when 'establishing NPMs', ie during the whole procedure of any establishment according to Art 17 OP. The Paris Principles consist of a comprehensive series of recommendations on the role, composition, status, and functions of national human rights institutions (NHRIs).[154] In particular, the Paris Principles stress the independence, pluralism, and efficiency of national human rights institutions and demand that their composition and mandate should be clearly set forth in a constitutional or legislative act.

65 In fact, by explicitly referring to the Paris Principles, Article 18(4) OP was interpreted as also possibly encouraging states to use NHRIs for the implementation of the OP[155]—which, to date, the majority of States parties to the OP have done.[156] However, it must be noted that an NHRI's compliance with the Paris Principles does not equal compliance with the OP, since the requirements on NPMs are found in Article 18(1)–(3) OP. Hence, on the one hand, compliance with the Paris Principles is the key determining

[150] APT and IIDH (n 5) 90.

[151] CAT/OP/KGZ/1 (n 128) para 18.

[152] See APT and IIDH (n 5) ch II (commentary on Article 13) and s 8, ch IV.

[153] CAT/OP/BRA/1 (n 76) para 17.

[154] NHRIs are 'State bodies with a constitutional and/or legislative mandate to protect and promote human rights': OHCHR, *Professional Training Series No 4 (Rev 1): National Human Rights Institutions: History, Principles, Roles and Responsibilities* (HR/P/PT/4/Rev.1, UN Publication 2010) 13. While a NHRI is 'part of the State apparatus and funded by the State', it 'must be, and be seen to be, independent of the NGO sector, just as it must be independent of the Government': ibid 13. An NHRI should build 'bridge' between civil society and Governments on the issue of promotion and protection of human rights (Paris Principles (n 5) Principle 1(f)(Methods of Operation)).

[155] NHRIs have been encouraged to engage in the issue of prevention of torture and other ill-treatment in several ways (APT, Asia Pacific Forum, and OHCHR, 'Preventing Torture: An Operational Guide for National Human Rights Institutions' (2010)), including monitoring places of detention. Several provisions of the Nairobi Declaration, adopted at the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights (Nairobi, 21–24 October 2008), are directly relevant to torture prevention, such as providing training for law enforcement and prison staff; conducting unannounced visits to police stations and places of detention; reviewing standards and procedures; and promoting ratification of the United Nations Convention against Torture and its Optional Protocol. The annual review of the implementation of the Nairobi Declaration during meetings of the International Coordinating Committee provides an additional opportunity for NHRIs to be more actively involved in the prevention of torture: see APT, Asia Pacific Forum, and OHCHR (n 155) 83, referring as legal basis to Paris Principles (n 5) Principle 3(a)(ii) and (iv) as well as 3(b) (Competence and responsibilities). See also ICHRP and OHCHR (n 29) 18–19: 'NHRIs should have authority to make regular visits to all places of detention, at times of their choosing, preferably with minimal notice. Their powers should be those foreseen for national preventive mechanisms in the Optional Protocol to the Convention against Torture.'

[156] APT, 'Opportunities and Challenges' (n 34) 4.

factor in the accreditation process by the Global Alliance of NHRIs (GANHRI, before the Sub-Committee on Accreditation (SCA)) of the International Coordinating Committee (ICC) with status 'A', 'B', or 'C'.[157] On the other hand, the SPT made clear that even after the accreditation process has become more robust and arguably more independent,[158] accreditation by the ICC with 'A' 'does not automatically qualify an NHRI as an NPM'.[159] Therefore, the accreditation process by the ICC cannot be seen as indicative for the level of fulfilment of the OP requirements by the respective NHRI, ie not even a status 'A' of an NHRI means that it is in full compliance with the OP.[160]

STEPHANIE KRISPER

[157] See International Human Rights Instruments, 'Conclusions of the International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies: Berlin, 23–24 November 2006' (2007) UN Doc HRI/MC/2007/3, Annex I (Draft Harmonized Approach to National Human Rights Institutions (NHRIs) Engagement with Treaty Body Processes'; and Rachel Murray, *The Role of National Human Rights Institutions and at the International and Regional Levels: The Experience of Africa* (Hart 2007). The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) was originally established by NHRIs at their International Conference in Tunis in 1993. It coordinates the activities of Paris Principle-compliant NHRIs internationally, including the accreditation of its members (ie providing official recognition that NHRIs meet or continue to comply fully with the Paris Principles). Accreditation takes place under the rules of procedure of the International Coordinating Committee's Sub-Committee on Accreditation (SCA). The SCA can accord NHRIs with one of three statuses: 'A status' denotes a voting member of the ICC that complies fully with the Paris Principles; 'B status' denotes an observer member that does not fully comply with the Paris Principles or has not yet submitted sufficient documentation to make that determination; and 'C status' denotes a non-member that does not comply with the Paris Principles. See OHCHR (n 154) 44–45.

[158] Murray and others (n 15) 130.

[159] SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, para 49—including Corrigendum. The SCA clarified in its General Observations regarding its assessment of NHRIs as NPMs that it will consider, besides of general compliance with the Paris Principles, 'as it thinks appropriate'—eg as far as applicable to NHRIs—'any guidance that has been developed by the relevant treaty body', referring as example to the SPT's Preliminary Guidelines: SPT, 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc CAT/C/40/2, ch IV(B) (Preliminary guidelines for the ongoing development of national preventive mechanisms) paras 28–29. 'It notes, however, that its role is to assess a NHRI against the Paris Principles (n 5), whereas the relevant treaty body undertakes its assessment of a national preventive or monitoring mechanism against the relevant international instrument upon which it is based': ICC, General Observations (n 71) 46. The SPT clarified this, arguing that, '[w]hereas the accreditation process is clearly seen as of value to/by NHRIs … it is important to distinguish between the general human rights mandate of NHRIs and the specific preventive mandate of NPMs': CAT/C/42/2/Corr.1 (n 159) para 49—including Corr. Rather, it 'is a supplementary mechanism but should not be used as a procedure for accreditation of national mechanisms in general, since it is for the Subcommittee to make such assessments in specific cases': CAT/C/44/2 (n 20) para 61.

[160] CAT, 'Concluding Observations: Azerbaijan' (2009) UN Doc CAT/C/AZE/CO/3, para 10: 'Notwithstanding the "A" rating received by the Ombudsman's office from the body that oversees implementation of the Paris Principles, the Committee is deeply concerned at the information from the State party that the Ombudsman's office is not permitted by its founding documents to monitor all State organs. The Committee is concerned that the Ombudsman lacks the requisite degree of independence to be the national institution responsible for investigating complaints of torture and other human rights violations, as well as to serve as the national prevention mechanism under the Optional Protocol to the Convention against Torture'. In this sense, NHRIs also recognized in the Nairobi Declaration (n 155) that states should consider designating NHRIs as NPM only when the necessary powers and resources are made available to them.

Article 19

Mandate and Power of National Preventive Mechanisms

The national preventive mechanisms shall be granted at a minimum the power:

(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;

(c) To submit proposals and observations concerning existing or draft legislation.

1. Introduction	911
2. Travaux Préparatoires	912
2.1 Chronology of Draft Texts	912
2.2 Analysis of Working Group Discussions	913
3. Issues of Interpretation	914
3.1 Regularly Examine Places of Detention	914
3.2 Recommendations	916
3.2.1 Reference to International Standards	916
3.2.2 Relevant Authorities	917
3.2.3 Communication of Recommendations	917
3.2.3.1 Preliminary Recommendations	917
3.2.3.2 Visit Reports	918
3.3 Submitting Proposals and Observations	918
3.4 Further Activities	919

1. Introduction

1 The mandate and power of NPMs, as defined in Article 19 OP, must be read together with the corresponding obligations of States parties under Articles 17, 18, and 20 to 23 OP. The main function of NPMs is to conduct regular visits to all places of detention in their respective country, to examine the conditions of detention therein and the treatment of detainees with a view to strengthening their protection against torture and ill-treatment. On the basis of such visits, the NPM shall make recommendations to the relevant authorities with the aim of improving conditions of detention and preventing torture. In addition, the NPMs are granted the power to comment on existing or draft legislation, allowing them to become involved in preventive legislative efforts.

2 As was pointed out above, the purpose of visits to places of detention is threefold: preventive, fact-finding, and as a means of cooperating with the Government

concerned.[1] Whereas Art 1 OP stresses the preventive function of visits to places of detention as the overall objective of the Protocol,[2] Art 19 OP concentrates more on the *fact-finding task of NPMs*.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Mexican Draft (13 February 2001)*[3]

Article 5

National mechanisms shall have the following powers, as a minimum:

(a) To examine the situation of persons deprived of their liberty with a view to strengthening, if necessary, their protection from torture and other cruel, inhuman or degrading treatment or punishment;

(b) To make recommendations to the competent authorities with a view to improving the treatment and conditions of persons deprived of their liberty and preventing torture and other cruel, inhuman or degrading treatment or punishment;

(c) To propose or comment on draft or existing legislation on this question;

(d) To take any initiatives that would help States Parties fulfil their obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other relevant international instruments.

4 *EU Draft (22 February 2001)*[4]

Article 15 (new)

For the purpose of this Protocol, a State Party wishing to establish a national mechanism undertakes to ensure that:

(a) The national mechanism will be composed of independent experts fulfilling the requirements set out in Articles 4 paragraph 3 and 5 paragraph 2;

(b) It has full powers to issue recommendations to the concerned authorities;

(c) It has unrestricted access to all places where persons are deprived of their liberty under all situations, including in peacetime, times of public disorder or states of emergency and during war in accordance with international humanitarian law;

(d) Unrestricted access to persons deprived of their liberty;

(e) Full freedom to interview the persons deprived of their liberty without witnesses, with the assistance of interpreters, if required, as well as all relevant personnel or persons;

(f) Unrestricted liberty to contact, inform and meet with the Sub-Committee with a view to implementing Article 9 paragraph 1 (d);

(g) The reports on its visits shall be public.

[1] See above Art 1 OP, §§ 44–46. [2] UNGA, Res 57/199 of 18 December 2002, Art 1.

[3] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

[4] ibid, Annex II.

5 *US Draft (16 January 2002)*[5]

Article 3

National mechanisms may, inter alia:

(a) Examine the situation of persons deprived of their liberty pursuant to an order of a public authority with a view to strengthening, if necessary, their protection from torture and other cruel, inhuman or degrading treatment or punishment;

(b) Make recommendations to the competent authorities with a view to improving the treatment and conditions of such persons and preventing torture and other cruel, inhuman or degrading treatment or punishment;

(c) Propose or comment on draft or existing legislation on matters relating to the treatment of such persons;

(d) Request, where necessary, technical advice from the Subcommittee on Prevention designed to assist States Parties with the effective implementation of their obligations under the Convention with a view to strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.

2.2 Analysis of Working Group Discussions

6 During its ninth session from 12 to 23 February 2001, the Working Group discussed the alternative draft the delegation of *Mexico* had submitted with the support of GRULAC.

7 Most delegations considered that the mandate of national mechanisms should be as broad as possible and that they should apply universal standards for the protection of detainees.[6]

8 At the tenth session of the Working Group from 14 to 25 January 2002, the concept of national preventive mechanisms was further elaborated.[7] With regard to the functions of these mechanisms, the delegations of *China*, the *United States* of America, and *Egypt* proposed that national and regional bodies should take the leading role in visiting places of detention. However, the delegation of the United States of America strongly opposed the concept of establishing mandatory visiting mechanisms for these bodies with unrestricted authority to visit places of detention and suggested instead a system of limited authority that would provide checks and balances and ensure accountability.[8]

9 In the proposal presented by the Chairperson-Rapporteur, the concept of national preventive mechanisms was described in Part IV, where it was stated that States would be required to maintain, designate, or establish national mechanisms, based on the Paris Principles, to work in close cooperation with the Subcommittee.[9] During the discussions on the proposal, the delegation of *Japan* stated that there were no reasonable grounds for the establishment of a mandatory national visiting mechanism that would have basically the same mandate as an international visiting mechanism.[10]

[5] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E.

[6] E/CN.4/2001/67 (n 3) para 29.

[7] E/CN.4/2002/78 (n 5) paras 37ff.

[8] ibid, para 40. See above § 5.

[9] E/CN.4/2002/78 (n 5) para 50 and Annex I.

[10] ibid, para 80.

3. Issues of Interpretation

10 Article 19 OP precisely lists the operational powers of an NPM: to regularly examine the treatment of the persons deprived of their liberty, to make recommendations to the relevant authorities and to submit proposals and observations concerning existing or draft legislation. These are declared to be the minimum powers to be granted to an NPM ('shall be granted at a minimum the power …').

3.1 Regularly Examine Places of Detention

11 Whereas Article 11(1)(a) OP defines the mandate of the SPT to 'visit the places referred to in article 4', Article 19 OP formulates the power to 'regularly examine the treatment of the persons deprived of their liberty'. However, it is evident that the latter provision attributes the conduct of visits as the core mandate of the NPM, which is also referred to in Article 3 OP as 'visiting' body and in the Preamble when noting the objective of the OP to be 'to establish a system of regular visits undertaken by independent international and national bodies.' In this sense, the SPT clarifies in its Self-Assessment Tool that '[t]he major function of a national preventive mechanism in discharging its preventive role is to carry out visits … to places of detention. The purpose of such visits is to regularly examine the treatment of persons deprived of their liberty'.[11]

12 The word '*examine*' reflects the fact that a preventive function of visits also implies a fact-finding task.[12] While this power is mainly realized by visiting places of detention, it also includes the analysis of information from other reliable sources.[13] In fact, the SPT stated that the NPMs should ensure that information is collected 'from all available sources, such as the administration and staff of the institution visited, detainees from all areas and units, other visitors, if appropriate, and outside actors, such as civil society and other monitoring mechanisms'.[14] On this information, the NPM should keep record in an archive[15] and put in place an 'effective data management system'[16] to build an institutional memory.[17]

13 The phrase '*regularly examine*' in Article 19(a) OP mainly means examination by regular visits.[18] While the OP leaves the decision on the frequency of the visits to places

[11] SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1, para 8.

[12] See above Art 12 OP, § 3.

[13] CAT/OP/1/Rev.1 (n 11) para 45: 'The national preventive mechanism should ensure that important concrete and contextual observations arising from its visits to institutions and stemming from other reliable sources, its recommendations and the responses from the authorities are categorized, filed and systematically processed for use in dialogue with the authorities, in the ongoing planning of work and in the further development of its strategies.'

[14] ibid, para 24. [15] CAT/OP/1/Rev.1 (n 11) para 21. [16] ibid, para 26.

[17] See also below Art 20 OP, § 33.

[18] In this sense, the Preamble refers twice to 'regular visits to places of detention' and Article 1 OP refers to 'a system of regular visits undertaken by … national bodies'. Principle 29 of the Body of Principles also provides that 'places of detention shall be *visited regularly* by qualified and experienced persons appointed': see UNGA, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', Res 43/173 of 9 December 1988 (Body of Principles), Principle 29; The SPT stated in its Guidelines that the State should 'ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides (SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 25) and that the NPM should 'establish a work plan or programme which, over time, encompasses visits to all, or any, suspected, places of deprivation of liberty' in the realm of the OP (para 33; see also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Honduras, Report for the National Preventive Mechanism' (2010) UN Doc CAT/OP/HND/3, para 18).

of deprivation of liberty with the NPM, it makes clear that the NPM should not ignore any institution or geographical area.[19] For the monitoring system established by the OP to have *a preventive character*, it is crucial that visits are conducted in a *regular* manner. Regularity is highlighted as necessary element for inspections of places of detention to be the 'most effective preventive measure'[20] against torture and other ill-treatment.

14 The SPT stated that NPMs have to visit places of detention with appropriate frequency'[21] or periodically.[22] The aim of a '*sufficient* frequency' is 'to make an *effective contribution* to the prevention of torture and other cruel, inhuman or degrading treatment or punishment'.[23] NPMs must conduct visits in such a frequency to achieve two of their central purposes: first, to have by repetition of appearance a preventive effect by deterrence (the mere fact of being able to enter places of detention unannounced[24] reduces the risk of torture and other forms of ill-treatment); second, to have up-to-date information on the treatment of persons concerned.[25] The latter enables the NPM to make a system-wide analysis that aims to identify risks of torture and other ill-treatment and, thus, allows root causes to be addressed.

15 However, this minimum of frequency, the NPM should not visit every place of detention with the same mathematical regularity, but rather prioritize certain types of or individual places of detention. In this sense, the SPT recommends that NPMs 'collectively develop criteria for selecting the facilities to be visited that will ensure that they are all visited periodically'.[26] Such criteria are, according to the SPT's Self-Assessment Tool, 'the type and size of institutions, their security level and the nature of known human rights problems, while leaving room for flexibility in the allocation of resources to ensure that follow-up and urgent visits can be undertaken'.[27]

16 The terms 'persons deprived of their liberty' and 'places of detention' shall be interpreted in line with the respective definitions in Article 4(1) and (2) OP.[28]

[19] In this sense, CAT/OP/1/Rev.1 (n 11) para 46.

[20] SRT (Nowak), 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/65/273, para 75.

[21] See SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to the National Preventive Mechanism' (2013) UN Doc CAT/OP/DEU/2, para 49; see also below Art 20 OP, § 29.

[22] See CAT/OP/HND/3 (n 18) para 18; CAT/OP/DEU/2 (n 21) para 50; SPT, 'Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism, Report to the National Preventive Mechanism' (2017) UN Doc CAT/OP/ARM/2, para 39).

[23] CAT/OP/12/5 (n 18) para 34.

[24] See below Art 20 OP, 3.2.2.

[25] SRT (Nowak), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) UN Doc A/61/259, para 72: 'Preventive visits to places of detention have a double purpose. The very fact that national or international experts have the power to inspect every place of detention at any time without prior announcement, have access to prison registers and other documents, are entitled to speak with every detainee in private and to carry out medical investigations of torture victims has a strong deterrent effect. At the same time, such visits create the opportunity for independent experts to examine, at first hand, the treatment of prisoners and detainees and the general conditions of detention.'

[26] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report to the National Preventive Mechanism' (2013) UN Doc CAT/OP/MDA/2, para 23.

[27] CAT/OP/1/Rev.1 (n 11) para 22. See also CAT/OP/HND/3 (n 18) para 18; CAT/OP/DEU/2 (n 21) para 50;

[28] See above Art 4 OP.

3.2 Recommendations

17 Article 19(b) OP mandates NPMs to make recommendations to the authorities aimed at, first, 'improving the treatment and the conditions of the persons deprived of their liberty' and, second, 'to prevent torture, cruel, inhuman or degrading treatment or punishment'. NPMs are, thus, empowered to make recommendations with the aim not only to contribute to immediately correcting problems affecting detainees, but, more importantly, to examine all aspects of detention and identify the factors and the situations that increase the risk for persons deprived of their liberty to be ill-treated or tortured.[29] In this sense, the SPT notes in its Self-Assessment Tool that recommendations should, in general, 'have a preventive focus, addressing systematic gaps and practices (root causes)'.[30] It clarifies in its Approach to the Concept of Prevention that the purpose of recommendations

> is not only to bring about compliance with international obligations and standards but to offer practical advice and suggestions as how to reduce the likelihood or risk of torture or ill-treatment occurring and will be firmly based on, and informed by, the facts found and circumstances encountered during the visits undertaken.[31]

Focus should be laid on the legal and administrative measures applied within the place; the material conditions; the regime of detention and the activities; the medical care; the organization and management of detainees and staff; and the relations between staff and detainees.[32]

18 The SPT noted that the NPM's recommendations should be well founded and, in general, feasible in practice. They should be 'relevantly focused, precise and non-complex, so as to avoid confusion in the dialogue about their implementation'.[33] As practical guidance to make recommendations as effective and useful as possible, the APT proposes a 'double-smart model' which suggests the application of the following criteria: **s**pecific, **m**easurable, **a**chievable, **r**esults-oriented, **t**ime-bound as well as **s**olution-suggestive, **m**indful of prioritization, sequencing and risks, **a**rgued, **r**oot-cause responsive, **t**argeted.[34]

3.2.1 Reference to International Standards

19 According to Article 19(b) OP, NPMs shall, when making recommendations, take 'into consideration the relevant norms of the United Nations'. Hence, while the OP was established to ensure compliance with the CAT's provisions, the NPMs' recommendations should 'reflect, among other things, relevant international norms and practices'.[35]

[29] Veronica Filippeschi, 'National Preventive Mechanisms: Role and Developments' in ACAT, *A World of Torture: ACAT 2016 Report* (ACAT 2016) 170.

[30] CAT/OP/1/Rev.1 (n 11) para 31.

[31] SPT, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/12/6, para 4; for more, see Art 11 OP, paras 21–24.

[32] Filippeschi (n 29) 170; see also APT, *Monitoring Places of Detention: A Practical Guide* (APT 2004).

[33] CAT/OP/1/Rev.1 (n 11) para 31; see also CAT/OP/HND/3 (n 18) para 28; CAT/OP/MDA/2 (n 26) para 31; SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Senegal, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/SEN/2, para 56; CAT/OP/DEU/2 (n 21) para 70; CAT/OP/ARM/2 (n 22) para 59; APF, APT, and OHCHR, 'Preventing Torture: An Operational Guide for National Human Rights Institutions' (2010) 91.

[34] APT, 'Detention Monitoring Briefings, Briefing No 1: Making Effective Recommendations' (APT 2008).

[35] CAT/OP/1/Rev.1 (n 11) para 31.

The list of relevant binding and non-binding international human rights law in Article 2(2) OP can be referred to here,[36] respective regional standards as developed by the CPT or the ECtHR being also seen as useful.

20 As the NPM is in continuous contact with the State party, it should also pay due attention to the recommendations made by the SPT, if they are made public or communicated to the NPM in accordance with Article 16 OP.[37]

3.2.2 Relevant Authorities

21 According to Article 19(a) OP, the recommendations shall be made 'to the relevant authorities'. The OP leaves it open to the NPM to determine which authorities are 'relevant' to any particular recommendation. The NPM's work will be more effective when recommendations are made both to the management of the place of detention such as the directors/managers of the places of detention concerned' and as well as to the supervisory authority, ie 'governmental authorities'.[38] The director of the place visited can address practical solutions while system-wide issues require decisions 'to be taken at the national level or amendments to legislation'.[39] Thus, in line with Article 22 OP, every recommendation should also be submitted, as also foreseen by the SPT in addressing the recommendations to the 'governmental authorities',[40] to the highest relevant respective authority (eg the Minister of Interior, Justice, Defence, or Health). The SPT noted that '[i]n particular cases it may be appropriate to recommend that authorities immediately put an end to certain practices and initiate a criminal investigation.'[41]

22 It is advisable that the legislative act establishing an NPM defines the process and the central authority. This discretion of the NPM should be provided for in the NPM's implementing legislation.[42]

3.2.3 Communication of Recommendations

3.2.3.1 Preliminary Recommendations

23 In the course of an immediate debriefing with the representatives of the place of detention at the end of a visit, preliminary observations and possible recommendations should be presented—particularly those that can be implemented immediately.[43] Such direct communication of recommendations in a debriefing with the representative of the

[36] UNGA, Res 57/199 of 18 December 2002, Art 2(2): 'The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty'.

[37] SPT, 'Report on the Visit to Sweden' (2008) UN Doc CAT/OP/SWE/1, para 40; see also CAT/OP/HND/3 (n 18) para 28; SPT, 'Report on the Visit to Benin' (2011) UN Doc CAT/OP/BEN/1, para 317(g).

[38] CAT/OP/1/Rev.1 (n 11) para 34.

[39] APT (ed), *Guide: Establishment and Designation of National Preventive Mechanisms* (APT 2006) 65.

[40] CAT/OP/1/Rev.1 (n 11) para 34.

[41] CAT/OP/1/Rev.1 (n 11) para 34.

[42] APT, *Guide* (n 39) 65; Moritz Birk and others, 'Enhancing Impact of National Preventive Mechanisms, Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward' (Ludwig Boltzmann Institute of Human Rights 2015) 22, 40, 46 <https://bim.lbg.ac.at/sites/files/bim/attachments/enhancing_impact_of_national_preventive_mechanisms.pdf> accessed 6 November 2017.

[43] See below Art 20, § 54. The SPT welcomes it when an NPM strives for non-bureaucratic approaches, making recommendations relating to specific concerns to the authorities responsible for those places they visit; see SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to State Party' (2013) UN Doc CAT/OP/DEU/1, para 14; see also CAT/OP/DEU/2 (n 21) para 11.

place visited is even more important if the place is privately run where the link to the competent supervisory state authority is weak and the representative may otherwise be excluded from the knowledge on the problems.

24 A personal debriefing or formal written feedback in the form of a detailed letter or a preliminary report gives the director of the place of detention the opportunity to address any shortcomings before the state or supervisory authorities is/are informed.[44] Furthermore, the transparent inclusion of the visited institutions in the dialogue inhibits 'monitoring fatigue', which could negatively influence the cooperation and willingness to implement recommendations.[45]

3.2.3.2 Visit Reports

25 While no provision in the OP commits the NPMs to issue visit reports,[46] the SPT clarified in its Guidelines that '[t]he NPM[sic] should produce Reports [sic]following their visits … and any other forms of Report [sic]which it deems necessary. When appropriate, Reports[sic] should contain recommendations addressed to the relevant authorities.'[47] In fact, for effectiveness of their visits, NPMs should issue a report on every visit and do so as promptly as possible.[48]

26 For the NPM to fulfil its mandate effectively, its visit reports need to be of a certain quality. The SPT sets the following standards for visit reports in its Self-Assessment Tool:

> Visit reports should focus on the most important issues, that is, the reporting of ill-treatment, gaps in policies, regulations and practices, and the appropriateness of conditions under which detainees are living, and should reflect any systematic lack of protection of the rights of detainees. Good practices should be noted and filed for systematic analysis. Cases of deliberate ill-treatment should be examined to identify gaps in the protection of persons deprived of their liberty.[49]

As to the depth of information included in the report, the SPT noted that it should enable readers, including those who are not familiar with the institutions visited, to form a realistic picture of the situations. Thus reports should describe the places visited giving details of, for example, the dimensions of cells, the lighting, the toilet facilities, and the ventilation.[50]

3.3 Submitting Proposals and Observations

27 Article 19(c) OP empowers NPMs to assess existing and proposed legislation and submit observations and proposals, ie draft legislation.[51] This power further strengthens the broad preventive approach and is only limited by the relevance of legislation for the NPM's mandate,[52] ie the State party's international obligations and other international

[44] Birk and others (n 42) 52, with example; see also below Art 20, § 53. [45] ibid, 52.

[46] Only Article 23 OP refers to report of the NPMs, namely their annual reports that the States parties have to publish and disseminate.

[47] CAT/OP/12/5 (n 18) para 36.

[48] In this sense, CAT/OP/HND/3 (n 18) para 28; CAT/OP/MDA/2 (n 26) para 31, CAT/OP/ARM/2 (n 22) paras 58–59; SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Ecuador, Report for the National Preventive Mechanism' (2015) UN Doc CAT/OP/ECU/2, para 55; CAT/OP/SEN/2 (n 33) para 55.

[49] CAT/OP/1/Rev.1 (n 11) para 30.

[50] CAT/OP/SEN/2 (n 33) para 55; see also Birk and others (n 42) 31.

[51] SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 50.

[52] CAT/OP/12/5 (n 18) para 35: 'The NPM should make proposals and observations to the relevant State authorities regarding existing and draft policy or legislation which it considers to be relevant to its mandate.'

standards relevant to the prevention of torture and ill-treatment, including the CAT, OP, and the Paris Principles.[53] This capacity of the NPM constitutes a key aspect of its mandate and represents an important function complementary to visits: problems identified during visits to places of detention may be the result of inadequate laws or regulations. The capacity to propose revisions to respond to gaps in legal protections and/or to propose legal safeguards constitutes an important tool for NPMs.[54]

28 To facilitate this aspect of the NPM's mandate, the SPT sees an obligation on the side of the State party to inform the NPM of any draft legislation under consideration which is relevant to its mandate and give the NPM the possibility to make proposals or observations on existing or draft policy or legislation.[55]

29 The NPM on its side should, first, develop an alert system to ensure to be informed on relevant legislation and draft laws.[56] Second, in order to fully discharge its mandate in accordance with Article 19(c) OP, the NPM should by its own initiative advocate for legislative changes and their implementation with parliamentarians and Government.[57] To that end, the NPM should, based on a comprehensive analysis of the problem detected, have a proactive strategy for setting priorities and should follow up on its comments and recommendations.[58]

3.4 Further Activities

30 Article 19 OP provides for the power that shall be granted to the NPMs by the States parties 'at a minimum'. In its Self-Assessment Tool, the SPT has listed the mandate of the NPM to include also the following activities:

- Publicizing relevant information about its work, especially through education and by making use of a broad range of media[59]
- Submitting proposals concerning relevant human rights action plans[60]
- Performing systematic reviews of interrogation rules, instructions, methods, and practices and of arrangements for the detention and treatment of detained persons[61]
- Examining rules or instructions issued in regard to the duties and functions of law enforcement personnel, civil or military, medical personnel, public officials, and other relevant persons[62]

[53] CAT/OP/1/Rev.1 (n 11) para 40.

[54] APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010) 247.

[55] CAT/OP/12/5 (n 18), para 28.

[56] CAT/OP/1/Rev.1 (n 11) para 40.

[57] ibid. As concrete examples, the SPT brought forward that the NPMs should ensure that the relevant legislative framework encompasses an absolute prohibition of torture and a definition of torture in accordance with the provisions in Article 1 CAT, and that the penalties for infractions are commensurate with the gravity of the offence. Furthermore, the term 'place of detention' should be defined in national law, bearing in mind the principles set out in the OP and the protection of human rights. NPMs should also dedicate themselves to the establishment of 'a national register of allegations of torture, any investigation or criminal proceedings undertaken and the outcome thereof', as well as of 'an independent body with the capacity to assess allegations of torture and ill-treatment in accordance with the [so-called Istanbul Protocol]': see CAT/OP/1/Rev.1 (n 11) para 39; see also OHCHR, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations Publication 2004).

[58] CAT/OP/HND/3 (n 18) para 14; CAT/OP/MDA/2 (n 26) para 17; CAT/OP/ARM/2 (n 22) para 35; in that sense, CAT/OP/HND/3 (n 18) para 14; CAT/OP/DEU/2 (n 18) para 33.

[59] CAT/OP/1/Rev.1 (n 11) para 9(b) with reference to UNGA, 'Principles Relating to the Status of National Institutions', Res 48/134 of 20 December 1993 (Paris Principles).

[60] ibid, para 9(c) with reference to Paris Principles (n 57).

[61] CAT/OP/1/Rev.1 (n 11), para 9(d) with reference to Art 11 CAT.

[62] ibid, para 9(e) with reference to Art 10(2) CAT.

- Assisting in the formulation of programmes for the teaching of the prohibition and prevention of torture and other forms of ill-treatment, carrying out research into human rights, and, where appropriate, taking part in the execution of such programmes and research in schools, universities, and professional circles[63]
- Examining the curricula of education institutions to ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials, and other relevant persons[64]
- Contributing to the reports that States parties are required to submit to UN bodies or presenting its own reports and, where necessary, expressing an opinion on the subject, in accordance with its independent status[65]
- Following up on the process of implementation of recommendations made by relevant UN and regional bodies to the States parties, providing advice at the national level and providing the recommending bodies with information[66]
- Considering establishing and maintaining contacts with other NPMs with a view to sharing experiences and reinforcing effectiveness[67]
- Establishing and maintaining contact with the SPT by regularly exchanging information and meeting with it.[68]

STEPHANIE KRISPER

[63] CAT/OP/1/Rev.1 (n 11), para 9(f) with reference to Paris Principles (n 57).
[64] ibid, para 9(g) with reference to Art 10(1) CAT.
[65] CAT/OP/1/Rev.1 (n 11), para 9(h) with reference to Paris Principles (n 57).
[66] ibid, para 9(i).
[67] CAT/OP/1/Rev.1 (n 11), para 9(j) with reference to CAT/OP/12/5 (n 18) para 6.
[68] CAT/OP/1/Rev.1 (n 11) para 9(k).

Article 20

Obligations of States Parties to Facilitate Visits by the National Preventive Mechanisms

In order to enable the national preventive mechanisms to fulfil their mandate, the States parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Access to all information referring to the treatment of those persons as well as their conditions of detention;

(c) Access to all places of detention and their installations and facilities;

(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;

(e) The liberty to choose the places they want to visit and the persons they want to interview;

(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

1. Introduction 922

2. Travaux Préparatoires 922

2.1 Chronology of Draft Texts 922

2.2 Analysis of Working Group Discussions 923

3. Issues of Interpretation 924

3.1 Access to Information 925

3.2 Access to All Places of Detention and Their Installations and Facilities 926

3.2.1 Unrestricted Access 926

3.2.2 Unannounced Visits 927

3.2.3 Private Interviews 928

3.2.4 Liberty to Choose the Place 930

3.2.4.1 Prioritization 930

3.2.4.2 Information Gathering on the Places of Detention 931

3.3 Cooperation between NPMs and the SPT 931

3.4 Visit Methodology: Further Considerations 932

3.4.1 Before the Visit 932

3.4.2 During the Visit 934

1. Introduction

1 Article 20 mirrors Article 14 OP, which foresees almost identical obligations for States parties regarding the Subcommittee.[1] This reflects the desire of most States parties/delegations to grant the NPMs a mandate as broad as the Subcommittee's as compromise.[2] Indeed, it was the intention of the *Mexican Draft* of 2001 that the assessment of the situation of detainees on the basis of regular visits to all places of detention be the primary function of NPMs, whereas the Subcommittee was meant to advise, assist and supervise NPMs and only conduct country missions and visits to places of detention by itself when there was a particular need.[3] However, the *EU Draft*, which was tabled in reaction to the Mexican Draft shortly thereafter, maintained the Subcommittee as the body primarily responsible for conducting regular missions and visits to places of detention, whereas NPMs were only foreseen if States parties wished to establish them.[4]

2 The final result is demonstrated by Article 20 OP: the OPCAT establishes similar duties for international and national OPCAT bodies, along with corresponding obligations for States parties and hence accords equal importance to international and national efforts to prevent torture and other ill-treatment.[5]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Mexican Draft (13 February 2001)*[6]

Article 6

1. In order to assess the situation of persons deprived of their liberty and to make the relevant recommendations, national prevention mechanisms shall carry out visits to places where persons are deprived of their liberty; they shall have:

(a) Unrestricted access to all relevant information concerning the number of persons deprived of their liberty pursuant to an order of a public authority or at its instigation or with its consent or acquiescence, as well as the number of places and their location;

(b) Unrestricted access to all information relevant to treatment and conditions of detention;

(c) Unrestricted access to all places where persons are deprived of their liberty;

(d) Unrestricted access to all premises where persons are deprived of their liberty;

(e) Freedom to interview persons deprived of their liberty, without witnesses, personally or with the assistance of an interpreter, if required, as well as of any personnel deemed necessary;

[1] cf in detail the various guarantees for the effective functioning of the Subcommittee's visits to places of detention above Art 14 OP.

[2] See below 2.2.

[3] cf Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I (the Mexican Draft) arts 6, 15, and 16. See below para 3.

[4] cf E/CN.4/2001/67 (n 3) Annex II (the EU Draft) arts 2, 3, 9, and 15. See below para 4.

[5] APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010) 94.

[6] E/CN.4/2001/67 (n 3) Annex I.

(f) Freedom to select the places they wish to visit;

(g) Unrestricted freedom to contact, inform and meet with the Sub-Committee.

2. Such visits may not be prohibited except in cases of absolute military necessity or serious disturbances in the place to be visited and then only as an exceptional and temporary measure. The organization, frequency and duration of such visits may not be restricted.

3. No person or organization may be penalized or otherwise harmed for having provided relevant information to a national mechanism.

Article 7

1. National mechanisms shall:

(a) Inform the competent authorities of their observations and make recommendations to them;

(b) Regularly inform the Subcommittee of their observations and recommendations.

2. No personal data shall be made public without the prior consent of the person concerned, subject to liability.

4 *EU Draft (22 February 2001)*[7]

Article 15 (new)

For the purpose of this Protocol, a State Party wishing to establish a national mechanism undertakes to ensure that:

(a) The national mechanism will be composed of independent experts fulfilling the requirements set out in Articles 4 paragraph 3 and 5 paragraph 2;

(b) It has full powers to issue recommendations to the concerned authorities;

(c) It has unrestricted access to all places where persons are deprived of their liberty under all situations, including in peacetime, times of public disorder or states of emergency and during war in accordance with international humanitarian law;

(d) Unrestricted access to persons deprived of their liberty;

(e) Full freedom to interview the persons deprived of their liberty without witnesses, with the assistance of interpreters, if required, as well as all relevant personnel or persons;

(f) Unrestricted liberty to contact, inform and meet with the Sub-Committee with a view to implementing Article 9 paragraph 1 (d);

(g) The reports on its visits shall be public.

2.2 Analysis of Working Group Discussions

5 During its ninth session from 12 to 23 February 2001, the Working Group discussed the alternative draft the delegation of *Mexico* had submitted with support of the GRULAC.

6 Most delegations considered that the mandate of national mechanisms should be as broad as possible and that they should apply universal standards for the protection of

[7] ibid, Annex II.

detainees. In order to be an effective method of preventing torture, such mechanisms should, according to most delegations, have full access to all persons deprived of liberty.[8]

7 At the tenth session of the Working Group from 14 to 25 January 2002, the concept of NPMs and questions related to their mandate were further elaborated.[9] With regard to the functions of these mechanisms, the delegations of *China*, the *United States* of America, and *Egypt* proposed that national and regional bodies should take the leading role in visiting places of detention. The delegation of the United States of America, however, strongly opposed the concept of establishing mandatory visiting mechanisms with unrestricted authority to visit places of detention. They suggested instead a system of limited authority that would provide checks and balances and ensure accountability. In contrast, many other delegations found that the national mechanisms should have unrestricted access to all places where persons were deprived of their liberty as well as full freedom to interview persons held in those places, without witnesses.

8 In the proposal presented by the *Chairperson-Rapporteur*, the concept of NPMs was described in Part IV, where it was stated that States would be required to maintain, designate, or establish national mechanisms, based on the *Paris Principles*, to work in close cooperation with the Subcommittee.[10] During the discussions on the proposal, the delegation of Japan stated that there were no reasonable grounds for the establishment of a mandatory national visiting mechanism that would have basically the same mandate as an international visiting mechanism.[11]

3. Issues of Interpretation

9 Article 20 is almost identical to Article 14 OP. The various issues of interpretation related to 'access to all information' in Article 20(a) and (b) OP, 'access to all places of detention and their installations and facilities' in Article 20(c) OP, 'the opportunity to have private interviews' in Article 20(d) OP as well as 'the liberty to choose the places' to visit and 'the persons' to interview in Article 20(e) OP have been discussed above for the Subcommittee, and the relevant conclusions apply equally to the NPMs and the interpretation of Article 20 OP.[12]

10 Apart from this, there are a few important differences between the respective mandates that raise questions of interpretation. Furthermore, the SPT concretized certain issues for the NPMs and issued recommendations on the NPMs' visiting methodology. The powers that the States parties grant their NPMs according to Article 20 OP shall enable them to 'fulfil their mandate'. Hence, these powers are to be interpreted as guaranteeing the effective functioning of NPMs.[13] All powers attributed to the NPM in Article 20 OP should be expressly provided by the implementing legislation.

[8] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, para 29.

[9] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, paras 37ff.

[10] ibid, para 50; see also Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I.

[11] E/CN.4/2002/78 (n 9) para 80.

[12] See above Arts 12 and 14 OP.

[13] APT and IIDH (n 5) 95.

3.1 Access to Information

11 For the effective functioning of its monitoring mandate, an NPM must be in the position to make effective use of its liberty of choice among the places of detention according to Article 20(e) OP. Effective use necessitates having the relevant information for decision-making. Hence, information from the State party is of great importance, in addition to information from other sources such as civil society, professional bodies, and NHRIs.[14]

12 *Access to all information concerning the number of places and their location* is highly relevant as only complete information on all places of detention enables an NPM to fulfil the entire scope of its mandate according to Article 4 OP. Hence, the State party should inform its NPM thoroughly on all places of detention and changes in due course.[15]

13 The State party is also obliged to provide its NPM *access to all information referring to the treatment of those persons as well as their conditions of detention*. This requires that State authorities and authorities in charge of places of detention keep respective records to facilitate prompt access by the NPM to accurate and full information relating to detainees and records on detainees, such as incident registers and medical records, in addition to personal files.[16] Other relevant information includes records of arrest, complaints, the use of disciplinary sanctions, the use of restraint, medical treatment requested and received, time spent in detention; statistical information on gender, age, ethnic background, etc; and information on staff and personnel;[17] as well as schedules (including records of time spent in cells, time spent exercising, time spent indoors versus outdoors, and time spent working), and suicide watch arrangements.[18] The NPM should actively seek all relevant information in the framework of its visiting activities.[19] The NPM visiting team should examine information relating to detainees that the responsible authorities have to keep due to their obligation under Article 20(b), such as incident registers and medical records, in addition to personal files.[20] According to the SPT's Assessment Tool, 'existing registries, examples of case records and activities and services for the detainees should be assessed, unless the visit is thematic only. If a visit is thematic, its coverage of the facilities can be only partial.'[21] The SPT concretizes in its reports that NPM team members should

[14] ibid, 94–95.

[15] In one mission report, the SPT recommends the State party to 'develop a full list of the types of places where persons are deprived of their liberty', and urges the State party to 'ensure that the NPMs are given full and unlimited access to all relevant information … to enable them to properly fulfil their mandate': SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Malta, Report to State Party' (2016) UN Doc CAT/OP/MLT/1, paras 23 and 34.

[16] UNGA, 'United Nations Standard Minimum Rules for the Treatment of Prisoners', Res 70/175 of 8 January 2016 (Nelson Mandela Rules), Rule 84(1)(a); SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to State Party' (2013) UN Doc CAT/OP/DEU/1, para 46.

[17] Moritz Birk and others, 'Enhancing Impact of National Preventive Mechanisms, Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward' (Ludwig Boltzmann Institute of Human Rights 2015) 42 <https://bim.lbg.ac.at/sites/files/bim/attachments/enhancing_impact_of_national_preventive_mechanisms.pdf> accessed 6 November 2017.

[18] APT (ed), *Guide: Establishment and Designation of National Preventive Mechanisms* (APT 2006) 58.

[19] SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1, para 21; see also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to the National Preventive Mechanism' (2013) UN Doc CAT/OP/DEU/2, para 41.

[20] CAT/OP/DEU/1 (n 16) para 46.

[21] CAT/OP/1/Rev.1 (n 19) para 25.

'inspect all facilities in the places of deprivation of liberty it visits, systematically examining records and files and cross-checking them with information from other sources. If records are unavailable, the NPM should recommend changes in existing practices that will enable them to become available.'[22]

14 Regarding allegations and incidents of torture and ill-treatment, access of the NPM to a central confidential database could be useful to initiate urgent action where needed and set further necessary priorities in its visiting plan.[23]

15 If necessary, the States parties need to enact exemption to allow NPMs access to, and use of, relevant information in accordance with the OP.[24]

3.2 Access to All Places of Detention and Their Installations and Facilities

3.2.1 Unrestricted Access

16 Article 20(c) OP does not explicitly oblige the States parties to grant the NPM 'unrestricted' access, in contrast to Article 14(1)(c) OP for the SPT. However, a *literal interpretation* of Article 20(c) OP leads to the conclusion that, due to the absence of any limitation clause comparable to Article 14(2) OP to '*temporarily* prevent the carrying out' of a visit, NPMs shall have access to all places of detention and their installations and facilities without restriction in space[25] and time.[26]

[22] CAT/OP/DEU/2 (n 19) para 64; see also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Honduras, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/HND/3, para 25.

[23] In this sense, the SPT recommended a centralized national database, including anonymous, confidential information obtained under professional confidentiality. The SPT sees such a register as 'a source of useful information that could point to situations where urgent action is required, and could also assist in the development and adoption of preventive measures. The NPM and other such bodies vested with authority to deal with prevention of and complaints concerning torture and ill-treatment should also have access to such a national register': SPT, 'Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc CAT/C/48/3, para 81, referring to UNGA, Res 66/150 (2012) para 8, which encourages States to consider records.

[24] APT and IIDH (n 5) 95.

[25] 'Article 20(c) requires the State authorities to provide the national preventive mechanism access to all parts of any place of detention. This would include, for example, living quarters, isolation cells, courtyards, exercise areas, kitchens, workshops, educational facilities, medical facilities, sanitary installations, and staff quarters': APT, *Guide* (n 18) 54.

[26] Such unrestricted access would correspond to the explicit provisions and intentions of the EU Draft. On the one hand, it was precisely this word 'unrestricted' which the Chairperson deleted in her final draft and which distinguishes Article 20(c) from the comparable provision of Article 14(1)(c). A comparative analysis of Articles 14(2) and 20(c) could, therefore, be interpreted in the sense that certain restrictions might be permitted. But, contrary to Article 14(2), the reason and extent of such restrictions are not defined, and even the Mexican Draft had only envisaged 'cases of absolute military necessity or serious disturbances in the place to be visited as an exceptional and temporary measure'. On the other hand, however, Article 32 VCLT permits the use of the *travaux préparatoires* only when the textual approach either leaves the meaning of a treaty provision ambiguous or obscure, or leads to a manifestly absurd or unreasonable result. Article 20(c) OP is not particularly ambiguous or obscure, and an unrestricted right of access of NPMs to all places of detention cannot be regarded as an absurd or unreasonable result of interpretation. On the other hand, it might not be unreasonable for a Government, in the exceptional case of serious prison riots, to prevent an NPM temporarily from entering such a prison. In any case, even the *travaux préparatoires*, if at all accepted as a supplementary method of interpretation, clearly suggest that such restrictions could only be justified as a truly exceptional and temporary measure, as envisaged in the Mexican Draft. The grounds of public safety or natural disaster, as foreseen in Art 14(2) in relation to a visit of the Subcommittee, could certainly not be invoked as a reason for denying a NPM access to a detention facility.

17 Unrestricted access in space means according to the SPT that the State party ensures 'full and unlimited access to these places.[27] The SPT recommended that a State party 'ensure and facilitate effective and unrestricted access' of independent monitoring bodies to certain facilities falling under the OP.[28] In order to fulfil this obligation of access, the SPT recommends that it 'be expressly included in the legislative basis for the NPM, and that the State maintain a dialogue with different stakeholders in the field to identify and clarify the exact meaning of the term "places of detention", in full conformity with the OPCAT.'[29]

18 Access without temporary restriction means that no circumstances permit an objection by the Government or the authorities to a visit by the NPM due to the intended time; it is entitled to access 'at any time of day or night.'[30]

3.2.2 Unannounced Visits

19 As Article 14(c) OP for the SPT, also Article 20(c) OP does not oblige the States parties to grant unannounced access. Although also no other provision of the OP explicitly speaks of 'unannounced visits' to be conducted by the NPM, the compromise on the two-pillar system must be understood in the sense that visits by both the national and international visiting body do not require any prior consent. The SPT has expressly confirmed that the right of NPMs to conduct unannounced visits is implied in its mandate.[31] In this sense, the SPT recommended in numerous mission reports, emphasizing 'the confidential nature of the NPM work as envisaged in the Optional Protocol',[32] that the NPM keep information about its visits confidential with a view to enabling unannounced visits to be undertaken.[33] In this vein, the SRT has called the system established by the OP a 'system of unannounced visits to all places of detention by independent experts',[34] confirmed the power of national or international experts 'to inspect every place of detention at any time without prior announcement',[35] and strongly appealed to all States to ratify the OP and establish NPMs with, among others characteristics, 'the right to carry out unannounced visits'.[36]

20 In fact, the essential preventive effect of the NPM can only be achieved if it can conduct unannounced visits. In this sense, the SPT stated in its Self-Assessment Tool that '[t]he major function of a national preventive mechanism in discharging its preventive role

[27] CAT/OP/MLT/1 (n 15) para 34.

[28] SPT, 'Report on the Visit to Italy' (2016) UN Doc CAT/OP/ITA/1, para 51(b).

[29] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Armenia, Report to State Party' (2015) UN Doc CAT/OP/ARM/1, para 44.

[30] APT, *Guide* (n 18) 56.

[31] 'The State should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides. This includes … the right to carry out *unannounced* visits at all times to all places of deprivation of liberty, in accordance with the provisions of the Optional Protocol': in SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 25, emphasis added.

[32] CAT/OP/DEU/2 (n 19) para 53; SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/MDA/2, para 25.

[33] CAT/OP/HND/3 (n 22) para 21; SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Senegal, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/SEN/2, para 39; CAT/OP/MDA/2 (n 32) para 25; CAT/OP/DEU/2 (n 19) paras 45 and 54.

[34] SRT (Nowak), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) UN Doc A/61/259, para 73.

[35] ibid, para 72.

[36] ibid, para 75; see also APT, *Guide* (n 18) 56–57, for the start of list/reports.

is to carry out visits, which may be *unannounced*, to places of detention.'[37] Furthermore, it has noted in several reports the importance of unannounced visits by the NPM as such visits or short-notice visits, which 'make it possible to obtain a clearer picture of the prevailing conditions in places of detention',[38] 'give a much more realistic idea of conditions in a place of deprivation of liberty',[39] 'assist [the NPM to] ascertain the real situation of persons deprived of their liberty',[40] 'are necessary to ensure that the NPM can form an accurate understanding of the experience of those deprived of liberty',[41] and 'allow for greater insights into the real conditions prevailing in a centre of deprivation of liberty'.[42]

21 It may be added that the NPM has the right to conduct all visits, including follow-up visits, unannounced.[43]

3.2.3 Private Interviews

22 Article 20(d) OP guarantees that NPMs have the same right to conduct private interviews as the SPT does under Article 14(d) OP.[44] Private interviews of persons who have been deprived of their liberty are a central source of information on the treatment and conditions of detention. The SPT noted that '[w]ith due respect for the security regulations in force in any given institution … it is possible to conduct interviews with detainees inside cells and without surveillance.'[45] However, all detainees 'must be treated with humanity and their private space within the cells should be respected'.[46]

23 Also with other persons who the NPM believes may supply relevant information, Article 20(d) provides for private interviews. Such valuable sources might be alleged victims who are no longer detained, family members of detainees, witnesses, lawyers, doctors, prison staff, NGO, and media representatives.[47]

24 Unless there are substantive reasons for doing otherwise, the NPM should conduct *individual and private interviews* with persons deprived of their liberty and employees of the institution in question, including medical personnel.[48] If the size of the visiting team is limited, the SPT recommended that the members of the team give such interviews with detainees at least an equal priority with speaking to those in authority.[49] As to the aim of the interview, the SPT formulated clearly that interviews should be used 'to take a closer look at structural aspects of the system of deprivation of liberty in order to collect

[37] CAT/OP/1/Rev.1 (n 19) para 8.
[38] SPT, 'Report on the Visit to Honduras' (2010) UN Doc CAT/OP/HND/1, para 21.
[39] CAT/OP/SEN/2 (n 33) para 38. [40] CAT/OP/DEU/2 (n 19) para 45.
[41] ibid, para 53.
[42] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Ecuador, Report for the National Preventive Mechanism' (2014) UN Doc CAT/OP/ECU/2, para 48.
[43] CAT/OP/MDA/2 (n 32) para 23; see also SPT, 'Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism, Report to the National Preventive Mechanism' (2017) UN Doc CAT/OP/ARM/2, para 38: 'NPM should agree on and establish a long-term strategy of its activities and an annual plan of work including unannounced and follow-up visits.'
[44] The SPT noted in its Guidelines, CAT/OP/12/5 (n 31), para 25: 'The State should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides. This includes the ability to conduct private interviews with those deprived of liberty.'
[45] CAT/OP/SEN/2 (n 33) para 49. [46] CAT/OP/ARM/2 (n 43) para 51.
[47] See above Art 14 OP, § 21.
[48] In this sense, CAT/OP/ECU/2 (n 42) para 55; see also CAT/OP/HND/3 (n 22) para 23; CAT/OP/MDA/2 (n 32) para 27; CAT/OP/DEU/2 (n 19) para 60; CAT/OP/ARM/2 (n 43) para 51.
[49] CAT/OP/DEU/2 (n 19) para 64.

information and thus be in a position to undertake a comprehensive, substantiated analysis of institutional, legal and public policy risk factors'.[50] The NPM should establish a policy setting out which types of information can be collected during group interviews and which types of information should be collected in private interviews only.[51] As group interviews pose certain risks as reprisals and have the potential to rapidly get out of hand,[52] the specific circumstances in the respective institution, the usefulness and relevance of such an interview should be evaluated.[53]

25 Holding an interview in private means out of ear and sight of the authorities to ensure confidentiality, privacy, and to avoid reprisals. Moreover, to preserve the anonymity of the source of possibly sensitive or critical information obtained during a private interview, a number of private interviews should be conducted.[54] When reporting on systematic issues or crimes, attention must be taken to assess whether the sharing of information might inevitably lead to the disclosure of personal data or to the identification of a person who has not given express consent for his/her personal data to be revealed. In such cases 'the obligation of confidentiality prevails'.[55]

26 At the beginning of the interview, the members of the NPM should introduce themselves by telling them their name, profession, and position in the NPM.[56] To facilitate communication and trust-building, the interviewer should explain the NPM's mandate, especially its preventive nature, and objectives.[57] The interviewer 'should also obtain the consent of the interviewee and make it clear that the interview is confidential, voluntary and can be interrupted at any time at the interviewee's request'.[58]

27 The distribution of a leaflet by the NPM members to the detained persons is a useful tool recommended by the to inform about the NPM's mandate and working methods, the concept of informed consent, and contact information. It should also encourage persons to report any reprisal to the NPM.[59]

28 It is of course important that the members of the NPM hold the interview in a professional manner keeping objective distance to staff and focusing on establishing a trustful relationship to the detainees by listening actively and showing interest.[60] Moreover, they

[50] In this sense, see CAT/OP/ECU/2 (n 42) para 62.

[51] CAT/OP/1/Rev.1 (n 19) para 37(a). The SPT noted, eg, in its mission report on Senegal with interest that an NPM 'recognizes that group interviews do not permit discussion of the most sensitive topics': see CAT/OP/SEN/2 (n 33) para 50.

[52] See CAT/OP/SEN/2 (n 33) para 50.

[53] See CAT/OP/ECU/2 (n 42) para 60.

[54] CAT/OP/1/Rev.1 (n 19) para 37(a).

[55] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, Annex on 'Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms', para 8.

[56] The SPT recommended so in numerous reports, eg in CAT/OP/HND/3 (n 22) para 22; CAT/OP/MDA/2 (n 32) para 26; see also CAT/OP/SEN/2 (n 33) para 46; CAT/OP/DEU/2 (n 19) para 58; CAT/OP/ARM/2 (n 43) para 48.

[57] SPT, CAT/OP/DEU/2 (n 19) para 57; see also CAT/OP/HND/3 (n 22) para 22; CAT/OP/MDA/2 (n 32) para 26.

[58] The SPT recommended so in numerous reports, eg in CAT/OP/HND/3 (n 22) para 22; CAT/OP/MDA/2 (n 32) para 26; see also CAT/OP/SEN/2 (n 33) para 46; SPT, CAT/OP/DEU/2 (n 19) para 58; CAT/OP/ARM/2 (n 43) para 48.

[59] See, eg, CAT/OP/MDA/2 (n 32) para 26; see also CAT/OP/HND/3 (n 22) para 22; CAT/OP/SEN/2 (n 33) para 47; CAT/OP/DEU/2 (n 19) para 58; CAT/OP/ARM/2 (n 43)para 49; CAT/OP/ECU/2 (n 42) para 55.

[60] In one mission report, the SPT found it necessary to note that the members of the visiting team must 'concentrate on their tasks and interviewers must be fully focused on the meeting with the detainees; there must be no manifestation of friendship with staff of the institution visited, nor must any be perceived. Finally,

need to be sensitive to the vulnerable situation of the person deprived of liberty, paying due regard to the central 'do no harm' principle. The Istanbul Protocol and monitoring guides of the OHCHR and civil society organizations such as APT provide detailed guidance on how to adequately conduct interviews.[61]

3.2.4 Liberty to Choose the Place

3.2.4.1 Prioritization

29 While Article 20(e) OP implies the NPMs' liberty to choose the places they want to visit, it has been already elaborated on Article 19 OP that the principles of effectiveness and prevention demand that, besides a minimum of frequency of visits, the NPM will also need to prioritize certain types of or individual places of detention. Thus, places of detention are not to be visited with mathematical regularity,[62] but following criteria that make the NPM's work most effective. The criteria chosen should be transparent, clear, and published.[63]

30 Such criteria should include 'the type and size of institutions, their security level and the nature of known human rights problems'.[64] A valid addition to these criteria was made in one mission report, namely 'the institutions' accessibility to other oversight mechanisms'.[65] Regarding the first criterion of type and size of institutions, risk is particularly high, for instance, in places used for the initial phase of detention where interrogations are carried out, in places with a fluctuation of persons deprived of liberty (eg police stations, detention centres for irregular migrants pending deportation, or pre-trial facilities),[66] as well as in other places with high concentrations of particularly vulnerable categories of detainees (eg detention centres for irregular migrants pending deportation).[67] Furthermore, next to the criterion of the security level of institutions, the SPT finds the nature of known human rights problems to be relevant for the choice of places of detention to visit.[68] Places with a record of problems (eg recent complaints, reports from other organizations or the media) should be considered visiting priorities.[69] Lack of information can also be of relevance via the criterion of accessibility to other oversight mechanisms: it seems sensible for NPMs to also concentrate on places of detention that would otherwise not be open to public scrutiny or external oversight (eg psychiatric institutions, social care homes, or centres for migrants).[70]

detainees have to be treated with humanity and their private space within the cells should be respected'; CAT/OP/ARM/2 (n 43) para 51. In another report, a good practice was identified by the SPT where the NPM staff succeeded in 'establishing rapport with them by listening actively and asking specific questions … The interviewers also conducted the interviews in such a way that the persons deprived of their liberty could feel at ease and speak spontaneously'; CAT/OP/ECU/2 (n 42) para 56.

[61] Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment paras 120–60; OHCHR Manual on Human Rights Monitoring, Chapter 8—Interviewing, 109–27; APT, Asia Pacific Forum, and OHCHR, 'Preventing Torture: An Operational Guide for National Human Rights Institutions' HR/PUB/10/1 (APT, Asia Pacific Forum, and OHCHR 2010) 43–54.

[62] See above Art 19 OP, § 15.

[63] CAT/OP/1/Rev.1 (n 19) para 22; see also CAT/OP/HND/3 (n 22) para 18; CAT/OP/DEU/2 (n 19) para 50.

[64] CAT/OP/1/Rev.1 (n 19) para 22. [65] CAT/OP/SEN/2 (n 33) para 21.

[66] APT and IIDH (n 5) 240. [67] APT, *Guide* (n 18) 43, fn 15.

[68] CAT/OP/SEN/2 (n 33) para 21. [69] APT and IIDH (n 5) 241. [70] ibid 240.

31 While the NPM should prioritize the most problematic issues and institutions, it should fulfil its obligation to visit all places of detention in a minimum frequency.[71] Further, additional flexibility and resources should be kept for follow-up and urgent visits.[72]

3.2.4.2 Information Gathering on the Places of Detention

32 The prioritization of places of detention must be based on all relevant information available on places of detention.[73] For that purpose cooperation and exchange of information with civil society as well as other relevant actors is crucial. Particularly those who are in day-to-day contact with persons deprived of their liberty are a very valuable source of information who are in direct. This can be staff of NGOs supporting detained persons, organizations of relatives, social workers, or other monitoring mechanisms.[74]

33 The NPM should 'keep an archive of all relevant information about places of detention and the treatment of persons held there'[75] and put in place an 'effective data management system'[76] to be able to establish a long-term strategy of its activities as well as a subsequent annual plan of work.[77]

3.3 Cooperation between NPMs and the SPT

34 According to Article 20(f) OP, States parties endeavour to grant NPMs the 'right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it'. This provision expands the obligation of States parties according to Article 12(c) OP to 'encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms'. This direct relationship between the OP bodies establishes the Protocol's complementary system of prevention,[78] the NPM complementing the work of the SPT at the national level to ensure the continuity of the dialogue with the national authorities.[79]

[71] CAT/OP/1/Rev.1 (n 19) para 46: 'not exclude from the scope of its work any particular form of institution or geographical area or any national preventive mechanism task other than visiting.'

[72] CAT/OP/1/Rev.1 (n 19) para 22; see also CAT/OP/HND/3 (n 22) para 18; CAT/OP/DEU/2 (n 19) para 50.

[73] According to the SPT's Assessment Tool, CAT/OP/1/Rev.1 (n 19) para 21, the NPM should 'actively seek information in order to ensure that it has data and background information for all places of detention' in the framework of its visiting activities in order to have the relevant information to accurately decide on prioritization and necessary follow-up visits.'

[74] In this sense, the SPT noted that the NPM should ensure that 'information from all available sources, such as the administration and staff of the institution visited, detainees from all areas and units, other visitors, if appropriate, and outside actors, such as civil society and other monitoring mechanisms, is collected': see CAT/OP/1/Rev.1 (n 19) para 24; see also CAT/OP/HND/3 (n 22) para 20; CAT/OP/DEU/2 (n 19) para 31; CAT/OP/MDA/2 (n 32) para 25; CAT/OP/SEN/2 (n 33) para 35; CAT/OP/DEU/2 (n 19) para 56; CAT/OP/ARM/2 (n 43) para 41. The SPT concretized in a visit report that 'the day-to-day presence of NGOs and organizations of relatives in places of deprivation of liberty is a valuable source of information that the national preventive mechanism could take advantage of in order to plan its schedule of visits strategically and to determine the extent to which its earlier recommendations have been implemented. In order to enhance the effectiveness of its work, the national preventive mechanism should cooperate with NGOs and other civil society associations that offer assistance, support or services to persons deprived of their liberty. If this is done and if a detainee then asks staff members of the national preventive mechanism for help during one of its visits, they can provide the person with the appropriate information', in CAT/OP/ECU/2 (n 42) para 43.

[75] CAT/OP/1/Rev.1 (n 19) para 21.

[76] ibid, para 26; see also CAT/OP/SEN/2 (n 33) para 37.

[77] This was recommended in CAT/OP/MDA/2 (n 32) para 23; see also SPT, CAT/OP/ARM/2 (n 43) para 38.

[78] See above Preamble OP, § 30.

[79] See, eg, SPT, 'Report on the Visit to Benin' (2011) UN Doc CAT/OP/BEN/1, para 24; see also below Art 22 OP, § 14.

35 This provision foresees the NPMs' right to direct confidential contact with the SPT and not an obligation to send information or report to it. However, a refusal to co-operate with the SPT prevents the Subcommittee from exercising its duties in regard to NPMs under Article 11(b) OP and may inhibit its reception of valuable information on the situation in the country, especially the implementation of its recommendations.[80] In fact, according to the SPT's Guidelines, the NPM should 'actively seek to follow up on the implementation of any recommendations which the SPT has made in relation to the country in question, *liaising with the SPT when doing so*.'[81]

36 Additionally, the SPT encouraged in its mission reports the NPMs to transmit it their annual reports,[82] invited NPMs to keep it informed about the process underway in regard to their legislative basis and any other significant new developments,[83] and recommended that NPMs continue to develop their capacity through increasing cooperation with the SPT.[84]

37 States parties, when establishing NPMs in accordance with Article 17 OP, should provide for an explicit obligation of NPMs to cooperate with the SPT and to provide it with relevant information.

3.4 Visit Methodology: Further Considerations

38 In accordance with the principle of effectiveness, the NPM should work in such a way as to conduct its visits to places of detention in the most efficient manner.[85] The following will present what the SPT sees as most effective conduct of an NPM to achieve the overriding purpose of its visits, namely to maximize its preventive impact.

3.4.1 Before the Visit

39 In its Self-Assessment Tool, the SPT noted that, on an ongoing basis, an NPM should develop guidelines for the following issues:[86]

[80] The SPT stated in its Guidelines, CAT/OP/12/5 (n 31) para 40, that the NPM 'should seek to establish and maintain contact with the SPT, as provided for and for the purposes set out in the Optional Protocol.' In its Rules of Procedure, it did not create an obligation for NPMs to submit to it, upon its request, relevant information, but merely stated that it 'shall maintain direct, and if necessary confidential, contact with [the NPMs], which includes the *right to receive information from and meet with them*, in accordance with articles 11 and 20(f) of the Optional Protocol': SPT, 'Rules of Procedure' (2013) UN Doc CAT/OP/3, para 30(1), emphasis added.

[81] CAT/OP/12/5 (n 31) para 38. The SPT even claimed in its first reports that 'one of the key aspects of the work of the NPM' is to maintain direct contact with the SPT and facilitate exchange of information in order to ensure the compliance of the reports, and respectively recommendations, of the SPT, if those reports are made public in accordance with Article 16 OP (SPT, 'Report on the Visit to Sweden' (2008) UN Doc CAT/OP/SWE/1, para 40; CAT/OP/BEN/1 (n 79) para 24; SPT, 'Report on the Visit to the Maldives' (2009) UN Doc CAT/OP/MDV/1, para 72(h)), later only voicing its hope for constructive dialogue and readiness to assist the NPM 'as far as it is able in the common goal of prevention of torture and ill-treatment with a view to translating commitments into the reality': see CAT/OP/MDA/2 (n 32) para 33; see also CAT/OP/SEN/2 (n 33) para 60; CAT/OP/ARM/2 (n 43) para 65; CAT/OP/ECU/2 (n 42) para 68.

[82] CAT/OP/SEN/2 (n 33) para 60; CAT/OP/ARM/2 (n 43) para 65; SPT, 'Report on the Visit to Brazil' (2012) UN Doc CAT/OP/BRA/1, para 9.

[83] SPT, 'Visit to the Netherlands for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism: Recommendations and Observations Addressed to the State Party' (2016) UN Doc CAT/OP/NLD/1, para 51.

[84] CAT/OP/BRA/1 (n 82) para 38.

[85] In this sense, see CAT/OP/MDA/2 (n 32) para 24; CAT/OP/DEU/2 (n 19) para 51.

[86] CAT/OP/1/Rev.1 (n 19) para 24; see also CAT/OP/HND/3 (n 22) para 20; CAT/OP/DEU/2 (n 19) para 31; CAT/OP/MDA/2 (n 32) para 25; CAT/OP/SEN/2 (n 33) para 35; CAT/OP/DEU/2 (n 19) para 56; CAT/OP/ARM/2 (n 43) para 41; CAT/OP/1/Rev.1 (n 19) para 29.

- visits to the various categories of places of detention, including instructions for selecting the theme of a visit
- conducting private interviews
- developing policies for dealing with vulnerable groups of detainees
- developing policies for ensuring that information from all available sources, such as the administration and staff of the institution visited, detainees from all areas and units, other visitors, if appropriate, and outside actors, such as civil society and other monitoring mechanisms, is collected.
- reporting individual cases of deliberate ill-treatment
- requesting inquiries
- maintaining the confidentiality of the detainee concerned and any other source of relevant information, and
- protecting such persons against reprisals

40 Besides following these guidelines, the NPM should, according to the SPT's Assessment Tool, consider developing a code of conduct for visiting teams, covering, among other things,

- addressing detainees and staff,
- observing cultural and any other relevant sensitivities,
- conducting individual or group interviews, including how and when to conduct such interviews,
- handling security and safety issues,
- ensuring confidentiality,
- managing internal debriefings in order to coordinate and cross-check data collected and prepare for the closing of the visit,
- ensuring that the visitors do not step outside or in any other way exceed the mandate of the mechanism during a visit, and
- participating in reporting and follow-up.[87]

41 Furthermore, the SPT recommended that the NPM should 'develop a strategy for preventing reprisals and threats' against persons interviewed during visits and others who may provide sensitive or critical information before or after a visit, against members and staff of the mechanism.[88] Finally, the SPT recommended that the NPM develop protocols, in consultation with a security specialist.[89]

42 As identifying common guidelines for interviews and shared methodology for visits to different places of detention is 'key to the NPM's efficiency', the SPT recommended that, 'in the medium term, the NPM make available operational guidelines and handbooks to all members and staff … with a view to ensuring consistency of working methods and transferal of knowledge among all members of the NPM.'[90] The working methods[91] should be regularly reviewed by the NPM, its members, and its staff.[92]

43 After the general requirements regarding composition of the members and staff of the NPM,[93] the SPT noted on the concrete composition of the visiting team that it 'should take into account the necessary knowledge, including with respect to languages,

[87] CAT/OP/1/Rev.1 (n 19) para 28. [88] ibid, para 37.
[89] CAT/OP/ECU/2 (n 42) para 58.
[90] CAT/OP/MDA/2 (n 32) para 25; see also CAT/OP/DEU/2 (n 19) para 55.
[91] The SPT elaborated on the working strategy of the national preventive mechanism in its Assessment Tool, CAT/OP/1/Rev.1 (n 19) paras 17–20.
[92] CAT/OP/12/5 (n 31) para 31. [93] See above Art 18 OP, § 59.

groups with special needs and vulnerable groups, the experience and skills of members, gender balance and the adequate representation of ethnic and minority groups'.[94]

44 The SPT has recommended in its reports that the NPMs

> divide the tasks to be completed by all its members before their arrival at the place to be visited, in order to avoid any duplication of work, allow efficient execution of the planned activities and to enable them to cover all necessary areas, and better use [possibly] limited resources. The NPM should divide tasks and have clear attribution of roles among the members of team. The division of tasks during visits should consider the professional qualification of experts and staff in order to maximize the result of such activity.[95]

The SPT also mentioned that efficiency be increased if the members of the team 'choose specific issues to be addressed with particular attention depending on a case by case assessment of each place'.[96] Moreover, it may be useful that the NPM holds preparatory meetings to establish priorities and set up gender-balanced teams.[97]

45 The *duration* of an NPM's visit must be adequate for the size, character, and complexity of the place concerned.[98] In the case of large facilities, this can mean a full visit taking several days.[99] In order for the NPM to not become predictable and obtain a full picture of the treatment in detention, visits should be carried out at different times, including during the night.[100]

46 As to *equipment*, the SPT recommended that for the purpose of identification and the visibility of the institution the visiting team should, be 'clearly identified as the NPM, eg wearing badges or vests'[101] and take a leaflet with information along for distribution to the authorities,[102] the persons deprived of liberty, their family members, and staff of the visited institution.[103] To verify the actual conditions of the place of detention (eg size, light, temperature), measuring equipment should be taken along, such as torches, lamps, thermometers, and measuring tools for humidity and space measures, etc.[104]

3.4.2 During the Visit

47 While particularly at the initial visit it may be important that the team members hold a meeting with the authorities to introduce themselves, the NPM mandate, and the objective of the visit,[105] it is advisable that the monitoring team starts inspecting the

[94] CAT/OP/1/Rev.1 (n 19) para 23; in its reports, the SPT was less demanding, stating that the composition of the visiting team should be such as 'to allow both general and specific issues to be covered and should include a health-care professional, preferably a doctor'; see CAT/OP/DEU/2 (n 19) para 52; see also CAT/OP/HND/3 (n 22) para 19; CAT/OP/ECU/2 (n 42) para 64.

[95] CAT/OP/ARM/2 (n 43) para 41; see also CAT/OP/HND/3 (n 22) para 19, with reference to Guidelines (n 28) para 34. CAT/OP/MDA/2 (n 32) para 24; CAT/OP/DEU/2 (n 19) para 52.

[96] See, eg, CAT/OP/ARM/2 (n 43) para 42; see also CAT/OP/HND/3 (n 22) para 19; CAT/OP/MDA/2 (n 32) para 24; CAT/OP/DEU/2 (n 19) para 52.

[97] In this sense, see CAT/OP/ECU/2 (n 42) para 50.

[98] The SPT recommended in its mission report on Germany that the NPM 'ensures that the time it spends conducting a visit to a place of detention is commensurate to the size, character and complexity of the place concerned': see CAT/OP/DEU/2 (n 19) para 39.

[99] In this sense, see CAT/OP/SEN/2 (n 33) para 41.

[100] In this sense, see CAT/OP/DEU/2 (n 19) para 45.

[101] See, eg, CAT/OP/ARM/2 (n 43) para 46; see also CAT/OP/MDA/2 (n 32) para 29; CAT/OP/DEU/2 (n 19) para 62.

[102] CAT/OP/ARM/2 (n 43) paras 29 and 46.

[103] See further down, para 50 on leaflet.

[104] CAT/OP/MDA/2 (n 32) para 29; CAT/OP/DEU/2 (n 19) paras 61–62.

[105] In this sense, the SPT recommended, eg, in its mission report on Armenia that 'members of the NPM explain their mandate clearly to the authorities as well as the working methods used and indicate how interviews

facility and interviewing detainees as soon as possible. In the initial conversation with the management, the NPM should also stress that reprisals are explicitly prohibited in the OP and will be focused on in the context of follow-up.[106]

48 If there are *security-related restrictions* proposed by the staff of the place of detention, the NPM team members should consider them carefully.[107] However, what may be the security regulations in force in any given institution, it must be possible to conduct interviews with detainees inside cells and without surveillance.[108] If a member of the NPM team suffers harassment and/or violation of his/her personal integrity, according to the SPT the Government is obliged to 'promptly carry out a full, impartial and detailed investigation into the circumstances surrounding this incident, bring those responsible to justice and take all necessary measures to prevent such incidents to happen in the future'.[109]

49 The aim of the NPM's visit is to obtain a full picture of the situation in the given place of detention. The SPT noted in its Analytical Assessment Tool for NPMs that 'practices and tools should be developed to cross-check, test and assess observations and to ensure that recommendations are based on rigorous analysis and are factually well grounded'.[110] Triangulation of information, ie the method for fact-finding on visits to arrive at a view of the particular situation under scrutiny 'by thoroughly inspecting the facilities, examining the institution's records, and talking to inmates and staff',[111] is in the SPT's view, the only way to obtain a full picture of the situation in any given place of detention.[112]

50 According to the SPT's Assessment Tool, all facilities within the institution should be visited, unless the visit is thematic only—then, the coverage of the institution can be partial.[113] During the general tour of the institution, sensitive areas to be inspected more thoroughly can be identified.[114] Passive observation or deploying the visiting team in groups stationed at various points around the premises is seen by the SPT as useful technique for gathering information besides interviews.[115]

will be conducted. The SPT is of the opinion that an appropriate and complete presentation to the authorities, especially on the mandate and objective of the visit has a didactic effect on the authorities, and contributes to the visibility and credibility of the NPM. […] A leaflet with information could also be provided to the authorities': see CAT/OP/ARM/2 (n 43) para 46.

[106] CAT/OP/1/Rev.1 (n 19) para 37(b); see also CAT/OP/MDA/2 (n 32) para 30; CAT/OP/DEU/2 (n 19) para 68; CAT/OP/SEN/2 (n 33) para 53; CAT/OP/ARM/2 (n 43) para 55.

[107] In this sense, see CAT/OP/ECU/2 (n 42) para 58.

[108] See eg CAT/OP/SEN/2 (n 33) para 49.

[109] SPT, 'Report on the Visit to Brazil Undertaken from 19 to 30 October 2015: Observations and Recommendations Addressed to the State Party' (2017) UN Doc CAT/OP/BRA/3, para 100.

[110] CAT/OP/1/Rev.1 (n 19) para 26; see also CAT/OP/12/6, para 5(f); CAT/OP/DEU/2 (n 19) para 64.

[111] CAT/OP/HND/3 (n 22) para 26. In this sense, the SPT noted that relevant information by inmates would merit, if possible, 'a review of the records to corroborate the information and identify possible patterns of violations of the human rights of persons deprived of their liberty'; see CAT/OP/ECU/2 (n 42) para 62.

[112] SPT, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/12/6, para 5(f) and CAT/OP/HND/3 (n 22) para 26.

[113] CAT/OP/1/Rev.1 (n 19) para 25.

[114] See eg CAT/OP/SEN/2 (n 33) para 43.

[115] ibid, para 41.

51 Regarding *individual complaints* made by detainees and attempted to resolve them,[116] the SPT highlighted that the NPM should rather 'advise detainees on how and to whom to address individual complaints and seek to ensure the effectiveness of complaints mechanisms as a means of prevention'.[117] The SPT recommended that the NPM develop clear guidelines for reporting individual cases of deliberate ill-treatment[118] and for requesting, with the consent of the interviewee in question, that investigations be opened.[119] However, the information received by the complaint of the person deprived of liberty can be relevant as indicators of systemic or institutional shortcomings.

52 In the conversation with management and staff, the visiting team members should stress that reprisals are explicitly prohibited in the OP and will be focused on in the context of follow-up.[120]

53 The NPM should hold an *internal debriefing* at the end of the visit and this should be included in the team's code of conduct.[121] As good practice, the SPT welcomed the practice of NPM staff of sharing the findings among the team and deciding on priority issues as a group before submitting their comments to the director of the institution concerned.[122]

54 According to the SPT's Assessment Tool, there should be a 'policy that provides for an *immediate debriefing with the representatives* of the place of detention at the end of a visit'.[123] The SPT recommended 'that systematic and constructive debriefings' should be provided to the responsible persons for the facilities visited, presenting preliminary observations and recommendations, if any—particularly recommendations that can be implemented immediately.[124] The Subcommittee considered that

> during the final interview it is essential to be open with the official in charge with regard to the main problems identified, except in respect of individual cases where it is thought that the physical and psychological integrity of detainees would be compromised by the mere fact that the official in charge was directly involved (such situations should be referred to the authorities supervising the official in question).[125]

Emphasis should be put on such feedback that calls for immediate action or is of a humanitarian nature. As a preventive measure, the issues of possible reprisal should be systematically mentioned.[126]

[116] See eg CAT/OP/HND/3 (n 22) para 27; CAT/OP/MDA/2 (n 32) para 28; CAT/OP/DEU/2 (n 19) para 65; CAT/OP/ARM/2 (n 43) para 52.

[117] The SPT also recalled that 'the mandate of the NPM differs from that of other bodies working against torture and is characterized by its preventive approach which involves identifying patterns and detecting systemic risks of torture and ill-treatment': see CAT/OP/DEU/2 (n 19) para 66; CAT/OP/MDA/2 (n 32) para 28; CAT/OP/ARM/2 (n 43) paras 52–53.

[118] CAT/OP/1/Rev.1 (n 19), para 24, 29; see also CAT/OP/HND/3 (n 22), para 20; CAT/OP/DEU/2 (n 19), paras 31 and 56; CAT/OP/MDA/2 (n 32) para 25; CAT/OP/SEN/2 (n 33), para 35; CAT/OP/ARM/2 (n 43), para 41.

[119] CAT/OP/HND/3 (n 22) para 27.

[120] CAT/OP/1/Rev.1 (n 19) para 37(b); see also CAT/OP/MDA/2 (n 32) para 30; CAT/OP/DEU/2 (n 19) para 68; CAT/OP/SEN/2 (n 33) para 53; CAT/OP/ARM/2 (n 43) para 55.

[121] CAT/OP/1/Rev.1 (n 19) para 28.

[122] CAT/OP/ECU/2 (n 42) para 63.

[123] CAT/OP/1/Rev.1 (n 19) para 27.

[124] See above Art 19 OP, § 23.

[125] CAT/OP/SEN/2 (n 33) para 54.

[126] ibid; see also CAT/OP/ARM/2 (n 43)para 57.

55 In the case of criticism and recommendations that are intended to be included in the visit report, good practice suggests that these concerns may be shared in the debriefing after the visit or in a written format, eg letter or preliminary report, to give the competent authority the possibility for comments and factual checking[127] for the sake of strengthening transparency, trust, and cooperation by more intense dialogue,[128] especially if the visit report will be published.

STEPHANIE KRISPER

[127] APT and IIDH (n 5) 244.

[128] Birk and others (n 17) 52–53, with examples.

Article 21

Prohibition of Sanctions against any Source of Information of the NPM

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

1. Introduction	938
2. Travaux Préparatoires	938
2.1 Chronology of Draft Texts	938
2.2 Analysis of Working Group Discussions	939
3. Issues of Interpretation	939
3.1 Prohibition of Sanction	939
3.2 Principle of Confidentiality	940
3.2.1 Protection of Confidential Information	940
3.2.2 No Duty of Confidentiality: Publication of Reports	941
3.2.3 Data Protection Legislation	943

1. Introduction

1 Article 21(1) mirrors Article 15 OP relating to the Subcommittee. It contains an important principle for the protection of detainees, family members, witnesses, lawyers, NGOs, and other relevant persons or organizations against any *reprisals* or *victimization* on the ground of having provided any information, true or false, to the NPM.[1] Such sources of information shall be immune against any civil or criminal liability.[2]

2 Article 21(2) contains rudimentary provisions about the confidentiality of information provided to the NPM. In the absence of a general duty of confidentiality on the part of NPMs, these provisions raise several questions of interpretation.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Mexican Draft (13 February 2001)*[3]

[1] cf above Art 15 OP, § 3. [2] cf above Art 15 OP, § 14.

[3] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

Article 6

3. No person or organization may be penalized or otherwise harmed for having provided relevant information to a national mechanism.

4 *EU Draft (22 February 2001)*[4]

Article 15 (new)

For the purpose of this Protocol, a State Party wishing to establish a national preventive mechanism undertakes to ensure that:

(g) The reports on its visits shall be public.

2.2 Analysis of Working Group Discussions

5 During the ninth and tenth session of the Working Group, the relevant provisions were not subject to any discussions.[5]

3. Issues of Interpretation

3.1 Prohibition of Sanction

6 For the prohibition of sanctions against any source of information of the NPM in Article 21(1) OP, it may be referred to the questions of interpretation discussed in relation to the identical provision of Article 15 OP.[6] Thus, only the SPT's elaborations on the issue specifically regarding NPMs will be discussed here.

7 The SPT concretized in its Guidelines:

> The State should not order, apply, permit or tolerate any *sanction, reprisal or other disability* [sic] to be suffered by any person or organisation for having communicated with the NPM or for having *provided* the NPM with any *information*, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way.[7]

The persons who fall under the protection of Article 21(1) are those who *engage* with the NPM or with whom the NPM *engages* '*in the fulfilment of its functions*' under the OP.[8]

8 For the protection of Article 21(1) OP to be effective, the *persons that could potentially benefit thereof must be informed of it*. As a first step, the legal basis should include provisions on the issue of reprisals and other such actions against NPM members.[9] Furthermore, the SPT recommended in its Assessment Tool that the *NPMs develop a strategy* for 'preventing reprisals and threats by detention centre staff, as well as by fellow detainees' against persons interviewed during a visit, and other persons who provide sensitive or critical information before or after a visit as well as NPM members and staff.[10]

[4] ibid, Annex II. [5] But see above Art 15 OP, 2.2; Art 20 OP, 2.2; and below Art 23 OP, 2.2.

[6] See above Art 15 OP, 3.

[7] SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 27.

[8] ibid, para 14.

[9] In this sense, see SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Ecuador, Report to the National Preventive Mechanism' (2014) UN Doc CAT/OP/ECU/2, para 16 (long); SPT, 'Report on the Visit to Italy' (2016) UN Doc CAT/OP/ITA/1, para 14.

[10] SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1, para 37; see also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to the National Preventive Mechanism' (2013) UN Doc CAT/OP/DEU/2, para 68; SPT, 'Report on the Visit for the Purpose of

The SPT has suggested elements for this strategy to the NPM,[11] seeking to ensure that in cases of alleged reprisal 'a disciplinary or criminal investigation is initiated and that victims are protected and, when relevant, compensated'.[12]

3.2 Principle of Confidentiality

3.2.1 Protection of Confidential Information

9 Article 21(2) OP outlines the principle of confidentiality in relation to the work of NPMs. In its Compilation of Advice, the SPT voiced its belief that the obligation of confidentiality under the Protocol should be given the *widest possible interpretation* in order to reflect the spirit of the Convention.[13] It is the preventive nature of the NPM's work that demands for confidentiality not to be breached.[14]

10 Confidential information collected by the NPM shall be '*privileged*'. This means that, first, no authority of the State shall force the NPM to disclose the source of information provided to the NPM on the basis of confidentiality, and that, second, the State party shall protect the NPM and the source against pressure from third parties. In other words, this provision protects the NPM from undue pressure on its sources of information. This intention explains why confidentiality is regulated in the context of a provision aimed at prohibiting sanctions against any person for having communicated any information to the NPM.

11 The SPT has provided guidance on the sensitive situation that an NPM becomes aware of allegedly criminal activity, whether of torture, related crimes, or other categories of crime. The SPT stated that

> such activity may be reported, but unless there is express consent, personal data related to it shall be protected … Thus, for example, where information relating to systematic issues or crimes is gathered, its existence can be reported in general terms. However, particular care must be taken to assess whether the sharing of information relating to a particular situation or particular crime might inevitably lead to the disclosure of personal data or to the identification of a person who has not given their express consent for their personal data to be revealed. In such cases the obligation of confidentiality prevails.[15]

12 Pursuant to the first sentence of Article 21(2) OP and the respect for the right to *privacy* of the source of information, the NPM has the duty to respect information that it receives confidentially from detainees and other sources of information. In this sense, the SPT stated in its Guidelines that the NPM 'should ensure that any confidential

Providing Advisory Assistance to the National Preventive Mechanism of Senegal, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/SEN/2, para 53; SPT, 'Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism, Report to the National Preventive Mechanism' (2017) UN Doc CAT/OP/ARM/2, para 55.

[11] CAT/OP/1/Rev.1 (n 10) para 37(a)–(h); see also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to State Party' (2013) UN Doc CAT/OP/DEU/1, para 68.

[12] CAT/OP/1/Rev.1 (n 10) para 37(h); see also APT, 'Detention Monitoring Briefings, Briefing No. 4: Mitigating the Risks of Sanctions Related to Detention Monitoring' (2012) <https://www.apt.ch/content/files_res/Briefing4_en.pdf> accessed 12 December 2018.

[13] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, Annex on 'Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms' para 5.

[14] See CAT/C/57/4 (n 13) Annex, para 6.

[15] ibid, para 8.

information acquired in the course of its work is fully protected'.[16] Therefore, if a detainee explicitly requests that the interview given to a delegation of an NPM remain confidential, then the NPM is bound by this request and shall not publish the contents of the interview, even if it does not contain protected personal data. Accordingly, the French as well as the Norwegian NPM refused to give testimony in court.[17]

13 The obligation extends to the confidential information received by the SPT.

14 The second sentence of Article 21(2) OP repeats the general principle deriving from the right to *privacy* and *data protection*: 'No personal data shall be published without the express consent of the person concerned.' The SPT views the sharing of such information with a third party as equal to the publication of personal data .[18]

15 As possible source of information under personal data protection, the SPT listed exemplarily 'persons deprived of their liberty, their families, lawyers, members of non-governmental organizations and State officials'.[19]

3.2.2 No Duty of Confidentiality: Publication of Reports

16 Apart from the prohibition from publishing personal data without the express consent of the person concerned, the Protocol does not contain any explicit duty of confidentiality on the part of the NPM. This is different for the Subcommittee on Prevention that is not only prohibited to publish personal data,[20] but shall be guided by the principle of confidentiality,[21] meet in camera,[22] maintain direct, and if necessary confidential, contact with the NPM,[23] communicate its recommendations and observations after a country mission confidentially to the State party, and, if relevant, to the NPM,[24] and is only authorized in exceptional cases to publish its mission reports, partly only on the basis of a decision by the Committee against Torture.[25]

17 The question arises as to why the Protocol places such strict duties of confidentiality on the Subcommittee and no equivalent duty of confidentiality on the NPMs, as both bodies have the same mandate of carrying out preventive visits to places of detention with the aim to prevent torture and ill-treatment. How can the Subcommittee be required to communicate its confidential country mission report to the NPM if the latter is not bound by a duty of confidentiality?

18 The *textual interpretation* of Article 21(2) OP, in the context of other provisions of the Protocol and especially in comparison with the respective provisions relating to the Subcommittee, leads to the conclusion that the strict duty of confidentiality on the part of the Subcommittee is primarily based on the fact that the Subcommittee is an

[16] CAT/OP/12/5 (n 7) para 37.

[17] Anders Brekke and others, 'Sivilombudsmannen stiller ikke i Breivik-rettssaken' (2016) NRK <https://www.nrk.no/norge/sivilombudsmannen-stiller-ikke-i-breivik-rettssaken-1.12858404> accessed 12 December 2018.

[18] SPT, 'Fourth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc CAT/C/46/2, para 99; CAT/C/57/4 (n 13) Annex, para 21: hence, an NPM that is part of an NHRI has to take into account the principle of confidentiality by carefully considering the need for the information to be shared with the NHRI staff on a case-by-case basis.

[19] CAT/C/57/4 (n 13) Annex, para 7.

[20] See above Art 16 OP, § 29.

[21] See above Art 2 OP, § 27; in this sense, the SPT recalled in CAT/OP/ECU/2 (n 9) para 36 that the principle of confidentiality set forth in the OP 'applies only to the activities of the Subcommittee, not to the activities of NPMs'.

[22] See above Art 10 OP, § 12.

[23] See above Art 11 OP, § 33.

[24] See above Art 16 OP, § 24.

[25] See above Art 16 OP, 3.2.

international body whose monitoring functions are perceived as constituting an undue interference with *State sovereignty*.

19 The fact that this difference of treatment of the SPT and the NPMs is not the result of blunder during the drafting of the OP can be seen from the *travaux préparatoires*. The *EU Draft* of 2001, for example, contained far-reaching duties of confidentiality for the Subcommittee relating to its mission reports and at the same time provided explicitly that the NPM 'reports on its visits shall be public'.[26] Even the *Mexican Draft* did not contain any explicit duties of confidentiality on the part of the NPMs.[27]

20 For the SPT, the provision on protection of personal data was introduced for the case that the State party requests the publication of its mission report. For the NPM, the inclusion of the same provision and in addition of the provision on confidentiality only makes sense if the NPM reports can, in principle, be made public. Hence, NPMs are not only allowed to publish their annual reports in accordance with Article 23 OP, but also, with respect to confidentiality and protection of personal data,[28] to *publish and disseminate reports on their visits to places of detention*, including their recommendations to the relevant authorities in accordance with Article 19(b) OP.

21 Accordingly, the SPT recommended in its Assessment Tool that '[v]isit reports, including recommendations, should, in principle, be published. Exceptions may exist where the national preventive mechanism considers it inappropriate to do so or where there is a legal impediment … The mechanism may also publish thematic reports.'[29]

22 As to the State party's obligations, the SPT also recommended that, depending on the country situation, the State party 'facilitate the publication of all reports produced by the NPMs'[30] or 'should take steps to ensure that, as a rule, the reports of the national preventive mechanism are published, with recourse to confidentiality being the exception'.[31]

23 In general, publicity of the NPM's reports is important, as it informs civil society about its work, the situation in places of detention, and hence enables cooperation and follow-up to the NPM's findings and recommendations. Only in exceptional circumstances, not publishing a report and recommendations may be better, eg if a private dialogue with the relevant authorities make implementation probable.[32] The SPT noted in its Assessment Tool that the NPM should, 'based on its experience, develop a strategy for the use of its report, which should include the submission of the report to relevant official bodies and the Government as a basis for and dialogue, and possibly its publication and dissemination, for the purpose of alerting the wider society'.[33] The SPT concretized in a report that the strategy for making use of its visit reports should be 'based on a serious consideration of the value of publishing all or part of such reports, as appropriate'.[34]

[26] cf E/CN.4/2001/67 (n 3), Annex II, Arts 14 and 15(g); see also above, para 4.

[27] See above E/CN.4/2001/67 (n 3), Annex I (the Mexican Draft) para 3.

[28] The SPT clarified in its reports that the publication of reports is possible without violating the right of persons to their personal data. For example, in CAT/OP/DEU/2 (n 10) para 69, it stated that the NPM 'should prepare and make public reports on the visits it conducts, without disclosing confidential information such as personal information concerning individuals deprived of their liberty'.

[29] CAT/OP/1/Rev.1 (n 10) para 35.

[30] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Malta, Report to State Party' (2016) UN Doc CAT/OP/MLT/1, para 36.

[31] CAT/OP/ECU/2 (n 9) para 35.

[32] E Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention' (2014) 14 Human Rights Law Review 1, 22.

[33] CAT/OP/1/Rev.1 (n 10) para 32.

[34] CAT/OP/ECU/2 (n 9) para 36.

To achieve this purpose, the SPT found in the situation that 'the relevant authorities and institutions do not respond to the reports within a reasonable time frame and the reports are not published'[35] that the NPM's preventive function 'cannot be fulfilled and its visibility suffers'[36] and hence recommended that the publication of the NPM's visit reports 'should be a matter of course, and that reports should be deemed to be confidential in exceptional cases only'.[37] The SPT added the recommendation for 'timely' publication in the case of Germany, where 'recommendations to the responsible authorities following the visit currently remain confidential until their publication in the Annual Report'.[38]

3.2.3 Data Protection Legislation

24 It is important to have data protection and confidentiality legislation in place. Implementing legislation should permit an NPM to disclose or publish data about individuals when they give their express consent and does not put them at risk. Disclosure 'must also be possible when the interviewee explicitly requests that the NPM refer his/her complaint to another institution, such as a prosecutor, ombudsman, professional association, or human rights tribunal'. An NPM should also have the unrestricted right to publish statistical or other information collated from personal data if this is truly rendered anonymous.[39] Wherever, however, legislation requires the NPM or its officials to report crimes and/or share information, the SPT highlighted that 'the principle of confidentiality as provided for in [the] Optional Protocol, and as explained above, shall prevail'.[40]

STEPHANIE KRISPER

[35] CAT/OP/ECU/2 (n 9) para 35. [36] ibid. [37] ibid, para 36.
[38] CAT/OP/DEU/2 (n 10) para 71.
[39] APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010).
[40] CAT/C/57/4 (n 13) Annex, para 10.

Article 22

Obligation of States Parties to Examine the Recommendations of National Preventive Mechanisms

The competent authorities of the State party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

1. Introduction	944
2. Travaux Préparatoires	944
2.1 Chronology of Draft Texts	944
2.2 Analysis of Working Group Discussions	945
3. Issues of Interpretation	945
3.1 'Competent authorities'	945
3.2 Examination of Recommendations	946
3.3 Dialogue on Possible Implementation Measures	947

1. Introduction

1 It derives from the principle of cooperation between the States parties, the Subcommittee, and NPMs that the recommendations by both visiting bodies have to be taken seriously by the authorities. This duty of States parties vis-à-vis the Subcommittee was laid down in Article 12(d) OP,[1] which formed the model for an identical provision in relation to the NPMs in Article 22 OP.

2 This provision is very important for follow up and implementation—meaning the impact—of NPM work.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Mexican Draft (13 February 2001)*[2]

Article 8

Each State Party to the present Protocol undertakes to implement the recommendations made by its national mechanism.

[1] See above Art 12 OP, 3.

[2] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

4 *Proposal by the Chairperson-Rapporteur (17 January 2002)*[3]

Article 22

> The competent authorities of the State party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

2.2 Analysis of Working Group Discussions

5 No discussions are reported on this article in the reports of the ninth and tenth session of the Working Group.

3. Issues of Interpretation

6 Article 22 OP mirrors Article 12(d) OP and obliges States parties to 'examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures'. By stressing the principle of cooperation also for the NPMs, Article 22 OP 'accords equal importance to international and national preventive efforts'.[4]

3.1 'Competent authorities'

7 The difference of Article 22 OP to Article 12(d) OP lies in the concretization of the persons under obligation: 'the competent authorities of the state party concerned.' These are the persons with the power to implement the respective recommendation. Hence, the authority that is 'competent' for a recommendation can be situated on different level in the hierarchy, ie from the administration of the visited institution up to the Ministers (of Interior, Justice, Defence, Health, etc) under whose authority the respective place of detention falls.[5]

8 The 'competent' authorities are identical to the 'relevant' authorities that the NPM addresses its recommendations to according to Article 19 OP, assuming that the NPM has correctly identified the respective authority. As already discussed,[6] it also serves the effectiveness of the NPM's work if the first authority that examines the recommendation and enters into dialogue with the NPM on its implementation is the hierarchically lowest one with the competence to correct the problems that the NPM identified. Additionally, a focal point in every relevant ministry can be useful to follow up on the implementation of the NPM's recommendations and report to the mechanism in that regard.[7] Many

[3] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I.

[4] APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010) 100.

[5] In this sense, the SPT states that the NPM 'should maintain a constructive dialogue with, firstly, those to whom the recommendations are addressed, namely, governmental authorities and the directors/managers of the places of detention concerned, but also with their supervising authorities': SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1, para 34.

[6] See above Art 19 OP, 3.2.3.1.

[7] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report to State Party' (2013) UN Doc CAT/OP/MDA/1, para 27; SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to State Party' (2013) UN Doc CAT/OP/DEU/1, para 40.

recommendations of the NPMs might need legislative measures for their full implementation, and thus the legislature may also be considered as competent authorities.

9 It may be suggested that implementing legislation gives the NPM the discretion to determine which authorities it deems appropriate to receive a certain recommendation. If the NPM makes a recommendation to an authority it erroneously finds to be 'relevant' according to Article 19 OP, this receiving authority should be obliged in good faith to refer the recommendation to the competent authority which would then have the duty to respond.[8] The implementing law should also allow the NPM to 'set a defined period within which it expects a response and dialogue with the competent officials'.[9]

3.2 Examination of Recommendations

10 Article 22 OP only stipulates a duty to 'examine the recommendations' and to enter into a dialogue with the NPM on 'possible implementation measures'. This underlines that, like the recommendations of the Subcommittee, the recommendations of NPMs are non-binding under international law. Nevertheless, it follows from the objective and purpose of the OP, and the general principle of cooperation as well as from good faith engagement after ratification of the Protocol that States shall take the recommendations of both bodies seriously and are under a duty to implement them due to the obligation to take all possible and relevant measures to prevent torture and ill-treatment.[10] According to the SPT the NPM legislation should also 'clearly state the obligation of competent authorities to examine the recommendations of the national preventive mechanism and to enter into a dialogue with it regarding the implementation of its recommendations'.[11]

11 In one of its first visit reports, the SPT urged the respective federal Government and the various state governments to 'comply with the recommendations issued to date by the national preventive mechanism and with its future recommendations', adding that '[t]he State party has an international obligation to do so', as stipulated in Articles 22 and 23 OP.[12] The SPT noted in its Guidelines that the State should take proposals and observations received from the NPM 'into consideration' on legislation that is relevant to its mandate.[13]

12 The SPT noted early that it is one of the main objectives of the NPMs 'to enter into a dialogue with the competent authorities with a view to improving the situation of persons deprived of their liberty and *proposing ways of implementing the recommendations*',[14]

[8] APT (ed), *Guide: Establishment and Designation of National Preventive Mechanisms* (APT 2006) 65; Moritz Birk and others, 'Enhancing Impact of National Preventive Mechanisms, Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward' (Ludwig Boltzmann Institute of Human Rights 2015) 47 <https://bim.lbg.ac.at/sites/files/bim/anhang/publikationen/enhancing_impact_of_national_preventive_mechanisms_0.pdf> accessed 12 December 2018: 'in many countries such as Austria, Estonia, France, Germany, Malta and Slovenia the authorities are required in domestic law to respond to the recommendations within a stated timeframe or a 'suitable period' (Germany). In Bulgaria, the timeframe specifies that the authorities notify the Ombudsman within one month of any action taken to address the recommendations; for Portugal it is 60 days, although for urgent matters the timeframe is 10 days.'

[9] APT, *Guide* (n 8) 65, referring to Czech NPM.

[10] See above Art 12 OP, § 34.

[11] CAT/OP/1/Rev.1 (n 5) para 41; APT, *Guide* (n 8) 64. For example, in the UK there is a multiple NPM structure. There are legislative provisions for particular state authorities to respond to NPM recommendations. Thus in England and Wales the local policing bodies must prepare comments and invite the chief constable to submit comments on the published report of Her Majesty's Inspectorate of Constabulary (HMIC).

[12] SPT, 'Report on the Visit to Mexico' (2010) UN Doc CAT/OP/MEX/1, para 32.

[13] SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 28.

[14] SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 50.

especially by means of its visit reports.[15] In fact, the SPT envisages that the official in charge of the institutions will receive, as competent authority, the recommendations as an integral part of the visit report—this after possible preliminary recommendations in the course of an immediate debriefing at the end of a visit with the representative of the place of detention, or via formal written feedback in the form of a detailed letter or a preliminary report to the places of detention.[16] Visit reports are to be used 'as a platform for dialogue'[17] and are also a key tool for any follow-up processes. As the competent authority considers the whole report when 'examining' the recommendations, its quality is highly relevant[18] to increase the likelihood that the recommendations are considered and implemented.

3.3 Dialogue on Possible Implementation Measures

13 As with the recommendations of the Subcommittee, it follows from the objective and purpose of the OP and the general principle of cooperation that States shall make bona fide attempts to implement the NPM recommendations.[19] Further, while Article 22 OP only refers to the recommendations of the NPM, the principle of complementarity implies that, as a body complementing the work of the SPT at the national level, the NPM 'is in a frontline position to ensure the continuity of the dialogue with the national authorities on issues relating to prevention of ill-treatment'.[20]

14 NPMs should not only consider but also *follow-up the SPT recommendations* and liaise with the SPT in the process.[21] The mandate of an NPM includes '[f]ollowing up on the process of implementation of recommendations made by United Nations and regional bodies to the States parties with regard to torture and related issues, providing advice at the national level and providing the recommending bodies with information, as appropriate'.[22] In that regard the SPT considered it to be an example of good practice where an NPM designed a matrix for use in following up on the recommendations set out in the Subcommittee's earlier visit report to the State party concerned.[23] Moreover,

[15] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Honduras, Report for the National Preventive Mechanism' (2010) UN Doc CAT/OP/HND/3, para 28; SPT, Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/MDA/2, para 31; SPT, 'Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism, Report to the National Preventive Mechanism' (2017) UN Doc CAT/OP/ARM/2, para 59.

[16] See above Art 19 OP, 3.2.3.

[17] CAT/OP/HND/3 (n 15) para 29; CAT/OP/MDA/2 (n 15) para 32, with 'develop' instead of 'devise'; CAT/OP/ARM/2 (n 15) para 58.

[18] See above Art 19 OP, § 18.

[19] See above Art 12 OP, § 34. In this sense, the SPT stated in its Assessment Tool that '[t]hose to whom the recommendations are addressed should, on request from the mechanism, develop a concrete policy or plan of action to commence reform where needed', in CAT/OP/1/Rev.1 (n 5) para 34; in one mission report, the SPT even recommended that 'the State Party issue an annual report describing the effectiveness of the interaction of the Government with the NPM in assessing and eradicating torture and ill-treatment in places of detention': SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Armenia' (2015) UN Doc CAT/OP/ARM/1, para 42.

[20] SPT, 'Report on the Visit to Benin' (2011) UN Doc CAT/OP/BEN/1, para 24; SPT, 'Report on the Visit to Sweden' (2008) UN Doc CAT/OP/SWE/1, para 40.

[21] Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 217; CAT/OP/12/5 (n 13) para 38.

[22] CAT/OP/1/Rev.1 (n 5) para 9(i); see also CAT/OP/HND/3 (n 15) para 16.

[23] CAT/OP/HND/3 (n 15) para 16.

the SPT encouraged an NPM to consider holding a national workshop to adopt a programme for the implementation of the recommendations made by the SPT as another means of bearing this responsibility.[24]

15 As to the *dialogue on implementation*, the SPT has given some indications over time how it could be held. In this regard, the SPT has only occasionally itself voiced possible scenarios for the State party to implement its obligation to engage in a 'meaningful dialogue'.[25] Instead, it has focused more on defining the NPMs' envisaged role in this process, seeing it as an activity included in the mandate of the NPM to engage 'in a meaningful process of dialogue' concerning the implementation of its recommendations with, apart from other stakeholders, the State party responsible.[26] For a meaningful, ie effective, dialogue, mechanisms for follow-up are necessary.[27]

16 The SPT has recommended to 'put in place a *follow-up strategy* that is clear and impact-oriented and develop the practices and tools necessary to implement the strategy'.[28] Follow-up with the State authorities is only one part of an NPM's follow-up strategy that should, according to the SPT, include to 'regularly verify the implementation of recommendations, primarily through follow-up visits to problematic institutions, but also based on relevant information from, among others, human rights bodies, governmental institutions and civil society'.[29] For the here relevant part of follow-up with the State party, different elements are to be considered.

17 A *database of recommendations* is necessary in order to be able to measure the progress of implementation of the recommendations. In its Assessment Tool, the SPT recommended that the NPMs systematize their experiences, to ensure that

> important concrete and contextual observations arising from its visits to institutions and stemming from other reliable sources, its recommendations and the responses from the authorities are categorized, filed and systematically processed for use in dialogue with the authorities, in the ongoing planning of work and in the further development of its strategies.[30]

18 The term 'implementation' provokes the question of *how its achievement can be identified*. When developing a policy or plan and considering its approach to the monitoring of implementation,[31] an NPM may consider how it will measure implementation at the time of drafting recommendations and have a strategy in place to consider how it will present its assessment of the level of implementation.[32] The decision as to whether or not the benchmarks have been reached will be based on a multidisciplinary approach,

[24] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Senegal, Report for the National Preventive Mechanism' (2013) UN Doc CAT/OP/SEN/2, para 59.

[25] CAT/OP/MDA/1 (n 7) para 27; In this sense, CAT/OP/DEU/1 (n 7) para 48.

[26] CAT/OP/1/Rev.1 (n 5) para 9(a). In its Guidelines, the SPT stated that the NPM 'should ensure that it has the capacity to and does engage in a meaningful process of dialogue with the State concerning the implementation of its recommendations': CAT/OP/12/5 (n 13) para 38.

[27] In this sense, the SPT recommended in one mission report that the NPM 'set up mechanisms for following up on its recommendations and that it do this, insofar as possible, in conjunction with the authorities': CAT/OP/HND/3 (n 15) para 29.

[28] CAT/OP/1/Rev.1 (n 5) para 33; see also, SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Federal Republic of Germany, Report to the National Preventive Mechanism' (2013) UN Doc CAT/OP/DEU/2, para 72; CAT/OP/MDA/2 (n 15) para 32; CAT/OP/ARM/2 (n 15) para 60.

[29] CAT/OP/1/Rev.1 (n 5) para 33.

[30] CAT/OP/1/Rev.1 (n 5) para 45; see also Birk and others (n 8) 42.

[31] Birk and others (n 8) 25–26.

[32] ibid 27.

the experience of the NPM and knowledge of the context and engaging with various experts.[33]

19 The SPT envisages the NPM to request the competent authorities to develop policies or *action plans*.[34] In fact, action plans are a practical tool to measure implementation, to strategically work towards the implementation of recommendations through a set of agreed measures as well as to support and evaluate the steps taken by the authorities.[35]

20 The process to follow up the implementation of the action plan should, as envisaged by the SPT, involve both written and oral exchanges on the implementation of the recommendations.[36] The *personal exchange* with the authorities starts with the direct dialogue at a follow-up visit or subsequent visit with a follow-up element. This is again particularly useful in regard to privately administered places of detention, as they are not part of the NPM's dialogue with the State.[37] Personal exchange should also involve regular meetings, round-tables, or working groups, etc. The process and its format depend on the access to and relationship with the States authorities. While regular personal contact can build trust, resolve possible deadlocks in the dialogue with the authorities, enable the findings to be explained in more detail, and encourage the implementation of recommendations, meetings should be held in an effective and resource-efficient manner in order to ensure that the NPM maintains professional distance safeguarding its position as independent actor.[38] As an institutionalized format for high level exchange and follow-up to the NPMs' *annual reports*, the SPT urges States parties to introduce an '*institutional forum*'.[39]

21 An EU-wide study has identified and analysed the different ways how NPMs follow up and promote the implementation of recommendations. It has found that with most NPMs the measures move along the familiar paths, namely follow-up visits and written dialogue during the drafting of the reports. Formats for direct exchanges with the authorities are largely underdeveloped although some interesting practices were identified and exchanged among NPMs. Moreover the study found that most NPMs lack a strategic approach on how to follow up their recommendations and achieve lasting change. It thus suggested 'building blocks' of an effective follow-up strategy for NPMs and recommended that NPMs develop 'pathways of change' to increase the impact of their work.[40]

22 No consequences are foreseen in the Optional Protocol if States parties refuse to cooperate with their NPM or to take steps to improve the situation in light of the NPM's recommendations. This is in contrast to the provisions relating to non-cooperation with the Subcommittee, which provide that such *violation of the principle of cooperation lead to sanctions* in accordance with Article 16(4), namely a public statement by the Committee against Torture or its decision to publish the entire mission report of the Subcommittee.[41] However, unlike the SPT with its mission reports and recommendations, the NPM can—and should—publish their reports in any case.[42]

[33] ibid 26–27.

[34] According to the Assessment Tool, CAT/OP/1/Rev.1 (n 5) para 34, those to whom the recommendations are addressed 'should, on request from the mechanism, develop a concrete policy or plan of action to commence reform where needed.'

[35] Birk and others (n 8) 54; with examples, 54–55. [36] CAT/OP/1/Rev.1 (n 5) para 34.

[37] Birk and others (n 8) 50. [38] ibid 55–57.

[39] CAT/OP/ARM/1 (n 19) para 41; see also SPT, 'Visit to the Netherlands for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism: Recommendations and Observations Addressed to the State Party' (2016) UN Doc CAT/OP/NLD/1, para 35.

[40] Birk and others (n 8) 87–110.

[41] See above Art 16 OP, para 3. [42] See Art 21 OP, 3.2.2.

23 Cooperating with NPMs in different countries, the SPT has found that, in cases where ombudsman's offices (NHRIs) have taken on the mandate of NPMs

> it has been difficult for them to build the kind of constructive dialogue envisaged in the Optional Protocol because the authorities have been unable to distinguish clearly between the preventive and reactive roles of these bodies. Since the role of ombudsman's offices involves taking a critical look at State action, calling attention to problems when they arise and processing individual complaints, among other functions, the authorities are often reluctant to cooperate, especially where ombudsman's offices participate in judicial proceedings or are authorized to bring cases before a judge or prosecutor where there is evidence of criminal liability.[43]

The SPT recommends that such an Ombudsman institution 'clarify the nature of the principle that guides its work, which is based on sustained cooperation and dialogue over the long term as a means of assisting the authorities to make any changes required to prevent torture and ill-treatment'.[44]

STEPHANIE KRISPER

[43] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Ecuador, Report for the National Preventive Mechanism' (2015) UN Doc CAT/OP/ECU/2, para 32.

[44] ibid, para 33.

Article 23

Annual Reports of the National Preventive Mechanisms

The States parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

1. Introduction	951
2. Travaux Préparatoires	951
2.1 Chronology of Draft Texts	951
2.2 Analysis of Working Group Discussions	952
3. Issues of Interpretation	952

1. Introduction

1 As with the Committee against Torture[1] and the Subcommittee on Prevention,[2] NPMs shall also prepare an annual report on their activities. While the annual reports of the Committee against Torture are submitted to the States parties of the Convention, and the annual reports of the Subcommittee on Prevention to the Committee against Torture, the final addressee of the NPMs' annual reports is not limited to a specific body or group of persons.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 EU Draft (22 February 2001)[3]

> Article 15 (new)
>
> For the purpose of this Protocol, a State Party wishing to establish a national mechanism undertakes to ensure that:
>
> (g) The reports on its visits shall be public.

3 Proposal by the Chairperson-Rapporteur (17 January 2002)[4]

[1] See above Art 24. [2] See above Art 16(3) OP.

[3] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex II.

[4] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I.

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

2.2 Analysis of Working Group Discussions

4 During its ninth session from 12 to 23 February 2001, the Working Group discussed the alternative draft the delegation of *Mexico* had submitted, with the support of the GRULAC.

5 With regard to the question of publicity, it was felt by most of the delegates that the national mechanisms should operate under the *principle of publicity* and that they should be able, at least, to publish annual reports. In this context, some delegations expressed the view that the question of publicity versus confidentiality that would arise from the publication of reports could be left to the national laws.[5]

6 At the tenth session of the Working Group from 14 to 25 January 2002,[6] the issue of publicity was not elaborated any further.

3. Issues of Interpretation

7 Article 23 OP obliges the States parties to 'publish and disseminate' the NPMs' annual reports. While the States parties` obligation to '*publish*' the report may be understood as simple information-giving exercise without much effort of outreach,[7] the word '*disseminate*' clarifies that the States parties should also inform the public at large. The SPT has clarified in its Guidelines that the State should publish and 'widely disseminate' the annual report of the NPM.[8] The State should 'also ensure that it is presented to, and discussed in, by the national legislative assembly, or Parliament'.[9] Mention of this obligation should be made in the NPM law.[10] Depending on the public character and media coverage of Parliamentary discussions, this format can help for public reach. For the discussion and follow-up to the NPMs' annual reports, the SPT urged States parties to introduce an 'institutional forum'.[11]

[5] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, para 46.

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78.

[7] Rachel Murray, 'National Preventive Mechanisms Under the Optional Protocol to the Torture Convention: One Size Does Not Fit All' (2008) 26 Netherlands Quarterly of Human Rights 485, 514.

[8] SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 29. See also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Netherlands: Recommendations and Observations Addressed to the State Party' (2016) UN Doc CAT/OP/NLD/1, para 35; SPT, 'Report on the Visit to Brazil' (2012) UN Doc CAT/OP/BRA/1, para 10.

[9] CAT/OP/12/5 (n 8) para 29.

[10] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Ecuador, Report to the National Preventive Mechanism' (2014) UN Doc CAT/OP/ECU/2, para 16; see also SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of Moldova, Report to State Party' (2014) UN Doc CAT/OP/MDA/1, para 31(i).

[11] SPT, 'Report on the Visit for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Republic of Armenia, Report to State Party' (2015) UN Doc CAT/OP/ARM/1, para 41; see also CAT/OP/NLD/1 (n 8) para 35. Besides of being an essential tool for transparency, accountability and raising awareness of the work of the NPM, the annual reports can be used as part of the tools for dialogue

8 The SPT also noted vis-à-vis the State party that the NPM should transmit its annual reports to the SPT, also for publication on its website.[12] This transmission of the report is one way of dialogue and information-sharing between the NPM and the SPT in accordance with the principle of cooperation.

9 The OP does not prescribe the content of annual reports. The SPT elaborated in its Assessment Tool that annual reports should 'include, in addition to recommendations for change, the outcome of the dialogue with authorities, ie, follow-up on recommendations mentioned in previous annual reports. The mechanism may also publish thematic reports.'[13] It concretized on the reports' content:

(a) Accounts of current challenges to the protection of the rights of persons deprived of their liberty and to the effective execution of the mechanism's mandate, and strategic short-term and longer term plans, including with respect to setting priorities;
(b) Analysis of the most important findings and an account of recommendations and the responses of the authorities thereto;
(c) Follow-up on issues outstanding from previously published reports;
(d) Consideration of thematic issues;
(e) Accounts of cooperation with other actors on the prevention of torture;
(f) An overview of all other national preventive mechanism activities undertaken and their outcomes.[14]

STEPHANIE KRISPER

with the authorities and may contribute to the process of evaluating implementation and informing any policy reform; in Moritz Birk and others, 'Enhancing Impact of National Preventive Mechanisms, Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward' (Ludwig Boltzmann Institute of Human Rights 2015) 31–33 <http:// https://bim.lbg.ac.at/sites/files/bim/anhang/publikationen/enhancing_impact_of_national_preventive_mechanisms_0.pdf> accessed 12 December 2018.

[12] CAT/OP/12/5 (n 8) para 29; CAT/OP/BRA/1 (n 8) para 12. If the designated NPM is part of an institution, its annual report should be published as a separate report or, at the very least, it should be afforded a separate chapter in the institution's general annual report; in APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010) 102–103; see also SPT, 'Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism, Report to the National Preventive Mechanism' (2017) UN Doc CAT/OP/ARM/2, para 61.

[13] SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1, para 35.

[14] ibid, para 47.

PART V

DECLARATION

Article 24

Temporary Opting-Out Declaration

1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations either under part III or under part IV of the present Protocol.

2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two year period.

1. Introduction	957
2. Travaux Préparatoires	958
2.1 Chronology of Draft Texts	958
2.2 Analysis of Working Group Discussions	958
3. Issues of Interpretation	959
3.1 Declaration to Postpone the Implementation of Obligations	959
3.2 Validity of the Postponement	960

1. Introduction

1 Article 24 OP provides States parties with the opportunity to make a declaration to the effect that the competences of the SPT or of the respective NPM will be postponed for a maximum of three years. If need be, this period may be extended for another two years. This particular '*opting-out declaration*' was introduced by the Chairperson-Rapporteur in 2002 as a compromise for those States, including the *United States* and *Saudi Arabia*, which opposed the general prohibition of reservations to the Protocol.[1] It resembles, to some extent, the possibility of 'opting-out reservations' in accordance with Article 28(1) CAT, where States parties have the possibility to declare at the time of signature or ratification that they do not recognize the competence of the CAT Committee provided for in Article 20 CAT on the inquiry procedure, or in accordance with Article 30(2) CAT, stipulating that States parties may declare that they do not consider themselves bound by Article 30(1) CAT (containing a specific dispute settlement procedure).[2]

2 Until November 2017, only seven States parties to the OP have made use of the possibility to postpone the implementation of their obligations under the Protocol.[3]

[1] On the controversial discussions as to the permissibility of reservations to the Protocol see below Art 30 OP, 2.2.

[2] See above Arts 28 and 30 OP.

[3] Kazakhstan, Montenegro, Romania, Hungary, Bosnia and Herzegovina, Germany, and the Philippines.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Revised Costa Rica Draft (15 January 1991)*[4]

Article 18

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

3. No reservations may be made in respect of the provisions of this Protocol.

4 *Text of the Articles which constitute the Outcome of the First Reading (25 January 1996)*[5]

Article 18

3. No reservations [incompatible with the object and purpose of the Convention and Protocol] may be made in respect of the provisions of this Protocol.

5 *EU Draft (22 February 2001)*[6]

Article 19 bis (new)

No reservations shall be made to the present Protocol.

6 *Proposal by the Chairperson-Rapporteur (17 January 2002)*[7]

Article 24

1. Upon ratification, States parties can make a declaration postponing the implementation of their obligations either under Part III or under Part IV of the present Protocol.

2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two-year period.

2.2 Analysis of Working Group Discussions

7 The inclusion of a temporary opting-out possibility in Article 24 constitutes an attempt by the Chairperson-Rapporteur to reach a compromise on the *controversial question of reservations*.[8]

8 At the tenth session of the Working Group from 14 to 25 January 2002, the Chairperson-Rapporteur presented her draft proposal, containing a declaration in Article 24 (Part V), which would give States parties the possibility of postponing their obligations

[4] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[5] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Fourth Session (1996) UN Doc E/CN.4/1996/28, Annex I.

[6] E/CN.4/2001/WG.11/CRP.2.

[7] E/CN.4/2002/CRP.1.

[8] For these discussions see the analysis below Art 30 OP, 2.2.

either under Part III or under Part IV. The purpose of this provision was to facilitate the adoption of measures by States that would enable them to comply with their obligations under the Protocol. This Article, however, was open to negotiation, since it dealt with an issue that had not been discussed at the Working Group before.[9]

9 During the discussions on Article 24, the delegation of *Saudi Arabia* recalled that all the rules governing international instruments permitted reservations and that the Vienna regime on reservations was clear on this point. It therefore questioned the legal basis for the inadmissibility of reservations.[10] The delegation of *Cuba* stated that Article 24 did not resolve many of the concerns expressed by several delegations.[11] Other delegations, such as the delegation of *Poland*, while expressing concern about Article 24, were still ready to support the Chairperson's proposal at large.[12]

10 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[13]

3. Issues of Interpretation

3.1 Declaration to Postpone the Implementation of Obligations

11 The temporary 'opting-out declaration' under Article 24(1) OP enables States parties to postpone the '*implementation of their obligations*' either under Part III (mandate of the Subcommittee on Prevention) or under Part IV (mandate of the NPM) of the Protocol. The words 'either … or' indicate that *States have to choose*. They are not allowed to 'opt-out' from both procedures. To postpone the implementation of the mandate of the *SPT* means that the SPT has no mandate vis-à-vis the State party concerned for the period indicated in the respective declaration. In particular, the SPT is prevented from carrying out a mission to the State party concerned, and the State party has no obligations vis-à-vis the SPT under Articles 12, 14, or 15 OP. In addition, the SPT, during this initial period, cannot implement its advisory and assisting function under Article 11(b) OP in relation to the State party concerned and its NPM. Nevertheless, the State party is required to establish or designate a NPM within one year after the entry into force of the Protocol without the respective advice of the SPT.

12 The second option is to postpone the implementation of the mandate of the *NPM*. This means that the State party concerned postpones its obligation under Article 17 OP to establish or designate a NPM within one year after the entry into force of the Protocol, for another period of up to three years, ie for a total of four years. Within this period, the State party may, however, avail itself of the possibility under Article 11(b)(i) OP of being assisted by the SPT in its efforts to establish a NPM. The SPT may, for example, conduct a mission to the State party concerned, visit several places of detention and organize a seminar, together with the Government and relevant NGOs, on the measures necessary for establishing an independent and effective NPM.[14]

[9] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Tenth Session (2002) UN Doc E/CN.4/2002/78, para 51.

[10] ibid, para 72. [11] ibid, para 88. [12] ibid, para 107.

[13] CHR Res 202/33 of 22 April 2002. See above Art 1 OP, 2.2. [14] See above Art 11 OP, 3.

13 According to Article 24(1) OP, the opting-out declaration may be made '*upon ratification*'. Strictly speaking, this provision prevents a State which has not signed the Protocol and becomes a party by way of accession,[15] from making a respective declaration. The comparable provisions in Articles 28(1) and 30(2) CAT explicitly state that the respective reservations may be made 'at the time of signature or ratification of this Convention or accession thereto'.[16] Nevertheless, there are no strong reasons against also allowing declarations upon *accession*. But a State becoming a party to the Protocol by means of *succession* cannot use this opportunity to suspend the implementation of a part of the Protocol for a certain period.

14 In fact, the interpretation of Article 24(1) OP had proven to be quite controversial, as there existed a *discrepancy between the various authentic texts* of the Protocol. While the Arabic, Chinese, English, and French versions stipulated that such a declaration may be made 'upon ratification', the Russian and Spanish versions contained the phrase 'once ratified'. Following Article 33 VCLT, the terms of a treaty are presumed to have the same meaning in each of its authentic texts. Consequently, after a precedent was set by Kazakhstan, that made a declaration of postponement with regard to the establishment of its NPM almost one and a half year after ratification,[17] the question was referred to the UN Office of Legal Affairs, which 'initiated a correction procedure to bring the Russian and Spanish versions of article 24 into line with the other four authentic texts', ensuring that these versions mirrored the meaning of the phrase 'at the time of the ratification'. The change retroactively entered into force on 29 April 2010.[18]

3.2 Validity of the Postponement

15 The postponement of the implementation of certain provisions of the Protocol for the State party concerned shall be valid for the period indicated in the respective declaration. Article 24(2) specifies a maximum of three years. The period starts to run as from the entry into force of the Protocol for the State party concerned, ie either on 22 June 2006, or on the thirtieth day after the deposit of its own instrument of ratification (or eventually accession).[19] Until November 2017, only seven States parties to the OP have made use of the possibility to postpone the implementation of their obligations under the Protocol. While Kazakhstan, Montenegro, Romania, Hungary, Bosnia and Herzegovina, and Germany[20] declared to postpone their obligations under Part IV of the Protocol (related to the designation of the NPM), the Philippines declared

[15] See below Art 27(3) OP. [16] See above Art 28, 3; Art 30 OP, 3.

[17] Kazakhstan ratified the Protocol on 28 October 2008, invoking the Russian version of its text to make a declaration under Art 24 OP postponing the establishment of its NPM. The declaration was made on 8 February 2010.

[18] See SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/C/44/2, para 48; Secretary-General, 'Corrections to the Original Text of the Optional Protocol (Authentic Russian and Spanish Texts) and to the Certified True Copies' <http://treaties.un.org/Publication/CN/2010/CN.244.2010-Eng.pdf> accessed 20 November 2017.

[19] See below Art 28 OP.

[20] Germany made a declaration under Art 24 on 23 March 2012, stating that '[t]he distribution of competences within the Federal Republic of Germany means that a treaty between the Länder (federal states), which requires parliamentary approval, is needed in order to establish the national preventive mechanism at Länder level. Because of this requirement, Germany shall postpone the implementation of its obligations under Part IV of the Optional Protocol. The Subcommittee will be informed as soon as possible of the date from which the national prevention mechanism is operational.'

the postponement of the implementation of its obligations under Part III of the Optional Protocol, specifically Article 11 (1)(a) on the visitations by the SPT to places referred to in Article 4 and for them to make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

Already since 2008, relevant organizations active in the field of torture prevention encouraged the Philippian state authorities to demonstrate responsibility and approve the ratification instrument at the first given opportunity.[21] In 2009, the CAT Committee strongly recommended that 'the State party should take immediate steps to prevent acts of torture and ill-treatment throughout the country and to announce a policy of total elimination in respect of any ill-treatment or torture by State officials'.[22] It was only in 2012, however, that the Philippines acceded to the OP. This step was highly welcomed by the international community, which then recommended to further strengthen the Philippines' efforts to '[p]revent cases of torture in facilities of detention through the provision of legal safeguards for detainees and effective investigations into allegations of torture and the prosecution and sentencing of perpetrators'.[23]

16 Article 24(2) provides also for the possibility of *extending the period of three years for an additional two years*. This means that the establishment of a NPM might be postponed for a total of *six years* after the entry into force of the Protocol. However, a decision of extension can only be made by the CAT *Committee*, after due representations have been made by the State party and after consultation with the SPT. A State party to the Protocol would have to advance very strong reasons why the SPT should not be allowed to carry out its mandate vis-à-vis that State for a total period of five years, in order to convince both the SPT and the CAT Committee that such an extension is justified. Until November 2017, this possibility had not been made use of. The competence of the SPT under Article 24(2) to consult with the CAT Committee about the possibility of an extension is not affected by the declaration under Article 24(1), which only postpones the implementation of its mandate under Part III, not Part V.

17 The extension under Article 24(2) OP might become relevant in relation to the establishment of a *NPM* in accordance with Article 17 OP.[24] If the SPT, in exercising its advisory and assisting functions under Article 11(b)(i) OP, arrives at the conclusion that the State party has taken serious efforts but still faces considerable difficulties in establishing a truly effective NPM within the first period of four years, it may recommend that the CAT Committee extend the period for another two years.

KERSTIN BUCHINGER

[21] IRCT, 'A Step Forward: Ratifying OPCAT in the Philippines' (30 April 2008) <http://irct.org/media-and-resources/latest-news/article/361> accessed 20 November 2017.

[22] CAT, 'Concluding Observations: The Philippines' (2009) UN Doc CAT/C/PHL/CO/2, para 7.

[23] GA, 'Report of the Working Group on the Universal Periodic Review: Philippines' (2012) UN Doc A/HCR/21/12, para 129.18.

[24] See also APT and IIDH, *Optional Protocol to the United Nations Convention against Torture: Implementation Manual* (2nd rev edn, APT and IIDH 2010), 105.

PART VI

FINANCIAL PROVISIONS

Article 25

Financing of the Subcommittee

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.

2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee under the present Protocol.

1. Introduction	965
2. Travaux Préparatoires	966
2.1 Chronology of Draft Texts	966
2.2 Analysis of Working Group Discussions	968
3. Issues of Interpretation	970
3.1 Budget of the SPT	970
3.2 Staff and Facilities of the SPT	972

1. Introduction

1 Experience shows that the system of financing of treaty monitoring bodies by contributions of States parties, as provided for in Articles 17(7) and 18(5) CAT, simply does not work and leads to serious obstacles for the treaty bodies in performing their functions.[1] This is the reason why Australia in 1991 submitted a proposal for amending these provisions, together with the respective provisions of CERD. Both provisions were amended in accordance with the procedure envisaged in Article 29 CAT. However, these amendments never entered into force as the required ratification by two-thirds of the States parties was never achieved.[2] Nevertheless, the General Assembly, when endorsing these amendments in December 1992, as a provisional measure agreed to cover the expenses of the CAT and CERD Committees out of the general UN budget.[3] This provisional measure seems to have become a permanent solution.

2 The activities of the SPT, in particular after having grown to twenty-five members conducting missions to an increasing number of States parties, entail considerable expenses that go well beyond those of other human rights treaty monitoring bodies. Keeping the negative experiences of the CAT Committee with a funding model by States parties in mind, it is not surprising that all relevant drafts for the OP provided for funding of the SPT out of the regular UN budget.[4] Some delegations, above all the *United States of America*, nevertheless insisted that the costs of the SPT should be borne exclusively by

[1] See above Art 17, 6. See also Manfred Nowak, 'Proposals for Improving the UN Human Rights Programme' (1993) 11 NQHR 162 with further references.
[2] See above Art 29, 4. [3] GA Res 47/111 of 16 December 1992. [4] See below 2.1.

the States parties to the Protocol.[5] No compromise could be achieved, and the majority adopted the model of UN financing, supplemented by the creation of a Special Fund to help States parties financing the implementation of the Protocol on the domestic level.[6]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[7]

Article 13

1. Each State Party shall contribute to the expenditure incurred in the implementation of the present Protocol on the basis of the scale used by the United Nations Organization.

2. The draft annual budget, after approval by the Committee, shall be submitted by the Secretary-General to the annual Assembly of the States Parties.

4 *Revised Costa Rica Draft (15 January 1991)*[8]

Article 16

The expenditure incurred by the implementation of the present Protocol, including all its missions, shall be borne by the United Nations.

[1. States Parties shall contribute to the expenditure incurred in the implementation of the present Protocol on the basis of the scale used by the United Nations.

2. There may be established a Special Fund based on voluntary contributions of States, intergovernmental organizations, non-governmental organizations, private institutions and individuals.

3. The Special Fund shall supplement the financing by the States Parties of all the activities provided for in this Protocol. It shall be managed by the Subcommittee, which shall report to a Board of Trustees appointed by the States Parties.

4. Any expenses, such as the cost of staff, interpreters and facilities, incurred by the United Nations pursuant to Article 7 paragraph 4, shall be reimbursed by contributions of the States Parties and the Special Fund.]

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[9]

Article 16

1. The expenditure incurred by the implementation of the present Protocol, including missions, shall be borne by the United Nations, [subject to the approval of the General Assembly].

[5] cf Art 9(2) of the US Draft below, para 9, and the discussions in the Working Group below, 2.2.

[6] See below Art 26 OP.

[7] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[8] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[9] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Fourth Session (1996) UN Doc E/CN.4/1996/28, Annex I.

2. The Secretary-General of the United Nations shall provide necessary staff and facilities for the effective performance of the functions of the Sub-Committee under the present Protocol.

6 *Text of the Articles which Constitute the Outcome of the Second Reading (2 December 1999)*[10]

Article 16 [16]

1. The expenditure incurred by the implementation of the present Protocol, including missions, shall be borne by the United Nations.

2. The Secretary-General of the United Nations shall provide necessary staff and facilities for the effective performance of the functions of the Subcommittee under the present Protocol.

7 Mexican Draft (13 February 2001)[11]

Article 20 (former Article 16, amended)

1. The expenditure incurred by the implementation of the present Protocol shall be borne by the United Nations.

2. The Secretary-General of the United Nations shall provide the staff and services necessary for the effective performance by the Sub-Committee of its functions under the present Protocol.

8 *EU Draft (22 February 2001)*[12]

Article 17 (old 16)

1. The expenditure incurred by the implementation of the present Protocol, including missions and visits, shall be borne by the United Nations.

2. The Secretary-General of the United Nations shall provide necessary staff and facilities for the effective performance of the functions of the Sub-Committee under the present Protocol.

9 *US Draft (16 January 2002)*[13]

Article 9

1. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee under this Protocol.

2. The States Parties which shall have accepted this Protocol shall be responsible for expenses incurred in connection with the operation of the Subcommittee on Prevention, in a manner based upon the United Nations scale of assessment prorated to take into account the number of States Parties to the Protocol.

[10] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Eighth Session (1999) UN Doc E/CN.4/2000/58, Annex I.

[11] E/CN.4/2001/WG.11/CRP.1.

[12] E/CN.4/2001/WG.11/CRP.2.

[13] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Tenth Session (2002) UN Doc E/CN.4/2002/78, Annex II E.

2.2 Analysis of Working Group Discussions

10 During the first session of the Working Group, held from 19 to 30 October 1992, Article 16 of the revised Costa Rica Draft of 1991 was discussed under 'Logistics and financial considerations'.[14] The general approach of most delegations was that the implementation of the proposed system and the operations of the SPT should not be jeopardized by inadequate financing. There should be an assurance of sufficient financial and other resources, on a continuing basis, to meet the needs of the efficient operation of the system. Most representatives expressed the view that Article 16 needed further consideration, based on a financial evaluation of the projected costs of implementing the Protocol. Delegations requested the preparation of a detailed financial analysis of the costs associated with the operation of the proposed system of visits, to be provided to the Working Group in the course of its future deliberations.

11 Many delegations supported the principle that expenditures deriving from the implementation of the Protocol should be borne by the *regular UN budget*. Reference was made in this connection to the proposal made by the meeting of Chairpersons of the supervisory bodies that all treaty bodies be financed from the regular UN budget and that all new instruments should provide for the financing of new bodies from the regular budget. Further consideration would be needed, however, in light of the decision taken by the General Assembly at its forty-seventh session on the effective operation of the treaty bodies. If the General Assembly proposed changes to the CAT to allocate costs of the CAT Committee to the general budget, it was suggested that the same system should apply to the Protocol. The reliance on voluntary contributions, or on payments by States parties alone, would not provide the necessary assurance of resources to permit sound administration.

12 Some delegations nevertheless found that the idea that States parties should bear the expenditures should be retained for consideration. Others feared that if the entire costs were to be borne by States parties, this might inhibit many countries from ratifying the instrument.

13 Several speakers stressed the need for adequate financial resources as a prerequisite to the efficient implementation of the Protocol and expressed the fear that voluntary contributions would not be sufficient for this purpose. A number of delegations expressed the opinion that in a time of significant financial constraints, the establishment of this mechanism should not be at the expense of the effective functioning of other areas of the human rights treaty system.

14 At the fourth Working Group session from 30 October to 10 November 1995, it was the general approach of all delegations that the expenditures incurred in the implementation of the Protocol and the activities of the special fund should be dealt with in separate Articles.[15]

15 Most delegations supported the principle that expenditure deriving from the implementation of the Protocol should be borne by the regular UN budget. Reference was

[14] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28, paras 101ff.

[15] E/CN.4/1996/28 (n 9) para 74.

made to GA Resolution 47/111 of 16 December 1992, in which the Assembly endorsed respective amendments to two conventions, including CAT, providing for the financing of the CAT Committee from the regular budget.

16 The representative of *Cuba* suggested deleting the introductory part of Article 16, and the observer for *Nigeria* also stated that the contributions should be paid by the States parties themselves.

17 The delegation of the *United States* of America called on other delegations to take into account the financial situation of the United Nations and the resource situation of the Centre for Human Rights. It would not be advisable to impose a financial burden on the Centre unless it was assured that the Centre would receive additional resources for servicing that additional body, which would be quite expensive. It believed that the Working Group should place on record that if regular budget funding was decided upon, the Secretary-General should provide additional resources from within the existing regular UN budget to compensate the Centre of Human Rights for the additional expenses occasioned by the establishment of the SPT.

18 The majority of delegations, however, expressed the belief that the financial difficulties of the United Nations were temporary. It was generally felt that it was necessary to draft Article 16(2) along the lines of Article 18(3) CAT. Thus, a paragraph with such wording was added as paragraph 2.[16]

19 At the fifth plenary meeting on 9 November 1995, the Chairperson of the informal drafting group submitted the text of Article 16, stating that it was proposed that the article should contain two paragraphs, setting out that the expenditure incurred in the implementation of the Protocol should be borne by the United Nations. Paragraph 2 stipulated that the UN Secretary-General should provide the necessary staff and facilities for the effective performance of the SPT. The Working Group then agreed on this proposal.[17]

20 At the sixth session, held from 13 to 24 October 1997, the representatives of *Cuba* and *Egypt* once again stated that States parties should be responsible for the expenditures incurred by the implementation of the present Protocol.[18] The observer for *Amnesty International* noted that human rights work was an integral part of the mainstream work of the United Nations, that special funding could be uncertain and payment difficult to ensure, and that independence would be best guaranteed by regular budget funding. She recalled the problem of funding of the CAT Committee which eventually resulted in a change of funding from States parties to the regular budget. At the fourth plenary meeting on 14 October 1997, paragraph 2 of Article 16 was adopted without amendments.[19] At the sixth plenary meeting on 15 October 1997 the Chairperson of the drafting group decided to place a full stop after the words 'United Nations' and to delete the bracketed text. At the same meeting, paragraph 1 of Article 16 was adopted.[20]

21 During the ninth session from 12 to 23 February 2001, while considering the alternative draft text proposed by *Mexico* with the support of GRULAC, some delegations raised concerns about the financial implications of creating national and international mechanisms. They expressed reluctance to accept that the international mechanism should be funded under the regular UN budget and asked to receive information from the Secretariat concerning what the budget cost of the proposed mechanisms might be.[21]

[16] ibid, para 81. [17] ibid, para 82.

[18] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42 para 82.

[19] ibid, para 85. [20] ibid, para 88. [21] ibid, para 26.

22 At the tenth session of the Working Group from 14 to 25 January 2002, the delegation of the *United States* of America suggested that it would not be appropriate to fund the international visiting mechanism from the regular UN budget, as that would mean that every member of the United Nations would contribute to the mechanism whether or not it was a party to the OP. Therefore, the costs should be borne by the States parties to the Protocol themselves. Furthermore, the delegation, supported by the delegation of *Saudi Arabia*, expressed concern about the financial implications of creating an international mechanism and the budgetary consequences of such a mechanism on other human rights mechanisms.[22]

23 The delegations of Sweden, Denmark, and Finland were of the view that the international mechanism should be funded under the regular budget and recalled the provision to that effect contained in the draft presented by the *European Union* in 2001. This solution would also guarantee the independence and neutrality of the mechanism.[23]

24 The delegation of the *Netherlands* underlined the importance of financing through the regular budget. The UN treaty system was part of the United Nations and as such all member States contributed (*per ratio*) to the system, irrespective of the treaties they had signed or ratified. It would also be unfair for States parties to put a price tag on a human rights treaty. That would mean that only rich States would be in a position to become parties to such treaties. Many people would be denied human rights because their governments could not afford to become a party.[24]

25 According to the proposal presented by the Chairperson-Rapporteur, the SPT would be financed from the regular UN budget. The Chairperson was aware that certain delegations, including that of the *United States of America*, had very strong feelings about this issue. However, she recalled that this point had already been discussed and negotiated by the Working Group before.[25]

26 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[26]

3. Issues of Interpretation

3.1 Budget of the SPT

27 Article 25(1) OP, according to which all *costs of the SPT* shall be borne out of the *regular UN budget*, is based on the philosophy that UN human rights treaties were not drafted for the benefit of a small group of States but rather in general served the promotion of international cooperation and other objectives of the UN, such as achieving international peace, security, and development,[27] which called for the closest possible links with the world organization. In addition, it proved to be the only practical method of ensuring the smooth functioning of UN treaty bodies and constitutes the standard model of UN human rights treaties.[28]

[22] E/CN.4/2002/78 (n 13) para 32. [23] ibid, para 33. [24] ibid, para 34.
[25] ibid, para 52; see also E/CN.4/2002/WG.11/CRP.1.
[26] CHR Res 2002/33 of 22 April 2002; see above Art 1 OP, 2.2.
[27] On the interdependence of the three main UN aims and objectives, security, development, and human rights, see Kofi Annan, 'In Larger Freedom' (2005) UN Doc A/59/2005, paras 12–17.
[28] cf eg Art 17(8) CEDAW; Art 43(12) CRC; Art 72(8) CMW; Art 26(7) CED; Art 34(12) CRPD.

28 Article 25(1) is silent about the costs created by the additional work of the *CAT Committee* based on the Protocol. The Committee has only very limited functions under the Protocol. However, costs occur as it holds joint meetings with the SPT, discussing the various SPT reports, including its annual reports, it may decide about making a public statement on a particular country situation or publishing a country mission report of the SPT, extend the 'opting-out declaration' under Article 24 OP, and include in its own annual report a section on the implementation of the Protocol.[29] These additional costs also are and will be borne out of the general UN budget in accordance with GA Resolution 47/111 of December 1992.

29 Since the expenses of the SPT members are borne out of the regular UN budget, the Secretary-General must also provide the *necessary staff and facilities* for the effective performance of the functions of the SPT under the OP. The respective provision in Article 25(2) is in line with all other human rights treaties the implementation of which is financed by the UN.[30] In practice, the servicing of the SPT, as all other human rights treaty bodies, is carried out by the Office of the *UN High Commissioner for Human Rights in Geneva*.

30 In practice, the SPT has to face *serious budgetary constraints* ever since it started to be operational. When it began its work in 2007, no funding had been approved for it to carry out its mandate accordingly. Meanwhile, the SPT was supported by the High Commissioner for Human Rights, 'who provided resources, including interim secretariat assistance, from extrabudgetary funds'.[31] For the biennium 2008–2009, a regular budget of US$925,600.00 (being an average of slightly more than US$460,000 per year) had been approved for the SPT,[32] meaning that on this basis it was not even able to carry out one regular mission to each of the then thirty-four States parties once every eight years.[33] The assumptions on which the SPT budget was based would have allowed for four regular missions lasting for ten days each per year (as well as for two additional short follow-up missions of three days each), involving two SPT members, two persons of the secretariat, and two external experts.[34] Especially the assumptions about *expenditure for a regular mission* in the SPT's view appeared 'to significantly underestimate the actual cost of a Subcommittee visit'.[35] Moreover, the SPT expressed its concern that there had been 'no specific provision within the regular budget for the Subcommittee mandate to work in direct contact with national preventive mechanisms, since the existing budget lines [were] limited to sessions and visits'.[36] The OP itself expressly foresees and promotes cooperation between the SPT and NPMs, and in fact, quite a number of procedures and opportunities apart from sessions and country missions can be used in order to foster cooperation and communication between these bodies.[37]

[29] See above Arts 10(3) OP, 16(4) OP, 24(2) OP.

[30] cf eg Art 17(9) CEDAW; Art 43(11) CRC; Art 72(7) CMW; Art 26(7) CED; Art 34(11) CRPD. See also above Art 17, 6 OP.

[31] See SPT, 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc CAT/C/40/2, para 47.

[32] On this basis, the budget would allow for only four regular visits, lasting ten days each per year and two short follow-up visits of three days each.

[33] See CAT/C/40/2 (n 1) para 50. [34] ibid. [35] ibid, para 52. [36] ibid, para 53.

[37] See Arts 11(b) and 20(f) OP above; see also Moritz Birk and others, *Enhancing Impact of National Preventive Mechanisms, Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward* (Ludwig Boltzmann Institute of Human Rights 2015) 75.

31 During its second year, the SPT had to limit its planned programme to three missions per year.[38] Thus, the SPT made detailed proposals for a revision of the original budget assumptions for the biennium 2010–2011. The proposal was based on the assumption that an average mission would require at least four SPT members.[39] Moreover, the costs for UN security officers accompanying the SPT delegations as well as costs for interpretation on missions should be seen as additional costs and should be included in all future budgetary provisions.[40] Finally, the proposal addressed the previous lack of a specific provision for the SPT's mandate to work in direct contact with the NPMs.[41]

3.2 Staff and Facilities of the SPT

32 Following the expansion in the number of SPT members from ten to twenty-five, the UN General Assembly recognized the need to grant the SPT more resources in order to fulfil its mandate in an adequate manner.[42] However, the 'challenge of resources' remained an issue of concern for the SPT also in the following years, especially as no stable, core secretariat was in place 'to service its cycle of work'.[43] With regard to paragraph 26(d) of the General Assembly resolution 68/268,[44] the SPT strongly believed that in the course of 2015 and beyond it would benefit from the extra provision for capacity-building measures that the General Assembly called upon the Secetary-General to provide through the OHCHR.[45] In its ninth Annual Report, however, the SPT expressed its regret that this had not been the case.[46] Thus, it found it necessary to seek *additional meeting time* in order 'to ensure that its work is as effective as possible'.[47]

33 Since the *Special Fund*[48] that had been set up in accordance with Article 26 OP was only meant to help finance the implementation of the SPT's recommendations after a mission, but not the conduct of its missions, one had to think about other means to acquire voluntary contributions for the expenses of the SPT and its staff. The SPT is, therefore, being financially and/or resource-wise supported by certain States parties and called upon States parties to continue to do so in order to enable the SPT to conduct its work and mandate 'more fully and efficaciously'.[49]

KERSTIN BUCHINGER

[38] See SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Corrigendum' (2009) UN Doc CAT/C/42/2/Corr.1, para 5.

[39] ibid, para 71.

[40] ibid, paras 72–73.

[41] ibid, para 74.

[42] See GA Res No 64/153 of 18 December 2009, para 36.

[43] SeeSPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc CAT/C/52/2, para 105.

[44] GA Res No 68/268of 9 April 2014 (Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System). Paragraph 26(d) stipulates the need for an adequate allocation of financial and human resources to those treaty bodies whose main mandated role is to carry out field visits.

[45] See SPT, 'Eighth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment' (2015) UN Doc CAT/C/54/2, para 99.

[46] See SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, para 85.

[47] SPT, 'Decision on the Need for Additional Meeting Time for the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/OP/28/1. See also Secretary-General 'Status of the Human Rights Treaty Body System' (2016) UN Doc A/71/118, paras 57 and 91.

[48] See Art 26 OP below.

[49] CAT/C/54/2 (n 15) para 100.

Article 26

Special Fund

1. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.

2. This Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organisations and other private or public entities.

1. Introduction	973
2. Travaux Préparatoires	973
2.1 Chronology of Draft Texts	973
2.2 Analysis of Working Group Discussions	975
3. Issues of Interpretation	977

1. Introduction

1 Article 25 OP only provides that the expenditure incurred by the SPT shall be borne by the United Nations. But the main responsibility of carrying out visits to places of detention, according to the *two-pillar system* of the Protocol, rests with the NPMs to be established in every State party. As with the SPT, the respective costs are fairly considerable. In addition, States parties have to carry out measures and programmes aimed at improving conditions of detention and preventing practices of torture and other forms of ill-treatment in accordance with the respective recommendations of the SPT under Articles 12(d) and 16(1) OP, and of the NPM under Articles 19(b) and 22 OP. Such programmes may include the renovation of prisons and other detention facilities, far-reaching reforms of the criminal justice system, or the training of police officers and prison guards. In order to help finance the implementation of these recommendations, as well as of educational programmes of the NPMs, the drafters of the Protocol decided to establish a Special Fund.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Revised Costa Rica Draft (15 January 1991)*[1]

[1] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

Article 16

The expenditure incurred by the implementation of the present Protocol, including all its missions, shall be borne by the United Nations.

[1. States Parties shall contribute to the expenditure incurred in the implementation of the present Protocol on the basis of the scale used by the United Nations.

2. There may be established a Special Fund based on voluntary contributions of States, intergovernmental organizations, non-governmental organizations, private institutions and individuals.

3. The Special Fund shall supplement the financing by the States Parties of all the activities provided for in this Protocol. It shall be managed by the Subcommittee, which shall report to a Board of Trustees appointed by the States Parties.

4. Any expenses, such as the cost of staff, interpreters and facilities, incurred by the United Nations pursuant to Article 7 paragraph 4, shall be reimbursed by contributions of the States Parties and the Special Fund.]

3 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[2]

Article 16 bis

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Sub-Committee to a State Party expressing the need for additional assistance for its ongoing efforts to improve the protection of persons deprived of their liberty.

2. This Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations as well as other private or public entities.

4 *Text of the Articles which Constitute the Outcome of the Second Reading (2 December 1998)*[3]

Article 17 [16 bis]

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Sub-Committee to a State Party expressing the need for additional assistance for its ongoing efforts to improve the protection of persons deprived of their liberty.

2. This Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations as well as other private or public entities.

5 *Mexican Draft (13 February 2001)*[4]

[2] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Fourth Session (1996) UN Doc E/CN.4/1996/28, Annex I.

[3] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Eighth Session (1999) UN Doc E/CN.4/2000/58, Annex I.

[4] E/CN.4/2001/WG.11/CRP.1.

Article 21 (former Article 17 [16 bis])

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations of the Sub-Committee, in response to an express request by a State Party for assistance for its efforts to improve the protection of persons deprived of their liberty.

2. This Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

6 *EU Draft (22 February 2001)*[5]

Article 18 (old 17)

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Sub-Committee to a State Party expressing the need for additional assistance for its ongoing efforts to improve the protection of persons deprived of their liberty.

2. This Fund may be financed by voluntary contributions.

2.2 Analysis of Working Group Discussions

7 During the first session of the Working Group, held from 19 to 30 October 1992, one observer stated that the idea of establishing a special fund based on voluntary contributions was worthy of consideration and that his country would contribute substantially to such a fund, if established. Another delegation stated that it had no difficulty with the idea of the establishment of a special fund based on voluntary contributions for this purpose, but expressed some apprehension about the extra cost which might result from the appointment of the board of trustees.[6]

8 At its fourth session from 30 October to 10 November 1995, the Working Group decided to formulate issues relating to a special fund in a separate Article 16 bis.[7] The observer for *South Africa* suggested the following text:

1. A Special Fund based on voluntary contributions shall be set up in order to help finance the implementation of the recommendations made by the Sub-Committee to a State Party in view of reinforcing/strengthening if necessary the protection of people deprived of their liberty in the sense of this Protocol.
2. This Fund shall be financed through voluntary contributions made by States and other institutions or bodies.
3. A Board of Trustees, made up of five persons, selected in their personal capacity by the Secretary-General upon proposals made by the States Parties, will be responsible for supervising the correct use of these funds and their management.[8]

9 The majority of delegations supported the idea of establishing such a fund. The observer for *Spain*, however, stated that there were already some funds within the Centre for Human Rights and that it might be wise to strengthen those funds first before

[5] E/CN.4/2001/WG.11/CRP.2.

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28, paras 104ff.

[7] E/CN.4/1996/28 (n 2) para 85. [8] ibid, para 86.

establishing a new fund. The representatives of *Brazil, Chile, El Salvador*, and the *United States* of America found that the existence of other funds should not be considered as an obstacle to the establishment of the new fund. The delegations of *Canada* and *Germany* argued that certain criteria would need to be established and followed to ensure that the countries which really needed the money obtained it from the fund. The representative of the *United Kingdom* wished to keep open the option of the fund being operated either through an existing fund or, if not, then possibly through borrowing an existing board of trustees from an existing fund. The representative of *Japan* expressed the view that the fund should be financed by voluntary contributions made by the States parties to the Protocol and be administered by the UN Secretary-General in accordance with the applicable provisions of the financial regulations and rules of the United Nations.

10 After further discussions in the informal drafting group, its Chairperson submitted the results of the elaboration of this article. She said that the group proposed to include two paragraphs in Article 16 bis. Paragraph 1 provided for the establishment of a special fund to assist countries expressing a need for additional assistance for their ongoing efforts to improve the protection of persons deprived of their liberty. Paragraph 2 set out the sources from which the special fund might be financed.

11 The provisions, as revised by the drafting group, were adopted as Article 16 bis.[9] However, certain States, eg the delegation of *Canada*, expressed concern about the expensive administration of the fund in question.[10]

12 The representative of the *United States* of America proposed submitting to the Commission on Human Rights the following recommendation on behalf of the Working Group:

1. The Working Group believes that the establishment of a special fund for activities provided for in this Protocol should be accomplished in the most economical way possible in order to maximize the amount of voluntary contributions to the fund available for programmes, rather than administration.
2. To that end the Working Group recommends that subsequent meetings of the Working Group continue to keep in mind that the special fund may be efficiently administered by the Board of Trustees of the Voluntary Fund for Technical Cooperation (VFTC) and that the Working Group also, at its meeting when it finalizes the draft Protocol and recommends it for adoption, consider transmitting this recommendation to the Centre for Human Rights for forwarding to the General Assembly through the Economic and Social Council.
3. With regard to Article 16 bis of the draft OP, the Working Group recommends that the Commission on Human Rights invite States Members of the United Nations to request assistance from the VFTC of the Centre for Human Rights for programmes designed to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment.[11]

13 In addition, the US representative said that his delegation had consulted the Advisory Services and Technical Cooperation Branch on that issue and the Branch also agreed that the existing voluntary cooperation structure could handle the additional fund by setting up a separate account, so there would not be any mixing of funds, but it could be administered by the same Board of Trustees and there would be a large cost saving if that was done.[12]

[9] ibid, para 96. See above para 3. [10] ibid, para 97. [11] ibid, para 98.
[12] ibid, para 99.

14 The majority of delegations supported the United States of America's recommendation. In particular, the representative of *France* said that the provisions of Article 16 bis did not rule out the possible use of an already existing fund such as the VFTC to strengthen the protection of persons deprived of their liberty.[13]

15 At the sixth session, held from 13 to 24 October 1997, the Chairperson-Rapporteur again invited delegations to discuss Article 16 bis.[14] The representative of the *Netherlands* proposed adding the phrase 'as well as through the regular budget of the United Nations' to the end of paragraph 2 of Article 16 bis. The delegation of *South Africa* pointed out that a special fund would help developing countries and would assist States to respond to the recommendations of the SPT. The funding of the SPT was a separate issue from the establishment of a special fund for assistance for the implementation of the recommendations of the SPT by States parties in need. The observers for Switzerland, Amnesty International, and the Association for the Prevention of Torture, as well as the representatives of Denmark, Italy, and the United Kingdom made comments supporting this view. At the fourth plenary meeting, Article 16 bis was adopted without amendments.[15]

16 In the proposal presented by the Chairperson-Rapporteur, the educational activities and programmes of NPMs were included within the scope of the Special Fund contained in Article 26 OP.[16]

17 At its fiftieth meeting on 22 April 2002, the Commission on Human Rights finally adopted the text of the OP submitted by the Chairperson-Rapporteur at the tenth session of the Working Group by twenty-nine votes to ten.[17]

3. Issues of Interpretation

18 The proposal to establish a *Special Fund* based on *voluntary contributions* of States, intergovernmental organizations, NGOs, private institutions, and individuals was already included in Article 16 of the revised Costa Rica Draft of 1991[18] and was supported by most States during the drafting in the Working Group.[19] While the activities of the *SPT*, including its country missions, are financed by the *regular UN budget*, the considerable costs necessary for a proper implementation of the provisions of the Protocol at the *domestic level* could be financed in poorer countries with the assistance of the *Special Fund*. Although the establishment of effective NPMs causes considerable expenses for States parties, the regular costs of NPMs, their members, staff and facilities, cannot be financed by the Special Fund. In this respect, Article 26(1) only refers to '*education programmes*' of the NPMs. Why only this single aspect of the work of the NPMs was included in the text of Article 26 remains unclear. All previous drafts were fairly open and referred in general to the efforts of States parties to improve the protection of persons deprived of their liberty. But the *Chairperson-Rapporteur*, in her final draft of January 2002, included

[13] ibid, para 100.

[14] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42, paras 98ff.

[15] ibid, para 95.

[16] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42, para 52. See also E/CN.4/2002/WG.11/CRP.1.

[17] CHR Res. 2002/33 of 22 April 2002. See above Art 1 OP, 2.2.

[18] See above para 2.

[19] See above 2.2.

education programmes of the NPMs, which may lead to the conclusion that other activities of NPMs shall not be financed by the Fund, unless explicitly recommended by the SPT after a country mission in accordance with Article 11(b)(iv).

19 The main purpose of the Special Fund, which became operational in summer 2011, is 'to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State party'. Earlier drafts had also required an 'express request by a State party for assistance'[20] or at least 'expressing the need for additional assistance'.[21] The deletion of these words in the final draft of the Chairperson suggests that the initiative might also come from the SPT. In any case, the SPT should at least be requested by the Board of Trustees to give its opinion on the usefulness of providing funds to a particular State party. Since such funds shall only be provided after a country mission by the SPT, a certain *involvement of the SPT* seems to be guaranteed. In our opinion this would be necessary in order to ensure that the funds are in fact spent on a project aimed at implementing the respective recommendations of the SPT. The SPT might also consider a *follow-up mission* in accordance with Article 13(4) OP for the purpose of assessing whether or not the funds are in fact spent accordingly.[22]

20 According to Article 11(a) OP, the SPT shall make recommendations on the basis of its country missions 'concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment'.[23] Possible *projects to be financed by the Special Fund* must, therefore, aim at improving conditions of detention, the protection of detainees against ill-treatment and/or the prevention of torture and other forms of ill-treatment during detention. This includes all programmes in the context of the *reform of the criminal justice and prison system*, for example the renovation of detention facilities, legislative reforms, training of judges, prosecutors, law enforcement officials and prison guards, review of interrogation methods, forensic examinations of detainees, anti-torture complaints and investigation mechanisms, anti-corruption programmes in the context of the administration of criminal justice, and all other measures aimed at the prevention of torture in accordance with the respective provisions of the CAT and other relevant UN and regional instruments.[24]

21 According to Article 11(b)(iv) OP, the SPT shall also make 'recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment'. If the SPT, on the basis of its contacts with NPMs and its experiences during a country mission, arrives at the conclusion that the respective NPM lacks the required characteristics of independence and effectiveness, as required by Article 18 OP, or lacks the capacity and resources to carry out its mandate effectively, it may make a respective *recommendation on the strengthening of the NPM* to the State party concerned, the implementation of which may also be assisted by a project financed by the Special Fund.

22 Article 26(1) OP provides that the Special Fund shall be 'administered in accordance with the financial regulations and rules of the United Nations'. The *Financial*

[20] cf eg art 21(1) of the Mexican Draft: see above para 5.

[21] cf eg Art 16(1) of the 1996 draft, Art 17(1) of the 1999 draft, or Art 18 of the EU Draft. See above 2.1.

[22] See above Art 13 OP, 3.1.

[23] See above Art 11 OP, 3.

[24] See also eg AI, 'Amnesty International's 12-Point Programme for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State' amnesty.org (2005) <https://www.amnesty.org/download/Documents/80000/act400012005en.pdf> accessed on 25 November 2017.

Regulations and Rules of the United Nations provide, in particular, that UN funds shall be administered by an independent *Board of Trustees* to be appointed by the General Assembly or by the States parties to the respective treaty.[25] Thus, the Fund is currently being managed by the OHCHR, its Grants Committee acting as an advisory body. Since the main purpose of the Special Fund is to help finance the implementation of the SPT's recommendations after its country missions, the SPT is consulted in the development and assessment of the projects to be financed by the Special Fund. Consequently, it identifies thematic priorities (by country) for the *annual call for applications*[26] and—with the objective of funding—the implementation of recommendations contained in its mission reports. The SPT's bureau is kept informed about the applications received and the grants awarded, and members of the SPT may generally be consulted on any issues arising from applications and asked to join relevant meetings.[27]

23 According to Article 26(2) OP, the Special Fund receives *voluntary contributions* from governments, intergovernmental and non-governmental organizations, and other private or public entities. As at 31 December 2011, contributions to the Special Fund in the amount of $855,263.16 had been received from the Maldives, the Czech Republic, Spain, and the UK.[28] In 2012, it received contributions from the UK, the Czech Republic, Switzerland, and Italy.[29] In its eighth Annual Report, the SPT stated that it hoped 'that the Fund will continue to support projects that are essential for the effective prevention of torture and ill-treatment, and calls upon States to continue to support the Fund financially'.[30] Moreover, the SPT expressed that it believed 'that the work and visibility of the Fund would be enhanced were its administrative basis to be reviewed and a discrete Board of Trustees established to oversee its operation'.[31] As in 2015 only one contribution was made to the Fund, the SPT established a *working group* 'to review with the secretariat of the Fund how the work and visibility of the Fund could be maintained and enhanced'.[32] Moreover, the working group should study the Fund's administrative functions and explore the options for and possibilities of establishing an advisory mechanism to oversee its operation.[33] Consequently, the Secretary-General called on governments, intergovernmental and non-governmental organizations, and other private or public entities to contribute to the Special Fund, and to ensure sustained financial support to it.[34] As a considerable amount of money is required to finance the implementation of the various

[25] See the Secretary-General's Bulletin (9 May 2003) UN Doc ST/SGB/2003/7.

[26] The first call for applications was launched in November 2011 and the first grants were awarded during 2012.

[27] See SPT, 'Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc CAT/C/48/3, para 28.

[28] ibid, para 26.

[29] See SPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc CAT/C/52/2, para 30 (fn).

[30] SPT, 'Eighth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment' (2015) UN Doc CAT/C/54/2, para 32.

[31] ibid, para 32.

[32] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, paras 27–28.

[33] SPT, 'Decision on Establishing a Working Group to Strengthen and Facilitate the Work of the Special Fund Established by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/OP/28/2.

[34] Human Rights Council, 'Special Fund Established by the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc A/HRC/31/22, para 20.

recommendations of the SPT, in the future, *trans-national corporations* and other business enterprises, above all members of the *UN Global Compact*, could also be encouraged, as part of their activities in the context of *corporate social responsibility* programmes, to provide contributions to the Special Fund.

24 Applications for funding may be submitted by State institutions of States parties to the OP visited by the SPT and that have agreed upon the publication of the SPT report, and the NPMs of the said States parties. Moreover, applications from NHRIs compliant with the Paris Principles as well as from NGOs are eligible if the proposed projects are to be implemented in cooperation with eligible States parties or NPMs.

25 Until the end of 2015, the Fund had supported

> a total of 28 projects with a total amount of $ 801,197.85 in eight States across three regions, including the training of more than 1,300 people in torture prevention techniques and methodology, in particular staff members of national preventive mechanisms, members of the judiciary, law enforcement and penitentiary officers, medical personnel, social workers and members of civil society organizations.[35]

26 The *projects supported by the Fund* so far included legislative and policy changes (eg the adoption of a revised Code of Criminal Procedure in Benin, a Prison Act in Honduras, and a law prohibiting abusive body search for persons deprived of their liberty in Brazil), institutional changes (such as the development of a registry of detainees in Paraguay and an improved form for medical and legal examination of torture and ill-treatment in hospitals in the Maldives), as well as changes in peoples' lives (eg some detainees held without justification could have been released). The Fund's main focus, however, remains the support for NPMs.

KERSTIN BUCHINGER

[35] ibid, para 12.

PART VII

FINAL PROVISIONS

Article 27

Signature, Ratification, and Accession

1. The present Protocol is open for signature by any State that has signed the Convention.

2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

1. Introduction	983
2. Travaux Préparatoires	984
2.1 Chronology of Draft Texts	984
2.2 Analysis of Working Group Discussions	985
3. Issues of Interpretation	986

1. Introduction

1 Article 27 OP stipulates that only States parties that have signed, ratified, or acceded to the CAT may likewise sign, ratify, or accede to the OP. This provision results from the idea that the already existing obligations under the CAT shall be further implemented and fulfilled by the States parties of that treaty.[1] The described procedure itself is common for UN and other international or multinational treaties.

2 The mere signature of the OP does not per se create an obligation to ratify the Protocol. However, in accordance with Article 18 VCLT, the signing of a multilateral treaty creates an obligation upon the signatory State to refrain from acts which would defeat the object and the purpose of the treaty in question, in this case the OP. Therefore, signing the Protocol expresses the willingness to become legally bound by its obligations in the near or at least medium term.

3 *Ratification*—according to Article 2(1)(b) VCLT—means the international act whereby a State establishes its definite consent to be bound by a treaty. Pursuant to Article 7 VCLT, this is usually done by the Head of the State, being its official representative.

[1] cf APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010) 110.

The act of ratification is performed by a deposit of a corresponding instrument with the UN Secretary-General.

4 The States in question may also become parties to the OP by way of *accession*. This procedure replaces signature and ratification and is likewise effected by deposit of an instrument of accession with the Secretary-General. By acceding to a treaty that has already been signed by other States, a State that is not yet a signatory to the treaty agrees to be bound by the provisions codified in the treaty in question. The legal effects of accession are the same as of ratification.

5 Pursuant to Article 27(5), the Secretary-General shall inform all signatory States of the present Protocol and all States that have acceded to it of every subsequent ratification or accession.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

6 *Original Costa Rica Draft (6 March 1980)*[2]

Article 14

1. The present Protocol is open for signature by any State which has signed the Convention.

2. The present Protocol is subject to ratification or accession by any State which has ratified or acceded to the Convention. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

7 *Revised Costa Rica Draft (15 January 1991)*[3]

Article 17

1. The present Protocol is open for signature by any State which has signed the Convention.

2. The present Protocol is subject to ratification or open to accession by any State which has ratified or acceded to the Convention. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

8 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[4]

Article 17

1. The present Protocol is open for signature by any State which has signed the Convention.

[2] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica [1980] UN Doc E/CN.4/1409.

[3] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

2.2 Analysis of Working Group Discussions

9 In the first session of the Working Group in 1992, the discussion on signature, ratification, and accession was limited to the question of whether the Protocol should be open to *all States* or otherwise limited to States that were already *parties to the CAT*. Whereas some delegations argued that the signature, ratification of, or accession to the OP was legally limited to States parties to the CAT, others considered the possibility of setting up an instrument that was not necessarily related to the Convention. A number of representatives stressed the need for States to have made the substantive commitments contained in the Convention prior to becoming parties to the Protocol, as the latter, in their view, sought to implement the aims of the Convention.[5]

10 In the fourth session of the Working Group in 1995, the *Swedish* observer, supported by the *Netherlands* and *Switzerland*, proposed not to link the Subcommittee provided for in the OP too closely to the Committee against Torture. Thus, the Protocol could also be opened to ratification or accession by States that were not parties to the CAT but to the CCPR, which also contained the prohibition of torture.[6] *Mexico* spoke against this proposal. Regarding the format, the *Japanese* representative suggested modelling the Article on the four paragraphs of Article 8 of the First Optional Protocol to the CCPR while keeping paragraph 3 of the original Costa Rica draft on the Secretary-General's involvement.[7] Accordingly, a revised text was submitted, which after further elaboration by the drafting group was presented to the Working Group for consideration.[8]

1996/28, Annex I. See also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, Annex. Similar provisions are contained in Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II, Art 18; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I (the Mexican Draft) Art 24; Annex II (the EU Draft) Art 19; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E (the US Draft) Art 11; Annex I (Proposal by the Chairperson-Rapporteur) Art 27.

[5] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, para 108.

[6] ibid, para 103. [7] ibid, para 104. [8] E/CN.4/1996/28 (n 4) para 105. See above para 8.

11 In 1997, the observer for *Sweden* reiterated her Government's proposal to open the OP to States that had not ratified or acceded to the CAT. She repeated the argument that the prohibition of torture was also contained in other international instruments and, therefore, the Subcommittee's activities in promoting implementation of this prohibition were not limited to States parties to the CAT. Furthermore, opening the OP to States not party to the CAT could also have the effect of facilitating ratification of or accession to the Convention in a second step.[9] Although unusual, such provision would be, in the view of Sweden, legally possible. Regarding this proposal, a number of delegations discussed the advisability of requesting an opinion from the Office of the Legal Counsel.[10] Observers of NGOs present at the Working Group raised concerns about opening the Protocol to all States and argued that promotion of universal ratification of the Convention should be given priority.[11] Eventually, the Swedish observer withdrew the proposal and the Working Group at its sixth session adopted the text as submitted by the drafting group in 1995.[12]

12 Alternative drafts of the Protocol provided by *Mexico*,[13] the *European Union*,[14] and the *United States*[15] in later sessions contained similar or identical provisions on the issue of signature, ratification, or accession and were not discussed separately.

3. Issues of Interpretation

13 Article 27 OP is based almost literally on Article 8 of the first Optional Protocol to the CCPR.[16] The only controversial issue during the drafting in the Working Group was whether the OP should be open to signature, ratification, and accession to *all States* (as proposed by *Sweden*) or only to States which had signed, ratified, or acceded to the CAT as the main treaty, which is the usual requirement for optional protocols. Most States, as well as representatives of NGOs, spoke against the Swedish proposal, which was later withdrawn.[17] Apart from legal concerns, the opponents of the Swedish proposal argued that such a procedure might undermine the promotion of universal ratification of the CAT. This would have turned the OP into a free-standing treaty rather than a mere Protocol to the Convention.

14 According to Article 27(1) OP, the only requirement for signing the OP is prior *signature of the Convention*. This means that States that are signatories but not yet parties to the CAT are also invited to sign the Protocol. As a result, States parties to the CCPR, which are in fact bound by the prohibition of torture in Article 7 CCPR in a legally stronger manner than mere signatories of the CAT, are not invited to sign the Protocol.

15 *Ratification of the Protocol is only possible for States parties to the CAT*. It does not make a difference whether the State concerned became party to the CAT by way of signature and ratification, or by way of accession. In addition to being a party to the CAT, a

[9] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its sixth session [1997] UN Doc E/CN.4/1998/42, para 97.

[10] ibid, para 98. [11] ibid, para 99. [12] ibid, paras 100 and 101.

[13] E/CN.4/2001/67 (n 4) Annex I. [14] ibid, Annex II.

[15] E/CN.4/2002/78 (n 4) Annex II E.

[16] During the drafting of Article 27, Japan suggested following primarily the model of Article 8 of the first OP to the International Covenant on Civil and Political Rights (CCPR). On this provision, see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 902.

[17] See above 2.2.

State wishing to ratify the OP must first have signed the Protocol. This latter requirement does not apply to accession.

16 Although not explicitly mentioned in Article 27 OP, States may also sign, ratify, or accede to the Protocol by means of *succession*.[18] In fact, *Serbia and Montenegro* had signed the Protocol on 25 September 2003. After the secession of Montenegro on 3 June 2006, *Serbia* decided to ratify the Protocol on 26 September 2006, whereas *Montenegro*, by a notification of 23 October 2006, became a *signatory State by means of succession*.

17 The *OP was adopted* by the UN General Assembly on *18 December 2002* by a majority of 127 States in favour, four against (Nigeria, Marshall Islands, Palau, and the United States), and forty-two abstentions, including Australia, China, India, Japan, the Russian Federation, and other countries from Asia, Africa, and the Arab and Caribbean regions.[19] It was opened for *signature on 4 February 2003*. The first country to sign the Protocol on 4 February 2003 was *Costa Rica*, the country which had submitted the first draft for an OP in 1980, which had prepared a revised draft in 1991 as the main basis for the discussions in the Working Group, and which led the discussions in the Working Group, in particular through its former Minister of Justice, *Elizabeth Odio Benito*, as Chairperson-Rapporteur. Costa Rica was followed by *Denmark, Sweden*, and the *United Kingdom*, which all signed in 2003 on 26 June, the International Day for Victims of Torture. *Malta was the first country to ratify the Protocol* on 24 September 2003, followed by *Albania*'s accession on 1 October 2003, and ratification by the *United Kingdom* on 10 December 2003.

18 As of 12 December 2018, a total of 102 States had signed the OP (*Montenegro* by succession). Of the eighty-eight States parties, sixty had signed and ratified the Protocol, and twenty-five had become parties by means of accession.[20] Of the eighty-eight States parties, thirty-eight belong to the European Group, fifteen to the Latin American and the Caribbean Group, twenty-one to the African Group, eleven to the Asia-Pacific Group, and none to the North American Group.

STEPHANIE KRISPER

[18] On the difficult legal issues concerning succession see above Art 24 OP, § 13.
[19] UNGA, Res 57/199 of 18 December 2002.
[20] cf the Status of Signature/Ratification/Accession/Succession below Appendix B3.

Article 28

Entry into Force

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

1. Introduction	988
2. Travaux Préparatoires	988
2.1 Chronology of Draft Texts	988
2.2 Analysis of Working Group Discussions	990
3. Issues of Interpretation	991

1. Introduction

1 Article 28 OP describes the procedure of the entry into force of the Protocol in line with Article 27 CAT. Entry into force means that the provisions laid down in the Protocol become legally binding on all States parties that have ratified or acceded to it.

2 The required conditions for the entry into force of the OP were met on 23 May 2006, when *Bolivia* and *Honduras* ratified it and thus brought the total number of ratifications to twenty. Accordingly, and in line with Article 28(1) OP, the Protocol entered into force under international law thirty days later, ie on *22 June 2006*. As of 12 December 2018, the OP had eighty-eight States parties.[1]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[2]

Article 15

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force three months after the deposit of the fifth instrument of ratification or accession.

[1] cf the Status of Signature/Ratification/Accession/Succession below Appendix B3.

[2] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica [1980] UN Doc E/CN.4/1409.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the fifth instrument of ratification or instrument of accession the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

4 *Revised Costa Rica Draft (15 January 1991)*[3]

Article 18

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

3. No reservations may be made in respect of the provisions of this Protocol.

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[4]

Article 18

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the [number to be inserted] instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the [number to be inserted] instrument of ratification or instrument of accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

3. No reservations [incompatible with the object and purpose of the Convention and Protocol] may be made in respect of the provisions of this Protocol.

6 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[5]

Article 19

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of twentieth instrument of ratification or accession.

[3] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28, Annex I. See also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, Annex.

[5] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II. All later drafts contain similar provisions: Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I (the Mexican Draft) Art 25; Annex II (the EU Draft) Art 20; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E (the US Draft) Art 12; Annex I (Proposal by the Chairperson-Rapporteur).

> 2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

2.2 Analysis of Working Group Discussions

7 In the course of the initial drafting considerations, the delegations had dissenting opinions on the *number of instruments of ratification or accession* required for the Protocol's entry into force. Although an expeditious entry into force was favoured by many delegations, it was argued that the proposed number of *five* or *ten* States was not enough to provide for universal participation. Moreover, some representatives claimed that the initial number of ratifications or accessions would have an impact on the number of members of the Subcommittee which in turn would influence the efficiency of the Subcommittee. Others held the opinion that ten instruments of ratification or accession were sufficient and that an early entry into force of the Protocol would attract further ratifications or accessions. One speaker favoured an even lower number than ten ratifications.[6]

8 In the Working Group of 1995, the members of the Working Group could not reach agreement and hence decided to postpone the decision on the number of ratifications or accessions required for the entry into force again.[7] In this regard, *Mexico* also raised concerns over the financial implications this decision could have: if the Subcommittee was to be dependent on contributions by States parties rather than being financed by the regular UN budget, and the first ten States to the Protocol were not wealthy, then this might have negative impacts on the functioning of the body.[8] Other issues raised in regard to this provision entailed a proposal by *Chile* to bring the period of time between deposit and entry into force in line with the CAT, ie the thirtieth day after the date of deposit rather than after three months as proposed in the Costa Rica draft, which was agreed upon by the Working Group.[9] This proposal was agreed upon after the suggestion by delegate of *Japan* to name the UN Secretary-General as depositary.[10]

9 Two years later, in 1997, still no agreement was reached on the *number of required ratifications or accessions*. While initially Argentina, Cuba, the Czech Republic, the Dominican Republic, Finland, Italy, the Netherlands, Spain, Sweden, the Syrian Arab Republic, and Switzerland, supported by the observer of Amnesty International, were in favour of a low number as ten, Algeria, Australia, China, Denmark, Mexico, the United States, and later also Cuba preferred a number of twenty ratifications or more. Several States, such as Austria, Italy, and Switzerland, indicated in the course of the discussions that they were flexible as to the number.[11]

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, para 109.

[7] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28, para 110.

[8] ibid, para 112. [9] ibid, para 110. [10] ibid, para 111.

[11] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its sixth session [1997] UN Doc E/CN.4/1998/42, paras 102ff.

10 Although a considerable number of States still preferred a low number of ratifications necessary for entry into force of the OP in the seventh session of the Working Group, many of them indicated willingness to support as a compromise, but also as an absolute maximum, the requirement of *twenty ratifications or accessions*.[12] On the other hand, the representatives of *Australia* and the *United States*, who had argued for a higher number than twenty, agreed to this compromise.[13] Thus, the number of ratifications or accessions required for the entry into force of the Protocol was set with twenty and the provision was adopted by the Working Group.[14]

11 Alternative drafts of the Protocol provided by *Mexico*,[15] the *European Union*,[16] and the *United States*[17] in later sessions contained identical provisions on the question of entry into force and were not discussed separately.

3. Issues of Interpretation

12 While Article 18 of the revised Costa Rica Draft of 1991 was based on Article 9 of the first OP to the CCPR (ten ratifications or accessions required and entry into force three months thereafter), the final text of Article 28 OP is in line with Article 27 CAT (twenty ratifications or accessions required, entry into force thirty days thereafter).[18] The only controversial issue during the drafting process in the Working Group was the *number of States parties required* for the international entry into force of the Protocol. The number of *twenty States parties* is fairly high compared to similar procedural optional protocols, such as Article 9 of the First OP to the CCPR, Article 16 of the OP to the CEDAW, and Article 13 of the OP to the CRPD, which only require ten ratifications or accessions.[19]

13 However, in contrast to these treaties, the OP to the CAT provides not only for a new procedure, such as the OPs to the CCPR, CEDAW, and CRPD, but also for the establishment of a *new treaty body* to implement this procedure. Since only States parties to the OP have the right of nominating candidates for membership in the Subcommittee on the Prevention of Torture in accordance with Article 6 OP, a requirement of ten ratifications or accessions would have meant in fact that each of the ten States parties first ratifying the OP would have had one expert on the Subcommittee. The comparatively high number of twenty ratifications or accessions in fact did not, as was feared during the drafting process by some delegations, delay the entry into force of the Protocol, as there were only three-and-a-half years between the adoption of the Protocol on 18 December 2002[20] and its entry into force on 22 June 2006.

[12] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session [1998] UN Doc E/CN.4/1999/59, para 81.

[13] ibid, paras 82 and 83. [14] ibid, para 84. [15] E/CN.4/2001/67 (n 5) Annex I.

[16] ibid, Annex II. [17] E/CN.4/2002/78 (n 5) Annex II E. [18] See above Art 27.

[19] See also UNGA, 'Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty' Res 44/128 of 15 December 1989, Art 8; UNGA, 'Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict' Res 54/263 of 25 May 2000, Art 10; UNGA, 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' Res 54/263 of 25 May 2000, Art 14, which all require only ten instruments of ratification or accession.

[20] UNGA, Res 57/199 of 18 December 2002.

14 With the *entry into force on 22 June 2006*, the Protocol became binding for the first twenty States parties in its entirety, as no State party had made a declaration under Article 24 OP postponing the implementation of its obligations in relation to either the Subcommittee or the NPM.[21] The date of 22 June was the starting point for a number of *deadlines*. Within the first month thereafter, the Secretary-General had to address a letter to all States parties inviting them to submit their *nominations for Subcommittee candidates* in accordance with Article 6 OP until 22 October 2006.[22] The initial *election of the first ten Subcommittee members* had to be conducted by a first meeting of States parties, according to Article 7(1)(b) OP, no later than 23 December 2006, and was in fact held on 18 December 2006.[23] Furthermore, the first twenty States parties were under an obligation, pursuant to Article 17(1) OP, to establish, designate, or maintain one or several *NPMs* one year at the latest after the entry into force of the Protocol, ie by 23 June 2007.[24]

15 For each State ratifying, acceding or succeeding to the Protocol after 22 June 2006, its provisions become, pursuant to Article 28(2) OP, legally binding after the thirtieth day following the deposit of its instrument of ratification, accession, or succession.

STEPHANIE KRISPER

[21] cf above Art 24 OP.

[22] See the *note verbale* of the Secretary-General dated 18 July 2006, which invited the States parties to submit their nominations by 18 October 2006.

[23] See above Art 7 OP.

[24] See above Art 17 OP.

Article 29

Validity in Federal States

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

1. Introduction	993
2. Travaux Préparatoires	993
2.1 Chronology of Draft Texts	993
2.2 Analysis of Working Group Discussions	994
3. Issues of Interpretation	994

1. Introduction

1 The text uses the same wording as Article 50 CCPR and Article 10 of the first OP to the CCPR.[1] This provision, which might be called an '*anti-federal clause*',[2] clearly indicates that the Protocol and its provisions shall be binding for the whole territory of each State party, irrespective of its actual given (political) structure. This interpretation is in line with Article 29 VCLT, referring to the '[t]erritorial scope of treaties' and stipulating that: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[3]

Article 18

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

[1] cf Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) (*CCPR Commentary*) 808 and 904.

[2] ibid 809.

[3] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28, Annex I. See also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, Annex.

3 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[4]

Article 20

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

2.2 Analysis of Working Group Discussions

4 Although the Costa Rica Draft did not contain or propose any 'federal State clause', this issue had already been raised during the first session of the Working Group in 1992.[5] In the course of the fourth Working Group session in 1995, the delegation of *China* finally suggested adding a new article to the OP relating to the application of the Protocol in federal States.[6] The Working Group adopted Article 18 bis (now Article 29) at its sixth session on 15 October 1997 without any further amendments.[7]

5 Alternative drafts of the Protocol provided by *Mexico*,[8] the *European Union*,[9] and the *United States*[10] in later sessions contained identical provisions on the issue of federal States and were not discussed separately.

3. Issues of Interpretation

6 The '*anti-federal clause*' of Article 29 OP was inserted into the Protocol on the initiative of *China* and corresponds literally to Article 50 CCPR and Article 10 of its first OP. During the drafting of the CCPR and CESCR, certain States, including the *United States, Australia, Denmark*, and *India*, had proposed the insertion of a 'federal clause' to the effect that for matters falling within the responsibility of constituent states, provinces, or cantons, the international obligation of the federal Government would be limited to transmitting the provisions to the responsible authorities with a recommendation that the necessary steps be taken.[11] The opponents of a 'federal clause', above all the *Soviet Union*, argued that this would conflict with the principle of universality and establish an unequal status between federal and unitary States. Their counter-motion of inserting an 'anti-federal clause' ultimately prevailed, although the same effect would have been

[4] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II. All subsequent drafts contain an identical provision. See Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I, Art 26; Annex II, Art 21; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I (Proposal by the Chairperson-Rapporteur) Art 29.

[5] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, para 110.

[6] E/CN.4/1996/28 (n 3) para 118.

[7] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its sixth session [1997] UN Doc E/CN.4/1998/42, para 113.

[8] E/CN.4/2001/67 (n 4) Annex I. [9] ibid, Annex II.

[10] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E.

[11] cf Nowak, *CCPR Commentary* (n 1) 808.

achieved without an explicit rule. According to Article 29 VCLT, a treaty is binding upon each party for its entire territory, unless a 'federal clause' or 'colonial clause' restricts its applicability to constituent states or dependent territories.

7 Accordingly, a federal structure cannot be used as an excuse for failing to fully implement obligations under the Protocol, meaning that federal and centralized States should be equally bound by the present Protocol's provisions to allow for preventive visits to all places of detention by both the Subcommittee and NPMs. Thus, the federal governments remain responsible for the proper fulfilment and respect for their obligations under the Protocol, even if their regional governments fail to do so.[12] However, decentralized States encounter certain difficulties in fully and effectively implementing international human rights treaties. Therefore, in order to overcome such challenges, a general framework for the implementation of the OP has to be considered with regard to federal or decentralized States.

8 First of all, it is necessary to assess whether the federal Government has enough constitutional authority to pass the corresponding implementing legislation. Subsequently, an adequate process of ratification or implementation must be ensured, either by referring to an existing process or by establishing an ad hoc negotiation process. Accordingly, it must be assessed whether legislative changes are necessary in order to ensure that the Subcommittee on Prevention possesses the powers required in the Protocol.

9 Possible *models for NPMs in decentralized States* are (a) a unified national body, enacted and appointed by the federal Government only or by the federal and regional governments together, or (b) multiple bodies acting on a regional basis for the territory for which the regional Government is responsible.[13]

10 The latter approach is quite controversial for several reasons. Although this approach has its advantages for States which are geographically large and feature a divided constitutional authority, additional efforts and resources are necessary in order to ensure the system's consistency in terms of recommendations and findings as well as its effectiveness and efficiency with regard to the communication between the NPMs and the Subcommittee. A possible solution for this problem can be found in the designation or creation of an administratively unified preventive mechanism, which could still comprise a large number of members and geographically widespread offices, reflecting the decentralized structure of the State.[14]

11 It is up to the States concerned to develop a well-functioning national system of prevention. The overall aim in centralized as well as in decentralized States shall be to ensure the coverage of all places where persons may be deprived of their liberty,[15] to guarantee the expertise and powers required by the Protocol and to obtain effective and consistent results.[16]

[12] cf Matt Pollard, 'Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Federal and other Decentralized States', discussion paper for the seminar 'The Optional Protocol to the UN Convention against Torture: Implementation in Federal States and Decentralized States' Brazil, 22–24 June 2005 <https://www.files.ethz.ch/isn/103004/Federal_English.pdf> accessed 12 December 2018, 10, n 29.

[13] cf ibid 11. [14] cf ibid 12.

[15] SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, paras 24 and 33.

[16] cf ibid. For legal, political and practical considerations and respective recommendations, see Association for the Prevention of Torture (APT), 'OPCAT Briefing, Implementation of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and Other Decentralised States' (2011) <https://www.apt.ch/content/files_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf> accessed 15 November 2017.

12 Brazil was one case in which the SPT recommended the authorities with reference to Article 29 OP to 'take all appropriate measures to ensure the establishment and effective functioning of preventive mechanisms in all states of the country'.[17]

STEPHANIE KRISPER

[17] SPT, 'Report on the Visit to Brazil' (2012) UN Doc CAT/OP/BRA/1, para 95; SPT, 'Report on the Visit to Brazil undertaken from 19 to 30 October 2015: Observations and Recommendations addressed to the State Party' (2016) UN Doc CAT/OP/BRA/3, para 96: Vis-à-vis the lack of political will to create local NPMs, the SPT called upon state governments concerned to 'take action and to establish preventive mechanisms at state level, in compliance with OPCAT requirements, with functional independence and sufficient resources to allow these bodies to carry out their functions effectively', as foreseen by the Federal Law; and para 97: finally, the SPT recommended that the Federal Government 'take a more proactive approach as part of an established national public program, in coordination with state-level authorities, to foster the creation of local mechanisms. This may include meetings with high-level state authorities, regular advocacy visits to the states, technical support to the drafting of legislation and economic incentives through allocation of funds'.

Article 30

Prohibition of Reservations

No reservations shall be made to the present Protocol.

1. Introduction	997
2. Travaux Préparatoires	998
2.1 Chronology of Draft Texts	998
2.2 Analysis of Working Group Discussions	998
3. Issues of Interpretation	1000

1. Introduction

1 Since both the CAT and its Protocol contain primarily procedural obligations, the question whether reservations should be permitted turned out to be highly controversial during the drafting of both instruments. In principle, the drafters had three options: either to remain silent on this issue, to adopt a provision explicitly allowing for (at least certain types of) reservations or to adopt a provision explicitly prohibiting any reservations. If a human rights treaty is silent, reservations are permissible, according to Article 19(c) VCLT, only in so far as they are not 'incompatible with the object and purpose of the treaty'. This option has been chosen, for example, by the drafters of the two Covenants, which led to a highly controversial *General Comment of the Human Rights Committee* on issues relating to reservations under the CCPR and its two OPs.[1] Most UN human rights treaties contain provisions explicitly permitting reservations made in accordance with the VCLT.[2]

2 After long and heated discussions, the *drafters of the OP agreed on a provision which explicitly prohibits reservations*. This is in line with Article 19(a) VCLT, which stipulates that States may formulate reservations 'unless the reservation is prohibited by the treaty'. In a final attempt to reach a consensus on this controversial issue, in January 2002 the Chairperson-Rapporteur introduced the possibility of a temporary '*opting-out declaration*'

[1] HRC, 'General Comment No 24 on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (1994) UN Doc CCPR/C/21/Rev.1/Add.6.

[2] cf eg International Convention on the Elimination of All Forms of Racial Discrimination (adopted and opened for signature on 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) Art 20; Convention on the Elimination of All Forms of Discrimination Against Women (adopted and opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) Art 28; Convention on the Rights of the Child (adopted and opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) Art 51; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted and opened for signature 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (CMW) Art 91.

preventing visits to places of detention by either the Subcommittee or an NPM for a period of up to three years.[3]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Revised Costa Rica Draft (15 January 1991)*[4]

Article 18

3. No reservations may be made in respect of the provisions of this protocol.

4 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[5]

Article 18 bis

3. No reservations [incompatible with the object and purpose of the Convention and Protocol] may be made in respect of the provisions of this Protocol.

5 *EU Draft (22 February 2001)*[6]

Article 19 bis

No reservations shall be made to the present Protocol.

6 *Proposal by the Chairperson-Rapporteur (17 January 2002)*[7]

Article 30

No reservations shall be made to the present Protocol.

2.2 Analysis of Working Group Discussions

7 Sir *Nigel S Rodley*, the then *UN Special Rapporteur on Torture*, addressed the issue of reservations in his comments to the Working Group in 2001 and stated that no reservations should be permissible with regard to the OP: 'It is so hard to conceive of a reservation to an instrument of this nature that would not have such an adverse effect that a general exclusion of reservations would appear appropriate.'[8]

8 Already in the first session of the Working Group the question whether any reservations should be admissible or if the Protocol should contain a clause that excluded

[3] See above Art 24 OP.

[4] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[5] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28, Annex I. See also, Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, Annex.

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex II.

[7] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I.

[8] Comments and Proposals Submitted by the Syrian Arab Republic and the Special Rapporteur of the Commission on Human Rights on the Question of Torture [1994] UN Doc E/CN.4/1994/WG.11/WP.2, para 6.

this possibility triggered a *heated discussion*. On the one hand, it was argued that the Protocol did not contain provisions of substantive law and that therefore reservations should be inadmissible. Otherwise, it was brought forward, the effectiveness of the national preventive mechanism could be seriously hampered. Furthermore, the Protocol already envisaged a so-called '*negotiated reservation*' allowing States to suspend a visit of the Subcommittee under certain circumstances.[9] On the other hand, States advocating the possibility of making reservations stated that excluding reservations might inhibit States from becoming parties to the Protocol as this situation might make its implementation difficult for them. Moreover, allowing reservations would not be dangerous since the VCLT declared any reservation that is inconsistent with the object and purpose of the respective treaty to be inadmissible. Certain permissible reservations were discussed as a possible consensus.[10]

9 In the course of the fourth session of the Working Group in 1996, the discussion on reservations was taken up again. Certain States, such as Canada, Chile, France, the Netherlands, the Russian Federation, South Africa, Sweden, and Switzerland, supported by Amnesty International, clearly argued for excluding any reservations. On the other side, the Japanese delegate proposed to delete a provision with such content. Otherwise, it was proposed to add that only reservations incompatible with the object and purpose of the Protocol should not be permitted. This proposal was explicitly contested by the representative of Sweden with a reference to the VCLT, which declared such reservations inadmissible in any case. The delegates from Algeria, Mexico, and the United States suggested that reservations addressing procedural issues should be allowed and the US delegation made the proposal to add to the provision that reservations 'incompatible with the object and purpose of the Convention and the Protocol' should not be admissible.[11]

10 In the 1997 meeting, the two groups with contrary positions consolidated: on the one hand, Argentina, Austria, Canada, the Czech Republic, Germany, Italy, the Netherlands, and the Russian Federation, supported again by Amnesty International, reiterated that States parties should not be entitled to make reservations since such reservations could render the preventive mechanism useless. On the other hand, Algeria, Brazil, China, Cuba, the Dominican Republic, Mexico, the Syrian Arab Republic, and the United States expressed opposition to a complete exclusion of reservations. Observers of the APT and the International Commission of Jurists stated that they preferred no reservations at all but could accept a provision that excluded reservations only to the core articles of the Protocol as a compromise. The representative of South Africa, although preferring no reservations, also indicated willingness to accept reservations in the interest of reaching agreement.[12]

11 In the Working Group of 1999, the opponents of a possibility for reservations emphasized once again that it was not logical to permit reservations since the Protocol only contained institutional and procedural provisions, while supporters of reservations

[9] See above Art 14(2) OP.

[10] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, para 111.

[11] E/CN.4/1996/28 (n 5) paras 113ff.

[12] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its sixth session [1997] UN Doc E/CN.4/1998/42, paras 109ff.

countered that the Protocol also contained substantive provisions imposing obligations on States parties which in turn, should be entitled to reservations. Alternatively, they proposed to make an explicit reference in the Protocol to those Articles where a reservation was not permitted.[13]

12 In the ninth session of the Working Group in 2001, where some delegations cited as an argument for allowing reservations recent practice in the two OPs to the CRC, still no consensus was found.[14]

13 In the final session of the Working Group, the *Chairperson-Rapporteur* presented a draft OP, which contained a provision excluding all reservations. Although some delegations explicitly contested this provision—the representative of the *United States* called it an 'unwise departure from current standard-setting trends'[15] and the *Russian Federation* perceived it as 'a matter of grave concern'[16]—the proposal of the Chairman-Rapporteur was eventually adopted with a vote on 24 January 2002.[17]

3. Issues of Interpretation

14 The prohibition of any reservation (with the exception of the temporary 'opting out-declaration' in Article 24 OP) in Article 30 OP is based on Article 21 ECPT and Article 18(3) of the revised Costa Rica Draft of 1991.[18] Although the admissibility of a provision explicitly prohibiting reservations was questioned by some delegates in the Working Group,[19] there can be no doubt that Article 30 OP is in line with Article 19(a) VCLT, which permits reservations to a treaty 'unless the reservation is prohibited by the treaty'. The main reason for the prohibition of reservations is that the Protocol only contains institutional and procedural provisions and that reservations excluding the application of some of these provisions might be incompatible with the object and purpose of the Protocol. The general prohibition of reservations can also be found in other treaties of a procedural nature, such as Article 17 of the OP to CEDAW and Article 120 of the ICC Statute.

15 One should, however, keep in mind that many *compromises* had been achieved during the drafting process of the OP in order to accommodate the concerns of States which opposed too far-reaching powers of the Subcommittee and the NPMs. These compromises include the possibility of a *temporary 'opting-out-declaration' under Article 24 OP*,[20] and of the '*negotiated reservation*' *in Article 14(2) OP* allowing States parties to object to a visit by the Subcommittee to a particular place of detention under exceptional circumstances.[21]

STEPHANIE KRISPER

[13] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, paras 20ff.

[14] E/CN.4/2001/67 (n 6) para 25. [15] E/CN.4/2002/78 (n 7), para 60. [16] ibid, para 69.

[17] ibid, para 117. [18] See above para 3.

[19] cf eg E/CN.4/2002/78 (n 7) para 72, the delegation of Saudi Arabia; see also the strong criticism voiced by the US and the Russian Federation, paras 60 and 69; see also above para 13.

[20] This 'declaration' in fact comes very close to a specific reservation, similar to those permitted under Arts 28(1) and 30(2) CAT.

[21] See above Art 14 OP.

Article 31

Relation to Regional Systems of Preventive Visits to Places of Detention

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

1. Introduction	1001
2. Travaux Préparatoires	1001
2.1 Chronology of Draft Texts	1001
2.2 Analysis of Working Group Discussions	1002
3. Issues of Interpretation	1004
3.1 Relevant Regional Systems of Visits to Places of Detention	1004
3.2 Avoiding Duplication	1005

1. Introduction

1 This provision reflects the principle of cooperation, which is at the heart of the OP's preventive approach.[1] It aims to ensure not only that the work of other monitoring bodies in the field of torture prevention shall not be undermined by the Subcommittee on Prevention,[2] but also that the experiences gained so far by regional mechanisms shall be shared with the Subcommittee in order to promote the objectives of the OP. Unnecessary duplication, however, shall be avoided in order not to waste valuable and limited resources.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Revised Costa Rica Draft (15 January 1991)*[3]

[1] SPT, 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/12/6, paras 5(g)–(i).

[2] Although under this Article reference is made mainly to the European regional system of torture prevention being a role model for the system installed by the OP, the considerations thereto might also be applied to other regional monitoring mechanisms.

[3] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

Article 9

1. If, on the basis of a regional convention, a system of visits to places of detention similar to the one of the present Protocol is in force for a State Party, the Subcommittee shall only in exceptional cases, when required by important circumstances, send its own mission to such a State Party. It may, however, consult with the organs established under such regional conventions with a view to coordinating activities including the possibility of having one of its members participate in missions carried out under the regional conventions as an observer. Such an observer shall report to the Subcommittee. This report shall be strictly confidential and shall not be made public.

2. The present Protocol does not affect the provisions of the Geneva Conventions of 12 August 1949 for the protection of victims of war and their Additional Protocols of 8 June 1977 by which the Protecting Powers and the International Committee of the Red Cross visit places of detention, or the right of any State Party to authorize the International Committee to visit places of detention in situations not covered by international humanitarian law.

3 *Mexican Draft (13 February 2001)*[4]

Article 19

1. The provisions of the present Protocol shall not affect the obligations of States parties under any regional convention based on a system of visits to places of detention. The Sub-Committee and the bodies established on the basis of such regional mechanisms shall consult and cooperate in order to promote effectively the objectives of the present Protocol and avoid any duplication of work.

4 *US Draft (16 January 2002)*[5]

Article 10

1. The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention based on a system of visits to places of detention. The Sub-Committee on Prevention and the bodies established on the basis of such regional mechanisms shall consult and cooperate in order to promote effectively the objectives of the present Protocol and avoid any duplication of work.

2.2 Analysis of Working Group Discussions

5 Although the revised Costa Rica Draft of 1991 did not contain a clause similar to that which was finally adopted as Article 31 OP, the issue of the relationship between the preventive mechanism envisaged under the Protocol and other regional mechanisms, such as the CPT, was the subject of intense negotiations within the Working Group. The discussions took place in the framework of Article 9 of the Costa Rica Draft, which contained a provision covering cases where, based on a regional convention, a system of visits to places of detention similar to that of the Protocol was in force for a State party. The draft envisaged

[4] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I.

[5] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E.

that in such cases the Subcommittee should only in exceptional cases send its own mission to the State party. However, the Article provided for consultations between the Subcommittee and the regional mechanism as well as for the possibility of dispatching a member of the Subcommittee as an observer to a mission carried out by the regional mechanism.

6 In the first session of the Working Group, the Chairperson-Rapporteur invited the States' representatives to give due consideration to this issue.[6] Most delegations considered a balanced relationship between the Subcommittee and regional bodies vital for the credibility of the new mechanism. Hence, the introduction of appropriate measures of coordination in order to avoid competition and duplication and to enhance complementarity was required.[7] The Working Group also took note of the reservations expressed by the Chairperson of the CPT about the proposed dispatch of a member of the Subcommittee as an observer to a mission of the regional mechanism.[8] The Working Group agreed that any arrangement should respect regional mechanisms that were working effectively, provide a certain degree of integration between the regional and the international systems without prejudicing their essential characteristics and requirements, and avoid any subordination of either system to the other. A possible solution was seen in the *principle of complementarity* of function of these bodies and in the *principle of reciprocal cooperation* between them. A number of delegations noted that the existence of a regional mechanism for certain States should not serve as an exemption from international scrutiny by the Subcommittee under the Protocol.[9]

7 The relationship between regional bodies and the Subcommittee, which was declared a priority issue in the first session of the Working Group, was discussed in greater detail during the second and third sessions. It was stressed that *duplication between these bodies should be avoided and complementarity enhanced*. Since the scope of the Protocol was universal, no region should be excluded even if it was covered by a regional system. Some delegates found Article 9 of the Costa Rica draft sufficient while others argued that the relationship between different systems had to be made clearer in order to avoid overlapping. Again, the principle of reciprocal cooperation was seen as a possible solution. A proposal was made that States that had ratified both a regional convention as well as the Protocol should agree that their respective visit reports drawn up by the regional body be automatically forwarded to the Subcommittee on a confidential basis.[10]

8 After a number of amendments the Working Group adopted Article 9 as the outcome of the beginning of the first reading on 21 October 1994.[11] Paragraph 2, which encouraged the Subcommittee to cooperate with different organs and institutions, including regional mechanisms, was followed by paragraph 3, which ascertained

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, para 20.

[7] ibid, para 95.

[8] Letter from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1992/WG.11/WP.1/Add.6.

[9] E/CN.4/1993/28 (n 6) paras 96ff.

[10] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, paras 69ff.

[11] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its third session [1994] UN Doc E/CN.4/1995/38, paras 31ff.

the universal scope of the Protocol by placing the decision to visit States parties that are also parties to regional conventions on the Subcommittee. However, cooperation between the Subcommittee and the regional mechanism was envisaged and States were encouraged to submit to the Subcommittee visit reports drawn up by the regional body.[12]

9 A number of editorial changes were made to paragraph 3 of Article 9 in the sixth session of the Working Group in 1997 and it was adopted as new paragraph 3 of Article 11 as outcome of the second reading.[13] However, when *Mexico*, with the support of GRULAC, introduced a new draft,[14] its Article 18(2) only contained a general clause on cooperation with international and regional bodies, leaving out detailed arrangements governing this cooperation. In addition to earlier drafts, a provision was inserted which clarified that the provisions of the Protocol shall not affect the obligations of States parties under any regional convention instituting a system of visits to places of detention. Again, the Subcommittee and regional mechanisms were encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the Protocol. Also the proposal by the *United States*[15] followed this undisputed approach, which was taken up by the Chairperson-Rapporteur in the tenth session of the Working Group[16] and finally adopted as Article 31 OP.

3. Issues of Interpretation

3.1 Relevant Regional Systems of Visits to Places of Detention

10 The relevant regional bodies are primarily the CPT under the European Convention against Torture,[17] as well as the Special Rapporteur on Prisons and Other Conditions of Detention under the African Charter on Human and Peoples' Rights[18] and the Special Rapporteur on the Rights of Persons Deprived of Freedom under the American Declaration of the Rights and Duties of Man.[19]

11 Much value can be identified in the system that has been initiated by the Protocol. First of all, the Protocol introduced a preventive system with a *two-pillar approach*, combining efforts on the international as well as on the national level. Second, the Subcommittee on Prevention has a global mandate to visit places of detention worldwide and in any country or territory under a State party's jurisdiction. Consequently, it has gained much experience in the international field and has contributed enormously to the overall and common goal of an effective prevention of torture and other forms of ill-treatment.

[12] ibid, Annex, Art 9.

[13] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its sixth session [1997] UN Doc E/CN.4/1998/42, paras 32ff and Annex, Art 11(3).

[14] E/CN.4/2001/67 (n 4) Annex I. See above para 7.

[15] E/CN.4/2002/78 (n 5) Annex II E. See above para 8.

[16] ibid, Annex I (proposal by the Chairperson-Rapporteur).

[17] Rachel Murray and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011) 146–48.

[18] ibid 149–51. [19] ibid 151–52.

3.2 Avoiding Duplication

12 As the CPT was already active by the time the OPCAT entered into force, this could mean that the SPT steps back from conducting missions to countries that are visited by the CPT. Hence, while the phrase 'avoiding duplication' clearly does not oblige the SPT to do so, this was indeed the practice of the SPT in the first years—with the exception of a visit to Sweden in its first year of operation (2007) which was determined on the basis of drawing lots. Only after visiting the Ukraine in 2011 did the SPT start to undertake visits to Council of Europe countries more frequently each year.

13 Although the drafting process of the Protocol has already shown that the *Subcommittee on Prevention*—in its mandate—*is based primarily on the experiences of the CPT*, there are some *major differences* between these two bodies as far as their functioning is concerned. Whilst the CPT's mandate is geared to a particular region, the mandate of the Subcommittee is potentially global. Due to this global reach, it is challenging for the Subcommittee to ensure that every region worldwide is sufficiently represented in its annual programme of missions. This is compounded by the fact that the international body consists of only twenty experts and that the length and duration of its missions and visits is different from those conducted by the CPT. Furthermore, the CPT has the mandate to conduct so-called *ad hoc visits* in addition to its *periodic visits*, whereas the Subcommittee can propose to carry out a *follow-up visit* to the State party concerned, but does not have the mandate to act on an ad hoc basis.[20]

14 Duplication can be understood as an overlap of visits. This has only been an issue in the case of ad hoc visits by the CPT. However, also avoiding to 'getting in each other's way' should be an aim that can be reached by avoiding visits taking place in too close a proximity to each other.[21] Such planning should avoid disturbing the possibly lengthy process of dialogue arising out of a visit.[22]

15 As to *consultation and cooperation* foreseen by Article 31 OP between the Subcommittee and the regional treaty bodies, it is of the utmost importance that all treaty monitoring bodies aim at establishing a system of good cooperation and dialogue, including the sharing of information, a framework for mutual consultations, and the possibility of joint projects, as well as an adjustment of criteria for joint visits to States parties.[23] Between the CPT and the SPT, cooperation exists by informal exchange between

[20] See above Art 13 OP.

[21] Christine Bicknell and Malcolm Evans, 'Monitoring Prisons: The Increasingly Complex Relationship Between International and Domestic Frameworks' in T Daems (ed), *Europe in Prisons* (Palgrave McMillan, Cham 2017) 18.

[22] ibid 30: 'On average, a CPT visit report is transmitted about eight or nine months after the visit takes place, and a response is requested within six months. Thus the state is likely to be most engaged substantively about a year after the actual visit has taken place. Although the SPT tends to transmit its reports four or five months after a visit, the period of response is similar' (31).

[23] In its first mission report, the SPT notes that it has studied the recommendations made by the CPT carefully and, as not all these recommendations were reflected in the legislation considered by the SPT, the SPT issues recommendations similar to those made by the CPT. In another mission report, the SPT reminds the State party of and reinforces the CPT's recommendations. Furthermore, when recommending that the State party request the publication of the SPT's report in accordance with Article 16(2) OP, it also recommended that the State party requests the publication of the CPT's report: see SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden' (2008) UN Doc CAT/OP/SWE/1, para 121; SPT, 'Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine' (2016) UN Doc CAT/OP/UKR/1, para 96.

the secretariats of the two committees as well as between their members. Information sharing is impeded by the fact that the deliberations of each Committee are confidential and due to the timings of decision-making the relevant information may just not yet be there to share.[24] The coordination between the SPT and the CPT has been apparent in some SPT reports.[25]

STEPHANIE KRISPER

[24] Bicknell and Evans (n 21) 31, para 23: 'Thus whilst the decision making of the SPT takes place in June of the preceding year, that of the CPT now takes places earlier and is made public in time for it to be taken into consideration. Obviously, the CPT will not be aware of the SPT's as yet undecided plans. This reverses the situation before 2014, when the decision-making of the SPT was made in ignorance of the CPT's plans, though it must be said that there is a degree of predictability to the CPT's cycle of regular visits. The CPT's ad hoc visits are of course entirely unpredictable and cannot be factored into any planning process. It seems unlikely that the CPT takes much account of the SPT's visiting programme when considering whether to undertake an ad hoc visit, but given their differing natures and backgrounds, that is reasonable.'

[25] See eg SPT, 'Fifth Annual Report' (2012) CAT/C/48/3, para 36; SPT, 'Sixth Annual Report' (2013) CAT/C/50/2, para 47; SPT, 'Ninth Annual Report' (2016) CAT/C/57/4, para 35.

Article 32

Relation to the International Committee of the Red Cross

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

1. Introduction	1007
2. Travaux Préparatoires	1008
2.1 Chronology of Draft Texts	1008
2.2 Analysis of Working Group Discussions	1009
3. Issues of Interpretation	1009

1. Introduction

1 In times of *international armed conflict*, the ICRC is authorized by the Geneva Conventions to visit all places of detention where prisoners of war, detained civilians, and other protected persons are or may be.[1] Since torture is absolutely prohibited under the Geneva Conventions and constitutes a grave breach of international humanitarian law, the ICRC also monitors the implementation of the prohibition of torture during its visits to places of detention and thereby significantly contributes to its prevention. In times of *non-international armed conflict* and in *peace times*, the ICRC is not empowered by the Geneva Conventions to visit places of detention, but States may authorize it on the basis of *ad hoc agreements*. The ICRC is based on the principles of neutrality, independence, impartiality, cooperation, and strict confidentiality, and, therefore, never publicly reports on its findings and recommendations. The ICRC and its experiences prompted the Swiss banker and expert on humanitarian law *Jean-Jacques Gautier* to develop a system of

[1] cf above all, Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135 (Third Geneva Convention) Art 126 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 (Fourth Geneva Convention) Art 143; cf eg Philippe de Sinner and Hernan Reyes, 'Activités du CICR en matière de visites aux personnes privées de liberté: une contribution à la lutte contre la torture' in Antonio Cassese (ed), *The International Fight against Torture—La Lutte Internationale Contre La Torture* (Nomos Verlagsgesellschaft 1991) 153; Francis Amar and Hans-Peter Gasser, 'La contribution du Comité international de la Croix-Rouge à la lutte contre la torture: Les visites du CICR aux personnes privées de liberté en situation de troubles et tensions internes: objectifs et méthodes' (1989) 775 CICR 28; Francis Amar, 'Problems Raised by Visits to Places of Detention: Objectives and Working Methods of the ICRC in Internal Disturbances and Tensions, Strasbourg Seminar on the Implementation of the European Convention for the Prevention of Torture' (1989) 10 HRLJ 165; see also Ursula Kriebaum, *Folterprävention in Europa: Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung* (Verlag Österreich 2000) 219ff.

preventive visits to places of detention by a human rights treaty monitoring body of the United Nations.[2]

2 Since international human rights law also applies in times of armed conflict, the question of the relationship between the Protocol and the Geneva Conventions arose. The original Costa Rica Draft and *Article 17(3) ECPT* are based on the principle that a *visit by the ICRC should be given preference* to visits by a human rights monitoring body which, therefore, shall refrain from visiting places of detention which are visited by the ICRC.[3] *Article 32 OP* is, however, based on the opposite principle, namely that *both types of visits are complementary* and demand cooperation between the Subcommittee and the ICRC.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[4]

Article 1

> 2. A place of detention within the meaning of this Article shall not include any place which representatives or delegates of a Protecting Power or of the International Committee of the Red Cross are entitled to visit and do visit pursuant to the Geneva Conventions of 1949 and their additional protocols of 1977.

4 *Revised Costa Rica Draft (15 January 1991)*[5]

Article 9

> 2. The present Protocol does not affect the provisions of the Geneva Conventions of 12 August 1949 for the protection of victims of war and their Additional Protocols of 8 June 1977 by which the Protecting Powers and the International Committee of the Red Cross visit places of detention, or the right of any State Party to authorize the International Committee to visit places of detention in situations not covered by international humanitarian law.

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[6]

[2] See above Introduction CAT.

[3] On the relationship between the ICRC and the CPT see eg Kriebaum (n 1) 219ff.

[4] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica [1980] UN Doc E/CN.4/1409.

[5] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[6] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28, Annex I; see also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, Annex. Later drafts contain similar or identical provisions: cf Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II, Art 11; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I (the Mexican Draft) Art 19; Annex II (the EU Draft) Art 12; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E (the US Draft) Art 10; Report

Article 9

4. The provisions of the present Protocol do not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, or the possibility of any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

2.2 Analysis of Working Group Discussions

6 From the first session of the Working Group, the relationship between the Subcommittee and the ICRC was given due consideration. Throughout the ten years of negotiations, the ICRC was represented by an observer, who explained to the Working Group on several occasions that the Protecting Powers and the ICRC were governed by different objectives than the Subcommittee. Therefore, these mechanisms should not interfere with each other. He was of the opinion that informal means of consultation between the ICRC and the Subcommittee should be allowed to develop in practice a maximum of complementarity. A number of States' delegations supported this view, arguing that detailed arrangements of cooperation in the Protocol might prove detrimental to flexibility.[7]

7 In the fifth session of the Working Group in 1996, this issue was discussed with the then UN Special Rapporteur on Torture, Sir *Nigel Rodley*, who expressed concern that the work of the ICRC could be seriously compromised if the Subcommittee were not provided with certain essential elements, such as the clear right to visit any State party, also on an ad hoc basis; to have access to any place of detention; to meet privately with persons deprived of their liberty and other rights.[8]

8 At the sixth session, the Working Group adopted the text of Article 9(4) OP. Alternative drafts of the Protocol provided by *Mexico*,[9] the *European Union*,[10] and the *United States*[11] in later sessions contained identical provisions on the question of the relationship with the ICRC and were not discussed separately.

3. Issues of Interpretation

9 Article 1(2) of the *original Costa Rica Draft* of 1980 provided that any place of detention which representatives or delegates of a Protecting Power or of the ICRC are entitled to visit and actually do visit pursuant to the Geneva Conventions and their Additional Protocols shall be excluded from the competence of the visiting body to be established under the OP.[12] This *principle of mutual exclusiveness* and preference of the ICRC found its way in slightly different words into *Article 17(3) ECPT*. The CPT is

of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I (Proposal by the Chairperson-Rapporteur) Art 32.

[7] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, para 99.

[8] Report of the working group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fifth session [1996] UN Doc E/CN.4/1997/33, para 21.

[9] E/CN.4/2001/67 (n 6) Annex I.

[10] ibid, Annex II.

[11] E/CN.4/2002/78 (n 6) Annex II E.

[12] See above para 3.

thereby prevented from visiting places of detention which the ICRC effectively visits 'on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977 thereto'. This prohibition for the CPT from visiting a State only applies to *international armed conflicts*, because visits during internal armed conflicts or in peace time are not based on the Geneva Conventions, but on ad hoc agreements with the States concerned.[13]

10 The *CPT* has visited places of detention that were also visited by the ICRC based on ad hoc agreements, for example in *Albania, Azerbaijan, the Russian Federation (Chechen Republic), and the Ukraine*.[14] These parallel or even overlapping visits have not led to any discernible problems of competition or mutual interference with each other's competences, but rather to greater protection for persons deprived of their liberty.[15] In practice, the level of *cooperation between the ICRC and the CPT* seems to have been quite fruitful for both bodies, which maintain frequent informal contacts in order to coordinate their activities, subject of course to the principle of *confidentiality* that binds both bodies. The same holds true for the cooperation and coordination between the Special Rapporteur on Torture and both the CPT and the ICRC. There is no reason to believe that the situation would be different in times of international armed conflict, which means in retrospect that the provision of Article 17(3) ECPT was overly cautious.

11 *Article 32 OP* therefore, follows the *opposite philosophy*, namely that visits by both bodies are *complementary* in international and non-international armed conflicts and that both bodies should cooperate and coordinate their activities accordingly. Article 9 of the revised Costa Rica Draft of 1991 had changed from mutual exclusiveness to *cooperation*.[16] This principle was no longer seriously challenged during the discussions in the Working Group,[17] and discussion among the delegations focused on how the provision on cooperation should be regulated in detail.

12 The outcome is very flexible with regard to the ways and means of cooperation between the Subcommittee, NPMs, and the ICRC. Article 32 simply guarantees that neither the obligations of States parties under the Geneva Conventions to permit visits of the ICRC during international armed conflicts, nor their right to authorize visits of the ICRC in situations of non-international armed conflict and in peace time shall be affected by becoming parties to the Protocol. In other words, the Subcommittee or an NPM shall not have preference over visits by the ICRC, which can also be authorized to visit places of detention parallel to visits by the respective NPM and the Subcommittee.

STEPHANIE KRISPER

[13] cf Kriebaum (n 1) 220, with further references.

[14] On the mission to Albania in December 1997 and a certain lack of cooperation between the CPT and ICRC see Kriebaum (n 1) 222. On the nine missions to the Chechen Republic see the following three public statements: CPT, 'Public Statement Concerning the Chechen Republic of the Russian Federation', CPT/Inf. (2001) 15 of 10 July 2001, CPT/Inf (2003) 33 of 10 July 2003 and CPT/Inf (2007) 17 of 13 March 2007. On the mission to Azerbaijan in 2002 see CPT, 'Report to the Azerbaijani Government on the Visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment', CPT/Inf (2004) 36 of 7 December 2004. Since the Government of Turkey steadily denied the existence of an armed conflict with the PKK, it refused the ICRC the permission to visit the conflict region and places of detention.

[15] cf Edouard Delaplace and Matt Pollard, 'Visits by Human Rights Mechanisms as a Means of Great Protection for Persons Deprived of Their Liberty' (2005) 857 IRRC 69, 75.

[16] See above para 4. [17] See above 2.2.

Article 33

Denunciation

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.

3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

1. Introduction	1011
2. Travaux Préparatoires	1012
2.1 Chronology of Draft Texts	1012
2.2 Analysis of Working Group Discussions	1013
3. Issues of Interpretation	1014

1. Introduction

1 Pursuant to Article 33, a State party may denounce the OP at any time by written notification to the Secretary-General, being the sole requirement for withdrawal. The possibility and procedure of *denunciation* is quite common with regard to international treaties, at least as to their optional elements. However, a State party may not tackle its obligations under the present Protocol until the expiration of one year calculated from the date of receipt of the notification by the Secretary-General. Furthermore, and in order to hinder States parties from denouncing the Protocol for the purpose of suppressing any grievances, the act of denunciation does not function retroactively.

2 The provision at hand is based on Article 31 CAT, which—unlike the CCPR[1]—contains an explicit provision on denunciation. The ECPT also contains a comparable

[1] Only Art 12 of the first OP to the CCPR contains a similar denunciation clause; the Covenant itself can only be terminated in accordance with the general rules of international law or Arts 54–72 VCLT. See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR-Commentary* (2nd rev edn, NP Engel 2005) XXXVI, 905ff.

provision for the European system in its Article 22, especially as regards the date on which the denunciation becomes effective.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

3 *Original Costa Rica Draft (6 March 1980)*[2]

Article 16

Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall inform the other States Parties and the Committee. Denunciation shall take effect one year after the date of receipt of the notification. Denunciation shall not affect the execution of measures authorised prior to it.

4 *Revised Costa Rica Draft (15 January 1991)*[3]

Article 19

Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties, the Committee against Torture and the Subcommittee. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

5 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[4]

Article 19

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Protocol in regard to any act or situation which occurs prior to the date at which the denunciation becomes effective, or to the actions that the Sub-Committee [the Committee against Torture] has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Sub-Committee [the Committee against Torture] prior to the date at which denunciation becomes effective.

[2] Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Costa Rica (1980) UN Doc E/CN.4/1409.

[3] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights (1991) UN Doc E/CN.4/1991/66.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Fourth Session (1996) UN Doc E/CN.4/1996/28, Annex I. See also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1993) UN Doc E/CN.4/1994/25, Annex.

6 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[5]

Article 21

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation which occurs prior to the date at which the denunciation becomes effective, or to the actions that the Subcommittee has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Subcommittee prior to the date at which denunciation becomes effective.

3. Following the date at which the denunciation of the State Party becomes effective, the Subcommittee shall not commence consideration of any new matter regarding that State.

2.2 Analysis of Working Group Discussions

7 The issue of denunciation was only briefly considered during the first session of the Working Group in 1992, when one delegation questioned the need to inform the CAT Committee of such a denunciation as contained in the Costa Rica Draft which formed the basis for discussions.[6]

8 In 1995, the representatives of *Australia, Chile*, and the *Netherlands* supported the retention of a clause dealing with the effect of a denunciation with regard to any act or situation occurring prior to it into the provision. Similar clauses could also be found in Article 31(2) CAT and Article 12 of the first OP to the CCPR. According to this clause, a denunciation should not have the effect of releasing a State party from its obligations under the Protocol in relation to any act or omission which occurred prior to the date at which the denunciation becomes effective, nor should the denunciation prejudice the continued consideration of any matter before the SPT.[7]

9 In 1997, the outcome of the first reading was modified in so far as a reference to the CAT Committee in paragraph 2 of the Article, dealing with the effects of a denunciation, was deleted. Furthermore, *Mexico* reintroduced a third paragraph preventing the SPT commencing considerations of any new matter after the date at which the denunciation becomes effective. The text of the provision was then adopted by the Working Group.[8]

[5] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Eighth Session (1999) UN Doc E/CN.4/2000/58, Annex II. Later drafts contain similar or identical provisions: see Art 27 of the Mexican Draft of 13 February 2001 (E/CN.4/2001/WG.11/CRP.1); Art 22 of the EU Draft of 22 February 2001 (E/CN.4/2001/WG.11/CRP.2); Art 13 of the US Draft of 16 January 2001 (E/CN.4/2002/78); Art 33 of the Proposal of the Chairperson-Rapporteur of 17 January 2002 (E/CN.4/2002/CRP.1).

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc E/CN.4/1993/28, para 113.

[7] E/CN.4/1996/28 (n 4) para 122.

[8] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42, paras 115ff.

10 Alternative drafts of the Protocol provided by *Mexico*[9] and the *European Union*[10] in later sessions contained identical provisions on the question of denunciation and were not discussed separately. The draft by the *United States*,[11] which provided for the possibility of denunciation, remained silent on the effects of such denunciation.

3. Issues of Interpretation

11 Article 33 OP is based on the detailed provisions of *Article 31 CAT*. On the various questions of interpretation related to the *denunciation clause*, the reader is referred to the respective comments on Article 31 CAT.[12] In the following, we will only focus on the *differences* between both provisions.

12 By inserting the words '*at any time*' in paragraph 1, Article 33 OP only confirms the interpretation applied to Article 31 CAT, namely that States parties are free to denounce the Protocol even immediately after having deposited the respective instruments of ratification or accession.

13 Article 33(2) OP confirms that the State party concerned remains fully bound by the provisions of the Protocol for the *one-year period* between the notification of the respective denunciation and its entry into force. But the formulation also refers to any 'situation' that may occur during this period as well as to 'the actions that the SPT has decided or may decide to take with respect to the State Party concerned'. The word '*situation*' may be interpreted as referring, for example, to a serious deterioration of prison conditions caused by riots or similar events which the State party has to address as if it had not denounced the Protocol. It might also refer to a situation in which a comprehensive prison or police reform project has just started, with the financial assistance of the Special Fund in Article 26, aimed at implementing a specific recommendation of the SPT. The *actions which the SPT may decide to take within this one-year period* are, above all, to carry out a regular or a follow-up *mission* to the country concerned, to maintain contacts with the NPM in the country and to provide the NPM with training, advice, and technical assistance in the evaluation of the needs and means necessary to improve the conditions of detention in the country and to strengthen the protection of detainees against torture and ill-treatment.[13]

14 As with respect to Article 31 CAT, any *reasonable interpretation* of Article 33(2) and (3) OP must strike a *fair balance* between the legitimate concern of the SPT not to be prevented from finalizing pending procedures and activities and the legitimate concern of the respective State party that this one-year period will not be misused by the SPT to arbitrarily initiate, continue, and perhaps delay certain proceedings and activities as a reaction to its *notification of denunciation*.[14] This means that the SPT may, of course continue its preparations for a country mission and even start a new country mission at the beginning of the one-year period, and finalize its report and recommendations also after the one-year period. The same holds true for any training, advice, and assistance activities

[9] E/CN.4/2001/WG.11/CRP.1. [10] E/CN.4/2001/WG.11/CRP.2.
[11] E/CN.4/2002/78 (n 5) Annex II E.
[12] See above Art 31. [13] See above Art 11 OP. [14] See above Art 31.

in relation to the NPM. But the SPT should not start the initiative for a new country mission or a new training programme with the NPM ten months after the notification of denunciation in order to be able to carry out as many activities as possible even after the one year period, although strictly speaking, this would not be prevented by Article 33(3) OP.

15 The denunciation of the OP only has the legal effect that the *SPT shall not commence new activities* after the date of its entry into force, but it has *no similar automatic effect on the NPM*. If the State party also wishes to discontinue the functioning of the NPM, it would have to take the required legislative and other action. Such measures should, however, only be commenced after the entry into force of the denunciation, ie after the one-year period foreseen in Article 33(1) OP.

KERSTIN BUCHINGER

Article 34

Amendments

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

1. Introduction	1016
2. Travaux Préparatoires	1016
2.1 Chronology of Draft Texts	1016
2.2 Analysis of Working Group Discussions	1018
3. Issues of Interpretation	1018

1. Introduction

1 This provision provides for the common UN procedure for amendments, being in line with the minimum standards of the VCLT[1] and literally corresponding to Article 29 CAT, which is based on Article 51 CCPR.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[2]

[1] See Vienna Convention on the Law of Treaties (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Arts 39ff.

[2] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/

Article 19 bis

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. An amendment shall come into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

3 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[3]

Article 22

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional process.

1996/28, Annex I. See also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, Annex.

[3] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II. Later drafts contained similar or identical provisions: see Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I (the Mexican Draft) Art 28; Annex II (the EU Draft) Art 23; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I (Proposal by the Chairperson-Rapporteur) Art 34.

> 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

2.2 Analysis of Working Group Discussions

4 In the first session of the Working Group in 1992, it was noted that the Costa Rica Draft of 1991, on which the Working Group based its discussions, did not contain a provision for amendments of the Protocol.[4] A proposal by the drafting group presented at the fourth session in 1995, which combined elements of Article 11 of the first OP to the CCPR as well as of Article 29 CAT, was adopted by the Working Group as draft Article 19 bis.[5]

5 The discussion was opened again in the course of the second reading of draft Article 19 bis in 1997, when the representative of *Mexico* noted that the Article was inconsistent with the wording of the Convention. Accordingly, the Working Group decided to adopt only paragraph 3 of Article 19 bis and postponed the adoption of paragraphs 1 and 2.[6]

6 A lengthy discussion on the issue of amendments followed in 1998, where a number of questions were raised by the delegates, such as whether an amendment should be approved by a *two-thirds majority or by all States parties*, whether an *approval of the General Assembly* was needed for an amendment, or whether the matter was exclusively for the States parties to decide. The representative of the *Netherlands* made the proposal to delete the whole provision, since Article 40 VCLT was applicable in any case. This proposal did not find support among the participants. Taking into consideration all arguments, the Chairperson of the drafting group presented a revised provision on amendments, which was adopted by the Working Group after the second reading as new Article 22.[7]

7 Alternative drafts of the Protocol provided by *Mexico*,[8] the *European Union*,[9] and the *United States*[10] in later sessions contained identical provisions on the question of amendments and were not discussed separately.

3. Issues of Interpretation

8 In contrast to Article 51(2) CCPR, the words 'within four months from the date of such communication' have been inserted in paragraph 1 of Article 34 OP. Further, the requirement of approval by the UN General Assembly, contained also in Article 51(2) CCPR, has been left out.

9 Article 34 OP is almost identical to the wording and substance of Article 29 CAT. The only substantial difference to Article 29(1) CAT, which merely requires a simple

[4] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, para 112.

[5] E/CN.4/1996/28 (n 2) paras 126ff. See above para 3.

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its sixth session [1997] UN Doc E/CN.4/1998/42, paras 119ff.

[7] Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session [1998] UN Doc E/CN.4/1999/59, paras 86ff. See above para 4.

[8] E/CN.4/2001/67 (n 3) Annex I.

[9] ibid, Annex II.

[10] E/CN.4/2002/78 (n 3) Annex II E.

majority, is that the number of States parties required for the adoption of the amendment under Article 34(1) OP was raised from a simple majority to a *two-thirds majority of the States parties* present and voting. This was the reaction to the proposal of the delegate of the *Netherlands* to delete this article in order to make the provisions of the VCLT directly applicable.[11] However, this higher requirement does not solve the problem. It would either be necessary to raise the requirement of acceptance of the amendment in Article 34(2) from a two-thirds majority to all States parties,[12] or to accept that a procedural amendment could also become binding on all States parties after acceptance by only two-thirds of the States parties. The first option is applied, for example, to all procedural Protocols to the ECHR;[13] the second option was applied by the States parties to the CRC when in 1995 they decided to raise the number of members of the Committee on the Rights of the Child from ten to eighteen by simply ignoring the respective provision of Article 50(3) CRC.[14]

10 On the various questions of interpretation and the non-practicality of a procedural amendment, which shall only be binding on the States parties that have accepted it, the reader is referred to the remarks on Article 29 CAT.[15]

STEPHANIE KRISPER

[11] See above para 7.

[12] This was in fact proposed in the Working Group but did not find approval.

[13] cf the relevant provisions in Protocols Nos 2, 3, 5, 8, 9, 10, 11, and 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR). This high requirement is the only reason why the Fourteenth Protocol, aimed at reforming the procedure before the European Court of Human Rights, has not yet entered into force, as the Russian Federation refuses to ratify it.

[14] cf UNGA, Res 50/155 of 21 December 1995.

[15] cf also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 811ff.

Article 35

Privileges and Immunities

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

1. Introduction	1020
2. Travaux Préparatoires	1021
2.1 Chronology of Draft Texts	1021
2.2 Analysis of Working Group Discussions	1022
3. Issues of Interpretation	1023

1. Introduction

1 Article 35 OP stipulates that the members of the Subcommittee on Prevention as well as of the NPMs shall be granted the necessary privileges and immunities in order to exercise their monitoring functions independently.

2 With regard to the members of the *Subcommittee*, special reference is made to the *General Convention on the Privileges and Immunities of the United Nations* of 13 February 1946.[1] Article VI, Section 22 of the General Convention is to ensure that 'experts … performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions'. The existing provision, which conforms with the majority of comparable human rights instruments,[2] aims at ensuring that in carrying out their functions, the members of the Subcommittee are given, for example, immunity from personal arrest or detention, immunity from legal process related to the performance of their missions, and inviolability for all their papers and documents, as well as immunities and facilities regarding their personal baggage.

[1] UNGA, Res 22 A (I) of 13 February 1946, 1 UNTS 16.

[2] cf eg Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Art 23; International Covenant on Civil and Political Rights (adopted and opened for signature 16 December 1966, entered into force 23 March 1976, for all provisions except those of Article 41; 28 March 1979 for the provisions of Article 41) 999 UNTS 171 (CCPR) Art 43; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 51; and American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 (ACHR) Art 70. See above Art 23 OP.

3 No special reference is made to international standards regarding *NPMs*. However, according to Article 35 OP, its members shall be granted privileges and immunities that are necessary for the independent exercise of their functions. Consequently, similar facilities to the ones mentioned above shall be granted to the members of the national visiting bodies under the respective domestic laws in order to be able to carry out their mandates effectively.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

4 *Revised Costa Rica Draft (15 January 1991)*[3]

Article 23

> Members of the Subcommittee and of missions authorized under the present Protocol shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. In particular, they shall be accorded the privileges and immunities specified in section 22 of the Convention on Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

5 *Trial of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[4]

Article 20

> The members of the Sub-Committee and of [its delegation] shall be entitled to the facilities, privileges and immunities [of experts on mission for the United Nations] as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

6 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[5]

Article 23

> Members of the Subcommittee and of missions authorized under the present Protocol shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. In particular, they shall be accorded the privileges and immunities specified in section 22 of the Convention on Privileges and Immunities

[3] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[4] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28, Annex I; see also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, Annex.

[5] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II. Later drafts contained similar or identical provisions: cf Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I (the Mexican Draft) Art 29; Annex II (the EU Draft) Art 24; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E (the US Draft) Art 8; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I (Proposal by the Chairperson-Rapporteur) Art 35.

of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

2.2 Analysis of Working Group Discussions

7 Although it was not disputed in the Working Group that a provision on privileges and immunities for members of the Subcommittee should in principle be inserted in the Protocol, a delegate stated that he held a different view on privileges and immunities of experts, interpreters, and other members of a delegation visiting a country. Another speaker observed that such privileges and immunities should only be granted during the course of a mission.[6]

8 The issue was discussed again in 1995, when the representative of *Japan* asked for clarification as to to whom the privileges and immunities should be extended. Furthermore, she proposed to add 'during the period of their mission' to the draft provision. The *Chinese* representative reiterated that he had reservations regarding privileges and immunities for those others than members of the Subcommittee. The delegate of *Sweden*, supported by the *United States*, proposed to seek a legal opinion of the UN Legal Counsel whether a reference to existing provisions under the United Nations regarding privileges and immunities of 'experts on mission' was sufficient, rather than finding new wording. In this regard, Sweden considered it important to retain the reference to the *UN Convention on Privileges and Immunities of the United Nations* of 13 February 1946. The matter was postponed for further consideration at the second reading.[7]

9 During the sixth session and following further discussions, the *United States* provided the participants of the Working Group with a new proposal, accompanied by relevant existing regulations on privileges and immunities as well as an explanation of their scope, when they apply, and to whom they apply. Again, *China* declared that experts on mission should not enjoy the same privileges and immunities as members of the Subcommittee. The Chinese representative proposed that members of missions should be divided into three categories with varying degrees of privileges and immunities. Members of the Subcommittee should be granted the same privileges and immunities as delegations of UN Member States; experts should enjoy only such privileges and immunities necessary for their concrete needs; and interpreters, who might be nationals of the country visited, should have only limited privileges and immunities. Also, she was in favour of adding a waiver of privileges and immunities in the text of the provision. Other speakers explicitly opposed the idea of making a division between members of a delegation. A second proposal of the *United States*, which was based on Section 22 of the 1946 Convention on the Privileges and Immunities of the United Nations and Article 6 of the Convention on the Safety of United Nations and Associated Personnel, was supported by a number of States. The representative of *Cuba* wished to insert a reference to Section 23 of the 1946 Convention on Privileges and Immunities, which states that such privileges and immunities are not granted for the personal benefit of the individuals but in the interests of the United Nations, and which gives the Secretary-General the right to waive the immunity of an expert. After the drafting group had taken into consideration the comments, the provision was adopted by the Working Group. The representative of

[6] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1992] UN Doc E/CN.4/1993/28, para 114.

[7] ibid, paras 130ff.

China explicitly made a reservation on this issue, declaring that she regretted that her proposal to make a distinction between members of the Subcommittee and others had not been taken up in the adopted text.[8]

10 Alternative drafts of the Protocol provided by *Mexico*[9] and the *European Union*[10] in later sessions contained identical provisions on the question of privileges and immunities and were not discussed separately. Also, the proposal of the *United States*[11] to grant the members of the Subcommittee the same privileges and immunities as held by the members of the Committee under Article 23 CAT, did not give rise to further negotiations.

3. Issues of Interpretation

11 Article 35 OP is based on comparable provisions in Article 23 CAT and other UN human rights treaties,[12] but is more explicit in referring to sections 22 and 23 of the *Convention on the Privileges and Immunities of the United Nations* of 13 February 1946. These two sections are part of Article VI of the Convention, which relates exclusively to experts on missions for the United Nations.

12 In the Working Group, several delegates proposed that such privileges and immunities should only be granted to members of the Subcommittee during the period of their country missions.[13] This proposal was not adopted. Rather, Section 22 of the Convention specifies that experts shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions '*during the period of their missions*'. This formulation applies to experts who are appointed for a particular fact-finding mission or other mission. The word 'mission' therefore does not refer to the country missions conducted by the Subcommittee, but must rather be interpreted as applying to the *entire period for which an expert serves as member of the Subcommittee*. However, most of the privileges and immunities spelled out in Section 22, such as immunity from personal arrest and from seizure of personal baggage, are primarily relevant when members of the Subcommittee are on a *country mission*.

13 According to Article 13(3) OP, the members of the Subcommittee may be accompanied during their country missions by other *experts*, such as *forensic experts*; they shall be selected from a roster of experts established at the Office of the UN High Commissioner for Human Rights.[14] During the drafting of Article 35 OP, *China* and other States stressed that the privileges and immunities shall only be accorded to members of the Subcommittee.[15] The final text of Article 35 OP thus does not include any reference to the experts mentioned in Article 13(3) OP. Nevertheless, all experts selected from the roster of experts at the Office of the High Commissioner must receive a contract from the United Nations and will, therefore, be considered for this particular country mission as 'experts on missions' of the United Nations entitled to the same privileges and

[8] Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its sixth session [1997] UN Doc E/CN.4/1998/42, paras 131ff.

[9] E/CN.4/2001/67 (n 5) Annex I. [10] ibid, Annex II.

[11] E/CN.4/2002/78 (n 5) Annex II E.

[12] See above Art 23; cf also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) 787ff; cf eg Art 43 CCPR (n 2); Art 51 ECHR (n 2); Art 70 ACHR (n 2).

[13] cf eg the respective Japanese proposal above, para 8. [14] See above Art 13 OP.

[15] See above 2.2.

immunities as members of the Subcommittee by virtue of directly applying Sections 22 and 23 of the Convention. Whether or not *interpreters* and other members of the delegation enjoy similar privileges and immunities depends on their respective contracts with the United Nations.

14 On the initiative of the representative of *Cuba*, a special reference was made in Article 35 OP to *Section 23 of the Convention*. This provision stipulates that the privileges and immunities granted to experts on mission are only *functional immunities*, which are not granted 'for the personal benefit of the individuals themselves'. Consequently, the *Secretary-General* shall have the right and the duty to *waive the immunity* of any member of the Subcommittee in a case where immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. For example, if a member of the Subcommittee is charged for a crime committed during a country mission which is not directly related to his or her mandate, the Secretary-General may decide to waive the respective immunity contained in Section 22(b) of the Convention. If, however, a member is charged because of criticizing the Government of the country visited in relation to the conditions of detention observed, his or her immunity shall not be waived. Difficult questions of interpretation arise in relation to a member of the Subcommittee participating in court proceedings as a witness, *amicus curiae*, or in any other function because of his or her UN function. The Secretary-General in such a case may also have to consider waiving immunities in relation to the right and duty of confidentiality, such as the inviolability of all documents or the right to use codes, etc.

15 Article 35 OP also contains a reference to privileges and immunities of members of the NPMs 'as are *necessary for the independent exercise of their functions*'. The extent of the privileges and immunities afforded to SPT member should serve as a model in these regards.[16] In any case, they should enable the NPM to independently and effectively carry out preventive and unannounced visits to all places of detention, and to conduct private interviews with detainees. The SPT elaborated that routine body searches and pat-downs contravene the spirit of the OPCAT,[17] and that application of or exemption from searches shall be carried out in the same manner as for other authorities with similar or equal privileges and immunities to those granted to NPM members and ought to include freedom from such searches.[18] Protection should include immunity from personal arrest, detention, and seizure of personal baggage; immunity from seizure or surveillance of papers and documents; immunity from legal actions in respect to words, spoken or written, or acts performed in the course of their NPM duties; and no interference with communications relating to the exercise of NPM functions.[19]

16 While Article 35 OP speaks of 'members' of the NPM, a systematic interpretation in accordance with the ordinary meaning of the terms in the context and in the light of the object and purpose of the OP[20] expands the protective scope of this provision to NPM personnel as understood by Article 18(1) OP.[21] While the protection of NPM

[16] APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010) 125.

[17] SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc CAT/C/57/4, Annex on 'Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms', para 24.

[18] ibid, para 25. [19] APT and IIDH (n 16) 125.

[20] Vienna Convention on the Law of Treaties (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art 31(1).

[21] See above Art 18 OP.

members is indisputably important, the NPM can only independently and effectively carry out its work of preventive and unannounced visits, private interviews with detainees, and issuance of recommendations if all personnel involved in this substantive work enjoy the privileges and immunities provided by Article 35 OP.

17 In this sense, the SPT states in its Guidelines that '[t]he State should ensure that both the members of the NPM and its staff enjoy such privileges and immunities as are necessary for the independent exercise of their functions.'[22] In its advice on body searches and pat-downs, it noted that, while it is accepted that essential basic security measures are to be complied with for the benefit of all concerned, it is equally important that 'those working' for the NPM are not in any way restricted in their work and that they do not feel that they might be subject to any form of pressure.[23] Hence, '[m]embers of the mechanism and its staff' should enjoy the protection of Article 35 OP.[24]

18 External experts are also part of NPM personnel and thereby must meet the same requirements of independence according to Article 18(1) OP and be afforded the same privileges and guarantees against reprisals as NPM members.[25] In this context, the SPT states that the NPM's legal framework should 'outline privileges and immunities of NPM members and those who contribute to the NPM, including experts and civil society'.[26]

19 Changes to laws or regulations could be necessary in addition to the NPM law providing for privileges and immunities. For example, NPM personnel are to be excluded from the rule that communications with pre-trial detainees should be monitored by prison personnel.

STEPHANIE KRISPER

[22] SPT, 'Guidelines on National Preventive Mechanisms' (2010) UN Doc CAT/OP/12/5, para 26.
[23] CAT/C/57/4 (n 17) Annex, para 24. [24] ibid, para 25. [25] APT and IIDH (n 16) 90.
[26] SPT, 'Report on the Visit to the Netherlands for the Purpose of Providing Advisory Assistance to the National Preventive Mechanism of the Netherlands: Recommendations and Observations Addressed to the State Party, Report of the Subcommittee' (2016) UN Doc CAT/OP/NLD/1, para 27.

Article 36

Obligations of Members of the Subcommittee during Country Missions

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State;

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

1. Introduction	1026
2. Travaux Préparatoires	1026
2.1 Chronology of Draft Texts	1026
2.2 Analysis of Working Group Discussions	1027
3. Issues of Interpretation	1029

1. Introduction

1 Article 2 OP specifies that the SPT shall be guided by the purposes and principles of the UN and observe the principles of confidentiality, impartiality, non-selectivity, universality, and objectivity.[1] Nevertheless, when discussing the duties of States parties in relation to the SPT's country missions and visits of places of detention under Articles 12 and 14 OP, several delegations insisted that during such missions the members of the SPT should also be bound by the *relevant domestic laws and regulations*.[2] After lengthy and highly controversial discussions,[3] the Working Group agreed to insert a special provision directly related to the privileges and immunities of SPT members under Article 35 OP.[4]

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Text of the Articles which Constitute the Basis for Future Work (2 December 1999)*[5]

[1] See above Art 2 OP, 3. [2] See above Art 12 OP, 2.2 and 3. [3] See below 2.2.
[4] See above Art 35 OP, 3.
[5] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) UN Doc E/CN.4/1998/42, Annex 1. Later drafts contain similar provisions: cf Art 30 of the Mexican Draft of 13 February 2001 (E/CN.4/2001/WG.11/CRP.1); Art 25 of the EU Draft of 22 February 2001 (E/CN.4/2001/WG.11/CRP.1); Art 36 of the Proposal of the Chairperson-Rapporteur of 17 January 2002 (E/CN.4/2002/CRP.1).

Article 22

In the conduct of missions, all members shall without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State; and

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

2.2 Analysis of Working Group Discussions

3 The question of a *reference to national law* in the Protocol proved to be much contested. The discussion on this issue mainly took place in the context of Article 14 OP dealing with the *obligations of States parties vis-à-vis the SPT*. In the third session of the Working Group, some speakers brought forward the argument that members of the SPT should be obliged to respect national laws while visiting a country. Others considered a reference to national laws counterproductive and raised concerns that these laws could be invoked by States as a means of restricting the delegation's access to places of detention. Furthermore, the insertion of a reference to 'professional ethics' was proposed. One delegation suggested limiting the reference to national rules relating to privacy, data protection, and principles of medical ethics.[6]

4 At its sixth session in 1997, a considerable number of States participating in the Working Group expressed concern about a reference to national law in the context of the SPT's rights. They argued that the primary aim of the Protocol was to maintain international standards, which lay outside the domestic sphere. On the other hand, some delegations, such as *China, Cuba*, and *Egypt*, insisted that the *respect of national laws was a necessary counterweight to the obligations put on the States parties*, such as the granting of unrestricted access to all places of detention. The representative of the *ICRC* explained that although national laws were respected during visits of the *ICRC*, the States would remove certain restrictions in order to allow an effective fulfilment of the mandate.[7] At the same session, the representative of *Uruguay* noted that she preferred no reference to national law in the Protocol. However, if it was deemed necessary to include such a reference, she would prefer not to link it to the provision on the obligations of States towards the SPT but rather to the provision on privileges and immunities.[8] The Chairperson of the drafting group reported later that the drafting group had agreed on inserting an article on national law after the provision on privileges and immunities, which was based on Article 6 of the *Convention on the Safety of UN and Associated Personnel* of 9 December 1994. She explained that many delegations had made a link between the introduction of this provision and the provision on the specific liberties that were to be granted to the SPT. Thus, their approval was dependent on a positive satisfactory outcome of the latter provision.[9]

5 In the following session, the issue of a reference to national laws beyond what was already contained in draft Article 22 was brought up on several occasions. In particular, in the seventh session of the Working Group a major part of the negotiations was dedicated

[6] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995) UN Doc E/CN.4/1995/38, paras 45ff.
[7] E/CN.4/1998/42 (n 5) paras 74ff. [8] ibid, para 143. [9] ibid, paras 148ff.

to the issue of domestic law. It was common understanding that all visits of the SPT should be conducted in the framework of the national legislation of the host country. However, this legislation should be consistent with international law, the UN Charter and other international obligations of this State. Some delegates emphasized that national laws should not be used to obstruct the fulfilment of a mission and that a balance between the rights and duties of the host State and those of the SPT should be established. Nevertheless, some participants felt that national legislation was essential to complement and implement the provisions of the Protocol and that a clear reference to national laws had to be made. Otherwise, they argued, the SPT might be seen as a 'supranational' body that enjoyed '*compétence de sa compétence*', or even had the right to interpret national laws unilaterally. Furthermore, national legislation could never contradict the provisions of the Protocol because it had to be consistent with its provisions as part of each State party's international obligations. Another argument for the insertion of such a reference was that this was necessary to safeguard the SPT's integrity, as the non-observance of domestic regulations might put its members at risk.[10]

6 At the same session, the Chairperson of the drafting group presented two paragraphs dealing with the issue of national legislation, which in her view could be best placed into the Article with the liberties and rights of the SPT in the context of a mission. While some representatives felt that the proposal could form a basis for further discussions, others insisted that such a reference was not necessary. In the following discussion, the delegations of *Cuba, China, Germany*, and *Egypt* brought forward other proposals on this question. The delegations of Algeria, China, Cuba, Egypt, Saudi Arabia, Sudan, and the Syrian Arab Republic commonly observed that for the aforementioned reasons a reference to domestic law in the context of visits of the SPT was fundamental. Also in this regard, the representative of the *United States* made a detailed statement at the end of the seventh session, explaining that the Fourth Amendment of the US Constitution guaranteed its citizens that public officials could not have access to private homes without a court decision or else under very narrow circumstances. These national provisions were also applicable to the SPT, which, if it had 'excessive powers', could conduct visits virtually everywhere if it were of the opinion that a person might be detained with State acquiescence.

7 Also in the eighth session of the Working Group, no consensus could be found. While some States noted that they could only accept the provision on the rights of the SPT if a paragraph or even separate Article on domestic legislation was inserted, others refused to accept such a reference as this would undermine the objectives of the Protocol.[11] Eventually, the text proposed by the *Chairperson-Rapporteur* in the last meeting of the Working Group only referred to national laws in Article 36, which had already been agreed upon during the sixth session.

[10] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Seventh Session (1998) UN Doc E/CN.4/1999/59, paras 26ff.

[11] Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its Eighth Session (1999) UN Doc E/CN.4/2000/58, para 58.

3. Issues of Interpretation

8 The obligations under Article 36 are directly related to the *privileges and immunities* accorded to members of the SPT. While such privileges and immunities apply to the entire period of serving as UN experts on the SPT, ie also in their home countries and third countries, the duties under Article 36 only apply to *country missions* in accordance with Articles 11 to 16 OP. In fact, the issue of SPT members having to respect domestic laws and regulations came up during the discussions on Article 12 OP.[12]

9 That members of the SPT, as stipulated in Article 36(b) OP, shall refrain from any action or activity incompatible with the impartial and international nature of their duties is self-evident and follows from their duty under Article 2 to be guided by the UN Charter and the *principles of impartiality and objectivity*.[13]

10 More controversial, however, is their obligation under Article 36(a) OP to '*[r]espect the laws and regulations of the visited State*'. Again, it is self-evident that the SPT shall not commit crimes in contravention of domestic criminal law and shall respect particular religious or traditional rules and customs of the country concerned. Their privileges and immunities are only of a functional nature and are not granted for the 'personal benefits' of the SPT members.[14]

11 A strict interpretation of Article 36(a) OP might, however, also lead to the result that the members of the SPT, during a country mission, must respect all provisions of prison rules, codes of criminal procedure, and similar laws to the same extent as the public in general. For example, all countries in the world have enacted specific legal provisions restricting access to places of detention by providing visiting hours for family members and other persons permitted to visit detainees, and even legal counsel may be prevented from conducting private interviews with their clients while in pre-trial detention. In military facilities, the taking of photographs is usually restricted or prohibited for the purpose of protecting military secrets, but at the same time it is part of the professional conduct of forensic examination of detainees that the forensic expert takes photos of the signs alleged to have been inflicted by torture. The same holds true for electronic equipment and other tools which the members of the delegation need to bring into a detention facility in order to carry out their work in a professional manner.

12 A *reasonable interpretation* of all relevant provisions of the Protocol, including the respective obligations of States parties to grant the SPT unrestricted access to all places of detention, their installations and facilities, as well as all relevant documents, to grant the delegation the factual opportunity to have private interviews with detainees, and to respect all privileges and immunities as UN experts on mission, as well as the obligations of the SPT members to comply with the principles of confidentiality, impartiality, objectivity, and professional conduct respectful of the general laws, traditions, and rules of the country to be visited, must strike a *fair balance between legitimate interests of the States parties as well as the legitimate interests of the SPT* to carry out its mandate of visiting places of detention in a professional manner in accordance with its mandate as laid down in the Protocol.[15] Guided by the overall principle of cooperation between States parties and the SPT under Article 2(4) OP,[16] States parties shall refrain from all actions aimed at obstructing the professional work of the SPT and, in particular, must not misuse prison

[12] See above Art 12 OP, 2.2 and 3.
[13] See above Art 2 OP, 3.
[14] See above Art 35 OP, 3.
[15] See also above Art 12 OP, 3.
[16] See above Art 2 OP, 3.

laws and regulations as a pretext for unduly restricting the freedom of the SPT to visit all places of detention and to communicate freely with all persons it wants to interview. At the same time, the SPT members must not misuse their specific rights, privileges, and immunities under this Protocol for their personal benefit and shall act respectfully towards all persons they interact with, above all detainees, witnesses, and staff of places of detention. Most importantly, they shall always respect the privacy of all interview partners, their right to confidentiality and data protection, as well as their right, on the basis of the principle of informed consent, to refuse to speak with the delegation or to provide certain information to the delegation.

13 The rights, privileges, and immunities of the members of the SPT are similar to other bodies visiting places of detention and conducting private interviews with detainees, above all the *CPT* and the *Special Rapporteur on Torture (SRT)*.[17] During the preparations for his visit to the *Russian Federation* in autumn 2006, the SRT was informed by the Government of Russia that certain elements of his terms of reference for carrying out visits to detention facilities would contravene Russian Federation law, particularly with respect to carrying out unannounced visits, and holding private interviews with detainees. Since these issues could not be resolved prior to the visit, he had to announce that he was not in a position to proceed as planned and the visit had to be postponed.[18] Generally, the *rights to carry out unannounced visits and to conduct private interviews with detainees* are fundamental to any international and national body concerned with the investigation or prevention of torture and ill-treatment, and States should refrain from obstructing the work of such mechanisms by invoking national legislation in this regard. Missions carried out by any of the relevant mechanisms under such restrictions, such as restricted access to detainees, would serve to undermine the credibility and objectivity of their findings as well as their impartiality and independence.[19]

KERSTIN BUCHINGER

[17] On the terms of reference of the UN special procedures, and in particular the SRT, when on fact-finding missions, see above Art 12 OP, 3. On the practice of the CPT, see Ursula Kriebaum, *Folterprävention in Europa: Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung* (Verlag Österreich 2000) 173ff; Malcolm D Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press/Oxford University Press 1998) 193ff.

[18] UNSRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2007) UN Doc A/HRC/4/33, paras 8ff.

[19] See ibid, para 13; see also UNSRT (Nowak) 'Report of the Special Rapporteur on the Question of Torture' (2005) UN Doc E/CN.4/2006/6, paras 20ff regarding the country visit methodology of the SRT.

Article 37

Authentic Texts

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

1. Introduction	1031
2. Travaux Préparatoires	1031
2.1 Chronology of Draft Texts	1031
2.2 Analysis of Working Group Discussions	1032
3. Issues of Interpretation	1032

1. Introduction

1 According to its Article 37, the OP is translated into all official UN languages and it explicitly refers to the fact that all translations are equally authentic.

2. Travaux Préparatoires

2.1 Chronology of Draft Texts

2 *Revised Costa Rica Draft (15 January 1991)*[1]

Article 21

1. The present Protocol, of which Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Protocol to all States.

3 *Text of the Articles which Constitute the Outcome of the First Reading (25 January 1996)*[2]

[1] Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations at Geneva addressed to the Under-Secretary-General for Human Rights [1991] UN Doc E/CN.4/1991/66.

[2] Report of the Working Group on the Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its fourth session [1995] UN Doc E/CN.4/1996/28, Annex I; see also Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1993] UN Doc E/CN.4/1994/25, Annex. Later drafts contain similar provisions: Report of the Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its eighth session [1999] UN Doc E/CN.4/2000/58, Annex II, Art 25; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman

Article 21

1. The present Protocol, of which Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Protocol to all States.

2.2 Analysis of Working Group Discussions

4 Article 37 OP, which was included in a similar manner in all drafts, did not give rise to any discussion and was adopted at the fourth session of the Working Group in 1995.

3. Issues of Interpretation

5 Article 37 OP is in conformity with the common procedure for UN Conventions, stating that 'the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic'.[3] The six mentioned languages therefore equally control the interpretation of the Protocol's text. Should a difference in meaning be discovered by a text comparison, the true meaning of the OP is to be ascertained by applying the rules of interpretation laid down in the VCLT.[4]

As elaborated above,[5] the different language versions of Article 24 have raised some issues in terms of coherence and interpretation of the OPCAT, which were officially clarified by amendments to the original texts.

6 In conformity with Article 102(1) of the UN Charter and Article 80 VCLT, Article 37 OP, which is identical to Article 33 CAT, in fact designates the *UN Secretary-General as depository of the OP*.[6]

STEPHANIE KRISPER

or Degrading Treatment or Punishment on its ninth session [2001] UN Doc E/CN.4/2001/67, Annex I, Art 31; Annex II, Art 26; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex II E, Art 15; Report of the Working Group on a Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its tenth session [2002] UN Doc E/CN.4/2002/78, Annex I (Proposal by the Chairperson-Rapporteur) Art 37.

[3] These six languages are the official and designated languages of the United Nations.

[4] cf Vienna Convention on the Law of Treaties (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Arts 31, 32, and 33(4); for greater detail on questions of interpretation, see above Art 33, and Manfred Nowak, *UN Covenant in Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) (*CCPR Commentary*) 817ff.

[5] See above Art 24 OP, § 14.

[6] On the duties of the Secretary General deriving from this function, see above Art 33, 4; Nowak, *CCPR Commentary* (n 4) 817ff.

APPENDICES

APPENDIX A

Texts relating to the Convention Against Torture

APPENDIX A.1

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984

Entered into force on 26 June 1987, in accordance with Article 27 (1)

Preamble

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

Part I

Article 1

1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
   (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
   (b) When the alleged offender is a national of that State;
   (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph I of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

*Article **10***

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall

consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.
3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.
6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.
7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties. (amendment (see General Assembly resolution 47/111 of 16 December 1992); status of ratification)

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
   (a) Six members shall constitute a quorum;
   (b) Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article. (amendment (see General Assembly Resolution 47/111 of 16 December 1992); status of ratification)

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph I of this article

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs I to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party

of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph I and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:
   (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
   (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph I (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

Part III

Article 25

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph I of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph I of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States

Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under articles 25 and 26;
(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
(c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

APPENDIX A.2

Selected Draft Convention Texts

DECLARATION ON THE PROTECTION OF ALL PERSONS FROM BEING SUBJECTED TO TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (DECLARATION)

(9 DECEMBER 1975)[1]

The General Assembly,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Considering that these rights derive from inherent dignity of the human person,

Considering also the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Adopts the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the text of which is annexed to the present resolution, as a guideline for all States and other entities exercising effective power.

Annex

Article 1

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 2

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

[1] GA Res. 3452 (XXX).

Article 3

No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 4

Each state party shall, in accordance with the provisions of this declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.

Article 5

The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons.

Article 6

Each State Party shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

Article 7

Each State Party shall ensure that all acts of torture as defined in Article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.

Article 8

Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to, and to have his case impartially examined by, the competent authorities of the State concerned.

Article 9

Wherever there is reasonable ground to believe that an act of torture as defined in Article 1 has been committed, the competent authorities of the State concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint.

Article 10

If an investigation under Article 8 or Article 9 establishes than an act of torture as defined in Article 1 appears to have been committed, criminal proceedings shall be instituted against the alleged offender or offenders in accordance with national law. If an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well founded,

the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings.

Article 11

Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law.

Article 12

Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment may not be invoked as evidence against the person concerned or against any other person in any proceedings.

DRAFT CONVENTION FOR THE PREVENTION AND SUPPRESSION OF TORTURE, SUBMITTED BY THE INTERNATIONAL ASSOCIATION OF PENAL LAW (IAPL DRAFT)

(15 JANUARY 1978)[2]

The Parties to this Convention hereby agree as hereinafter provided:

Article I

(Torture as an international crime)

Torture is a crime under international law.

Article II

(Definition of torture)

For the purposes of this Convention, torture is any conduct by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of a public official or for which a public official is responsible under Article III, in order:

(a) to obtain from that person or another person information or a statement or confession; or
(b) to intimidate, discredit or humiliate that person or another person; or
(c) to inflict punishment on that person or another person, save where such conduct is in proper execution of a lawful sanction not constituting cruel, inhuman or degrading treatment or punishment.

Article III

(Responsibility)

A person is responsible for committing or instigating torture when that person:

(a) personally engages in or participates in such conduct; or
(b) assists, incites, solicits, commands or considers with others to commit torture; or

[2] E/CN.4/NGO/213.

(c) being a public official, fails to take appropriate measures to prevent or suppress torture when such person has knowledge or reasonable belief that torture has been or is being committed and has the authority or is in a position to take such measures.

Article IV

(National measures for the prevention an suppression of torture)

The Contracting Parties undertake to adopt legislative, judicial, administrative and other measures necessary to give effect to this convention to prevent and suppress torture, and in particular, to ensure that:

(a) any act of torture is punishable under its laws as a grave crime;
(b) their public officials do not practice or permit any form of torture;
(c) all complaints of torture or any circumstances which give reasonable grounds to believe that torture has been committed shall be investigated speedily and effectively and that complainants shall not be exposed to any sanction by reason of their complaints, unless they have been shown to have been made falsely and maliciously.
(d) persons believed to be responsible for acts of torture are prosecuted and when found guilty, punished and disciplined in accordance with their laws;
(e) any victim of torture is afforded adequate and proper redress and compensation;
(f) no person is expelled or extradited to a State where there are reasonable grounds to believe that that person may be in danger of being tortured; and
(g) the text of this convention is widely disseminated and its contents made knows to all persons arrested and detained.

Article V

(Superior orders)

The fact that a person was acting in obedience to superior orders shall not be a defence to a charge of torture.

Article VI

(Non-derogation)

Torture can in no circumstances be justified or excused by a state or threat of war or armed conflict, a state of siege, emergency or other exceptional circumstances, or by any necessity or any urgency of obtaining information, or by any other reason.

Article VII

(Evidentiary effect)

Any oral or written statement or confession obtained by means of torture or any other evidence derived therefrom shall have no legal effect whatever and shall not be invoked in any judicial or administrative proceedings, except against a person accused of obtaining it by torture.

Article VIII

(Period of limitation)

No prosecution or punishment of torture shall be barred by the application of a period of limitation of lesser duration than that applicable to the most serious offence in the laws of the Contracting Parties.

Article IX

(Jurisdiction)

1. Jurisdiction for the prosecution and punishment of the international crime of torture shall vest in the following order in:
   (a) the contracting Party in whose territory the act occurred;
   (b) any contracting Party of which the accused is a national;
   (c) any Contracting Party of which the victim is a national;
   (d) any Contracting Party within whose territory the accused may be found.
2. Nothing in this Article shall be construed as affecting the jurisdiction of any competent international criminal court.

Article X

(Extradition)

1. Where a Contracting Party receives a request for extradition from a Contracting Party having prior or concurrent jurisdiction, it shall grant extradition of persons accused of torture in accordance with its laws and treaties in force and subject to the provisions of this Convention.
2. In the absence of a treaty of extradition with a requesting Contracting Party, the Contracting Parties undertake to extradite on the basis of this Convention.
3. Contracting Parties which do not make extradition conditional on the existence of a treaty shall recognize torture as an extraditable offence.

Article XI

(Co-operation)

The Contracting Parties shall afford one another the greatest measure if judicial and other co-operation in connexion with criminal proceedings brought in implementation of this Convention.

Article XII

(Torture not a Political Offence)

For the purposes of this Convention, torture shall not be deemed a political offence.

Article XIII

(International measure of implementation)

1. The Contracting Parties undertake to submit to the Human Rights Committee established under the International Covenant on Civil and Political Rights periodic reports on the legislative, judicial, administrative and other measures they have adopted to implement this Convention.
2. The first report of a Contracting Party shall be submitted within one (1) year of the entry into force of the Convention and thereafter a report shall be submitted every two (2) years.
3. The Chairman of the Human Rights Committee shall, after consulting the other members of the Committee, appoint a Special Committee on the Prevention of Torture, consisting of five (5) members of the Human Rights Committee who are also nationals of the Contracting Parties to this Convention to consider reports submitted by Contracting Parties in accordance with this Article.
4. If, among the members of the Human Rights Committee, there are no nations of Contracting Parties to this Convention or if there are fewer than five such nationals, the

Secretary-General of the United Nations shall, after consulting all Contracting Parties to this Convention, designate a national of the Contracting Party of nationals of the Contracting Parties which are not members of the Human Rights Committee to take part in the work of the Special Committee established in accordance with paragraph 3 of this Article, until such time as sufficient nationals of the Contracting Parties to this Convention are elected to the Human Rights Committee.

5. The Special Committee on the Prevention of Torture shall meet not less than once a year for a period of not more than give days, either before the opening or after the closing of sessions of the Human Rights Committee and shall issue an annual report of its findings.

Article XIV

(Settlement of disputes)

Any dispute by Contracting Parties arising out of the interpretation, application or implementation of this Convention which has not been settled by negotiation, arbitration or referral to an independent and impartial body shall, at the request of any party to the dispute, be brought before the International Court of Justice.

Article XV

(Signature and accessions)

1. This Convention is open for signature by all States
2. Any State which does not sign this Convention before its entry into force may accede to it thereafter.

Article XVI

(Reservations)

No reservations may be made to Article VI of this Convention. The pertinent provisions of the Vienna Convention on the Law of Treaties shall apply with respect to any other reservations.

Article XVII

(Depositing instruments of ratification)

This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article XVIII

(Accession)

Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article XIX

(Entry into Force)

1. This Convention shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification of accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification of accession.

Article XX

(Revision)

1. A request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly by the United Nations shall decide upon the steps, if any, to be taken in respect to such a request.

Article XXI

(Notification)

The Secretary-General of the United Nations shall inform all States of the following particulars:
(1) Signatures, ratifications, accessions and reservations under Articles XV-XVIII of this Convention;
(2) The date of entry into force of the present Convention;
(3) Notification under Article XX of the present Convention.

Article XXII

(Official languages)

This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

Article XXIII

(Transmittal)

The Secretary-General of the United Nations shall transmit certified copies of this Convention to all Contracting Parties.

DRAFT INTERNATIONAL CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ORIGINAL SWEDISH DRAFT) (18 JANUARY 1978)[3]

(Preamble to be elaborated)

Article 1

1. For the purpose of the present Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

[3] E/CN.4/1285.

Article 2

1. Each State Party undertakes to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place within its jurisdiction. Under no circumstances shall any State Party permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture or other cruel inhuman or degrading treatment or punishment.

Article 3

Each state party shall, in accordance with the provisions of the present convention, take legislative, administrative, judicial and other measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.

Article 4

No State Party may expel or extradite a person to a State where there are reasonable grounds to believe that he may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Article 5

1. Each State party shall ensure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment are fully included in the curricula of the training of law enforcement personnel and of other public officials as well as medical personnel who may be responsible for persons deprived of their liberty.
2. Each State party shall include this prohibition in the general rules or instructions issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of persons deprived of their liberty.

Article 6

Each State Party shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

Article 7

1. Each State Party shall ensure that all acts of torture as defined in Article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.
2. Each State Party undertakes to make the offences referred to in paragraph 1 of this Article punishable by severe penalties.

Article 8

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 7 in the following cases:
   (a) when the offences are committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State;
(c) when the victim is a national of that State.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in its territory and it does not extradite him pursuant to Article 14 to any of the States mentioned in paragraph 1 of this Article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 9

Each State Party shall guarantee to any individual who alleges to have been subjected within its jurisdiction to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of its public officials, the right to complain to and to have his case impartially examined by its competent authorities without threat of further torture or other cruel, inhuman or degrading treatment or punishment.

Article 10

Each State Party shall ensure that, even if there has been no formal complaint, its competent authorities proceed to an impartial, speedy and effective investigation, wherever there is reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed within its jurisdiction.

Article 11

1. Each State Party shall, except in the cases referred to in Article 14, ensure that criminal proceedings are instituted in accordance with its national law against an alleged offender who is present in its territory, if its competent authorities establish that an act of torture as defined in Article 1 appears to have been committed and if that State Party has jurisdiction over the offence in accordance with Article 8.
2. Each State Party shall ensure that an alleged offender is subject to criminal, disciplinary or other appropriate proceedings, when an allegation of other forms of cruel, inhuman or degrading treatment or punishment within its jurisdiction is considered to be well founded.

Article 12

Each State Party shall guarantee an enforceable right to compensation to the victim of an act of torture or other cruel, inhuman or degrading treatment or punishment committed by or at the instigation of its public officials. In the event of the death of the victim, his relatives or other successors shall be entitled to enforce this right to compensation.

Article 13

Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence against the person concerned or against any other person in any proceedings.

Article 14

Instead of instituting criminal proceedings in accordance with paragraph 1 of Article 11, a State Party may, if requested, extradite the alleged offender to another State Party, which has jurisdiction over the offence in accordance with Article 8.

Article 15

1. States Parties shall afford one another the greatest measure of assistance in connection with proceedings referred to in Article 11, including the supply of all evidence at their disposal necessary for the proceedings.
2. The provisions of paragraph 1 of this Article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

Article 16

States Parties undertake to submit to the Secretary-General of the United Nations, when so requested by the Human Rights Committee established in accordance with Article 28 of the International Covenant on Civil and Political Rights (hereafter referred to in the present Convention as the Human Rights Committee), reports or other information on measure taken to suppress and punish torture and other cruel, inhuman or degrading treatment or punishment. Such reports or information shall be considered by the Human Rights Committee in accordance with the procedures set out in the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

Article 17

If the Human Rights Committee receives information that torture is being systematically practice in a certain State Party, the Committee may designate one or more of its members to carry out an inquiry and to report to the Committee urgently. The inquiry may include a visit to the State concerned, provided that the Government of that State gives its consent.

Article 18

1. A State Party may at any time declare under this Article that it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another States Party is not fulfilling its obligations under the present Convention. Communications under this Article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Human Rights Committee. No communication shall be received by the Human Rights Committee if it concerns a State Party which has not made such a declaration.
2. Communications received under this Article shall be dealt with in accordance with the procedure provided for in Article 41 of the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

Article 19

If a matter referred to the Human Rights Committee in accordance with Article 18 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission. The procedures governing this Commission shall be the same as those provided for in Article 42 of the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

Article 20

1. A State Party may at any time declare under this Article that it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to have been subjected to torture or other cruel, inhuman or degrading treatment or punishment in contravention of the obligations of that State Party under the present

Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Communications received under this Article shall be dealt with in the accordance with the procedure provided for in the Optional Protocol to the International Covenant on Civil and Political Rights and in the Rules of Procedure of the Human Rights Committee.

Article 21

The Human Rights Committee shall include in its annual report to the General Assembly a summary of its activities under Article 16, 17, 18, 19 and 20 of the present Convention

(Final clauses to be elaborated)
REVISED TEXT OF THE SUBSTANTIVE PARTS OF THE DRAFT INTERNATIONAL CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (REVISED SWEDISH DRAFT)

(19 FEBRUARY 1979)[4]

Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. [Torture is an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.]
3. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application relating to the subject matter of this Convention.

Article 2

1. Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer of a public authority may not be invoked as a justification of torture, [however, this may be considered a ground for mitigation of punishment, if justice so requires.]

[4] E/CN.4/WG.1/WP.1.

Article 3

No State Party shall expel, return ('refouler') or extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(Remark to be included in the Commission's report:

"Some delegations indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by Article 3 of the Convention, in so far as that Article might not be compatible with obligations towards States not Party to the Convention under extradition treaties concluded before the date of the signature of the Convention.")

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:
   (a) When the offences are committed in any territory under its jurisdiction;
   (b) When the alleged offender is a national of that State;
   (c) [When the victim is a national of that State.]
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied that the circumstances so warrant, any State Party in whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary enquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.
4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States referred to in Article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction.
5. Any person regarding whom proceedings are being carried out in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 7

The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in any territory under its jurisdiction, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

Article 8

1. The offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it [may] [shall] consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.

Article 10

1. Each State party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant is protected against ill-treatment in consequence of his complaint.

Article 13

Each State Party shall ensure that, even if there has been no formal complaint, its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 14

1. Each State Party shall ensure that the victim of an act of torture has an enforceable right to compensation. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this Article shall affect any other right to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of obtaining that statement by torture.

Article 16

This Convention shall be without prejudice to any provisions in other international instruments or in national law which prohibit cruel, inhuman and degrading treatment and punishment.

PROPOSALS FOR THE PREAMBLE AND THE FINAL PROVISIONS OF THE DRAFT CONVENTION (SWEDISH DRAFT)

(2 DECEMBER 1980)[5]

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)),

[5] E/CN.4/1427.

Desiring to convert to the principles of the Declaration into binding treaty obligations and to adopt a system for their effective implementation,

Have agreed as follows:

Final Provisions

Article A

1. The present Convention is open for signature by all States at the United Nations Headquarters in New York.
2. Any State which does not sign the Convention before its entry into force may accede to it.

Article B

1. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article C

1. The present Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification of accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification of accession.

Article D

1. A request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly by the United Nations shall decide upon the steps, if any, to be taken in respect to such a request.

Article E

The Secretary-General of the United Nations shall inform all States of the following particulars:

(a) Signatures, ratifications, accessions and reservations under Articles A and B;
(b) The date of entry into force of the present Convention under Article C;
(c) Notification under Article D.

Article F

1. The present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

APPENDIX A.3

Status of Ratification of the Convention and Acceptance of Optional Procedures as of 31 December 2017

State	Signature	Ratification, Accession (a), Succession (d)	Entry into Force (b)			✓(*) ✗(*)		Settlement of disputes (Art 30)		Amendments Arts 17(7) and 18(5)
				Individual Complaints	Inter-state Complaints	Inquiry procedure (Arts 20 and 28)				
				Art 22	Art 21	Art 20	Reservations Art 28		Reservations Art 30	
Afghanistan	4.2.1985	1.4.1987	26.6.1987	✗	✗	✗	1.4.1987	✗	1.4.1987	
Albania		11.5.1994(a)	10.6.1994	✗	✗	✓		✓		
Algeria	26.11.1985	12.9.1989	12.10.1989	✓	✓	✓		✓		
Andorra	5.8.2002	22.9.2006	22.10.2006	✓(22.11.2006)	✓(22.11.2006)	✓		✓		
Angola (s)	24.9.2013									
Antigua and Barbuda		19.7.1993(a)	18.8.1993	✗	✗	✓		✓		
Argentina	4.2.1985	24.9.1986	26.6.1987	✓	✓	✓		✓		
Armenia		13.9.1993(a)	13.10.1993	✗	✗	✓		✓		
Australia	10.12.1985	8.8.1989	7.9.1989	✓ (28.1.1993)	✓ (28.1.1993)	✓		✓		15.10.1993
Austria	14.3.1985	29.7.1987	28.8.1987	✓	✓	✓		✓		
Azerbaijan		16.8.1996(a)	15.9.1996	✓ (4.2.2002)	✗	✓		✓		
Bahamas (s)	16.12.2008									
Bahrain		6.3.1998(a)	5.4.1998	✗	✗	✓(4.8.1998)	[6.3.1998] withdrawal on 4.8.1999	✗	6.3.1998	
Bangladesh		5.10.1998(a)	4.11.1998	✗	✗	✓		✓		

Belarus	19.12.1985	13.3.1987	26.6.1987	✗	✗	✓(03/10/2001)	[13.3.1987] withdrawal on 3.10.2001	✓ (19/04/ 1989)	[13.3.1987] withdrawal on 19.4.1989	
Belgium	4.2.1985	25.6.1999	25.7.1999	✓	✓	✓		✓		11.11.2016
Belize		17.3.1986(a)	26.6.1987	✗	✗	✓		✓		
Benin		12.3.1992(a)	11.4.1992	✗	✗	✓		✓		
Bolivia	4.2.1985	12.4.1999	12.5.1999	✓(14.2.2006)	✓(14.2.2006)	✓		✓		
Bosnia and Herzegovina (I)		1.9.1993(d)	6.3.1992	✓(4.6.2003)	✗	✓		✓		
Botswana	8.9.2000	8.9.2000	8.10.2000	✗	✗	✓		✓		
Brazil	23.9.1985	28.9.1989	28.10.1989	✓(26.6.2006)	✗	✓		✓		
Brunei Darussalam (s)	22.9.2015									
Bulgaria	10.6.1986	16.12.1986	26.6.1987	✓(12.5.1993)	✓(12.5.1993)	✓(25.6.1999)	[16.12.1986] withdrawal on 25.6.1999	✓(24.6.1992)	[16.12.1986] withdrawal on 24.6.1992	2.3.1995
Burkina Faso		4.1.1999(a)	3.2.1999	✗	✗	✓		✓		
Burundi		18.2.1993(a)	20.3.1993	✓(10.6.2003)	✗	✓		✓		
Cambodia		15.10.1992(a)	14.11.1992	✗	✗	✓		✓		
Cameroon		19.12.1986(a)	26.6.1987	✓(12.10.2000)	✓(12.10.2000)	✓		✓		
Canada	23.8.1985	24.6.1987	24.7.1987	✓(13.11.1989)	✓(13.11.1989)	✓		✓		8.2.1995
Cape Verde		4.6.1992(a)	4.7.1992	✗	✗	✓		✓		
Central African Republic		11.10.2016(a)	10.11.2016	✗	✗	✓		✓		
Chad		9.6.1995(a)	9.7.1995	✗	✗	✓		✓		

Appendix A.3. (Contd.)
Status of Ratification

State	Signature	Ratification, Accession (a), Succession (d)	Entry into Force (b)			✓(*)	✗(*)	Settlement of disputes (Art 30)		Amendments Arts 17(7) and 18(5)
				Individual Complaints	Inter-state Complaints	Inquiry procedure (Arts 20 and 28)				
				Art 22	Art 21	Art 20	Reservations Art 28		Reservations Art 30	
Chile	23.9.1987	30.9.1988	30.10.1988	✓(15/03/2004)	✓(15/03/2004)	✓(07/09/1990)	[30.9.1988] withdrawal on 7.9.1990	✓(03/09/1999)	[30.9.1988] withdrawal on 3.9.1999	
China	12.12.1986	4.10.1988	3.11.1988	✗	✗	✗	4.10.1988	✗	4.10.1988	10.7.2002
Colombia	10.4.1985	8.12.1987	7.1.1988	✗	✗	✓		✓		1.9.1999
Comoros	22.9.2000	25.5.2017	24.6.2017	✗	✗	✓		✓		
Congo		30.7.2003(a)	29.8.2003	✗	✗	✓		✓		
Costa Rica	4.2.1985	11.11.1993	11.12.1993	✓(27.2.2002)	✓(27.2.2002)	✓		✓		
Côte d'Ivoire		18.12.1995(a)	17.1.1996	✗	✗	✓		✓		
Croatia (I)		12.10.1992(d)	8.10.1991	✓(12.10.1992)	✓(12.10.1992)	✓		✓		
Cuba	27.1.1986	17.5.1995	16.6.1995	✗	✗	✓(*)		✗(*)		
Cyprus	9.10.1985	18.7.1991	17.8.1991	✓(8.4.1993)	✓(8.4.1993)	✓		✓		22.2.1994
Czech Republic (II)		22.2.1993(d)	1.1.1993	✓(3.9.1996)	✓(3.9.1996)	✓(3.9.1996)	[*7.7.1988 date of the reservation made by Czechoslovakia; then confirmed with the notification of succession by Czech Republic on 22.2.1993*] withdrawal by Czech Republic on 3.9.1996	✓	[*7.7.1988 date of the reservation made by Czechoslovakia*] withdrawal by Czechoslovakia on 26.4.1991	

Democratic Republic of the Congo		18.3.1996(a)	17.4.1996	✗	✗	✓		✓		
Denmark	4.2.1985	27.5.1987	26.6.1987	✓	✓	✓		✓		3.9.1993
Djibouti		5.11.2002(a)	5.12.2002	✗	✗	✓		✓		
Dominican Republic	4.2.1985	24.1.2012	23.2.2012	✗	✗	✓		✓		
Ecuador	4.2.1985	30.3.1988	29.4.1988	✓(6.9.1988)	✓(6.9.1988)	✓		✓		6.9.1995
Egypt		25.6.1986(a)	26.6.1987	✗	✗	✓		✓		
El Salvador		17.6.1996(a)	17.7.1996	✗	✗	✓		✓		
Equatorial Guinea		8.10.2002(a)	7.11.2002	✗	✗	✗	8.10.2002	✗	8.10.2002	
Eritrea		25.9.2014(a)	25.10.2014	✗	✗	✗	25.9.2014	✗	25.9.2014	
Estonia		21.10.1991(a)	20.11.1991	✗	✗	✓		✓		
Ethiopia		14.3.1994(a)	13.4.1994			✓		✓		
Fiji	1.3.2016	14.3.2016	13.4.2016	✗	✗	✗	14.3.2016	✗	14.3.2016	
Finland	4.2.1985	30.8.1989	29.9.1989	✓	✓	✓		✓		5.2.1993
France	4.2.1985	18.2.1986	26.6.1987	✓	✓	✓		✗	18.2.1986	24.5.1994
Gabon	21.1.1986	8.9.2000	8.10.2000	✗	✗	✓		✓		
Gambia (s)	23.10.1985									
Georgia		26.10.1994(a)	25.11.1994	✓(30.6.2005)	✓(30.6.2005)	✓		✓		
Germany*	13.10.1986	1.10.1990	31.10.1990	✓(19.10.2001)	✓(19.10.2001)	✓		✓		8.10.1996
Ghana	7.9.2000	7.9.2000	7.10.2000	✓	✓	✓		✓(*)		
Greece	4.2.1985	6.10.1988	5.11.1988	✓	✓	✓		✓		

Appendix A.3. (Contd.)
Status of Ratification

State	Signature	Ratification, Accession (a), Succession (d)	Entry into Force (b)			✓(*)	✗(*)	Settlement of disputes (Art 30)		Amendments Arts 17(7) and 18(5)
				Individual Complaints	Inter-state Complaints	Inquiry procedure (Arts 20 and 28)				
				Art 22	Art 21	Art 20	Reservations Art 28		Reservations Art 30	
Guatemala		5.1.1990(a)	4.2.1990	✓(25/09/2003)	✗	✓(30/05/1990)	[5.1.1990] withdrawal on 30.5.1990	✓(30/05/1990)	[5.1.1990] withdrawal on 30.5.1990	
Guinea	30.5.1986	10.10.1989	9.11.1989	✗	✗	✓		✓		
Guinea-Bissau	12.9.2000	24.9.2013	24.10.2013	✓	✓	✓		✓		
Guyana	25.1.1988	19.5.1988	18.6.1988	✗	✗	✓		✓		
Haiti (s)	16.8.2013									
Holy See		26.6.2002(a)	26.7.2002	✗	✗	✓		✓		
Honduras		5.12.1996(a)	4.1.1997	✗	✗	✓		✓		
Hungary	28.11.1986	15.4.1987	26.6.1987	✓(13.9.1989)	✓(13.9.1989)	✓(13.9.1989)	[15.4.1987] withdrawal on 13.9.1989	✓(13.9.1989)	[15.4.1987] withdrawal on 13.9.1989	
Iceland	4.2.1985	23.10.1996	22.11.1996	✓	✓	✓		✓		23.10.1996
India (s)	14.10.1997									
Indonesia	23.10.1985	28.10.1998	27.11.1998	✗	✗	✓(*)		✗(*)	28.10.1998	
Iraq		7.7.2011(a)	6.8.2011	✗	✗	✓		✓		
Ireland	28.9.1992	11.4.2002	11.5.2002	✓	✓	✓		✓		
Israel	22.10.1986	3.10.1991	2.11.1991	✗	✗	✗	3.10.1991	✗	3.10.1991	
Italy	4.2.1985	12.1.1989	11.2.1989	✓(10.10.1989)	✓(10.10.1989)	✓		✓		
Japan		29.6.1999(a)	29.7.1999	✗	✓	✓		✓		
Jordan		13.11.1991(a)	13.12.1991	✗	✗	✓		✓		
Kazakhstan		26.8.1998(a)	25.9.1998	✓(21.2.2008)	✓(21.2.2008)	✓		✓		

Kenya		21.2.1997(a)	23.3.1997	✗	✗	✓		✓		
Kuwait		8.3.1996(a)	7.4.1996	✗	✗	✗	8.3.1996	✗	8.3.1996	
Kyrgyzstan		5.9.1997(a)	5.10.1997	✗	✗	✓		✓		
Lao People's Democratic Republic	21.9.2010	26.9.2012	26.10.2012	✗	✗	✗	26.9.2012	✗	26.9.2012	
Latvia		14.4.1992(a)	14.5.1992	✗	✗	✓		✓		
Lebanon		5.10.2000(a)	4.11.2000	✗	✗	✓		✓		
Lesotho		12.11.2001(a)	12.12.2001	✗	✗	✓		✓		
Liberia		22.9.2004(a)	22.10.2004	✗	✗	✓		✓		16.9.2005
Libyan Arab Jamahiriya		16.5.1989(a)	15.6.1989	✗	✗	✓		✓		
Liechtenstein	27.6.1985	2.11.1990	2.12.1990	✓	✓	✓		✓		24.8.1994
Lithuania		1.2.1996(a)	2.3.1996	✗	✗	✓		✓		
Luxembourg	22.2.1985	29.9.1987	29.10.1987	✓	✓	✓		✓		31.1.2005
Madagascar	1.10.2001	13.12.2005	12.1.2006	✗	✗	✓		✓		
Malawi		11.6.1996(a)	11.7.1996	✗	✗	✓		✓		
Maldives		20.4.2004(a)	20.5.2004	✗	✗	✓		✓		
Mali		26.2.1999(a)	28.3.1999	✗	✗	✓		✓		
Malta		13.9.1990(a)	13.10.1990	✓	✓	✓		✓		
Marshall Islands				✗	✗	✓		✓		
Mauritania		17.11.2004(a)	17.12.2004	✗	✗	✗	17.11.2004	✗	17.11.2004	
Mauritius		9.12.1992(a)	8.1.1993	✗	✗	✓		✓		
Mexico	18.3.1985	23.1.1986	26.6.1987	✓(15.3.2002)	✗	✓		✓		15.3.2002
Monaco		6.12.1991(a)	5.1.1992	✓	✓	✓		✗	6.12.1991	

Appendix A.3. (Contd.)
Status of Ratification

State	Signature	Ratification, Accession (a), Succession (d)	Entry into Force (b)	✓(*) ✗(*)				Settlement of disputes (Art 30)		Amendments Arts 17(7) and 18(5)
				Individual Complaints	Inter-state Complaints	Inquiry procedure (Arts 20 and 28)				
				Art 22	Art 21	Art 20	Reservations Art 28		Reservations Art 30	
Mongolia		24.1.2002(a)	23.2.2002	✗	✗	✓		✓		
Montenegro (I)		23.10.2006(d)	3.6.2006	✓(23.10.2006)	✓(23.10.2006)	✓(23.10.2006)		✓		
Morocco	8.1.1986	21.6.1993	21.7.1993	✓(19.10.2006)	✗	✓(19.10.2006)	[21.6.1993] withdrawal on 19.10.2006	✗	21.6.1993	11.9.2012
Mozambique		14.9.1999(a)	14.10.1999	✗	✗	✓		✓		
Namibia		28.11.1994(a)	28.12.1994	✗	✗	✓		✓		
Nauru	12.11.2001	26.9.2012	26.10.2012	✗	✗	✓		✓		26.9.2012
Nepal		14.5.1991(a)	13.6.1991	✗	✗	✓		✓		
Netherlands	4.2.1985	21.12.1988	20.1.1989	✓	✓	✓		✓		24.1.1995
New Zealand	14.1.1986	10.12.1989	9.1.1990	✓	✓	✓		✓		8.10.1993
Nicaragua	15.4.1985	5.7.2005	4.8.2005	✗	✗	✓		✓		
Niger		5.10.1998(a)	4.11.1998	✗	✗	✓		✓		
Nigeria	28.7.1988	28.6.2001	28.7.2001	✗	✗	✓		✓		
Norway	4.2.1985	9.7.1986	26.6.1987	✓	✓	✓		✓		6.10.1993
Pakistan	17.4.2008	23.6.2010	23.7.2010	✗	✗	✗	23.6.2010	✗	23.6.2010	
Palau (s)	20.9.2011									
Panama	22.2.1985	24.8.1987	23.9.1987	✗	✗	✓		✗	24.8.1987	
Paraguay	23.10.1989	12.3.1990	11.4.1990	✓(29.5.2002)	✓(29.5.2002)	✓		✓		
Peru	29.5.1985	7.7.1988	6.8.1988	✓	✓	✓		✓		

Philippines		18.6.1986(a)	26.6.1987	✗	✗	✓		✓		27.11.1996
Poland	13.1.1986	26.7.1989	25.8.1989	✓(12.5.1993)	✓(12.5.1993)	✓(*)		✗ (*)		23.3.2009
Portugal	4.2.1985	9.2.1989	11.3.1989	✓	✓	✓		✓		17.4.1998
Qatar		11.1.2000(a)	10.2.2000	✗(*)	✗(*)	✓		✓		
Republic of Korea		9.1.1995(a)	8.2.1995	✓(9.11.2007)	✓(9.11.2007)	✓		✓		
Republic of Moldova		28.11.1995(a)	28.12.1995	✓(2.9.2011)	✓(2.9.2011)	✓		✓		
Romania		18.12.1990(a)	17.1.1991	✗	✗	✓		✓		
Russian Federation	10.12.1985	3.3.1987	26.6.1987	✓(1.10.1991)	✓(1.10.1991)	✓(1.10.1991)	[3.3.1987- by the USSR)] withdrawal on 1.10.1991 by the withdrawn on 8 March 1989 by the USSR	✓(8.3.1989)	[3.3.1987 by the USSR] withdrawal on 8.3.1989 by the withdrawn on 8 March 1989 by the USSR	
Rwanda		15.12.2008(a)	14.1.2009	✗	✗	✓		✓		
Saint Vincent and the Grenadines		1.8.2001(a)	31.8.2001	✗	✗	✓		✓		
San Marino	18.9.2002	27.11.2006	27.12.2006	✓(4.8.2015)	✓(4.8.2015)	✓		✓		
Sao Tome and Principe	6.9.2000	10.1.2017	9.2.2017	✗	✗	✓		✓		
Saudi Arabia		23.9.1997(a)	23.10.1997	✗	✗	✗	23.9.1997	✗	23.9.1997	
Senegal	4.2.1985	21.8.1986	26.6.1987	✓(16.10.1996)	✓(16.10.1996)	✓		✓		
Serbia (I)		12.3.2001(d)	27.4.1992	✓(12.3.2001)	✓(12.3.2001)	✓		✓		
Seychelles		5.5.1992(a)	4.6.1992	✓(6.8.2001)	✗	✓		✓		23.7.1993

Appendix A.3. (Contd.)
Status of Ratification

State	Signature	Ratification, Accession (a), Succession (d)	Entry into Force (b)			✓(*) ✗(*)		Settlement of disputes (Art 30)		Amendments Arts 17(7) and 18(5)
				Individual Complaints	Inter-state Complaints	Inquiry procedure (Arts 20 and 28)				
				Art 22	Art 21	Art 20	Reservations Art 28		Reservations Art 30	
Sierra Leone	18.3.1985	25.4.2001	25.5.2001	✗	✗	✓		✓		
Slovakia (II)		28.5.1993(d)	1.1.1993	✓(17.3.1995)	✓(17.3.1995)	✓(17.3.1995)	[*7.7.1988 date of the reservation made by Czechoslovakia; then confirmed with the notification of succession by Slovakia on 28.5.1993*] withdrawal on 17.3.1995	✓	[*7.7.1988 date of the reservation made by Czechoslovakia*] withdrawal by Czechoslovakia on 26.4.1991	
Somalia		24.1.1990(a)	23.2.1990	✗	✗	✓		✓		
South Africa	29.1.1993	10.12.1998	9.1.1999	✓	✓	✓(*)		✓		
Spain	4.2.1985	21.10.1987	20.11.1987	✓	✓	✓		✓		5.5.1999
Sri Lanka		3.1.1994(a)	2.2.1994	✓(16.8.2016)	✗	✓		✓		
State of Palestine		2.4.2014(a)	2.5.2014	✗	✗	✓		✓		
Sudan (s)	4.6.1986									
South Sudan		30.4.2015(a)	30.5.2015	✗	✗	✓		✓		
Swaziland		26.3.2004(a)	25.4.2004	✗	✗	✓		✓		
Sweden	4.2.1985	8.1.1986	26.6.1987	✓	✓	✓		✓		14.5.1993
Switzerland	4.2.1985	2.12.1986	26.6.1987	✓	✓	✓		✓		10.12.1993
Syrian Arab Republic		19.8.2004(a)	18.9.2004	✗	✗	✗	19.8.2004	✓		

Tajikistan		11.1.1995(a)	10.2.1995	✗	✗	✓		✓		
Thailand		2.10.2007(a)	1.11.2007	✗	✗	✓		✗	2.10.2007	
The Former Yugoslav Republic of Macedonia (I)		12.12.1994(d)	17.11.1991	✗	✗	✓		✓		
Timor-Leste		16.4.2003(a)	16.5.2003	✗	✗	✓		✓		
Togo	25.3.1987	18.11.1987	18.12.1987	✓	✓	✓		✓		
Tunisia	26.8.1987	23.9.1988	23.10.1988	✓	✓	✓		✓		
Turkey	25.1.1988	2.8.1988	1.9.1988	✓	✓	✓		✗	2.8.1988	
Turkmenistan		25.6.1999(a)	25.7.1999	✗	✗	✓		✓		
Uganda		3.11.1986(a)	26.6.1987	✗	✓(19.12.2001)	✓		✓		
Ukraine	27.2.1986	24.2.1987	26.6.1987	✓(12.9.2003)	✓(12.9.2003)	✓(12.9.2003)	[24.2.1987] withdrawal on 12.9.2003	✓(20.4.1989)	[24.2.1987] withdrawal on 20.4.1989	17.6.1994
United Arab Emirates		19.7.2012(a)	18.8.2012	✗	✗	✗	19.7.2012	✗	19.7.2012	
United Kingdom of Great Britain and Northern Ireland	15.3.1985	8.12.1988	7.1.1989	✗	✓	✓		✓		7.2.1994
United States of America	18.4.1988	21.10.1994	20.11.1994	✗	✓	✓		✗	21.10.1994	
Uruguay	4.2.1985	24.10.1986	26.6.1987	✓(27.7.1988)	✓(27.7.1988)	✓		✓		
Uzbekistan		28.9.1995(a)	28.10.1995	✗	✗	✓		✓		
Vanuatu		12.7.2011(a)	11.8.2011	✗	✗	✓		✓		
Venezuela (Bolivarian Republic of)	15.2.1985	29.7.1991	28.8.1991	✓(26.4.1994)	✓(26.4.1994)	✓		✓		

Appendix A.3. (Contd.)
Status of Ratification

State	Signature	Ratification, Accession (a), Succession (d)	Entry into Force (b)	✓(*)		✗(*)		Settlement of disputes (Art 30)		Amendments Arts 17(7) and 18(5)
				Individual Complaints	Inter-state Complaints	Inquiry procedure (Arts 20 and 28)				
				Art 22	Art 21	Art 20	Reservations Art 28		Reservations Art 30	
Viet Nam	7.11.2013	5.2.2015	7.3.2015	✗	✗	✗	5.2.2015	✗	5.2.2015	
Yemen		5.11.1991(a)	5.12.1991	✗	✗	✓		✓		
Zambia		7.10.1998(a)	6.11.1998	✗	✗	✓(19.2.1999)	[7.10.1998] withdrawal on 19.2.1999	✓		
Total No. of States parties	**83**	**162**		**69**	**63**	**148**	**14**	**138**	**24**	**31**

Sources
Where not otherwise indicated, information were retrieved from the United Nations Treaty Collection's website <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en>
Legend
(s) Signatory State
(a) Accession
(d) Succession
(I) Successor States of the Socialist Federalist Republic of Yugoslavia (SFRY). The SFRY signed the Convention on 18 April 1989 and ratified it on 10 September 1991. It entered into force on 10 October 1991.
(II) Successor State of Czechoslovakia. Czechoslovakia signed the Convention on 8 September 1986 and ratified it on 7 July 1988. It entered into force on 6 August 1988.
(*) see notes below
Notes
* Unless otherwise indicated, the date of acceptance of the procedures under Arts 21, 22, 20 and 30 was done upon ratification or accession and entered into force with the entry into force of the Convention.
* Cuba: Upon ratification, Cuba made the following declarations on Articles 28 and 30: 'The Government of the Republic of Cuba declares, in accordance with article 28 of the Convention, that the provisions of para graphs 1, 2 and 3 of article 20 of the Convention will have to be invoked in strict compliance with the principle of the sovereignty of States and implemented with the prior con sent of the States Parties. In connection with the provisions of article 30 of the Convention, the Government of the Republic of Cuba is of the view that any dispute between Parties should be settled by negotiation through the diplomatic channel.'
* Germany: The data reported above refer to the Federal Republic of Germany. The date of accession, was on 3.10.1990, the day of accession of the German Democratic Republic to the Federal Republic of Germany. With regard to the German Democratic Republic: the German Democratic Republic signed the Convention on 7.4.1986 and ratified it on 9.9.1987, so that Convention entered

into force on 9.10.1987. Reservations regarding Arts 20, 30, 17(7) and 18(5) were made upon ratification. They were withdrawn on 13.9.1990. The German Democratic Republic recognized the competence of the Committee with regard to Art 22 and Art 21 from 13.9.1990 on.

* Ghana: Upon ratification, Ghana the following declaration on Article 30 'in accordance with Article 30 (2) of the said Convention that the submission under Article 30 (1) to arbitration or the International Court of Justice of disputes between State Parties relating to the interpretation or application of the said Convention shall be by the consent of ALL the Parties concerned and not by one or more of the Parties concerned'.

* Indonesia: Upon ratification, Indonesia made the following declaration on Articles 20 and 30: 'The Government of the Republic of Indonesia declares that the provisions of paragraphs 1, 2, and 3 of Article 20 of the Convention will have to be implemented in strict compliance with the principles of the sovereignty and territorial integrity of States'; 'The Government of the Republic of Indonesia does not consider itself bound by the provision of article 30, paragraph 1, and takes the position that disputes relating to the interpretation and application of the Convention which cannot be settled through the channel provided for in paragraph 1 of the said article, may be referred to the International Court of Justice only with the consent of all parties to the disputes.'

* Poland: The Committee no longer includes Poland in the list of opting out States as of 209. While not counting Poland in the opting out States from 1998 until 2005 and then again as of 2009, the Committee had inserted Poland in its list of Committee's lists from 2005 until 2009 (A/60/44, Annex II; A/61/44, Annex II; A/62/44, Annex II; A/63/44, Annex II; A/64/44, Annex II). The 'UN Treaty Collection—Status of Treaties' webpage reports that Poland has made a reservation to Art 20 upon signature, but neither the text of the reservation nor its withdrawal are reported under the webpage 'UN Treaty Collection website—Depositary Notifications'.

* Qatar: Upon accession, Qatar made the following reservation on Articles 21 and 22: '(b) The competence of the Committee as indicated in articles 21 and 22 of the Convention' On 14 March 2012, it withdrew its reservation to the mandate of the Committee against Torture as stipulated in Articles 21 and 22 of the Convention.

*South Africa: Upon ratification, South Africa made the following declaration on Article 30 that: 'it recognises, for the purposes of article 30 of the Convention, the competence of the International Court of Justice to settle a dispute between two or more State Parties regarding the interpretation or application of the Convention, respectively.'

APPENDIX A.4

Reservations, Declarations, Notifications, and Objections Relating to the Convention

AFGHANISTAN

Reservations upon ratification (1 April 1987)

Article 20
"While ratifying the above-mentioned Convention, the Democratic Republic of Afghanistan, invoking paragraph 1 of the article 28, of the Convention, does not recognize the authority of the committee as foreseen in the article 20 of the Convention."

Article 30
"Also according to paragraph 2 of the article 30, the Democratic Republic of Afghanistan, will not be bound to honour the provisions of paragraph 1 of the same article since according to that paragraph 1 the compulsory submission of disputes in connection with interpretation or the implementation of the provisions of this Convention by one of the parties concerned to the International Court of Justice is deemed possible. Concerning to this matter, it declares that the settlement of disputes between the States Parties, such disputes may be referred to arbitration or to the International Court of Justice with the consent of all the Parties concerned and not by one of the Parties."

ALGERIA

Declarations upon ratification (12 September 1989)

Article 21
"The Algerian Government declares, pursuant to article 21 of the Convention, that it recognizes the competence of the Committee Against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"The Algerian Government declares, pursuant to article 22 of the Convention, that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

ANDORRA

Declarations (22 November 2006)

Article 21
"The Principality of Andorra recognizes, in accordance with article 21 of the Convention, the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention."

Article 22
"The Principality of Andorra recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction, who claim to be victims of a violation of the provisions of the Convention."

ARGENTINA

Declarations upon ratification (24 September 1986)

Article 21
"The Argentine Republic recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"It also recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

AUSTRALIA

Declarations (28 January 1993)

Article 21
"The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the aforesaid Convention."

Article 22
"The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications from or on behalf of individuals subject to Australia's jurisdiction who claim to be victims of a violation by a State Party of the provisions of the aforesaid Convention."

AUSTRIA

Declarations upon ratification (29 July 1987)

Article 5

"1. Austria will establish its jurisdiction in accordance with article 5 of the Convention irrespective of the laws applying to the place where the offence occurred, but in respect of paragraph 1 (c) only if prosecution by a State having jurisdiction under paragraph 1 (a) or paragraph 1 (b) is not to be expected.

Article 15

"2. Austria regards article 15 as the legal basis for the inadmissibility provided for therein of the use of statements which are established to have been made as a result of torture."

Article 21
"Austria recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.

Article 22
"Austria recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to Austrian jurisdiction who claim to be victims of a violation of the provisions of the Convention."

AZERBAIJAN

Declaration (4 February 2002)

Article 22
"…..the Government of the Republic of Azerbaijan declares that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

BAHRAIN

Reservations upon accession (6 March 1998)

[Article 20
"The State of Bahrain does not recognize the competence of the Committee for which provision is made in article 20 of the Convention"] withdrawn on 4 August 1999

Article 30
"The State of Bahrain does not consider itself bound by paragraph 1 of article 30 of the Convention."

BANGLADESH

Declaration upon accession (5 October 1998)

Article 14
"The Government of the People's Republic of Bangladesh will apply article 14 para 1 in consonance with the existing laws and legislation in the country."

Objections to certain declarations/reservations

France (30 September 1999)

"The Government of France notes that the declaration made by Bangladesh in fact constitutes a reservation since it is aimed at precluding or modifying the legal effect of certain provisions of the treaty. A reservation which consists in a general reference to domestic law without specifying its contents does not clearly indicate to the other parties to what extent the State which issued the reservation commits itself when acceding to the Convention. The Government of France considers the reservation of Bangladesh incompatible with the objective and purpose of the treaty, in respect of which the provisions relating to the right of victims of acts of torture to obtain redress and compensation, which ensure the effectiveness and tangible realization of obligations under the Convention, are essential, and consequently lodges an objection to the reservation entered by Bangladesh regarding article 14, paragraph 1. This objection does not prevent the entry into force of the Convention between Bangladesh and France."

Germany (17 December 1999)

"The Government of the Federal Republic of Germany notes that the said declaration constitutes a reservation of a general nature. A reservation according to which article 14 paragraph 1 of the Convention will only be applied by the Government of the People's Republic of Bangladesh "in consonance with the existing laws and legislation in the country" raises doubts as to the full commitment of Bangladesh to the object and purpose of the Convention. It is in the common interest of States that treaties to which they have chosen to become Parties are respected, as to their object and purpose, by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of the Federal Republic of Germany therefore objects to the reservation made by the Government of the People's Republic of Bangladesh to the Convention. This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the People's Republic of Bangladesh."

Netherlands (20 December 1999)

"The Government of the Kingdom of the Netherlands considers that such a reservation, which seeks to limit the responsibilities of the reserving State under the Convention by invoking national law, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.

It is in the common interest of States that treaties to which they have chosen to become parties should be respected, as to object and purpose, by all parties. The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Government of Bangladesh.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Bangladesh."

Finland (13 December 1999)

"The Government of Finland has examined the contents of the declaration made by the Government of Bangladesh to Article 14 paragraph 1 to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and notes that the declaration constitutes a reservation as it seems to modify the obligations of Bangladesh under the said article.

A reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may raise doubts as to the commitment of the reserving state to fulfil its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

Therefore the Government of Finland objects to the aforesaid reservation to Article 14 paragraph 1 made by the Government of Bangladesh. This objection does not preclude the entry into force of the Convention between Bangladesh and Finland. The Convention will thus become operative between the two States without Bangladesh benefitting from these reservations."

Spain (13 December 1999)

"The Government of the Kingdom of Spain considers that this declaration is actually a reservation, since its purpose is to exclude or modify the application of the legal effect of certain provisions of the Convention. Moreover, in referring in a general way to the domestic laws of Bangladesh, without specifying their content, the reservation raises doubts among the other States parties as to the extent to which the People's Republic of Bangladesh is committed to ratifying the Convention.

The Government of the Kingdom of Spain believes that the reservation lodged by the Government of the People's Republic of Bangladesh is incompatible with the objective and purpose of the Convention, for which the provisions concerning redress and compensation for victims of torture are essential factors in the concrete fulfilment of the commitments made under the Convention.

The Government of the Kingdom of Spain therefore states an objection to the above-mentioned reservation lodged by the Government of the People's Republic of Bangladesh to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concerning article 14, paragraph 1, of that Convention.

This objection does not affect the entry into force of the above-mentioned Convention between the Kingdom of Spain and the People's Republic of Bangladesh."

Sweden (14 December 1999)

"The Government of Sweden has examined the declaration regarding article 14, paragraph 1, made by the Government of Bangladesh at the time of its accession to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declaration made by the Government of Bangladesh, in the absence of further clarification, in substance constitutes a reservation to the Convention.

The Government of Sweden notes that the said declaration imply that the said article of the Convention is being made subject to a general reservation referring to the contents of existing laws and regulations in the country.

The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of Sweden therefore objects to the aforesaid declaration made by the Government of Bangladesh to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment."

BELARUS

Reservations upon signature (10 December 1985) and confirmed upon ratification (13.03.1987) by the Byelorussian Soviet Socialist Republic

[Article 20
"The Byelorussian Soviet Socialist Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention."] withdrawn by Belarus on 3 October 2001

[Article 30
"The Byelorussian Soviet Socialist Republic does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention."] withdrawn by Belarus on 19 April 1989

BELGIUM

Declarations upon ratification (25 June 1999)

Article 21
"In accordance with article 21, paragraph 1, of the Convention, Belgium declares that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention."

Article 22
"In accordance with article 22, paragraph 1, of the Convention, Belgium declares that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

BOLIVIA

Declarations (14 February 2006)

Article 21
"The Government of Bolivia recognizes the competence of the Committee against Torture as provided for under article 21 of the Convention."

Article 22
"The Government of Bolivia recognizes the competence of the Committee against Torture as provided for under article 22 of the Convention."

BOSNIA AND HERZEGOVINA

Declaration (4 June 2003)

Article 22
"The State of Bosnia and Herzegovina … accepts without reservations the competence of the Committee Against Torture [in accordance with Article 22]."

BOTSWANA

Reservation upon signature and confirmed upon ratification (8 September 2000)

Article 1
"The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention to the extent that 'torture' means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana."

Objections to certain declarations/reservations
Sweden (2 October 2001)

"The Government of Sweden has examined the reservation made by Botswana upon ratification of the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or

Punishment, regarding article 1 of the Convention. The Government of Sweden notes that the said article of the Convention is being made subject to a general reservation referring to the contents of existing legislation in Botswana. Article 1.2 of the Convention states that the definition of torture in article 1.1 is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".

The Government of Sweden is of the view that this reservation, in the absence of further clarification, raises doubts as to the commitment of Botswana to the object and purpose of the Convention. The Government of Sweden would like to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of Botswana to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

This objection shall not preclude the entry into force of the Convention between Botswana and Sweden. The Convention enters into force in its entirety between the two States, without Botswana benefiting from its reservation."

Denmark (4 October 2001)

"The Government of Denmark has examined the contents of the reservation made by the Government of Botswana to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The reservation refers to legislation in force in Botswana as to the definition of torture and thus to the scope of application of the Convention. In the absence of further clarification the Government of Denmark considers that the reservation raises doubts as to the commitment of Botswana to fulfill her obligations under the Convention and is incompatible with the object and purpose of the Convention.

For these reasons, the Government of Denmark objects to this reservation made by the Government of Botswana. This objection does not preclude the entry into force of the Convention in its entirety between Botswana and Denmark without Botswana benefiting from the reservation."

Norway (4 October 2001)

"The Government of Norway has examined the contents of the reservation made by the Government of the Republic of Botswana upon ratification of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The reservation's reference to the national Constitution without further description of its contents, exempts the other States Parties to the Convention from the possibility of assessing the effects of the reservation. In addition, as the reservation concerns one of the core provisions of the Convention, it is the position of the Government of Norway that the reservation is contrary to the object and purpose of the Convention. Norway therefore objects to the reservation made by the Government of Botswana.

This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and the Republic of Botswana. The Convention thus becomes operative between Norway and Botswana without Botswana benefiting from the said reservation."

BRAZIL

Declaration (26 June 2006)

Article 22
".....the Federative Republic of Brazil recognizes the competence of the Committee against Torture to receive and consider denunciations of violations of the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on December 10, 1984, as permitted by Article 22 of the Convention."

BULGARIA

Reservations upon signature (16 December 1986) and confirmed upon ratification (16.12.1986)

[Article 20
"Pursuant to Article 28 of the Convention, the People's Republic of Bulgaria states that it does not recognize the competence of the Committee against Torture provided for in Article 20 of the Convention, as it considers that the provisions of Article 20 are not consistent with the principle of respect for sovereignty of the States-parties to the Convention."] withdrawn on 25 June 1999

[Article 30
"Pursuant to Article 30, paragraph 2 of the Convention, the People's Republic of Bulgaria states that it does not consider itself bound by the provisions of Article 30, paragraph 1 of the Convention, establishing compulsory jurisdiction of international arbitration or the International
Court of Justice in the settlement of disputes between States-parties to the Convention.
The People's Republic of Bulgaria maintains its position that disputes between two or more States can be submitted for consideration and settlement by international arbitration or the International Court of Justice only provided all parties to the dispute, in each individual case, have explicitly agreed to that."]
withdrawn on 24 June 1992

Declarations (12 May 1993)

Article 21
"The Republic of Bulgaria declares that in accordance with article 21 (2) of the Convention it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"The Republic of Bulgaria declares that in accordance with article 22 (1) of the Convention it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of this Convention."

BURUNDI

Declaration (10 June 2003)

Article 22
"The Government of the Republic of Burundi declares that it recognizes the competence of the Committee of the United Nations against Torture to receive and consider individual communications in accordance with article 22, paragraph 1 of the United Nations Convention against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted at New York on 10 December 1984."

CAMEROON

Declaration (12 October 2000)

Article 21
"[The Republic of Cameroon declares], that [it] recognizes the competence of the Committee against Torture to receive and consider communications from a State Party claiming that the Republic of Cameroon is not fulfilling its obligations under the Convention. However, such communications will not be receivable unless they refer to situations and facts subsequent to this declaration and emanate from a State Party which has made a similar declaration indicating its reciprocal acceptance of the competence of the Committee with regard to itself at least twelve (12) months before submitting its communication.

In accordance with article 22 of the Convention, the Republic of Cameroon also declares that it recognizes, in the case of situations and facts subsequent to this declaration, the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

CANADA

Declarations (13 November 1989)

Article 21
"The Government of Canada declares that it recognizes the competence of the Committee Against Torture, pursuant to article 21 of the said Convention, to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under this Convention."

Article 22
"The Government of Canada also declares that it recognizes the competence of the Committee Against Torture, pursuant to article 22 of the said Convention, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a state party of the provisions of the Convention."

CHILE

Reservation upon signature (30 September 1987)

"The Government of Chile reserve the right to formulate, upon ratifying the Convention, any declarations or reservations it may deem necessary in the light of its domestic law."

Reservations upon ratification (30 September 1988)

[Article 2
"To Article 2, paragraph 3, in so far as it modifies the principle of 'obedience upon reiteration' contained in Chilean domestic law. the Government of Chile will apply the provisions of that international norm to subordinate personnel governed by the Code of Military Justice, provided that the order patently

intended to lead to perpetration of the acts referred to in article 1 is not insisted on by the superior officer after being challenged by his subordinate."] withdrawn on 7 September 1990

[Article 3
"To Article 3, by reason of the discretionary and subjective nature of the terms in which it is drafted. The Government of Chile declares that in its relations with American States that are Parties to the Inter-American Convention to Prevent and Punish Torture, it will apply that Convention in cases where its provisions are incompatible with those of the present Convention."] withdrawn on 7 September 1990

[Article 20
"As provided for in article 28, paragraph 1, the Government of Chile does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention."] withdrawn on 7 September 1990.

[Article 30
"The Government of Chile will not consider itself bound by the provisions of article 30, paragraph 1 of the Convention"] withdrawn on 7 September 1990.

Declarations (15 March 2004)

Article 17
"By virtue of the powers vested in me by the Constitution of the Republic of Chile, I should like to declare that the Government of Chile recognizes the competence of the Committee against Torture established pursuant to article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations in resolution 39/46 of 10 December 1984, with respect to acts of which the commencement of execution is subsequent to the communication of this declaration by the Republic of Chile to the Secretary-General of the United Nations:"

Article 21

"(a) To receive and consider communications to the effect that a State party claims that the State of Chile is not fulfilling its obligations under the Convention, in accordance with article 21 thereof"

Article 22

"(b) To receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by the State of Chile of the provisions of the Convention, in accordance with article 22 thereof."

Objections to certain declarations/reservations

Italy (14 August 1989)

"The Government of Italy considers that the reservations entered by Chile are not valid, as they are incompatible with the objection and purpose of the Convention. The present objection is in no way an obstacle to the entry into force of this Convention between Italy and Chile."

Denmark (7 September 1989)

"The Danish Government considers the said reservations as being incompatible with the object and purpose of the Convention and therefore invalid.

This objection is not an obstacle to the entry into force of the said Convention between Denmark and Chile."

Luxembourg (12 September 1989)

" … The Grand Duchy of Luxembourg objects to the reservations, which are incompatible with the intent and purpose of the Convention.

This objection does not represent an obstacle to the entry into force of the said Convention between the Grand Duchy of Luxembourg and Chile."

Czechoslovakia (20 September 1989)

"The Czechoslovak Socialist Republic considers the reservations of the Government of Chile […] as incompatible with the object and purpose of this Convention.

The obligation of each State to prevent acts of torture in any territory under its jurisdiction is unexceptional. It is the obligation of each State to ensure that all acts of torture are offences under its criminal law. This obligation is confirmed, inter alia, in article 2, paragraph 3 of the Convention concerned.

The observance of provisions set up in article 3 of this Convention is necessitated by the need to ensure more effective protection for persons who might be in danger of being subjected to torture and this is obviously one of the principal purposes of the Convention.

Therefore, the Czechoslovak Socialist Republic does not recognize these reservations as valid."

France (20 September 1989)

"France considers that the reservations made by Chile are not valid as being incompatible with the object and purpose of the Convention.

Such objection is not an obstacle to the entry into force of the Convention between France and Chile."

Sweden (25 September 1989)

"The Swedish Government has examined the reservations made by Chile with respect to article 2, paragraph 3, and article 3 of the Convention and has come to the conclusion that these reservations are incompatible with the object and purpose of the Convention and therefore are impermissible according to article 19 (c) of the Vienna Convention on the Law of Treaties. For this reason the Government of Sweden objects to these reservations. This objection does not have the effect of preventing the Convention from entering into force between Sweden and Chile, and the said reservations cannot alter or modify, in any respect, the obligations arising from the Convention."

Spain (26 September 1989)

"The Government of the Kingdom of Spain declares that it objects to the reservations made by Chile to article 2, paragraph 3, and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, because the aforementioned reservations are contrary to the purposes and aims of the Convention. The present objection does not constitute an obstacle to the entry into force of the Convention between Spain and Chile."

Norway (28 September 1989)

" … The Government of Norway considers the said reservations as being incompatible with the object and purpose of the Convention and therefore invalid.

This objection is not an obstacle to the entry into force of the said Convention between Norway and Chile."

Portugal (6 October 1989)

" … The Government of Portugal considers such reservations to be incompatible with the object and purpose of this Convention and therefore invalid.

This objection does not constitute an obstacle to the entry into force of the Convention between Portugal and Chile."

Greece (13 October 1989)

"Greece does not accept the reservations since they are incompatible with the purpose and object of the Convention.

The above-mentioned objection is not an obstacle to the entry into force of the Convention between Greece and Chile."

Finland (20 October 1989)

" … The Government of Finland considers the said reservations as being incompatible with the object and purpose of the Convention and therefore invalid.

This objection is not an obstacle to the entry into force of the said Convention between Finland and Chile."

Canada (23 October 1989)

"The Government of Canada hereby formally objects to the reservations made by Chile in respect of Article 2, Paragraph 3 and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The reservations by Chile are incompatible with the object and purpose of the Convention Against Torture and thus inadmissible under Article 19(C) of the Vienna Convention on the Law of Treaties."

Turkey (3 November 1989)

"The Government of Turkey considers such reservations to be incompatible with the object and purpose of this Convention and therefore invalid.

This objection does not constitute an obstacle to the entry into force of the Convention between Turkey and Chile."

Australia (7 November 1989)

"[The Government of Australia] has come to the conclusion that these reservations are incompatible with the object and purpose of the Convention and therefore are impermissible according to article 19 of the Vienna Convention on the Law of Treaties. The Government of Australia therefore objects to these reservations. This objection does not have the effect of preventing the Convention from entering into force between Australia and Chile, and the afore-mentioned reservations cannot alter or modify, in any respect, the obligations arising from the Convention."

Netherlands (7 November 1989)

"Since the purpose of the Convention is strengthening of the existing prohibition of torture and similar practices the reservation to article 2, paragraph 3, to the effect to an order from a superior officer or a public authority may – in some cases – be invoked as a justification of torture, must be rejected as contrary to the object and purpose of the Convention.

For similar reasons the reservation to article 3 must be regarded as incompatible with the object and purpose of the Convention.

These objections are not an obstacle to the entry into force of this Convention between the Kingdom of the Netherlands and Chile."

Switzerland (8 November 1989)

"These reservations are not compatible with the object and purpose of the Convention, which are to improve respect for human rights of fundamental importance and to make more effective the struggle against torture throughout the world.

This objection does not have the effect of preventing the Convention from entering into force between the Swiss Confederation and the Republic of Chile.

United Kingdom of Great Britain and Northern Ireland (8 November 1989)

"The United Kingdom is unable to accept the reservation to article 2, paragraph 3, or the reservation to article 3.

In the same communication, the Government of the United Kingdom notified the Secretary-General of the following:

(a) The reservations to article 28, paragraph 1, and to article 30, paragraph 1, being reservations expressly permitted by the Convention, do not call for any observations by the United Kingdom.
(b) The United Kingdom takes note of the reservation referring to the Inter-American Convention to Prevent and Punish Torture, which cannot, however, affect the obligations of Chile in respect of the United Kingdom, as a non-Party to the said Convention."

Austria (9 November 1989)

"The reservations […] are incompatible with the object and purpose of the Convention and are therefore impermissible under article 19 (c) of the Vienna Convention on the Law of Treaties. The Republic of Austria therefore objects against these reservations and states that they cannot alter or modify, in any respect, the obligations arising from the Convention for all States Parties thereto."

New Zealand (10 December 1989)

" … The New Zealand Government considers the said reservations to be incompatible with the object and purpose of the Convention. This objection does not constitute an obstacle to the entry into force of the Convention between New Zealand and Chile."

Bulgaria (24 January 1990)

"The Government of the People's Republic of Bulgaria considers the reservations made by Chile with regard to art. 2, para. 3 and art. 3 of the Convention against torture and other forms of cruel, inhuman or degrading treatment or punishment of December 10, 1984 incompatible with the object and the purpose of the Convention.

The Government of the People's Republic of Bulgaria holds the view that each State is obliged to take all measures to prevent any acts of torture and other forms of cruel and inhuman treatment within its jurisdiction, including the unconditional qualification of such acts as crimes in its national criminal code. It is in this sense that art. 2, para. 3 of the Convention is formulated.

The provisions of art. 3 of the Convention are dictated by the necessity to grant the most effective protection to persons who risk to suffer torture or other inhuman treatment. For this reason these provisions should not be interpreted on the basis of subjective or any other circumstances, under which they were formulated.

In view of this the Government of the People's Republic of Bulgaria does not consider itself bound by the reservations."

CHINA

Reservations upon signature (12 December 1986) and confirmed upon ratification (4 October 1988)

Article 20

"(1) The Chinese Government does not recognize the competence of the Committee against Torture as provided for in article 20 of the Convention."

Article 30

"(2) The Chinese Government does not consider itself bound by paragraph l of article 30 of the Convention."

COSTA RICA

Declarations (27 February 2002)

Article 21

"…..the Republic of Costa Rica, with a view to strengthening the international instruments in this field and in accordance with full respect for human rights, the essence of Costa Rica's foreign policy, recognizes, unconditionally and during the period of validity of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention."

Article 22

"Furthermore, the Republic of Costa Rica recognizes, unconditionally and during the period of validity of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

The foregoing is in accordance with articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984."

CROATIA

Declarations (12 October 1992)

Articles 21 and 22

"[The] Republic of Croatia … accepts the competence of the Committee in accordance with articles 21 and 22 of the said Convention."

CUBA

Declarations upon ratification (17 May 1995)

Article 2

"The Government of the Republic of Cuba deplores the fact that even after the adoption of General Assembly resolution 1514 (XV) containing the Declaration on the granting of independence to colonial countries and peoples, a provision such as paragraph 1 of article 2 was

included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

Article 20
"The Government of the Republic declares, in accordance with article 28 of the Convention, that the provisions of paragraphs 1, 2 and 3 of article 20 of the Convention will have to be invoked in strict compliance with the principle of the sovereignty of States and implemented with the prior consent of the States Parties."

Article 30
"In connection with the provisions of article 30 of the Convention, the Government of the Republic of Cuba is of the view that any dispute between Parties should be settled by negotiation through the diplomatic channel."

CYPRUS

Declarations (8 April 1993)

Articles 21 and 22
"The Government of the Republic of Cyprus hereby declares that the Republic of Cyprus recognizes the competence of the Committee established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly on 10 December 1984:

1. to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention (Article 21), and
2. to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention (Article 22)."

CZECH REPUBLIC

Reservation upon signature and confirmed upon ratification by Czechoslovakia (7 July 1988) and then confirmed upon succession by Czech Republic (22 February 1993)

[Article 20
"In accordance with Article 28, paragraph 1, the Czechoslovak Socialist Republic does not recognize the competence of the Committee against Torture as defined by Article 20 of the Convention."] withdrawn by Czech Republic on 3 September 1996

Reservation upon signature and then confirmed upon ratification by Czechoslovakia (7 July 1988)

[Article 30
"The Czechoslovak Socialist Republic does not consider itself bound, in accordance with Article 30, paragraph 2, by the provisions of Article 30, paragraph 1, of the Convention."] withdrawn by Czechoslovakia on 26 April 1991

Declarations, Czech Republic (3 September 1996)

Article 21
"The Czech Republic declares that in accordance with article 21, paragraph 1, of the Convention it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"The Czech Republic declares that in accordance with article 22, paragraph 1, of the Convention it recognizes the competence of the Committee to received and consider communications from or on behalf of individuals within its jurisdiction who claim to be victims of violation by a State Party of the provisions of the Convention."

DENMARK

Declarations upon ratification (27 May 1987)

Article 21
"The Government of Denmark [. . .] recognizes the competence of the Committee to receive and consider communications to the effect that the State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"The Government of Denmark [. . .] recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

ECUADOR

Declarations (6 September 1988)

Article 21
"The Minister for Foreign Affairs of the Republic of Ecuador, in exercise of his authority, expressly declares that the Ecuadorian State, pursuant to article 21 of the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention; it also recognizes in regard to itself the competence of the Committee, in accordance with article 21."

Article 22
"It further declares, in accordance with the provisions of article 22 of the Convention, that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

EQUATORIAL GUINEA

Reservations upon accession (8 October 2002)

Article 20
"The Government of Equatorial Guinea hereby declares that, pursuant to article 28 of this Convention, it does not recognize the competence of the Committee provided for in article 20 of the Convention."

Article 30
"With reference to the provisions of article 30, the Government of Equatorial Guinea does not consider itself bound by paragraph 1 thereof."

ERITREA

Declarations upon accession (25 September 2014)

Article 20
"In accordance with Article 28 of the Convention, Eritrea declares that it does not recognize the competence of the Committee provided for it in article 20."

Article 30
"The State of Eritrea does not consider itself bound by paragraph 1 of Article 30 which stipulates that all disputes concerning the interpretation or application of the Convention shall be referred to the International Court of Justice by one of the parties."

FIJI

Reservations upon ratification (14 March 2016)

Article 1
"The Government of the Republic of Fiji does not recognize the definition of Torture as provided for in article 1 of the Convention therefore shall not be bound by these provisions. The definition of Torture in the Convention is only applicable to the extent as expressed in the Fijian Constitution."

Article 14
"The Government of the Republic of Fiji recognizes the article 14 of the Convention only to the extent that the right to award compensation to victims of an act of torture shall be subject to the determination of a Court of law."

Articles 20, 21 and 22
"The Government of the Republic of Fiji does not recognize the competence of the Committee against Torture as provided for in article(s) 20, 21 and 22 of the Convention and therefore shall not be bound by these provisions."

Article 30
"The Government of the Republic of Fiji does not recognize paragraph 1 of article 30 of the Convention and therefore shall not be bound by this provision."

Objections to certain declarations/reservations

Sweden (26 October 2016)

'The Republic of Fiji expresses that '[t]he Government of the Republic of Fiji does not recognize the definition of Torture as provided for in article 1 of the Convention therefore shall not be bound by these provisions. The definition of Torture in the Convention is only applicable to the extent as expressed in the Fijian Constitution'.

As regards the reservation to the definition of torture provided for in article 1 of the Convention, Sweden would like to state the following.

Reservations by which a State Party limits its responsibilities under the Convention by not considering itself bound by certain articles and by invoking general references to national law may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.

It is in the common interest of states that treaties to which they have chosen to become parties also are respected, as to object and purpose, by all parties. The Government of Sweden therefore objects to the aforementioned reservation.

This objection shall not preclude the entry into force of the Convention between Sweden and the Republic of Fiji, without the Republic of Fiji benefitting from its aforementioned reservation."

Switzerland (27 February 2017)

"The Swiss Federal Council has examined the reservations made by the Government of the Republic of Fiji upon ratification of the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The reservation made regarding the definition of torture contained in article 1 of the Convention, as well as the fact that in general it subordinates the definition of torture to the Constitution of the Republic of Fiji, constitutes a reservation of general scope that may raise doubts about the full commitment of the Republic of Fiji to the object and purpose of the Convention. The Swiss Federal Council notes that, according to article 19 (c) of the Vienna Convention of 23 May 1969 on the Law of Treaties, no reservation incompatible with the object and purpose of the Convention is permissible.

It is in the common interest of States that the object and purpose of the instruments to which they choose to become parties be respected by all parties thereto, and that States be prepared to amend their legislation in order to fulfil their treaty obligations.

Consequently, the Swiss Federal Council objects to the reservation made by the Republic of Fiji concerning article 1 of the Convention. This objection shall not preclude the entry into force of the Convention, in its entirety, between Switzerland and the Republic of Fiji."

Finland (1 March 2017)

"… The Government of Finland has carefully examined the contents of the reservations made by the Republic of Fiji concerning the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Regarding the reservation to Article 1 of the Convention, the Government of Finland notes that reservations by which a State Party limits its responsibilities under the Convention by invoking national law may cast doubts on the commitment of the reserving State to the object and purpose of the Convention. Such reservations are also subject to the general principle of treaty law according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

In view of the Government of Finland, the reservation made by Fiji to Article 1 of the Convention is incompatible with the object and purpose of the Convention. According to Article 19 of the Vienna Convention on the Law of Treaties and customary international law, such reservations shall not be permitted.

Therefore, the Government of Finland objects to the aforesaid reservation made by the Republic of Fiji. This objection does not preclude the entry into force of the Convention between Finland and the Republic of Fiji. The Convention will thus become operative between the two States without the Republic of Fiji benefitting from the aforementioned reservation … "

Ireland (9 March 2017)

"The Government of Ireland welcomes the ratification by the Republic of Fiji of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984) on 14 March 2016.

The Government of Ireland has examined the reservation to Article 1 made by the Government of the Republic of Fiji upon ratification.

The Government of Ireland considers that a reservation which consists of a general reference to the Constitution of the reserving State and which does not clearly specify the extent of the derogation from the provision of the Convention may cast doubts on the commitment of the reserving state to fulfil its obligations under the Convention.

The Government of Ireland is furthermore of the view that such a reservation may undermine the basis of international treaty law and is incompatible with the object and purpose of the Convention. The Government of Ireland recalls that under international treaty law a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Ireland therefore objects to the aforesaid reservation made by the Government of the Republic of Fiji to Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

This objection shall not preclude the entry into force of the Convention between Ireland and the Republic of Fiji."

Netherlands (13 March 2017)

"The Government of the Kingdom of the Netherlands has carefully examined the reservations made by Fiji upon ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

With respect to the reservation to Article 1 of the Convention, the Government of the Kingdom of the Netherlands notes that Fiji does not consider itself bound by the definition of torture contained therein and that it considers this definition only to be applicable to the extent as expressed in the Fijian Constitution.

The Government of the Kingdom of the Netherlands considers that such a reservation, which seeks to limit the responsibilities of the reserving State under the Convention by invoking provisions of its domestic law, is likely to deprive the provisions of the Convention of their effect and therefore must be regarded as incompatible with the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands recalls that according to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Kingdom of the Netherlands therefore objects to the reservation of Fiji to Article 1 of the Convention.

This objection does not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Fiji."

United Kingdom of Great Britain and Northern Ireland (15 March 2017)

"The United Kingdom Mission to the United Nations in New York [. . .] wishes to lodge an objection to one of the reservations made by Fiji upon accession to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment.

The reservation is as follows:

Reservation 'The Government of the Republic of Fiji does not recognize the definition of Torture as provided for in article 1 of the Convention therefore shall not be bound by these provisions. The definition of Torture in the Convention is only applicable to the extent as expressed in the Fijian Constitution.'

The Government of the United Kingdom considers that the effect of the reservation is to exclude or modify the definition of torture, which is incompatible with the object and purpose of the treaty.

Further, the Government of the United Kingdom note that a reservation which consists of a general reference to a system of law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the

obligations of the Convention. The Government of the United Kingdom therefore object to the aforesaid reservation."

Austria (16 March 2017)

"The Government of Austria has examined the reservation made by the Republic of Fiji upon ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Austria considers that by recognizing the definition of torture according to Article 1 of the Convention only to the extent as expressed in the Fijian Constitution Fiji has made a reservation of a general and indeterminate scope. This reservation does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention.

Austria therefore considers the reservation to be incompatible with the object and purpose of the Convention and objects to it.

This objection shall not preclude the entry into force of the Convention between the Republic of Austria and the Republic of Fiji."

Germany (16 March 2017)

"The Government of the Federal Republic of Germany has examined the reservation made by the Republic of Fiji upon its ratification of ... the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 with respect to Article 1 thereof.

The Government of the Federal Republic of Germany considers that the reservation to Article 1 makes the application of the Convention conditional on a definition contained in the national Constitution. The reservation is of a general and indeterminate nature and raises doubts as to the extent of the Republic of Fiji's commitment to fulfil its obligations under the Convention. In the opinion of the Government of the Federal Republic of Germany such a reservation is incompatible with the object and purpose of the Convention. The Government of the Federal Republic of Germany therefore objects to this reservation as being impermissible.

This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and the Republic of Fiji."

Portugal (21 March 2017)

"The Government of the Portuguese Republic has examined the contents of the reservations made by the Republic of Fiji upon ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Government of the Portuguese Republic considers that the reservation made upon ratification regarding Article 1 is incompatible with the object and purpose of the Convention.

The Government of the Portuguese Republic considers that reservations by which a State limits its responsibilities under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by not recognizing the definition of torture and invoking domestic law raises doubts as to the commitment of the reserving State to the object and purpose of the Convention, as the reservation is likely to deprive the provisions of the Convention of their effect and are contrary to the object and purpose thereof.

The Government of the Portuguese Republic recalls that according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of the Portuguese Republic thus objects to this reservation.

This objection shall not preclude the entry into force of the Convention between the Portuguese Republic and the Republic of Fiji."

Italy (23 March 2017)

"The Government of the Italian Republic welcomes the ratification by the Republic of Fiji of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment on 14 March 2016.

The Government of the Italian Republic has carefully examined the reservation made by the Republic of Fiji to Article 1 of the Convention.

The Italian Government considers that, by declaring not to recognize the definition of Torture as provided for in Article 1 of the Convention, and to only accept the definition of Torture as expressed in the Fijian Constitution, the Republic of Fiji has made a reservation of a general and indeterminate scope. As such the reservation introduces an element of uncertainty for the other States Parties to the Convention as to how the reserving State intends to implement the obligations of the Convention.

The Italian Republic considers that the reservation made by the Republic of Fiji regarding Article 1 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment is incompatible with the object and purpose of the Convention and therefore objects to it.

This objection nonetheless shall not preclude the entry into force of the Convention between the Republic of Fiji and the Italian Republic."

Peru (12 April 2017)

"The Government of the Republic of Peru has examined the contents of the reservation made by the Government of the Republic of Fiji to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984.

In this regard, the Government of the Republic of Peru considers that the reservation concerning article 1 may be incompatible with the object and purpose of the Convention, as invoking norms of internal law creates ambiguity concerning the commitments of the State with regard to the provisions of the Convention.

Furthermore, the reservation made by the Government of the Republic of Fiji is unacceptable under public international law, as pursuant to article 27 of the Vienna Convention on the Law of Treaties of 1969 a State party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

In light of the foregoing, the Government of the Republic of Peru objects to the reservation made by the Republic of Fiji concerning article 1 of the Convention.

This objection shall not preclude the entry into force of the Convention between the Republic of Peru and the Republic of Fiji, without the Republic of Fiji benefitting from the abovementioned reservation."

Norway (13 April 2017)

"The Government of Norway has examined the reservation made by the Government of the Republic of Fiji in relation to article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in which the Government of the Republic of Fiji declares: 'The Government of the Republic of Fiji does not recognize the definition of Torture as provided for in article 1 of the Convention therefore shall not be bound by these provisions. The definition of Torture in the Convention is only applicable to the extent as expressed in the Fijian Constitution.'

By declaring itself not bound by an essential provision of the Convention and invoking general reference to the national Constitution without further description of its content, the Republic of Fiji exempts the other States Parties to the Convention from the possibility of assessing the full effects of the reservation. The Government of Norway is of the view that the reservation casts doubts

as to the full commitment of the Government of the Republic of Fiji to the object and purpose of the Convention. Furthermore, such a reservation may contribute to undermining the basis of international treaty law.

It is in the common interest of States that treaties to which they have chosen to become Parties are respected, as to their object and purpose, by all Parties. The Government of Norway therefore objects to the aforesaid reservation.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Norway and the Republic of Fiji. The Convention thus becomes operative between the Kingdom of Norway and the Republic of Fiji without the Republic of Fiji benefiting from the aforesaid reservation."

Latvia (17 April 2017)

"The Government of the Republic of Latvia has carefully examined the reservations made by the Republic of Fiji upon ratification of the Convention against Torture and Other [Cruel,] Inhuman or Degrading Treatment or Punishment.

The Republic of Latvia considers that the definition of torture as expressed in Article 1 of the Convention forms the very basis of the Convention and thereof International Human Rights Law, thus no derogations from it can be made.

Therefore, the Government of the Republic of Latvia considers that [the] reservation made by the Republic of Fiji seeks to limit the responsibilities of the reserving State under the Convention by invoking provisions of its domestic law and are likely to deprive the provisions of the Convention of their effect and, hence, must be regarded as incompatible with the object and purpose of the Convention against Torture and Other [Cruel,] Inhuman or Degrading Treatment or Punishment.

Thus, the Republic of Latvia considers that general reservation to Article 1 of the Convention cannot be considered in line with [the] object and purpose of the Convention.

Consequently, the Government of the Republic of Latvia objects to the reservation made by the Republic of Fiji concerning Article 1 of the Convention. This objection shall not preclude the entry into force of the Convention, in its entirety, between the Republic of Latvia and the Republic of Fiji."

FINLAND

Declaration upon ratification (30 August 1989)

Articles 21 and 22

"Finland declares that it recognizes fully the competence of the Committee against Torture as specified in article 21, paragraph 1 and article 22, paragraph 1 of the Convention."

FRANCE

Declarations/reservations upon ratification (18 February 1986)

Article 21

"The Government of France declares […] that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention."

Article 22

"The Government of France declares […] that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

Article 30
"The Government of France declares in accordance with article 30, paragraph 2, of the Convention, that it shall not be bound by the provisions of paragraph 2 of [article 30]."

GEORGIA

Declarations (30 June 2005)

Article 21
"In accordance with article 21, paragraph 1, of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on December 10, 1984 Georgia hereby declares that it recognizes the competence of the Committee against Torture under the conditions laid down in article 21, to receive and consider communications to the effect that another state party claims that Georgia is not fulfilling its obligations under this Convention."

Article 22
"In accordance with article 22, paragraph 1, of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on December 10, 1984 Georgia hereby declares that it recognizes the competence of the Committee against Torture under the conditions laid down in article 22, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by Georgia of the provisions of the Convention."

GERMANY

Reservation upon signature, Federal Republic of Germany (13 October 1986)

Article 3
"The Government of the Federal Republic of Germany reserves the right to communicate, upon ratification, such reservations or declarations of interpretation as are deemed necessary especially with respect to the applicability of article 3."

Reservations and declaration upon ratification, German Democratic Republic (9 October 1987)

[Article 20
"The German Democratic Republic declares in accordance with article 28, paragraph 1 of the Convention that it does not recognize the competence of the Committee provided for in article 20."] withdrawn by German Democratic Republic on 13 September 1990
[Article 30
"The German Democratic Republic declares in accordance with article 30, paragraph 2 of the Convention that it does not consider itself bound by paragraph l of this article."] withdrawn by German Democratic Republic on 13 September 1990

[Article 17 and 18
"The German Democratic Republic declares that it will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic."] withdrawn by German Democratic Republic on 13 September 1990

Declarations, German Democratic Republic (13 September 1990)

Article 21
"The German Democratic Republic declares in accordance with article 21, paragraph 1, that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"The German Democratic Republic in accordance with article 22, paragraph 1, declares that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

Declaration upon ratification, Federal Republic of Germany (1 October 1990)

Article 3
"This provision prohibits the transfer of a person directly to a State where this person is exposed to a concrete danger of being subjected to torture. In the opinion of the Federal Republic of Germany, article 3 as well as the other provisions of the Convention exclusively establish State obligations that are met by the Federal Republic of Germany in conformity with the provisions of its domestic law which is in accordance with the Convention."

Declarations, Federal Republic of Germany (19 October 2001)

Article 21
"In accordance with article 21 (1) of the Convention, the Federal Republic of Germany declares that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention."

Article 22
"In accordance with article 22 (1) of the Convention, the Federal Republic of Germany declares that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by the Federal Republic of Germany of the provisions of the Convention."

Objections to certain reservations, German Democratic Republic

France (23 June 1988)

"France makes an objection to [the declaration] which it considers contrary with the object and purpose of the Convention.

The said objection is not an obstacle to the entry into force of the said Convention between France and the German Democratic Republic."

Luxembourg (9 September 1988)

"The Grand Duchy of Luxembourg objects to this declaration, which it deems to be a reservation the effect of which would be to inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention.

The present objection does not constitute an obstacle to the entry into force of the said Convention between the Grand Duchy of Luxembourg and the German Democratic Republic."

Sweden (28 September 1988)

"According to article 2, paragraph 1 (d) of the Vienna Convention on the Law of Treaties a unilateral statement, whereby a State e.g. when ratifying a treaty purports to exclude the legal effect of certain provisions of the Treaty in their application, is regarded as a reservation. Thus, such unilateral statements are considered as reservations regardless of their name or phrase. The Government of Sweden has come to the conclusion that the declaration made by the German Democratic Republic is incompatible with the object and purpose of the Convention and therefore is invalid according to article 19 (c) of the Vienna Convention on the Law of Treaties. For this reason the Government of Sweden objects to this declaration."

Austria (29 September 1988)

"The Declaration […] cannot alter or modify, in any respect, the obligations arising from that Convention for all States Parties thereto."

Denmark (29 September 1988)

"The Government of Denmark hereby enters its formal objection to [the declaration] which it considers to be a unilateral statement with the purpose of modifying the legal effect of certain provisions of the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment in their application to the German Democratic Republic. It is the position of the Government of Denmark that the said declaration has no legal basis in the Convention or in international treaty law.

This objection is not an obstacle to the entry into force of the said Convention between Denmark and the German Democratic Republic."

Norway (29 September 1988)

"The Government of Norway cannot accept this declaration entered by the German Democratic Republic. The Government of Norway considers that any such declaration is without legal effect, and cannot in any manner diminish the obligation of a Government to contribute to the costs of the Committee in conformity with the provisions of the Convention."

Canada (5 October 1988)

"The Government of Canada considers that this declaration is incompatible with the object and purpose of the Convention against Torture, and thus inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties. Through its functions and its activities, the Committee against Torture plays an essential role in the execution of the obligations of States parties to the Convention against Torture. Any restriction whose effect is to hamper the activities of the Committee would thus be incompatible with the object and purpose of the Convention."

Greece (6 October 1988)

"The Hellenic Republic raises an objection to this declaration, which it considers to be in violation of article 19, paragraph (b), of the Vienna Convention on the Law of Treaties. The Convention against Torture expressly sets forth in article 28, paragraph 1, and article 30, paragraph 2, the reservations which may be made. The declaration of the German Democratic Republic is not, however, in conformity with these specified reservations.

This objection does not preclude the entry into force of the said Convention as between the Hellenic Republic and the German Democratic Republic."

Spain (6 October 1988)

" … The Government of the Kingdom of Spain feels that such a reservation is a violation of article 19, paragraph (b), of the Vienna Convention on the Law of Treaties of 23 May 1969, because the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment sets forth, in article 28, paragraph 1, and article 30, paragraph 2, the only reservations that may be made to the Convention, and the above-mentioned reservation of the German Democratic Republic does not conform to either of those reservations."

Switzerland (7 October 1988)

"The Swiss Government objects to the reservation by the German Democratic Republic to the effect that that State will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic. That reservation is contrary to the purpose and aims of the Convention which are, through the Committee's activities, to encourage respect for a vitally important human right and to enhance the effectiveness of the struggle against torture the world over. This objection does not have the effect of preventing the Convention from entering into force between the Swiss Confederation and the German Democratic Republic."

United Kingdom of Great Britain and Northern Ireland (8 December 1988)

"The Government of the United Kingdom of Great Britain and Northern Ireland has taken note of the reservations formulated by the Government of the German Democratic Republic pursuant to article 28, paragraph 1, and article 30, paragraph 2, respectively, and the declaration made by the German Democratic Republic with reference to article 17, paragraph 7, and article 18, paragraph 5. It does not regard the said declaration as affecting in any way the obligations of the German Democratic Republic as a State Party to the Convention (including the obligations to meet its share of the expenses of the Committee on Torture as apportioned by the first meeting of the States Parties held on 26 November 1987 or any subsequent such meetings) and do not accordingly raise objections to it. It reserves the rights of the United Kingdom in their entirety in the event that the said declaration should at any future time be claimed to affect the obligations of the German Democratic Republic as aforesaid."

Netherlands (21 December 1988)

"This declaration, clearly a reservation according to article 2, paragraph 1, under (d), of the Vienna Convention on the Law of Treaties, not only "purports to exclude or modify the legal effect" of articles 17, paragraph 7, and 18, paragraph 5, of the present Convention in their application to the German Democratic Republic itself, but it would also affect the obligations of the other States Parties which would have to pay additionally in order to ensure the proper functioning of the Committee Against Torture. For this reason the reservation is not acceptable to the Government of the Kingdom of the Netherlands."

Italy (12 January 1989)

"The Convention authorizes only the reservations indicated in article 28 (1) and 30 (2). The reservation made by the German Democratic Republic is not therefore admissible under the terms of article 19 (b) of the 1969 Vienna Convention on the Law of Treaties."

Portugal (9 February 1989)

" … The Government of Portugal considers that this declaration is incompatible with the object and purpose of the present Convention. This objection does not constitute an obstacle to the entry into force of the Convention between Portugal and G.D.R."

Australia (8 August 1989)

"The Government of Australia considers that this declaration is incompatible with the object and purpose of the Convention and, accordingly, hereby conveys Australia's objection to the declaration."

Finland (20 October 1989)

" … The Government of Finland considers that any such declaration is without legal effect, and cannot in any manner diminish the obligation of a Government to contribute to the costs of the Committee in conformity with the provisions of the Convention."

New Zealand (10 December 1989)

" … The Government of New Zealand considers that this declaration is incompatible with the object and purpose of the Convention. This objection does not constitute an obstacle to the entry into force of the Convention between New Zealand and the German Democratic Republic."

GHANA

Declarations upon ratification (7 September 2000)

Articles 21 and 22
"The Government of the Republic of Ghana recognises the competence of the Committee Against Torture to consider complaints brought by or against the Republic in respect of another State Party which has made a Declaration recognising the competence of the Committee as well as individuals subject to the jurisdiction of the Republic who claim to be victims of any violations by the Republic of the provisions of the said Convention.

The Government of the Republic of Ghana interprets Article 21 and Article 22 as giving the said Committee the competence to receive and consider complaints in respect of matters occurring after the said Convention had entered into force for Ghana and shall not apply to decisions, acts, omissions or events relating to matters, events, omissions, acts or developments occurring before Ghana becomes a party."

Article 30
"[The Government of Ghana declares] in accordance with Article 30 (2) of the said Convention that the submission under Article 30 (1) to arbitration or the International Court of Justice of disputes between State Parties relating to the interpretation or application of the said Convention shall be by the consent of ALL the Parties concerned and not by one or more of the Parties concerned."

GREECE

Declarations upon ratification (6 October 1988)

Article 21
"The Hellenic Republic declares, pursuant to article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider

communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention."

Article 22
"The Hellenic Republic declares, pursuant to article 22, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claims to be victims of a violation by a State Party of the provisions of the Convention."

GUATEMALA

Reservations upon accession (5 January 1990)

[Articles 28 and 30
"With a declaration that Guatemala does not recognize, in accordance with article 28 (1), the competence of the Committee provided for in article 20, nor considers itself bound by article 30(1)."] withdrawn on 30 May 1990

Declaration (25 September 2003)

Article 22
"In accordance with article 22 of the Convention … , the Republic of Guatemala recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation of the provisions of the Convention in respect of acts, omissions, situations or events occurring after the date of the present declaration."

GUINEA BISSAU

Declarations upon ratification (24 September 2013)

Article 21
"Recognize the competence of the Committee Against Torture to receive and consider communications in which a Party claims that another Party is not fulfilling its obligations under this Convention"

Article 22
"Also declare that we recognize the Committee's competence to receive and consider communications from individuals or groups of individuals within our jurisdiction claiming to be victims of a violation of any of the rights contained in this Convention."

HOLY SEE

Declaration upon accession (26 June 2002)

"The Holy See considers the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment a valid and suitable instrument for fighting against acts that constitute a serious offence against the dignity of the human person. In recent times the Catholic Church has consistently pronounced itself in favour of unconditional respect for life itself and unequivocally condemned "whatever violates the integrity of the human person, such as mutilation, torments

inflicted on body or mind, attempts to coerce the will itself" (Second Vatican Council, Pastoral Constitution Gaudium et spes, 7 December 1965).

The law of the Church (Code of Canon Law, 1981) and its catechism (Catechism of the Catholic Church, 1987) enumerate and clearly identify forms of behaviour that can harm the bodily or mental integrity of the individual, condemn their perpetrators and call for the abolition of such acts. On 14 January 1978, Pope Paul VI, in his last address to the diplomatic corps, after referring to the torture and mistreatment practised in various countries against individuals, concluded as follows: "How could the Church fail to take up a stern stand … with regard to torture and to similar acts of violence inflicted on the human person?" Pope John Paul II, for his part, has not failed to affirm that "torture must be called by its proper name" (message for the celebration of the World Day of Peace, 1 January 1980). He has expressed his deep compassion for the victims of torture (World Congress on Pastoral Ministry for Human Rights, Rome, 4 July 1998), and in particular for tortured women (message to the Secretary-General of the United Nations, 1 March 1993). In this spirit the Holy See wishes to lend its moral support and collaboration to the international community, so as to contribute to the elimination of recourse to torture, which is inadmissible and inhuman.

The Holy See, in becoming a party to the Convention on behalf of the Vatican City State, undertakes to apply it insofar as it is compatible, in practice, with the peculiar nature of that State."

HUNGARY

Reservations upon signature and confirmed upon ratification (15 April 1987)

[Article 20
"The Hungarian People's Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention."] withdrawn on 13 September 1989

[Article 30
The Hungarian People's Republic does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention."] withdrawn on 13 September 1989

Declarations (13 September 1989)

Articles 21 and 22
"[The Government of Hungary] recognizes the competence of the Committee against Torture provided for in articles 21 and 22 of the Convention."

ICELAND

Declaration upon ratification (23 October 1996)

Articles 21 and 22
"... on behalf of the Government of Iceland, pursuant to article 21, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that Iceland recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention and, pursuant to article 22, paragraph 1, of the Convention, that Iceland recognizes the competence of the Committee against Torture to receive and consider

communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

INDONESIA

Declarations/reservations upon ratification (28 October 1998)

Article 20
"The Government of the Republic of Indonesia declares that the provisions of paragraphs 1, 2, and 3 of article 20 of the Convention will have to be implemented in strict compliance with the principles of the sovereignty and territorial integrity of States."

Article 30
"The Government of the Republic of Indonesia does not consider itself bound by the provision of article 30, paragraph 1, and takes the position that disputes relating to the interpretation and application of the Convention which cannot be settled through the channel provided for in paragraph 1 of the said article, may be referred to the International Court of Justice only with the consent of all parties to the disputes."

IRELAND

Declarations upon ratification (11 April 2002)

Article 21
"Ireland declares, in accordance with article 21 of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention

Article 22
Ireland declares, in accordance with article 22 of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

ISRAEL

Reservations upon ratification (3 October 1991)

Article 20

"1. In accordance with article 28 of the Convention, the State of Israel hereby declares that it does not recognize the competence of the Committee provided for in article 20."

Article 30

"2. In accordance with paragraph 2 of article 30, the State of Israel hereby declares that it does not consider itself bound by paragraph 1 of that article."

ITALY

Declarations (10 October 1989)

Articles 21
"Article 21: Italy hereby declares, in accordance with article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention"

Article 22
"Article 22: Italy hereby declares, in accordance with article 22, paragraph 1, of the Convention, that it recognizes the competence of the Committee against torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of violations by a State Party of the provisions of the Convention."

JAPAN

Declaration upon accession (29 June 1999)

Article 21
"The Government of Japan declares under article 21 of the Convention that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

KAZAKHSTAN

Declaration (21 February 2008)

Article 21
"In accordance with article 21, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment done at New York on December 10, 1984 the Republic of Kazakhstan hereby declares that it recognizes the competence of the Committee against torture under the conditions laid down in article 21, to receive and consider communications to the effect that another state party claims that the Republic of Kazakhstan is not fulfilling its obligations under this Convention."

Article 22
"In accordance with article 22, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment done at New York on December 10, 1984 the Republic of Kazakhstan hereby declares that it recognizes the competence of the Committee against torture under the conditions laid down in article 22, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by the Republic of Kazakhstan of the provisions of the Convention."

KUWAIT

Reservations upon accession (8 March 1996)

Articles 20 and 30
" … with reservations as to article (20) and the provision of paragraph (1) from article (30) of the Convention."

LAO PEOPLE'S DEMOCRATIC REPUBLIC

Reservations upon ratification (26 September 2012)

Article 20
"The Government of the Lao People's Democratic Republic, pursuant to Article 28 of the Convention, does not recognize the competence of the Committee against Torture under Article 20."

Article 30
"The Government of the Lao People's Democratic Republic does not consider itself bound by the provisions of Article 30, paragraph 1, to refer any dispute concerning the interpretation and application of the Convention to the International Court of Justice."

Declaration upon ratification (26 September 2012)

Article 1
"It is the understanding of the Government of the Lao People's Democratic Republic that the term 'torture' in Article 1, paragraph 1, of the Convention means torture as defined in both national law and international law"

Article 8
"The Government of the Lao People's Democratic Republic declares that, pursuant to Article 8, paragraph 2 of the Convention it makes extradition conditional on the existence of a treaty. Therefore, it does not consider the Convention as the legal basis for extradition in respect of the offences set forth therein. It further declares that bilateral agreements will be the basis for extradition as between the Lao People's Democratic Republic and other States Parties in respect of any offences."

Objections to certain reservations/declarations

Portugal (13 September 2013)

"The Government of the Portuguese Republic has examined the reservations and declaration made by the Lao People's Democratic Republic on ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984.

The Government of the Portuguese Republic considers that the declaration made by the Lao People's Democratic Republic to Article 1 of the Convention, insofar as it refers to the national law of the Lao People's Democratic Republic, constitutes in substance a reservation of general scope, which does not specify the extent of the derogation and is incompatible with the object and purpose of the Convention.

The Government of the Portuguese Republic underlines that according to Customary International Law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted, and recalls that it is in the common interest of all States that Treaties to which they have chosen to become parties are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the Treaties.

The Government of the Portuguese Republic therefore objects to the aforesaid declaration made by the Government of the Lao People's Democratic Republic of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984.

The present objection shall not preclude the entry into force of the Convention between the Portuguese Republic and the Lao People's Democratic Republic."

Ireland (18 September 2013)

"1. The Government of Ireland has examined the reservations and declarations made by the Lao People's Democratic Republic upon ratification of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984), made on 26 September 2012.
2. The Government of Ireland is of the view that this declaration in substance constitutes a reservation limiting the scope of the Convention.
3. The Government of Ireland considers that a reservation which consists of a general reference to domestic laws of the reserving State and which does not clearly specify the extent of the derogation from the provision of the Convention may cast doubts on the commitment of the reserving state to fulfil its obligations under the Convention.
4. The Government of Ireland is furthermore of the view that such a reservation may undermine the basis of international treaty law and is incompatible with the object and purpose of the Covenant. The Government of Ireland recalls that according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Covenant shall not be permitted.
5. The Government of Ireland therefore objects to the aforesaid reservation made by the Lao People's Democratic Republic to Article 1 (1) of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.
6. This objection shall not preclude the entry into force of the Convention between Ireland and the Lao People's Democratic Republic."

Netherlands (19 September 2013)

"The Government of the Kingdom of the Netherlands has carefully examined the reservations and the declarations made by the Lao People's Democratic Republic upon ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The Government of the Kingdom of the Netherlands considers that the declaration made by the Lao People's Democratic Republic regarding Article 1 of the Convention in substance constitutes a reservation limiting the scope of the Convention.

The Government of the Kingdom of the Netherlands considers that with this reservation the application of the Convention is made subject to national legislation in force in the Lao People's Democratic Republic.

The Government of the Kingdom of the Netherlands considers that reservations of this kind must be regarded as incompatible with the object and purpose of the Convention and would recall that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Kingdom of the Netherlands therefore objects to the reservation of the Lao People's Democratic Republic to Article 1 of the Convention. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the Lao People's Democratic Republic."

Finland (20 September 2013)

"The Government of Finland has carefully examined the contents of the declaration [made by the Lao People's Democratic Republic relating to article 1, paragraph 1 of the Convention] and considers that it amounts to a reservation as it seems to modify the obligations of the Lao People's Democratic Republic under the said article.

A reservation which consists of a general reference to national law without specifying its contents does not clearly define for other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore, raises doubts as to the commitment of the reserving State to fulfil its obligations under the Convention. Such a reservation is also subject to the

general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Finland wishes to recall that according to customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the treaty is not permitted. In its present formulation, the reservation to article 1, paragraph 1, is in contradiction with the object and purpose of the Convention.

Therefore, the Government of Finland objects to the aforesaid reservation to article 1, paragraph 1, made by the Lao People's Democratic Republic. This objection does not preclude the entry into force of the Convention between Finland and the Lao People's Democratic Republic. The Convention will thus become operative between the two States without the Lao People's Democratic Republic benefitting from this reservation."

Austria (23 September 2013)

"The Government of Austria has examined the declaration made by the Lao People's Democratic Republic upon ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In Austria's view the declaration amounts to a reservation. The Government of Austria considers that by the reference to national law regarding Art. 1 of the Convention the Lao People's Democratic Republic has made a reservation of general and indeterminate scope. This reservation does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of Austria therefore considers the reservation to Art. 1 incompatible with the object and purpose of the Convention and objects to it. This objection shall not preclude the entry into force of the Convention between Austria and the Lao People's Democratic Republic."

Greece (23 September 2013)

"The Government of the Hellenic Republic has examined the reservations and declarations formulated by the Lao People's Democratic Republic upon ratification of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Government of the Hellenic Republic considers that the declaration formulated by the Lao People's Democratic Republic regarding Article 1 paragraph 1 of the above Convention constitutes in substance a reservation limiting the scope of the Convention to the extent that with this reservation the application of the Convention is made subject to national legislation in force in the Lao People's Democratic Republic.

The Government of the Hellenic Republic considers that reservations of this kind must be regarded as incompatible with the object and purpose of the Convention and would like to recall that according to Article 19 (c) of the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted.

For these reasons the Government of the Hellenic Republic objects to the above mentioned reservation formulated by the Lao People's Democratic Republic.

This objection shall not preclude the entry into force of the Convention between Greece and the Lao People's Democratic Republic."

Italy (23 September 2018)

"The Government of Italy has examined the reservations and declarations formulated by the Lao People's Democratic Republic upon ratification of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.

The Government of Italy considers that the declaration formulated by the Lao People's Democratic Republic regarding Article 1, paragraph 1, of the above Convention constitutes in substance a reservation limiting the scope of the Convention to the extent that with this reservation the application of the Convention is made subject to national legislation in force in the Lao People's Democratic Republic.

The Government of Italy considers that reservations of this kind must be regarded as incompatible with the object and purpose of the Convention and would like to recall that according to Article 19 (c) of the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted.

For these reasons the Government of Italy objects to the above mentioned reservation formulated by the Lao People's Democratic Republic.

This objection shall not preclude the entry into force of the Convention between Italy and the Lao People's Democratic Republic."

Sweden (23 June 2011)

"The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by the Lao People's Democratic Republic, according to which the term 'torture' in Article 1 paragraph 1 of the Convention shall mean torture as defined in both national law and international law, in substance constitutes a reservation modifying the scope of the Convention.

The Government of Sweden notes that this reservation implies that the application of the Convention is made subject to a general reservation referring to existing legislation in the Lao People's Democratic Republic. The Government of Sweden is of the view that such a reservation, which does not clearly specify the extent of the derogation, raises serious doubt as to the commitment of the Lao People's Democratic Republic to the object and purpose of the Convention. According to customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation made by the Lao People's Democratic Republic to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and considers the reservation null and void.

This objection shall not preclude the entry into force of the Convention between the Lao People's Democratic Republic and Sweden. The Convention enters into force in its entirety between the Lao People's Democratic Republic and Sweden, without the Lao People's Democratic Republic benefiting from its reservation."

Czech Republic (25 September 2013)

"The Government of the Czech Republic has examined the reservations and declarations made by the Lao People's Democratic Republic on ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter as the "Convention").

The Government of the Czech Republic is of the view that the declaration made by the Lao People's Democratic Republic with regard to the definition of torture in Article 1, paragraph 1, of the Convention is of general and vague nature and, therefore, its character and scope cannot be properly assessed. The declaration leaves open the question whether it amounts to a reservation and whether such a reservation is compatible with the object and purpose of the Convention, i.e., to what extent the Lao People's Democratic Republic commits itself to the binding definition of torture as contained in Article 1, paragraph 1, of the Convention, which forms part of the object and purpose of the Convention and cannot be excluded or modified by the definitions of torture contained in national law of the States Parties to the Convention.

The Government of the Czech Republic wishes to recall that reservations may not be general or vague, since such reservations, without indicating in precise terms their scope, make it impossible to assess whether or not they are compatible with the object and purpose of the treaty. Therefore, the Government of the Czech Republic objects to the aforesaid declaration made by the Government of the Lao People's Democratic Republic. This objection shall not preclude the entry into force of the Convention between the Lao People's Democratic Republic and the Czech Republic, without the Lao People's Democratic Republic benefiting from its declaration."

United Kingdom of Great Britain and Northern Ireland (24 September 2013)

"The Government of the United Kingdom have examined the Declaration made by the Government of the Lao People's Democratic Republic in respect of Article 1, paragraph 1 of the Convention: 'It is the understanding of the Government of the Lao People's Democratic Republic that the term 'torture' in Article 1, paragraph1 of the Convention means torture as defined in both national law and international law.'

The Government of the United Kingdom considers that the Declaration is capable of being understood as an attempt by the Government of the Lao People's Democratic Republic to exclude or modify the definition of torture set out in under Article 1 of the Convention. To the extent that the Declaration is intended to exclude or modify the definition of torture under Article 1 of the Convention, and is accordingly a reservation, the United Kingdom objects to the said reservation.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic."

Germany (25 September 2013)

"The Government of the Federal Republic of Germany has carefully examined the declaration made by the Lao People's Democratic Republic upon its ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 with respect to Article 1, paragraph 1, thereof.

The Government of the Federal Republic of Germany considers that the declaration, notwithstanding its designation, amounts to a reservation which is meant to limit the scope of application of the Convention. A reservation which makes the application of the Convention conditional on a definition contained in national laws is of a general and indeterminate nature and raises doubts as to the extent of the State's commitment to fulfil its obligations under the Convention. In the opinion of the Government of the Federal Republic of Germany such a reservation is incompatible with the object and purpose of the Convention.

The Government of the Federal Republic of Germany therefore objects to this reservation as being impermissible.

This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and the Lao People's Democratic Republic."

Norway (7 October 2013)

"The Government of Norway has examined the declarations contained in the instrument of ratification to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), made by the Lao People's Democratic Republic on 26 September 2012.

The Government of Norway is of the view that the declaration with regard to Article 1, paragraph 1, of the Convention in substance constitutes a general reservation aimed at limiting the scope of the Convention with reference to national law, without identifying the provisions in question. The Government of Norway accordingly considers that the reservation casts serious doubts on the commitment of the Government of the Lao People's Democratic Republic to the object and purpose of the Convention and therefore objects to the said reservation.

This objection does not preclude the entry into force of the Convention between the Kingdom of Norway and the Lao People's Republic. The Convention thus becomes operative between the Kingdom of Norway and the Lao People's Democratic Republic without the Lao People's Democratic Republic benefiting from the aforesaid reservation."

LIECHTENSTEIN

Declarations upon ratification (2 November 1990)

Article 21

"The Principality of Liechtenstein recognizes, in accordance with article 21, paragraph 1, of the Convention, the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22

"The Principality of Liechtenstein recognizes in accordance with article 22, paragraph 1, the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

LUXEMBOURG

Declarations upon ratification (29 September 1987)

Article l

"The Grand Duchy of Luxembourg hereby declares that the only "lawful sanctions" that it recognizes within the meaning of article 1, paragraph 1, of the Convention are those which are accepted by both national law and international law."

Article 21

"The Grand Duchy of Luxembourg hereby declares [. . .] that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22

"The Grand Duchy of Luxembourg hereby declares [. . .] that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

MALTA

Declaration upon accession (13 September 1990)

Articles 21 and 22
"The Government of Malta fully recognizes the competence of the Committee against Torture as specified in article 21, paragraph 1, and article 22, paragraph 1, of the Convention."

MAURITANIA

Reservations upon accession (17 November 2004)

Article 20
"The Mauritanian Government does not recognize the competence granted to the Committee in article 20 of the Convention, which provides as follows:

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State Party, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the cooperation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the cooperation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24."

Article 30
"Pursuant to article 30, paragraph 2, of the Convention, the Government of Mauritania declares that it does not consider itself bound by paragraph 1 of this article, which provides that in the event of a dispute concerning the interpretation or application of the Convention, one of the Parties may refer the dispute to the International Court of Justice by request."

MEXICO

Declarations (15 March 2002)

Article 17
"The United Mexican States recognizes as duly binding the competence of the Committee against Torture, established by article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984."

Article 22
"Pursuant to Article 22 of the Convention, the United Mexican States declares that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

MONACO

Declarations upon accession (6 December 1991)

Article 21
"In accordance with article 21, paragraph 1, of the Convention, the Principality of Monaco declares that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"In accordance with article 22, paragraph 1, of the Convention, the Principality of Monaco declares, that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

Reservation upon accession (6 December 1991)

Article 30
"In accordance with paragraph 2 of article 30 of the Convention, the Principality of Monaco declares that it does not consider itself bound by paragraph 1 of that article."

MONTENEGRO

Declaration upon succession (23 October 2006)—confirmation of the declaration under Articles 21 and 22

Article 21
"Yugoslavia recognizes, in compliance with article 21, paragraph 1 of the Convention, the competence of the Committee against Torture to receive and consider communications in which one State Party to the Convention claims that another State Party does not fulfil the obligations pursuant to the Convention"

Article 22
"Yugoslavia recognizes, in conformity with article 22, paragraph 1 of the Convention, the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

MOROCCO

Reservations upon signature and confirmed upon ratification (21 June 1993)

[Article 20
"The Government of the Kingdom of Morocco does not recognize the competence of the Committee provided for in article 20."] withdrawn on 19 October 2006

Article 30
"In accordance with article 30, paragraph 2, the Government of the Kingdom of Morocco further declares that it does not consider itself bound by paragraph 1 of the same article."

Declarations (19 October 2006)

Article 22
"The Government of the Kingdom of Morocco declares, under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that it recognizes, on the date of deposit of the present document, the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation, subsequent to the date of deposit of the present document, of the provisions of the Convention."

NETHERLANDS

Declarations upon ratification (21 December 1988)

Article 1
"It is the understanding of the Government of the Kingdom of the Netherlands that the term "lawful sanctions" in article 1, paragraph 1, must be understood as referring to those sanctions which are lawful not only under national law but also under international law."

Article 21
"The Government of the Kingdom of the Netherlands hereby declares that it recognizes the competence of the Committee against Torture under the conditions laid down in article 21, to receive and consider communications to the effect that another State Party claims that the Kingdom is not fulfilling its obligations under this Convention"

Article 22
"The Government of the Kingdom of the Netherlands hereby declares that it recognizes the competence of the Committee against Torture, under the conditions laid down in article 22, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by the Kingdom of the provisions of the Convention."

NEW ZEALAND

Reservation upon ratification (10 December 1989)

Article 14
"The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention Against Torture only at the discretion of the Attorney-General of New Zealand."

Declarations (9 January 1990)

Article 21

"1. In accordance with article 21, paragraph 1, of the Convention, [the Government of New Zealand declares] that it recognises the competence of the Committee Against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention"

Article 22

"2. In accordance with article 22, paragraph 1, of the Convention, [the Government of New Zealand] recognises the competence of the Committee Against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

NORWAY

Declarations upon ratification (9 July 1986)

Article 21
"Norway recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"Norway recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

PAKISTAN

Reservation upon signature (17 April 2008)

"The Government of the Islamic Republic of Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in respect of various provisions of the Convention at the time of ratification."

Declarations/reservations upon ratification (23 June 2010)

[Article 3
"The Government of the Islamic Republic of Pakistan declares the provisions of Article 3 shall be so applied as to be in conformity with the provisions of its laws relating to extradition and foreigners."]
withdrawn on 20 September 2011

[Article 4, 6, 12, 13 and 16
"The Government of the Islamic Republic of Pakistan declares that the provisions of these Articles shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws."] withdrawn on 20 September 2011

Article 8
"The Government of the Islamic Republic of Pakistan declares that pursuant to Article 8, paragraph 2, of the Convention, it does not take this Convention as the legal basis for cooperation on extradition with other States Parties."

Article 20
"In accordance with Article 28, paragraph 1, of the Convention, the Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 20."

Article 30
"The Government of the Islamic Republic of Pakistan does not consider itself bound by Article 30, Paragraph 1 of the Convention."

Objections to certain declarations/reservations

Poland (3 June 2011)

"The Government of the Republic of Poland has examined the reservations made by the Islamic Republic of Pakistan upon accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by General Assembly of the United Nations on 10 December 1984, with regard to Articles 3, 4, 6, 8, 12, 13, 16, 28 and 30 of the Convention.

The Government of the Republic of Poland is of the view that the implementation of the reservations aiming at the elimination of the duty to fulfill by the reserving State vital obligations enshrined in the Convention made by the Islamic Republic of Pakistan with regard to Articles 3, 4, 6, 12, 13 and 16 of the Convention would make it impossible to attain the objective of the Convention, which is to protect entities from torture and other cruel, inhuman or degrading treatment or punishment and to make the struggle against such violations of human rights more effective. In consequence, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, which is a treaty and customary norm, these reservations shall not be permitted as incompatible with the object and purpose of the Convention.

In order to justify its will to exclude the legal consequences of certain provisions of the Convention, the Islamic Republic of Pakistan raised in the reservations with regard to Articles 3, 4, 6, 12, 13 and 16 the inconsistency of these provisions with its domestic legislation. The Government of the Republic of Poland recalls that, according to Article 27 of the Vienna Convention on the Law of Treaties, which is a treaty and customary norm, the State Party to an international agreement may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Islamic Republic of Pakistan refers in the above-mentioned reservations to the Sharia laws and to its domestic legislation as possibly affecting the application of the Convention. Nonetheless it does specify the exact content of these laws and legislation. As a result, it is impossible to clearly define the extent to which the reserving State has accepted the obligations of the Convention. Therefore, the Government of the Republic of Poland objects to the reservations made by the Islamic Republic of Pakistan upon accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984, with regard to Articles 3, 4, 6, 12, 13 and 16.

This objection does not preclude the entry into force of the Covenant between the Republic of Poland and the Islamic Republic of Pakistan."

Canada (7 June 2011)

"The Government of Canada has carefully examined the reservations made by the Government of the Islamic Republic of Pakistan upon ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in accordance with which the Government of the Islamic Republic of Pakistan declares that:

The provisions of Articles 4, 6, 12, 13 and 16 'shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws'.

The Government of Canada considers that a reservation which consists of a general reference to national law or to the prescriptions of the Islamic Sharia constitutes, in reality, a reservation with a general, indeterminate scope. Such a reservation makes it impossible to identify the modifications to obligations under the Convention that it purports to introduce and impossible for the other States Parties to the Convention to know the extent to which Pakistan has accepted the obligations

of the Convention, an uncertainty which is unacceptable, especially in the context of treaties related to human rights.

The Government of Canada notes that the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan, addressing many of the most essential provisions of the Convention, and aiming to exclude the obligations under those provisions, are incompatible with the object and purpose of the Convention, and thus inadmissible under article 19(c) of the Vienna Convention on the Law of Treaties. The Government of Canada therefore objects to the aforesaid reservations made by the Government of the Islamic Republic of Pakistan.

This objection does not preclude the entry into force in its entirety of the Convention between Canada and the Islamic Republic of Pakistan."

Czech Republic (20 June 2011)

"The Czech Republic believes that the reservations of Pakistan made to Articles 3, 4, 6, 8, 12, 13 and 16 of the Convention, if put into practice, would result in restriction and weakening of the universal prohibition of torture. Such restriction or weakening is contrary to the object and purpose of the Convention. Furthermore, Pakistan supports reservations to Articles 4, 6, 12, 13 and 16 by references to its domestic law, which is, in the opinion of the Czech Republic, unacceptable under customary international law, as codified in Article 27 of the Vienna Convention on the Law of Treaties. Finally, the reservations to Articles 4, 6, 12, 13 and 16 that refer to the notions such as "Constitution of Pakistan" and "Sharia laws" and to Article 3 that refer to the notions such as "the provisions of its laws relating to extradition and foreigners", without specifying its contents, do not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations under the Convention.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to Article 28 paragraph 2 of the Convention and according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of a treaty shall not be permitted.

The Czech Republic, therefore, objects to the aforesaid reservations made by Pakistan to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and Pakistan. The Convention enters into force in its entirety between the Czech Republic and Pakistan, without Pakistan benefiting from its reservation."

Greece (22 June 2011)

"The Government of the Hellenic Republic considers that the reservation with respect to Article 3, a core provision of the Convention, which subjects its application to the laws of the Islamic Republic of Pakistan relating to extradition and foreigners without specifying their content, is incompatible with the object and purpose of the above Convention.

Moreover, the Government of the Hellenic Republic considers that the reservations with respect to Articles 4, 12, 13 and 16, which contain a general reference to the Provisions of the Constitution of Pakistan and Sharia laws do not specify the extent of the derogation therefrom and, therefore, are incompatible with the object and purpose of the Convention.

For those reasons the Government of the Hellenic Republic objects to the abovementioned reservations formulated by the Islamic Republic of Pakistan."

Sweden (22 June 2011)

"The Government of Sweden is of the view that these reservations raise serious doubt as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Convention, as the

reservations are likely to deprive the provisions of the Convention of their effect and are contrary to the object and purpose thereof.

The Government of Sweden would like to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservations made by the Islamic Republic of Pakistan to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

This objection shall not preclude the entry into force of the Convention between Pakistan and Sweden. The Convention enters into force in its entirety between the two States, without Pakistan benefiting from these reservations."

Ireland (23 June 2011)

"The Government of Ireland has examined the reservations made on 23 June 2010 by the Islamic Republic of Pakistan upon ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The Government of Ireland notes that the Islamic Republic of Pakistan subjects Articles 3, 4, 6, 12, 13 and 16 to the Constitution of Pakistan, its domestic law and/or Sharia law. The Government of Ireland is of the view that a reservation which consists of a general reference to the Constitution or the domestic law of the reserving State or to religious law, may cast doubt on the commitment of the reserving state to fulfill its obligations under the Convention. The Government of Ireland is of the view that such general reservations are incompatible with the object and purpose of the Convention and may undermine the basis of international treaty law.

The Government of Ireland therefore objects to the reservations made by the Islamic Republic of Pakistan to Articles 3, 4, 6, 12, 13 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

This objection shall not preclude the entry into force of the Convention between Ireland and the Islamic Republic of Pakistan."

Slovakia (23 June 2011)

"The Slovak Republic has examined the reservations made by the Islamic Republic of Pakistan upon its ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984, according to which:

'The Government of the Islamic Republic of Pakistan declares that the provisions of Article 3 shall be so applied as to be in conformity with the provisions of its laws relating to extradition and foreigners.

The Government of the Islamic Republic of Pakistan declares that pursuant to Article 8, paragraph 2, of the Convention, it does not take this Convention as the legal basis for cooperation on extradition with other States Parties.

The Government of the Islamic Republic of Pakistan declares that the provisions of these Articles [Article 4, 6, 12, 13, and 16] shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws.

In accordance with Article 28, paragraph 1, of the Convention, the Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 20.

The Government of the Islamic Republic of Pakistan does not consider itself bound by Article 30, paragraph 1 of the Convention.'

The Slovak Republic considers that with the reservations to Articles 4, 6, 12, 13 and 16 the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is made subject to the Islamic Sharia law. Moreover it considers the reservations with respect to Article 3 of the Convention as incompatible with the object and purpose of the Convention.

This makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the Convention as to its commitment to the object and purpose of the Convention.

It is in the common interest of States that all parties respect treaties to which they have chosen to become party, as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Slovak Republic recalls that the customary international law, as codified by the Vienna Convention on the Law of Treaties, and in particular Article 19 (c), sets out that the reservation that is incompatible with the object and purpose of a treaty is not permitted. The Slovak Republic therefore objects to the reservations made by the Islamic Republic of Pakistan to Articles 3, 4, 6, 12, 13 and 16 of the Convention.

This objection shall not preclude the entry into force of the Convention between the Slovak Republic and the Islamic Republic of Pakistan, without the Islamic Republic of Pakistan benefiting from its reservations."

Austria (24 June 2011)

"The Government of Austria has examined the reservations made by the Islamic Republic of Pakistan upon ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Government of Austria considers that in aiming to exclude the application of those provisions of the Convention which are deemed incompatible with the Constitution of Pakistan, Sharia laws and certain national laws, the Islamic Republic of Pakistan has made reservations of general and indeterminate scope. These reservations do not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of Austria therefore considers the reservations of the Islamic Republic of Pakistan to Articles 3, 4, 6, 12, 13 and 16 incompatible with the object and purpose of the Covenant and objects to them. These objections shall not preclude the entry into force of the Convention between Austria and the Islamic Republic of Pakistan."

France (27 June 2011)

"The Government of the French Republic has considered the reservations made by the Islamic Republic of Pakistan upon its ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 23 June 2010.

Concerning the reservations to articles 3, 4, 6, 12, 13 and 16, France considers that in seeking to exclude the application of provisions of the Convention, insofar as they might be contrary to or inconsistent with laws relating to extradition and foreigners, the Constitution of Pakistan and Sharia law, the Islamic Republic of Pakistan has made reservations of a general and indeterminate nature. Indeed, these reservations are vague since they do not specify which provisions of domestic law are affected. Thus, they do not allow other States Parties to appreciate the extent of the commitment of the Islamic Republic of Pakistan, including the compatibility of the provisions with the object and purpose of the Convention.

The Government of the French Republic therefore objects to the reservations made by the Islamic Republic of Pakistan. However, this objection shall not preclude the entry into force of the Convention between France and Pakistan."

Australia (28 June 2011)

"The Government of Australia has examined the reservation made by The Islamic Republic of Pakistan to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and now hereby objects to the same for and on behalf of Australia:

The Government of Australia considers that the reservations by the Islamic Republic of Pakistan are incompatible with the object and purpose of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention).

The Government of Australia recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty is not permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

Furthermore, the Government of Australia considers that The Islamic Republic of Pakistan, through its reservations, is purporting to make the application of the Convention subject to the provisions of general domestic law in force in The Islamic Republic of Pakistan. As a result, it is unclear to what extent The Islamic Republic of Pakistan considers itself bound by the obligations of the Convention and therefore raises concerns as to the commitment of The Islamic Republic of Pakistan to the object and purpose of the Convention.

The Government of Australia considers that the reservations to the Convention are subject to the general principle of treaty interpretation, pursuant to Article 27 of the Vienna Convention of the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

For the above reasons, the Government of Australia objects to the aforesaid reservations made by The Islamic Republic of Pakistan to the Convention and expresses the hope that the Islamic Republic of Pakistan will withdraw its reservations.

This objection shall not preclude the entry into force of the Convention between Australia and The Islamic Republic of Pakistan."

Belgium (28 June 2011)

"Belgium has carefully examined the reservations made by Pakistan upon accession on 23 June 2010 to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The vagueness and general nature of the reservations made by Pakistan with respect to Articles 3, 4, 6, 12, 13 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment may contribute to undermining the bases of international human rights treaties.

The reservations make the implementation of the Convention's provisions contingent upon their compatibility with the Islamic Sharia and legislation in force in Pakistan. This creates uncertainty as to which of its obligations under the Convention Pakistan intends to observe and raises doubts as to Pakistan's respect for the object and purpose of the Convention.

It is in the common interest for all parties to respect the treaties to which they have acceded and for States to be willing to enact such legislative amendments as may be necessary in order to fulfil their treaty obligations.

Belgium also notes that the reservations concern fundamental provisions of the Convention.

Consequently, Belgium considers the reservations to be incompatible with the object and purpose of that instrument.

Belgium notes that under customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty is not permitted (article 19 (c)).

Furthermore, under Article 27 of the Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Consequently, Belgium objects to the reservations formulated by Pakistan with respect to Articles 3, 4, 6, 12, 13 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Belgium and Pakistan."

Denmark (28 June 2011)

"The Government of the Kingdom of Denmark has examined the reservations made by the Government of the Islamic Republic of Pakistan upon ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The Government of Denmark considers, that the reservations made by the Islamic Republic of Pakistan to articles 3, 4, 6, 12, 13, and 16 of the Convention, which make the application of these essential obligations under the Convention subject to Sharia and/or constitutional and/or national law in force in the Islamic Republic of Pakistan, raise doubts as to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and concern as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Convention.

The Government of Denmark wishes to recall that, according to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of the Convention shall not be permitted.

Consequently, the Government of Denmark considers the said reservations as incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.

The Government of Denmark therefore objects to the aforementioned reservations made by the Government of the Islamic Republic of Pakistan. This shall not preclude the entry into force of the Convention in its entirety between the Islamic Republic of Pakistan and Denmark.

The Government of Denmark recommends the Government of the Islamic Republic of Pakistan to reconsider its reservations to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment."

Finland (28 June 2011)

"The Government of Finland welcomes the ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by the Islamic Republic of Pakistan. The Government of Finland has carefully examined the content of the reservations relating to Articles 3, 4, 6, 8, 12, 13, 16, 28 and 30 of the Convention made by the Islamic Republic of Pakistan upon ratification.

The Government of Finland notes that the Islamic Republic of Pakistan reserves the right to apply the provisions of Article 3 so as to be in conformity with the provisions of its laws relating to extradition and foreigners, and the provisions of Articles 4, 6, 12, 13 and 16 to the extent that they are not repugnant to the provisions of the Constitution of Pakistan and the Sharia laws.

The Government of Finland notes that a reservation which consists of a general reference to national law without specifying its content does not clearly define to other Parties to the Convention the extent to which the reserving States commits itself to the Convention and creates serious doubts as to the commitment of the reserving State to fulfil its obligations under the Convention. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The reservations to Articles 3, 4, 6, 12, 13 and 16 seeks to restrict essential obligations of the Islamic Republic of Pakistan under the Convention and raise serious doubts as to the commitment

of the Islamic Republic of Pakistan to the object and purpose of the Convention. The Government of Finland wishes to recall that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties and customary international law, a reservation contrary to the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Finland therefore objects to the reservations made by the Islamic Republic of Pakistan in respect of Articles 3, 4, 6, 12, 13 and 16 of the Convention. This objection shall not preclude the entry into force of the Convention between the Islamic Republic of Pakistan and Finland. The Convention will thus become operative between the two states without the Islamic Republic of Pakistan benefiting from its reservations."

Germany (28 June 2011)

"The Government of the Federal Republic of Germany has carefully examined the reservations made by the Islamic Republic of Pakistan on 23 June 2010 to Articles 3, 4, 6, 12, 13 and 16 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Government of the Federal Republic of Germany is of the opinion that these reservations subject the application of Articles 3, 4, 6, 12, 13 and 16, all of which are core provisions of the Convention, to a system of domestic norms without specifying the contents thereof, leaving it uncertain to which extent the Islamic Republic of Pakistan accepts to be bound by the obligations under the Convention and raising serious doubts as to its commitment to fulfil its obligations under the Convention. The reservations therefore are considered incompatible with the object and purpose of the Convention and consequently impermissible under Art. 19 c of the Vienna Convention on the Law of Treaties.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservations as being incompatible with the object and purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and the Islamic Republic of Pakistan."

Hungary (28 June 2011)

"With regard to the reservations made by the Islamic Republic of Pakistan:

The Government of the Republic of Hungary has examined the reservations made by the Islamic Republic of Pakistan upon accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by General Assembly of the United Nations on 10 December 1984, with regard to Articles 3, 4, 6, 8, 12, 13, 16, 28 and 30 of the Convention.

The Government of the Republic of Hungary is of the view that the implementation of the reservations aiming at the elimination of the duty to fulfill by the reserving State vital obligations enshrined in the Convention made by the Islamic Republic of Pakistan with regard to Articles 3, 4, 6, 12, 13 and 16 of the Convention would make it impossible to attain the objective of the Convention, which is to protect entities from torture and other cruel, inhuman or degrading treatment or punishment and to make the struggle against such violations of human rights more effective. In consequence, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, which is a treaty and customary norm, these reservations shall not be permitted as they are incompatible with the object and purpose of the Convention.

In order to justify its will to exclude the legal consequences of certain provisions of the Convention, the Islamic Republic of Pakistan raised in the reservations with regard to Articles 3, 4, 6, 12, 13 and 16 the inconsistency of these provisions with its domestic legislation. The Government of the Republic of Hungary recalls that, according to Article 27 of the Vienna Convention on the Law of Treaties, which is a treaty and customary norm, the State Party to an international agreement may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Islamic Republic of Pakistan refers in the above-mentioned reservations to the Sharia laws and to its domestic legislation as possibly affecting the application of the Convention. Nonetheless, it fails to specify the exact content of these laws and legislation. As a result, it is impossible to clearly define the extent to which the reserving State has accepted the obligations of the Convention.

Therefore, the Government of the Republic of Hungary objects to the reservations made by the Islamic Republic of Pakistan upon accession to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984, with regard to Articles 3, 4, 6, 12, 13 and 16.

This objection does not preclude the entry into force of the [Convention] between the Republic of Hungary and the Islamic Republic of Pakistan."

Italy (28 June 2011)

"The Government of Italy has examined the reservations made on 23 June 2010 by the Islamic Republic of Pakistan upon ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, regarding Articles 3, 4, 6, 12, 13 and 16 of the Convention.

The Government of Italy notes that the said articles of the Convention are being made subject to a general reservation referring to the contents of existing legislation in the Islamic Republic of Pakistan.

The Government of Italy is of the view that, in the absence of further clarification, these reservations raise doubts as to the commitment of the Islamic Republic of Pakistan as to the object and purpose of the Convention and would like to recall that, according to customary international law as codified by the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Italy, therefore, objects to the aforesaid reservations made by the Islamic Republic of Pakistan to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

This objection shall not preclude the entry into force of the Convention between Italy and the Islamic Republic of Pakistan."

Portugal (28 June 2011)

"The Government of the Portuguese Republic has examined the reservations made by the Islamic Republic of Pakistan upon ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984.

The Government of the Portuguese Republic considers that the reservations made by the Islamic Republic of Pakistan to Articles 3, 4, 6, 12, 13 and 16 are reservations that seek to subject the application of the Convention to its Constitution, its domestic law or/and Sharia Law, limiting the scope of the Convention on an unilateral basis and contributing to undermining the basis of International Law.

The Government of the Portuguese Republic considers that reservations by which a State limits its responsibilities under the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, by invoking its Constitution, the domestic law or/and the Sharia Law raise serious doubts as to the commitment of the reserving State to the object and purpose of the Convention, as the reservations are likely to deprive the provisions of the Convention of their effect and are contrary to the object and purpose thereof.

It is in the common interest of all the States that Treaties to which they have chosen to become parties are respected as to their object and purpose by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the Treaties.

The Government of the Portuguese Republic recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Portuguese Republic therefore objects to the aforesaid reservations made by the Government of the Islamic Republic of Pakistan to Articles 3, 4, 6, 12, 13 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984.

However, these objections shall not preclude the entry into force of the Convention between the Portuguese Republic and the Islamic Republic of Pakistan."

Spain (28 June 2011)

"The Government of the Kingdom of Spain has examined the reservations made by Pakistan upon its ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, with regard to articles 3, 4, 6, 12, 13 and 16 of that international instrument.

The Government of the Kingdom of Spain considers that those articles refer to rights and guarantees that are essential for achieving the object and purpose of the Convention. As the reservations formulated by Pakistan make application of those articles of the Convention subject to their consistency with domestic law on extradition, with the Constitution and with Sharia laws, to which it refers in general terms without specifying their content, they make it impossible to determine the extent of Pakistan's commitment to achieving the object and purpose of the Convention. Furthermore, they violate the principle of international law, well established in practice, that a State cannot make compliance with international obligations that are assumed voluntarily subordinate to the application of the provisions of domestic law, whatever their nature. In no case may such reservations, as formulated, exclude the legal effects of obligations arising from the relevant provisions of the Convention.

Consequently, the Government of the Kingdom of Spain objects to the reservations made to articles 3, 4, 6, 12, 13 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and Pakistan."

Switzerland (28 June 2011)

"The Swiss Federal Council has examined the reservations made by the Islamic Republic of Pakistan upon its accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, with regard to articles 3, 4, 6, 12, 13 and 16.

The reservations to the articles, which refer to the provisions of domestic law and Islamic Sharia law, do not specify their scope and raise doubts about the ability of the Islamic Republic of Pakistan to honour its obligations as a party to the Convention.

Article 19 of the Vienna Convention on the Law of Treaties of 23 May 1969 prohibits any reservation that is incompatible with the object and purpose of a treaty.

Consequently, the Swiss Federal Council objects to the aforesaid reservations made by the Islamic Republic of Pakistan to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

This objection does not preclude the entry into force of the Convention between Switzerland and the Islamic Republic of Pakistan."

United Kingdom of Great Britain and Northern Ireland (28 June 2011)

"The Government of the United Kingdom of Great Britain and Northern Ireland has examined the reservations made by the Government of Pakistan to the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] on 23 June 2010, which read:

1. Article 3 – The Government of the Islamic Republic of Pakistan declares that provisions of Article 3 shall be so applied as to be in conformity with the provisions of its laws relating to extradition and foreigners.
2. Article 8 – The Government of the Islamic Republic of Pakistan declares that pursuant to Article 8, paragraph 2, of the Convention, it does not take this Convention as the legal basis for cooperation on extradition with other States Parties.
3. Article 4, 6, 12, 13 and 16 – The Government of the Islamic Republic of Pakistan declares that the provisions of these Articles shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws.
4. Article 28 – In accordance with Article 28, paragraph 1, of the Convention, the Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 20.
5. Article 30 – The Government of the Islamic Republic of Pakistan does not consider itself bound by Article 30, paragraph 1 of the Convention.

In the view of the United Kingdom a reservation should clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. Reservations which consist of a general reference to a constitutional provision, law or system of laws without specifying their contents do not do so.

The Government of the United Kingdom therefore objects to the reservations made by the Government of Pakistan to Articles 3, 4, 6, 12, 13 and 16.

The United Kingdom will re-consider its position in light of any modifications or withdrawals of the reservations made by the Government of Pakistan to the Convention."

Norway (29 June 2011)

"The Government of Norway has examined the reservations made by the Islamic Republic of Pakistan upon ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Government of Norway considers that the reservations with regard to articles 3, 4, 6, 12, 13 and 16 of the Convention are so extensive as to be contrary to its object and purpose. The Government of Norway therefore objects to the said reservations made by the Islamic Republic of Pakistan. This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and the Islamic Republic of Pakistan. The Convention thus becomes operative between the Kingdom of Norway and the Islamic Republic of Pakistan without the Islamic Republic of Pakistan benefiting from the aforesaid reservations."

United States of America (29 June 2011)

"The Government of the United States of America objects to Pakistan's reservations to the CAT. Pakistan has reserved to Articles 3, 4, 6, 12, 13, and 16 of the Convention, which address non refoulement, criminalization of acts which constitute torture, arrest or apprehension of those suspected of committing torture, investigation of credible allegations of torture, the right to bring before and have examined by competent authorities allegations of torture and for protection of complainants and witnesses, and the prevention of cruel, inhuman or degrading treatment or punishment. At the same time, Pakistan has chosen not to participate in the Committee's inquiry process under Article 20. The combination of Pakistan's reservations and its decision not to participate in the Article 20

process raises serious concerns because the reservations obscure the extent to which Pakistan intends to modify its substantive obligations under the Convention, and preclude further inquiry by the Committee if well founded indications of systematic torture do arise. As a result, the United States considers the totality of Pakistan's reservations to Articles 3, 4, 6, 12, 13, and 16 to be incompatible with the object and purpose of the [Convention]. This objection does not constitute an obstacle to the entry into force of the [Convention] between the United States and Pakistan, and the aforementioned articles shall apply between our two states, except to the extent of Pakistan's reservations."

Netherlands (30 June 2011)

"The Government of the Kingdom of the Netherlands has examined the reservations made by the Islamic Republic of Pakistan upon ratification of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

The Government of the Kingdom of the Netherlands considers that with its reservations to the Articles 3, 4, 6, 12, 13 and 16 of the Convention, the Islamic Republic of Pakistan has made the application of essential obligations under the Convention subject to the Sharia laws and/or the constitutional and/or national laws in force in Pakistan.

This makes it unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and raises concerns as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands considers that reservations of this kind must be regarded as incompatible with the object and purpose of the Convention and would recall that, according to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Kingdom of the Netherlands therefore objects to the reservations of the Islamic Republic of Pakistan to the aforesaid Articles of the Convention.

This objection does not constitute an obstacle to the entry into force of the convention between the Kingdom of the Netherlands and the Islamic Republic of Pakistan."

PANAMA

Reservation upon ratification (24 August 1987)

Article 30

"The Republic of Panama declares in accordance with article 30, paragraph 2 of the Convention that it does not consider itself bound by the provisions of paragraph 1 of the said article."

PARAGUAY

Declarations (29 May 2002)

Articles 21 and 22

"…..the Government of the Republic of Paraguay recognizes the competence of the Committee against Torture, pursuant to articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, approved by the General Assembly of the United Nations on 10 December 1984.

…..the Honourable National Congress of the Republic of Paraguay has granted its approval for the recognition of the competence of the Committee to receive communications from States parties and individuals."

PERU

Declarations (17 October 2002)

Article 21
"The Republic of Peru recognizes, in accordance with Article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the said Convention."

Article 22
"Likewise, the Republic of Peru recognizes, in accordance with the provisions of Article 22 of the above-mentioned Convention, the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

POLAND

Reservations upon signature (13 January 1986)

Article 20
"Under article 28 the Polish People's Republic does not consider itself bound by article 20 of the Convention."

Article 30
"Furthermore, the Polish People's Republic does not consider itself bound by article 30, paragraph 1, of the Convention."

Declarations (12 May 1993)

Articles 21 and 22
"The Government of the Republic of Poland, in accordance with articles 21 and 22 of the Convention, recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that the Republic of Poland is not fulfilling its obligations under the Convention or communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by the Republic of Poland of the provisions of the Convention."

PORTUGAL

Declarations upon ratification (9 February 1989)

Article 21
"Portugal hereby declares, in accordance with article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee Against Torture to receive and consider communications to the effect that the State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"Portugal hereby declares, in accordance with article 22, paragraph 1 of the Convention, that it recognizes the competence of the Committee Against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of violation by State Party of the provisions of the Convention."

QATAR

Reservations upon accession (11 January 2000)

General reservation

"(a) Any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion;] partially withdrawn on 14 March 2012, when the State of Qatar communicated that it "1) partially withdraws its general reservation, while keeping in effect a limited general reservation within the framework of Articles 1 and 16 of the Convention"

[Article 21 and 22

"(b) The competence of the Committee as indicated in articles 21 and 22 of the Convention."] withdrawn on 14 March 2012

Objections to certain declarations/reservations

Spain (14 March 2000)

"The Government of the Kingdom of Spain has examined the reservation made by the Government of the State of Qatar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 11 January 2000, as to any interpretation of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion.

The Government of the Kingdom of Spain considers that, by making a general reference to Islamic law and religion rather than to specific content, this reservation raises doubts among the other States parties as to the extent of the commitment of the State of Qatar to abide by the Convention.

The Government of the Kingdom of Spain considers the reservation made by the Government of the State of Qatar to be incompatible with the purpose and aim of the Convention, in that it relates to the entire Convention and seriously limits or even excludes its application on a basis which is not clearly defined, namely, a general reference to Islamic law.

Accordingly, the Government of the Kingdom of Spain objects to the above-mentioned reservation made by the Government of the State of Qatar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

This objection does not prevent the Convention's entry into force between the Government of Spain and the Government of the State of Qatar."

Luxembourg (6 April 2000)

"The Government of the Grand Duchy of Luxembourg has examined the reservation made by the Government of the State of Qatar to [the Convention] regarding any interpretation incompatible with the precepts of Islamic law and the Islamic religion.

The Government of the Grand Duchy of Luxembourg considers that this reservation, by referring in a general way to both Islamic law and the Islamic religion without specifying their content, raises doubts among other States Parties about the degree to which the State of Qatar is committed to the observance of the Convention. The Government of the Grand Duchy of Luxembourg believes that the aforementioned reservation of the Government of the State of Qatar is incompatible with the objective and purpose of the Convention, because it refers to it as a whole and seriously limits or even excludes its application on a poorly defined basis, as in the case of the global reference to Islamic law.

Consequently, the Government of the Grand Duchy of Luxembourg objects to the aforementioned reservation made by the Government of the State of Qatar to [the Convention]. This

objection does not prevent the entry into force of the Convention between the Grand Duchy of Luxembourg and the State of Qatar."

Sweden (27 April 2000)

"The Government of Sweden has examined the reservations made by the Government of Qatar at the time of its accession to the [Convention], as to the competence of the committee and to any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic laws and the Islamic religion.

The Government of Sweden is of the view that as regards the latter, this general reservation, which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, raises doubts as to the commitment of Qatar to the object and purpose of the Convention.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

According to customary law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Sweden therefore objects to the aforesaid general reservation made by the Government of Qatar to the [Convention].

This shall not preclude the entry into force of the Convention between the State of Qatar and the Kingdom of Sweden, without Qatar benefiting from the said reservation".

Finland (16 January 2001)

"The Government of Finland has examined the context of the reservation made by the Government of Qatar regarding any interpretation incompatible with the precepts of Islamic law and the Islamic religion. The Government of Finland notes that a reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other Parties to the Convention the extent to which the reserving State commits itself to the Convention and may therefore raise doubts as to the commitment of the reserving state to fulfil its obligations under the Convention. Such a reservation, in the view of the Government of Finland, is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland also notes that the reservation of Qatar, being of such a general nature, raises doubts as to the full commitment of Qatar to the object and purpose of the Convention and would like to recall that, according to the Vienna Convention on the Law of the Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

For the above-mentioned reasons the Government of Finland objects to the reservation made by the Government of Qatar. This objection does not preclude the entry into force of the Convention between Qatar and Finland. The Convention will thus become operative between the two States without Qatar benefitting from this reservation."

Norway (18 January 2001)

"It is the Government of Norway's position that paragraph (a) of the reservation, due to its unlimited scope and undefined character, is contrary to the object and purpose of the Convention, and thus impermissible according to well established treaty law. The Government of Norway therefore objects to paragraph (a) of the reservation.

This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and Qatar. The Convention thus becomes operative between Norway and Qatar without Qatar benefitting from the said reservation."

Netherlands (19 January 2001)

"The Government of the Kingdom of the Netherlands considers that the reservation concerning the national law of Qatar, which seeks to limit the responsibilities of the reserving State under the Convention by invoking national law, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.

It is in the common interest of States that treaties to which they have chosen to become party should be respected, as to object and purpose, by all parties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Government of Qatar.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Qatar."

Germany (23 January 2001)

"The Government of the Federal Republic of Germany has examined the reservation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment made by the Government of Qatar. The Government of the Federal Republic of Germany is of the view that the reservation with regard to compatibility of the rules of the Convention with the precepts of Islamic law and the Islamic religion raises doubts as to the commitment of Qatar to fulfil its obligations under the Convention. The Government of the Federal Republic of Germany considers this reservation to be incompatible with the object and purpose of the Convention. Therefore the Government of the Federal Republic of Germany objects to the aforesaid reservation made by the Government of Qatar to the Convention.

This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and Qatar."

France (24 January 2001)

"The Government of the French Republic has carefully considered the reservation made by the Government of Qatar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, whereby it excludes any interpretation of the Convention which would be incompatible with the precepts of Islamic law and the Islamic religion. The reservation, which seeks to give precedence to domestic law and practices over the Convention to an indeterminate extent, is comprehensive in scope. Its terms undermine the commitment of Qatar and make it impossible for the other States parties to assess the extent of that commitment.

The Government of France consequently objects to the reservation made by Qatar."

Italy (5 February 2001)

"The Government of the Italian Republic has examined the reservation to the Convention against torture and other cruel, inhuman or degrading treatment or punishment made by the Government of Qatar. The Government of the Italian Republic believes that the reservation concerning the compatibility of the rules of the Convention with the precepts of the Islamic law and the Islamic Religion raises doubts as the commitment of Qatar to fulfill its obligations under the Convention. The Government of the Italian Republic considers this reservation to be incompatible with the object and purpose of the Convention according to article 19 of the 1969 Vienna Convention on the Law of Treaties. This reservation does not fall within the rule of article 20, paragraph 5 and can be objected anytime.

Therefore, the Government of the Italian Republic objects to the aforesaid reservation made by the Government of Qatar to the Convention.

This objection does not preclude the entry into force of the Convention between Italy and Qatar."

Denmark (21 February 2001)

"The Government of Denmark has examined the contents of the reservation made by the Government of Qatar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion. The Government of Denmark considers that the reservation, which is of a general nature, is incompatible with the object and purpose of the Convention and raises doubts as to the commitment of Qatar to fulfil her obligations under the Convention. It is the opinion of the Government of Denmark that no time limit applies to objections against reservations which are inadmissible under international law.

For the above-mentioned reasons, the Government of Denmark objects to this reservation made by the Government of Qatar. This objection does not preclude the entry into force of the Convention between Qatar and Denmark."

Portugal (20 July 2001)

"The Government of the Portuguese Republic has examined the reservation made by the Government of Qatar to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), whereby it excludes any interpretation of the said Convention which would be incompatible with the precepts of Islamic Law and the Islamic Religion.

The Government of the Portuguese Republic is of the view that this reservation goes against the general principle of treaty interpretation according to which a State party to a treaty may not invoke the provisions of its internal law as justification for failure to perform according to the obligations set out by the said treaty, creating legitimate doubts on its commitment to the Convention and, moreover, contribute to undermine the basis of International Law.

Furthermore, the said reservation is incompatible with the object and purpose of the Convention.

The Government of the Portuguese Republic wishes, therefore, to express its disagreement with the reservation made by the Government of Qatar."

United Kingdom of Great Britain and Northern Ireland (9 November 2001)

"The Government of the United Kingdom have examined the reservation made by the Government of Qatar on 11 January 2000 in respect of the Convention, which reads as follows:'…..with reservation as to: (a) Any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion.'

The Government of the United Kingdom note that a reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to the reservation made by the Government of Qatar.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and Qatar."

REPUBLIC OF KOREA

Declarations (9 November 2007)

Article 21
"The Republic of Korea recognizes the competence of the Committee against Torture, pursuant to Article 21 of the ….. Convention, to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention … "

Article 22
"[The Republic of Korea] … recognizes the competence of the … Committee [against Torture], pursuant to Article 22 of the … Convention, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention"

REPUBLIC OF MOLDOVA

Declarations (2 September 2011)

Article 21
"In accordance with article 21, paragraph 1, of the Convention, the Republic of Moldova recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"In accordance with article 22, paragraph 1, of the Convention, the Republic of Moldova recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

RUSSIAN FEDERATION

Reservations upon signature and confirmed upon ratification, Union of Soviet Socialist Republics (26 June 1987)

[Article 20
„The Union of Soviet Socialist Republics does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention."] withdrawn on 1 October 1991 by the Union of Soviet Socialist Republics

[Article 30
"The Union of Soviet Socialist Republics does not consider itself bound by the provisions of paragraph 1 of article 30 of the Convention."] withdrawn on 8 March 1989 by the Union of Soviet Socialist Republics

Declarations, Union of Soviet Socialist Republics (1 October 1991)

Article 21
"The Union of Soviet Socialist Republics declares that, pursuant to article 21 of the Convention, it recognizes the competence of the Committee against Torture to receive and consider communications in respect of situations and events occurring after the adoption of the present declaration, to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention."

Article 22
"The Union of Soviet Socialist Republics also declares that, pursuant to article 22 of the Convention, it recognizes the competence of the Committee to receive and consider communications in respect of situations or events occurring after the adoption of the present declaration, from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

SAN MARINO

Declarations (4 August 2015)

Article 21
"The Republic of San Marino hereby declares, in accordance with article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention … "

Article 22
"The Republic of San Marino hereby declares, in accordance with article 22, paragraph 1, of the Convention, that it recognizes the competence of the Committee against torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of violations by a State Party of the provisions of the Convention."

SAUDI ARABIA

Reservations upon accession (23 September 1997)

Article 20
"The Kingdom of Saudi Arabia does not recognize the jurisdiction of the Committee as provided for in article 20 of this Convention."

Article 30
"The Kingdom of Saudi Arabia shall not be bound by the provisions of article 30, paragraph 1, of this Convention."

SENEGAL

Declarations (16 October 1996)

Article 21
"The Government of the Republic of Senegal declares, in accordance with article 21, paragraph 1, of the Convention that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"The Government of the Republic of Senegal declares, in accordance with article 22, paragraph 1, of the Convention that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

SERBIA

Declarations (12 March 2001)

Article 21
"Yugoslavia recognizes, in compliance with article 21, paragraph 1 of the Convention, the competence of the Committee against Torture to receive and consider communications in which one State Party to the Convention claims that another State Party does not fulfil the obligations pursuant to the Convention"

Article 22
"Yugoslavia recognizes, in conformity with article 22, paragraph 1 of the Convention, the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

SEYCHELLES

Declaration (6 August 2001)

Article 22
"The Republic of Seychelles accepts without reservations the competence of the Committee against Torture."

SLOVAKIA

Reservation upon ratification by Czechoslovakia (7 July 1988)

[Article 30
"The Czechoslovak Socialist Republic does not consider itself bound, in accordance with Article 30, paragraph 2, by the provisions of Article 30, paragraph 1, of the Convention."] withdrawn by Czechoslovakia on 26 April 1991

Reservation upon ratification by Czechoslovakia (7 July 1988) then confirmed upon succession by Slovakia (28 May 1993)

[Article 20
"The Czechoslovak Socialist Republic does not recognize the competence of the Committee against Torture as defined by article 20 of the Convention."] withdrawn by Slovakia on 17 March 1995

Declarations (17 March 1995)

Article 21
"The Slovak Republic, pursuant to article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"The Slovak Republic further declares, pursuant to article 22 of the Convention, that it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

SLOVENIA

Declarations upon accession (16 July 1993)

Article 21

"1. The Republic of Slovenia declares that it recognizes the competence of the Committee against Torture, pursuant to article 21 of the said Convention, to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22

"2. The Republic of Slovenia also declares that it recognizes the competence of the Committee against Torture, pursuant to article 22 of the said Convention, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

SOUTH AFRICA

Declarations upon ratification (10 December 1998)

Articles 21 and 22
"The Republic of South Africa declares that:

(a) it recognises, for the purposes of article 21 of the Convention, the competence of the Committee Against Torture to receive and consider communications that a State Party claims that another State Party is not fulfilling its obligations under the Convention;
(b) it recognises, for the purposes of article 22 of the Convention, the competence of the Committee Against Torture to receive and consider communications from, or on behalf of individuals who claim to be victims of torture by a State Party."

Article 30
"[The Republic of South Africa declares that] it recognises, for the purposes of article 30 of the Convention, the competence of the International Court of Justice to settle a dispute between two or more State Parties regarding the interpretation or application of the Convention, respectively."

SPAIN

Declarations upon ratification (21 October 1987)

Article 21
"Spain declares that, pursuant to article 21, paragraph 1, of the Convention, it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that the Spanish State is not fulfilling its obligations under this Convention. It is Spain's understanding that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration."

Article 22
"Spain declares that, pursuant to article 22, paragraph l, of the Convention, it recognizes the competence of the Committee to receive and consider communications sent by, or on behalf of, persons subject to Spanish jurisdiction who claim to be victims of a violation by the Spanish State of the

provisions of the Convention. Such communications must be consistent with the provisions of the above-mentioned article and, in particular, of its paragraph 5."

SRI LANKA

Declaration (16 August 2016)

Article 22
"The Government of the Democratic Socialist Republic of Sri Lanka declares, pursuant to Article 22 of the Convention against Torture, that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by Sri Lanka of the provisions of the Convention."

SWEDEN

Declarations upon ratification (8 January 1986)

Article 21
"Sweden recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"Sweden recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

SWITZERLAND

Declarations upon ratification (2 December 1986)

Article 21

"(a) Pursuant to the Federal Decree of 6 October 1986 on the approval of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Federal Council declares, in accordance with article 21, paragraph 1, of the Convention, that Switzerland recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that Switzerland is not fulfilling its obligations under this Convention."

Article 22

"(b) Pursuant to the above-mentioned Federal Decree, the Federal Council declares, in accordance with article 22, paragraph 1, of the Convention, that Switzerland recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by Switzerland of the provisions of the Convention."

SYRIAN ARABIC REPUBLIC

Declaration upon accession (19 August 2004)

Article 20

"In accordance with the provisions of article 28, paragraph 1, of the Convention, the Syrian Arab Republic does not recognize the competence of the Committee against Torture provided for in article 20 thereof; The accession of the Syrian Arab Republic to this Convention shall in no way signify recognition of Israel or entail entry into any dealings with Israel in the context of the provisions of this Convention."

THAILAND

Declarations upon accession (2 October 2007)

Article 1

"1. With respect to the term "torture" under Article 1 of the Convention, although there is neither a specific definition nor particular offence under the current Thai Penal Code corresponding to the term, there are comparable provisions under the aforesaid Thai Penal Code applicable to acts under Article 1 of the Convention. The term "torture" under Article 1 of the Convention shall accordingly be interpreted in conformity with the current Thai Penal Code.

The Kingdom of Thailand shall revise its domestic law to be more consistent with Article 1 of the Convention at the earliest opportunity."

Article 4

"2. For the same reason as stipulated in the preceding paragraph, Article 4 of the Convention which stipulates: 'Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture,' shall be interpreted in conformity with the current Thai Penal Code.

The Kingdom of Thailand shall revise its domestic law to be more consistent with Article 4 of the Convention at the earliest opportunity."

Article 5

"3. Article 5 of the Convention which provides: 'Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4....." is interpreted by the Kingdom of Thailand to mean that the jurisdiction referred to in Article 5 shall be established in accordance with the current Thai Penal Code.

The Kingdom of Thailand shall revise its domestic law to be more consistent with Article 5 of the Convention at the earliest opportunity."

Reservation upon accession (2 October 2007)

Article 30

"The Kingdom of Thailand does not consider itself bound by Article 30, paragraph 1, of the Convention."

Objection to certain declarations/reservations

Sweden (29 September 2008)

"The Government of Sweden recalls that the designation assigned to a statement does not determine whether or not it constitutes a reservation to a treaty. If the legal effect of certain provisions of a treaty is excluded or modified by an interpretative declaration, this in fact amounts to a reservation.

Since the application of a number of provisions of the Convention have been made subject to provisions of the Thai Penal Code it is unclear to what extent the Kingdom of Thailand considers itself bound by the obligations of the treaty. This in turn raises doubts as to the commitment of the Kingdom of Thailand to the object and purpose of the Convention. This applies in particular to the declaration made under Article 1 of the Convention which contains a clear and generally recognized definition of the concept of torture.

The Government of Sweden therefore objects to the aforesaid reservation made by the Kingdom of Thailand to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This objection shall not preclude the entry into force of the Convention between the Kingdom of Thailand and Sweden, without the Kingdom of Thailand benefiting from its reservation."

TOGO

Reservation upon signature (25 March 1987)
"The Government of the Togolese Republic reserves the right to formulate, upon ratifying the Convention, any reservations or declarations which it might consider necessary."

Declarations upon ratification (18 November 1987)

Article 21
"The Government of the Republic of Togo hereby declares, in accordance with article 21 of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention."

Article 22
"The Government of the Republic of Togo further declares, in accordance with article 22 of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

TUNISIA

Declaration upon signature (26 August 1987)

[*"The Government of Tunisia reserves the right to make at some later stage any reservation or declaration which it deems necessary, in particular with regard to articles 20 and 21 of the said Convention."*] withdrawn upon ratification on 23 September 1988

Declaration upon ratification (23 September 1988)

Articles 21 and 22
"[The Government of Tunisia] declares that it recognizes the competence of the Committee Against Torture provided for in article 17 of the Convention to receive communications pursuant

to articles 21 and 22, thereby withdrawing any reservation made on Tunisia's behalf in this connection."

TURKEY

Declarations upon ratification (2 August 1988)

Article 21
"The Government of Turkey declares, pursuant to article 21, paragraph 1, of the Convention that it recognizes the competence of the Committee Against Torture to receive and consider communications to the effect that a State Party is not fulfilling its obligations under the Convention."

Article 22
"The Government of Turkey declares, pursuant to article 22, paragraph 1, of the Convention that it recognizes the competence of the Committee Against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

Reservation upon ratification (2 August 1988)

Article 30
"The Government of Turkey declares in accordance with article 30, paragraph 2, of the Convention, that it does not consider itself bound by the provisions of paragraph 1 of this article."

UGANDA

Declaration (19 December 2001)

Article 21
"In accordance with Article 21 of the Convention, the Government of the Republic of Uganda declares that it recognizes the competence of the Committee against Torture to receive and consider communications submitted by another State party, provided that such other State Party has made a declaration under Article 21 recognizing the competence of the Committee to receive and consider communications in regard to itself."

UKRAINE

Reservations upon signature and confirmed upon ratification, Ukrainian Soviet Socialist Republic (27 February 1986)

[Article 20
"The Ukrainian Soviet Socialist Republic does not recognize the competence of the Committee against torture as defined by article 20 of the Convention."] withdrawn by Ukraine on 12 September 2003

[Article 30
"The Ukrainian Soviet Socialist Republic does not consider itself bound by the provisions of para. 1 article 30 of the Convention."] withdrawn by Ukrainian Soviet Socialist Republic on 20 April 1989

Declarations, Ukraine (12 September 2003)

Article 21
"Ukraine fully recognizes extension to its territory of Article 21 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as regards recognition

of the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.

Article 22
"Ukraine fully recognizes extension to its territory of Article 22 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as regards recognition of the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to jurisdiction of a State Party who claim to be victims of a violation by a State Party of the provisions of the Convention."

"Ukraine declares that the provisions of Articles 20, 21 and 22 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment shall extend to cases which may arise as from the date of receipt by the UN Secretary General of the notification concerning the withdrawal of reservations and relevant declarations of Ukraine."

UNITED ARAB EMIRATES

Reservations upon accession (19 July 2012)

Article 20
"In accordance with paragraph 1 of article 28 of the Convention, the United Arab Emirates declares that it does not recognize the competence of the Committee against Torture referred to in article 20 of the Convention."

Article 30
"In accordance with paragraph 2 of article 30 of the Convention, the United Arab Emirates does not consider itself bound by paragraph 1 of article 30 relating to arbitration in this Convention."

Declaration upon accession (19 July 2012)

Article 1
"The United Arab Emirates also confirms that the lawful sanctions applicable under national law, or pain or suffering arising from or associated with or incidental to these lawful sanctions, do not fall under the concept of "torture" defined in article 1 of this Convention or under the concept of cruel, inhuman or degrading treatment or punishment mentioned in this Convention."

Objections to certain declarations/reservations

Austria (31 January 2013)

With regard to the reservation made by the United Arab Emirates upon ratification:

"The Government of Austria has examined the reservation made by the United Arab Emirates upon accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Government of Austria considers that by the reference to national law regarding Art. 1 of the Convention the United Arab Emirates have made a reservation of general and indeterminate scope. This reservation does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention.

The Government of Austria therefore considers the reservation of the United Arab Emirates to Art. 1 incompatible with the object and purpose of the Convention and objects to it.

This objection shall not preclude the entry into force of the Convention between Austria and the United Arab Emirates."

Sweden (7 March 2013)

"The Government of Sweden has examined the declaration and reservations made by the United Arab Emirates at the time of its accession to the Convention.

The Government of Sweden recalls that the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by the United Arab Emirates in substance constitutes a reservation limiting the scope of the Convention.

The Government of Sweden notes that the reservation, according to which 'the lawful sanctions applicable under national law, or pain or suffering arising from or associated with or incidental to these lawful sanctions, do not fall under the concept of 'torture' defined in article 1 of this Convention or under the concept of cruel, inhuman or degrading treatment or punishment mentioned in this Convention', implies that the application of the Convention is made subject to a general reservation referring to existing legislation in the United Arab Emirates. The Government of Sweden is of the view that such a reservation, which does not clearly specify the extent of its scope, raises serious doubt as to the commitment of the United Arab Emirates to the object and purpose of the Convention.

According to customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation made by the United Arab Emirates to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and considers this reservation null and void. This objection shall not preclude the entry into force of the Convention between the United Arab Emirates and Sweden. The Convention enters into force between the United Arab Emirates and Sweden, without the United Arab Emirates benefiting from this reservation."

Switzerland (1 July 2013)

"The Swiss Federal Council has examined the reservations and the declaration made by the United Arab Emirates upon accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 10 December 1984. The Council believes that the declaration related to article 1 of the Convention, insofar as it refers to the national law of the United Arab Emirates, constitutes in substance a reservation of general scope, which does not specify the extent of the derogation and is therefore incompatible with the object and purpose of the Convention. Consequently, the Swiss Federal Council objects to the reservation. This objection shall not preclude the entry into force of the Convention between Switzerland and the United Arab Emirates."

Romania (2 July 2013)

"The Government of Romania has examined the declaration made by the United Arab Emirates which sustains that 'the lawful sanctions applicable under national law, or pain or suffering arising from or associated with or incidental to these lawful sanctions, do not fall under the concept of 'torture' defined in article 1 of this Convention or under the concept of cruel, inhuman or degrading treatment or punishment mentioned in this Convention' and regards this declaration as a disguised reservation. The reservation refers to the legislation in force in the United Arab Emirates as to the definition of torture and thus to the scope of the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Furthermore, if the intention of the United Arab Emirates is to subordinate the application of the Convention entirely to the provisions of its internal law as it results from the text of the

declaration, the reservation is contrary to the general rule (contained in article 27 VCLT) according to which a party may not invoke its internal law as justification for failure to perform a treaty. Thus, the reservation is inconsistent with the object and purpose of the treaty. Romania appreciates that the term 'lawful sanctions' under article 1, paragraph 1 of the Convention must not be subordinated only to domestic law but it incorporates also a standard of legality under international law.

For these reasons, the Government of Romania objects to the aforesaid reservation made by the United Arab Emirates to the Convention as being incompatible with its object and purpose even though the objection does not constitute an obstacle to the entry into force of the Convention between Romania and the United Arab Emirates. At the same time, the Government of Romania recommends the United Arab Emirates to reconsider its reservation and expresses the hope in its withdrawal."

Czech Republic (15 July 2013)

"The Government of the Czech Republic has examined the declaration and reservations made by the United Arab Emirates at the time of its accession to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Government of the Czech Republic considers that the declaration made by the United Arab Emirates in substance constitutes a reservation limiting the scope of the Convention. The Government of the Czech Republic is of the view that the reservation, according to which 'the lawful sanctions applicable under national law, or pain or suffering arising from or associated with or incidental to these lawful sanctions, do not fall under the concept of 'torture' defined in article 1 of this Convention or under the concept of cruel, inhuman or degrading treatment or punishment mentioned in this Convention' raises serious doubt as to the commitment of the United Arab Emirates to the object and purpose of the Convention. The Government of the Czech Republic therefore considers the aforesaid reservation incompatible with the object and purpose of the Convention and objects to it.

This objection shall not preclude the entry into force of the Convention between the United Arab Emirates and the Czech Republic. The Convention enters into force between the United Arab Emirates and the Czech Republic, without the United Arab Emirates benefiting from this reservation."

Netherlands (16 July 2013)

"The Government of the Kingdom of the Netherlands has carefully examined the reservations and the declaration made by the United Arab Emirates upon accession to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The Government of the Kingdom of the Netherlands considers that the declaration made by the United Arab Emirates regarding Article 1 of the Convention in substance constitutes a reservation limiting the scope of the Convention. The Government of the Kingdom of the Netherlands considers that with this reservation the application of the Convention is made subject to national legislation in force in the United Arab Emirates. The Government of the Kingdom of the Netherlands considers that reservations of this kind must be regarded as incompatible with the object and purpose of the Convention and would recall that, according to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. The Government of the Kingdom of the Netherlands therefore objects to the reservation of the United Arab Emirates to Article 1 of the Convention. This objection does not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the United Arab Emirates."

Poland (17 July 2013)

"The Government of the Republic of Poland has examined the reservation made by the United Arab Emirates upon accession to the Convention against Torture and Other Cruel. Inhuman or Degrading Treatment or Punishment adopted by General Assembly of the United Nations on 10 December 1984, with regard to Article 1 of the Convention.

The reservation made by the United Arab Emirates with regard to Article 1 of the Convention is of general nature and in view of the reference to national law does not allow to define the extent to which State Party making a reservation will be bound by the Convention's provisions. In consequence, according to Article 19(c) of the Vienna Convention of the Law of Treaties, which is a treaty and customary norm, the reservation shall not be permitted as incompatible with the object and purpose of the treaty.

Therefore, the Government of the Republic of Poland objects to the reservation made by the United Arab Emirates upon accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by General Assembly of the United Nations on 10 December 1984, with regard to Article 1.

This objection does not preclude the entry into force of the Convention between the Republic of Poland and the United Arab Emirates."

Ireland (18 July 2013)

"The Government of Ireland has examined the declaration contained in the instrument of accession to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, made by the United Arab Emirates on 19 July 2012.

The Government of Ireland is of the view that this declaration in substance constitutes a reservation limiting the scope of the Convention.

The Government of Ireland considers that a reservation which consists of a general reference to domestic laws of the reserving State and which does not clearly specify the extent of the reservation to the provisions of the Convention may cast doubts on the commitment of the reserving state to fulfil its obligations under the Convention.

The Government of Ireland is furthermore of the view that such a reservation may undermine the basis of international treaty law and is incompatible with the object and purpose of the Convention.

The Government of Ireland therefore objects to the aforesaid reservation made by the United Arab Emirates to Article 1 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

This objection shall not preclude the entry into force of the Convention between Ireland and the United Arab Emirates."

Portugal (19 July 2013)

"The Government of the Portuguese Republic has examined the declaration made by the United Arab Emirates upon accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984.

The Government of the Portuguese Republic considers that the declaration made by the United Arab Emirates, to Article 1, is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its object and purpose.

The reservation furthermore is not compatible with the terms of Article 2 of the Convention according to which each State Party shall take effective measures to prevent acts of torture in any territory under its jurisdiction.

The Government of the Portuguese Republic recalls that, according to Article 19 (c) of the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Portuguese Republic therefore objects to the aforesaid reservation made by the United Arab Emirates to Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984.

However, this objection shall not preclude the entry into force of the Convention between the Portuguese Republic and the United Arab Emirates."

Finland (22 July 2013)

"The Government of Finland has examined the contents of the declaration made by the Government of the United Arab Emirates to Article 1 to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and notes that the declaration constitutes a reservation as it seems to modify the obligations of the United Arab Emirates under the said article.

A reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may raise doubts as to the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

In its present formulation, the reservation to Article 1 is incompatible with the object and purpose of the Convention. According to Article 19, paragraph (c) of the Vienna Convention on the Law of the Treaties, such reservations shall not be permitted.

Therefore, the Government of Finland objects to the aforesaid reservation to Article 1 made by the Government of the United Arab Emirates. This objection does not preclude the entry into force of the Convention between Finland and the United Arab Emirates. The Convention will thus become operative between the two States without the United Arab Emirates benefitting from this reservation."

Germany (23 July 2013)

"The Government of the Federal Republic of Germany has carefully examined the declaration made by the United Arab Emirates upon its accession to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

The Government of the Federal Republic of Germany considers that the declaration, notwithstanding its designation, amounts to a reservation, which is meant to limit the scope of application of the Convention. The Government of the Federal Republic of Germany also considers that a reservation which subjects the application of the Convention to national laws on sanctions is of a general and indeterminate nature and raises doubts as to the extent of the commitment to fulfil obligations under the Convention. According to the opinion of the Government of the Federal Republic of Germany such a reservation is incompatible with the object and purpose of the Convention. The Government of the Federal Republic of Germany therefore objects to this reservation as being impermissible.

This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and the United Arab Emirates."

Belgium (23 July 2013)

"Belgium has examined the declaration formulated by the United Arab Emirates upon its accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Government of Belgium considers that, in referring to national law in connection with article 1 of the Convention, the United Arab Emirates has formulated a reservation of general, indeterminate scope that does not define clearly for the other States parties to the Convention the extent to which the State that formulated the reservation has accepted the obligations arising from the Convention. The

Government of Belgium considers that the reservation formulated by the United Arab Emirates concerning article 1 is incompatible with the object and purpose of the Convention.

Belgium recalls that, pursuant to article 19, paragraph (c), of the Vienna Convention on the Law of Treaties, a reservation may not be formulated when it is incompatible with the object and purpose of the treaty in question. Belgium therefore objects to the declaration, while specifying that this objection shall not preclude the entry into force of the Convention between the United Arab Emirates and Belgium."

Norway (24 July 2013)

"The Government of Norway is of the view that this declaration in substance constitutes a general reservation aimed at limiting the scope of the Convention with reference to national law, without identifying the provisions in question. It is the understanding of the Government of Norway that the term 'lawful sanctions' in article 1, paragraph 1 of the Convention must be understood as referring to sanctions which are lawful not only under national law but also under international law. The Government of Norway accordingly considers that the reservation casts serious doubts on the commitment of the United Arab Emirates to the object and purpose of the Convention and therefore objects to the said reservation.

This objection does not preclude the entry into force of the Convention between the Kingdom of Norway and the United Arab Emirates. The Convention thus becomes operative between the Kingdom of Norway and the United Arab Emirates without the United Arab Emirates benefiting from the aforesaid reservation."

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Declaration upon signature (15 March 1985)

"The United Kingdom reserves the right to formulate, upon ratifying the Convention, any reservations or interpretative declarations which it might consider necessary."

Declarations upon ratification (8 December 1988)

"The instrument of ratification specifies that the said Convention is ratified in respect of the United Kingdom of Great Britain and Northern Ireland, Anguilla, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, Saint Helena, Saint Helena Dependencies, Turks and Caicos Islands. "

Article 21
"The Government of the United Kingdom declares under article 21 of the said Convention that it recognizes the competence of the Committee Against Torture to receive and consider communications submitted by another State Party, provided that such other State Party has, not less than twelve months prior to the submission by it of a communication in regard to the United Kingdom, made a declaration under article 21 recognizing the competence of the Committee to receive and consider communications in regard to itself."

Declaration (9 December 1992)—Territorial application

"I have the honour to declare on behalf of the Government of the United Kingdom that its ratification of the Convention shall extend to the following territories: Bailiwick of Guernsey Bailiwick

of Jersey Isle of Man Bermuda Hong Kong This extension is subject to the same declaration under Article 21 of the Convention as accompanied the said ratification."

Objections to certain declarations/reservations

Argentina (14 April 1989)

"The Government of Argentina reaffirms its sovereignty over the Malvinas Islands, which form part of its national territory, and, with regard to the Malvinas Islands, formally objects to and rejects the declaration of territorial extension issued by the United Kingdom of Great Britain and Northern Ireland in the instrument of ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, deposited with the Secretary-General of the United Nations on 8 December 1988.

The General Assembly of the United Nations adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12 and 39/6 in which it recognizes the existence of a sovereignty dispute regarding the question of the Malvinas Islands and has repeatedly requested the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to resume negotiations in order to find as soon as possible a peaceful and definitive solution to the dispute and their remaining differences relating to that question, through the good offices of the Secretary-General. The General Assembly also adopted resolutions 40/21, 41/40, 42/19 and 43/25, which request the parties to initiate negotiations with a view to finding the means to resolve peacefully and definitively the problems pending between both countries, including all aspects on the future of the Malvinas Islands.

Subsequently, on 17 April 1991, the Secretary-General received from the Government of Argentina the following declaration:

The Argentine Government rejects the extension of the application of the [said] Convention to the Malvinas Islands, effected by the United Kingdom of Great Britain and Northern Ireland on 8 December 1988, and reaffirms the rights of sovereignty of the Argentine Republic over those Islands, which are an integral part of its national territory.

The Argentine Republic recalls that the United Nations General Assembly has adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19 and 43/25, in which it recognizes the existence of a sovereignty dispute and requests the Governments of the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to initiate negotiations with a view to finding the means to resolve peacefully and definitively the pending questions of sovereignty, in accordance with the Charter of the United Nations."

UNITED STATES OF AMERICA

Declaration upon signature (18 April 1988)

"The Government of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary."

Reservations, understandings and declarations upon ratification (21 October 1994)

Article 16 and 30

"I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and

inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to article 30 (2) the United States declares that it does not consider itself bound by Article 30 (1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:"

Articles 1 and 3

"II. The Senate's advice and consent is subject, to the following understandings, which shall apply to the obligations of the United States under this Convention: (1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to article 1 of the Convention, the Unites States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

(2) That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'

(3) That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments.

Accordingly, in implementing articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfilment of the Convention."

Article 1 to 16

"III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing."

Article 21

"The United States declares, pursuant to article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration."

Objections to certain declarations/reservations

Netherlands (26 February 1996)

"The Government of the Netherlands considers the reservation made by the United States of America regarding the article 16 of [the Convention] to be incompatible with the object and purpose of the Convention, to which the obligation laid down in article 16 is essential.

Moreover, it is not clear how the provisions of the Constitution of the United States of America relate to the obligations under the Convention. The Government of the Kingdom of the Netherlands therefore objects to the said reservation. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the United States of America.

The Government of the Kingdom of the Netherlands considers the following understandings to have no impact on the obligations of the United States of America under the Convention:

II. 1 a This understanding appears to restrict the scope of the definition of torture under article 1 of the Convention.

1 d This understanding diminishes the continuous responsibility of public officials for behaviour of their subordinates.

The Government of the Kingdom of the Netherlands reserves its position with regard to the understandings II. 1b, 1c and 2 as the contents thereof are insufficiently clear."

Finland (27 February 1996)

"A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfil its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle to treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.

The Government of Finland therefore objects to the reservation made by the United States to Article 16 of the Convention (cf. Reservation I. (1)). In this connection the Government of Finland would also like to refer to its objection to the reservation entered by the United States with

regard to article 7 of the International Covenant on Civil and Political Rights. It is also the view of the Government of Finland that the understandings expressed by the United States do not release the United States as a Party to the Convention from the responsibility to fulfil the obligations undertaken therein."

Sweden (27 February 1996)

"With regard to the reservations, understandings and declarations entered by the United States of America to the [above] Convention, the Government of Sweden would like to refer to its objections to the reservations entered by the United States of America with regard to article 7 of the International Covenant on Civil and Political Rights.

The same reasons for objection apply to the now entered reservation with regard to article 16 reservation I (1) of [the Convention]. The Government of Sweden therefore objects to that reservation.

It is the view of the Government of Sweden that the understandings expressed by the United States of America do not relieve the United States of America as a party to the Convention from the responsibility to fulfil the obligations undertaken therein."

Germany (26 February 1996)

"The Government of the Federal Republic of Germany has taken note of the reservations and understandings of the Government of the United States of America contained in the instrument of ratification of the [above] Convention, especially with regard to the reservation under I (1) and the understanding under II (2) and (3). It is the understanding of the Government of the Federal Republic of Germany that they do not touch upon the obligations of the United States of America as State Party to the Convention."

URUGUAY

Declaration (27 July 1988)

Articles 21 and 22
"The Government of Uruguay recognizes the competence of the Committee Against Torture to receive and consider communications referring to the said articles [21 and 22]."

VENEZUELA

Declaration (26 April 1994)

Articles 21 and 22
"The Government of the Republic of Venezuela recognizes the competence of the Committee against Torture as provided for under articles 21 and 22 of the Convention …"

VIET NAM

Declarations upon ratification (5 February 2015)

Articles 20 and 30
"The Socialist Republic of Viet Nam declares, in accordance with article 28 paragraph 1, that it does not recognize the competence of the Committee provided for in article 20, and in accordance with article 30, paragraph 2, that it does not consider itself bound by article 30, paragraph 1."

Article 4
"The Socialist Republic of Viet Nam does not consider the Convention as the direct legal basis for extradition in respect of the offences referred to in Article 4 of the Convention. Extradition shall be decided on the basis of extradition treaties to which Viet Nam is a party or the principle of reciprocity, and shall be in accordance with Vietnamese laws and regulations."

Objections to certain declarations/reservations

Poland (4 February 2016)

"The Government of the Republic of Poland has examined the declaration made by the Socialist Republic of Viet Nam upon ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in New York on December 10, 1984. The declaration meets the definition of a reservation laid out in the Vienna Convention on the Law of Treaties.

The Government of the Republic of Poland notes that the purpose and object of the Convention is to ensure an enhanced effectiveness of the protection from torture and other cruel or degrading treatment or punishment globally. To this end State-parties took it upon themselves to undertake legislative, administrative, judicial or other measures to prevent the use of torture.

The Government of the Republic of Poland notes that the reservation of the Socialist Republic of Viet Nam – to the extent it concerns not recognizing the Convention as a direct legal basis for extradition in relation to offences referred to in Article 4 – leads to an exemption of certain provisions of that treaty. The efficacy of Article 7, paragraph 1, and Article 8, paragraph 2, of the Convention will depend on the extradition treaties binding the Socialist Republic of Viet Nam or on the domestic authorities' decision regarding the principle of mutuality. Furthermore, the reservation may cause the avoidance of the obligation to supplement the catalogue of offences in the already-binding extradition treaties with the offence of use of torture as stipulated in Article 8, paragraph 1, of the Convention.

It is the opinion of the Government of the Republic of Poland that the reservation is incompatible with the object and purpose of the Convention in relation to the indicated provisions and as such is not permissible.

Therefore, the Government of the Republic of Poland objects to the reservation made by the Socialist Republic of Viet Nam to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in New York on December 10, I984.

This objection does not preclude the entry into force of the Convention between the Socialist Republic of Viet Nam and the Republic of Poland."

YUGOSLAVIA

Declarations upon ratification (10 September 1991)

Article 21
"Yugoslavia recognizes, in compliance with article 21, paragraph 1 of the Convention, the competence of the Committee against Torture to receive and consider communications in which one State Party to the Convention claims that another State Party does not fulfil the obligations pursuant to the Convention"

Article 22
"Yugoslavia recognizes, in conformity with article 22, paragraph 1 of the Convention, the competence of the Committee against Torture to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention."

Confirmation upon succession (12 March 2001)
"Confirmation upon succession of the declaration made by the Socialist Federal Republic of Yugoslavia."

ZAMBIA

Reservation upon accession (7 October 1998)

[Article 20
"With a reservation on article 20."] withdrawn on 19 February 1999

APPENDIX A.5
Rules of Procedure*

Contents

PART ONE. GENERAL RULES

I. SESSIONS

1. Meetings of the Committee
2. Regular sessions
3. Special sessions
4. Place of sessions
5. Notification of opening date of sessions

II. AGENDA

6. Provisional agenda for regular sessions
7. Provisional agenda for special sessions
8. Adoption of the agenda
9. Revision of the agenda
10. Transmission of the provisional agenda and basic documents

III. MEMBERS OF THE COMMITTEE

11. Members
12. Beginning of term of office
13. Filling of casual vacancies
14. Solemn declaration
15. Independence and impartiality of members

IV. OFFICERS

16. Elections
17. Term of office
18. Position of Chairperson in relation to the Committee
19. Acting Chairperson
20. Powers and duties of the Acting Chairperson
21. Replacement of officers

V. SECRETARIAT

22. Duties of the Secretary-General
23. Statements
24. Servicing of meetings
25. Keeping the members informed
26. Financial implications of proposals

* Adopted by the Committee at its first and second sessions and amended at its thirteenth, fifteenth, twenty-eighth, forty-fifth, and fiftieth sessions [CAT/C/3/Rev.6].

VI. LANGUAGES
27. Official and working languages
28. Interpretation from a working language
29. Interpretation from other languages
30. Languages of formal decisions and official documents
VII. PUBLIC AND PRIVATE MEETINGS
31. Public and private meetings
32. Issue of communiqués concerning private meetings
VIII. RECORDS
33. Correction of summary records
34. Distribution of summary records
IX. DISTRIBUTION OF REPORTS AND OTHER OFFICIAL DOCUMENTS OF THE COMMITTEE
35. Distribution of official documents
X. CONDUCT OF BUSINESS
36. Quorum
37. Powers of the Chairperson
38. Points of order
39. Time limit on statements
40. List of speakers
41. Suspension or adjournment of meetings
42. Adjournment of debate
43. Closure of debate
44. Order of motions
45. Submission of proposals
46. Decisions on competence
47. Withdrawal of motions
48. Reconsideration of proposals
XI. VOTING
49. Voting rights
50. Adoption of decisions
51. Equally divided votes
52. Method of voting
53. Roll-call votes
54. Conduct during voting and explanation of votes
55. Division of proposals
56. Order of voting on amendments
57. Order of voting on proposals
XII. ELECTIONS
58. Method of elections
59. Conduct of elections when only one elective place is to be filled
60. Conduct of elections when two or more elective places are to be filled
XIII. SUBSIDIARY BODIES
61. Establishment of subsidiary bodies

XIV. SUBCOMMITTEE ON PREVENTION
62. Meetings with the Subcommittee on Prevention
XV. INFORMATION AND DOCUMENTATION
63. Submission of information, documentation and written statements
XVI. ANNUAL REPORT OF THE COMMITTEE
64. Annual report

PART TWO RULES RELATING TO THE FUNCTIONS OF THE COMMITTEE
XVII. REPORTS FROM STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION
65. Submission of reports
66. List of issues submitted to a State party prior to receiving its report
67. Non-submission of reports
68. Attendance by States parties at examination of reports
69. Request for additional reports and information
70. Examination of report and dialogue with State party's representatives
71. Concluding observations by the Committee
72. Follow-up and Rapporteurs
73. Obligatory non-participation or non-presence of a member in the consideration of a report
XVIII. GENERAL COMMENTS OF THE COMMITTEE
74. General comments on the Convention
XIX. PROCEEDINGS UNDER ARTICLE 20 OF THE CONVENTION
75. Transmission of information to the Committee
76. Register of information submitted 77. Summary of the information
78. Confidentiality of documents and proceedings
79. Meetings
80. Issue of communiqués concerning closed meetings 25
81. Preliminary consideration of information by the Committee
82. Examination of the information
83. Documentation from United Nations bodies and specialized agencies
84. Establishment of an inquiry
85. Cooperation of the State party concerned
86. Visiting mission
87. Hearings in connection with the inquiry
88. Assistance during the inquiry
89. Transmission of findings, comments or suggestions
90. Summary account of the results of the proceedings
XX. PROCEDURE FOR THE CONSIDERATION OF COMMUNICATIONS RECEIVED UNDER ARTICLE 21 OF THE CONVENTION
91. Declarations by States parties
92. Notification by the States parties concerned
93. Register of communications
94. Information to the members of the Committee

95. Meetings
96. Issue of communiqués concerning closed meetings
97. Requirements for the consideration of communications
98. Good offices
99. Request for information
100. Attendance by the States parties concerned
101. Report of the Committee

XXI. PROCEDURE FOR THE CONSIDERATION OF COMMUNICATIONS RECEIVED UNDER ARTICLE 22 OF THE CONVENTION

A. General provisions
102. Declarations by States parties
103. Transmission of complaints
104. Registration of complaints; Rapporteur on new complaints and interim measures
105. Request for clarification or additional information
106. Summary of the information
107. Meetings and hearings
108. Issue of communiqués concerning closed meetings
109. Obligatory non-participation or non-presence of a member in the examination of a complaint
110. Optional non-participation of a member in the examination of a complaint

B. Procedure for determining admissibility of complaints
111. Method of dealing with complaints
112. Establishment of a working group and designation of special Rapporteurs for specific complaints
113. Conditions for admissibility of complaints
114. Interim measures
115. Additional information, clarifications and observations
116. Inadmissible complaints

C. Consideration of the merits
117. Method of dealing with admissible complaints; oral hearings
118. Findings of the Committee; decisions on the merits
119. Individual opinions
120. Follow-up procedure
121. Summaries in the Committee's annual report and inclusion of texts of final decisions

PART ONE. GENERAL RULES

I. Sessions

Rule 1
Meetings of the Committee

The Committee against Torture (hereinafter referred to as "the Committee") shall hold meetings as may be required for the satisfactory performance of its functions in accordance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Convention").

Rule 2
Regular sessions

1. The Committee shall normally hold two regular sessions each year.
2. Regular sessions of the Committee shall be convened at dates decided by the Committee in consultation with the Secretary-General of the United Nations (hereinafter referred to as "the Secretary-General"), taking into account the calendar of conferences as approved by the General Assembly.

Rule 3
Special sessions

1. Special sessions of the Committee shall be convened by decision of the Committee. When the Committee is not in session, the Chairperson may convene special sessions of the Committee in consultation with the other officers of the Committee. The Chairperson of the Committee shall also convene special sessions:
   (a) At the request of a majority of the members of the Committee;
   (b) At the request of a State party to the Convention.
2. Special sessions shall be convened as soon as possible at a date fixed by the Chairperson in consultation with the Secretary-General and with the other officers of the Committee, taking into account the calendar of conferences as approved by the General Assembly.

Rule 4
Place of sessions

Sessions of the Committee shall normally be held at the United Nations Office at Geneva. Another place for a session may be designated by the Committee in consultation with the Secretary-General, taking into account the relevant rules of the United Nations.

Rule 5
Notification of opening date of sessions

The Secretary-General shall notify the members of the Committee of the date and place of the first meeting of each session. Such notifications shall be sent, in the case of regular sessions, at least six weeks in advance, and in the case of a special session, at least three weeks in advance, of the first meeting.

II. Agenda

Rule 6
Provisional agenda for regular sessions

The provisional agenda of each regular session shall be prepared by the Secretary-General in consultation with the Chairperson of the Committee, in conformity with the relevant provisions of the Convention, and shall include:
(a) Any item decided upon by the Committee at a previous session;
(b) Any item proposed by the Chairperson of the Committee;

(c) Any item proposed by a State party to the Convention;
(d) Any item proposed by a member of the Committee;
(e) Any item proposed by the Secretary-General relating to his functions under the Convention or these Rules.

Rule 7
Provisional agenda for special sessions

The provisional agenda for a special session of the Committee shall consist only of those items which are proposed for consideration at that special session.

Rule 8
Adoption of the agenda

The first item on the provisional agenda of any session shall be the adoption of the agenda, except for the election of the officers when required under rule 16.

Rule 9
Revision of the agenda

During a session, the Committee may revise the agenda and may, as appropriate, defer or delete items; only urgent and important items may be added to the agenda.

Rule 10
Transmission of the provisional agenda and basic documents

The provisional agenda and basic documents relating to each item appearing thereon shall be transmitted to the members of the Committee by the Secretary-General as early as possible. The provisional agenda of a special session shall be transmitted to the members of the Committee by the Secretary-General simultaneously with the notification of the meeting under rule 5.

III. Members of the Committee

Rule 11
Members

Members of the Committee shall be the 10 experts elected in accordance with article 17 of the Convention.

Rule 12
Beginning of term of office

1. The term of office of the members of the Committee elected at the first election shall begin on 1 January 1988. The term of office of members elected at subsequent elections shall begin on the day after the date of expiry of the term of office of the members whom they replace.
2. The Chairperson, members of the Bureau and Rapporteurs may continue performing the duties assigned to them until one day before the first meeting of the Committee, composed of its new members, at which it elects its officers.

Rule 13
Filling of casual vacancies

1. If a member of the Committee dies or resigns or for any other cause can no longer perform his/her Committee duties, the Secretary-General shall immediately declare the seat of that member to be vacant and shall request the State party whose expert has ceased to function as a member of the Committee to appoint another expert from among its nationals within two months, if possible, to serve for the remainder of his/her predecessor's term.
2. The name and the curriculum vitae of the expert so appointed shall be transmitted by the Secretary-General to the States parties for their approval. The approval shall be considered given

unless half or more of the States parties respond negatively within six weeks after having been informed by the Secretary-General of the proposed appointment to fill the vacancy.

3. Except in the case of a vacancy arising from a member's death or disability, the Secretary-General shall act in accordance with the provisions of paragraphs 1 and 2 of the present rule only after receiving, from the member concerned, written notification of his/her decision to cease to function as a member of the Committee.

Rule 14

Solemn declaration

Before assuming his/her duties after his/her first election, each member of the Committee shall make the following solemn declaration in open Committee:

"I solemnly declare that I will perform my duties and exercise my powers as a member of the Committee against Torture honourably, faithfully, independently, impartially and conscientiously."

Rule 15

Independence and impartiality of members

1. The independence and impartiality of the members of the Committee are essential for the performance of their duties and requires that they serve in their personal capacity and shall neither seek nor accept instructions from anyone concerning the performance of their duties. Members are accountable only to the Committee and their own conscience.
2. In their duties under the Convention, members of the Committee shall maintain the highest standards of impartiality and integrity, and apply the standards of the Convention equally to all States and all individuals, without fear or favour and without discrimination of any kind.
3. The Addis Ababa guidelines on the independence and impartiality of members of the human rights treaty bodies are annexed to the present rules of procedure.[1] The guidelines are an important tool for the interpretation of the rules concerning the independence and impartiality of the members of the Committee.

IV. Officers

Rule 16

Elections

The Committee shall elect from among its members a Chairperson, three Vice-Chairpersons and a Rapporteur. In electing its officers, the Committee shall give consideration to equitable geographical distribution and appropriate gender balance and, to the extent possible, rotation among members.

Rule 17

Term of office

Subject to the provisions of rule 12 regarding the Chairperson, members of the Bureau and Rapporteurs, the officers of the Committee shall be elected for a term of two years. They shall be eligible for re-election. None of them, however, may hold office if he/she ceases to be a member of the Committee.

[1] In accordance with United Nations documentation regulations, a United Nations document already published cannot be reissued in a different document. Consequently, reference is made to the Addis Ababa guidelines contained in annex I to the report of the Chairs of the human rights treaty bodies on their twenty-fourth meeting (A/67/222).

Rule 18

Position of Chairperson in relation to the Committee

1. The Chairperson shall perform the functions conferred upon him/her by the Committee and by these rules of procedure. In exercising his/her functions as Chairperson, the Chairperson shall remain under the authority of the Committee.
2. Between sessions, at times when it is not possible or practical to convene a special session of the Committee in accordance with rule 3, the Chairperson is authorized to take action to promote compliance with the Convention on the Committee's behalf if he/she receives information which leads him/her to believe that it is necessary to do so. The Chairperson shall report on the action taken to the Committee at its following session at the latest.

Rule 19

Acting Chairperson

1. If during a session the Chairperson is unable to be present at a meeting or any part thereof, he/she shall designate one of the Vice-Chairpersons to act in his/her place.
2. In the event of the absence or temporary disability of the Chairperson, one of the Vice-Chairpersons shall serve as Chairperson, in the order of precedence determined by their seniority as members of the Committee; where they have the same seniority, the order of seniority in age shall be followed.
3. If the Chairperson ceases to be a member of the Committee in the period between sessions or is in any of the situations referred to in rule 21, the Acting Chairperson shall exercise this function until the beginning of the next ordinary or special session.

Rule 20

Powers and duties of the Acting Chairperson

A Vice-Chairperson acting as Chairperson shall have the same powers and duties as the Chairperson.

Rule 21

Replacement of officers

If any of the officers of the Committee ceases to serve or declares his/her inability to continue serving as a member of the Committee or for any reason is no longer able to act as an officer, a new officer shall be elected for the unexpired term of his/her predecessor.

V. Secretariat

Rule 22

Duties of the Secretary-General

1. Subject to the fulfilment of the financial obligations undertaken by States parties in accordance with article 18, paragraph 5, of the Convention, the secretariat of the Committee and of such subsidiary bodies as may be established by the Committee (hereinafter referred to as "the secretariat") shall be provided by the Secretary-General.
2. Subject to the fulfilment of the requirements referred to in paragraph 1 of the present rule, the Secretary-General shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the Convention.

Rule 23

Statements

The Secretary-General or his/her representative shall attend all meetings of the Committee. Subject to rule 37, he/she or his/her representative may make oral or written statements at meetings of the Committee or its subsidiary bodies.

Rule 24

Servicing of meetings

The Secretary-General shall be responsible for all the necessary arrangements for meetings of the Committee and its subsidiary bodies.

Rule 25

Keeping the members informed

The Secretary-General shall be responsible for keeping the members of the Committee informed of any questions which may be brought before it for consideration.

Rule 26

Financial implications of proposals

Before any proposal which involves expenditures is approved by the Committee or by any of its subsidiary bodies, the Secretary-General shall prepare and circulate to its members, as early as possible, an estimate of the cost involved in the proposal. It shall be the duty of the Chairperson to draw the attention of members to this estimate and to invite discussion on it when the proposal is considered by the Committee or by a subsidiary body.

VI. Languages

Rule 27

Official and working languages

Arabic, Chinese, English, French, Russian and Spanish shall be the official languages of the Committee and, to the extent possible, also its working languages, including for its summary records.

Rule 28

Interpretation from a working language

Speeches made in any of the working languages shall be interpreted into the other working languages.

Rule 29

Interpretation from other languages

Any speaker addressing the Committee and using a language other than one of the working languages shall normally provide for interpretation into one of the working languages. Interpretation into the other working languages by interpreters of the Secretariat may be based on the interpretation given in the first working language.

Rule 30

Languages of formal decisions and official documents

All formal decisions and official documents of the Committee shall be issued in the official languages.

VII. Public and private meetings

Rule 31

Public and private meetings

The meetings of the Committee and its subsidiary bodies shall be held in public, unless the Committee decides otherwise or it appears from the relevant provisions of the Convention that the meeting should be held in private.

Rule 32

Issue of communiqués concerning private meetings

At the close of each private meeting, the Committee or its subsidiary body may issue a communiqué, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee at its closed meetings.

VIII. Records

Rule 33

Correction of summary records

Summary records of the public and private meetings of the Committee and its subsidiary bodies shall be prepared by the Secretariat. They shall be distributed as soon as possible to the members of the Committee and to any others participating in the meetings. All such participants may, within three working days of the receipt of the records of the meetings, submit corrections to the Secretariat in the languages in which the records have been issued. Corrections to the records of the meetings shall be consolidated in a single corrigendum to be issued after the end of the session concerned. Any disagreement concerning such corrections shall be decided by the Chairperson of the Committee or the Chairperson of the subsidiary body to which the record relates or, in the case of continued disagreement, by decision of the Committee or of the subsidiary body.

Rule 34

Distribution of summary records

1. The summary records of public meetings shall be documents for general distribution.
2. The summary records of private meetings shall be distributed to the members of the Committee and to other participants in the meetings. They may be made available to others upon decision of the Committee at such time and under such conditions as the Committee may decide.

IX. Distribution of reports and other official documents of the Committee

Rule 35

Distribution of official documents

1. Without prejudice to the provisions of rule 34 and subject to paragraphs 2 and 3 of the present rule, reports, formal decisions and all other official documents of the Committee and its subsidiary bodies shall be documents for general distribution, unless the Committee decides otherwise.
2. Reports, formal decisions and other official documents of the Committee and its subsidiary bodies relating to articles 20, 21 and 22 of the Convention shall be distributed by the secretariat to all members of the Committee, to the States parties concerned and, as may be decided by the Committee, to members of its subsidiary bodies and to others concerned.
3. Reports and additional information submitted by States parties under article 19 of the Convention shall be documents for general distribution, unless the State party concerned requests otherwise.

X. Conduct of business

Rule 36

Quorum

Six members of the Committee shall constitute a quorum.

Rule 37
Powers of the Chairperson

The Chairperson shall declare the opening and closing of each meeting of the Committee, direct the discussion, ensure observance of these rules, accord the right to speak, put questions to the vote and announce decisions. The Chairperson, subject to these rules, shall have control over the proceedings of the Committee and over the maintenance of order at its meetings. The Chairperson may, in the course of the discussion of an item, propose to the Committee the limitation of the time to be allowed to speakers, the limitation of the number of times each speaker may speak on any question and the closure of the list of speakers. He/she shall rule on points of order. He/she shall also have the power to propose adjournment or closure of the debate or adjournment or suspension of a meeting.

Debate shall be confined to the question before the Committee, and the Chairperson may call a speaker to order if his/her remarks are not relevant to the subject under discussion.

Rule 38
Points of order

During the discussion of any matter, a member may, at any time, raise a point of order, and such a point of order shall immediately be decided upon by the Chairperson in accordance with the rules of procedure. Any appeal against the ruling of the Chairperson shall immediately be put to the vote, and the ruling of the Chairperson shall stand unless overruled by a majority of the members present. A member raising a point of order may not speak on the substance of the matter under discussion.

Rule 39
Time limit on statements

The Committee may limit the time allowed to each speaker on any question. When debate is limited and a speaker exceeds his/her allotted time, the Chairperson shall call him/her to order without delay.

Rule 40
List of speakers

During the course of a debate, the Chairperson may announce the list of speakers and, with the consent of the Committee, declare the list closed. The Chairperson may, however, accord the right of reply to any member or representative if a speech delivered after he/she has declared the list closed makes this desirable. When the debate on an item is concluded because there are no other speakers, the Chairperson shall declare the debate closed. Such closure shall have the same effect as closure by the consent of the Committee.

Rule 41
Suspension or adjournment of meetings

During the discussion of any matter, a member may move the suspension or the adjournment of the meeting. No discussion on such motions shall be permitted, and they shall immediately be put to the vote.

Rule 42
Adjournment of debate

During the discussion of any matter, a member may move the adjournment of the debate on the item under discussion. In addition to the proposer of the motion, one member may speak in favour of and one against the motion, after which the motion shall immediately be put to the vote.

Rule 43

Closure of debate

A member may, at any time, move the closure of the debate on the item under discussion, whether or not any other member has signified his/her wish to speak. Permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall immediately be put to the vote.

Rule 44

Order of motions

Subject to rule 38, the following motions shall have precedence in the following order over all other proposals or motions before the meeting:

(a) To suspend the meeting;
(b) To adjourn the meeting;
(c) To adjourn the debate on the item under discussion;
(d) For the closure of the debate on the item under discussion.

Rule 45

Submission of proposals

Unless otherwise decided by the Committee, proposals and substantive amendments or motions submitted by members shall be introduced in writing and handed to the secretariat, and their consideration shall, if so requested by any member, be deferred until the next meeting on a following day.

Rule 46

Decisions on competence

Subject to rule 44, any motion by a member calling for a decision on the competence of the Committee to adopt a proposal submitted to it shall be put to the vote immediately before a vote is taken on the proposal in question.

Rule 47

Withdrawal of motions

A motion may be withdrawn by the member who proposed it at any time before voting on it has commenced, provided that the motion has not been amended. A motion which has thus been withdrawn may be reintroduced by any member.

Rule 48

Reconsideration of proposals

When a proposal has been adopted or rejected, it may not be reconsidered at the same session unless the Committee so decides. Permission to speak on a motion to reconsider shall be accorded only to two speakers in favour of the motion and to two speakers opposing the motion, after which it shall be immediately put to the vote.

XI. Voting

Rule 49

Voting rights

Each member of the Committee shall have one vote.

Rule 50

Adoption of decisions

1. Decisions of the Committee shall be made by a majority vote of the members present.
2. Before voting, the Committee shall endeavour to reach its decisions by consensus, provided that the Convention and the rules of procedure are observed and that such efforts do not unduly delay the work of the Committee.

3. Bearing in mind the previous paragraph of this rule, the Chairperson at any meeting may, and at the request of any member shall, put a proposal or the adoption of a decision to a vote.

Rule 51

Equally divided votes

If a vote is equally divided on matters other than elections, the proposal shall be regarded as rejected.

Rule 52

Method of voting

Subject to rule 58, the Committee shall normally vote by show of hands, except that any member may request a roll-call, which shall then be taken in the alphabetical order of the names of the members of the Committee, beginning with the member whose name is drawn by lot by the Chairperson.

Rule 53

Roll-call votes

The vote of each member participating in any roll-call shall be inserted in the record.

Rule 54

Conduct during voting and explanation of votes

After the voting has commenced, there shall be no interruption of the voting except on a point of order by a member in connection with the actual conduct of the voting. Brief statements by members consisting solely of explanations of their votes may be permitted by the Chairperson before the voting has commenced or after the voting has been completed.

Rule 55

Division of proposals

Parts of a proposal shall be voted on separately if a member requests that the proposal be divided. Those parts of the proposal which have been approved shall then be put to the vote as a whole; if all the operative parts of a proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

Rule 56

Order of voting on amendments

1. When an amendment to a proposal is moved, the amendment shall be voted on first. When two or more amendments to a proposal are moved the Committee shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom, and so on, until all amendments have been put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon.
2. A motion is considered an amendment to a proposal if it merely adds to, deletes from or revises part of that proposal.

Rule 57

Order of voting on proposals

1. If two or more proposals relate to the same question, the Committee shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted.
2. The Committee may, after each vote on a proposal, decide whether to vote on the next proposal.
3. Any motions requiring that no decision be taken on the substance of such proposals shall, however, be considered as previous questions and shall be put to the vote before them.

XII. Elections

Rule 58
Method of elections

Elections shall be held by secret ballot, unless the Committee decides otherwise in the case of elections to fill a place for which there is only one candidate.

Rule 59
Conduct of elections when only one elective place is to be filled

1. When only one person or member is to be elected and no candidate obtains in the first ballot the majority required, a second ballot shall be taken, which shall be restricted to the two candidates who obtained the greatest number of votes.
2. If the second ballot is inconclusive and a majority vote of members present is required, a third ballot shall be taken in which votes may be cast for any eligible candidate.

If the third ballot is inconclusive, the next ballot shall be restricted to the two candidates who obtained the greatest number of votes in the third ballot and so on, with unrestricted and restricted ballots alternating, until a person or member is elected.

3. If the second ballot is inconclusive and a two-thirds majority is required, the balloting shall be continued until one candidate secures the necessary two-thirds majority. In the next three ballots, votes may be cast for any eligible candidate. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the two candidates who obtained the greatest number of votes in the third such unrestricted ballot, and the following three ballots shall be unrestricted, and so on until a person or member is elected.

Rule 60
Conduct of elections when two or more elective places are to be filled

When two or more elective places are to be filled at one time under the same conditions, those candidates obtaining in the first ballot the majority required shall be elected. If the number of candidates obtaining such majority is less than the number of persons or members to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled; provided that, after the third inconclusive ballot, votes may be cast for any eligible candidates. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the candidates who obtained the greatest number of votes in the third of the unrestricted ballots, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until all the places have been filled.

XIII. Subsidiary bodies

Rule 61
Establishment of subsidiary bodies

1. The Committee may, in accordance with the provisions of the Convention and subject to the provisions of rule 26, set up ad hoc subsidiary bodies as it deems necessary and define their composition and mandates.
2. Each subsidiary body shall elect its own officers and adopt its own rules of procedure. Failing such rules, the present rules of procedure shall apply mutatis mutandis.
3. The Committee may also appoint one or more of its members as Rapporteurs to perform such duties as mandated by the Committee.

XIV. Subcommittee on Prevention

Rule 62
Meetings with the Subcommittee on Prevention

In order to pursue its institutional cooperation with the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture, especially as established in articles 10, paragraph 3, 16, paragraphs 3 and 4, and 24, paragraph 2, of the Optional Protocol to the Convention, the Committee shall meet with the Subcommittee on Prevention, at least once a year, during the regular session they both hold simultaneously.

XV. Information and documentation

Rule 63
Submission of information, documentation and written statements

1. The Committee may invite the Secretariat, specialized agencies, United Nations bodies concerned, Special Procedures of the Human Rights Council, intergovernmental organizations, National Human Rights Institutions, non-governmental organizations, and other relevant civil society organizations, to submit to it information, documentation and written statements, as appropriate, relevant to the Committee's activities under the Convention.
2. The Committee may receive, at its discretion, any other information, documentation and written statements submitted to it, including from individuals and sources not mentioned in the previous paragraph of this rule.
3. The Committee shall determine, at its discretion, how such information, documentation and written statements are made available to the members of the Committee, including by devoting meeting time at its sessions for such information to be presented orally.
4. Information, documentation and written statements received by the Committee concerning article 19 of the Convention are made public through appropriate means and channels, including by posting on the Committee's web page. However, in exceptional cases, the Committee may consider, at its discretion, that information, documentation and written statements received are confidential and decide not to make them public. In these cases, the Committee will decide on how to use such information.

XVI. Annual report of the Committee

Rule 64
Annual report

The Committee shall submit an annual report on its activities under the Convention to the States parties and to the General Assembly of the United Nations, including a reference to the activities of the Subcommittee on Prevention, as they appear in the public annual report submitted by the Subcommittee to the Committee under article 16, paragraph 3, of the Optional Protocol.

PART TWO RULES RELATING TO THE FUNCTIONS OF THE COMMITTEE

XVII. Reports from States parties under article 19 of the Convention

Rule 65
Submission of reports

1. The States parties shall submit to the Committee, through the Secretary-General, reports on the measures they have taken to give effect to their undertakings under the Convention, within one year after the entry into force of the Convention for the State party concerned. Thereafter the

States parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Committee may consider the information contained in a recent report as covering information that should have been included in overdue reports. The Committee may recommend, at its discretion, that States parties consolidate their periodic reports.
3. The Committee may recommend, at its discretion, that States parties present their periodic reports by a specified date.
4. The Committee may, through the Secretary-General, inform the States parties of its wishes regarding the form and contents as well as the methodology for consideration of the reports to be submitted under article 19 of the Convention, and issue guidelines to that effect.

Rule 66

List of issues submitted to a State party prior to receiving its report

The Committee may submit to a State party a list of issues prior to receiving its report. If the State party agrees to report under this optional reporting procedure, its response to this list of issues shall constitute, for the respective period, its report under article 19 of the Convention.

Rule 67

Non-submission of reports

1. At each session, the Secretary-General shall notify the Committee of all cases of non-submission of reports under rules 65 and 69. In such cases the Committee may transmit to the State party concerned, through the Secretary-General, a reminder concerning the submission of such report or reports.
2. If, after the reminder referred to in paragraph 1 of this rule, the State party does not submit the report required under rules 65 and 69, the Committee shall so state in the annual report which it submits to the States parties and to the General Assembly of the United Nations.
3. The Committee may notify the defaulting State party through the Secretary-General that it intends, on a date specified in the notification, to examine the measures taken by the State party to protect or give effect to the rights recognized in the Convention in the absence of a report, and adopt concluding observations.

Rule 68

Attendance by States parties at examination of reports

1. The Committee shall, through the Secretary-General, notify the States parties, as early as possible, of the opening date, duration and place of the session at which their respective reports will be examined. Representatives of the States parties shall be invited to attend the meetings of the Committee when their reports are examined. The Committee may also inform a State party from which it decides to seek further information that it may authorize its representative to be present at a specified meeting. Such a representative should be able to answer questions which may be put to him/her by the Committee and make statements on reports already submitted by his/her State, and may also submit additional information from his/her State.
2. If a State party has submitted a report under article 19, paragraph (1), of the Convention but fails to send a representative, in accordance with paragraph 1 of this rule, to the session at which it has been notified that its report will be examined, the Committee may, at its discretion, take one of the following courses:
   (a) Notify the State party through the Secretary-General that, at a specified session, it intends to examine the report and thereafter act in accordance with rules 68, paragraph 1, and 71; or
   (b) Proceed at the session originally specified to examine the report and thereafter adopt and submit to the State party provisional concluding observations for its written comments. The Committee shall adopt final concluding observations at its following session.

Rule 69

Request for additional reports and information

1. When considering a report submitted by a State party under article 19 of the Convention, the Committee shall first determine whether the report provides all the information required under rule 65.
2. If a report of a State party to the Convention, in the opinion of the Committee, does not contain sufficient information or the information provided is outdated, the Committee may request, through a list of issues to be sent to the State party, that it furnish an additional report or specific information, indicating by what date the said report or information should be submitted.

Rule 70

Examination of report and dialogue with State party's representatives

1. The Committee may establish, as appropriate, country Rapporteurs or any other methods of expediting its functions under article 19 of the Convention.
2. During the examination of the report of the State party, the Committee shall organize the meeting as it deems appropriate, in order to establish an interactive dialogue between the Committee's members and the State party's representatives.

Rule 71

Concluding observations by the Committee

1. After its consideration of each report, the Committee, in accordance with article 19, paragraph 3, of the Convention, may make such general comments, concluding observations, or recommendations on the report as it may consider appropriate and shall forward these, through the Secretary-General, to the State party concerned, which in reply may submit to the Committee any comment that it considers appropriate.
2. The Committee may, in particular, indicate whether, on the basis of its examination of the report and information supplied by the State party, it appears that some of its obligations under the Convention have not been discharged or that it did not provide sufficient information and, therefore, request the State party to provide the Committee with additional follow-up information by a specified date.
3. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 1 of this rule, together with any observations thereon received from the State party concerned, in its annual report made in accordance with article 24 of the Convention. If so requested by the State party concerned, the Committee may also include a copy of the report submitted under article 19, paragraph 1, of the Convention.

Rule 72

Follow-up and Rapporteurs

1. In order to further the implementation of the Committee's concluding observations, including the information to be provided by the State party under rule 71, paragraph 2, the Committee may designate at least one Rapporteur to follow-up with the State party on its implementation of a number of recommendations identified by the Committee in its concluding observations.
2. The follow-up Rapporteur(s) shall assess the information provided by the State party in consultation with the country Rapporteurs and report at every session to the Committee on his/her activities. The committee may set guidelines for such assessment.

Rule 73

Obligatory non-participation or non-presence of a member in the consideration of a report

1. A member shall not take part in the consideration of a report by the Committee or its subsidiary bodies if he/she is a national of the State party concerned, is employed by that State, or if any other conflict of interest is present.

2. Such a member shall not be present during any non-public consultations or meetings between the Committee and National Human Rights Institutions, non-governmental organizations, or any other entities referred to in rule 63, as well as during the discussion and adoption of the respective concluding observations.

XVIII. General comments of the Committee

Rule 74
General comments on the Convention

1. The Committee may prepare and adopt general comments on the provisions of the Convention with a view to promoting its further implementation or to assisting States parties in fulfilling their obligations.
2. The Committee shall include such general comments in its annual report to the General Assembly.

XIX. Proceedings under article 20 of the Convention

Rule 75
Transmission of information to the Committee

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, information which is, or appears to be, submitted for the Committee's consideration under article 20, paragraph 1, of the Convention.
2. No information shall be received by the Committee if it concerns a State party which, in accordance with article 28, paragraph 1, of the Convention, declared at the time of ratification of or accession to the Convention that it did not recognize the competence of the Committee provided for in article 20, unless that State has subsequently withdrawn its reservation in accordance with article 28, paragraph 2, of the Convention.

Rule 76
Register of information submitted

The Secretary-General shall maintain a permanent register of information brought to the attention of the Committee in accordance with rule 75 and shall make the information available to any member of the Committee upon request.

Rule 77
Summary of the information

The Secretary-General, when necessary, shall prepare and circulate to the members of the Committee a brief summary of the information submitted in accordance with rule 75.

Rule 78
Confidentiality of documents and proceedings

All documents and proceedings of the Committee relating to its functions under article 20 of the Convention shall be confidential, until such time when the Committee decides, in accordance with the provisions of article 20, paragraph 5, of the Convention, to make them public.

Rule 79
Meetings

1. Meetings of the Committee concerning its proceedings under article 20 of the Convention shall be closed. A member shall neither take part in nor be present at any proceedings under article 20 of the Convention if he/she is a national of the State party concerned, is employed by that State, or if any other conflict of interest is present.

2. Meetings during which the Committee considers general issues, such as procedures for the application of article 20 of the Convention, shall be public, unless the Committee decides otherwise.

Rule 80

Issue of communiqués concerning closed meetings

The Committee may decide to issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding its activities under article 20 of the Convention.

Rule 81

Preliminary consideration of information by the Committee

1. The Committee, when necessary, may ascertain, through the Secretary-General, the reliability of the information and/or of the sources of the information brought to its attention under article 20 of the Convention or obtain additional relevant information substantiating the facts of the situation.
2. The Committee shall determine whether it appears to it that the information received contains well-founded indications that torture, as defined in article 1 of the Convention, is being systematically practised in the territory of the State party concerned.

Rule 82

Examination of the information

1. If it appears to the Committee that the information received is reliable and contains well-founded indications that torture is being systematically practised in the territory of a State party, the Committee shall invite the State party concerned, through the Secretary-General, to cooperate in its examination of the information and, to this end, to submit observations with regard to that information.
2. The Committee shall indicate a time limit for the submission of observations by the State party concerned, with a view to avoiding undue delay in its proceedings.
3. In examining the information received, the Committee shall take into account any observations which may have been submitted by the State party concerned, as well as any other relevant information available to it.
4. The Committee may decide, if it deems it appropriate, to obtain additional information or answers to questions relating to the information under examination from different sources, including the representatives of the State party concerned, governmental and non-governmental organizations, as well as individuals.
5. The Committee shall decide, on its initiative and on the basis of its rules of procedure, the form and manner in which such additional information may be obtained.

Rule 83

Documentation from United Nations bodies and specialized agencies

The Committee may at any time obtain, through the Secretary-General, any relevant documentation from United Nations bodies or specialized agencies that may assist it in the examination of the information received under article 20 of the Convention.

Rule 84

Establishment of an inquiry

1. The Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to it within a time limit which may be set by the Committee.
2. When the Committee decides to make an inquiry in accordance with paragraph 1 of this rule, it shall establish the modalities of the inquiry as it deems it appropriate.

3. The members designated by the Committee for the confidential inquiry shall determine their own methods of work in conformity with the provisions of the Convention and the rules of procedure of the Committee.
4. While the confidential inquiry is in progress, the Committee may defer the consideration of any report the State party may have submitted during this period in accordance with article 19, paragraph 1, of the Convention.

Rule 85

Cooperation of the State party concerned

The Committee shall invite the State party concerned, through the Secretary-General, to cooperate with it in the conduct of the inquiry. To this end, the Committee may request the State party concerned:

(a) To designate an accredited representative to meet with the members designated by the Committee;
(b) To provide its designated members with any information that they, or the State party, may consider useful for ascertaining the facts relating to the inquiry;
(c) To indicate any other form of cooperation that the State may wish to extend to the Committee and to its designated members with a view to facilitating the conduct of the inquiry.

Rule 86

Visiting mission

If the Committee deems it necessary to include in its inquiry a visit of one or more of its members to the territory of the State party concerned, it shall request, through the Secretary-General, the agreement of that State party and shall inform the State party of its wishes regarding the timing of the mission and the facilities required to allow the designated members of the Committee to carry out their task.

Rule 87

Hearings in connection with the inquiry

1. The designated members may decide to conduct hearings in connection with the inquiry as they deem it appropriate.
2. The designated members shall establish, in cooperation with the State party concerned, the conditions and guarantees required for conducting such hearings. They shall request the State party to ensure that no obstacles are placed in the way of witnesses and other individuals wishing to meet with the designated members of the Committee and that no retaliatory measure is taken against those individuals or their families.
3. Every person appearing before the designated members for the purpose of giving testimony shall be requested to take an oath or make a solemn declaration concerning the veracity of his/her testimony and respect for the confidentiality of the proceedings.

Rule 88

Assistance during the inquiry

1. In addition to the staff and facilities to be provided by the Secretary-General in connection with the inquiry and/or the visiting mission to the territory of the State party concerned, the designated members may invite, through the Secretary-General, persons with special competence in the medical field or in the treatment of prisoners as well as interpreters to provide assistance at all stages of the inquiry.
2. If the persons providing assistance during the inquiry are not bound by an oath of office to the United Nations, they shall be required to declare solemnly that they will perform their duties honestly, faithfully and impartially, and that they will respect the confidentiality of the proceedings.

3. The persons referred to in paragraphs 1 and 2 of the present rule shall be entitled to the same facilities, privileges and immunities provided for in respect of the members of the Committee, under article 23 of the Convention.

Rule 89

Transmission of findings, comments or suggestions

1. After examining the findings of its designated members submitted to it in accordance with rule 84, paragraph 1, the Committee shall transmit, through the Secretary-General, these findings to the State party concerned, together with any comments or suggestions that it deems appropriate.
2. The State party concerned shall be invited to inform the Committee within a reasonable delay of the action it takes with regard to the Committee's findings and in response to the Committee's comments or suggestions.

Rule 90

Summary account of the results of the proceedings

1. After all the proceedings of the Committee regarding an inquiry made under article 20 of the Convention have been completed, the Committee may decide, after consultations with the State party concerned, to include a summary account of the results of the proceedings in its annual report made in accordance with article 24 of the Convention.
2. The Committee shall invite the State party concerned, through the Secretary-General, to inform the Committee directly or through its designated representative of its observations concerning the question of a possible publication, and may indicate a time limit within which the observations of the State party should be communicated to the Committee.
3. If it decides to include a summary account of the results of the proceedings relating to an inquiry in its annual report, the Committee shall forward, through the Secretary-General, the text of the summary account to the State party concerned.

XX. Procedure for the consideration of communications received under article 21 of the Convention

Rule 91

Declarations by States parties

1. The Secretary-General shall transmit to the other States parties copies of the declarations deposited with him/her by States parties recognizing the competence of the Committee, in accordance with article 21 of the Convention.
2. The withdrawal of a declaration made under article 21 of the Convention shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under that article; no further communication by any State party shall be received under that article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State party has made a new declaration.

Rule 92

Notification by the States parties concerned

1. A communication under article 21 of the Convention may be referred to the Committee by either State party concerned by notice given in accordance with paragraph 1 (b) of that article.
2. The notice referred to in paragraph 1 of this rule shall contain or be accompanied by information regarding:
   (a) Steps taken to seek adjustment of the matter in accordance with article 21, paragraphs 1 (a) and (b), of the Convention, including the text of the initial communication and of any subsequent written explanations or statements by the States parties concerned which are pertinent to the matter;

(b) Steps taken to exhaust domestic remedies;
(c) Any other procedure of international investigation or settlement resorted to by the States parties concerned.

Rule 93

Register of communications

The Secretary-General shall maintain a permanent register of all communications received by the Committee under article 21 of the Convention.

Rule 94

Information to the members of the Committee

The Secretary-General shall inform the members of the Committee without delay of any notice given under rule 92 and shall transmit to them as soon as possible copies of the notice and relevant information.

Rule 95

Meetings

The Committee shall examine communications under article 21 of the Convention at closed meetings.

Rule 96

Issue of communiqués concerning closed meetings

The Committee may, after consultation with the States parties concerned, issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee under article 21 of the Convention.

Rule 97

Requirements for the consideration of communications

A communication shall not be considered by the Committee unless:
(a) Both States parties concerned have made declarations under article 21, paragraph 1, of the Convention;
(b) The time limit prescribed in article 21, paragraph 1 (b), of the Convention has expired;
(c) The Committee has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law, or that the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of the Convention.

Rule 98

Good offices

1. Subject to the provisions of rule 97, the Committee shall proceed to make its good offices available to the States parties concerned with a view to an amicable solution of the matter on the basis of respect for the obligations provided for in the Convention.
2. For the purpose indicated in paragraph 1 of this rule, the Committee may, when appropriate, set up an ad hoc conciliation commission.

Rule 99

Request for information

The Committee may, through the Secretary-General, request the States parties concerned or either of them to submit additional information or observations orally or in writing. The Committee shall indicate a time limit for the submission of such written information or observations.

Rule 100

Attendance by the States parties concerned

1. The States parties concerned shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.
2. The Committee shall, through the Secretary-General, notify the States parties concerned as early as possible of the opening date, duration and place of the session at which the matter will be examined.
3. The procedure for making oral and/or written submissions shall be decided by the Committee, after consultation with the States parties concerned.

Rule 101

Report of the Committee

1. Within 12 months after the date on which the Committee received the notice referred to in rule 92, the Committee shall adopt a report in accordance with article 21, paragraph 1 (h), of the Convention.
2. The provisions of paragraph 1 of rule 100 shall not apply to the deliberations of the Committee concerning the adoption of the report.
3. The Committee's report shall be communicated, through the Secretary-General, to the States parties concerned.

XXI. Procedure for the consideration of communications received under article 22 of the Convention

A. General provisions

Rule 102

Declarations by States parties

1. The Secretary-General shall transmit to the other States parties copies of the declarations deposited with him/her by States parties recognizing the competence of the Committee, in accordance with article 22 of the Convention.
2. The withdrawal of a declaration made under article 22 of the Convention shall not prejudice the consideration of any matter which is the subject of a complaint already transmitted under that article; no further complaint by or on behalf of an individual shall be received under that article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State party has made a new declaration.

Rule 103

Transmission of complaints

1. The Secretary-General shall bring to the attention of the Committee, in accordance with the present rules, complaints which are or appear to be submitted for consideration by the Committee under paragraph 1 of article 22 of the Convention.
2. The Secretary-General, when necessary, may request clarification from the complainant of a complaint as to his/her wish to have his/her complaint submitted to the Committee for consideration under article 22 of the Convention. In case there is still doubt as to the wish of the complainant, the Committee shall be seized of the complaint.

Rule 104

Registration of complaints; Rapporteur on new complaints and interim measures

1. Complaints may be registered by the Secretary-General or by decision of the Committee or by the Rapporteur on new complaints and interim measures.
2. No complaint shall be registered by the Secretary-General if:
   (a) It concerns a State which has not made the declaration provided for in article 22, paragraph 1, of the Convention; or

(b) It is anonymous; or
(c) It is not submitted in writing by the alleged victim or by close relatives of the alleged victim on his/her behalf or by a representative with appropriate written authorization.

3. The Secretary-General shall prepare lists of the complaints brought to the attention of the Committee in accordance with rule 103 with a brief summary of their contents, and shall circulate such lists to the members of the Committee at regular intervals. The Secretary-General shall also maintain a permanent register of all such complaints.
4. An original case file shall be kept for each summarized complaint. The full text of any complaint brought to the attention of the Committee shall be made available to any member of the Committee upon his/her request.

Rule 105

Request for clarification or additional information

1. The Secretary-General or the Rapporteur on new complaints and interim measures may request clarification from the complainant concerning the applicability of article 22 of the Convention to his/her complaint, in particular regarding:
   (a) The name, address, age and occupation of the complainant and the verification of his/her identity;
   (b) The name of the State party against which the complaint is directed;
   (c) The object of the complaint;
   (d) The provision or provisions of the Convention alleged to have been violated;
   (e) The facts of the claim;
   (f) Steps taken by the complainant to exhaust domestic remedies;
   (g) Whether the same matter is being, or has been, examined under another procedure of international investigation or settlement.
2. When requesting clarification or information, the Secretary-General shall indicate an appropriate time limit to the complainant of the complaint with a view to avoiding undue delays in the procedure under article 22 of the Convention. Such time limit may be extended in appropriate circumstances.
3. The Committee may approve a questionnaire for the purpose of requesting the above-mentioned information from the complainant.
4. The request for clarification referred to in paragraph 1 (c)-(g) of the present rule shall not preclude the inclusion of the complaint in the list provided for in rule 104, paragraph 3.
5. The Secretary-General shall instruct the complainant on the procedure that will be followed and inform him/her that the text of the complaint shall be transmitted confidentially to the State party concerned in accordance with article 22, paragraph 3, of the Convention.

Rule 106

Summary of the information

For each registered complaint the Secretary-General shall prepare and circulate to the members of the Committee a summary of the relevant information obtained.

Rule 107

Meetings and hearings

1. Meetings of the Committee or its subsidiary bodies during which complaints under article 22 of the Convention will be examined shall be closed.
2. Meetings during which the Committee may consider general issues, such as procedures for the application of article 22 of the Convention, may be public if the Committee so decides.

Rule 108

Issue of communiqués concerning closed meetings

The Committee may issue communiqués, through the Secretary-General, for the use of the information media and the general public regarding the activities of the Committee under article 22 of the Convention.

Rule 109

Obligatory non-participation or non-presence of a member in the examination of a complaint

1. A member shall not take part in the examination of a complaint by the Committee or its subsidiary body if he/she:
   (a) Has any personal interest in the case or if any other conflict of interest is present; or
   (b) Has participated in any capacity, other than as a member of the Committee, in the making of any decision; or
   (c) Is a national of the State party concerned or is employed by that country.
2. Such member shall not be present during any non-public consultations or meetings of the Committee, as well as during any discussion, consideration or adoption related to that complaint.
3. Any question which may arise under paragraphs 1 and 2 above shall be decided by the Committee without the participation of the member concerned.

Rule 110

Optional non-participation of a member in the examination of a complaint

If, for any reason, a member considers that he/she should not take part or continue to take part in the examination of a complaint, he/she shall inform the Chairperson of his/her withdrawal.

B. Procedure for determining admissibility of complaints

Rule 111

Method of dealing with complaints

1. In accordance with the following rules, the Committee shall decide by simple majority as soon as practicable whether or not a complaint is admissible under article 22 of the Convention.
2. The Working Group established under rule 112, paragraph 1, may also declare a complaint admissible by majority vote or inadmissible by unanimity.
3. The Committee, the Working Group established under rule 112, paragraph 1, or the Rapporteur(s) designated under rule 112, paragraph 3, shall, unless they decide otherwise, deal with complaints in the order in which they are received by the secretariat.
4. The Committee may, if it deems it appropriate, decide to consider two or more communications jointly.
5. The Committee may, if it deems appropriate, decide to sever consideration of complaints of multiple complainants. Severed complaints may receive a separate registry number.

Rule 112

Establishment of a working group and designation of special Rapporteurs for specific complaints

1. The Committee may, in accordance with rule 61, set up a working group to meet shortly before its sessions, or at any other convenient time to be decided by the Committee, in consultation with the Secretary-General, for the purpose of taking decisions on admissibility or inadmissibility and making recommendations to the Committee regarding the merits of complaints, and assisting the Committee in any manner which the Committee may decide.
2. The Working Group shall comprise no less than three and no more than five members of the Committee. The Working Group shall elect its own officers, develop its own working methods,

and apply as far as possible the rules of procedure of the Committee to its meetings. The members of the Working Group shall be elected by the Committee every other session.

3. The Working Group may designate Rapporteurs from among its members to deal with specific complaints.

Rule 113

Conditions for admissibility of complaints

With a view to reaching a decision on the admissibility of a complaint, the Committee, its Working Group or a Rapporteur designated under rules 104 or 112, paragraph 3, shall ascertain:

(a) That the individual claims to be a victim of a violation by the State party concerned of the provisions of the Convention. The complaint should be submitted by the individual himself/herself or by his/her relatives or designated representatives, or by others on behalf of an alleged victim when it appears that the victim is unable personally to submit the complaint, and, when appropriate authorization is submitted to the Committee;

(b) That the complaint is not an abuse of the Committee's process or manifestly unfounded;

(c) That the complaint is not incompatible with the provisions of the Convention;

(d) That the same matter has not been and is not being examined under another procedure of international investigation or settlement;

(e) That the individual has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(f) That the time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State party.

Rule 114

Interim measures

1. At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations.
2. Where the Committee, the Working Group, or Rapporteur(s) request(s) interim measures under this rule, the request shall not imply a determination of the admissibility or the merits of the complaint. The State party shall be so informed upon transmittal.
3. The decision to grant interim measures may be adopted on the basis of information contained in the complainant's submission. It may be reviewed, at the initiative of the State party, in the light of timely information received from that State party to the effect that the submission is not justified and the complainant does not face any prospect of irreparable harm, together with any subsequent comments from the complainant.
4. Where a request for interim measures is made by the Working Group or Rapporteur(s) under the present rule, the Working Group or Rapporteur(s) should inform the Committee members of the nature of the request and the complaint to which the request relates at the next regular session of the Committee.
5. The Secretary-General shall maintain a list of such requests for interim measures.
6. The Rapporteur on new complaints and interim measures shall also monitor compliance with the Committee's requests for interim measures.
7. The State party may inform the Committee that the reasons for the interim measures have lapsed or present arguments why the request for interim measures should be lifted.
8. The Rapporteur, the Committee or the Working Group may withdraw the request for interim measures.

Rule 115

Additional information, clarifications and observations

1. As soon as possible after the complaint has been registered, it should be transmitted to the State party, requesting it to submit a written reply within six months.
2. The State party concerned shall include in its written reply explanations or statements that shall relate both to the admissibility and the merits of the complaint as well as to any remedy that may have been provided in the matter, unless the Committee, Working Group or Rapporteur on new complaints and interim measures has decided, because of the exceptional nature of the case, to request a written reply that relates only to the question of admissibility.
3. A State party that has received a request for a written reply under paragraph 1 both on admissibility and on the merits of the complaint may apply in writing, within two months, for the complaint to be rejected as inadmissible, setting out the grounds for such inadmissibility. The Committee or the Rapporteur on new complaints and interim measures may or may not agree to consider admissibility separately from the merits.
4. Following a separate decision on admissibility, the Committee shall fix the deadline for submissions on a case-by-case basis.
5. The Committee or the Working Group established under rule 112 or Rapporteur(s) designated under rule 112, paragraph 3, may request, through the Secretary-General, the State party concerned or the complainant to submit additional written information, clarifications or observations relevant to the question of admissibility or merits.
6. The Committee or the Working Group or Rapporteur(s) designated under rule 112, paragraph 3, shall indicate a time limit for the submission of additional information or clarification with a view to avoiding undue delay.
7. If the time limit provided is not respected by the State party concerned or the complainant, the Committee or the Working Group may decide to consider the admissibility and/or merits of the complaint in the light of available information.
8. A complaint may not be declared admissible unless the State party concerned has received its text and has been given an opportunity to furnish information or observations as provided in paragraph 1 of this rule.
9. If the State party concerned disputes the contention of the complainant that all available domestic remedies have been exhausted, the State party is required to give details of the effective remedies available to the alleged victim in the particular circumstances of the case and in accordance with the provisions of article 22, paragraph 5 (b), of the Convention.
10. Within such time limit as indicated by the Committee or the Working Group or Rapporteur(s) designated under rule 112, paragraph 3, the State party or the complainant may be afforded an opportunity to comment on any submission received from the other party pursuant to a request made under the present rule. Non-receipt of such comments within the established time limit should not generally delay the consideration of the admissibility of the complaint.

Rule 116

Inadmissible complaints

1. Where the Committee or the Working Group decides that a complaint is inadmissible under article 22 of the Convention, or its consideration is suspended or discontinued, the Committee shall as soon as possible transmit its decision, through the Secretary-General, to the complainant and to the State party concerned.
2. If the Committee or the Working Group has declared a complaint inadmissible under article 22, paragraph 5, of the Convention, this decision may be reviewed at a later date by the Committee upon a request from a member of the Committee or a written request by or on behalf of the individual concerned. Such written request shall contain evidence to the effect that the reasons for inadmissibility referred to in article 22, paragraph 5, of the Convention no longer apply.

C. Consideration of the merits

Rule 117

Method of dealing with admissible complaints; oral hearings

1. When the Committee or the Working Group has decided that a complaint is admissible under article 22 of the Convention, before receiving the State party's reply on the merits, the Committee shall transmit to the State party, through the Secretary-General, the text of its decision together with any submission received from the author of the communication not already transmitted to the State party under rule 115, paragraph 1. The Committee shall also inform the complainant, through the Secretary-General, of its decision.
2. Within the period established by the Committee, the State party concerned shall submit to the Committee written explanations or statements clarifying the case under consideration and the measures, if any, that may have been taken by it. The Committee may indicate, if it deems it necessary, the type of information it wishes to receive from the State party concerned.
3. Any explanations or statements submitted by a State party pursuant to this rule shall be transmitted, through the Secretary-General, to the complainant who may submit any additional written information or observations within such time limit as the Committee shall decide.
4. The Committee may invite the complainant or his/her representative and representatives of the State party concerned to be present at specified closed meetings of the Committee in order to provide further clarifications or to answer questions on the merits of the complaint. Whenever one party is so invited, the other party shall be informed and invited to attend and make appropriate submissions. The non-appearance of a party will not prejudice the consideration of the case.
5. The Committee may revoke its decision that a complaint is admissible in the light of any explanations or statements thereafter submitted by the State party pursuant to this rule. However, before the Committee considers revoking that decision, the explanations or statements concerned must be transmitted to the complainant so that he/she may submit additional information or observations within a time limit set by the Committee.

Rule 118

Findings of the Committee; decisions on the merits

1. In those cases in which the parties have submitted information relating both to the questions of admissibility and the merits, or in which a decision on admissibility has already been taken and the parties have submitted information on the merits, the Committee shall consider the complaint in the light of all information made available to it by or on behalf of the complainant and by the State party concerned and shall formulate its findings thereon. Prior thereto, the Committee may refer the communication to the Working Group or to a case Rapporteur designated under rule 112, paragraph 3, to make recommendations to the Committee.
2. The Committee, the Working Group, or the Rapporteur may at any time in the course of the examination obtain any document from United Nations bodies, specialized agencies, or other sources that may assist in the consideration of the complaint.
3. The Committee shall not decide on the merits of a complaint without having considered the applicability of all the admissibility grounds referred to in article 22 of the Convention. The findings of the Committee shall be forwarded, through the Secretary-General, to the complainant and to the State party concerned.
4. The Committee's findings on the merits shall be known as "decisions".
5. The State party concerned shall generally be invited to inform the Committee within a specific time period of the action it has taken in conformity with the Committee's decisions.

Rule 119

Individual opinions

Any member of the Committee who has participated in a decision may request that his/her individual opinion be appended to the Committee's decisions.

Rule 120

Follow-up procedure

1. The Committee may designate one or more Rapporteur(s) for follow-up on decisions adopted under article 22 of the Convention, for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's findings.
2. The Rapporteur(s) may make such contacts and take such action as appropriate for the due performance of the follow-up mandate and report accordingly to the Committee.

The Rapporteur(s) may make such recommendations for further action by the Committee as may be necessary for follow-up.

3. The Rapporteur(s) shall regularly report to the Committee on follow-up activities.
4. The Rapporteur(s), in discharge of the follow-up mandate, may, with the approval of the Committee, engage in necessary visits to the State party concerned.

Rule 121

Summaries in the Committee's annual report and inclusion of texts of final decisions

1. The Committee may decide to include in its annual report a summary of the complaints examined and, where the Committee considers appropriate, a summary of the explanations and statements of the States parties concerned and of the Committee's evaluation thereof.
2. The Committee shall include in its annual report the text of its final decisions under article 22, paragraph 7 of the Convention.
3. The Committee shall include information on follow-up activities in its annual report.

APPENDIX A.6

Members of the Committee against Torture since 1988 as of 31 December 2017

Name	State Party	from 1 Jan (unless otherwise indicated)	to 31 Dec (unless otherwise indicated)
Mr Hassib Ben AMMAR[1]	Tunisia	1992	1995
Ms Saadia BELMIR	Morocco	2006	2021
Mr Alfredo RA BENGZON O[2]	Philippines	1988	30.10.1990
Mr Alessio BRUNI	Italy	2010	2017
Mr Peter Thomas BURNS O	Canada	1988	2003
Mr Guibril CAMARA	Senegal	1996	2007
Ms Christine CHANET O	France	1988	1991
Ms Socorro DÍAZ PALACIOS O	Mexico	1988	1991
Mr Alexis DIPANDA MOUELLE O	Cameroon	1988	1997
Mr Satyabhooshun Gupt DOMAH	Mauritius	2012	2015
Mr Fawzi EL IBRASHI	Egypt	1992	1995
Mr Sayed Kassam EL MASRY	Egypt	1998	2005
Ms Felice GAER	United States of America	2000	2019
Mr Luis GALLEGOS CHIRIBOGA[3]	Ecuador	November 2006	2011
Mr Abdoulaye GAYE	Senegal	2008	2015
Mr Ricardo GIL LAVEDRA O	Argentina	1988	1995
Mr Alejandro GONZALEZ POBLETE[4]	Chile	1996	2003
Mr Claudio GROSSMAN[5]	Chile	10.11.2003	2015
Mr Abdelwahab HANI	Tunisia	2016	2019
Mr Claude HELLER ROUASSANT	Mexico	2016	2019
Mrs Julia ILIOPOULOS- STRANGAS	Greece	1994	1997
Mr Yuri A KHITRIN	Union of Soviet Socialist Republic	1988	1993
Ms Myrna KLEOPAS	Cyprus	2008	2011
Mr Alexander KOVALEV	Russian Federation	2006	2009
Mr Hugo LORENZO	Uruguay	1992	1995
Mr Andreas MAVROMMATIS[6]	Cyprus	6.5.1998	2007
Mr Fernando Mariño MENENDEZ	Spain	2002	2013
Mr Dimitar MIKHAILOV O	Bulgaria	1988	1993

Appendix A.6 (contd.)

Name	State Party	from 1 Jan (unless otherwise indicated)	to 31 Dec (unless otherwise indicated)
Mr Jens MODVIG	Denmark	2014	2021
Mr Antonio P PERLAS[7]	Philippines	1990	1991
Mr Georghios M PIKIS [8]	Cyprus	1996	1998
Ms Ada POLAJNAR-PAVCNIK[9]	Slovenia	5.1999	1999
Ms Sapana PRADHAN-MALLA[10]	Nepal	2014	2017
Mr Julio PRADO VALLEJO[11]	Ecuador	2004	2006
Ms Ana RACU	Republic of Moldova	2016	2019
Mr Ole Vedel RASMUSSEN[12]	Denmark	2000	2005
Mr Mukunda REGMI	Nepal	1994	1997
Mr Diego RODRÍGUEZ-PINZÓN	Colombia	2018	2021
Mr Bhogendra SHARMA[13]	Nepal	1.10.2013	6.2.2014
Mr Antonio SILVA HENRIQUES GASPAR	Portugal	1998	2001
Mr Habib SLIM[14]	Tunisia	1.4.1995	1995
Mr Bent SØRENSEN [O 15]	Denmark	1988	1999
Ms Nora SVEAASS	Norway	2006	2013
Mr Sébastien Touzé	France	2016	2019
Mr George TUGUSHI	Georgia	2012	2015
Mr Bakhtiyar TUZMUKHAMEDOV	Russian Federation	2018	2021
Mr Joseph VOYAME [O]	Switzerland	1988	1993
Mr Xuexian WANG[16]	China	5.2005	2013
Mr Alexander M YAKOVLEV	Russian Federation	1994	2005
Mr Mengja YU[17]	China	1998	2004
Mr Kening Zhang	China	2014	2017
Ms Honghong ZHANG	China	2018	2021
Mr Bostjan M ZUPANCIC[18]	Slovenia	1996	1999

[O] Member of the original composition of the CAT committee.

[1] Mr Hassib Ben AMMAR, by a letter dated 6 January 1995, informed the Secretary-General of his decision to cease his functions as a member of the Committee (A/50/44, para 5).

[2] Mr Alfredo R.A. BENGZON, by a letter dated 30 October 1990, informed the Secretary-General of his intention to cease his functions as a Committee member (A/46/46, para 5).

[3] Mr Luis Gallegos CHIRIBOGA was appointed as a successor of Mr Julio Prado VALLEJO.

[4] Mr Alejandro González POBLETE passed away in February 2003.

[5] On 10 November 2003 Mr GROSSMAN, designated to replace Mr Alejandro González POBLETE, made the solemn declaration upon assuming his duties.

[6] Mr Andreas MAVROMMATIS was appointed as successor to Mr Georghios M PIKIS.

[7] Mr Antonio P PERLAS was appointed as a successor to Alfredo BENGZON to serve the remainder of his term (A/46/46, para 5).

[8] Mr Georghios M PIKIS, by a letter dated 16 March 1998, informed the Secretary-General of his decision to cease his functions as a member of the Committee (A/50/44, para 5).
[9] Ms Ada Polajnar PAVNIK was appointed as a successor to Mr Bostjan M ZUPANCIC.
[10] Ms Sapana PRADHAN-MALLA was appointed as a successor to Mr Bhogendra SHARMA (A/68/44, para 6).
[11] Mr Julio Prado VALLEJO on 12 April 2006 informed the Secretary-General of his decision to resign from the Committee. He died on 20 October 2006.
[12] Mr Ole Vedel RASMUSSEN was appointed as successor to Mr Bent SØRENSEN.
[13] Mr Habib SLIM was appointed as a successor to Mr Hassib Ben AMMAR.
[14] Mr Bhogendra SHARMA on 6 February 2014 informed the Secretary-General of his decision to cease his functions as a member of the Committee (A/68/44, para 6).
[15] Mr Bent SØRENSEN, by a letter dated 22 December 1999, informed the Secretary-General of his decision to cease his functions as a member of the Committee as of 31 December 1999.
[16] Mr Xuexian WANG was appointed as successor to Mr Yu MENGJIA.
[17] Mr Yu MENGJIA resigned in November 2004 (A/60/44, para 5-6).
[18] Mr Bostjan ZUPANCIC, by a letter dated 12 November 1998, informed the Secretary-General of his decision to cease his functions as a member of the Committee (A/54/44, para 5).

APPENDIX A.7A

Table 1: Article 3 Decisions Broken Down by State Party (Host Country) as of 31 March 2017

State Party	Inadmissible	Non-violation	Violation	Country total
Australia	1	23	3	27
Azerbaijan	0	0	1	1
Canada	14	19	8	41
Denmark	4	11	5	20
Finland	0	1	3	4
France	4	2	3	9
Germany	0	1	1	2
Greece	0	1	0	1
Hungary	2	0	0	2
Kazakhstan	0	0	4	4
Monaco	1	0	0	1
Morocco	0	1	4	5
Netherlands	1	12	3	16
Norway	3	2	1	6
Republic of Korea	0	1	0	1
Russian Federation	0	0	1	1
Spain	1	0	0	1
Sweden	18	46	22	**86**
Switzerland	10	58	18	**86**
Venezuela	0	0	1	1

APPENDIX A.7B

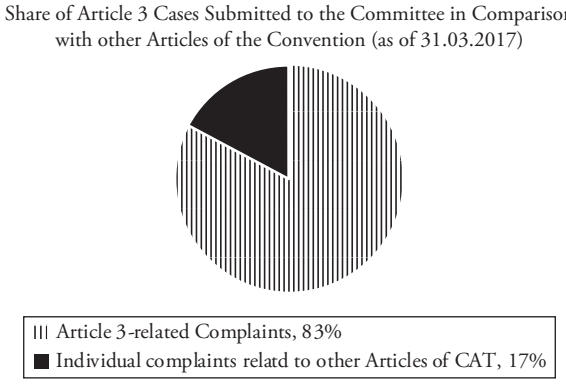


FIGURE 1: Share of Article 3 Cases Submitted to the Committee in Comparison with Other Articles of the Convention, as of 31 March 2017

APPENDIX A.7C

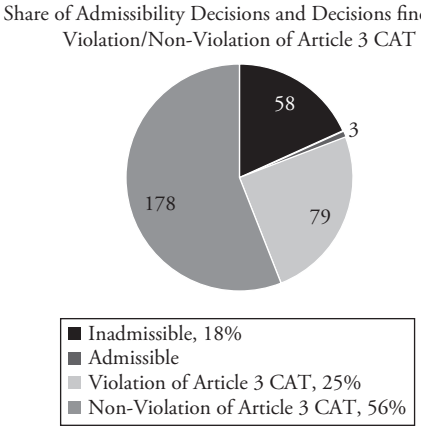


FIGURE 2: Share of Admissibility Decisions and Decisions on the Merits in relation to Article 3 CAT

APPENDIX A.7D

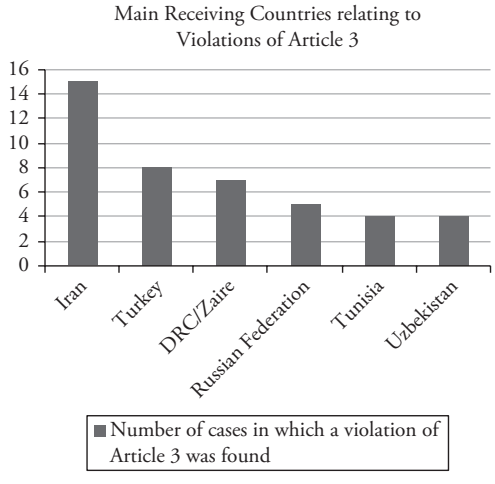


FIGURE 3: Main Receiving Countries relating to Violations of Article 3

APPENDIX B

Texts relating to the Optional Protocol

APPENDIX B.1

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted and opened for signature, ratification and accession by General Assembly Resolution 57/199 of 18 December 2002

Entered into force on 22 June 2006, in accordance to Article 28(1)

Preamble

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing those articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all and that international implementing bodies complement and strengthen national measures,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention, intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows:

Part I

General Principles

Article 1

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 2

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

Article 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

Part II

Subcommittee on Prevention

Article 5

1. The Subcommittee on Prevention shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to twenty-five.
2. The members of the Subcommittee on Prevention shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of

justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.

3. In the composition of the Subcommittee on Prevention due consideration shall be given to equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.
4. In this composition consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination.
5. No two members of the Subcommittee on Prevention may be nationals of the same State.
6. The members of the Subcommittee on Prevention shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee on Prevention efficiently.

Article 6

1. Each State Party may nominate, in accordance with paragraph 2 of the present article, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.
2.
   (a) The nominees shall have the nationality of a State Party to the present Protocol;
   (b) At least one of the two candidates shall have the nationality of the nominating State Party;
   (c) No more than two nationals of a State Party shall be nominated;
   (d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.
3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties that have nominated them.

Article 7

1. The members of the Subcommittee on Prevention shall be elected in the following manner:
   (a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;
   (b) The initial election shall be held no later than six months after the entry into force of the present Protocol;
   (c) The States Parties shall elect the members of the Subcommittee on Prevention by secret ballot;
   (d) Elections of the members of the Subcommittee on Prevention shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee on Prevention shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.
2. If during the election process two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee on Prevention. Where nationals have received the same number of votes, the following procedure applies:
   (a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;
   (b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become the member;

(c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

Article 8

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party that nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of those members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 (d).

Article 10

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.
2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:
   (a) Half the members plus one shall constitute a quorum;
   (b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;
   (c) The Subcommittee on Prevention shall meet in camera.
3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee on Prevention shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

Part III

Mandate of the Subcommittee on Prevention

Article 11

1. The Subcommittee on Prevention shall:
   (a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
   (b) In regard to the national preventive mechanisms:
      (i) Advise and assist States Parties, when necessary, in their establishment;
      (ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;

(iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;

(c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.

Article 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid down in article 11, the States Parties undertake:

(a) To receive the Subcommittee on Prevention in their territory and grant it access to the places of detention as defined in article 4 of the present Protocol;

(b) To provide all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

(c) To encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;

(d) To examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

Article 13

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.
2. After consultations, the Subcommittee on Prevention shall notify the States Parties of its programme in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted.
3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members may be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.
4. If the Subcommittee on Prevention considers it appropriate, it may propose a short follow-up visit after a regular visit.

Article 14

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:
   (a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;

(b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention;
(c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities;
(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information;
(e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. Objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

Article 15

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

Article 16

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism.
2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.
3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.
4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee on Prevention.

Part IV

National Preventive Mechanisms

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.

Article 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

Article 19

The national preventive mechanisms shall be granted at a minimum the power:

(a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
(b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
(c) To submit proposals and observations concerning existing or draft legislation.

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
(b) Access to all information referring to the treatment of those persons as well as their conditions of detention;
(c) Access to all places of detention and their installations and facilities;
(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
(e) The liberty to choose the places they want to visit and the persons they want to interview;
(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

Article 21

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.
2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

Article 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

Part V

Declaration

Article 24

1. Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol.
2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.

Part VI

Financial provisions

Article 25

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee on Prevention under the present Protocol.

Article 26

1. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.
2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

Part VII

Final Provisions

Article 27

1. The present Protocol is open for signature by any State that has signed the Convention.

2. The present Protocol is subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 28

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of deposit of its own instrument of ratification or accession.

Article 29

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 30

No reservations shall be made to the present Protocol.

Article 31

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

Article 32

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 33

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the St ate Party from its obligations under the present Protocol in regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to take with respect to the State Party concerned, nor

shall denunciation prejudice in any way the continued consideration of any matter already under consideration by the Subcommittee on Prevention prior to the date on which the denunciation becomes effective.

3. Following the date on which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

Article 34

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment that they have accepted.

Article 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 36

When visiting a State Party, the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State;
(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 37

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

APPENDIX B.2
Selected Draft Optional Protocol Texts

Draft Optional Protocol to the Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Original Costa Rica Draft)

(6 March 1980)[1]

Preamble

The States Parties to the present Protocol,

Considering that in order further to achieve the purpose of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and the implementation of its provisions, it would be appropriate to establish an independent International Committee authorised to arrange visits to places of detention of all kinds under the jurisdiction of the States Parties to the present Protocol and to report thereon with recommendations to the governments concerned,

Have agreed as follows:

Article 1

1. A State Party to the Convention that becomes a party to the present Protocol agrees to permit visits in accordance with the terms of the present Protocol to any place (hereinafter referred to as a place of detention) subject to the jurisdiction of a State Party where persons are held who have been deprived of their liberty for any reasons, including persons under investigation by the law enforcement authorities, civil or military, persons in preventive, administrative or re-educative detention, persons who are being prosecuted or punished for any offence and persons in custody for medical reasons.
2. A place of detention within the meaning of this Article shall not include any place which representatives or delegates of a Protecting Power or of the International Committee of the Red Cross are entitled to visit and do visit pursuant to the Geneva Conventions of 1949 and their additional protocols of 1977.

Article 14

1. The present control is open for signature by any State which has signed the Convention.
2. The present Protocol is subject to ratification or accession by any State which has ratified or acceded to the Convention. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.
3. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

[1] E/CN.4/1409.

Article 15

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force three months after the deposit of the fifth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the fifth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 16

Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall inform the other State Parties and the Committee. Denunciation shall take effect one year after the date of receipt of the notification. Denunciation shall not affect the execution of measures authorised prior to it.

DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT (REVISED COSTA RICA DRAFT)

(5 JANUARY 1991)[2]

Preamble

The States Parties to the present Protocol,

Considering that in order to further achieve the purpose of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) it is appropriate to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment, by resorting to non-judicial means of a preventive character based on visits,

Have agreed as follows:

Part I

Article 1

1. A State Party to the present Protocol agrees to permit visits, in accordance with this Protocol, to any place within its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held.
2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from other cruel, inhuman or degrading treatment or punishment in accordance with international standards.

[2] E/CN.4/1991/66.

Article 2

The Committee against Torture shall establish a Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Subcommittee); the Subcommittee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

Article 3

In the application of this Protocol, the Subcommittee and the competent national authorities of the State Party concerned shall cooperate with each other.

Part II

Article 4

1. The Subcommittee shall consist of a maximum of 25 members. While there are less than 25 States Parties to the present Protocol, the number of members of the Subcommittee shall be equal to that of the States Parties.
2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of the international protection of human rights.
3. No two members of the Subcommittee may be nationals of the same State.
4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

Article 5

1. The members of the Subcommittee shall be elected by the Committee against Torture by an absolute majority of votes from a list of persons possessing the qualifications prescribed in article 4 and nominated by the States Parties to the present Protocol.
2. Within three months of the entry into force of the present Protocol, the accession of a new member or a vacancy, each State Party shall nominate three persons, at least two of whom shall possess its nationality. They shall be indicated in alphabetical order.
3. Subject to article 4, paragraph 1, the Committee against Torture shall hold elections whenever there is an accession to the present Protocol or a vacancy in the Subcommittee.
4. A member shall be eligible for re-election if renominated.

Article 6

1. The members of the Subcommittee shall be elected for a period of four years. However, among the members elected at the first election, the terms of five members, to be chosen by lot, shall expire at the end of two years.
2. In the election of the members of the Subcommittee, consideration shall be given to equitable geographical distribution of membership, to a proper balance among the various fields of competence referred to in article 4, paragraph 2, and to the representation of different traditions and legal systems.

Article 7

1. The Subcommittee shall meet for a regular session at least twice a year; for special sessions at the initiative of its Chairman or at the request of not less than one third of its members.

2. The Subcommittee shall meet in camera. Half of the members shall constitute a quorum. The decisions of the Subcommittee shall be taken by a majority of the members present, subject to article 14, paragraph 2.
3. The Subcommittee shall draw up its own rules of procedure.
4. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee against Torture and the Subcommittee under this Protocol.

Part III

Article 8

1. The Subcommittee shall establish a programme of regular missions to each of the States Parties. Apart from regular missions, it shall also undertake such other missions as appear to it to be required in the circumstances.
2. The Subcommittee shall postpone any such mission if the State Party concerned has agreed to a visit to its territory by the Committee against Torture pursuant to article 20, paragraph 3, of the Convention.

Article 9

1. If, on the basis of a regional convention, a system of visits to places of detention similar to the one of the present Protocol is in force for a State Party, the Subcommittee shall only in exceptional cases, when required by important circumstances, send its own mission to such a State Party. It may, however, consult with the organs established under such regional conventions with a view to coordinating activities including the possibility of having one of its members participate in missions carried out under the regional conventions as an observer. Such an observer shall report to the Subcommittee. This report shall be strictly confidential and shall not be made public.
2. The present Protocol does not affect the provisions of the Geneva Conventions of 12 August 1949 for the protection of victims of war and their Additional Protocols of 8 June 1977 by which the Protecting Powers and the International Committee of the Red Cross visit places of detention, or the right of any State Party to authorize the International Committee to visit places of detention in situations not covered by international humanitarian law.

Article 10

1. As a general rule, the missions shall be carried out by at least two members of the Subcommittee, assisted by experts and interpreters if necessary.
2. No member of a delegation shall be a national of the State to be visited.

Article 11

1. Experts shall act on the instructions and under the authority of the Subcommittee. They shall have particular knowledge and experience in the areas covered by this Protocol and shall be bound by the same duties of independence, impartiality and availability as the members of the Subcommittee.
2. A State Party may exceptionally and for reasons given confidentially declare that an expert or other person assisting the Subcommittee may not take part in a mission to its territory.

Article 12

1. The Subcommittee shall notify the Government of the State Party concerned of its intention to organize a mission. After such notification, it may at any time visit any place referred to in article 1, paragraph 1.
2. The State Party within whose jurisdiction a mission is to take place or is being carried out shall provide the delegation with all the facilities necessary for the proper fulfilment of their tasks and shall not obstruct by any means or measures the programme of visits or any other activities which the delegation is carrying out specifically for or in relation to the visits. In particular, the State Party shall provide the delegation with the following facilities:
   (a) access to its territory and the right to travel without restriction;
   (b) full information on the places referred to in article 1, paragraph 1, including information requested about specific persons;
   (c) unlimited access to any place referred to in article 1, paragraph 1, including the right to move inside such places without restriction;
   (d) assistance in gaining access to places where the delegation has reason to believe that persons may be deprived of their liberty;
   (e) producing any person deprived of his liberty whom the delegation wishes to interview, at the request of the delegation and at a convenient location;
   (f) other information available to the State Party which is necessary for the delegation to carry out its task.
3. Members of the delegation may interview in private, inside or outside his place of detention, without witnesses, and for the time they deem necessary, any person deprived of his liberty under the terms of article 1. They may also communicate without restriction with relatives, friends, lawyers and doctors of persons who are or have been deprived of their liberty, and with any other person or organization that they think may be able to provide them with relevant information for their mission. In seeking such information, the delegation shall have regard to applicable rules of national law relating to data protection and principles of medical ethics.
4. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee or to the delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.
5. In urgent cases the delegation shall at once submit observations and recommendations either of general or specific nature to the competent authorities of the State Party concerned.

Article 13

1. In the context of a mission, the competent authorities of the State Party concerned may make representations to the Subcommittee or its delegation against a particular visit if urgent and compelling reasons relating to serious disorder in the particular place to be visited temporarily prevent the carrying out of the visit.
2. Following any such representation, the Subcommittee and the State Party shall immediately enter into consultations in order to clarify the situation and seek agreement on arrangements to enable the Subcommittee to exercise its functions expeditiously. Such arrangements may include the transfer to another place of any person whom the Subcommittee proposed to visit. Until the visit takes place, the State Party shall provide information to the Subcommittee about any person concerned.

Article 14

1. After each mission, the Subcommittee shall draw up a report on the facts found during the mission, taking account of any observations which may have been submitted by the State Party

concerned. It shall transmit to the latter its report containing any recommendations it considers necessary and may consult with the State Party with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty.

2. If the State Party fails to cooperate or refuses to improve the situation in the light of the Subcommittee's recommendations, the Committee against Torture may at the request of the Subcommittee decide by a majority of its members, after the State Party has had an opportunity to make known its views, to make a public statement on the matter or to publish the Subcommittee's report.
3. The Subcommittee shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.
4. In all other respects, the information gathered by the Subcommittee and its delegation in relation to a mission, its report and its consultation with the State Party concerned shall remain confidential. Members of the Committee against Torture, the Subcommittee, its delegations and their staff are required to maintain confidentiality during and after their terms of office.

Article 15

1. The Committee against Torture shall examine the reports and recommendations which may be submitted to it by the Subcommittee. It shall keep them confidential as long as no public statement in accordance with article 14, paragraph 2, has been made or as long as they have not become public in accordance with article 14, paragraph 3, of this Protocol.
2. Subject to the rules of confidentiality, the Subcommittee shall every year submit a general annual report on its activities to the Committee against Torture, which shall include information on the activities under this Protocol in its annual report to the General Assembly of the United Nations in accordance with article 24 of the Convention.

Part IV

Article 16

The expenditures incurred by the implementation of the present Protocol, including all its missions, shall be borne by the United Nations.

[1. States Parties shall contribute to the expenditure incurred in the implementation of the present Protocol on the basis of the scale used by the United Nations.
2. There may be established a Special Fund based on voluntary contributions of States, intergovernmental organizations, non-governmental organizations, private institutions and individuals.
3. The Special Fund shall supplement the financing by the States Parties of all the activities provided for in this Protocol. It shall be managed by the Subcommittee, which shall report to a Board of Trustees appointed by the States Parties.
4. Any expenses, such as the cost of staff, interpreters and facilities, incurred by the United Nations pursuant to article 7, paragraph 4, shall be reimbursed by contributions of the States Parties and the Special Fund].

Article 17

1. The present Protocol is open for signature by any State which has signed the Convention.
2. The present Protocol is subject to ratification or open to accession by any State which has ratified or acceded to the Convention. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 18

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.
3. No reservations may be made in respect of the provisions of this Protocol.

Article 19

Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties, the Committee against Torture and the Subcommittee. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article 20

The members of the Subcommittee and of its delegations shall be entitled to the facilities, privileges and immunities referred to in article 23 of the Convention.

Article 21

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Protocol to all States.

ALTERNATIVE PRELIMINARY DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, SUBMITTED BY THE DELEGATION OF MEXICO WITH THE SUPPORT OF THE LATIN AMERICAN GROUP (GRULAC) AT THE NINTH SESSION OF THE WORKING GROUP IN 2001 (MEXICAN DRAFT)

(13 FEBRUARY 2001)[3]

Preamble

The States Parties to the present Optional Protocol,

Recognizing that torture and other, cruel, inhuman or degrading treatment or punishment are prohibited,

Recalling that articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment require each State Party to take effective measures to prevent

[3] E/CN.4/2002/78

acts of torture and other acts of cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Further recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires a combination of legislative, administrative, judicial and other measures,

Recognizing that States have the primary responsibility for implementing international law and the relevant international standards, that strengthening the protection of and full respect for human rights is a common responsibility shared by all and that international mechanisms are complementary to national measures,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment may be strengthened by non-judicial means of a preventive character based on visits to places of detention,

Desiring to undertake an international commitment to make the prevention of torture and other cruel, inhuman or degrading treatment or punishment more effective,

Have agreed as follows,

Part I

Article 1

Each State Party to the present Protocol shall establish or maintain, at the national level, a visiting mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national mechanism), which shall carry out visits to places in any territory under its jurisdiction where persons may be or are deprived of their liberty pursuant to an order of a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention), with a view to strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.

Article 2 (former art. 2, amended)

There shall be established a Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture which shall carry out the functions laid down in the present Protocol (hereinafter referred to as the Subcommittee):

1. The Subcommittee shall be responsible for supporting and supervising the work carried out by national mechanisms in accordance with the provisions of the present Protocol;
2. The Subcommittee shall carry out its work within the framework of the Charter of the United Nations and shall be guided by the purposes and principles enunciated therein;
3. The Subcommittee shall also be guided by the principles of confidentiality, impartiality, universality and objectivity.

Part II

Article 3

Each State Party shall establish a national mechanism at the highest possible level within one year of the entry into force of, or of its accession to, the present Protocol.

Article 4

1. When setting up a national mechanism, each State Party shall guarantee its functional independence and the independence of its staff.

2. Each State Party shall take the necessary measures to ensure that the members of the national mechanism have the professional knowledge and skills required. It shall also take account of the gender balance and the need to ensure that ethnic groups and minorities are adequately represented.
3. The members shall be chosen from among persons of high moral character having proven professional experience in the field of the practice of law and the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

Article 5

National mechanisms shall have the following powers, as a minimum:

(a) To examine the situation of persons deprived of their liberty with a view to strengthening, if necessary, their protection from torture and other cruel, inhuman or degrading treatment or punishment;
(b) To make recommendations to the competent authorities with a view to improving the treatment and conditions of persons deprived of their liberty and preventing torture and other cruel, inhuman or degrading treatment or punishment;
(c) To propose or comment on draft or existing legislation on this question;
(d) To take any initiatives that would help States Parties fulfil their obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other relevant international instruments.

Article 6

1. In order to assess the situation of persons deprived of their liberty and to make the relevant recommendations, national prevention mechanisms shall carry out visits to places where persons are deprived of their liberty; they shall have:
   (a) Unrestricted access to all relevant information concerning the number of persons deprived of their liberty pursuant to an order of a public authority or at its instigation or with its consent or acquiescence, as well as the number of places and their location;
   (b) Unrestricted access to all information relevant to treatment and conditions of detention;
   (c) Unrestricted access to all places where persons are deprived of their liberty;
   (d) Unrestricted access to all premises where persons are deprived of their liberty;
   (e) Freedom to interview persons deprived of their liberty, without witnesses, personally or with the assistance of an interpreter, if required, as well as of any personnel deemed necessary;
   (f) Freedom to select the places they wish to visit;
   (g) Unrestricted freedom to contact, inform and meet with the Subcommittee.
2. Such visits may not be prohibited except in cases of absolute military necessity or serious disturbances in the place to be visited and then only as an exceptional and temporary measure. The organization, frequency and duration of such visits may not be restricted.
3. No person or organization may be penalized or otherwise harmed for having provided relevant information to a national mechanism.

Article 7

1. National mechanisms shall:
   (a) Inform the competent authorities of their observations and make recommendations to them;
   (b) Regularly inform the Subcommittee of their observations and recommendations.
2. No personal data shall be made public without the prior consent of the person concerned, subject to liability.

Article 8

Each State Party to the present Protocol undertakes to implement the recommendations made by its national mechanism.

Part III

Article 9 (former art. 4)

1. The Subcommittee shall be composed of 10 members. After the fiftieth accession to the present Protocol, the number of members of the Subcommittee shall increase to 25.
2. The members of the Subcommittee shall be chosen from among persons of high moral character having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.
3. No two members of the Subcommittee may be nationals of the same State.
4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

Article 10 (former art. 5)

1. Each State Party may nominate, in accordance with paragraph 2, up to two candidates possessing the qualifications and meeting the requirements set out in article 9, and in doing so shall provide detailed information on the qualifications of the nominees.
2.
   (a) Nominees of the Subcommittee shall have the nationality of a State Party to the present Protocol;
   (b) At least one of the two candidates shall have the nationality of the nominating State Party;
   (c) Not more than two nationals of a State Party shall be nominated;
   (d) Before a State Party nominates a national of another State Party, it shall seek and obtain the written consent of that State Party.
3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them.

Article 11 (former art. 6)

1. The members of the Subcommittee shall be elected in the following manner:
   (a) Elections of the members of the Subcommittee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting;
   (b) The initial election shall be held no later than six months after the date of the entry into force of the present Protocol;
   (c) The States Parties shall elect the members of the Subcommittee by secret ballot;
   (d) In the election of the members of the Subcommittee, primary consideration shall be given to the fulfilment of the requirements and criteria of article 9. Furthermore, due consideration shall be given to the equitable geographical distribution of membership and to the representation of the different forms of civilization and legal systems of the States Parties.

2. Consideration shall also be given to the balanced representation of women and men on the basis of the principles of equality and non-discrimination.
3. If, during the election process, two nationals of a State Party have become eligible to serve as members of the Subcommittee, the candidate receiving the higher number of votes shall serve as the member of the Subcommittee.

Article 12 (former art. 7)

If a member of the Subcommittee dies or resigns or for any other cause can no longer perform the member's Subcommittee duties, the State Party which nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 9, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 13 (former art. 9 [6])

The members of the Subcommittee shall be elected for a term of four years. They shall be eligible for re-election once if re-nominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these members shall be chosen by lot by the Chairman of the meeting referred to in article 11, paragraph 1.

Article 14 (former art. 10 [7])

1. The Subcommittee shall elect its officers for a term of two years. They may be re-elected.
2. The Subcommittee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
   (a) Half plus one of its members shall constitute a quorum;
   (b) Decisions of the Subcommittee shall be made by a majority vote of the members present;
   (c) The Subcommittee shall meet in camera.
3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee. After its initial meeting, the Subcommittee shall meet at such times as shall be provided in its rules of procedure.

Part IV

Article 15

The Subcommittee shall have as its mandate to:
1. Advise and assist States Parties, when necessary, in the establishment of national mechanisms;
2. Maintain close contact with national mechanisms and provide them with training and advice with a view to strengthening their capacities;
3. Provide national mechanisms with assistance and advice in assessing needs and measures in order to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;
4. Supervise the functioning of national mechanisms;
5. Make recommendations to national mechanisms and to States Parties on measures to strengthen, if necessary, the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment;

6. Make recommendations and observations to States Parties with a view to strengthening the capacities and mandate of national mechanisms for the prevention of torture.

Article 16

1. In order to enable the Subcommittee to fulfil its mandate as set out in article 15, States Parties undertake to:
   (a) Facilitate contact between the Subcommittee and national mechanisms;
   (b) Receive the Subcommittee in their territory when required;
   (c) Implement the recommendations of the Subcommittee.
2. The Subcommittee may request any information from national mechanisms that may enable it to assess needs and the measures to be taken to strengthen the protection of persons deprived of their liberty against torture and other forms of cruel, inhuman or degrading treatment or punishment, including information concerning the number and location of places of detention, the persons deprived of their liberty and their treatment.

Article 17

1. The Subcommittee shall inform the Committee against Torture and the State Party concerned of its recommendations and observations.
2. The Subcommittee shall submit an annual report of its activities to the Committee against Torture.

Article 18

1. The Subcommittee and the State Party concerned shall cooperate with each other in the implementation of this Protocol (**former art. 3, para. 1**).
2. The Subcommittee should cooperate in the prevention of torture with all bodies and mechanisms and with all international or regional mechanisms working to strengthen the protection of persons deprived of their liberty against torture and other forms of cruel, inhuman or degrading treatment or punishment.

Article 19

1. The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention based on a system of visits to places of detention. The Subcommittee and the bodies established on the basis of such regional mechanisms shall consult and cooperate in order to promote effectively the objectives of the present Protocol and avoid any duplication of work.
2. The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, or the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 20 (former art. 16, amended)

1. The expenditure incurred by the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the staff and services necessary for the effective performance by the Subcommittee of its functions under the present Protocol.

Article 21 (former art. 17 [16 bis])

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations of the Subcommittee, in response to an express request by a State Party for assistance in its efforts to improve the protection of persons deprived of their liberty.
2. This Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

Article 22

The States Parties to the present Protocol undertake to accord the Subcommittee all the powers granted to national mechanisms for the prevention of torture under the provisions of articles 5 and 6 if, within two years of ratification of the present Protocol, a national mechanism has not started to visit places of detention.

Article 23

1. A State Party to the present Protocol may at any time declare under this article that it agrees to receive a delegation of the Subcommittee to carry out, in accordance with the present Protocol, visits to any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are or may be held.
2. The Subcommittee shall establish, by lot, a programme of visits to all States Parties making the declaration provided for in the preceding paragraph.
3. Such visits may be conducted jointly with the national mechanism.
4. Visits shall be conducted by at least two members of the Subcommittee. They may be accompanied by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol and shall be selected by consensus from a roster of experts prepared on the basis of proposals made by the States Parties that have made the declaration provided for in paragraph 1 of this article, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for Crime Prevention. In preparing the roster of experts, the States Parties concerned shall propose no more than five national experts.
5. The delegation making the visits and its members shall enjoy the same powers and duties conferred on the national mechanism under articles 5, 6 and 7, paragraphs 1 (a) and 2.
6. The provisions of this article shall enter into force when five States Parties to the present Protocol have made the declaration provided for in paragraph 1 of this article. Such declarations must be deposited by States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such declarations shall not become effective until six months after their notification.

Article 24 (former art. 18 [17])

1. The present Protocol shall be open for signature by any State that has signed the Convention.
2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 25 (former art. 19 [18])

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 26 (former art. 20 [18 bis])

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 27 (former art. 21 [19])

1. A State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol with regard to any act or situation that may occur prior to the date on which the denunciation becomes effective, or to the actions that the Subcommittee has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Subcommittee prior to the date on which the denunciation becomes effective.
3. As of the date on which the denunciation of the State Party becomes effective, the Subcommittee shall not commence consideration of any new matter regarding that State.

Article 28 (former art. 22 [19 bis])

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 29 (former art. 23 [20], amended)

Members of national mechanisms and of the Subcommittee shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. In particular, they shall be accorded the privileges and immunities specified in section 22 of the Convention on Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 30 (former art. 24, amended)

During a visit to a State Party and without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy, members of the Subcommittee shall:
(a) Respect the laws and regulations of the visited State; and
(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 31 (former art. 25 [21])

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

PROPOSAL OF NEW AND REVISED ARTICLES TO BE INCLUDED IN THE ORIGINAL DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, SUBMITTED BY THE DELEGATION OF SWEDEN ON BEHALF OF THE EUROPEAN UNION AT THE NINTH SESSION OF THE WORKING GROUP IN 2001 (EU DRAFT)

(22 FEBRUARY 2001)[4]

Preamble

The States Parties to the present Protocol,

Recalling the purposes and principles of the Charter of the United Nations, and the obligation of States under the Charter, in particular articles 55 and 56,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited,

Recalling articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which obliges each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Convinced that further measures are necessary to achieve the purpose of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and of the need to

[4] E/CN.4/2001/WG.11/CRP.2.

strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment,

Convinced also that combating impunity constitutes an important element in the prevention of torture and recalling in this regard article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as the *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Istanbul Protocol),

Welcoming the positive impact an independent regional and national mechanism could have on the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment,

Considering that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits,

Bearing in mind also the principles of cooperation and confidentiality as basic principles of the present Protocol,

Article 1 (new)

For the purpose of this Protocol:

(a) Deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will by order of any judicial, administrative or other public authority;

(b) A mission includes the travel and all the activities carried out by the Subcommittee in a State Party's territory;

(c) A visit means the inspection of a physical facility where persons are deprived of their liberty;

(d) The Subcommittee shall be deemed to be represented by its delegation.

Article 2 (old 2)[*]

1. A Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture shall be established which shall carry out the functions laid down in the present Protocol (hereinafter referred to as the Subcommittee); the Subcommittee shall be responsible for organizing missions and visits to the States Parties to the present Protocol for the purposes stated in article 3.
2. The establishment of the Subcommittee does not preclude the setting up as appropriate of a national mechanism to carry out unrestricted visits to places where persons are deprived of their liberty, as referred to in article 15.

Article 3 (old 1 revised)

1. The objective of this Protocol is to establish an international preventive visiting mechanism to examine the treatment of persons deprived of their liberty, with a view to recommending means for strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.
2. Each State Party agrees to permit missions by the Subcommittee to its territory and visits to any place under its jurisdiction and control where persons are or may be deprived of their liberty.
3. Objection to a visit may only be made on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited, which temporarily prevent the carrying out of such a visit. The existence of a state of emergency cannot as such be invoked by a State Party as a reason to object to a visit.

[*] See E/CN.4/2002/58.

4. Following objections under paragraph 3, the State Party and the Subcommittee shall immediately enter into consultations in order to clarify the situation and seek agreement to enable the Subcommittee to exercise its functions expeditiously. Such arrangements may include the transfer to another place of any person whom the Subcommittee proposed/wishes to visit. Until the visit takes place, the State Party shall provide information to the Subcommittee about the person concerned.
5. A State Party may at the time of its ratification or accession to this Protocol consult with the Subcommittee in order to assess its needs for technical cooperation.
6. A State Party may also upon ratification or accession submit a public declaration delaying visits by the Subcommittee to its territory or places where persons are deprived of their liberty under its jurisdiction and control, for a maximum of two years after the entry into force of the Optional Protocol for that State Party. The State Party, in consultation with the Subcommittee, shall review this declaration one year after the entry into force of the Optional Protocol for that State Party. Missions may take place immediately after the entry into force of the Optional Protocol for that State Party.

Article 4 (old 3)

1. In the application of this Protocol the Subcommittee and the national authorities of the State Party concerned shall cooperate with each other.
2. The Subcommittee shall conduct its work within the framework of the Charter of the United Nations and be guided by the purposes and principles thereof.
3. The Subcommittee shall also be guided by the principles of confidentiality, impartiality, universality and objectivity.

Article 5 (old 4)

1. The Subcommittee shall consist of 10 members. After the fiftieth ratification or accession to the present Protocol, the number of members of the Subcommittee shall increase to 25.
2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.
3. No two members of the Subcommittee may be nationals of the same State.
4. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee effectively.

Article 6 (old 5)

1. Each State Party may nominate, in accordance with paragraph 2, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.
2.
   (a) Nominees of the Subcommittee shall have the nationality of a State Party to the present Protocol;
   (b) At least one of the two candidates shall have the nationality of the nominating State Party;
   (c) Not more than two nationals of a State Party shall be nominated;
   (d) Before a State Party nominates a national of another State Party, it shall seek and obtain the written consent of that State Party.
3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General

shall submit a list in alphabetical order of all persons thus nominated, indicating the States Parties, which have nominated them.

Article 7 (old 6)

The members of the Subcommittee shall be elected in the following manner:

1. Elections of the members of the Subcommittee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.
2. The initial election shall be held no later than six months after the date of entry into force of the present Protocol.
3. The States Parties shall elect the members of the Subcommittee by secret ballot.
4. In the election of the members of the Subcommittee, primary consideration shall be given to the fulfilment of the requirements and criteria of article 5. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 5, to equitable geographical distribution of membership and to representation of the different forms of civilization and legal systems of the States Parties.
5. Consideration shall also be given to balanced representation of women and men on the basis of the principles of equality and non-discrimination.
6. If, during the election process, two nationals of a State Party have become eligible to serve as members of the Subcommittee, the membership of the Subcommittee shall be resolved in the following manner, in conformity with article 5, paragraph 3:
   (a) The candidate receiving the higher number of votes shall serve as the member of the Subcommittee;
   (b) Where the nationals have received the same number of votes, the following procedure applies:
      (i) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee.
      (ii) Where both nationals have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall be the member;
      (iii) Where neither national has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which national shall be the member.

Article 8 (old 7)

If a member of the Subcommittee dies or resigns or for any other cause can no longer perform the member's Subcommittee duties, the State Party which nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9 (old 8 revised)

1. The Subcommittee:
   (a) Shall establish on the basis of a transparent procedure, a programme of regular missions to all States Parties. These missions may also include follow-up missions;

(b) Shall also undertake such visits or missions as appear to be required in the circumstances and based on information received by the Subcommittee and assessed by it as credible, with a view to furthering the aims of this Protocol;
(c) Shall after a mission or a visit advise and assist the State Party in assessing the needs and appropriate measures for strengthening the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment;
(d) May make recommendations to the State Party on the mandate, the competence and the effective functioning as well as other relevant activities of an established national mechanism for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with article 15;
(e) Shall transmit requests from a State Party for technical assistance and technical cooperation as well as facilitate the provision of such cooperation from the relevant United Nations bodies such as UNHCHR, UNDP, ODCCP, UNICEF and UNIFEM.

2. The Subcommittee shall send a written notification to the Government of the State Party concerned of its intention to organize a mission.
3. Before a mission is carried out, the Subcommittee and the State Party concerned shall, if either of them so request, enter into consultations with a view to agreeing without delay on the practical arrangements for the mission. Such consultations on the practical arrangements for the mission may not include negotiations on the obligations of a State Party under articles 3 or 13.

Article 10 (old 9)

The members of the Subcommittee shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1.

Article 11 (old 10)

1. The Subcommittee shall elect its officers for a term of two years. They may be re-elected.
2. The Subcommittee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
   (a) Half plus one members shall constitute a quorum;
   (b) Decisions of the Subcommittee shall be made by a majority vote of the members present;
   (c) The Subcommittee shall meet in camera.
3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee. After its initial meeting, the Subcommittee shall meet at such times as shall be provided in its rules of procedure.

Article 12 (old 11)

1. The Subcommittee may decide to postpone a mission to a State Party if the State Party concerned has agreed to a scheduled visit to its territory by the Committee against Torture, pursuant to article 20, paragraph 3 of the Convention. The dates of the rescheduled mission shall be determined taking into account the provisions of articles 3 and 9.
2. The Subcommittee, while respecting the principles set out in article 4, is encouraged to cooperate for the prevention of torture in general with the relevant United Nations organs and mechanisms as well as international, regional and national institutions or organizations working towards strengthening the protection of persons from torture and other cruel, inhuman or degrading treatment or punishment.
3. If, on the basis of a regional convention, a system of visits to places of detention similar to the one under the present Protocol is in force for a State Party, the Subcommittee shall still be responsible for missions to such a State Party under this Protocol, assuring its universal application. However,

the Subcommittee and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to the efficient promotion of the objectives of this Protocol, including on the matter of duplication of work. Such cooperation may not exempt the States Parties belonging also to such conventions from cooperating fully with the Subcommittee.

4. The provisions of the present Protocol do not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977, or the possibility for any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 13 (old 12 revised)

1. The Subcommittee and the State Party shall cooperate with a view to the effective fulfilment of the mission. In particular, the State Party shall provide the Subcommittee with:
   (a) Unrestricted access to all information, deemed relevant by the Subcommittee, concerning the number of persons deprived of their liberty, in accordance with article 16 of the Convention, as well as the number of places and their location;
   (b) Unrestricted access to all information, deemed relevant by the Subcommittee, concerning the treatment and the conditions of detention;
   (c) Access to and freedom of movement within any territory under its jurisdiction and control for the conduct of the mission;
   (d) All information deemed relevant by the Subcommittee to the effective conduct of the mission, including in particular on any person or places referred to in article 3 of the Protocol;
   (e) Access to and within any place referred to in article 3 of the Protocol;
   (f) Access to persons referred to in article 3 of the Protocol, and the opportunity for private interviews with them;
   (g) The opportunity to communicate freely with any person whom they believe can supply relevant information.
2. With regard to a particular visit, the obligations referred to under paragraph 1 shall be implemented in a manner consistent with national law and professional ethics complimentary to international human rights standards.

Article 14 (old 14)[*]

1. After each mission or visit, the Subcommittee shall draw up a report on the mission or the visit and any recommendations it considers necessary, which shall be submitted to the State Party concerned. The Subcommittee shall finalize its report after fair consideration is given to comments submitted, within a reasonable time, by the State Party concerned. If a State Party so wishes its comments shall form an annex to the report.
2. The Subcommittee shall transmit to the State Party its report containing any recommendations it considers necessary to improve the protection of persons deprived of their liberty. To this effect, the Subcommittee and the State Party may consult on the implementation of the recommendations, including ways and means in which the State Party can be assisted, as well as the submission of a request for technical cooperation as referred to in article 9, paragraph 1 (e).
3. The information gathered by the Subcommittee in relation to a visit, its report and its consultations with the State Party shall be confidential. Members of the Subcommittee and other persons assisting the Subcommittee are required, during their terms of office, to maintain the confidentiality of the facts or information of which they have become aware during the discharge of their functions.
4. At the request of the State Party concerned, the Subcommittee shall publish its report on a visit. By agreement between the Subcommittee and the State Party, the report on a visit may

[*] See E/CN.4/1996/28.

be published or made public in part. If the State Party decides to make part of the report on a visit public, the Subcommittee may make a public statement or publish the report in whole or in part in order to ensure a balanced presentation of the contents of the report.

5. If a State Party fails to cooperate or refuses to improve the situation in the light of the Subcommittee's recommendations, the Committee against Torture may at the request of the Subcommittee decide by majority of its members, after the State Party has had an opportunity to make known its views, to make a public statement on the matter or to publish the report.
6. No personal data shall be published without the expressed consent of the person concerned.
7. Subject to the rule of confidentiality under paragraph 3, the Subcommittee shall every year submit an annual report to the Committee against Torture on its activities, which shall be public.

Article 15 (new)

For the purposes of this Protocol, a State Party wishing to establish a national mechanism undertakes to ensure that:

(a) The national mechanism will be composed of independent experts fulfilling the requirements set out in articles 4, paragraph 3, and 5, paragraph 2;
(b) It has full powers to issue recommendations to the concerned authorities;
(c) It has unrestricted access to all places where persons are deprived of their liberty under all situations, including in peacetime, times of public disorder or states of emergency and during war in accordance with international humanitarian law;
(d) Unrestricted access to persons deprived of their liberty;
(e) Full freedom to interview the persons deprived of liberty without witnesses, with the assistance of interpreters, if required, as well as all relevant personnel or persons;
(f) Unrestricted liberty to contact, inform and meet with the Subcommittee with a view to implementing article 9, paragraph 1 (d);
(g) The reports on its visits shall be public.

Article 16 (old 15)

Each State Party shall disseminate information about the present Protocol, the tasks of the Subcommittee and the facilities to be provided to the Subcommittee during a mission to all concerned authorities and ensure the inclusion of such information in the training of relevant personnel, civil, police and military, who are involved in the custody, interrogation or treatment of persons in situations referred to in article 3.

Article 17 (old 16)

1. The expenditure incurred by the Subcommittee in the implementation of the present Protocol, including missions and visits, shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee under the present Protocol.

Article 18 (old 17)

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee to a State Party expressing the need for additional assistance for its ongoing efforts to improve the protection of persons deprived of their liberty.
2. This Fund may be financed through voluntary contributions.

Article 19 (old 18)

1. The present Protocol is open for signature by any State which has signed the Convention.
2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Convention.
3. Instruments of ratification or instrument of accession, together with a public declaration pursuant to article 3, paragraph 6, shall be deposited with the Secretary-General of the United Nations.
4. The present Protocol shall be open to accession by any State which has ratified or acceded to the Convention.
5. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
6. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession and public declaration submitted pursuant to article 3, paragraph

Article 19 bis (new)

No reservations shall be made to the present Protocol.

Article 20 (old 19)

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 21 (old 20)

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 22 (old 21)

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation which occurs prior to the date at which the denunciation becomes effective, or to the actions that the Subcommittee has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Subcommittee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of the State Party becomes effective, the Subcommittee shall not commence consideration of any new matter regarding that State.

Article 23 (old 22)

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him

whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional process.
3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 24 (old 23)

Members of the Subcommittee and of missions authorized under the present Protocol shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. In particular, they shall be accorded the privileges and immunities specified in section 22 of the Convention on Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 25 (old 24)

In the conduct of missions, all members shall without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State; and
(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 26 (old 25)

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

ALTERNATIVE DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, SUBMITTED BY THE DELEGATION OF THE UNITED STATES OF AMERICA AT THE TENTH SESSION OF THE WORKING GROUP IN 2002 (US DRAFT),

(16 JANUARY 2002)[5]

Preamble

The States Parties to the present Optional Protocol,

Recalling the purposes and principles of the Charter of the United Nations and the obligations of States under the Charter,

[5] E/CN.4/2002/78, Annex II E.

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited,

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) requires a combination of legislative, administrative, judicial and other measures,

Recognizing that strengthening the protection of and full respect for human rights is a common responsibility shared by all and that international mechanisms are complementary to national measures,

Recognizing the important contribution that regional mechanisms may make to the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment, particularly by non-judicial means of a preventive character based on visits,

Desiring to undertake an international commitment to make the prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Convention more effective,

Bearing in mind the principles of cooperation and confidentiality as basic principles of the present Protocol,

Have agreed as follows,

Part I

Article 1

1.
   (a) There shall be established, under the Committee against Torture (hereinafter referred to as the Committee), a Subcommittee on the Prevention of Torture (hereinafter referred to as the Subcommittee on Prevention) which shall carry out the functions hereinafter provided.
   (b) The Subcommittee shall consist of [five] experts of recognized competence in the field of human rights, who shall serve in their personal capacity and shall, under its direction, carry out the functions herein provided.
2. Each State Party may, in furtherance of articles 2 and 16 of the Convention, establish, maintain or provide for national mechanisms to strengthen, if necessary, the protection of persons deprived of their liberty pursuant to an order of a public authority from torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as national mechanisms).

Article 2

The Subcommittee on Prevention, under the direction of the Committee, shall:

(a) Assist members of the Committee with respect to the Committee's functions under the Convention, including, in particular, the making of confidential inquiries in accordance with paragraphs 1–5 of article 20, as well as with voluntary visits the Committee may propose to State Parties that may be made in agreement with them;
(b) Assist, upon request, States Parties in setting up national mechanisms;
(c) Respond to requests for technical advice designed to assist States Parties with the operation of national mechanisms, as well as with the effective implementation of their obligations under articles 2 and 16 of the Convention;
(d) Serve as a resource for technical information and advice to promote safe, humane, cost-efficient and appropriately secure facilities for detention or imprisonment.

Article 3

National mechanisms may, inter alia:

(a) Examine the situation of persons deprived of their liberty pursuant to an order of a public authority with a view to strengthening, if necessary, their protection from torture and other cruel, inhuman or degrading treatment or punishment;

(b) Make recommendations to the competent authorities with a view to improving the treatment and conditions of such persons and preventing torture and other cruel, inhuman or degrading treatment or punishment;

(c) Propose or comment on draft or existing legislation on matters relating to the treatment of such persons;

(d) Request, where necessary, technical advice from the Subcommittee on Prevention designed to assist States Parties with the effective implementation of their obligations under the Convention with a view to strengthening, if necessary, the protection of such persons from torture and other cruel, inhuman or degrading treatment or punishment.

Article 4

1. The Subcommittee on Prevention shall submit an annual report of its activities to the Committee which shall be made available to States Parties. National mechanisms which may be established, maintained or provided for in accordance with the Protocol shall be provided with such reports.
2. States Parties shall permit direct contact between such national mechanisms and the Subcommittee on Prevention.

Part II

Article 5

The members of the Subcommittee on Prevention shall be elected in the same manner as members of the Committee referred to in paragraphs 2 to 6 of article 17, consideration being given to equitable geographical distribution and to the usefulness of the participation of persons having professional experience in the field of the administration of justice, criminal law, prison or police administration, or in the various medical fields relevant to the treatment of persons deprived of their liberty.

Article 6

The Committee shall establish rules of procedure for the Subcommittee on Prevention, but these rules shall provide, inter alia, that:

(a) [Four] members shall constitute a quorum, and;

(b) Decisions of the Subcommittee shall be made by a majority of the members present.

Article 7

The Committee shall convene the initial meeting of the Subcommittee. After its initial meeting, the Subcommittee shall meet at such times as shall be provided in its rules of procedure.

Article 8

Members of the Subcommittee on Prevention shall be entitled to the facilities, privileges and immunities provided to members of the Committee under article 23 of the Convention.

Part III

Article 9

1. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee under this Protocol.
2. The States Parties which shall have accepted this Protocol shall be responsible for expenses incurred in connection with the operation of the Subcommittee on Prevention, in a manner based upon the United Nations scale of assessment prorated to take into account the number of States Parties to the Protocol.

Article 10

1. The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention based on a system of visits to places of detention. The Subcommittee on Prevention and the bodies established on the basis of such regional mechanisms shall consult and cooperate in order to promote effectively the objectives of the present Protocol and avoid any duplication of work.
2. The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 11

1. The present Protocol shall be open for signature by any State that has signed the Convention.
2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 12

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 13

A State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article 14

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 15

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

(PROPOSAL BY THE CHAIRPERSON-RAPPORTEUR)

(17 JANUARY 2002)[6]

Preamble

The States Parties to the present Protocol,

Reaffirming that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights,

Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment,

Recalling that articles 2 and 16 of the Convention oblige each State Party to take effective measures to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction,

Recognizing that States have the primary responsibility for implementing these articles, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all, and that international implementing bodies complement and strengthen national measures,

[6] E/CN.4/2002/WG.11/CRP.1, Art 6.

Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial or other measures,

Recalling also that the World Conference on Human Rights firmly declared that efforts to eradicate torture should first and foremost be concentrated on prevention and called for the adoption of an optional protocol to the Convention which is intended to establish a preventive system of regular visits to places of detention,

Convinced that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention,

Have agreed as follows:

Part I
General Principles

Article 1

The objective of this Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 2

1. A Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (hereinafter referred to as the Subcommittee on Prevention) shall be established and shall carry out the functions laid down in the present Protocol.
2. The Subcommittee on Prevention shall carry out its work within the framework of the Charter of the United Nations and will be guided by the purposes and principles thereof, as well as the norms of the United Nations concerning the treatment of people deprived of their liberty.
3. Equally, the Subcommittee on Prevention shall be guided by the principles of confidentiality, impartiality, non-selectivity, universality and objectivity.
4. The Subcommittee on Prevention and the States Parties shall cooperate in the implementation of the present Protocol.

Article 3

Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will by order of any judicial, administrative or other authority.

Part II
The Subcommittee on Prevention

Article 5

1. The Subcommittee on Prevention shall consist of 10 members. After the fiftieth ratification or accession to the present Protocol, the number of the members of the Subcommittee on Prevention shall increase to 25.
2. The members of the Subcommittee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.
3. In the composition of the Subcommittee due consideration shall be given to the equitable geographic distribution and to the representation of different forms of civilization and legal systems of the States Parties.
4. In this composition consideration shall also be given to the balanced gender representation on the basis of the principles of equality and non-discrimination.
5. No two members of the Subcommittee may be nationals of the same State.
6. The members of the Subcommittee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Subcommittee efficiently.

Article 6

1. Each State Party may nominate, in accordance with paragraph 2, up to two candidates possessing the qualifications and meeting the requirements set out in article 5, and in doing so shall provide detailed information on the qualifications of the nominees.
2.
   (a) The nominees shall have the nationality of a State Party to the present Protocol;
   (b) At least one of the two candidates shall have the nationality of the nominating State Party;
   (c) No more than two nationals of a State Party shall be nominated;
   (d) Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.
3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list, in alphabetical order, of all persons thus nominated, indicating the States Parties which have nominated them.

Article 7

1. The members of the Subcommittee on Prevention shall be elected in the following manner:
   (a) Primary consideration shall be given to the fulfilment of the requirements and criteria of article 5 of the present Protocol;
   (b) The initial election shall be held no later than six months after the entry into force of the present Protocol;
   (c) The States Parties shall elect the members of the Subcommittee by secret ballot;
   (d) Elections of the members of the Subcommittee shall be held at biennial meetings of the States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Subcommittee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting;
2. If, during the election process, two nationals of a State Party have become eligible to serve as members of the Subcommittee on Prevention, the candidate receiving the higher number of

votes shall serve as the member of the Subcommittee. Where nationals have received the same number of votes, the following procedure applies:

(a) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Subcommittee on Prevention;

(b) Where both candidates have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall become member;

(c) Where neither candidate has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which candidate shall be the member.

Article 8

If a member of the Subcommittee on Prevention dies or resigns, or for any cause can no longer perform his or her duties, the State Party which nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 5, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9

The members of the Subcommittee on Prevention shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in article 7, paragraph 1 (d).

Article 10

1. The Subcommittee on Prevention shall elect its officers for a term of two years. They may be re-elected.
2. The Subcommittee on Prevention shall establish its own rules of procedure. These rules shall provide, inter alia, that:
   (a) Half plus one members shall constitute a quorum;
   (b) Decisions of the Subcommittee on Prevention shall be made by a majority vote of the members present;
   (c) The Subcommittee on Prevention shall meet in camera.
3. The Secretary-General of the United Nations shall convene the initial meeting of the Subcommittee on Prevention. After its initial meeting, the Subcommittee shall meet at such times as shall be provided by its rules of procedure. The Subcommittee on Prevention and the Committee against Torture shall hold their sessions simultaneously at least once a year.

Part III
Mandate of the Subcommittee on Prevention

Article 11

The Subcommittee on Prevention shall:

(a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment;

(b) In regard to the national preventive mechanisms:
   (i) Advise and assist States Parties, when necessary, in their establishment;

(ii) Maintain direct, if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities;
(iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment;
(iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;

(c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working toward the strengthening of the protection of persons from torture and other cruel, inhuman or degrading treatment or punishment.

Article 12

In order to enable the Subcommittee on Prevention to comply with its mandate as laid out in article 11, the States Parties undertake to:

(a) Receive the Subcommittee on Prevention in its territory and grant it access to the places of detention as defined in article 4 of the present Protocol;
(b) Share all relevant information the Subcommittee on Prevention may request to evaluate the needs and measures that should be adopted in order to strengthen the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment;
(c) Encourage and facilitate contacts between the Subcommittee on Prevention and the national preventive mechanisms;
(d) Examine the recommendations of the Subcommittee on Prevention and enter into dialogue with it on possible implementation measures.

Article 13

1. The Subcommittee on Prevention shall establish, at first by lot, a programme of regular visits to the States Parties in order to fulfil its mandate as established in article 11.
2. After consultations, the Subcommittee on Prevention shall notify its programme to the States Parties in order that they may, without delay, make the necessary practical arrangements for the visits to take place.
3. The visits shall be conducted by at least two members of the Subcommittee on Prevention. These members can be accompanied, if needed, by experts of demonstrated professional experience and knowledge in the fields covered by the present Protocol who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the Office of the United Nations High Commissioner for Human Rights and the United Nations Centre for International Crime Prevention. In preparing the roster, the States Parties concerned shall propose no more than five national experts. The State Party concerned may oppose the inclusion of a specific expert in the visit, whereupon the Subcommittee on Prevention shall propose another expert.
4. If the Subcommittee on Prevention considers it appropriate, it can propose a short follow-up visit after regular visit.

Article 14

1. In order to enable the Subcommittee on Prevention to fulfil its mandate, the States Parties to the present Protocol undertake to grant it:

(a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
(b) Unrestricted access to all information referring to the treatment of these persons as well as their conditions of detention;
(c) Subject to paragraph 2, unrestricted access to all places of detention and their installations and facilities;
(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person whom the Subcommittee on Prevention believes may supply relevant information;
(e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. Objection to a visit to a particular place of detention can only be made on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited which temporarily prevent the carrying out of such a visit. The existence of a declaration of a state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

Article 15

No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the Subcommittee on Prevention or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.

Article 16

1. The Subcommittee on Prevention shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national mechanism.
2. The Subcommittee on Prevention shall publish its report, together with any comments of the State Party concerned, whenever requested to do so by that State Party. If the State Party makes part of the report public, the Subcommittee on Prevention may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned.
3. The Subcommittee on Prevention shall present a public annual report on its activities to the Committee against Torture.
4. If the State Party refuses to cooperate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the Subcommittee's recommendations, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the Subcommittee's report.

Part IV
National Preventive Mechanisms

Article 17

Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol, if they are in conformity with its provisions.

Article 18

1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
2. The States Parties shall take the necessary measures in order for the experts of the national mechanism to have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status and functioning of national institutions for the promotion and protection of human rights.

Article 19

The national preventive mechanisms shall be granted at least the powers to:

(a) Regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection from torture, cruel, inhuman or degrading treatment or punishment;
(b) Make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
(c) Submit proposals and observations concerning existing or draft legislation.

Article 20

In order to enable the national preventive mechanisms to fulfil their mandate, the States Parties to the present Protocol undertake to grant them:

(a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
(b) Access to all information referring to the treatment of these persons as well as their conditions of detention;
(c) Access to all places of detention and their installations and facilities;
(d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person whom the national preventive mechanism believes may supply relevant information;
(e) The liberty to choose the places they want to visit and the persons they want to interview;
(f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

Article 21

1. No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.
2. Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.

Article 22

The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.

Article 23

The States Parties to the present Protocol undertake to publish and disseminate the annual reports of the national preventive mechanisms.

Part V
Declaration

Article 24

1. Upon ratification, States Parties can make a declaration postponing the implementation of their obligations either under Part III or under Part IV of the present Protocol.
2. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend this period for an additional two-year period.

Part VI
Financial Provisions

Article 25

1. The expenditure incurred by the Subcommittee on Prevention in the implementation of the present Protocol shall be borne by the United Nations.
2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee under the present Protocol.

Article 26

1. A Special Fund shall be set up in accordance with the relevant procedures of the General Assembly, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Subcommittee on Prevention to a State Party after a visit, as well as education programmes of the national preventive mechanisms.
2. The Special Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations and other private or public entities.

Part VII
Final Provisions

Article 27

1. The present Protocol is open for signature by any State which has signed the Convention.
2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 28

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 29

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 30

No reservations shall be made to the present Protocol.

Article 31

The provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol.

Article 32

The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, or the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 33

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation which occurs prior to the date at which the denunciation becomes effective, or to the actions that the Subcommittee on Prevention has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Subcommittee on Prevention prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of the State Party becomes effective, the Subcommittee on Prevention shall not commence consideration of any new matter regarding that State.

Article 34

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional process.
3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 35

Members of the Subcommittee on Prevention and of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. Members of the Subcommittee on Prevention shall be accorded the privileges and immunities specified in section 22 of the Convention on Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 36

When visiting a State Party the members of the Subcommittee on Prevention shall, without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State; and
(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 37

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

APPENDIX B.3

Status of Ratification of the Optional Protocol as of 31 December 2017

Participant	Signature	Ratification, Accession (a)
Albania		1.10.2003 (a)
Angola	24.9.2013	
Argentina	30.4. 2003	15.11.2004
Armenia		14.9.2006 (a)
Australia	19.5.2009	21.12.2017
Austria	25.9.2003	4.12.2012
Azerbaijan	15.12.2005	28.1.2009
Belgium	24.10.2005	
Belize		4.9.2015 (a)
Benin	24.2.2005	20.9.2006
Bolivia	2.5.2006	23.5.2006
Bosnia and Herzegovina	7.12.2007	24.10.2008
Brazil	13.10.2003	12.1.2007
Bulgaria	22.9.2010	1.6.2011
Burkina Faso	21.9.2005	7.7.2010
Burundi		18.10.2013 (a)
Cabo Verde	26.9.2011	1.4.2016
Cambodia	14.9.2005	30.3.2007
Cameroon	15.12.2009	
Central African Republic		11.10.2016 (a)
Chad	26.9.2012	
Chile	6.6.2005	12.12.2008
Congo	29.9.2008	
Costa Rica	4.2.2003	1.12.2005
Croatia	23.9.2003	25.4.2005
Cyprus	26.7.2004	29.4.2009
Czech Republic	13.9.2004	10.7.2006
Democratic Republic of the Congo		23.9.2010 (a)
Denmark	26.6.2003	25.6.2004
Ecuador	24.5.2007	20.7.2010
Estonia	21.9.2004	18.12.2006
Finland	23.9.2003	8.10.2014

(continued)

Appendix B.3. (contd.)

Participant	Signature	Ratification, Accession (a)
France	16.9.2005	11.11.2008
Gabon	15.12.2004	22.9.2010
Georgia		9.8.2005 (a)
Germany	20.9.2006	4.12.2008
Ghana	6.11.2006	23.9.2016
Greece	3.3.2011	11.2.2014
Guatemala	25.9.2003	9.6.2008
Guinea	16.9.2005	
Guinea-Bissau	24.9.2013	
Honduras	8.12.2004	23.5.2006
Hungary		12.1.2012 (a)
Iceland	24.9.2003	
Ireland	2.10.2007	
Italy	20.8.2003	3.4.2013
Kazakstan	25.9.2007	22.10.2008
Kyrgyzstan		29.12.2008 (a)
Lebanon		22.12.2008 (a)
Liberia		22.9.2004 (a)
Liechtenstein	24.6.2005	3.11.2006
Lithuania		20.1.2014 (a)
Luxembourg	13.1.2005	19.5.2010
Madagascar	24.9.2003	21.9.2017
Maldives	14.9.2005	15.2.2006
Mali	19.1.2004	12.5.2005
Malta	24.9.2003	24.9.2003
Mauritania	27.9.2011	3.10.2012
Mauritius		21.6.2005 (a)
Mexico	23.9.2003	11.4.2005
Mongolia	24.9.2013	12.2.2015
Moldova	16.9.2005	24 July 2006
Montenegro	23.10.2006	6.3.2009
Morocco		24.11.2014 (a)
Mozambique		1.7.2014 (a)
Nauru		24.1.2013 (a)
Netherlands	3.6.2005	28.9.2010
New Zealand	23.9.2003	14.3.2007
Nicaragua	14.3.2007	25.2.2009
Niger		7.11.2014 (a)
Nigeria		27.7.2009 (a)

Appendix B.3. (contd.)

Participant	Signature	Ratification, Accession (a)
Norway	24.9.2003	27.6.2013
Panama	22.9.2010	2.6.2011
Paraguay	22.9.2004	2.12.2005
Peru		14.9.2006 (a)
Philippines		17.4.2012 (a)
Poland	5.4.2004	14.9.2005
Portugal	15.2.2006	15.1.2013
Romania	24.9.2003	2.7.2009
Rwanda		30.6.2015 (a)
Senegal	4.2.2003	18.10.2006
Serbia	25.9.2003	26.9.2006
Sierra Leone	26.9.2003	
Slovenia		23.1.2007 (a)
South Africa	20.9.2006	
South Sudan		30.4.2015 (a)
Spain	13.4.2005	4.4.2006
Sweden	26.6.2003	14.9.2005
Switzerland	25.6.2004	24.9.2009
The Former Yugoslav Republic of Macedonia	1.9.2006	13.2.2009
Timor-Leste	16.9.2005	
Togo	15.9.2005	20.7.2010
Tunisia		29.6.2011 (a)
Turkey	14.9.2005	27.9.2011
Ukraine	23.9.2005	19.9.2006
United Kingdom of Great Britain and Northern Ireland	26.6.2003	10.12.2003
Uruguay	12.1.2004	8.12.2005
Venezuela (Bolivarian Republic of)	1.7.2011	
Zambia	27.9.2010	

APPENDIX B.4
Rules of Procedure

In accordance with article 10, paragraph 2, of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter 'the Optional Protocol'), the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter 'the SPT') adopted the following rules of procedure at its eighteenth session held in Geneva from 12 to 16 November 2012.[1]

PART ONE
General rules

I. Sessions

Rule 1
Dates of sessions

1. Regular sessions of the SPT shall be convened at dates decided by the SPT, in consultation with the Secretary-General of the United Nations (hereinafter 'the Secretary-General'), taking into account the calendar of conferences as approved by the General Assembly.
2. The SPT shall set the dates of future regular sessions in advance on an ongoing basis, in consultation with the Secretary-General. Amendments to the agreed dates of future regular sessions shall be possible only after consultation with members at least six months in advance of the set date.
3. The SPT and the Committee against Torture shall hold at least one session a year simultaneously, in accordance with article 10, paragraph 3, of the Optional Protocol.
4. In addition to regular sessions, special sessions shall be held at dates agreed by the SPT, in consultation with the Secretary-General.

Rule 2
Place of sessions

Sessions of the SPT shall normally be held at the United Nations Office at Geneva. Another venue for a session may be designated by the SPT, in consultation with the Secretary-General, taking into account the calendar of conferences approved by the General Assembly and rule 16 of the SPT rules of procedure.

Rule 3
Notification of sessions

The Secretary-General shall notify the members of the SPT of the date, duration and place of each session as early as possible, but no later than two months prior to the beginning of the session concerned, such date being in accordance with the dates agreed in advance by the SPT (see rule 1).

Rule 4
Provisional agenda and draft order of business

1. The provisional agenda and the draft order of business for a session shall be prepared by the secretariat of the SPT (hereinafter 'the Secretariat'), in consultation with the Bureau of the SPT, no later than one month prior to the beginning of the session. They shall be transmitted in the

[1] These rules of procedure will be complemented by separate guidelines on visits to States parties.

working languages of the SPT at least two weeks prior to the opening of the session, and shall contain the issues agreed for discussion by the SPT at the previous session, as well as other issues proposed by the Chairperson, the Bureau or the Secretariat.

2. The first item on the provisional agenda and draft order of business of any session shall be amendments to and adoption of the agenda and order of business.
3. The agenda and order of business may be revised by the SPT in the course of the session in the light of the emerging needs.

Rule 5

Transmission of documentation

The Secretariat shall transmit documents other than the provisional agenda and draft order of business to the members of the SPT in the working languages of the SPT as early as possible. All working documents prepared or other documents received by the Secretariat in advance of the session shall be transmitted forthwith to the SPT (including in electronic form, if available and appropriate, taking into account the requirements for confidentiality) in the original language of the document and, as soon as possible thereafter, in translation into the other working languages of the SPT.

II. Members of the SPT

Rule 6

Election of members of the SPT

1. Members of the SPT shall be the 25 experts elected in accordance with article 5 of the Optional Protocol.
2. Members shall be eligible for re-election once, if renominated.
3. Members of the SPT shall serve in their individual capacity and may not be represented by alternates.

Rule 7

Term of office

1. The term of office of the members of the SPT shall begin on 1 January of the year after the date of their election by the meeting of the States parties. The term of office shall expire on 31 December four years later, except for those members chosen by lot to serve for two years, whose terms shall expire on 31 December two years after their election.
2. In accordance with article 8 of the Optional Protocol, the term of the member appointed to fill a casual vacancy begins on the date of her or his approval, and shall end on the date of expiration of the term of office of the member being replaced.

Rule 8

Casual vacancies

1. In accordance with article 8 of the Optional Protocol, if a member of the SPT dies or resigns, or for any cause can no longer perform her or his duties, the Secretary-General shall immediately declare the seat vacant and inform the State party that nominated the member, which shall nominate, within two months, another eligible candidate subject to the approval of the majority of the States parties. Approval shall be considered given unless half or more of the States parties respond negatively within six weeks of having been informed of the proposed nominee.
2. When a member of the SPT is consistently unable to carry out her or his duties for any cause other than absence of a temporary nature, said member shall resign. Written notification of such resignation shall be submitted to the SPT and the Secretary-General. The Secretary-General shall inform the State party which nominated the member so that action can be taken in accordance with article 8 of the Optional Protocol.

3. The Secretary-General shall inform the States parties of the name of the member filling the casual vacancy as soon as possible after approval.
4. Where approval of a replacement under paragraph 1 of this rule is declined, the State party that nominated the member shall be invited to nominate another eligible candidate, meeting the requirements of article 5 of the Optional Protocol.

Rule 9

Solemn declaration

Before assuming her or his duties, each member of the SPT shall, at the first meeting of the SPT at which she or he is present following election, make the following solemn declaration:

"I solemnly declare that I will perform my duties and exercise my powers as a member of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment impartially, independently and efficiently."

III. Bureau of the SPT

Rule 10

Election of the Bureau

1. The SPT shall elect from among its members a Chairperson and four Vice-Chairpersons who shall constitute the Bureau of the SPT. The Bureau shall select one of its Vice-Chairpersons to act as Rapporteur. Three members of the Bureau shall constitute a quorum.
2. Members of the Bureau shall be elected for a term of two years and be eligible for re-election.
3. Where there is only one candidate for election as one of its officers, the SPT may decide to elect that person by consensus. Where there are two or more candidates for election as one of its officers, or where the SPT otherwise decides to proceed with a ballot, the person who obtains a simple majority of votes shall be elected. If no single candidate receives a majority of votes, the members of the SPT shall endeavour to reach a consensus before holding another ballot. Elections shall be by secret ballot.

Rule 11

Functions of the Bureau

1. The Bureau shall direct the work of the SPT and shall perform all other functions conferred upon it by these rules of procedure and by the SPT. In particular, when the SPT is not in session, the Bureau may make decisions on urgent or delegated matters on its behalf. Members shall be consulted on such decisions whenever time and circumstances permit and each such decision shall be communicated to all members as soon as possible, account being taken of the requirements for confidentiality. The Bureau shall report to the SPT at each session on any decisions or actions of an urgent or delegated nature which have been taken on behalf of the SPT since the previous session.
2. The Bureau shall meet as required during regular sessions and in special sessions as necessary to fulfil its obligations and the mandate of the SPT.

Rule 12

Powers of the Chairperson and Vice-Chairpersons

1. The Chairperson shall exercise her or his functions under the authority of the SPT.
2. In accordance with these rules of procedure, the Chairperson shall ensure the orderly conduct of the proceedings of the SPT, including observance of these rules.
3. The Chairperson shall represent the SPT at the United Nations and other meetings. If the Chairperson is unable to represent the SPT at such meetings, she or he may designate one of the Vice-Chairpersons. If no Vice-Chairperson is available, with the permission of the SPT,

the Chairperson may designate a member of the SPT, to attend such meetings on behalf of the SPT.

Rule 13

Acting Chairperson

1. If, during a session, the Chairperson is unable to be present at a meeting or any part thereof, she or he shall designate a Vice-Chairperson to act in her or his place.
2. If the Chairperson and the Vice-Chairpersons are simultaneously unable to carry out their duties, or if none has been elected, the SPT shall entrust such duties to any member of the SPT until such time as the Chairperson or Vice-Chairpersons assume their functions or are elected. The Secretariat may, if necessary and in consultation with the SPT, call a meeting of the SPT for that purpose.
3. Any member acting as Chairperson shall have the same powers and duties as the Chairperson.

IV. Secretariat of the SPT

Rule 14

Provision of the SPT secretariat

In accordance with article 25, paragraph 2, of the Optional Protocol, the Secretary-General shall provide the necessary staff and facilities for the effective performance of the functions of the Subcommittee. As such, the SPT shall be provided with a dedicated secretariat, including a secretary and a team of staff with the capacity to engage in SPT fieldwork.

Rule 15

Duties of the SPT secretariat

1. The SPT secretariat shall be responsible for all the necessary arrangements for sessions of the SPT.
2. The Secretariat shall attend all sessions of the SPT and may make oral or written statements at those sessions.
3. The Secretariat shall provide working documents in advance of the sessions to enable the SPT to address all the items on its draft agenda and to carry out its fieldwork effectively. The Secretariat shall provide the SPT during sessions with all information which the SPT considers necessary in order for the SPT to fulfil its mandate effectively.
4. The Secretariat shall respond as early as possible to requests made by the Bureau for information, and shall provide draft correspondence and draft documents upon request as soon as possible.

Rule 16

Financial implications of proposals

1. The expenditure incurred by the SPT in the implementation of the Optional Protocol shall be borne by the United Nations.
2. Before any proposal involving additional expenditure to that already approved by the General Assembly is approved by the SPT, the Secretariat shall prepare and circulate to the members of the SPT, as early as possible, an estimate of the cost involved in the proposal indicating the additional expenditure is involved. It shall be the duty of the Chairperson to draw the members' attention to this estimate and the additional expenditure involved prior to a decision being taken on the proposal.

V. Communications

Rule 17
Incoming and outgoing communications

1. The Secretariat shall bring to the attention of the SPT all communications received containing information submitted for consideration by the SPT.
2. Communications received by individual members of the SPT which relate to the mandate of the SPT shall be forwarded to the Secretariat.
3. The Secretariat shall keep a record of all communications received and shall, where appropriate, send an acknowledgement of receipt to the authors of such communications.
4. All correspondence sent by the SPT or on behalf of the SPT shall be agreed in advance by the Bureau. The Secretariat shall provide the Bureau with copies of all such correspondence sent out with the date of transmission.
5. The Secretariat shall be responsible for informing the SPT of any issues that may be brought before it for consideration or of any other developments that may be of relevance to it. The Secretariat shall transmit to the SPT information on all correspondence and other communications addressed to it or relevant to its mandate.

Rule 18
Meetings with States parties

The Secretariat shall be responsible for informing the SPT in advance of all meetings with States parties at which the SPT is the subject of discussion, and shall consult with the SPT in advance as to any input concerning the SPT at such meetings. The Secretariat shall also ensure that the SPT has the opportunity to be represented at such meetings in person, or by contributing to and agreeing information to be provided about the SPT.

VI. Languages

Rule 19
Official and working languages

1. Arabic, Chinese, English, French, Russian and Spanish shall be the official languages of the SPT. Statements made in an official language shall be interpreted into the other official languages.
2. English, Spanish and French shall be the working languages of the SPT. The working languages of the SPT may be changed by its decision. All formal decisions and official documents of the SPT shall be issued in the working languages.

VII. Confidentiality

Rule 20
In camera sessions

1. The meetings of the SPT shall be held in camera. Its deliberations shall remain confidential.
2. The SPT may hear any person whom it considers to be in a position to assist it in the performance of its functions under the Optional Protocol. Such persons shall attend a meeting by invitation of the SPT only, in consultation with the Secretariat, and shall be bound by strict confidentiality.
3. The SPT may decide on an ad hoc basis that a meeting shall be public.

VIII. Documents of the SPT

Rule 21
Confidentiality

All documentation and information of the SPT shall be kept strictly confidential, unless the SPT decides otherwise in relation to a particular document.

Rule 22
Summary reports

1. The Secretariat shall produce a draft summary report of each session in a working language of the SPT, including the main observations, issues addressed and decisions taken. The draft summary report shall be analytically structured in accordance with the items of the agenda, and shall be transmitted to the SPT for comments and amendments within one month of the end of the session concerned. A revised version of the summary report, incorporating the amendments suggested by the SPT, shall be circulated to the SPT at least three weeks prior to the next session, in the working languages of the SPT.

Rule 23
List of decisions

A draft list of decisions taken by the SPT during each session shall be prepared by the Secretariat, in consultation with the Bureau, and adopted by the SPT.

Rule 24
Annual report

In accordance with article 16, paragraph 3, of the Optional Protocol, the SPT shall prepare a public annual report on its activities. The SPT shall present its public annual report to the Committee against Torture.

IX. Conduct of business

Rule 25
Quorum

Fourteen (14) members of the SPT shall constitute a quorum.

Rule 26
Adoption of decisions

1. The SPT shall endeavour to reach all of its decisions by consensus. If a consensus cannot be reached, decisions of the SPT shall be put to a vote and made by a simple majority vote of the members present and voting.
2. Each member of the SPT shall have one vote.
3. The SPT may adopt decisions by e-mail in accordance with the established set of procedures.

Rule 27
Working groups and Rapporteurs

The SPT may appoint Rapporteurs and set up ad hoc working groups comprising a limited number of its members. The terms of reference of such rapporteurships and working groups shall be defined by the SPT.

Rule 28
Independence of members

1. The members of the SPT shall serve in their personal capacity and shall not only be independent and impartial, but shall also be seen to be so by a reasonable observer. To this end, SPT members shall conduct themselves in accordance with the Guidelines on the independence and impartiality of members of the human rights treaty bodies ('the Addis Ababa guidelines'), in particular:
   (a) No member of the SPT shall participate in activities which may imply, or may be seen to imply, a conflict of interest with her or his capacity as an independent and impartial member of the SPT;

(b) Members of the SPT shall avoid any action which might give the impression that any given State is receiving treatment which is more favourable or less favourable than that accorded to other States;

(c) Members of the SPT holding multiple nationalities shall inform, on their own initiative, the Chairperson of the SPT and its secretariat thereof.

2. (a) No member of the SPT shall participate in the conduct of a visit or involve themselves in the consideration of the report on the visit to the State party in respect of the nationality of which she or he was elected, of the State party which nominated her or him, or of any other nationality which she or he holds;

(b) No member of the SPT shall participate in the preparation of or follow-up to a country visit or inquiry or the consideration of ensuing reports, if any real or perceived conflict of interest is present.

3. If for any reason a member of the SPT considers that she or he is facing a potential conflict of interest, she or he shall promptly inform the Chairperson of the SPT who shall advise on the potential conflict of interest taking into account the Addis Ababa guidelines. Ultimately, the SPT as a whole shall take all measures necessary to safeguard the requirements of independence and impartiality of its members.

X. Co-operation with United Nations organs and mechanisms and other international, regional and national institutions or organizations

Rule 29
Consultation with other bodies

1. The SPT may invite relevant bodies to submit, or may receive, for consideration information, documentation and written statements on such matters as covered by the Optional Protocol that fall within the scope of its activities.
2. In accordance with article 31 of the Optional Protocol, the SPT may consult with bodies established under regional conventions with a view to cooperating with them and avoiding duplication, in order to promote effectively the objectives of the Optional Protocol.

part two
Rules Concerning National Preventive Mechanisms

Rule 30
Relationship with national preventive mechanisms

1. The SPT shall advise and assist States parties, when necessary, in the establishment of national preventive mechanisms. It shall maintain direct, and if necessary confidential, contact with them, which includes the right to receive information from and meet with them, in accordance with articles 11 and 20 (f) of the Optional Protocol.
2. The SPT shall offer the national preventive mechanisms training and technical assistance with a view to strengthening their capacities.
3. The SPT shall advise and assist the national preventive mechanisms in the evaluation of their needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.
4. The SPT shall make recommendations and observations to the States parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention against torture and other cruel, inhuman or degrading treatment or punishment of persons deprived of their liberty.
5. In its relations with the national preventive mechanisms, the SPT shall give due consideration to the Principles relating the Status of National Institutions (the Paris Principles).

6. The SPT has adopted a separate set of guidelines on national preventive mechanisms (CAT/OP/12/5).

PART THREE
Rule Relating to Interpretation

Rule 31
Interpretation

For the purpose of interpreting the present rules, the headings, which are inserted for reference purposes only, shall be disregarded.

PART FOUR
Rules Relating to Suspension and Amendment of these Rules

Rule 32
Suspension

Any of the present rules may be suspended by a decision of the SPT, provided such suspension is not inconsistent with the provisions of the Optional Protocol.

Rule 33
Amendments

The present rules may be amended by a decision of the SPT, at least twenty-four (24) hours after the proposal for the amendment has been circulated, provided that the amendment is not inconsistent with the provisions of the Optional Protocol.

Rule 34
Additions

The SPT may decide to add to the present rules at any time. An additional rule may be adopted by a decision of the SPT, at least twenty-four (24) hours after the proposal for the additional rule has been circulated, provided that the additional rule is not inconsistent with the provisions of the Optional Protocol.

APPENDIX B.5

Members of the Subcommittee since 2007 as of 31 December 2017

Name	State Party	From 1 Jan (unless otherwise indicated)	To 31 Dec(unless otherwise indicated
Ms Mari AMOS*	Estonia	2011	2018
Mr Hans-Jörg Viktor BANNWART	Switzerland	2015	2016
Ms Silvia CASALE* O	United Kingdom	2007	26.6.2009[1]
Mr Mario Luis CORIOLANO* O	Argentina	2007	1.10.2012[2]
Mr Arman DANIELYAN*	Armenia	2011	2018
Ms Marija DEFINIS GORJANOVIC O	Croatia	2007	2018[3]
Mr Satyabhooshun Gupt DOMAH	Mauritius	2017	2020
Mr Malcolm EVANS *	United Kingdom of Great Britain and Northern Ireland	2009	2020[4]
Mr Roberto Michel FEHÉR PÉREZ	Uruguay	2015	2018
Mr Daniel FINK	Switzerland	2017	2020
Mr Enrique Andrés FONT	Argentina	2013	2016
Mr Emilio GINÉS SANTIDRIÁN*	Spain	2009	2018[5]
Ms Lowell Patria GODDARD*	New Zealand	2011	2016
Ms Maria Dolores GOMEZ	Argentina	2017	2020
Ms Lorena GONZÁLEZ PINTO	Guatemala	2015	2018
Mr Zdenek HAJEK* O	Czech Republic	2007	2012
Ms Suzanne JABBOUR*	Lebanon	2011	2016
Mr Milos JANKOVIC	Serbia	2013	2016
Mr Goran KLEMENCIC	Slovenia	2011	2012

[1] Ms Silvia Casale resigned on 26 June 2009 shortly after taking up her second mandate (2009–2012). She was replaced by Mr Malcolm Evans (CAT/C/44/2, para 80 and Annex II).

[2] Mario Luis Coriolano resigned his membership on 1 October 2012 following his election as a member of the United Nations Human Rights Council Advisory Committee (CAT/C/50/2). His term of office was due to come to an end on 31 December 2012.

[3] In 2015 Marija Definis Gorjanovic was re-elected into office although she had already served two mandates from 2007 to 2012 (from 2007 to 2010; and from 2011 to 2012).

[4] In 2009 Malcom Evans replaced Silvia Casale (whose term of office was from 2009–2012 see CAT/C/44/2, para 80 and Annex II). After that, Malcom Evans was elected in 2013 and in 2017.

[5] In 2009 Mr Emilio Ginés Santidrian replaced Leopoldo Torres Boursault (CAT/C/44/2, Annex II). After that, he was elected in 2011 (CAT/C/46/2, Annex III) and in 2015 (<https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Elections2014.aspx|>).

Name	State Party	From 1 Jan (unless otherwise indicated)	To 31 Dec(unless otherwise indicated
Mr Gnambi Garba KODJO	Togo	2015	2018
Mr Paul LAM SHANG LEEN*	Mauritius	2011	2016
Mr Zbigniew LASOCIK* O	Poland	2007	2012
Mr Víctor MADRIGAL-BORLOZ	Costa Rica	2013	2016
Mr Petros MICHAELIDES	Cyprus	2011	2020[6]
Mr Kosta MITROVIC	Serbia	2017	2020
Ms Aisha Shujune MUHAMMAD*	Maldives	2011	2018
Ms Radhia NASRAOUI	Tunisia	2015	2018
Mr Olivier OBRECHT[7]	France	2011	12.12.2013
Ms Margarete OSTERFELD*	Germany	February 2013	2020[8]
Mr Abdellah OUNNIR	Morocco	2017	2020
Ms June Caridad PAGADUAN LOPEZ*	Philippines	2013	2020
Ms Catherine PAULET*	France	Feb 2013	2018[9]
Ms Zdenka PEROVIĆ	Montenegro	2017	2020
Mr Hans Draminsky PETERSEN* O	Denmark	2007	2014
Ms Maria Margarida E PRESSBURGER*	Brazil	2011	2016
Mr Christian PROSS	Germany	2011	30.10.2013[10]
Mr Haimoud RAMDAN	Mauritania	2017	2020
Mr Victor Manuel RODRIGUZ RESCIA*O	Costa Rica	2007	2012
Ms Judith SALGADO ALVAREZ	Ecuador	2011	2014
Mr Miguel SARRE INGUINIZ* O	Mexico	2007	2014
Ms Aneta STANCHEVSKA*	The Former Yugoslav Republic of Macedonia	2011	2018
Ms Nora SVEAASS	Norway	2015	2018
Mr Wilder TAYLER SOUTO* O	Uruguay	2007	2014
Mr Felipe VILLAVICENCIO TERREROS*	Peru	2011	2018

[6] Petros Michalides was in office for his first mandate from 2011 to 2014. He was then re-elected into office in 2017 for a second period of four years.

[7] Olivier Obrecht resigned his membership (due to an end at the end of 2014) on 12 December 2013 (CAT/C/52/2).

[8] At the twenty-second session of the SPT (24–38 February 2014) Margarete Osterfeld succeeded to the place vacated by the resignations of Christian Pross the previous year (CAT/C/54/2).

[9] At the twenty-second session of the SPT (24–38 February 2014) Catherine PAULET succeeded to the place vacated by the resignations of Olivier Obrecht the previous year (CAT/C/54/2).

[10] Christian Pross resigned his membership of the SPT on 30 October 2013 shortly after his re-election into office He was replaced by Margarete Osterfeld (CAT/C/52/2).

Name	State Party	From 1 Jan (unless otherwise indicated)	To 31 Dec(unless otherwise indicated
Mr Leopoldo TORRES BOURSAULT [O]	Spain	2007	18.2.2009[11]
Mr Victor ZAHARIA[*]	Republic of Moldova	2013	2020
Mr Fortuné Gaétan ZONGO	Burkina Faso	2011	2014

[*] Member re-elected.
[O] Member of the original composition of the SPT.

[11] In 2009 Leopoldo Torres Boursault resigned on 18 February 2009 and was replaced by Mr Emilio Ginés Santidrián (CAT/C/44/2, para 80 and Annex II).

Bibliography

Adjovi, R, 'Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers' (2013) 52 International Legal Materials 1020

African Commission on Human and Peoples' Rights (ACmHPR), 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003) <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/> accessed 1 December 2017

African Union, 'Report of the Committee of Eminent African Jurists on the Case of Hissène Habré' (2006) <https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf> accessed 11 November 2017

Allain, J, 'The jus cogens Nature of Non-Refoulement' (2001) 13 International Journal of Refugee Law 533

Alston, P and Crawford, J, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000)

Amar, F, 'Problems Raised by Visits to Places of Detention: Objectives and Working Methods of the ICRC in Internal Disturbances and Tensions, Strasbourg Seminar on the Implementation of the European Convention for the Prevention of Torture' (1989) 10 Human Rights Law Journal 165

Amar, F and Gasser, HP, 'La contribution du Comité international de la Croix-Rouge à la lutte contre la torture: Les visites du CICR aux personnes privées de liberté en situation de troubles et tensions internes: objectifs et méthodes' (1989) 775 International Review of the Red Cross 28

Ambos, K, 'The Transnational Use of Torture Evidence' (2009) 42 Israel Law Review 362

American Civil Liberties Union and Global Justice Clinic: New York University School of Law, 'The Inter-American Commission on Human Rights Written Submission in Support of the Thematic Hearing on Human Rights Situation of People Affected by the United States' (2015) <https://chrgj.org/wp-content/uploads/2018/01/IACHR-US-RDI-Thematic-Hearing.pdf> accessed 20 November 2017

American University Washington College of Law—Center for Human Rights and Humanitarian Law (CHRHL), 'Litigation Before the UN Committee against Torture: Strengthening This Important Tool against Torture. Proceedings of a Conference Presented by the American University Washington College of Law and the World Organisation Against Torture' (2013) 20(4) Human Rights Brief 1

Amnesty International (AI), *Report on Torture* (2nd rev edn, AI 1975)

AI, 'Bolivia. Torture and Ill-Treatment: Amnesty International's Concerns' (June 2001) <https://www.amnesty.org/download/Documents/124000/amr180082001en.pdf> accessed 11 December 2017

AI, 'Universal Jurisdiction: The Duty to States to Enact and Enforce Legislation: Chapter 10: T orture: State Practice at the National Level: Country by Country Review' (31 August 2001) <https://www.amnesty.org/en/documents/ior53/013/2001/en/> accessed 7 November 2017

AI, 'Amnesty International's 12-Point Programme for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State' (22 April 2005) <www.amnesty.org/download/Documents/80000/act400012005en.pdf> accessed 11 December 2017

AI, 'Uzbekistan: Lifting the Siege on the Truth about Andizhan' (19 September 2005) <https://www.amnesty.org/en/documents/eur62/021/2005/en/> accessed 11 December 2017

AI, 'Urgent Action in Focus: November 2005: Blood on the Streets: The Aftermath of the Killings in Andizhan' (November 2005) <https://www.amnesty.org/en/documents/act60/024/2005/en/> accessed 11 December 2017

AI, 'UK: Submission to the Intelligence and Security Committee' (31 October 2014) <www.amnesty.org/download/Documents/EUR450122014ENGLISH.pdf> accessed 11 December 2017

AI, *Combating Torture and other Ill-Treatment: A Manual for Action* (AI 2016)

AI, 'UK/Ireland: Hooded Men Torture Ruling is "very disappointing" ' (20 March 2018) <https://www.amnesty.org/en/latest/news/2018/03/uk-ireland-hooded-men-torture-ruling-is-very-disappointing/> accessed 21 March 2018

AI, Human Rights Watch (HRW), and the International Commission of Jurists, 'Reject rather than Regulate: Call on Council of Europe Member States Not to Establish Minimum Standards for the Use of Diplomatic Assurances in Transfers to Risk of Torture and Other Ill-Treatment' (2 December 2005) <www.amnesty.org/en/documents/ior61/025/2005/en/> accessed 17 November 2017

AI, International Commission of Jurists, and REDRESS Trust, 'Amicus Curiae Submission Pursuant to Internal Rule 33 Submitted in Chambers in the Courts of Cambodia No 002/19-09-2007-ECCC-OCIJ-PTC' (25 September 2009) <www.amnesty.org/download/Documents/44000/asa230202009en.pdf> accessed 11 December 2017

Andenas, M and Weatherall, T, 'II. International Court of Justice: Questions relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgement of 20 July 2012' (2013) 62 International & Comparative Law Quarterly 753

Anders Brekke and others, 'Sivilombudsmannen stiller ikke i Breivik-rettssaken' (2016) NRK <https://www.nrk.no/norge/sivilombudsmannen-stiller-ikke-i-breivik-rettssaken-1.12858404> accessed 2 November 2017

Andrysek, O, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures' (1997) 9 International Journal of Refugee Law 392

Arbour, L, 'No Exceptions to the Ban on Torture' *The New York Times* (Geneva, 6 December 2005) <www.nytimes.com/2005/12/06/opinion/no-exceptions-to-the-ban-on-torture.html> accessed 17 November 2017

Asia Pacific Forum (APF), *Undertaking Effective Investigations: A Guide for National Human Rights Institutions* (Asia Pacific Forum of National Human Rights 2015)

Assembly of the African Union, 'Declaration on the Hissène Habré Case and the African Union' (24 January 2006) <http://pantheon.hrw.org/legacy/english/docs/2006/01/24/chad12571.htm> accessed 28 January 2017

Associated Press (AP) Worldstream, 'Green Party Official Files Criminal Complaint against Ailing Iraqi Official' (16 August 1999)

Association for the Prevention of Torture (APT), *Position Paper on the Optional Protocol to the UN Convention against Torture: Added Value of the Optional Protocol for States Parties to the European Convention for the Prevention of Torture* (APT 2003)

APT, *Monitoring Places of Detention: A Practical Guide* (APT 2004)

APT, *Establishment and Designation of National Preventive Mechanisms* (APT 2006)

APT, *Guide: Establishment and Designation of National Preventive Mechanisms* (APT 2006)

APT, *Defusing the Ticking Bomb Scenario: Why We Must Say No To Torture, Always* (APT 2007)

APT, 'Detention Monitoring Briefings, Briefing No 1: Making Effective Recommendations' (November 2008) <https://www.apt.ch/content/files_res/Briefing1_en.pdf> accessed 11 November 2017

APT, 'Legal Briefing Series: Application of OPCAT to a State Party's Places of Military Detention Located Overseas' (October 2009) <https://www.apt.ch/content/files_res/LegalBriefing1_OPCAT.pdf> accessed 11 November 2017

APT, 'Amicus Curiae Brief Presented to the Inter-American Court of Human Rights by APT in the Case of Teodoro Cabrera García and Rodolfo Montiel Flores Against the United Mexican States, No. 12449' (10 September 2010) <https://apt.ch/content/files_res/apt-amicus-curiae-case-no-12-449-eng--1.pdf> accessed 11 November 2017

APT, 'OPCAT Briefings, Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and

Other Decentralised States' (March 2011) <https://www.apt.ch/content/files_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf> accessed 1 November 2017

APT, *Beware the Gift of Poison Fruit: Sharing Information with States That Torture* (APT 2012)

APT, 'Detention Monitoring Briefings, Briefing No 4: Mitigating the Risks of Sanctions Related to Detention Monitoring' (January 2012) <https://www.files.ethz.ch/isn/133285/Briefing4_en.pdf> accessed 11 November 2017

APT, 'OPCAT Briefings, National Preventive Mechanisms: Monitoring the Forces Deportation Flights of Migrants' (March 2012) <https://www.apt.ch/content/files_res/OPCATBriefing_MonitoringDeportationFlights_en.pdf> accessed 11 November 2017

APT, 'Alternative Reporting to the Committee Against Torture' (28 January 2013) <https://www.apt.ch/content/files/UN/Alternative%20reporting%20CAT_APT%20guidelines_28022013.pdf> accessed 11 November 2017

APT, 'APT Briefing Series, National Human Rights Institutions as National Preventive Mechanisms: Opportunities and Challenges' (December 2013) <https://www.apt.ch/content/files_res/apt-briefing-on-nhris-as-npms-en.pdf> accessed 11 November 2017

APT, 'October 2016 Elections to the Subcommittee on Prevention of Torture, Guidance on the Selection of Candidates at the Domestic Level and the Elections in Geneva' (July 2016)

APT, Asia Pacific Forum, and OHCHR, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (APT, APF, and OHCHR 2010)

APT, APF, and OHCHR, 'Preventing Torture: An Operational Guide for National Human Rights Institutions' (2010) <https://www.ohchr.org/Documents/Publications/PreventingTorture.pdf> accessed 2 November 2017.

APT and the Center for Justice and International Law (CEJIL), *Torture in International Law: A Guide to Jurisprudence* (APT and CEJIL 2008)

APT and CEJIL, *Torture in International Law: A Guide to Jurisprudence* (APT and CEJIL 2008)

APT and Convention against Torture Initiative (CTI), *Guide on Anti-Torture Legislation* (APT and CTI 2016)

APT and IIDH, *Optional Protocol to the UN Convention Against Torture: Implementation Manual* (rev edn, APT and IIDH 2010)

The Alkarama Foundation, AI, APT and others, 'Joint Observations regarding Revised General Comment No 1 (2017) on the Implementation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (3 April 2017) <https://www.amnesty.org/en/documents/ior40/6040/2017/en/> accessed 15 November 2017

Bantekas, I and Oette, L, *International Human Rights Law and Practice: Interview 8.1. The Role of Medical Documentation in Combating Torture: Istanbul Protocol (Dr Önder Öskalipçi)* (2nd edn, Cambridge University Press 2016)

Barker, P, 'Universal Civil Jurisdiction and the Extraterritorial Reach of the Alien Tort Statute: The Case of Kiobel before the United States Supreme Court' (2012) 20 University of Miami International and Comparative Law Review 1

Başoğlu, M, 'A Theory- and Evidence-Based Approach to the Definition of Torture' in M Başoğlu (ed), *Torture and its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press 2017)

Bassiouni, MC, 'Universal Jurisdiction Unrevisited: The International Court of Justice Decision in Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)' (2002–2003) 12 The Palestine Yearbook of International Law Online 27

Bauer, M and Helbing, F, *Die Tortur Geschichte der Folter im Kriminalverfahren aller Völker und Zeiten* (Aalen 1973)

Bayefsky, AF, *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International 2000)

Bayefsky, AF, *How to Complain to the UN Human Rights Treaty System* (Brill/Nijhoff 2002)

Berg, KJ, *Universal Criminal Jurisdiction as Mechanism and Part of the Global Struggle to Combat Impunity with Particular Regards to the Crime of Torture* (Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte, NWV, Neuer Wissenschaftlicher Verlag 2012)

Bianchi, A, 'Ferrini v Federal Republic of Germany' (2005) 99 The American Journal of International Law 242

Bicknell, C and Evans, M, 'Monitoring Prisons: The Increasingly Complex Relationship Between International and Domestic Frameworks' in T Deams (ed), *Europe in Prisons* (Palgrave McMillan Cham 2017)

Birk, M and others, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (Open Society Foundations 2011)

Birk, M and others, *Enhancing Impact of National Preventive Mechanisms, Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward* (Ludwig Boltzmann Institute of Human Rights 2015)

Boulesbaa, A, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999)

Brownlie, I, *Principles of Public International Law* (5th edn, Clarendon Press 1998)

Bufacchi, V and Arrigo, JM, 'Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument' (2006) 23 Journal of Applied Philosophy 354

Burgers, JH and Danelius, H, *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)

Burns, P and McBurney, S, 'Impunity and the United Nations Convention against Torture: A Shadow Play without an Ending' in CM Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001)

Burt, J and Estrada, P, 'The Guatemala Genocide Trial Resumes' (*International Justice Monitor*, 20 October 2017) <https://www.ijmonitor.org/2017/10/the-guatemala-genocide-trial-resumes/> accessed 1 December 2017

Bybee, JS, Memorandum from Jay S Bybee, Assistant Attorney-General for the Office of Legal Council at the US Department of Justice, to Alberto R Gonzales, Counsel to President, 1 August 2002

Carver, R, 'Zimbabwe: Drawing a Line through the Past' (1993) 37 Journal of African Law 69

Carver, R, *Performance & Legitimacy: National Human Rights Institutions* (2nd edn, International Council on Human Rights Policy 2004)

Carver, R and Handley, L (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016)

Cassese, A, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 589

Cassese, A, 'The Belgian Court of Cassation v The International Court of Justice: The Sharon and Others Case' (2003) 1 Journal of International Criminal Justice 437

Cassese, A, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13 European Journal of International Law 853

Center for Constitutional Rights (CCR) and Canadian Centre for International Justice (CCIJ), 'Hassan Bin Attash, Sami El-Hajj, Muhammed Khan Tumani, and Murat Kurnaz v Canada, Communication presented to the Committee against Torture, Pursuant to Article 22 of the Convention against Torture For Violation of Articles 5, 6 and 7 of the Convention' 14 November 2012 <https://ccrjustice.org/sites/default/files/assets/files/CAT%20Canada%20Petition%20.pdf> accessed 11 December 2017

CCR and CCIJ, 'Re: CAT/536/2013, Hassan bin Attash et al, Communication against Canada, Reply to Supplemental Submission (Alleged Violation of Articles 5(2), 6 and 7 of the Convention against Torture)' 17 July 2014 <https://ccrjustice.org/sites/default/files/assets/17%20July%202014%20Final%20Reply%20UN%20CAT%20CCR%20CCIJ.pdf> accessed 22 November 2017

Center for Human Rights and Humanitarian Law, 'Human Rights Brief: Litigation Before the UN Committee against Torture: Strengthening This Important Tool against Torture: Proceedings of a Conference Presented by the American University Washington College of Law and the World Organisation Against Torture' (American University Washington College of Law 2013)

Center for Human Rights and Humanitarian Law, Anti-Torture Initiative, 'Protecting Children against Torture in Detention: Global Solutions for a Global Problem' (American University Washington College of Law 2017)

Centre for Civil and Political Rights (CCPR), 'UN Human Rights Committee: Participation in the Reporting Process. Guidelines for Non-Governmental Organisations (NGOs)' (3rd edn, 2015) <http://ccprcentre.org/doc/CCPR/Handbook/CCPR_Guidelines%20for%20NGOs_en.pdf> accessed 3 November 2017

Chesney, RM, 'Leaving Guantánamo: The Law of International Detainee Transfers' (2006) 40 University of Richmond Law Review 657

Cleveland, S, 'The United States and the Torture Convention, Part II: Armed Conflict' (*Just Security*, 19 November 2014) <https://www.justsecurity.org/17581/united-states-torture-convention-armed-conflict/> accessed 19 January 2017

Commission of Inquiry, 'Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories' (7 May 1992) in NJ Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol 3: Laws, Rulings and Reports (United States Institute of Peace Press 1995) 51–90

Consejo General del Poder Judicial/Comunicación Poder Judicial, 'La Audiencia Nacional investigará al régimen sirio por la desaparición del hermano de una ciudadana española' (*Poder Judicial*, 27 March 2017) <http://www.poderjudicial.es/cgpj/en/Judiciary/Novelties/La-Audiencia-Nacional-investigara-al-regimen-sirio-por-la-desaparicion-del-hermano-de-una-ciudadana-espanola> accessed 7 June 2017

Contreras-Garduño, D and Fraser, JA, 'The Identification of Victims Before the Inter-American Court of Human Rights and the International Criminal Court and its Impact on Participation and Reparations: A Domino Effect?' (2015) 7 Inter-American and European Human Rights Journal 174

Convention against Torture Initiative (CTI) and APT, 'UNCAT Ratification Tool' (2nd edn, CTI & APT 2016)

CTI, 'CTI Training Tools 1/2017: Investigative Interviewing for Criminal Cases' (2017) <https://cti2024.org/content/docs/CTI-Training_Tool_1-Final.pdf> accessed 11 November 2017

CTI, 'Reporting to the UN Committee Against Torture, CTI/UNCAT Implementation Tool 3/2017' (2017) <https://cti2024.org/content/docs/CTI-Reporting_UNCAT_final.pdf> accessed 11 November 2017

CTI, 'UNCAT Implementation Tool 2/2017: Safeguards in the First Hours of Police Detention' (2017) <https://cti2024.org/content/docs/CTI-Safeguards-final%20rev.pdf> accessed 11 November 2017

Corten, O, *The Vienna Conventions on the Law of Treaties: A Commentary*, vol 1 (Oxford University Press 2011)

Costello, C and Foster, M, 'Non-Refoulement as Custom and jus cogens? Putting the Prohibition to the Test' (2016) 46 Netherlands Yearbook of International Law 273

Council of Europe (CoE), *Yearbook of the European Convention of Human Rights* (Springer Netherlands 1972)

CoE, 'Debriefing Paper: The European NPM Project, First Meeting of the European NPM Network' (Strasbourg, 5 November 2009) <https://www.coe.int/t/democracy/migration/Source/nhrs/debriefingPaper_051109.doc> accessed 22 November 2017

CoE, 'European Commission for Democracy Through Law (Venice Commission) Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners' (adopted 17–18 March 2006) CDL-AD(2006)009-f

CoE: Commissioner for Human Rights, 'Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police' (2009) CommDH(2009)4

CoE, 'Eradicating Impunity for Serious Human Rights Violations: Guidelines and Reference Text' (2011) H/Inf (2011) 7, VII No 2

CoE: Committee for the Prevention of Torture (CPT), 'The CPT Standards' (2002) CPT/Inf/E(2002)

CoE: CPT, 'Twelfth General Report' (2002) CPT/Inf (2002) 15

CoE: CPT, 'Fourteenth General Report' (2004) CPT/Inf (2004)

CoE: CPT, 'Report on the Visit to the United Kingdom Carried Out by the CPT from 14 to 19 March 2004' (2005) CPT/Inf (2005)10

CoE: CPT, 'Report on the Visit to Albania Carried Out by the CPT from 13 to 18 July 2003' (2006) CPT/Inf (2006)22

CoE: CPT, 'Twenty-Seventh General Report' CPT/Inf(2018)4 (2018)

CoE: Committee on Legal Affairs and Human Rights, 'Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees involving Council of Europe Member States: Draft report—Part II (Explanatory Memorandum) by Rapporteur Dick Marty' (7 June 2006) AS/Jur (2006) 16 Part II

CoE: Committee on Legal Affairs and Human Rights, 'Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report by Rapporteur Dick Marty' (11 June 2007) Doc 11302 rev.

CoE: Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, 11 January 2006, Rec(2006)2 <https://www.refworld.org/docid/43f3134810.html> accessed 25 July 2019

CoE: European Court of Human Rights (ECtHR), 'Practical Guide on Admissibility Criteria' (2014) <http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 6 November 2017

CoE: ECtHR, 'Rules of Court' (COE 2016)

Council of the European Union, 'Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union' (2000) OJ C 197, 1

Council of the European Union, 'Council Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan' (2005) OJ L 299, 72 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2005.299.01.0072.01.ENG> accessed 11 December 2017

De Feyter, K and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2006)

De Schutter, O, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2014)

De Weck, F, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill 2016)

Delaplace, E and Pollard, M, 'Visits by Human Rights Mechanisms as a Means of Great Protection for Persons Deprived of Their Liberty' (2005) 857 International Review of the Red Cross 69

Dershowitz, AM, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press 2002)

Deutsche Welle (DW), 'Uzbek Minister Leaves Germany After Probe Opens' (*Deutsche Welle*, 21 December 2005) <http://www.dw.com/en/uzbek-minister-leaves-germany-after-probe-opens/a-1829774> accessed 11 December 2017

Dinstein, Y, *The Defence of Obedience to Superior Orders in International Law* (Leyden 1965)

Dominicé, C, 'Le projet Gautier: utile et nécessaire' in ABieler, F Blanchard, and C Dominicé, *Il Faut Croire À La Lumiére: mélanges offerts à Jean-Jacques Gautier initiateur d'un nouveau moyen de lutte contre la torture* (Comité Suisse contre la torture 1982)

Donovan, DF and Roberts, A, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 American Journal of International Law 142

Duffy, A, 'Expulsion to Face Torture? *Non-Refoulement* in International Law' (2008) 20 International Journal of Refugee Law 373

Duxbury, A, 'The Privileges and Immunities of United Nations' Experts' (2000) Asia Pacific Journal on Human Rights and the Law 88

Edwards, A, 'The Optional Protocol to the Convention Against Torture and the Detention of Refugees' (2008) 57 The International and Comparative Law Quarterly 789

Ernst, A, *The Transnational Use of Torture Evidence* (Herbert Utz Verlag 2015)

European Center for Constitutional and Human Rights (ECCHR), 'Criminal Complaint against Zakir Almatov' <https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/uzbekistan.html> accessed 5 December 2017

ECCHR, 'Rumsfeld Torture Cases' <https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/rumsfeld.html> accessed 5 December 2017

European Union: European Parliament, 'European Parliament Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners' (11 September 2012) P7_TA(2012)0309

European Union: European Parliament, 'Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners by Rapporteur Giovanni Claudio Fava, European Parliament Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners' (26 January 2007) A6–9999/2007

European Union: Fundamental Rights Agency (FRA), *Fundamental Rights-Based Police Training: A Manual for Police Trainers* (FRA 2013)

Evans, MD, 'Getting to Grips with Torture' (2002) 51 International and Comparative Law Quarterly 365

Evans, MD, 'The Place of the Optional Protocol in the Scheme of International Approaches to Torture and Torture Prevention and Resulting Issues' in HC Scheu and S Hýbnerová (eds), *International and National Mechanisms against Torture* (University Karlova Law School 2004)

Evans, MD, ' "All the Perfumes of Arabia": The House of Lords and "Foreign Torture Evidence" ' (2006) 19 Leiden Journal of International Law 1125

Evans, MD and Haenni-Dale, C, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture' (2004) 4(1) Human Rights Law Review 19

Evans, MD and Morgan, R, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Clarendon Press 1998)

Evans, MD and Morgan, R (eds), *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (Oxford University Press 1999)

Evans, MD and others, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford University Press 1998)

Faria, C and Celso, E, 'The Lawful Sanctions Clause in the State Reporting Procedure before the Committee against Torture' (2006) 24 Netherlands Quarterly of Human Rights 305

Federal Agency for the Prevention of Torture, *Annual Report 2009/2010* (Druckerei Zeidler 2011)

Fédération Internationale des Ligues des Droits de l'Homme (FIDH), 'The Beach Massacre before the International Court of Justice' (*Fidh*, 17 June 2003) <https://www.fidh.org/en/issues/litigation/litigation-against-individuals/the-disappeared-of-the-beach-case/The-Beach-Massacre-before-the> accessed 20 February 2018

FIDH, 'Mauritanie—Affaire Ely Ould Dah' (*Fidh*, November 2005) <https://www.fidh.org/IMG/pdf/GAJ_Ely_Ould_Dah_nov2005_OK.pdf> accessed 13 November 2017

FIDH, 'Release of Jean François Ndengue—Paris: Complicity in Crimes against Humanity' (*Fidh*, 7 April 2004) <https://www.fidh.org/en/issues/litigation/litigation-against-individuals/the-disappeared-of-the-beach-case/Release-of-Jean-Francois-Ndengue> accessed 7 November 2017

Ferstman, C, 'Reparation as Prevention: Considering the Law and Practice of Orders for Cessation and Guarantees of Non-Repetition in Torture Cases' (2010) 6 Essex Human Rights Review 7

Filippeschi, V, National Preventive Mechanisms: Role and Developments in ACAT, *A World of Torture, Report* (ACAT 2016)

Fischer-Lescano, A, 'Torture in Abu Ghraib: The Complaint against Donald Rumsfeld under the German Code of Crimes against International Law' (2005) 6 German Law Journal 689

Forcese, C, 'Touching Torture with a Ten Foot Pole: The Legality of Canada's Approach to National Security Information Sharing with Human Rights-Abusing States' (2014) 52 Osgoode Hall Law Journal 263

Gaeta, P 'The Defence of Superior Irders. The Statute of the International Criminal Court versus Customary International Law' (1999) 10 European Journal of International Law 172

Gammeltoft-Hansen, T, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011)

Garraway, C, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied' (1999) 836 International Review of the Red Cross 785

Gasper, B, 'Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention in the Era of Terrorism' (2005) 21 American University International Law Review 27

Gattini, A, 'War Crimes and State Immunity in the Ferrini Decision' (2005) 3 Journal of International Criminal Justice 224

Giffard, C, *The Torture Reporting Handbook, How to Document and Respond to Allegations of Torture within the International System for the Protection of Human Rights* (Human Rights Centre 2000)

Gil-Bazo, MT, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 Refugee Survey Quarterly 11

Gilmore, Aideen, 'Wilton Park Conference Report on Strategies for Tackling Torture and Improving Prevention' (West Sussex, 30 March–1 April 2015)

Ginbar, Y, 'Making Human Rights Sense of the Torture Definition' in M Başoğlu (ed), *Torture and its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press 2017)

Global Alliance of National Human Rights Institutions (GANHRI) 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)' (Geneva 2016), <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20MAY%202016-English.pdf> accessed 12 December 2018

Global Justice Clinic of the New York University School of Law, 'Reparation & Apology: State Responses to Secret Detention and Torture', Submission to the Inter-American Commission on Human Rights Thematic Hearing on the Human Rights Situation of People Affected by the United States' Rendition, Detention, and Interrogation Program' (23 October 2015) <https://www.aclu.org/other/iachr-hearing-reparation-and-apology-state-responses-secret-detention-and-torture> accessed 11 November 2017

Goldman, RK, 'Trivializing Torture. The Office of Legal Counsel's 2002 Opinion Letter and International Law against Torture' (2004) 12(1) Human Rights Brief 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1249#.XW7SxAtoo9Y.link>

Goldmann, M, 'Arrest Warrant Case (Democratic Republic of the Congo v Belgium)' (January 2009) Max Planck Encyclopedia of Public International Law <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1249#.XW7SxAtoo9Y.link> accessed 7 December 2017

Gonzalez, PV and Ferstman, C, *Ending Threats and Reprisals Against Victims Of Torture And Related International Crimes: A Call To Action* (Redress 2009)

Goodwin-Gill, GS and McAdam, J, *The Refugee in International Law* (Oxford University Press 2007)

Gorlick, B, 'The Convention and Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 International Journal of Refugee Law 479

Governmental Committee of the European Social Charter, 'Report Concerning Conclusions 2005' (30 November 2005) CoE Doc T-SG(2005)25

Grabenwarter, C, *European Convention on Human Rights: Commentary* (Verlag CH Beck 2014)

Groome, D, *The Handbook of Human Rights Investigation: A Comprehensive Guide to the Investigation and Documentation of Violent Human Rights Abuses* (2nd rev edn, CreateSpace Independent Publishing Platform 2011) <https://www.theguardian.com/uk/2005/jul/18/afghanistan.world> accessed 24 November 2017

Hall, CK, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007) 18 The European Journal of International Law 921

Hallo de Wolf, A, 'Visits to Less Traditional Places of Detention: Challenges under the OPCAT' (2009) 6 Essex Human Rights Law Review 73

Hamdan, E, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill Nijhoff 2016)

Hanski, R and Scheinin, M, *Leading Cases of the Human Rights Committee* (Institute for Human Rights, Åbo Akademi University 2003)

Hathaway, O, Nowlan, A, and Spiegel, J, 'Tortured Reasoning: The Intent to Torture under International and Domestic Law' (2012) 52 Virginia Journal of International Law 791

Haug, H, *Das Projekt eines Fakultativprotokolls zur Internationalen Konvention gegen die Folter, in Internationales Kolloquium von Eisenstadt (16–18.9.1981), Vereinte Nationen und Menschenrechte* (Verlag CHBeck 1982)

Hawkins, KR, 'The Promises of Torturers: Diplomatic Assurances and the Legality of "rendition"' (2006) 20 Georgetown Immigration Law Journal 213

High-Value Detainee Interrogation Group (HIG), 'Interrogation Best Practices' (2016) <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view> accessed 11 November 2017

Penal Reform International and Human Rights Centre, *Essex Paper 3: Initial Guidance on the Interpretation and Implementation of the Nelson Mandela Rules* (PRI and HRC 2017)

Human Rights Implementation Centre, '"Deprivation of Liberty" as per Article 4 of OPCAT: The Scope' (2011) <https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/deprivationofliberty.pdf> accessed 12 December 2017

HRW, '"Bullets Were Falling Like Rain": The Andijan Massacre, May 13, 2005' (*Human Rights Watch*, 6 June 2005) <https://www.hrw.org/report/2005/06/06/bullets-were-falling-rain/andijan-massacre-may-13-2005> accessed 11 December 2017

HRW, 'Burying the Truth: Uzbekistan Rewrites the Story of the Andijan Massacre' (September 2005) <https://www.hrw.org/reports/2005/uzbekistan0905/uzbekistan0905.pdf> accessed on 11 December 2017

HRW, 'Chronology of the Habré Case' (*Human Rights Watch*, 27 April 2015) <https://www.hrw.org/news/2015/04/27/chronology-habre-case> accessed 7 November 2017

HRW, 'Germany: Almatov's Exit No Bar to Prosecution' (*Human Rights Watch*, 21 December 2005) <https://www.hrw.org/legacy/english/docs/2005/12/21/german12339_txt.htm> accessed 5 December 2017

HRW, 'Universal Jurisdiction in Europe: The State of the Art' (June 2006) <https://www.hrw.org/sites/default/files/reports/ij0606web.pdf> accessed 2 January 2018

HRW, *No Questions Asked' Intelligence Cooperation with Countries That Torture* (HRW 2010)

HRW, *Old Behind Bars: The Aging Prison Population in the United States* (HRW 2012)

HRW, 'Still at Risk: Diplomatic Assurances No Safeguard Against Torture' (2005)<https://www.hrw.org/sites/default/files/reports/eca0405.pdf> accessed 11 November 2017

HRW, *World Report 2005: Events of 2004* (HRW 2005)

Hungarian Helsinki Committee (HHC), 'Investigation of Ill-Treatment by the Police in Europe: Comparative Study of Seven EU Countries' (2017) <https://www.

europewithouttorture2017.com/wp-content/uploads/2017/05/english-investigating-torture.pdf> accessed 3 December 2017

Ingelse, C, *The UN Committee Against Torture: An Assessment* (Kluwer Law International 2001)

Inspectorate of Security and Justice, 'Monitoring Places of Detention: National Preventive Mechanisms, First Annual Report' (2011) <https://www.rsj.nl/binaries/annual-report-2011-npm-the-netherlands_tcm26-27588.pdf> accessed 11 November 2017

Inter-American Commission on Human Rights (IACmHR), 'Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas' (approved by the Commission during its 131st regular period of sessions, 3–14 March 2008)

Inter-American Court on Human Rights (IACtHR), 'Rules of Procedure of the Inter-American Court on Human Rights (IACtHR)' (approved by the Court during its LXXXV Regular Period of Sessions, held from November 16–28, 2009) (2009)

International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (International Commission of Jurists 2009)

International Commission of Jurists, 'Law and the Prevention of Torture' (1973) 11 The Review 23

International Commission of Jurists, 'Written Submissions on Behalf of the ICJ in the case of *Shavkatbek Salyzhanovich Rakhmanov v Russia*: Application no 49975/15' (22 September 2016) <https://www.icj.org/wp-content/uploads/2016/09/RussianFederation-ICJ-AmicusBrief-Rakhmanov-ECtHR-legalsubmission-2016.pdf> accessed 17 November 2017

International Commission of Jurists, 'Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity' (March 2007) <https://www.refworld.org/pdfid/48244e602.pdf> accessed 11 February 2017

International Commission of Jurists and Swiss Committee against Torture, *Torture—How to Make the International Convention Effective: A Draft Optional Protocol* (2nd edn, International Commission of Jurists 1980)

International Council on Human Rights Policy (ICHRP) and Office of the United Nations High Commissioner for Human Rights (OHCHR), *Assessing the Effectiveness of National Human Rights Institutions* (ATAR Roto Presse SA 2005)

International Court of Justice (ICJ), 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium): Overview of the Case' <http://www.icj-cij.org/en/case/121> accessed 14 November 2017

ICJ, 'Certain Criminal Proceedings in France (Republic of the Congo v France: Overview of the Case' <https://www.icj-cij.org/en/case/129> accessed 9 November 2017

International Criminal Court (ICC), 'Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court' [booklet] <https://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> accessed 20 November 2017

International Law Commission (ILC), 'Report of the International Law Commission' (2014) UN Doc A/69/10

International Law Commission (ILC), 'Survey of Multilateral Instruments which may be of Relevance for the Work of the International Law Commission on the Topic "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)" ' (2010) UN Doc A/CN.4/630

International Rehabilitation Council for Torture Victims (IRCT), *Action Against Torture: A Practical Guide to the Istanbul Protocol—for lawyers* (IRCT 2007)

Johnston, JG, 'The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11' (2011) 11 International Criminal Law Review 1

Joint Committee on Human Rights, *UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq (twenty-eighth report); Memorandum from Rachel Murray, Director of the OPCAT Project Team, University of Bristol, dated 3 April 2008* (2007-08, HL 157, HC 527)

Joseph, S and Castan, M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press 2013)

Kaleck, W, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008' (2009) 30 Michigan Journal of International Law 927

Kaleck, W, Ratner, M, Singelnstein, T, and Weiss, P (eds), *International Prosecution of Human Rights Crimes* (Springer-Verlag 2007)

Kälin, W, Caroni, M, and Heim, L, 'Article 33, Para 1' in A Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011)

Keller, H and Ulfstein, G (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012)

Kooijmans, P, The Ban on Torture: Legal and Socio-Political Problems' in Franz Matscher (ed.), *Folterverbot sowie Religions- und Gewissensfreiheit im Rechtsvergleich* (Kehl 1990)

Kozma, J, Nowak, M, and Scheinin, M, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010)

Kriebaum, U, *Folterprävention in Europa: Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung* (Verlag Österreich 2000)

Laguardia, F, 'Deterring Torture: The Preventive Power of Criminal Law and its Promise for Inhibiting State Abuses' (2017) 39 Human Rights Quarterly 189

Lambert, JJ, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Grotius 1990)

Ledwidge, F, 'The Optional Protocol to the Convention against Torture (OPCAT): A Major Step Forward in the Global Prevention of Torture' (2006) 17 Helsinki Monitor 1

Loper, K, 'Human Rights, Non-Refoulement, and the Protection of Refugees in Hong Kong' (2010) 22 International Journal of Refugee Law 404

MacLean, E, 'Guatemala's Constitutional Court Overturns Rios Montt Conviction and Sends Trial Back to 19 April' (*International Justice Monitor*, 21 May 2013) <https://www.ijmonitor.org/2013/05/constitutional-court-overturns-rios-montt-conviction-and-sends-trial-back-to-april-19/> accessed 1 December 2017

Maclean, E and Beaudoin, S, 'Eighteen Months After Initial Conviction, Historic Guatemalan Genocide Trial Reopens But Is Ultimately Suspended' (*International Justice Monitor*, 6 January 2015) <https://www.ijmonitor.org/2015/01/eighteen-months-after-initial-conviction-historic-guatemalan-genocide-trial-reopens-but-is-ultimately-suspended/> accessed 1 December 2017

Matscher, F (ed), *Folterverbot sowie Religions- und Gewissensfreiheit im Rechtsvergleich. The Prohibition of Torture and Freedom of Religion and Conscience, comparative aspects* (Engel 1990)

McGoldrick, D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press 1994)

Méndez, JE, 'Brief of Professor Juan E. Méndez, UN Special Rapporteur on Torture as Amicus Curiae on Reargument in Support of Petitioners' in the case Esther Kiobel et al v Royal Dutch Shell Petroleum Co et al, Supreme Court of the United States (2012) <http://www.ohchr.org/Documents/Issues/SRTorture/JuanMendezAmicusBriefKiobel.pdf> accessed 20 November 2017

Méndez, JE, 'Evolving Standards for Torture in International Law' in M Başoğlu (ed), *Torture and its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press 2017)

Murray, R, 'National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness' (2007) 25 Netherlands Quarterly of Human Rights 189

Murray, R, *The Role of National Human Rights Institutions and at the International and Regional Levels: The Experience of Africa* (Hart 2007)

Murray, R, 'National Preventive Mechanisms Under the Optional Protocol to the Torture Convention: One Size Does Not Fit All' (2008) 26 Netherlands Quarterly of Human Rights 485

Murray, R, and others, *The Optional Protocol to the UN Convention against Torture* (Oxford University Press 2011)

New Zealand Human Rights Commission, 'Report of the Ombudsman 2008/2009' (2009) <http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/372/original/ar_2008-09.pdf?1348524067> accessed 11 November 2017

New Zealand Human Rights Commission, *First Annual Report of Activities Under the Optional Protocol to the Convention Against Torture (OPCAT): 1 July 2007 to 30 June 2008* (Human Rights Commission 2008)

New Zealand, The Health and Disability Commissioner, *Residential Aged Care: Complaints to the Health and Disability Commissioner: 2010–2014* (New Zealand Human Rights Commission 2016)

Niyazmatov, A, 'Evidence Obtained by Cruel, Inhuman or Degrading Treatment: Why the Convention Against Torture's Exclusionary Rule Should Be Inclusive' (Cornell Law School Inter-University Graduate Student Conference, Ithaca NY, USA, April 2011)

Nowak, M, 'Die UNO-Konvention gegen die Folter vom 10. Dezember 1984' (1985) 12 Europäische Grundrechte Zeitschrift 109

Nowak, M, 'Die Europäische Konvention zur Verhütung der Folter: Ab 1989 regelmäßige Besuche von Haftanstalten durch Europäisches Komitee zur Verhütung der Folter' (1988) 15 Europäische Grundrechte Zeitschrift 537

Nowak, M, 'First Session of the UN Committee against Torture' (1988) 2 Netherlands Quarterly of Human Rights 111

Nowak, M, 'Proposals for Improving the UN Human Rights Programme' (1993) 11 Netherlands Quarterly of Human Rights 162

Nowak, M, 'Committee against Torture and Prohibition of Refoulement' (1996) 14 Netherlands Quarterly of Human Rights 435

Nowak, M, 'Ministerielle Verwirrung: Kommentar: Der Umgang mit Saddam Husseins Stellvertreter zeigt, dass Menschenrechtsverträge hierzulande nicht ernst genommen werden' (*Falter*, 25 August 1999) <https://www.falter.at/archiv/FALTER_199908251118005/ministerielle-verwirrungen> accessed 11 December 2017

Nowak, M, 'The Right of Victims of Gross Human Rights Violations to Reparation' in F Coomans and others (eds), *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven* (Kluwer Law International 2000)

Nowak, M, 'The Right to Reparation of Victims of Gross Human Rights Violations' in G Ulrich and Krabbe Boserup L (eds), *Human Rights in Development Yearbook 2001—Reparations: Redressing Past Wrongs* (Kluwer Law International 2002)

Nowak, M, *Introduction to the International Human Rights Regime* (Brill/Nijhoff 2003)

Nowak, M, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23 Netherlands Quarterly of Human Rights 674

Nowak, M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005)

Nowak, M, 'Reparation by the Human Rights Chamber for Bosnia and Herzegovina' in K De Feyter and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005)

Nowak, M, 'Legal Controversies Relating to Torture' in RF Jørgensen and K Slavensky (eds), *Implementing Human Rights: Essays in Honour of Morten Kjaerum* (Danish Institute for Human Rights 2007) 233–56

Nowak, M, 'The Need for a World Court of Human Rights' (2007) 7 Human Rights Law Review 251

Nowak, M, 'Vom Weltstrafrecht Zum Weltzivilrecht Oder Vom Internationalen Strafgerichtshof Zum Internationalen Gerichtshof Für Menschenrechte? Überlegungen Am Beispiel Der Folterbekämpfung' in I Buffard, J Crawford, A Pellet, and S Wittich (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Koninklijke Brill NV 2008)

Nowak, M, 'Extraordinary Renditions, Diplomatic Assurances and the Principle of Non-Refoulement' in MD Voyame and others (eds), *International Law, Conflict, and Development: The Emergence of a Holistic Approach in International Affairs* (Brill 2010)

Nowak, M, 'Powerlessness as a Defining Characteristic of Torture' in M Başoğlu (ed), *Torture and its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press 2017)

Nowak, M, *Torture: An Expert's Confrontation with an Everyday Evil* (University of Pennsylvania Press 2018)

Nowak M, 'What Practices Constitute Torture? US and UN Standards' (2006) 28 Human Rights Quarterly 809

Nowak, M, Birk, M, and Critti, T, 'The Obama Administration and Obligations Under the Convention Against Torture' (2011) 20 Transational Law & Contemporary Problems 33

Nowak, M, Steurer, D, and Tretter, H (eds), *Fortschritt im Bewußtsein der Grund- und Menschenrechte: Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora* (Engel 1988)

Nowak, M and Zenz, A, 'Der Straftatbestand der Folter in Österreich aus völkerrechtlicher Sicht' in Robert Kert and Andrea Lehner (eds), *Vielfalt des Strafrechts im internationalen Kontext—Festschrift für Frank Höpfel zum 65.Geburtstag* (NWV 2018)

O'Connor, DR, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, vol 3 (Ottawa-Ontario: Privy Council 2006)

O'Flaherty, M, *Human Rights and the UN: Practice Before the Treaty Bodies* (Springer 2002)

Oette L, Wawzonek, C, and Ferstman, C, *Taking Complaints of Torture Seriously: Rights of Victims and Responsibilities of Authorities* (Redress 2004)

Okafor, OC and Agbakwa, SC, 'On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context' (2002) 24 Human Rights Quarterly 662

Organisation Mondial Contre la Torture (OMCT), *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, vol 4 (2nd edn, OMCT 2014)

Organization for Security and Co-operation in Europe (OSCE): Office for Democratic Institutions and Human Rights (ODIHR), *Guidelines on Human Rights Education for Law Enforcement Officials* (OSCE & ODIHR 2012)

Parlett, K, 'Universal Jurisdiction for Torture' (2007) 4 European Human Rights Law Review 385

Pasqualucci, JM, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38 Vanderbilt Journal of Transnational Law 1

Pattenden, R, 'Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT' (2006) 10 International Journal of Evidence & Proof 1

Payne, LA and Lessa, F (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012)

Perez, AF, 'The Perils of Pinochet: Problems for Transitional Justice and Supranational Governance Solution' (2000) 28 Denver Journal of International Law and Policy 175

Pérez-Sales, P, *Psychological Torture: Definition, Evaluation, and Measurement* (Routledge 2017)

Pill, P, 'Case Report to the Public Prosecutor Vienna: concerning Izzat Ibrahim Khalil Al Doori' (13 August 1999) <https://www.legal-tools.org/doc/634994/pdf/> accessed 15 November 2017

Pollard, M, 'Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Federal and other Decentralized States' (discussion paper, Seminar 'The Optional Protocol to the UN Convention against Torture: Implementation in Federal States and Decentralized States', Brazil, 22–24 June 2005)

Pollard, M, 'Rotten Fruit: State Solicitation, Acceptance, and Use of Information Obtained through Torture by Another State' (2005) 23 Netherlands Quarterly of Human Rights 349

Poscher, R, 'Menschenwürde und Staatsnotstand' in Wolfgang Lenzen (ed), *Ist Folter erlaubt?* (Paderborn 2006) 47–65

Pringle, M, 'The Importance of the Ratification of the Optional Protocol to the United Nations Convention Against Torture for the Worldwide Prevention of Torture' in HC Scheu and S Hybnerova (eds), *International and National Mechanisms against Torture* (University Karlova Law School 2004)

Rachlew, A, 'From Interrogating to Interviewing Suspects of Terror: Towards a New Mindset' (2017) <https://goo.gl/7Hk9gn> accessed 13 December 2017

REDRESS, 'Reaching for Justice: The Right to Reparation in the African Human Rights System' (October 2013) <http://www.redress.org/downloads/publications/1310reaching-for-justicefinal.pdf> accessed 20 November 2017

Reid, K, *A Practitioner's Guide to the European Convention on Human Rights* (5th edn, Sweet & Maxwell 2015)

Reif, LC, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 Harvard Human Rights Journal 1

The Rendition Project, 'Maher Arar', project website <https://www.therenditionproject.org.uk/prisoners/arar.html> accessed 6 November 2017

Reydams, L, 'Belgium's First Application of Universal Jurisdiction: The Butare Four Case' (2003) 1 Journal of International Criminal Justice 428

Reydams, L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003)

Roberts, K, 'Police Interviewing of Criminal Suspects: A Historical Perspective' (2012) Internet Journal of Criminology 1

Rodley, SN, *The Treatment of Prisoners under International Law* (2nd edn, Clarendon Press 1999)

Rodley, SN, 'The Definition(s) of Torture in International Law' (2002) 55 Current Legal Problems 467

Rodley, SN and Pollard, M, 'Criminalisation of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006) 2 European Human Rights Law Review 115

Rodley, SN and Pollard, M, *The Treatment of Prisoners under International Law* (3rd edn, Oxford University Press 2009)

Roht-Arriaza, N, 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 New England Law Review 311

Roht-Arriaza, N, 'Guatemala Genocide Case, Judgment No STC 237/2005' (2006) 100 American Journal of International Law 207Ross, A, 'The Ríos Montt Case and Universal Jurisdiction' (2016) 18 Journal of Genocide Research 361

Ross, J, 'Black Letter Abuse: The US Legal Response to Torture since 9/11' (2007) 89 International Review of the Red Cross 561

Rouillard, LF, 'Misinterpreting the Prohibition of Torture under International Law: The Office of the Legal Counsel Memorandum' (2005) 21(1) American University International Law Review 9

Ryngaert, C, 'Universal Criminal Jurisdiction over Torture: a State of Affairs' (2005)

Saccucci A, *Le Misure Provvisorie nella Protezione Internazionale dei Diritti Umani* (Giappichelli 2006)

Sandoval-Villalba C, 'The Concepts of "Injured Party" and "Victim" of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on Their Implications for Reparations' in C Ferstman, M Goetz, and A Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill/Nijhoff 2009)

Schabas, WA, 'House of Lords Prohibits Use of Torture Evidence, but Fails to Condemn Its Use by the Police' (2007) 7 International Criminal Law Review 133

Schabas, WA, 'Final Report of the Expert Workshop on Human Rights and International Co-operation in Counter-terrorism' (2007) 7, n 22 <http://www.osce.org/odihr/24170?download=true> accessed 1 February 2018

Schabas, WA, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015)

Scharf, MP, 'Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?' (2008) 65 Washington & Lee Law Review 129

Schmidt, MG, 'Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform' (1992) 41 International and Comparative Law Quarterly 645

Schollum, M, *Investigative Interviewing: The Literature* (Office of the Commissioner of Police 2005)

Schutter, OD, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2014)

Scott, CM (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001)

Seibert-Fohr, A, *Prosecuting Serious Human Rights Violations* (Oxford Univerity Press 2009)

Senate Select Committee on Intelligence, *The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (Melville House 2014)

Shah, S, 'Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (2013) 13 Human Rights Law Review 351

Shany, Y, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge University Press 2015)

Shelton, D, *Remedies in International Human Rights Law* (Oxford University Press 2015)

Shue, H, 'Torture in Dreamland: Disposing of the Ticking Bomb' (2006) Case Western Reserve Journal of International Law 231

Sinner, PD and Reyes, H, 'Activités du CICR en matière de visites aux personnes privées de liberté: une contribution à la lutte contre la torture' in A Cassese (ed), *The International Fight against Torture—La Lutte Internationale Contre La Torture* (Nomos Verlagsgesellschaft 1991)

Spjut, RJ, 'Torture Under the European Convention on Human Rights' (1979) 73 American Journal of International Law 267

Steinerte, E, 'The Changing Nature of Relationship between the United Nations Subcommittee on Prevention of Torture and National Preventive Mechanisms: in Search for Equilibrium' (2013) 31 Netherlands Quarterly of Human Rights 132

Steinerte, E, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention' (2014) 14 Human Rights Law Review 1

Steinerte, E and Murray, R, 'Same but Different? National Human Rights Commissions and Ombudsman Institutions as National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture' (2009) Special Issue 2009 Essex Human Rights Review 54

Stern, B, 'Universality and Passive Personality Principles of Jurisdiction in French Law, In re Pinochet: French Tribunal de grande instance (Paris)' (1999) 93 The American Journal of International Law 696

Sulzer, J, 'Implementing the Principle of Universal Jurisdiction in France' in W Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer-Verlag 2007)

Suntinger, W, 'The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?' (1995) 49 Austrian Journal of Public and International Law 21

Suntinger, W, 'Police Training and International Human Rights Standards' in R Alleweldt and G Fickenscher (eds), *The Police and International Human Rights* (Springer International 2018)

Svanidze, E, 'Effective Investigation of Ill-Treatment: Guidelines on European Standards' (2nd edn, CoE 2014)

Tardu, M, 'The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1987) 56 Nordic Journal of International Law 303

Tardu, M, 'The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in L Dembinski (ed), *International Geneva Yearbook 1988* (Springer 1988)

Thienel, T, 'Foreign Acts of Torture and the Admissibility of Evidence The Judgment of the House of Lords in A and Others v. Secretary of State for the Home Department (No 2)' (2006) 4 Journal of International Criminal Justice 401

Thienel, T, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 European Journal of International Law 349

Thienel, T, 'The Admission of Torture Statements into Evidence' in SM Meisenberg and I Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia* (TMC Asser Press 2016)

Tomuschat, C, 'Comment on the Massera case (Massera et al v Uruguay, No 5/1977 under the Human Rights Committee)' (1979) 6 Europäische Grundrechte-Zeitschrift 501

Trechsel, S, 'Privater Schweizer Entwurf Für Eine Internationale Konvention Gegen Die Folter' in Alois Riklin (ed), *Internationale Konventionen gegen die Folter: Conventions Internationales Contre la Torture: International Conventions against Torture* (P Haupt 1979)

Trechsel, S, 'Probleme und aktueller Stand der Bemühungen um eine UN-Konvention gegen die Folter' (1982) 33 ÖZÖR 245

TRIAL International, 'Efrain Rios-Montt' (6 November 2012; last modified 4 April 2018) <https://trialinternational.org/latest-post/efrain-rios-montt/> accessed 9 November 2017

TRIAL International, 'Jan-Claude Duvalier' (27 April 2016; last modified 13 June 2016) <https://trialinternational.org/latest-post/jean-claude-duvalier/> accessed 5 December 2017

TRIAL International/FIDH/ECCHR/Redress/FIBGAR, 'Make Way For Justice #3: Universal Jurisdiction Annual Review 2017' (March 2017) <https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf> accessed 2 January 2018

Ulrich, G and L Krabbe Boserup (eds), *Human Rights in Development Yearbook 2001: Reparations: Redressing Past Wrongs* (Kluwer Law International 2002)

UN Committee Against Torture (UN CAT), 'Report of the Committee Against Torture' (1988) UN Doc A/43/46

UN CAT, 'Report of the Committee Against Torture' (1989) UN Doc A/44/46

UN CAT, 'Report of the Committee Against Torture' (1990) UN Doc A/45/44

UN CAT, 'Report of the Committee Against Torture' (1991) UN Doc A/46/46

UN CAT, 'Report of the Committee Against Torture' (1992) UN Doc A/47/44

UN CAT, 'Report of the Committee Against Torture' (1993) UN Doc A/48/44

UN CAT, 'Report of the Committee Against Torture' (1994) UN Doc A/49/44

UN CAT, 'Report of the Committee Against Torture' (1995) UN Doc A/50/44

UN CAT, 'Report of the Committee Against Torture' (1996) UN Doc A/51/44

UN CAT, 'Report of the Committee Against Torture' (1997) UN Doc A/52/44.

UN CAT, 'Report of the Committee Against Torture' (1998) UN Doc A/53/44

UN CAT, 'Report of the Committee Against Torture' (1999) UN Doc A/54/44

UN CAT, 'Report of the Committee Against Torture' (2000) UN Doc A/55/44

UN CAT, 'Report of the Committee Against Torture' (2001) UN Doc A/56/44

UN CAT, 'Report of the Committee Against Torture Twenty-Seventh Session (12–23 November 2001) Twenty-Eighth Session (29 April–17 May 2002)' (2002) UN Doc A/57/44

UN CAT, 'Report of the Committee Against Torture, Twenty-Ninthth session (11–22 November 2002) and Thirtieth session (28 April–16 May 2003)' (2003) UN Doc A/58/44

UN CAT, 'Report of the Committee Against Torture Thirty-First Session (10–21 November 2003) Thirty-Second Session (3–21 May 2004)' (2004) UN Doc A/59/44

UN CAT, 'Report of the Committee Against Torture Thirty-Third Session (16–26 November 2004) Thirty-Fourth Session (2–20 May 2005)' (2005) UN Doc A/60/44

UN CAT, 'Report of the Committee Against Torture Thirty-Fifth Session (14–25 November 2005) Thirty-Sixth Session (1–19 May 2006)' (2006) UN Doc A/61/44

UN CAT, 'Report of the Committee Against Torture Thirty-Seventh Session (6–24 November 2006) Thirty-Eighth Session (30 April–18 May 2007)' (2007) UN Doc A/62/44
UN CAT, 'Report of the Committee Against Torture, Thirty-Ninth Session (5–23 November 2007), Fortieth Session (28 April–16 May 2008)' (2008) UN Doc A/63/44
UN CAT, 'Report of the Committee Against Torture Forty-First Session (3–21 Novemeber 2008) Forty-Second Session (27 April–15 May 2009)' (2009) UN Doc A/64/44
UN CAT, 'Report of the Committee Against Torture Forty-Third Session (2–20 November 2009) Forty-Fourth Session (26 April–14 May 2010)' (2010) UN Doc A/65/44
UN CAT, 'Report of the Committee Against Torture Forty-Fifth Session (1–19 November 2010) Forty-Sixth Session (9 May–3 June 2011)' (2011) Un Doc A/66/44
UN CAT, 'Report of the Committee Against Torture Forty-Seventh Session (31 October–25 November 2011) Forty-Eighth Session (7 May–1 June 2012)' (2012) UN Doc A/67/44
UN CAT, Report of the Committee Against Torture Forty-Ninth Session (29 October–23 November 2012) Fiftieth Session (6–31 May 2013)' (2013) UN Doc A/68/44
UN CAT, 'Report of the Committee Against Torture Fifty-First Session (28 October–22 November 2013) Fifty-Second Session (28 April–23 May 2014)' (2014) UN Doc A/69/44
UN CAT, 'Report of the Committee Against Torture Fifty-Third Session (3–28 November 2014) Fifty-Fourth Session (20 April–15 May 2015)' (2015) UN Doc A/70/44
UN CAT, 'Report of the Committee Against Torture Fifty-Fifth Session (27 July–14 August 2015) Fifty-Sixth Session (9 November–9 December 2015) Fifty-Seventh Session (18 April–13 May 2016)' (2016) UN Doc A/71/44
UN CAT, 'Report of the Committee Against Torture Fifty-Eighth Session (25 July–12 August 2016) Fifty-Ninth Session (7 November–7 December 2016) Sixtieth Session (18-April–12 May 2017)' (2017) UN Doc A/72/44
UN CAT, 'General Comment No 1 (1997) on the Implementation of Article 3 of the Convention in the context of Article 22' (1999) UN Doc A/53/44, Annex IX
UN CAT, 'General Comment No 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2
UN CAT, 'General Comment No 3 on the Implementation of Article 14 by States Parties' (2012) UN Doc CAT/C/GC/3
UN CAT, General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the context of Article 22' (2018) UN Doc CAT/C/GC/4
UN CAT, 'General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 19 of the Convention' (1998) UN Doc CAT/C/14/Rev.1
UN CAT, 'General Guidelines Regarding the Form and Contents of Initial Reports to be Submitted by States Parties under Article 19 of the Convention' (2005) UN Doc CAT/C/4/Rev.3
UN CAT, 'Statement of the Committee Against Torture, Adopted at its Fifty-First Session (28 October–22 November 2013) on Reprisals' (2013) UN Doc CAT/C/51/3
UN CAT, 'Guidelines on the Receipt and Handling of Allegations of Reprisals Against Individuals and Organizations Cooperating with the Committee Against Torture Under Articles 13, 19, 20 and 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc CAT/C/55/2
UN CAT, 'Guidelines for Follow-up to Concluding Observations' (2015) UN Doc CAT/C/55/3
UN CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey' (1993) UN Doc A/48/44/Add.1
UN CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Egypt' (1996) UN Doc A/51/44
UN CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Peru' (2001) UN Doc A/56/44
UN CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Sri Lanka' (2002) UN Doc A/57/44

UN CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Mexico' (2003) UN Doc A/58/44
UN CAT, Report on Mexico Produced by the Committee Under Article 20 of the Convention and Reply from the Government of Mexico' (2003) UN Doc CAT/C/75
UN CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Serbia and Montenegro' (2004) UN Doc A/59/44
UN CAT, 'Summary Account of the Result of the Proceedings Concerning the Inquiry on Brazil' (2008) UN Doc A/63/44
UN CAT, 'Report on Brazil Produced by the Committee Under Article 20 of the Convention and Reply from the Government of Brazil' (2009) UN Doc CAT/C/39/2
UN CAT, 'Report on Nepal Adopted by the Committee Against Torture Under Article 20 of the Convention and Comments and Observations by the State Party' (2012) UN Doc A/67/44
UN CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Nepal' (2012) UN Doc A/67/44
UN CAT, 'Summary Account of the Results of the Proceedings Concerning the Inquiry on Lebanon' (2014) UN Doc A/69/44
UN CAT, 'Status of the optional reporting procedure of the Committee Against Torture and proposals for its revision' (2011) UN Doc CAT/C/47/2
UN CAT, 'Observations of the Committee Against Torture on the Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)' (2013) UN Doc CAT/C/51/4
UN Subcommittee on Prevention of Torture (UN SPT), 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (February 2007 to March 2008)' (2008) UN Doc CAT/C/40/2
UN SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (February 2008 to March 2009)' (2009) UN Doc CAT/C/42/2
UN SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (April 2009 to March 2010)' (2010) UN Doc CAT/C/44/2
UN SPT, 'Fourth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (April–December 2010) (2011)' UN Doc CAT/C/46/2
UN SPT, 'Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2011)' (2012) UN Doc CAT/C/48/3
UN SPT, 'Sixth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2012)' (2013) UN Doc CAT/C/50/2
UN SPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2013)' (2014) UN Doc CAT/C/52/2
UN SPT, 'Eighth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2014)' (2015) UN Doc CAT/C/54/2
UN SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2015)' (2016) UN Doc CAT/C/57/4
UN SPT, 'Tenth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2015)' (2017) UN Doc CAT/C/60/3
UN SPT, 'The approach of the Subcommittee on Prevention of Torture to the concept of prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/12/6

UN SPT, 'Analytical Assessment Tool for National Preventive Mechanisms' (2016) UN Doc CAT/OP/1/Rev.1

UN SPT, Guidelines on National Preventive Mechanisms (2010) UN Doc CAT/OP/12/5

UN SPT, 'Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties under article 11 (a) of the Optional Protocol' (2015) UN Doc CAT/OP/5

UN SPT, 'Obligations of States parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to facilitate the visits of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Statement adopted by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at its twenty-forth session (17–21 November 2014)' (2014) UN Doc. CAT/OP/24/1

UN SPT, 'Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on Reprisals in relation to its Visiting Mandate' (2016) UN Doc CAT/OP/6/Rev.1

UN SPT, 'Rules of Procedure' (2013) UN Doc CAT/OP/3

UN SPT, 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (February 2007 to March 2008)' (2008) UN Doc CAT/C/40/2

UN SPT, 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (February 2008 to March 2009)' (2009) UN Doc CAT/C/42/2

UN SPT, 'Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (April 2009 to March 2010)' (2010) UN Doc CAT/C/44/2

UN SPT, 'Fourth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (April–December 2010) (2011)' UN Doc CAT/C/46/2

UN SPT, 'Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2011)' (2012) UN Doc CAT/C/48/3

UN SPT, 'Sixth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2012)' (2013) UN Doc CAT/C/50/2

UN SPT, 'Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2013)' (2014) UN Doc CAT/C/52/2

UN SPT, 'Eigth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2014)' (2015) UN Doc CAT/C/54/2

UN SPT, 'Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January-December 2015)' (2016) UN Doc CAT/C/57/4

UN SPT, 'Tenth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (January–December 2015)' (2017) UN Doc CAT/C/60/3

UN SPT, 'The approach of the Subcommittee on Prevention of Torture to the concept of prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc CAT/OP/12/6

UN SPT, 'Analytical assessment tool for national preventive mechanisms' (2016) UN Doc CAT/OP/1/Rev.1

UN SPT, Guidelines on national preventive mechanisms (2010) UN Doc CAT/OP/12/5

UN SPT, 'Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties under article 11 (a) of the Optional Protocol' (2015) UN Doc CAT/OP/5

UN SPT, 'Obligations of States parties to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to facilitate the visits of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Statement adopted by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at its Twenty-Forth Session (17–21 November 2014)' (2014) UN Doc. CAT/OP/24/1

UN SPT, 'Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on Reprisals in relation to its Visiting Mandate' (2016) UN Doc CAT/OP/6/Rev.1

UN SPT, 'Rules of Procedure' (2013) UN Doc CAT/OP/3

UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SRT) (Melzer), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) UN Doc A/72/178

UNSRT (Méndez), 'Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2011) UN Doc A/66/268

UNSRT (Méndez), 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc A/67/279

UNSRT (Méndez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2012) UN Doc A/HRC/19/61

UNSRT (Méndez) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc A/68/295

UNSRT (Méndez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2013) UN Doc A/HRC/22/53

UNSRT (Méndez) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc A/69/387

UNSRT (Méndez), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2014) UN Doc A/HRC/25/60

UNSRT (Méndez) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc A/71/298

UNSRT (Méndez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc A/HRC/28/68

UNSRT (Méndez) Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) UN Doc A/HRC/31/57

UNSRT (Méndez), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57

UNSRT (Méndez) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2017) A/HRC/34/54

UNSRT (Nowak) 'Report of the Special Rapporteur on the question of torture' (2005) UN Doc E/CN.4/2006/6

UNSRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2005) UN Doc A/60/316

UNSRT (Nowak), Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2006) UN Doc A/61/259

UNSRT (Nowak), Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2006) UN Doc A/61/259

UNSRT (Nowak), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2007) UN Doc A/HRC/4/33/Add.1
UNSRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc A/HRC/7/3
UNSRT (Nowak) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2008) UN Doc A/63/175
UNSRT (Nowak), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2009) UN Doc A/HRC/10/44
UNSRT (Nowak) 'Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including An Assessment of Conditions of Detention' (2010) UN Doc A/HRC/13/39/Add.5
UNSRT (Nowak) 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/65/273
UNSRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010) UN Doc A/HRC/13/39
UNSRT (Van Boven), 'Report of the Special Rapporteur on the Question of Torture submitted in accordance with Commission Resolution 2002/38' (2002) UN Doc E/CN.4/2003/68
UNSRT (Van Boven) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2004) UN Doc A/59/324
UNSRT (Rodley), 'Report of the Special Rapporteur on Torture' (1997) UN Doc E/CN.4/1997/7
UNSRT (Rodley) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1999) UN Doc A/54/426
UNSRT (Rodley) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) UN Doc E/CN.4/2001/66
UNSRT (Rodley) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) UN Doc A/56/156
UNSRT (Kooijman), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1992) UN Doc E/CN.4/1993/26
UN Special Rapporteur on extrajudicial, summary or arbitrary executions (Heyns) 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2011) UN Doc A/HRC/17/28
UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies (Kiai/Heyns), 'Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies' (2016) UN Doc A/HRC/31/66
UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Emmerson), 'Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (2012) UN Doc A/67/396
UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (De Greiff), 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (2014) UN Doc A/HRC/27/56
UN Special Rapporteur on Violence against Women, its Causes and Consequences (Manjoo), 'Report of the Special Rapporteur on Aiolence Against Women, Its Causes and Consequences' (2010) UN Doc A/HRC/14/22
UN Chairperson-Rapporteur of the Working Group on Arbitrary Detention (Zerrougui) at al, 'Situation of Detainees at Guantánamo Bay' (2006) UN Doc E/CN.4/2006/120
UN Working Group on Arbitrary Detention, 'United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court' (2015) UN Doc A/HRC/30/37

UN Working Group on Enforced or Involuntary Disappearances, 'General Comment on the Right to the Truth in Relation to Enforced Disappearance' (2010) UN Doc A/HRC/16/48

UN Working Group on Enforced or Involuntary Disappearances, 'Report of the Working Group on Enforced or Involuntary Disappearances' (2011) UN Doc A/HRC/16/48

UN Committee on the Right of the Child (CRC), 'General Comment No 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts 19; 28, Para 2; and 37, inter alia)' (2007) UN Doc CRC/C/GC/8

UN Human Rights Committee (HRC), 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (1992) UN Doc HRI/GEN/1/Rev.9 (Vol. I)

UN HRC, 'General Comment No 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)' (1982) UN Doc HRI/GEN/1/Rev.9 (Vol. I)

UN HRC, 'General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)' (1992) UN Doc HRI/GEN/1/Rev.9 (Vol. I)

UN HRC 'General Comment on Issues relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights' (1997) UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1

UN HRC, 'Draft General Comment No 36: Article 6: Right to Life' (2015) UN Doc CCPR/C/GC/R.36/Rev.2

UN HRC, 'General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial' (2007) UN Doc CCPR/C/GC/32

UN HRC, 'General Comment No 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights' (2008) UN Doc CCPR/C/GC/33

UN HRC, 'General Comment No 35 on Article 9 (Liberty and Security of Person)' (2014) UN Doc CCPR/C/GC/35

UN High Commissioner for Refugees (UNHCR), 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (1994)

UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach' (2000) UN Doc EC/50/SC/CRP.17

UNHCR, 'Guidelines on International Protection No 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees' (2003) UN Doc HCR/GIP/03/04

UNHCR, 'UNHCR Note on Diplomatic Assurances and International Refugee Protection' (2006)

UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (2007)

UNHCR, 'UNHCR Statement on a Draft Revised General Comment No 1 on the Implementation of article 3 of the Convention against Torture in the Context of Article 22' (2017)

UN Human Rights Council, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Rehabilitation of Torture Victims' (2013) UN Doc A/HRC/22/L.11/Rev.1

UN Office on Drugs and Crime, *Handbook on Police Accountability, Oversight and Integrity* (United Nations 2011)

UN Office of the High Commissioner for Human Rights (UN OHCHR), 'Acts of Intimidation and Reprisal for Cooperation with the United Nations in the Field of Human Rights' (2018) <https://www.ohchr.org/EN/Issues/Reprisals/Pages/ReprisalsIndex.aspx> accessed 1 April 2018

UN OHCHR, 'Committee against Torture considers Report of the United States, News Release' (13 November 2014) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15290&LangID=E> accessed 4 November 2017

UN OHCHR, 'Handbook for Human Rights Treaty Body Members' (2015) <https://www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf> accessed 8 December 2017

UN OHCHR, 'How to Follow up on UN Human Rights Recommendations: A Practical Guide for Civil Society' (2014) <https://www.ohchr.org/Documents/AboutUs/CivilSociety/HowtoFollowUNHRRecommendations.pdf> accessed 8 December 2017

UN OHCHR, 'Human Rights Treaty Bodies and Election of Treaty Body Members: A Guide for United Nations Delegates Based in New York' (2013) <https://www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf> 8 December 2017

UN OHCHR, 'Human Rights: A Compilation of International Instruments' (2002) UN Doc ST/HR/1/Rev.6 (Vol I, Part 1 and 2)

UN OHCHR, 'Individual Complaint Procedures Under the United Nations Human Rights Treaties' (2013) Fact Sheet No 7/Rev.2 < https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf> accessed 8 December 2017

UN OHCHR, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (HR/PUB/08/1, UN 2008)

UN OHCHR, *Professional Training Series No 8 (Rev1), Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (HR/P/PT/8/Rev.1, UN 2004)

UN OHCHR, *Professional Training Series No 4 (Rev 1): National Human Rights Institutions: History, Principles, Roles and Responsibilities* (HR/P/PT/4/Rev.1, UN 2010)

UN General Assembly (UNGA), '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' Res 60/147 of 16 December 2005

UNGA, 'Basic Principles for the Treatment of Prisoners' Res 45/111 of 14 December 1990

UNGA, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' Res 43/173 of 9 December 1988 (Body of Principles)

UNGA, 'Committee against Torture: Resolution adopted by the General Assembly' Res 67/232 of 24 December 2012

UNGA, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' Res 40/34 of 29 November 1985

UNGA, 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' Res 25/2625 of 24 October 1970

UNGA, 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' Res 30/3452 of 9 December 1975

UNGA, 'Human Rights Council: Resolution adopted by the General Assembly' Res 60/251 of 15 March 2006

UNGA, 'Model Treaty on Extradition' Res 45/116 of 14 December 1990, and subsequently amended by Res 52/88 of 14 December 1990

UNGA, 'National Institutions for the Promotion and Protection of Human Rights' Res 48/134 of 20 December 1993

UNGA, 'Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', Recommended by General Assembly Resolution 55/89 of 4 December 2000

UNGA, 'Report of the Chairpersons of the Human Rights Treaty Bodies on Their Fifteenth Meeting' (2003) UN Doc A/58/350

UN, 'Report of the Chairs of the Human Rights Treaty Bodies on Their Twenty-Sixth Meeting' (2014) UN Doc A/69/285

UNGA, 'Report of the Committee against Torture and Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' Res 49/177 of 23 December 1994

UNGA, 'Report of the Third Meeting of Persons Chairing the Human Rights Treaty Bodies' (1990) UN Doc A/45/636
UNGA, 'Rights of the Child: Note by the Secretary-General' (2006) UN Doc A/61/299
UNGA, 'Rights of the Child: Resolution Adopted by the General Assembly on the Report of the Third Committee (A/69/484)' Res 69/157 of 18 December 2014
UNGA, 'Rights of the Child: Resolution Adopted by the General Assembly on the Report of the Third Committee (A/71/480)' Res 71/177 of 19 December 2016
UNGA, 'Social Advancement of Trust Territories' Res 323(IV) of 15 November 1949
UN, 'Status of the Human Rights Treaty Body System: Report of the Secretary-General' (2016) UN Doc A/71/118
UNGA, 'Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System: Resolution Adopted by the General Assembly' Res 68/268 of 9 April 2014
UNGA, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' Res 67/161 of 20 December 2012
UNGA, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Resolution adopted by the UN General Assembly' Res 61/153 of 19 December 2006
UNGA, 'United Nations International Day in Support of Victims of Torture: resolution adopted by the General Assembly' Res 52/149 of 18 February 1998
UNGA, 'United Nations Rules for the Protection of Juveniles Deprived of Their Liberty' Res 45/113 of 14 December 1990 (Havana Rules)
UNGA, 'United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders' Res 65/229 of 21 December 2010 (the Bangkok Rules)
UNGA, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice' Res 40/33 of 29 November 1985 (Beijing Rules)
UNGA, 'United Nations Standard Minimum Rules for the Treatment of Prisoners' as revised by Res 70/175 of 17 December 2015 (Mandela Rules)
UN, 'Reprisals in the Context of United Nations Human Rights Mechanisms' (2015) UN Doc HRI/MC/2015/5 – CAT-20
UN, 'Concluding Observations' (2014) UN Doc HRI/MC/2014/2
UN, 'Constructive Dialogue between Treaty Bodies and States Parties' (2014) UN Doc HRI/MC/2014/3
UN, 'Consultation Process for the Elaboration of Treaty Body General Comments' (2015) UN Doc HRI/MC/2015/4
UN, 'Guidelines against Intimidation or Reprisals ("San Jose Guidelines")' (2015) UN Doc HRI/MC/2015/6
UN, 'Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Documents' (2006) UN Doc HRI/MC/2006/3
UN, 'Overview of the Human Rights Treaty Body System and Working Methods to the Review of States Parties' (2013) UN Doc HRI/MC/2013/2
UN, 'Implementation by Treaty Bodies of the Conclusions and Recommendations of the Treaty Body Chairpersons at Their Twenty-Sixth Meeting in the Framework of General Assembly Resolution 68/268' (2015) UN Doc HRI/MC/2015/2
UN, 'Reprisals in the Context of United Nations Human Rights Mechanisms' (2015) UN Doc HRI/MC/2015/3
UN, 'Simplified Reporting Procedure' (2014) UN Doc HRI/MC/2014/4
UN, 'Timely, Late and Non-Reporting by States Parties to the Human Rights Treaty Bodies' (2016) UN Doc HRI/MC/2016/2
UN, Centre for Human Rights, 'Professional Training Series No 4: National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights' (HR/P/PT/4, United Nations 1995)

UN, *Manual on Human Rights Reporting: Under Six Major Human Rights Instruments* (United Nations 1997)

UN, 'United Nations Reform: Measures and Proposals' (2012) UN Doc A/66/860

UN, 'Implementation of Human Rights Instruments' (2016) UN Doc A/71/270

'UK Court Convicts Afghan Warlord of 'heinous' Crimes' *The Guardian* (London, 18 July 2005)

United Kingdom Foreign and Commonwealth Office, 'Annual Report on Human Rights 2009' (2010) <https://www.theguardian.com/uk/2005/jul/18/afghanistan.world> accessed 24 November 2017

United Kingdom, National Preventive Mechanism, *Monitoring Places of Detention: Second Annual Report of the United Kingdom's National Preventive Mechanism: 2010–11* (Cm 8282 2012)

University of Bristol, 'The Optional Protocol to the UNCAT: Preventive Mechanisms and Standards: Conference Report, Report on the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (OPCAT)' (Law School, University of Bristol, UK, 19–20 April 2007) http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/apr2007conference.pdf accessed 11 December 2017

Van Sliedregt, E and Keijzer, N, 'Correspondents' Reports: A Guide to State Practice concerning International Humanitarian Law' (2000) 3 Yearbook of International Humanitarian Law 405

Van Zyl Smit, D and Snacken, S, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press 2008)

Vandenhole, W, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence Or Convergence?* (Intersentia 2004)

Watson, GR, 'The Passive Personality Principle' (1993) 28 Texas International Law Journal 1

Weissbrodt, D and Bergquist, A, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 Harvard Human Rights Journal 123

Wendland, L, 'A Handbook on State Obligations under the UN Convention against Torture' (APT 2002)

Wouters, CW, *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention Against Torture* (Intersentia 2009)

Zegveld, L, 'The Bouterse Case' (2001) 32 Netherlands Yearbook of International Law 97

Zimmermann, A (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011)

Zimmermann, A and Wennholz, P, 'Article 1F' in A Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011)

Zwanenburg, M, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 Netherlands Quarterly of Human Rights 641

Index

I = Introduction (in bold) and paragraph number (eg **I1** = paragraph 1 of the Introduction)
P = Preamble (in bold) and paragraph number (eg **P1** = paragraph 1 of the Preamble chapter)
References are to Treaty Article (in bold) and paragraph number within each chapter (eg **A1:**1 = paragraph 1 of chapter on **Article 1** of CAT)
OP preceding Article and paragraph number refers to Optional Protocol (eg **OP P1** (**P** = Preamble); **OP A1:**1 (**A** = Article and 1 = paragraph number)
App = Appendix (eg **App** A.1)
CAT = Torture Convention 1984
NPMs = national preventive mechanisms
OP = Optional Protocol
Subcommittee = Subcommittee on Prevention of Torture

***absentia*, proceedings in**
universal jurisdiction, principle of **A5:**142–50
absolute rights
non-derogable rights vs **A2:**58
non-refoulement principle and **A3:**3
Abu Ghraib
universal jurisdiction, principle of **A5:**159–60
abuse of right of submission **A22:**37–9
accessions *see* **accessions to CAT; signature, ratification and accessions to Optional Protocol**
accessions to CAT I2; **A26:**1–21
accession **A26:**11–12
draft texts, chronology of **A26:**3–10
IAPL Draft 1978 **A26:**3
Proposal for the Preamble and Final Provisions of Draft Convention 1980 **A26:**4
Revised Set of Final Clauses Submitted by Chairman-Rapporteur 1983 **A26:**5
succession **A26:**13–21
travaux préparatoires **A26:**3–10
working group discussions **A26:**6–10
accessions to Optional Protocol I2
accessories **A4:**7, 11
accomplices **A4:**7; **A5:**92, 95, 110, 138
accountability
ex officio investigations **A12:**17, 24, 50
intelligence services **A15:**41
national preventive mechanism **A18:**16; **A19:**8; **A20:**7
of places of detention **OP A1:**45
principle of **A4:**12
***acquiescence* to torture**
concept of **A1:**29, 36, 61
definition of *acquiescence* **A1:**128–32
active nationality principle of jurisdiction **A5:**65–70
citizenship, change of **A5:**67–8
dual citizenship **A5:**67–8
General Comment No 2 **A5:**66
torture by non-officials **A5:**69
admissibility *see* **admissibility of complaints; non-admissibility of evidence obtained by torture**
admissibility of complaints **A22:**1–187
abuse of the right of submission **A22:**37–9
decisions, legal effect of **A22:**164–71
development of **A22:**172–4
draft texts, chronology of **A22:**6–7
examination under another procedure **A22:**62–72
exhaustion of domestic remedies **A22:**73–105
existence of several remedies **A22:**82
follow-up procedure **A22:**172–83
inadmissibility of anonymous complaints **A22:**35–6
incompatibility with provisions of the Convention **A22:**47–61
individuals, definition of **A22:**18–20
individuals subject to its jurisdiction **A22:**31–4
interim measures **A22:**106–26
manifestly unfounded **A22:**40–6
on behalf of individuals, definition of **A22:**26–30
optional character **A22:**13–17
Original Swedish Draft 1978 **A22:**6
procedure before the Committee **A22:**127–71
procedure for granting interim measures **A22:**113–16
procedure on admissibility **A22:**145–50
procedure on the merits **A22:**151–62
Rapporteur for follow-up, practice of **A22:**178–83
Rapporteurs and Working Group **A22:**134–5
ratione loci **A22:**60–1
ratione materiae **A22:**51–3
ratione personae **A22:**48–50
ratione temporis **A22:**54–9
registration of complaints **A22:**136–44
reparations measures by the Committee, indication of **A22:**175–7
reprisals **A22:**184–7
standing of the applicant **A22:**18–30
submitting a complaint **A22:**132–3

admissibility of complaints (*cont.*)
Swedish Proposal for the Implementation Provisions 1981 **A22:**7
travaux préparatoires **A22:**6–12
victim, definition of **A22:**21–5
working group discussions **A22:**8–12
Afghanistan
Danish participation in **A3:**108
de facto effective control **A5:**116
dispute settlement **A30:**16
entry into force of CAT **A27:**12
inquiry procedure **A20:**2
mutual judicial assistance **A9:**19–20
non-refoulement, principle of **A3:**107–8
opting out of CAT **A28:**15
state reporting procedure **A19:**32, 40
African Charter of Human and Peoples' Rights (ACHPR) I1; **OP A31:**10
air transport *see* **aircraft**; **Hague Hijacking Convention**; **Montreal Civil Aviation Convention 1973**
aircraft **A1:**36; **A2:**2, 12, 53–6; **A3:**86, 106, 142; **A5:**3, 18–19, 23–4, 33, 50, 53, 57–8, 61–3, 66; **A7:**1, 20, 38, 41, 44; **A8:**7, 11, 37
Albania
accession to the Optional Protocol **OP A27:**17
compensation to victims of torture at hand of State officials **A14:**63
Red Cross and the Optional Protocol **OP A32:**10
***Al-Duri* Case** **A6:**35–6
Algeria
Djamila Bendib v Algeria case **A14:**47
French practices in **I1**
HB v Algeria case **A1:**97
individual complaints **A22:**96
non-refoulement, principles of **A3:**214
obligations of members of the Subcommittee **OP A36:**6
Preamble to the Optional Protocol **OP P**20
ratifications or accessions, number of required **OP A28:**9
remedy and adequate reparation, right of victims to **A14:**47, 75
reservations, prohibition of **OP A30:**9–10
system of preventive visits **OP A1:**39
terrorism, return of suspects **A3:**214
allegations, sufficiency of mere **A13:**25; **A22:**158
***Almatov* case** **A6:31–3**
Alston, Philip **A17:**54
amendments *see* **amendments to CAT; amendments to Optional Protocol**
amendments to CAT **A29:**1–15
draft texts, chronology of **A29:**3–5
IAPL Draft 1978 **A29:**3
Proposal for Preamble and Final provisions of Draft Convention, Submitted by Sweden 1980 **A29:**4
Revised Set of Final Clauses Submitted by Chairman-Rapporteur 1983 **A29:**5
travaux préparatoires **A29:**3–9
working group discussions **A29:**6–9
amendments to Optional Protocol OP **A34:**1–10
Basis for Future Work 1999 **OP A34:**3
draft texts, chronology of **OP A34:**2–3
Outcome of First Reading 1996, text of Articles which constitute the **OP A34:**2
travaux préparatoires **OP A34:**2–7
working group discussions **OP A34:**4–7
amnesties **A2:**63; **A5:**132, 172; **A12:**21; **A14:**77
immunities and **A4:**39–43, 47
Amnesty International (AI) P2.2, **P3**; **A3:**158; **A5:**175; **A6:**31; **A10:**1; **A14:**45; **A19:**46; **A20:**3; **OP A5:**15; **OP A11:**44; **OP A25:**20; **OP A26:**15; **OP A28:**9; **OP A30:**9–10
Andijan massacre **A5:**180; **A6:**31, 33
Andorra
entry into force of CAT **A27:**13
Annan, Kofi P3
announcements of visits *see* **unannounced visits**
annual programmes of visits **A13:**32; **OP A31:**13
annual reports *see* **annual reports under CAT; annual reports of national preventive mechanisms**
annual reports under CAT **A24:**1–24
content of the annual report **A24:**19–21
Draft Implementation Provisions, submitted by the Chairman-Rapporteur 1982 **A24:**9
Draft Optional Protocol by Costa Rica 1980 **A24:**7
draft texts, chronology of **A24:**5–11
IAPL (International Association of Penal Law) Draft 1978 **A24:**5
New Article submitted to the Working Group by the Chairman-Rapporteur 1983 **A24:**10
Original Swedish Draft 1978 **A24:**6
publication of the annual report **A24:**22–4
Report of the Working Group **A24:**11
Swedish Proposal for Implementation Provisions 1981 **A24:**8
travaux préparatoires **A24:**5–18
working group discussions **A24:**12–18
annual reports of national preventive mechanisms OP **A23:**1–9
draft texts, chronology of **OP A23:**2–3
EU Draft 2001 **OP A23:**2
proposal by the Chairperson-Rapporteur 2002 **OP A23:**3
travaux préparatoires **OP A23:**2–6
working group discussions **OP A23:**4–6
anonymous complaints, inadmissibility of **A22:**35–6
Antigua and Barbuda
state reporting procedure **A19:**57, 98, 104
any statement obtained as a result of torture, definition of
closed evidence **A15:**34
exculpatory evidence **A15:**27–9
foreign evidence **A15:**30–3
indirect evidence **A15:**18–24
statements:
made before or after torture **A15:**25–6
types of **A15:**16–17
apartheid I2–3; **A3:**13, 27, 38–9, 45, 50, 63, 65–6, 154–6; **A17:**19, 28
apologies **A14:**110, 129
arbitration procedure
International Court of Justice (ICJ) **A30:**23–7
Argentina
CAT inter-State procedure **A21:**41

entry into force of CAT **A27:**12
entry into force of Optional Protocol **OP A28:**9
extradition **A8:**20
Haro v Argentina case **A22:**101
implementation of the Convention **A17:**16, 28
individual complaints **A22:**160
inquiry procedure **A20:**25, 29
mandate of the Subcommittee **OP A11:**17
military junta **A5:**126
national preventive mechanism **OP A3:**8–9
decentralized units **OP A17:**11
independence **OP A18:**8
non-refoulement, principle of **A3:**30, 43
obligation to criminalize torture **A4:**47
obligations to cooperate **OP A12:**15
opting out of CAT **A28:**6
OR, MM and MS v Argentina case **A2:**70; **A5:**162–4; **A7:**78; **A22:**54
Punto Final cases **A14:**45
ratifications or accessions, number of required **OP A28:**9
remedy and adequate reparation, right of victims to **A14:**45
reservations, prohibition of **OP A30:**10
self-enforcement, option of **A17:**16
state reporting procedure **A19:**27, 31
system of preventive visits **OP A1:**39
universal jurisdiction, principle of **A5:**40, 48
armed conflicts **A1:**71; **A2:**62; **A3:**150, 166, 183; **A4:**43; **A14:**89, 126; **A26:**19; **OP A14:**27
law of **A1:**156–7; **A16:**92
non-international vs international **A3:**153; **OP A32:**1–2, 9
training of personnel **A10:**15
victims of **A2:**13
armed forces **A1:**123; **A2:**30, 56; **A5:**134; **A9:**20; **A16:**82
Armenia
de facto control of insurgent groups **OP A4:**33
ethnicity and risk of discrimination **A3:**178
individual complaints **A22:**53
non-refoulement, principle of **A3:**178; **A22:**53
NPM advisory visits **OP A11:**32; **OP A20:**47
succession to CAT **A26:**13
***Arrest Warrant* case** **A5:**145–7
arrests
review of interrogation and prison rules **A11:**22–43
assurances *see* **diplomatic assurances or guarantees, practice of obtaining**
asylum seekers *see also* **asylum seekers, principle of non-refoulement and**
asylum procedure **A2:**42
asylum seekers, principle of non-refoulement and
asylum procedure **A3:**193–8
attempts
attempt, definition of **A4:**20–3
Australia
amendments to CAT **A29:**12
and CERD provisions **A17:**55
asylum seekers, transfer of **A3:**88
composition of Subcommittee **OP A5:**16
denunciations, Optional Protocol and **OP A33:**8
Elmi v Australia case **A1:**126; **A3:**131, 183, 186
entry into force of Optional Protocol **OP A28:**9–10
federal clause **OP A29:**6
financing of the Committee **A17:**55; **A18:**38
financing of the Subcommittee **OP A25:**1
HMHI v Australia case **A3:**131, 186
inquiry procedure **A20:**25, 28
non-refoulement principle **A3:**88
obligations to cooperate **OP A12:**15
offshore processing **A3:**88
Preamble to the Optional Protocol **OP P**19
remedy and adequate reparation, right of victims to **A14:**95
reports of the Subcommittee **OP A16:**15
signature, ratification, and accession of Optional Protocol **OP A27:**17
state reporting procedure **A19:**21–2, 27, 29
system of preventive visits **OP A1:**28
terms of office of Subcommittee members **OP A9:**12, 15
universal jurisdiction, principle of **A5:**22, 34, 37, 48
Z v Australia case **A14:**95, 100
Austria
Al-Duri case **A5:**5, 117; **A6:**35–6
complain, right of victims to **A13:**13, 30
definition of torture and 'persons acting in an official capacity' **A1:**35, 122, 125
entry into force of Optional Protocol **OP A28:**9
extradition treaties **A3:**14, 19; **A8:**8
Halimi Nedyibi v Austria case **A22:**98
individual complaints **A22:**8
inquiry procedure **A20:**12, 28
inter-state communications **A21:**7
mandate of the Subcommittee **OP A11:**17
non-admissibility of evidence obtained by torture **A15:**10, 15
non-refoulement, principle of **A3:**14, 19, 102
obligation to prevent torture **A2:**10
remedy and adequate reparation, right of victims to **A14:**8
reservations, prohibition of **OP A30:**10
state reporting procedure **A19:**15
***aut dedere aut iudicare* principle** *see* **extradite or prosecute principle**
authentic texts *see* **authentic texts of CAT; authentic texts of Optional Protocol**
authentic texts of CAT **A33:**1–4
draft texts, chronology of **A33:**2
Proposal for Preamble and Final provisions of Draft Convention, Submitted by Sweden 1980 **A33:**2
travaux préparatoires **A33:**2–3
working group discussions **A33:**3
authentic texts of Optional Protocol **OP A37:**1–6
Costa Rica Draft 1991 **OP A37:**2
draft texts, chronology of **OP A37:**2–3
Outcome of First Reading 1996, text of Articles which constitute the **OP A37:**3
travaux préparatoires **OP A37:**2–4
working group discussions **OP A37:**4
aviation *see* **aircraft; Montreal Civil Aviation Convention 1973**

Azerbaijan
de facto control **OP A4:**33
Elif Pelit v Azerbaijan case **A3:**181, 251
non-refoulement, principle of **A3:**178, 181, 251
obligation to allow preventive visits **OP A4:**33
obligation to cooperate **OP A12:**29
obligation to facilitate visits **OP A14:**24
Red Cross, Optional Protocol and **OP A32:**10
reports of the Subcommittee **OP A16:**25
succession to CAT **A26:**13
suspension of missions to **OP A12:**29; **OP A14:**24

Bangladesh
declarations **A14:**28–32
optional, on the issue of **A22:**14
individual complaints **A22:**12, 75
nationalist BNP party **A3:**132
remedy and adequate reparation, right of victims to **A14:**28–32
Barbados
definition of torture **A1:**22, 28, 36, 38, 122
remedy and adequate reparation, right of victims to **A14:**9
Belarus
succession to CAT **A26:**13, 16
Belgium
Arrest Warrant case **A5:**145–7
definition of torture **A1:**54
Democratic Republic of Congo v Belgium case **A5:**6
dispute settlement **A30:**2, 18, 21, 24, 36
ex officio investigations **A12:**57
extradition requests **A5:**96; **A7:**58, 68
Habré case **A5:**96, 109–14, 148–50; **A6:**41–5; **A7:**43, 51–2, 73; **A30:**2, 18, 21, 24, 36
individual complaints **A22:**25
inquiry procedure **A20:**28
lawful sanctions **A1:**54, 137
state reporting procedure **A19:**29
universal jurisdiction, principle of **A5:**142
Belize
entry into force of CAT **A27:**12–13
state reporting procedure **A19:**40, 59
Benin
Code of Criminal Procedure, revisions to **OP A26:**26
country missions **OP A13:**40
follow-up missions **OP A13:**44
mutual judicial assistance **A9:**18
blindfolds **A1:**84; **A11:**46; **A12:**36
Bolivia
country missions **A13:**44
disciplinary confinement in punishment cells (*el bote*) **A1:**85
entry into force of CAT **A28:**2
state reporting procedure **A19:**31
Bosnia and Herzegovina
bribery and intimidation against witnesses **A14:**68
complaints **A26:**21
ethnic cleansing campaigns 1990s **A5:**127
national legislation, importance of with respect to victims' rights **A14:**64
postponement of Optional Protocol obligations **OP A24:**15
succession to CAT **A26:**13, 18, 21
Botswana
definition of torture **A1:**60, 62
Boulesbaa, A. **A1:**59, 66; **A2:**25, 73
***Bouterse* case**
universal jurisdiction, principle of **A5:**124–6, 165–6
boxes for complaints at detention centres **A13:**21
Brazil
aut dedere aut judicare principle **A7:**26, 34
country missions **I3**
decentralized units **OP A17:**11
declarations and reservations **A5:**39
federal states **OP A29:**12
inquiry procedure **A20:**37, 43, 47, 59, 62, 77, 81
nomination of Subcommittee members **OP A6:**10
obligation to cooperate **OP A12:**15
prior consent **OP A1:**25
reservations, prohibition of **OP A30:**10
self-enforcement, option of **A17:**16, 28
Special Fund **OP A26:**9, 26
systematic torture **A20:**47
terms of office of Subcommittee members **OP A9:**12, 15
universal jurisdiction **A5:**37, 45, 49, 51
budget of United Nations, financing from **A17:**25; **A29:**11, 13–14; **OP A26:**15
Bulgaria
entry into force of CAT **A27:**12
inquiry procedure **A20:**25
Keremedchiev v Bulgaria case **A10:**25; **A22:**66, 181
national preventive mechanism **OP A3:**8
non-refoulement, principle of **A3:**67
obligation to criminalize torture **A4:**12
Rapporteurs from **A24:**24
recommendations **OP A22:**9
state reporting procedure **A19:**27, 32
burden of proof
Committee procedure **A3:**245–50
credibility and plausibility of claim and applicant **A3:**227–33
evidence in support of claim **A3:**234–7
non-refoulement, principle of **A3:**219–50
procedure by domestic authorities **A3:**241–4
shift of burden of proof to state party **A3:**238–40
substantiation of risk by applicant **A3:**222–37
Burgers, Jan Herman **I2**; **P2**; **P3**; **A1:**30, 111; **A2:**12, 15, 73; **A4:**24; **A8:**12, 27; **A10:**16, 21; **A12:**38; **A15:**60; **A18:**6; **A19:**25; **A20:**23; **A24:**3; **A30:**11
Burundi
Abdulrahman Kabura v Burundi case **A16:**27
Boniface Ntikarahera v Burundi case **A16:**27
EN v Burundi case **A1:**112, 124
extra-judicial executions of government opponents **A14:**66
human rights situation **A3:**168
inquiry procedure **A20:**28
Kabura v Burundi case **A11:**16

Niyonzima v Burundi case **A11:**16; **A13:**34
non-refoulement, principle of **A3:**69, 168
Ntahiraja v Burundi case **A1:**82
Patrice Gahungu v Burundi case **A1:**73, 112
remedy and adequate reparation, right of victims to **A14:**66, 75
state reporting procedure **A19:**40, 57
X v Burundi case **A1:**118
Byelorussian Soviet Socialist Republic
Amendment to the Draft Resolution by the **A20:**10
entry into force of CAT **A27:**12
inquiry procedure **A20:**30, 32
1984 proposal **A28:**3
outing out of **A28:**1, 3, 8–11, 15
state reporting procedure **A19:**32–3
succession to CAT **A26:**13

Cambodia
country missions **A13:**44
Extraordinary Chambers in the Court of (ECCC) **A7:**63; **A14:**89; **A15:**61
state reporting procedure **A19:**57
Cameroon
Committee members **A17:**47
entry into force of CAT **A27:**12–13
state reporting procedure **A19:**40
Canada
Akhimien v Canada case **A22:**100
annual reports **A24:**24
aut dedere aut judicare **A7:**56
BS v Canada case **A3:**117; **A16:**19; **A22:**85
BSS v Canada case **A3:**190
Committee members **A17:**47; **A24:**24
composition of Subcommittee **OP A5:**16
cruel, inhuman or degrading treatment or punishment **A16:**19, 58, 91
definition of torture **A1:**21, 54, 137; **A14:**24
exclusionary rule **A15:**57
extradition **A8:**24
Falcon Ríos v Canada case **A22:**85
HBA et al v Canada case **A5:**117; **A6:**20–7
immigration procedures **A5:**119
individual complaints **A22:**33, 85, 91, 100, 102
inquiry procedure **A20:**24, 28
Judge v Canada case **A7:**56
Kalonzo v Canada case **A3:**180
lawful sanctions clause **A1:**137
mandate of Subcommittee **OP A11:**17
mutual judicial assistance **A8:**24; **A9:**17
national preventive mechanism **OP A3:**8, 10
national security interests **A16:**91
non-refoulement, principle of **A3:**51, 116–17, 141, 180, 190–1, 205, 252
NS v Canada case **A3:**191
obligations to cooperate **OP A12:**15
PSS v Canada case **A22:**102
Régent Boily v Canada case **A3:**205–6, 252
remedy and adequate reparation, right of victims to **A14:**24, 56, 96
reservations, prohibition of **OP A30:**9–10
Special Fund **OP A26:**10–11
SSS v Canada case **A3:**191
state reporting procedure **A19:**29
system of preventive visits **OP A1:**25, 39
terms of office of Subcommittee members **OP A9:**12, 15
TPS v Canada case **A3:**141; **A22:**91
universal jurisdiction **A5:**119
Cape Verde
definition of torture **A1:**123
state reporting procedure **A19:**57, 98, 104
capital punishment
cruel, inhuman or degrading treatment or punishment, prevention of **A16:**66–72
definition of torture **A3:**124–8
non-refoulement, principle of **A3:**124–8
capitulations, practice of **A5:**20
Chad
authoritarian rule **A5:**148; **A7:**50, 74; **A22:**25, 110; **A30:**21
obligation to establish jurisdiction **A5:**92, 148
chain gangs **A16:**55
changes of nationality
active nationality principle of jurisdiction **A5:**67–8
Habré case (ICJ) **A5:**85
passive nationality principle of jurisdiction **A5:**83–5
Pinochet case (France) **A5:**84
children
violence against **A2:**46–51
Chile see also ***Pinochet* case**
crimes against Spanish citizens **A5:**75
denunciations, Optional Protocol and **OP A33:**8
entry into force of Optional Protocol **OP A28:**8
extradition **A8:**24
inquiry procedure **A20:**2
mutual judicial assistance **A9:**17
National Commission on Political Imprisonment and Torture **A14:**121
opting out of CAT **A28:**15
prior consent, system of preventive visits and **OP A1:**25, 39
reservations, prohibition of **OP A30:**9
Special Fund **OP A26:**9
state reporting procedure **A19:**40
Subcommittee on prevention **OP A2:**10
torture and enforced disappearances **I1**
China
country missions **OP A13:**24
election of Subcommittee **OP A7:**11
entry into force of Optional Protocol **OP A8:**9
federal states **OP A29:**6
illicit conduct, lawful authority, justification or excuse of **A1:**144
inquiry procedure **A20:**2
mandate of Subcommittee **OP A11:**17
national preventive mechanisms **OP A3:**9
mandate and power of **OP A19:**8
non-refoulement, principle of **A3:**59, 63
obligations to cooperate **OP A12:**14
obligations of states parties to facilitate visits **OP A20:**7
obligations of Subcommittee members **OP A36:**4, 6
opting out procedure **A28:**15
Preamble to the Optional Protocol **OP P**20
privileges and immunities **OP A35:**8–9, 13

China (*cont.*)
remedy and reparation, right of torture victim to adequate **A14:**95
reservations, prohibition of **OP A30:**10
rules of procedure of Optional Protocol **OP A10:**9
signature and ratification of Optional Protocol **OP A27:**17
state reporting procedure **A19:**40, 98
system of preventive visits **OP A1:**25, 39
civil aviation *see* **aircraft**; **Montreal Civil Aviation Convention 1973**
civil proceedings
universal jurisdiction, principle of **A14:**91–103
codes of conduct for personnel **A10:**21–2
Cold War **A17:**35, 53; **A18:**23; **A19:**2, 61; **A22:**2
Colombia
definition of torture **A1:**96
state reporting procedure **A19:**31
colonies *see* **dependent territories and colonies**
Committee against Torture *see also* **Committee against Torture, rules of procedure of**
casual vacancies **A17:**48–51
composition of committee **A17:**30–7
Draft Implementation Provisions submitted by Chairman-Rapporteur of Working Group as alternative to new Swedish Proposals 1982 **A17:**8
Draft Optional Protocol by Costa Rica 1980 **A17:**6
draft texts, chronology of **A17:**4–9
election of committee members **A17:**41–7
financing of committee **A17:**52–5
Four Draft Articles on Implementation with Explanatory Note submitted by Chairman-Rapporteur 1982 **A17:**9
functions of committee **A17:**27–9
IAPL Draft 1978 **A17:**4
nature of committee **A17:**27–9
nomination of committee members **A17:**38–40
Original Swedish Draft **A17:**5
Swedish Proposal for the Implementation Provisions 1981 **A17:**7
travaux préparatoires **A17:**4–26
working group discussions **A17:**10–26
Committee against Torture, rules of procedure of
conduct of business **A18:**36
Draft Implementation Provisions submitted by Chairman-Rapporteur of Working Group as alternative to new Swedish Proposals 1982 **A18:**4
draft texts, chronology of **A18:**4–5
financing of committee **A18:**37–8
Four Draft Articles on Implementation with Explanatory Note submitted by Chairman-Rapporteur 1982 **A18:**5
meetings **A18:**30–6
officers, meaning of **A18:**13–21
public and private **A18:**32–4
records **A18:**35
rules of procedure **A18:**10–12
sessions **A18:**30–1
staff and facilities **A1:**26–9
travaux préparatoires **A18:**4–9
voting **A18:**22–5
working group discussions **A18:**6–9
Committee for the Prevention of Torture (CPT) **I2**; **A3:**213; **A22:**64; **OP A2:**4–8, 17
communications *see* **inter-state communications**
compensation, right of victims to **A14:117–22** *see also* **remedy and adequate reparation, right of victims to**
competent authorities
complain, right of victims to **A13:**25–9
definition of **A12:**35–8
discretion of authorities to prosecute **A7:**50–2
ex officio investigations **A12:**35–8
extradition requests, no requirement for **A7:**53
failure to prosecute **A7:**58
Habré case **A7:**50–2
international tribunals, transfer to **A7:**61–4
obligation to prosecute **A7:**54–60
option to extradite **A7:**54–60
extradition as an option **A7:**54–5
limitations to **A7:**56–7
as an obligation **A7:**58
practical order between extradition and prosecution **A7:**59–60
performance of obligations **A7:**65–73
promptly and impartially examined by competent authorities, definition of **A13:**25–9
prosecution as an obligation **A7:**54–5
recommendations of NPMs, obligation to examine **OP A22:**7–9
submission of case for purpose of prosecution **A7:**49–79
complain, right of victims to **A13:**1–37
Declaration 1975 **A13:**8
draft texts, chronology of **A13:**8–12
IAPL Draft 1978 **A13:**9
Original Swedish Draft 1978 **A13:**10
promptly and impartially examined by competent authorities, definition of **A13:**25–9
protected against all ill- treatment or intimidation, definition of **A13:**30–7
Revised Swedish Draft 1979 **A13:**12
right to complain, definition of **A13:**16–24
travaux préparatoires **A13:**8–15
US Draft 1978 **A13:**11
working group discussions **A13:**13–15
complaints *see* **complain, right of victims to**; **individual complaints procedure**; **registration of complaints**
complicity or participation **A3:**2; **A5:**25, 54; **A7:**87
definition of **A4:**6, 10–11, 20–3, 45
concealment **A4:**1, 10, 21–3
conciliation
ad hoc Conciliation Commission **A21:**29–31
conclusions and recommendations **A19:**3, 39, 61–5, 68–9, 80; **A24:**19; **A31:**12; **OP A2:**27
concurrent or previous international procedure *see* **international procedure, previous or concurrent**
conditions of detention *see also* **UN Standard Minimum Rules for the Treatment of Prisoners**
adequate material **A16:**26–9

confessions I3; **A1:**69, 110; **A2:**38, 51; **A4:**30; **A11:**31, 47; **A15:**1, 17, 21; **A16:**24; **A20:**47; **A22:**103
forced **A15:**41, 47, 58
confidentiality
confidential information, protection of **OP A21:**9–15
of mission reports **OP A16:**22–8
no duty of **OP A21:**16–23
principle of **OP A21:**9–24
***Congo Beach* case A5:**133–40
consent
definition of **A1:**128–32
consular representatives, communication with *see* **diplomatic or consular representatives, communication with**
control orders, derogating and non-derogating control orders A5:5
corporal punishment
cruel, inhuman or degrading treatment or punishment **A16:**56–65
definition of torture **A3:**124–8
non-refoulement, principle of **A3:**124–8
corporate social responsibility OP A26:23
Costa Rica
Preamble to the Optional Protocol **OP P**9, 18
signature and ratification of the Optional Protocol **OP A27:**17
state reporting procedure **A19:**31
system of preventive visits **OP A1:**38–9, 43
Costa Rica Draft Optional Protocol on system of preventive visits to places of detention *see* **Optional Protocol on system of preventive visits to places of detention**
Côte d'Ivoire
state reporting procedure **A19:**98
country missions *see* **country missions, obligations of Subcommittee concerning; Subcommittee on Prevention of Torture; Subcommittee members during country missions, obligations of**
country missions, obligations of Subcommittee concerning OP A13:1–44
composition of SPT delegations **OP A13:**37–43
conduct of missions **OP A13:**37–43
Costa Rica Draft 1980 **OP A13:**3
Costa Rica Draft 1991 **OP A13:**4
draft texts, chronology of **OP A13:**3–8
EU Draft 2001 **OP A13:**8
follow-up missions **OP A13:**44
Mexican Draft 2001 **OP A13:**7
Outcome of First Reading 1996, text of Articles which constitute the **OP A13:**5
Outcome of Second Reading 1999, text of Articles which constitute the **OP A13:**6
programme of missions **OP A13:**32–4
travaux préparatoires **OP A13:**3–29
types of missions **OP A13:**30–1
unannounced visits to places of detention **OP A13:**35–6
working group discussions **OP A13:**9–29
court of human rights, proposal for establishment of A22:4
crimes against humanity A6:31; **A7:**64; **A9:**18
jurisdiction **A5:**6, 92, 96, 100–1, 126–8, 134, 137, 145, 149–50, 160, 180
criminalize torture, state obligation to A4:1–52
all acts of torture, definition of **A4:**18–19
attempt, complicity and participation, definition of **A4:**20–3
criminalization torture under national law **A4:**24–32
criminalized acts **A4:**18–23
cruel, inhuman and degrading treatment **A4:**14–17
Declaration 1975 **A4:**3
definition of torture, inclusion of **A4:**30–2
excuse **A4:**38–43
IAPL Draft 1978 **A4:**4
immunity, exclusion of **A4:**38–43
individual complaints procedure **A4:**46–52
justification **A4:**38–43
Original Swedish Draft 1978 **A4:**5
punishable by appropriate penalties, definition of **A4:**33–7
Revised Swedish Draft 1979 **A4:**6
separate offence in criminal law, torture as **A4:**24–9
statute of limitation **A4:**44–5
travaux préparatoires **A4:**3–6
working group discussions, analysis of **A4:**7–11
Croatia
succession to CAT **A26:**13, 18–19, 21
terms of office of Subcommittee members **A9:**20
cruel, inhuman or degrading treatment or punishment A16:1–92
adequate material conditions of detention **A16:**26–9
applicability of statements obtained as a result of **A15:**55–8
capital punishment **A16:**66–72
corporal punishment **A16:**56–65
criminalize torture, state obligation to **A4:**14–17
definition of **A16:**5–12
definition of torture and **A3:**115–21
discipline **A16:**30–6
extra-custodial use of force **A16:**73–82
human dignity of detainees **A16:**30–6
ill-treatment in detention, prevention of **A16:**26–54
ill-treatment, forms of **A16:**13–24
inter-prisoner violence, prevention of **A16:**37–40
non-admissibility of evidence **A15:**55–8
non-refoulement, principle of **A3:**115–21
prevention of **A16:**55–72
private actors, prevention of ill-treatment committed by **A16:**83–8
remedy and adequate reparation, right of victims to **A14:**55–61
savings clause **A16:**89–92
security **A16:**30–6
state obligations to prevent **A16:**25
travaux préparatoires **A16:**2–4
vulnerable groups, protection against ill-treatment in detention **A16:**41–54

Cuba *see also* **Guantánamo Bay**
composition of Subcommittee **OP A5:**16
dispute settlement **A30:**16
entry into force of CAT **OP A28:**9
financing of Subcommittee **OP A25:**16, 20
mandate of Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**9–10
nomination of Subcommittee members **OP A6:**10
obligation to allow preventive visits **OP A4:**11–12
obligations of Subcommittee members **OP A36:**4, 6
opting out of CAT **A28:**14, 17; **A30:**16
opting out declaration **OP A24:**9
Preamble to Optional Protocol **OP P**20
privileges and immunities **OP A35:**9, 14
reservations, prohibition of **OP A30:**10
Subcommittee on prevention **OP A2:**17
system of preventive visits **OP A1:**25, 39, 41
terms of office of Subcommittee members **OP A9:**12, 15
custody, taking suspects into
Al-Duri case (Austria) **A6:**35–6
Almatov case (Germany) **A6:**31–3
Ely Ould Dah case (France) **A6:**34
definition of **A11:**11
presence of alleged torturer **A6:**28–36
procedural safeguards during preliminary investigations **A6:**48
review of interrogation and detention rules **A11:**11, 22–43
customary international law
aut dedere aut judicare **A7:**75
definition of torture **A1:**2, 133, 146–7, 154
jurisdiction **A5:**161, 165
non-refoulement, principle of **A3:**1, 72
obligation to criminalize torture **A4:**17
obligation to prevent torture **A2:**57
violations of **A14:**99
Cyprus
annual reports **A24:**24
Committee members from **A17:**34; **A24:**24
inquiry procedure **A20:**28
national preventive mechanism **OP A3:**8
non-refoulement, principle of **A3:**69, 116
state reporting procedure **A19:**29
Czech Republic
entry into force of CAT **A27:**14
entry into force of Optional Protocol **OP A28:**9
history of former Czechoslovakia **A28:**12, 15
mandate of the Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
opting out of CAT **A28:**12
reservations, prohibition of **OP A30:**10
Special Fund **OP A26:**23
succession to CAT **A26:**13
system of preventive visits **OP A1:**39

damages *see* **compensation, right of victims to**
data protection
collection of disaggregated data **A2:**52
legislation **OP A21:**24
death of detainees
dependents, rights of **A14:**51–2
death penalty *see* **capital punishment**
death row phenomenon **A3:**124, 127, 148; **A16:**35, 66, 69–71
Declaration on the Protection of All Persons from Being Subjected to Torture 1975 (UN General Assembly)
complain, right of victims to **A13:**8
criminalize torture, state obligation to **A4:**3
definition of torture **A1:**4, 23, 32, 40
ex officio investigations **A12:**8
non-admissibility of evidence obtained by torture **A15:**5
Preamble of CAT **P1**, **P2**.1, **P3**
remedy and adequate reparation, right of victims to **A14:**4
state obligation to prevent torture **A2:**6
text of **App** A.4
training of personnel **A10:**5
defence rights of suspects **A15:**23
definition of torture **A1:**1–157
acquiescence, definition of **A1:**128–32
conduct **A1:**65–6
consent, definition of **A1:**128–32
Declaration 1975 **A1:**4, 23, 32, 40
declarations **A1:**3, 60–2
definition of torture **A1:**63–132
draft texts, chronology of **A1:**4–7
IAPL Draft 1978 **A1:**5
ill-treatment and torture, distinction between **A1:**1, 67–80
instigation, definition of **A1:**128–32
intention **A1:**101–5
lawful sanctions **A1:**3, 54–5, 136–52
Original Swedish Draft 1978 **A1:**6, 23, 42
other person acting in an official capacity, definition of **A1:**125–7
powerlessness **A1:**1, 114–21
public official, definition of **A1:**123–4
public officials, involvement of **A1:**122–32
purpose **A1:**107–13
reservations **A1:**3, 60–2
Revised Swedish Draft 1979 **A1:**7, 14
savings clause **A1:**153–7
severe pain or suffering
definition of **A1:**81–100
infliction of **A1:**67–100
state obligations **A1:**133–5
travaux préparatoires **A1:**3–62
understandings **A1:**60–2
working group discussions **A1:**8–59
delay *see* **prompt and impartial investigation principle**
Democratic Republic of the Congo (DRC)
Democratic Republic of Congo v Belgium case **A5:**6, 145
non-refoulement, principle of **A3:**150
Denmark
AA v Denmark case **A12:**24, **A16:**54
annual reports **A24:**24
Committee members **A17:**47; **A24:**24
complain, right of victims to **A13:**13, 30
composition of Subcommittee **OP A5:**15
definition of torture **A1:**62

entry into force of CAT **A27:**1, 12
entry into force of Optional Protocol **OP A28:**9
ex officio investigations **A12:**23–4
federal states **OP A29:**6
financing of Subcommittee **OP A25:**23
Helle Jensen v Denmark case **A22:**81
FK v Denmark case **A12:**23
individual complaints **A22:**45, 81
inquiry procedure **A20:**28
mandate of Subcommittee **OP A11:**17
mutual judicial assistance **A9:**20
obligation to allow preventive visits **OP A4:**27
obligations to cooperate **OP A12:**15
national preventive mechanism **OP A3:**10
Pinochet case **A5:**126
RS v Denmark case **A22:**45
signature and ratification of CAT **A24:**11
signature and ratification of Optional Protocol **OP A27:**17
Special Fund **OP A26:**15
state reporting procedure **A19:**29, 31
system of preventive visits **OP A1:**25, 37
victims of torture, medical and social assistance to **A14:**26

denunciations *see* **denunciations, CAT and; denunciations, Optional Protocol and**

denunciations, CAT and **A31:**1–14
draft texts, chronology of **A31:**4
Revised Set of Final Clauses Submitted by Chairman-Rapporteur 1983 **A31:**4
travaux préparatoires **A31:**4–7
working group discussions **A31:**5–7

denunciations, Optional Protocol and **OP A33:**1–15
Basis for Future Work 1999 **OP A33:**6
Costa Rica Draft 1980 **OP A33:**3
Costa Rica Draft 1991 **OP A33:**4
draft texts, chronology of **OP A33:**3–10
Outcome of First Reading 1996, text of Articles which constitute the **OP A33:**5
travaux préparatoires **OP A33:**3–10
working group discussions **OP A33:**7–10

dependants
rights in the case of the death of the victim **A14:**51–2

dependent territories and colonies I1; **OP A29:**6

deportation *see also* **expulsion**
customary international law on **A14:**99
definitions **A3:**84–6
individual complaints **A22:**46, 91, 95–6, 110, 121, 123, 138, 164
migrants pending **OP A20:**30
non-refoulement, principle of **A3:**9, 74, 84–5, 104, 109, 119, 136, 142, 147, 191, 199, 201, 216–17, 237, 241, 243; **A16:**20
non-voluntary processes **OP A4:**37
preliminary investigations **A6:**28, 37
training of personnel **A10:**13
universal jurisdiction, principle of **A5:**119

depositary **A22:**15; **A25:**10; **A26:**11; **A27:**3; **A29:**12; **A31:**8; **A32:**1, 9; **A33:**4; **OP A28:**8

deprivation of liberty
definition of **OP A4:**14–17
obligation to oversee **A11:**16–19
preventive visits to places of detention **OP A4:**14–17
review of interrogation and detention rules **A11:**11, 16–19

desertion from army **A3:**173–4

deterrence **A2:**21, 40; **A4:**34; **A14:**113; **A15:**1, 10; **A19:**14; **OP P**27; **OP A1:**47; **OP A18:**35, 52

developing countries OP **A26:**15

diplomatic assurances or guarantees, practice of obtaining
non-refoulement, principle of **A3:**199–218

diplomatic or consular representatives, communication with **A6:**3

disappearances I1
enforced **A1:**96, 131; **A2:**43, 46, 52; **A3:**156, 159–60; **A11:**25; **A14:**106, 129; **A15:**54; **A16:**25, 36
Working Group on Enforced or Involuntary Disappearances (WGEID) **A20:**59

disciplinary offences, punishments for **A1:**47

discrimination
against detainees **A16:**40
against women **A17:**1; **A18:**8
anti-discrimination **OP A18:**31
Conventions of 1965 and 1979 **A17:**24, 50
damages and reparation for **A14:**111, 114, 126, 137
definition of torture **A1:**27, 32, 107, 109–10, 117, 120
ex officio investigations **A12:**41
LGBTI persons **A16:**50
non-discrimination, principle of **P2**, **P3**; **A11:**31; **A14:**83, 126; **OP A2:**25; **OP A5:**6, 7, 8, 14; **OP A6:**4; **OP A7:**4–7
non-refoulement, principle of **A3:**13, 27, 39, 46, 63, 65, 100, 154–6, 178
obligation to prevent torture **A2:**55
racial **A3:**13, 27, 39, 46, 63, 65, 154–6; **A17:**1; **A18:**2, 49
vulnerable persons **A5:**29; **A16:**43, 84–6

dispute settlement **A30:**1–36; **App** A.3
any dispute, definition of **A30:**19–22
Draft Implementation Provisions, Submitted by Chairman-Rapporteur 1982 **A30:**6
draft texts, chronology of **A30:**5–8
French Delegation 1984, proposal by the **A30:**8
IAPL Draft 1978 **A30:**5
ICJ arbitration **A30:**23–7
ICJ jurisdiction **A30:**23–7
ICJ negotiation **A30:**23–7
inter-state complaints procedure **A30:**28–36
Netherlands Delegation 1983, proposal by the **A30:**7
opting-out procedure **A30:**14–18
travaux préparatoires **A30:**5–13
working group discussions **A30:**9–13

Djibouti
definition of torture and redress for torture victims **A14:**62

doctors
abortion, doctor-patient confidentiality and **A2:**51
medical evidence from **A3:**236
medical examinations **A13:**19, 36

doctors (*cont.*)
participation in torture **A4:**22; **A10:**13
private interviews **OP A14:**21; **OP A20:**23
professional capacity of **A12:**28, 46; **A17:**34; **OP A5:**21
domestic remedies, exhaustion of *see* **exhaustion of domestic remedies**
domestic violence
legislative measures **A2:**46–51
drafting of Torture Convention I2
dual or multiple nationality
active nationality principle of jurisdiction **A5:**67–8

Ecuador
Committee members from **A17:**34
mandate of the Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
state reporting procedure **A19:**40
system of preventive visits **OP A1:**39
education *see also* **training of personnel**
definition of **A10:**15–20
Egypt
annual reports **A24:**24
country missions **OP A13:**19
death penalty **A16:**69
entry into force of CAT **A27:**12–13
financing of Subcommittee **OP A25:**20
independence of national mechanisms **OP A18:**8
inquiry procedure **I3**, **A2:**64; **A20:**37, 50, 62–3, 69, 80
mandate and power of NPMs **OP A19:**8
mandate of the Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**9
non-refoulement, principle of **A3:**98, 142, 158, 163, 210, 214
obligation to allow preventive visits **OP A4:**11
obligation of States parties to facilitate visits **OP A20:**7
obligations of Subcommittee members **OP A36:**4, 6
Preamble to the Optional Protocol **OP P**20
remedy and reparation, right of torture victims to **A14:**121
summary trials **A16:**69
system of preventive visits **OP P**1:39
terrorism **A2:**64; **A3:**98, 214; **A20:**80
El Salvador
country missions **OP A13:**22
gross, flagrant or mass violations of human rights **A3:**166
independence of national mechanisms **OP A18:**8
mandate of the Subcommittee **A11:**17
national monument to victims **A14:**132
Special Fund **OP A26:**9
election of the Subcommittee OP A7:1–20
Costa Rica Draft 1980 **OP A7:**2
Costa Rica Draft 1991 **OP A7:**3
draft texts, chronology of **OP A7:**2–8
EU Draft 2001 **OP A7:**7
Mexican Draft 2001 **OP A7:**6
Outcome of First Reading 1996, text of Articles which constitute the **OP A7:**4
Outcome of Second Reading 1999, text of Articles which constitute the **OP A7:**5
travaux préparatoires **OP A7:**2–12
US Draft 2002 **OP A7:**8
working group discussions **OP A7:**9–12
electroshock devices **A11:**42; **A16:**32, 55
emergencies I1; **A2:**63
entry into force *see* **entry into force of CAT; entry into force of Optional Protocol**
entry into force of CAT **A27:**1–14
draft texts, chronology of **A27:**4–5
IAPL Draft **A27:**4
Proposal for Preamble and Final provisions of Draft Convention, Submitted by Sweden 1980 **A27:**5
travaux préparatoires **A27:**4–11
working group discussions **A27:**7–11
entry into force of Optional Protocol OP A28:1–15
Basis for Future Work 1999 **OP A28:**6
Costa Rica Draft 1980 **OP A28:**3
Costa Rica Draft 1991 **OP A28:**4
draft texts, chronology of **OP A28:**3–6
Outcome of First Reading 1996, text of Articles which constitute the **OP A28:**5
travaux préparatoires **OP A28:**3–11
working group discussions **OP A28:**7–11
Equatorial Guinea
inquiry procedure **A20:**2
Eritrea
non-refoulement, principle of **A3:**89
ethnic minorities and minority groups *see* **racism and xenophobia**
European Convention for the Prevention of Torture I2
European Court of Human Rights (**ECtHR**) **A3:**4; **A5:**132; **A13:**6; **A16:**5, 65; **OP A4:**31
European Union (**EU**)
amendments to Optional Protocol **OP A34:**7
denunciation, Optional Protocol and **OP A33:**10
entry into force of Optional Protocol **OP A28:**11
federal states **OP A29:**5
financing of Subcommittee **OP A25:**23
mandate of Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
independence of **OP A18:**8; **A25:**23
privileges and immunities **OP A35:**10
Red Cross and the Optional Protocol **OP A32:**8
signature and ratification of Optional Protocol **OP A27:**12
system of preventive visits **OP A1:**39
evidence obtained by torture *see also* **evidence, principle of non-refoulement and; non-admissibility of**
closed **A15:**34
exculpatory **A15:**27–9
foreign **A15:**30–3
indirect **A15:**18–24
evidence, principle of ***non-refoulement*** **and**
evidence in support of claim **A3:**234–7
ex officio **investigations** **A12:**1–61
competent authorities, definition of **A12:**35–8
conduct of the investigation **A12:**41–51

Declaration 1975 **A12:**8
draft texts, chronology of **A12:**8–12
IAPL Draft 1978 **A12:**9
impartial investigation, definition of **A12:**39–61
investigation mechanism **A12:**52–61
obligation to proceed to an investigation **A12:**21–2
origin and level of suspicion required **A12:**23–30
Original Swedish Draft 1978 **A12:**10
prompt investigation, definition of **A12:**31–4
reasonable ground to believe, definition of **A12:**20–30
Revised Swedish Draft 1979 **A12:**12
travaux préparatoires **A12:**8–17
US Draft 1978 **A12:**11
working group discussions **A12:**13–17
examination under another procedure
examined, definition of **A22:**67–70
has not been, and is not being, definition of **A22:**65–6
same matter, definition of **A22:**71–2
exceptional circumstances, torture in **A2:**4, 7–9, 13–14, 57–8, 60–3, 65; **A3:**73; **A4:**38; **A11:**38, 40–1; **A15:**41; **A16:**32; **OP A14:**25–6
exhaustion of domestic remedies **A22:**73–105
all available domestic remedies, definition of **A22:**78–82
compliance with domestic procedures **A22:**78–81
existence and appropriateness **A22:**83–9
existence of several remedies **A22:**82
procedural aspects **A22:**101–5
unlikely to bring effective relief to the person, definition of **A22:**90–6
unreasonably prolonged, definition of **A22:**97–100
experts OP **A18:**52–63
expulsion see also **deportation**
asylum seekers, principle of *non-refoulement* and **A3:**77, 80, 101; **A16:**77
complainants **A13:**34; **A22:**52, 81, 89, 94, 110, 116, 123
detention and **A16:**54
extradition and, difference between **A3:**81–5, 90, 102; **A8:**13
immigration processes **OP A4:**26
interim measures **A22:**110, 123
non-refoulement, principle of **A3:**1, 7, 9, 19, 20, 74, 77, 80–5, 98, 113, 123, 142–3, 173, 241
prohibition against **A16:**20
preventive **A3:**113
savings clause **A16:**89
terrorism **A3:**74
extradite or prosecute principle **A7:**1–87
Belgium v Senegal case (*Habré* case before ICJ) **A7:**51–2
Chairman-Rapporteur Draft 1982 **A7:**15
competent authorities, submission of case for purpose of prosecution **A7:**49
discretion of authorities to prosecute **A7:**50–2
draft texts, chronology of **A7:**6–15
extradition as an option **A7:**54–5
extradition requests, no requirement for **A7:**53
failure to prosecute **A7:**58
fair treatment, suspect's right to **A7:**85–7
forum states: proceed to prosecution, obligation to **A7:**49–79
Guengueng et al v Senegal (*Habré* case before the CAT Committee) **A7:**50–1
Hague Hijacking Convention 1971 **A7:**6
international tribunals, transfer to **A7:**61–4
Joint Brazilian/Swedish Draft 1981 **A7:**14
limitations to **A7:**56–7
Netherlands Amended Text 1981 **A7:**13
New York Hostages Convention 1979 **A7:**12
as an obligation **A7:**58
obligation to prosecute **A7:**54–60
obligation to prosecute with authorization to extradite **A7:**43–8
option to extradite **A7:**54–60
Original Swedish Draft 1978 **A7:**7
performance of obligations **A7:**65–73
practical order between extradition and prosecution **A7:**59–60
preliminary inquiries **A6:**41–5
procedural safeguards in case of prosecution **A7:**80–4
prosecution as an obligation **A7:**54–5
Revised Swedish Draft 1979 **A7:**11
Swiss Draft 1978 **A7:**9
temporal scope of obligation to prosecute **A7:**74–9
travaux préparatoires **A7:**6–42
United Kingdom Draft 1978 **A7:**10
US Draft 1978 **A7:**8
working group discussions **A7:**16–42
extradition **A8:**1–28 *see also* **extradite or prosecute principle**
CAT as a legal basis for extradition, authorization to consider **A8:**21–4
domestic law, recognition of torture as extraditable offence in **A8:**25
draft texts, chronology of **A8:**2–6
extradite, definition of **A3:**90–6
extradition treaties, torture as an extraditable offence **A8:**18–20
future extradition treaties, relevance for **A8:**20
Hague Hijacking Convention 1970 **A8:**2
IAPL Draft 1978 **A8:**3
legal obstacles to extradition, removal of **A8:**13–17
Original Swedish Draft 1978 **A8:**4
pre-existing extradition treaties, relevance for **A8:**19
Revised Swedish Draft 1979 **A8:**6
territoriality and nationality principles, presumption of equality between **A8:**26–8
travaux préparatoires **A8:**2–12
US Draft 1978 **A8:**5
working group discussions **A8:**7–12
extraordinary rendition **A3:**97–9, 207, 210; **A14:**106; **OP A4:**37
extraterritoriality **A2:**56; **A3:**108, 181; **A9:**20; **A14:**54, 91–3, 96, 108; **OP A4:**28, 32
universal jurisdiction and **A5:**19, 56, 65, 71, 78, 85, 144, 165, 168

facilitate visits by national preventive mechanisms, states' obligation to OP A20:1–55
cooperation between NPMs and the SPT **OP A20:**34–7
draft texts, chronology of **OP A20:**3–4
EU Draft 2001 **OP A20:**4
facilities, access to **OP A20:**16–33
information gathering on places of detention **OP A20:**32–3
information, access to **OP A20:**11–15
installations, access to **OP A20:**16–33
liberty to choose the place **OP A20:**29–33
Mexican Draft 2001 **OP A20:**3
places of detention, access to **OP A20:**16–33
prioritization **OP A20:**29–31
private interviews **OP A20:**22–8
travaux préparatoires **OP A20:**3–8
unannounced visits **OP A20:**19–21
unrestricted access **OP A20:**16–18
visit methodology **OP A20:**38–55
during visit **OP A20:**47–55
pre-visit **OP A20:**39–46
working group discussions **OP A20:**5–8
facilitate visits to places of detention by Subcommittee, states' obligation to OP A14:1–27
Basis for Future Work 1999 **OP A14:**5
Costa Rica Draft 1980 **OP A14:**2
Costa Rica Draft 1991 **OP A14:**3
documentation **OP A14:**17–20
draft texts, chronology of **OP A14:**2–7
EU Draft 2001 **OP A14:**7
information, access to **OP A14:**17–20
interviews: private **OP A14:**21–4
Mexican Draft 2001 **OP A14:**6
objections: particular visits, to **OP A14:**25–7
Outcome of First Reading 1996, text of Articles which constitute the **OP A14:**4
travaux préparatoires **OP A14:**2–16
unrestricted access **OP A14:**17–20
working group discussions **OP A14:**8–16
fair treatment, suspect's right to A7:85–7
fair trial, right to a A2:2; **A3:**95, 128, 148; **A5:**98, 140; **A7:**30, 56, 86; **A11:**25; **A15:**1, 19, 27–9, 47; **A16:**66
families
communication of suspects with their **A11:**22
death row, families of prisoners on **A16:**70
hearings, partaking in **A20:**73
State responsibility for victims and their **A12:**7
victims' families and remedy/reparation **A14:**50, 66, 71, 73, 112, 128, 131–2, 135; **A16:**38
federal states OP A29:1–12
Basis for Future Work 1999 **OP A29:**3
draft texts, chronology of **OP A29:**2–3
Outcome of First Reading 1996, text of Articles which constitute the **OP A29:**2
travaux préparatoires **OP A29:**2–5
working group discussions **OP A29:**4–5
fees, exhaustion of domestic remedies and A13:18, 92
female genital mutilation A2:46; **A16:**11, 88
Fiji
definition of torture **A1:**60, 62
remedy and adequate reparation, right of victims to **A14:**33
filling of vacancies on Subcommittee on Prevention of Torture OP A8:1–11
draft texts, chronology of **OP A8:**2–3
Outcome of First Reading 1996, text of Articles which constitute the **OP A8:**2
Outcome of Second Reading 1999, text of Articles which constitute the **OP A8:**3
travaux préparatoires **OP A8:**2–7
working group discussions **OP A8:**4–7
final clauses *see* **accessions to CAT; amendments to CAT; authentic texts of CAT; denunciations, CAT and; dispute settlement; entry into force of CAT; notification by Secretary-General of signatures, accessions and ratifications; opting out of the inquiry procedure; signature and ratification of CAT**
finance *see also* **budget of United Nations, financing from; financing of Subcommittee; Special Fund**
financial resources of victims A2:45; **A14:**86; **A22:**105
financing of Subcommittee OP A25:1–33
budget of the SPT **OP A25:**27–31
Costa Rica Draft 1980 **OP A25:**3
Costa Rica Draft 1991 **OP A25:**4
draft texts, chronology of **OP A25:**3–9
EU Draft 2001 **OP A25:**8
Mexican Draft 2001 **OP A25:**7
Outcome of First Reading 1996, text of Articles which constitute the **OP A25:**5
Outcome of Second Reading 1999, text of Articles which constitute the **OP A25:**6
staff and facilities **OP A25:**32–33
travaux préparatoires **OP A25:**3–26
US Draft 2002 **OP A25:**9
working group discussions **OP A25:**10–26
Finland
definition of torture **A1:**62
entry into force of CAT **OP A28:**9
financing of Subcommittee **OP A25:**23
inquiry procedure **A20:**27–8
obligations to cooperate **OP A12:**15
remedy and reparation, right of torture victims to **A14:**31
state reporting procedure **A19:**28–9, 31
system of preventive visits **OP A1:**37
Flag jurisdiction *see* **territoriality and flag principle of jurisdiction**
flagrant violations of human rights, consistent pattern of *see* **gross, flagrant or mass violations of human rights, consistent pattern of**
flogging A1:139–41; **A2:**30; **A16:**60
follow ups A19:75–84 *see also* **state reporting procedure**
analysis of state information by Rapporteur **A19:**82
development of procedure **A19:**75
follow-up State party's report, submission of **A19:**81
individual complaints procedure **A22:**172–83
development of **A22:**172–4

Rapporteur for follow-up, practice of **A22:**178–83
reparations measures by the Committee, indication of **A22:**175–7
inquiry procedure **A20:**83
missions **OP A13:**44
Rapporteur for follow-up to concluding observations **A19:**79–80
recommendations, criteria for identification and selection of **A19:**76–8
state reporting procedure **A19:**75–86
States Parties, communication with **A19:**83–4
force, use of *see* **use of force**
France
Affair Javor case **A5:**127–8
aircraft **A5:**63
annual reports **A24:**24
any territory under its jurisdiction **A2:**53
Arana v France case **A22:**170
aut dedere aut judicare **A7:**22
Brada v France case **A22:**122, 170
Committee members **A24:**24
Congo Beach case **A5:**133–40
definition of torture and terminology of CAT **A1:**12, 31, 51, 62, 122; **A4:**8; **A5:**18, 22–3
detention and interrogation rules, review of **A11:**37
Ely Ould Dah case **A5:**5, 117, 130–2, 177; **A6:**34
entry into force of CAT **A21:**41; **A27:**12
ex officio investigations **A12:**12
extradition **A8:**9
filling of vacancies on Subcommittee **OP A8:**9
individual complaints **A22:**81, 95, 110, 122, 170
inter-state communications **A21:**41
inquiry procedure **A20:**12, 25, 28
jurisdiction, types of **A5:**22–3, 37, 54, 63, 117–18
mandate of Subcommittee **OP A11:**17
non-admissibility of evidence **A15:**46
non-refoulement, principle of **A3:**15, 81, 112
obligation to criminalize torture **A4:**8
obligation to prevent torture **A2:**13, 53
obligations to cooperate **OP A12:**15
PE v France case **A15:**46; **A22:**110
Pinochet case and **A5:**84
political refugees **A14:**45
R v France case **A22:**81
remedy and reparation, right of torture victims to **A14:**31, 45
reservations, prohibition of **OP A30:**9
sanctions, prohibition of **OP A15:**15
Special Fund **OP A26:**14
state reporting procedure **A19:**15, 29
system of preventive visits **OP A1:**25
Tebourski v France case **A3:**112, 152
freedom of movement, restrictions on suspects' A6:29, 36, 48; **OP A4:**16, 24; **OP A12:**8, 10, 20; **OP A14:**5, 7
frequency of visits OP A11:29; **OP A13:**27; **OP A20:**29

gender *see also* **discrimination**; **sexual orientation**; **women**
gender balance of Subcommittee **OP A5:**14, 26; **OP A13:**38
gender-based violence **A2:**46–51
Geneva Conventions I1; **A1:**52, 155; **A2:**13; **A3:**197; **A5:**127, 145, 149; **A7:**44; **OP A12:**14; **OP A32:**1–5, 9–10, 12
genocide P3
Guatemala Genocide case **A5:**157–8
Genocide Convention I2
Georgia
Abkhazia and Tskhinvali regions, obligation to allow visits **OP A4:**32–3
independence of national mechanisms **OP A18:**8
independent bodies **A12:**1
mandate of Subcommittee **OP A11:**17
national preventive mechanisms **A3:**8
right of victims to complain **A13:**21
succession to CAT **A26:**13
system of preventive visits **OP A1:**39
German Democratic Republic
Convention for the Suppression of Unlawful Seizure of Aircraft **A5:**53
definition of torture **A1:**11, 24, 27, 42–3
dispute settlement **A30:**18
inquiry procedure **A20:**12, 22, 24
non-refoulement, principle of **A3:**59–60, 65
opting out of CAT **A28:**17
state reporting procedure **A19:**14, 23, 26, 32
German Federal Republic
definition of torture **A1:**11, 35, 42–3, 125
inquiry procedure **A20:**24
Länder (federal states) **OP A24:**15
non-refoulement, principle of **A3:**54, 59, 64
state reporting procedure **A19:**26
Germany
Abichou v Germany case **A3:**94, 143
Abu Ghraib case **A5:**159–60
Almatov case **A5:**5, 117, 180; **A6:**31–3
Code of Crimes against International Law (*Völkerstrafgesetzbuch*) **A5:**180
definition of torture **A1:**62, 122
election of Subcommittee **OP A7:**19
filling of vacancies of the Subcommittee **OP A8:**9
individual complaints **A22:**80
MAK v Germany case **A22:**80
mandate of Subcommittee **OP A11:**17, 32
mission reports to **OP A18:**35; **OP A20:**45
national preventive mechanism **OP A3:**10
non-admissibility of evidence **A15:**20, 23, 40–1
non-refoulement, principle of **A3:**94, 143
obligations of Subcommittee members **OP A36:**6
opting out declaration **OP A24:**15
recommendations, timely publication of **OP A21:**23; **OP A22:**9
refugee status **A3:**181
reparations and remedy, right of torture victims to adequate **A14:**32, 99
reservations and declarations **A14:**32
reservations, prohibition of **OP A30:**10
Special Fund **OP A26:**9
system of preventive visits **OP A1:**25
Ghana
dispute settlement **A30:**16
gratuitous torture, definition of A1:32, 107

Greece
annual reports **A24:**24
Committee members **A24:**24
Dublin II Regulation **A3:**114
failure to provide food, water and medical care **A1:**66
Greek case **A1:**66, 68; **A16:**5
inquiry procedure **A20:**28
inter-state communication **A21:**18
jurisdiction, types of **A5:**27
military dictatorship, human rights violations during **A21:**18
opting out of CAT **A28:**17
state reporting procedure **A19:**31
gross, flagrant or mass violations of human rights, consistent pattern of **A3:**57–8, 67, 102, 149, 153, 168, 186
Guantánamo Bay **A2:**56, 66; **A3:**106, 215; **A5:**60–1, 160; **A14:**83, 104–5, 108; **OP A4:**32; **OP A12:**25
guarantees *see* **diplomatic assurances or guarantees, practice of obtaining**
Guatemala
Guatemala Genocide case **A5:**82, 157–8
mandate of Subcommittee **OP A11:**17
medical and psychological care for victims **A14:**41
national preventive mechanism **OP A3:**8, 10
National Reparations Programme **A14:**89
remedy and adequate reparation, right of victims to **A14:**41, 89
system of preventive visits **OP A1:**39
UN human rights mission MINUGUA **A17:**48
Guinea
human rights situation **A3:**168
inquiry procedure **A20:**2
state reporting procedure **A19:**104

habeas corpus **rights** **A6:29; A7:86; A13:20**
habitual, widespread and deliberate use of torture **A3:**161–3; **A20:**42, 45, 48
Habré **case**
Belgium v Senegal case (*Habré* case before ICJ) **A7:**51–2
CAT and *Guengueng et al v Senegal*, case before **A5:**102–8; **A7:**50–1
change of nationality **A5:**85
discretion of authorities to prosecute **A7:**50–2
passive nationality principle of jurisdiction **A5:**85
preliminary inquiries, procedural safeguards during **A6:**41–5
proceedings against Hissène Habré **A5:**91–14
prosecution or extradition principle **A5:**109–14; **A7:**50–2
universal jurisdiction principle **A5:**85
in absentia **A5:**148–50
temporal scope of jurisdiction **A5:**167
Hague Hijacking Convention
extradite or prosecute principle **A7:**6
extradition **A8:**2
judicial assistance **A9:**2
preliminary investigation phase, procedural safeguards during **A6:**4
universal jurisdiction principle **A5:**7
hard labour **A16:**55
hearings
inquiry procedure **A20:**73–4
High Commissioner for Human Rights *see* **UN High Commissioner for Human Rights**
Hijacking *see* **Hague Hijacking Convention**
Holy See
obligation to prevent torture **A2:**13, 57
Honduras
Criminal Code **A1:**123
entry into force of Optional Protocol **OP A28:**2
Military Code **A1:**123
NPM advisory visits **OP A11:**32; **A14:**26
NPM legislation **OP A18:**28
Prison Act **OP A26:**26
reports of Subcommittee **OP A16:**26
Hong Kong
definition of torture **A1:**144
non-refoulement, principle of **A3:**193
succession to CAT **A26:**15
hostages *see* **New York Hostages Convention 1979**
Human Rights Commission I1; **A1:**8; **A12:**46; **A17:**10, 16, 19, 28; **A18:**6; **A19:**15, 25, 30; **A20:**23; **A21:**6, 18; **A22:**84; **A23:**5, 8; **A24:**12; **OP A17:**24
Human Rights Council I4; **A3:**157–8, 249; **A18:**15; **A21:**18; **A22:**63–4; **A24:**2–3; **OP A15:**20
humiliation **A1:**97, 117, 121; **A16:**49
sexual **A1:**91; **A11:**46
Hungary
entry into force of CAT **A27:**12
inter-state communication **A21:**41
inquiry procedure **A20:**28
national preventive mechanism **OP A3:**8
opting out of CAT **A28:**15
opting out of Optional Protocol **OP A24:**15
state reporting procedure **A19:**32
system of preventive visits **OP A1:**39

IAPL (International Association of Penal Law) **I2**; **A1:8**
ill-treatment and torture, distinction between
definition of torture **A1:**1, 67–80
forms of ill treatment **A16:**13–24
past torture or other ill-treatment **A3:**169–72
prevention of ill-treatment in detention **A16:**26–54
adequate material conditions **A16:**26–9
discipline **A16:**30–6
human dignity **A16:**30–6
inter-prisoner violence **A16:**37–40
security **A16:**30–6
vulnerable groups **A16:**41–54
immigration
appeals commission (UK) **A15:**42–3
boards **A15:**39
detention **A16:**50
law **A3:**2, 198, 241, 244; **A5:**119; **A14:**45
processes and facilities **OP A4:**24, 26
immunities *see also* **privileges and immunities, CAT and; privileges and immunities, Optional Protocol and; state immunity**
exclusion of **A4:**38–43

impartiality *see also* **prompt and impartial investigation principle**
impartial investigation, definition of **A12:**39–61
conduct of investigation **A12:**41–51
investigation mechanism **A12:**52–61
Subcommittee **OP A5:**27
incitement **A1:**36, 38, 128; **A4:**1, 7–8, 21
incommunicado detention **A1:**98, 114; **A3:**141, 173; **A11:**25; **A15:**54; **A16:**30, 36; **A20:**48
incompatibility ***ratione loci*** **A22:**60–1
incompatibility ***ratione materiae*** **A22:**51–3
incompatibility ***ratione personae*** **A22:**48–50
incompatibility ***ratione temporis*** **A22:**54–9
independence
judicial **A2:**45
of NPMs **OP A18:**1–65
budget, adequacy of **OP A18:**33–5
composition of membership **OP A18:**60
establishment by law **OP A18:**14–28
ethnic and minority groups **OP A18:**61–3
expertise and pluralism **OP A18:**52–63
financial autonomy **OP A18:**30–2
financial independence **OP A18:**29–35
functional independence **OP A18:**12–38
independence defined **OP A18:**41–6
necessary resources for functioning **OP A18:**29–35
one or several independent NPMs, definition of **OP A17:**10
Paris Principles, due consideration of **OP A18:**64–5
period of office **OP A18:**36–8
personnel, definition of **OP A18:**40
personnel independence **OP A18:**39–51
procedure for NPM member selection **OP A18:**47–51
professional knowledge **OP A18:**52–9
protection from removal **OP A18:**36–8
required capabilities **OP A18:**52–9
of Subcommittee **OP A5:**27
independent and impartial reviews
monitoring of places of detention **A2:**40–1
India
definition of torture **A1:**21
federal states **OP A29:**6
individual complaints **A22:**102
inquiry procedure **A20:**58
non-refoulement, principle of **A3:**56–7, 141, 155, 190–1
ratification of Optional Protocol **OP A27:**17
remedy and reparation, right of torture victims to **A14:**21
state reporting procedure **A19:**24
system of preventive visits **OP A1:**39
individual complaints procedure **A22:**1–187 *see also* **admissibility of complaints**; **registration of complaints**
abuse of the right of submission **A22:**37–9
all available domestic remedies, definition of **A22:**78–82
another procedure of international investigation or settlement, definition of **A22:**63–4
authority of Committee to request **A22:**106–8
compliance with domestic procedures **A22:**78–81
criminalize torture, state obligation to **A4:**46–52
decisions, legal effect of **A22:**164–71
development of **A22:**172–4
draft texts, chronology of **A22:**6–7
examination under another procedure **A22:**62–72
examined, definition of **A22:**67–70
exhaustion of domestic remedies **A22:**73–105
existence and appropriateness **A22:**83–9
existence of several remedies **A22:**82
follow-up procedure **A22:**172–83
has not been, and is not being, definition of **A22:**65–6
inadmissibility of anonymous complaints **A22:**35–6
incompatibility *ratione loci* **A22:**60–1
incompatibility *ratione materiae* **A22:**51–3
incompatibility *ratione personae* **A22:**48–50
incompatibility *ratione temporis* **A22:**54–9
incompatibility with provisions of the Convention **A22:**47–61
individuals, definition of **A22:**18–20
individuals subject to its jurisdiction **A22:**31–4
interim measures **A22:**106–26
manifestly unfounded **A22:**40–6
non-compliance of **A22:**121–5
non-compliance, remedying a violation for **A22:**126
on behalf of individuals, definition of **A22:**26–30
optional character **A22:**13–17
Original Swedish Draft 1978 **A22:**6
procedural aspects **A22:**101–5
procedure before the Committee **A22:**127–71
procedure for granting interim measures **A22:**113–16
procedure on admissibility **A22:**145–50
procedure on the merits **A22:**151–62
Rapporteur for follow-up, practice of **A22:**178–83
Rapporteurs and Working Group **A22:**134–5
registration of complaints **A22:**136–44
reparations measures by the Committee, indication of **A22:**175–7
reprisals **A22:**184–7
revision and withdrawal of **A22:**117–20
same matter, definition of **A22:**71–2
scope of application **A22:**109–12
standing of the applicant **A22:**18–30
submitting a complaint **A22:**132–3
Swedish Proposal for the Implementation Provisions 1981 **A22:**7
training of personnel **A10:**23–6
travaux préparatoires **A22:**6–12
unlikely to bring effective relief to the person, definition of **A22:**90–6
unreasonably prolonged, definition of **A22:**97–100
victim, definition of **A22:**21–5
working group discussions **A22:**8–12
Indonesia
dispute settlement **A30:**16, 27

information *see also* **sanctions against sources of information, prohibition of**
access to **OP A14:**17–20; **OP A20:**11–15
additional reports of information, request for **A19:**59
additional sources of **A19:**44–7
analysis of state information by Rapporteur **A19:**82
confidential information, protection of **OP A21:**9–15
education and, definition of **A10:**15–20
examination of available **A6:**16–27
HBA et al v Canada case **A6:**20–7
facilitation of visits
by NPMs **OP A20:**11–15
to places of detention **OP A14:**17–20
information gathering on places of detention **OP A20:**32–3
inquiry procedure **A20:**52–60
preliminary investigations **A6:**16–27
source of information, evaluation of **A20:**52–60
reliable information, definition of **A20:**56–9
well-founded indications, definition of **A20:**60
state reporting procedure **A19:**44–7, 59
Subcommittee, provision of information to **OP A12:**30
training of personnel **A10:**15–20
inhuman or degrading treatment or punishment *see* **cruel, inhuman or degrading treatment or punishment**
inquiry procedure **A20:**1–90; **A28:**1–17; **App** A.3
adoption and publication of findings **A20:**76–82
adoption of report **A20:**76–8
Amendment to the Draft Resolution by the Byelorussian Soviet Socialist Republic **A20:**10
assistance during the inquiry **A20:**75
conducting the inquiry **A20:**65–75
country visit to the State party **A20:**68–72
decision to undertake an inquiry **A20:**61–4
Draft Implementation Provisions Submitted by Chairman-Rapporteur as alternative to new Swedish Proposals 1982 **A20:**7
Draft Resolution submitted by the Netherlands to General Assembly 1984 **A20:**9
draft texts, chronology of **A20:**5–10
follow-up **A20:**83
Four Draft Articles on Implementation with Explanatory Note submitted by Chairman-Rapporteur 1982 **A20:**8
hearings **A20:**73–4
inquiry, definition of **A20:**65–7
opting out of
draft texts, chronology of **A28:**3
General Assembly, discussions in **A28:**4–10
proposal by Byelorussia 1984 **A28:**3
travaux préparatoires **A28:**3–10
Original Swedish Draft 1978 **A20:**5
publication of the findings **A20:**79–82
reliable information, definition of **A20:**56–9
reprisals **A20:**84–90
source of information, evaluation of **A20:**52–60
Swedish Proposal for Implementation Provisions 1981 **A20:**6
systematic practise of torture, definition of **A20:**40–1
Third Committee: discussions, analysis of **A20:**11–33
transmission to the State party **A20:**76–8
travaux préparatoires **A20:**5–33
well-founded indications, definition of **A20:**60
working groups, discussion of **A20:**11–33
intention **A1:**101–5
Inter-American Commission on Human Rights **A11:**41
interim measures
authority of Committee to request **A22:**106–8
individual complaints procedure **A22:**106–26
non-compliance **A22:**121–5
remedying a violation for **A22:**126
non-refoulement, principle of **A3:**251–2
procedure for granting interim measures **A22:**113–16
revision and withdrawal of **A22:**117–20
scope of application **A22:**109–12
internal armed conflict *see* **armed conflicts**
internal flight alternative **A3:**184–92
International Association of Penal Law (IAPL) *see* **IAPL (International Association of Penal Law)**
International Committee of the Red Cross *see* **Red Cross, Optional Protocol and**
International Court of Justice (ICJ)
arbitration **A30:**23–7
Habré case (ICJ) **A5:**85, 167; **A6:**41–5; **A7:**51–2
jurisdiction **A30:**23–7
negotiation **A30:**23–7
International Covenant on Civil and Political Rights (ICCPR) **P1**, **P2.**2; **A17:**9; **A19:**9; **A21:**3; **A22:**6; **A26:**15
International Covenant on Economic, Social and Cultural Rights (ICESCR) **P1**
International Criminal Court (ICC) **A7:**61; **A9:**18; **A15:**7
International Criminal Tribunal for the former Yugoslavia (ICTY) **A7:**63
International Day in Support of Victims of Torture **A27:**1
international humanitarian law, breach of OP **A32:**1
international procedure, previous or concurrent **A21:**25; **A22:**63, 66–7
international tribunals
extradite or prosecute principle **A7:**61–4
transfer to **A7:**61–4
interpretation Committee against Torture **A17:**27–55
complain, right of victims to **A13:**16–37
Convention against Torture
accessions to **A26:**11–21
amendments to **A29:**10–15
annual reports **A24:**19–24
authentic texts **A33:**4
denunciations and **A31:**8–14
entry into force of **A27:**12–14
rules of procedure of **A18:**10–38
signature and ratification of **A25:**9–11

criminalize torture, state obligation to **A4:**14–52
cruel, inhuman or degrading treatment or punishment **A16:**5–92
declarations of **I5**
definition of torture **A1:**63–157
dispute settlement **A30:**14–36
ex officio investigations **A12:**18–61
extradite or prosecute principle **A7:**43–87
extradition **A8:**13–28
federal states **OP A29:**6–12
individual complaints procedure **A22:**13–187
inquiry procedure **A20:**34–90
  opting out of **A28:**11–17
inter-state communications **A21:**14–41
interrogation and detention rules, review of **A11:**9–47
judicial assistance **A9:**8–20
non-admissibility of evidence obtained by torture **A15:**16–64
non-refoulement, principle of **A3:**72–218
notifications by Secretary-General **A32:**6–9
NPMs **OP A3:**11–12; **OP A17:**7–30, **OP A18:**10–65, **OP A19:**10–30
  annual reports **OP A23:**7–9
  facilitation of visits by **OP A20:**9–55
  recommendations of, obligation to examine **OP A22:**6–23
Optional Protocol
  amendments to **OP A34:**8–10
  authentic texts **OP A37:**5–6
  Declaration, temporary opting-out of **OP A24:**11–17
  denunciations and **OP A33:**11–15
  entry into force **OP A28:**12–15
  privileges and immunities **OP A35:**11–19
  Red Cross and **OP A32:**9–12
  reservations to **OP A30:**14–15
  signature, ratification and accessions to **OP A27:**13–18
Preamble of CAT **P3**
Preamble of the Optional Protocol **OP P**23–31
preliminary investigation phase, procedural safeguards during **A6:**16–53
preventive visits to places of detention **OP A4:**14–38
  regional systems **OP A31:**10–15
  systems of **OP A1:**43–8
privileges and immunities **A23:**8–12; **OP A35:**11–19
remedy and reparation, right of victims to **A14:**34–137
rules of **I4**
sanctions against sources of information, prohibition of **OP A15:**13–21; **OP A21:**6–24
of savings clause **A14:**53–4
Special Fund **OP A26:**18–26
state obligation to prevent torture **A2:**16–73
state reporting procedure **A19:**35–109
Subcommittee **OP A2:**21–8
  country missions **OP A13:**30–44
  election of **OP A7:**13–20
  facilitation of visits to places of detention **OP A14:**17–27
  financing of **OP A25:**27–33
  mandate of **OP A11:**20–47
  members during country missions, obligations of **OP A36:**8–13
  nomination of members **OP A6:**12–18
  obligation to cooperate with **OP A12:**24–36
  reports **OP A16:**22–32
  rules of procedure **OP A10:**10–18
  size and composition **OP A5:**20–7
  terms of office of members **OP A9:**13–20
  vacancy filling **OP A8:**8–11
  training of personnel **A10:**12–26
  universal jurisdiction principle **A5:**55–180
interpreters, provision of **A3:**8; **A18:**27; **A20:**74–5; **A23:**12; **OP A13:**5–6, 37–8; **OP A18:**4; **OP A19:**4; **OP A20:**4; **OP A25:**4; **OP A26:**2; **OP A35:**7, 9, 13
interrogation rules *see* **review of interrogation and prison rules**
inter-state communications **A21:**1–41
  ad hoc Conciliation Commission **A21:**29–31
  admissibility requirements **A21:**23–6
  complaints procedure **A30:**28–36; **App** A.3
  conclusion of the procedure and report **A21:**35–40
  Draft Implementation Provisions, Submitted by Chairman-Rapporteur 1982 **A21:**5
  draft texts, chronology of **A21:**3–5
  entry into force **A21:**41
  friendly solution **A21:**27–8
  notification of the Committee **A21:**22
  optional character **A21:**17–20
  Original Swedish Draft 1978 **A21:**3
  preliminary procedure **A21:**21
  procedural provisions **A21:**32–4
  procedure **A21:**21–34
  scope of application **A21:**14–16
  Swedish Proposal for Implementation Provisions 1981 **A21:**4
  travaux préparatoires **A21:**3–13
  working group discussions **A21:**6–13
interviews
  private **OP A14:**21–4; **OP A20:**22–8
intimidation
  protected against all ill- treatment or intimidation, definition of **A13:**30–7
investigations *see also* ***ex officio*** **investigations**; **procedural safeguards during preliminary investigation phase**; **prompt and impartial investigation principle**
  state obligation to prevent torture **A2:**43
Iran
  Bouzari v Islamic Republic of Iran case **A14:**96
  death penalty **A3:**126
  human rights situation **A3:**168, 249
  non-refoulement, principle of **A3:**2, 126, 158, 165, 168
  systematic practice of torture **A3:**165
Iraq
  areas controlled by Daesh **OP A4:**33
  Danish participation in Iraq War **A3:**108
  non-refoulement, principle of **A3:**7, 107–8
  public officials, torture by **A5:**70
  Revolutionary Council **A6:**35
  terrorists, transfer of suspected **A3:**7, 107

Iraq (*cont.*)
UK and US troops, de facto control by **A5:**61, 116; **OP A4:**32
US-run prison Abu Ghraib **A5:**159–60
women fleeing from violence in ISIL-controlled areas **A14:**137
Ireland
corporal punishment in the home **A16:**65
definition of torture **A1:**21, 25
ex officio investigations **A12:**56
inquiry procedure **A20:**28
Ireland v United Kingdom case **A1:**25
Northern Ireland *see* United Kingdom
OMCT v Ireland case **A16:**65
remedy and adequate reparation, right of victims to **A14:**24, 56
state reporting procedure **A19:**29
Isle of Man
corporal punishment in **A1:**146; **A16:**57
Israel
absolute prohibition of torture, undermining of **A2:**59
definition of torture **A1:**74–5, 157
Gaza Strip **A1:**157
Habré case and Ariel Sharon **A5:**148
interrogation practices **A1:**74–5; **A11:**46
lex specialis **A1:**157
Occupied Palestinian Territory **A1:**157
state reporting procedure **A19:**40
system of preventive visits **OP A1:**39
West Bank **A1:**157
Italy
Bartesaghi Gallo and Others v Italy case **A1:**119
Cestaro v Italy case **A1:**119
customary international law on deportation, violations of **A14:**99
definition of torture **A1:**54, 62, 119
entry into force of Optional Protocol **OP A28:**9
Hirsi Jamaa and Others v Italy **A3:**89
inquiry procedure **A20:**25, 28
mission reports **OP A4:**26
non-refoulement, principle of **A3:**20, 89, 102
obligations to cooperate **OP A12:**15
opting out of CAT **A28:**17
reservations, prohibition of **OP A30:**10
Special Fund **OP A26:**15, 23
state reporting procedure **A19:**27, 29
universal jurisdiction, principle of **A5:**29
ius cogens **A2:**57; **A16:**71

Japan
composition of Subcommittee **OP A5:**16
entry into force of Optional Protocol **OP A28:**8
national preventive mechanism **OP A3:**10
mandate of **OP A19:**9; **OP** 20:8
nomination of Subcommittee members **OP A6:**10
obligation to allow preventive visits **OP A4:**11
obligations to cooperate **OP A12:**22
privileges and immunities **OP A35:**8
ratification of the Optional Protocol **OP A27:**13, 17
Special Fund **OP A26:**9
Subcommittee on prevention **OP A2:**17
systems of preventive visits **OP A1:**25, 39, 42

Jordan
election of Committee members **A17:**44
Memorandums of Understanding with **A3:**216
non-refoulement, principle of **A3:**216–17
judicial assistance *see* **mutual judicial assistance**
judicial review **A3:**241; **A11:**38; **A12:**21; **A14:**82; **A16:**34, 53–4; **A22:**81–3, 85–6, 94, 105
jurisdiction *see* **territoriality and flag principle of jurisdiction; universal jurisdiction, principle of**
juveniles **A11:**38; **A13:**23
deprivation of liberty **A16:**43–4; **OP A2:**26
execution of **A16:**71
penitentiaries for **A20:**72
protection of **A10:**16; **OP A2:**26
solitary confinement for **A16:**35

Kazakhstan
Abdussamatov et al v Kazakhstan case **A22:**155
Alexander Gerasimov v Kazakhstan case **A1:**81; **A12:**30; **A13:**33
armed guard **OP A4:**2
Bairamov v Kazakhstan case **A12:**41
definition of torture **A1:**81, 124, 127
ex officio investigations **A12:**30, 39, 55
individual complaints **A22:**58
NZ v Kazakhstan case **A12:**39, 41
obligation to prevent torture **A2:**24
Oleg Evloev v Kazakhstan case **A1:**124; **A12:**41
opting out declaration **OP A24:**14, 15
periodic reports **A26:**17
remedy and adequate reparation, right of victims to **A14:**77
succession to CAT **A26:**13, 15
Korea
composition of Subcommittee **OP A5:**16
death penalty, abolition of **A16:**69
doctrine of continuity of obligations **A26:**15
mandate of Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
independence of **OP A18:**8
sleep deprivation **A1:**91
Kuwait
opting out of CAT **A28:**10
remedy and reparation, right of torture victims to **A14:**100
system of preventive visits **OP A1:**39
Kyrgyzstan
periodic reports **A26:**17
succession to CAT **A26:**13
victims' right to obtain compensation **A14:**77

Lao People's Democratic Republic
definition of torture **A1:**60, 62
Latvia
definition of torture **A1:**62
mandate of Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
succession to CAT **A26:**13
system of preventive visits **OP A1:**39
lawful sanctions clause
definition of torture **A1:**3, 54–5, 136–52; **A3:**122–3
non-refoulement, principle of **A3:**122–3

layout of places of detention A11:38
Lebanon
inquiry procedure **I3**, **A2:**32, 70; **A20:**37, 48, 62
non-refoulement, principle of **A3:**216
Special Tribunal **A7:**63
systematic practice of torture **A2:**32
legal aid, exhaustion of domestic remedies and availability of A2:32; **A3:**2; **A11:**28; **A12:**49; **A13:**7, 22; **A14:**83, 87; **A22:**92, 105
legal representation, access to A11:28
legislative, administrative and judicial measures of prevention A2:27–52
access to justice **A2:**45
asylum procedure **A2:**42
children, violence against **A2:**46–51
criminalization of torture **A2:**29–31
data, collection of disaggregated **A2:**52
detention, independent monitoring of places of **A2:**40–1
detention safeguards **A2:**32–9
disabilities, violence against persons with **A2:**46–51
domestic violence **A2:**46–51
gender-based violence **A2:**46–51
independent judiciary **A2:**45
interrogation safeguards **A2:**32–9
investigations **A2:**43
non-refoulement, principle of **A2:**42
prosecution **A2:**43
redress, provision of **A2:**44
sexual violence **A2:**46–51
trafficking **A2:**46–51
vulnerable groups, violence against **A2:**46–51
length of detention A1:88
liberty and security, right to OP A4:15, 17
Libya
corporal punishment **A16:**59
non-admissibility of evidence **A15:**54
non-refoulement, principle of **A3:**89, 152, 214, 216
remedy and reparation, right of torture victims to **A14:**96
state reporting procedure **A19:**40
Liechtenstein
medical examinations **A11:**29
life, right to A3:124, 148; **A16:**66, 72
list of places of detention to be visited, provision of OP A11:6; **OP A13:**35
Luxembourg
definition of torture **A1:**62, 137
inquiry procedure **A20:**28
lawful sanctions **A1:**137
state reporting procedure **A19:**29

Macao (Macau)
definition of torture **A1:**123
electro-shock devices **A11:**42
succession to CAT **A26:**15
Macedonia
Khaled El-Masri v Macedonia case **A14:**106, 131
mandate and powers of NPM **OP A18:**28
non-refoulement, principle of **A3:**97
rendition operations **A3:**97
succession to CAT **A26:**13, 21
Malawi
state reporting procedure **A19:**98
Maldives
country missions **OP A13:**32, 40, 44
reports of the Subcommittee **OP A16:**26
Special Fund **OP A26:**23, 26
Mali
country missions **OP A12:**32
malice A22:38
Malta
mission reports **OP A18:**35
national preventive mechanism **A3:**8
ratification of Optional Protocol **OP A27:**17
recommendations **OP A22:**9
mandate of the Subcommittee OP A11:1–47
advice to NPMs **OP A11:**33–9
advice to states parties **OP A11:**28–32
Basis for Future Work after the Second Reading 1999, text of Articles which constitute the **OP A11:**6
budgetary issues **OP A11:**45–7
cooperation **OP A11:**41–4
Costa Rica Draft 1980 **OP A11:**3
Costa Rica Draft 1991 **OP A11:**4
country missions **OP A11:**21–7
draft texts, chronology of **OP A11:**3–9
EU Draft 2001 **OP A11:**8
Mexican Draft 2001 **OP A11:**7
observations **OP A11:**40
Outcome of First Reading 1996, text of Articles which constitute the **OP A11:**5
preventive visits to places of detention **OP A11:**21–7
recommendations **OP A11:**40
travaux préparatoires **OP A11:**3–19
US Draft 2002 **OP A11:**9
working group discussions **OP A11:**10–19
manifestly unfounded complaints A22:40–6
mass violations of human rights, consistent pattern of ***see*** **gross, flagrant or mass violations of human rights, consistent pattern of**
Mauritania
exile of Ould Dah **A5:**131; **A6:**34
individual complaints **A22:**29, 31
inquiry procedure **A20:**2
migration policies **A3:**87
non-refoulement, principle of **A3:**87
slavery, criminalization of **A1:**114
Mauritius
Committee members **A24:**24
country missions **OP A13:**32
media reports A19:45; **A20:**58; **OP A2:**28; **OP A15:**20; **OP A23:**7
mediation A16:52; **A21:**27, 38; **A30:**35–6
medical examinations A10:13; **A11:**29; **A12:**24, 48; **A13:**19 *see also* **doctors**
medical evidence A3:236–7; **A12:**41, 45, 47; **A22:**44–5, 104
medical or scientific experimentation A1:31
medical personnel A2:51; **A10:**6–9, 12–14; **A11:**38; **A12:**27, 41; **A14:**125; **A15:**52; **OP A19:**30; **OP A20:**24; **OP A26:**25

meetings
Committee against Torture, rules of procedure of **A18:**30–6
conduct of business **A18:**36
public and private **A18:**32–4
records **A18:**35
sessions **A18:**30–1
Subcommittee meetings *in camera* **OP A10:**13
mental torture **A1:**12, 27
merits, decisions on **A22:**151–62
Mexico
amendments to the Optional Protocol **OP A34:**5, 7
composition of Subcommittee **OP A5:**16, 18
country missions **OP A13:**27, 44
definition of torture **A1:**84, 119
denunciation of Optional Protocol **OP A33:**9–10
election of Subcommittee **OP A7:**19
entry into force of CAT **A27:**12
entry into force of Optional Protocol **OP A28:**8–9, 11
federal states **OP A29:**5
financing of Subcommittee **OP A25:**21
individual complaints **A22:**84, 111
inquiry procedure **I3**; **A1:**84; **A3:**158; **A20:**37, 43, 62–3, 70–1, 75, 81
mandate of Subcommittee **OP A11:**16–17
national preventive mechanisms **I2**; **OP A3:**2, 6–10
annual reports of **OP A23:**4
establishment of **OP A17:**1, 5
independence of **OP A18:**5
mandate and power of **OP A19:**6
non-refoulement, principle of **A3:**158
obligation to prevent torture **A2:**38
obligations of states parties to facilitate visits **OP A20:**5
privileges and immunities **OP A35:**10
Ramiro Ramírez Martínez et al v Mexico case **A2:**38; **A14:**136; **A22:**84
Red Cross, Optional Protocol and **OP A32:**8
regional systems of preventive visits **OP A31:**9
reservations, prohibition of **OP A30:**9–10
Rosendu Cantú et al v Mexico case **A1:**119
signature and ratification of CAT **OP A27:**10, 12
Subcommittee on prevention **OP A2:**17, 19
system of preventive visits **OP A1:**20, 25, 35, 39, 43
military *see* **armed forces**
military courts and commissions **A15:**36
Moldova
compensation, right of victims to **A14:**81
mandate of Subcommittee **OP A11:**32
Russian authorities in the Transnistrian region **OP A4:**32
succession to CAT **A26:**13
Mongolia
female victims of violence, protection for **A14:**137
state reporting procedure **A20:**32
monitoring *see* **inquiry procedure**; **inter-state communications**; **state reporting procedure**
Montenegro *see* **Serbia and Montenegro**
Montreal Civil Aviation Convention 1973
mutual judicial assistance **A9:**3
universal jurisdiction principle **A5:**8
moral damages **A14:**23, 118, 121
Morocco
Ali Aarrass v Morocco case **A12:**49
annual reports **A24:**24
Committee members **A24:**24
definition of torture **A1:**38, 122, 127
Diory Barry (or Diodory Barry) v Morocco case and migration **A16:**77
election to the Committee **A17:**44
Ennâma Asfari v Morocco case **A13:**32, 34
ex officio investigations **A12:**49
individual complaints **A22:**8, 31, 94, 96, 177
Ktiti v Morocco case **A15:**36, 48; **A22:**177
Mopongo et al v Morocco case **A15:**96
non-admissibility of evidence **A15:**36, 48
non-refoulement, principle of **A3:**126
opting out of CAT **A28:**10
penal legislation **A15:**12
RAY v Morocco case **A22:**94
Rouba Alhaj Ali v Morocco case **A3:**126
territoriality of penal legislation, principle of **A5:**20
Mozambique
health services, family planning and STDs **A14:**126
violence and sexual abuse in schools **A14:**136
mutual judicial assistance **A9:**1–20
draft texts, chronology of **A9:**2–6
greatest measure of assistance **A9:**11–15
Hague Hijacking Convention 1970 **A9:**2
Montreal Civil Aviation Convention 1971 **A9:**3
obligation to provide assistance to forum state **A9:**8–10
Original Swedish Draft 1978 **A9:**4
Revised Swedish Draft 1979 **A9:**6
travaux préparatoires **A9:**2–7
treaties, conformity with **A9:**16–20
US Draft 1978 **A9:**5
working group discussions **A9:**7

Namibia
corporal punishment **A16:**59
national liberation movements
national preventive mechanisms (NPMs) **OP A3:**1–12 *see also* **annual reports of national preventive mechanisms; facilitate visits by national preventive mechanisms, states' obligation to; recommendations of national preventative mechanisms, obligation to examine; sanctions against sources of information, prohibition of**
budget, adequacy of **OP A18:**33–5
composition of membership **OP A18:**60
deadline **OP A17:**28–30
decentralized units, definition of **OP A17:**11
designate, definition of **OP A17:**14
draft texts, chronology of **OP A3:**4–5, **OP A17:**2–4, **OP A18:**3–4, **OP A19:**3–5
efficiency of **OP A18:**1–65

establish, definition of **OP A17:**15
establishment by law **OP A18:**14–28
establishment of **OP A17:**1–30
ethnic and minority groups, adequate representation of **OP A18:**61–3
EU Draft 2001 **OP A18:**4, **OP A19:**4
expertise and pluralism **OP A18:**52–63
financial autonomy **OP A18:**30–2
financial independence **OP A18:**29–35
functional independence **OP A18:**12–38
further activities **OP A19:**30
independence **OP A18:**41–6
international standards, reference to **OP A19:**19–20
maintain, definition of **OP A17:**13
mandate **OP A19:**1–30
Mexican Draft 2001 **OP A3:**4; **OP A17:**3, **OP A18:**3, **OP A19:**3
modes of creating an NPM **OP A17:**12–15
necessary resources for the functioning **OP A18:**29–35
observations, submission of **OP A19:**27–9
one or several independent national preventive mechanisms, definition of OP **A17:**10
open and inclusive process **OP A17:**16–18
operational autonomy **OP A17:**19–27
organizational form of an NPM **OP A17:**7–11
Paris Principles, due consideration of **OP A18:**64–5
period of office **OP A18:**36–8
personnel, definition of **OP A18:**40
personnel independence **OP A18:**39–51
places of detention, regular examination of **OP A19:**11–16
pluralism of **OP A18:**1–65
powers **OP A19:**1–30
procedure for selection of NPM members **OP A18:**47–51
professional knowledge **OP A18:**52–9
Proposal by Chairman-Rapporteur 2002 **OP A17:**4
proposals, submission of **OP A19:**27–9
protection from removal **OP A18:**36–8
recommendations **OP A19:**17–26
communication of **OP A19:**23–26
preliminary **OP A19:**23–4
relevant authorities **OP A19:**21–2
required capabilities **OP A18:**52–9
transparency **OP A17:**16–18
travaux préparatoires **OP A3:**4–10; **OP A17:**2–6, **OP A18:**3–9, **OP A19:**3–9
US Draft 2002 **OP A3:**5; **OP A19:**5
visit reports **OP A19:**25–6
working group discussions **OP A3:**6–10; **OP A17:**5–6, **OP A18:**5–9, **OP A19:**6–9
nationality principle *see* **active nationality principle of jurisdiction; passive nationality principle of jurisdiction**
natural disasters OP A14:26–7
Nauru
asylum seekers, processing of **A3:**88
Nepal
Giri v Nepal case **A1:**79
inquiry procedure **I3**; **A20:**37–8, 43, 48, 50, 58, 62, 64, 69, 81
National Human Rights Commissions, reports from **A3:**158
non-refoulement, principle of **A3:**158
state reporting procedure **A19:**40
Netherlands
Amended Text 1981 **A7:**13
amendments to Optional Protocol **OP A34:**9
aut dedere aut judicare **A7:**22–5, 28, 86
Bouterse case **A5:**124–6, 140, 141, 165–6
Committee against Torture **A17:**13
definition of torture **A1:**31, 54, 62, 137
Delegation 1983, proposal by the **A30:**7
denunciation, Optional Protocol and **OP A33:**8
dispute settlement **A30:**12–13
Draft Resolution submitted by Netherlands to General Assembly 1984 **A19:**13; **A20:**9
entry into force of Optional Protocol **OP A28:**9
extraterritorial acts, key cases **A14:**96
inquiry procedure **A20:**27–9, 32
lawful sanctions **A1:**137
mandate of Subcommittee **OP A11:**17
mutual judicial assistance **A9:**20
national preventive mechanisms
establishment of **OP A17:**10
financing of Subcommittee **OP A18:**25, 35; **OP A25:**24
non-refoulement, principle of **A3:**187
Norgerhaven prison **OP A4:**35
obligations to cooperate **OP A12:**14
opting out declaration **A28:**5–6, 9
remedy and reparation, terminological issues of **A14:**15, 32, 92
reports of Subcommittee **OP A16:**18
reservations **A16:**12
prohibition of **OP A30:**9–10
Salah Sheekh v Netherlands case **A3:**187
signature and ratification of Optional Protocol **OP A27:**10
Special Fund **OP A26:**15
state reporting procedure **A19:**16, 28–31
system of preventive visits **OP A1:**25
term of office of Subcommittee members **OP A9:**12, 15
universal jurisdiction, principle of **A5:**22, 29, 34, 37, 54
New York Hostages Convention 1979
extradite or prosecute principle **A7:**12
universal jurisdiction principle **A5:**12
New Zealand
ex officio investigations **A12:**57
inquiry procedure **A20:**28
mandate of Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
establishment of **OP A17:**10
obligation to allow preventive visits **OP A4:**27
Prevention of Crimes of Torture Act **OP A18:**28
remedy and reparation, right of torture victims to **A14:**29
state reporting procedure **A19:**29
system of preventive visits **OP A1:**39
NGOs *see* **non-governmental organizations**
Niger
nomination of Subcommittee members **A6:**14

Nigeria
financing of Subcommittee **OP A25:**16
Habré case and **A5:**97
mandate of Subcommittee **OP A11:**32
nomination of Subcommittee members **OP A6:**10
oil extraction **A14:**97
ratification of Optional Protocol **OP A27:**17
nomination of Subcommittee members OP A6:1–18
Costa Rica Draft 1980 **OP A6:**2
Costa Rica Draft 1991 **OP A6:**3
draft texts, chronology of **OP A6:**2–5
Outcome of First Reading 1996, text of Articles which constitute the **OP A6:**4
Outcome of Second Reading 1999, text of Articles which constitute the **OP A6:**5
travaux préparatoires **OP A6:**2–11
working group discussions **OP A6:**6–11
non-admissibility of evidence obtained by torture A15:1–64
any proceedings, definition of **A15:**35–44
any statements obtained as a result of torture, definition of **A15:**16–34
cruel, inhuman and degrading treatment or punishment, applicability of statements obtained as a result of **A15:**55–8
Declaration 1975 **A15:**5
declarations **A15:**15
draft texts, chronology of **A15:**5–9
established, definition of **A15:**45–54
exception to the rule **A15:**59–64
IAPL Draft 1978 **A15:**6
Original Swedish Draft 1978 **A15:**7
reservations **A15:**15
Revised Swedish Draft 1979 **A15:**9
travaux préparatoires **A15:**5–15
US Draft 1978 **A15:**8
working group discussions **A15:**10–14
non-governmental organizations (NGOs) **A3:**249; **A5:**89; **A6:**17; **A11:**18; **A12:**29; **A13:**26; **A14:**127; **A20:**3; **A22:**50; **OP A13:**41; **OP A18:**49; **OP A25:**3–5, 23
***non-refoulement*, principle of** *see also* **asylum seekers, principle of *non-refoulement* and; diplomatic assurances or guarantees, practice of obtaining; evidence, principle of *non-refoulement* and; gross, flagrant or mass violations of human rights, consistent pattern of**
absolute prohibition of *refoulement* **A3:**72–8
burden of proof **A3:**219–50
cart punishment **A3:**124–8
Committee procedure **A3:**245–50
corporal punishment **A3:**124–8
credibility and plausibility of claim and applicant **A3:**227–33
cruel, inhuman and degrading treatment **A3:**115–21
diplomatic assurances **A3:**199–218
draft texts, chronology of **A3:**10–13
evidence in support of claim **A3:**234–7
expel, definition of **A3:**82–5
extradite, definition of **A3:**90–6
forms of prohibited conduct **A3:**79–99
general human rights situation in receiving State **A3:**153–68
receiving State and individual situation **A3:**145–52
IAPL Draft 1978 **A3:**10
indirect refoulement **A3:**109–10
individuals vulnerable to torture risk, activities and personal factors **A3:**173–83
interim measures **A3:**251–2
internal flight alternative **A3:**184–92
lawful sanctions **A3:**122–3
non-admission **A3:**86–9
non-state actors, torture by **A3:**129–34
objective test **A3:**145–52
Original Swedish Draft 1978 **A3:**11
past torture or other ill-treatment **A3:**169–72
person, meaning of **A3:**100–1
procedure by domestic authorities **A3:**241–4
refoulement and asylum procedure **A3:**193–8
relevant factors for **A3:**145–83
rendition **A3:**97–9
return (*refouler*), definition of **A3:**82–5
Revised Swedish Draft 1979 **A3:**12
risk assessment **A3:**135–218
safe third States **A3:**111–14
shift of burden of proof to state party **A3:**238–40
state obligation to prevent torture **A2:**42
subjective test **A3:**145–52
substantiation of risk by applicant **A3:**222–37
time of **A3:**138–44
to another State, definition of **A3:**102–14
torture, definition of **A3:**115–34
travaux préparatoires **A3:**10–71
USSR Draft 1979 **A3:**13
working group discussions **A3:**14–71
non-repetition, guarantees of A14:133–6
non-state actors, torture by A3:129–34
Norway
annual reports **A24:**24
Committee members **A24:**24
Dar v Norway case **A22:**94, 126
definition of torture **A1:**54, 62, 137
entry into force of CAT **A27:**12
individual complaints **A22:**92, 94, 105, 126
inquiry procedure **A20:**25, 28
inter-state communications **A21:**41
lawful sanctions **A1:**137
mandate of Subcommittee **OP A11:**17
national preventive mechanism **A3:**8
non-refoulement, principle of **A3:**67, 116
obligations to cooperate **A12:**16
state reporting procedure **A19:**29, 31
system of preventive visits **OP A1:**39
ZT v Norway case **A22:**92, 105
notification by Secretary-General of signatures, accessions and ratifications A32:1–9
draft texts, chronology of **A32:**2–5
IAPL Draft 1978 **A32:**2
Proposal for the Preamble and Final provisions of Draft Convention, Submitted by Sweden 1980 **A32:**3
travaux préparatoires **A32:**1–5
working group discussions **A32:**4–5
notifications, CAT and
text of **App** A.4

NPMs *see* **national preventive mechanisms (NPMs)**
Nuremberg principles **A2:**14–15, 73

objections to CAT
text of **App** A.4
objections to visits OP **A14:**25–7
obligation to criminalize torture
Argentina **A4:**47
Bulgaria **A4:**12
customary international law **A4:**17
France **A4:**8
United Kingdom **A4:**9
USSR **A4:**13
opting out *see* **opting out of the inquiry procedure; temporary opting-out of the Optional Protocol Declaration**
opting out of the inquiry procedure **A28:**1–17
draft texts, chronology of **A28:**3
General Assembly, discussions in **A28:**4–10
proposal by Byelorussia 1984 **A28:**3
travaux préparatoires **A28:**3–10
Optional Protocol on system of preventive visits to places of detention
Costa Rica Draft 1980, text of **App** B.2
Costa Rica Draft 1991, text of **App** B.2
declaration *see* temporary opting-out of the Optional Protocol Declaration
EU Draft 2001, text of **App** B.2
final provisions *see* amendments to Optional Protocol; authentic texts of Optional Protocol; denunciations, Optional Protocol and; federal states; entry into force of Optional Protocol; privileges and immunities, Optional Protocol and; Red Cross, Optional Protocol and; regional systems of preventive visits to places of detention; reservations to Optional Protocol; signature, ratification and accessions to Optional Protocol; Subcommittee members during country missions, obligations of
financial provisions *see* financing of Subcommittee; Special Fund
general principles *see* national preventive mechanisms (NPMs); preventive visits to places of detention; Subcommittee on Prevention of Torture; systems of preventive visits to places of detention
mandate of subcommittee on prevention *see* country missions, obligations of Subcommittee concerning; facilitate visits to places of detention by Subcommittee, states' obligation to; mandate of the Subcommittee; reports of the Subcommittee; sanctions against sources of information, prohibition of; Subcommittee, obligation to cooperate with
Mexican Draft 2001, text of **App** B.2
national preventive mechanisms *see* annual reports of national preventive mechanisms; facilitate visits by national preventive mechanisms, states' obligation to; national preventive mechanisms (NPMs); recommendations of national preventative mechanisms, obligation to examine; sanctions against sources of information, prohibition of
Proposal by the Chairperson-Rapporteur 2002, text of **App** B.2
ratifications of the Optional Protocol, status of 2017 **App** B.3
selected draft texts **App** B.2
subcommittee on prevention *see* election of the Subcommittee; filling of vacancies on Subcommittee on Prevention of Torture; nomination of Subcommittee members; size and composition of Subcommittee; Subcommittee on Prevention of Torture, rules of procedure of; terms of office of members of Subcommittee
text of **App** B.1
US Draft 2002, text of **App** B.2
***Ould Dah* case** **A5:**130–2, 177; **A6:**34
overcrowding **A11:**33–4; **A16:**26–9, 37, 51
overdue reporting
by committee **A19:**50–70
consolidation of reports **A19:**100
problem of:
examination in the absence of a report **A19:**103–5

pain or suffering, infliction of *see* **severe pain or suffering, infliction of**
Pakistan
Indian Sikh militants **A3:**141
individual complaints **A22:**94, 126
Panama
definition of torture **A1:**40, 122
inquiry procedure **A20:**28
mutual judicial assistance **A9:**17
Papua New Guinea
asylum seekers **A3:**88
Paraguay
country missions **OP A13:**44
national preventive mechanisms **OP A17:**18
rehabilitation programmes **A14:**127
Special Fund **OP A26:**26
pardons **A4:**41, 43, 49
Paris Principles
due consideration of **OP A18:**64–5
passive nationality principle of jurisdiction **A5:**71–85
citizenship, change of **A5:**83–5
facultative nature of jurisdiction **A5:**72–8
Habré case **A5:**85
is a national of that State, definition of **A5:**81–2
Pinochet case **A5:**84
Rosenmann v Spain case **A5:**75–8
victim, definition of **A5:**79–80
penalties
'punishable by appropriate penalties', definition of **A4:**33–7
personal integrity and dignity, right to **A1:**120; **A2:**1; **A16:**1, 72; **A20:**48
Peru
Cantoral Benavides v Peru case **A14:**116
Central Register of Victims, reparations and **A14:**89
Constitutional Court case **A22:**106
definition of torture **A1:**62, 88
inquiry procedure **I3**; **A20:**37–8, 62–3, 67
Loayza Tamayo v Peru case **A14:**116

Peru (*cont.*)
NGOs and national preventive mechanism **OP A17:**17
non-refoulement, principle of **A3:**158, 163–4
obligation to prevent torture **A2:**31, 51
periodic reports **A16:**50
preamble to CAT **P2**
system of preventive visits **OP A1:**39
transitional justice process **A14:**121
victims of internal armed conflict (1980–2000) **A14:**126
Petitions Unit **A18:**28; **A22:**132, 136, 138
Philippines
composition of Subcommittee **OP A5:**16
entry into force of CAT **A27:**12–13
national legislation criminalizing torture **A12:**18
nomination of Subcommittee members **OP A6:**10
temporary opting out declaration **OP A24:**15
***Pinochet* case**
France **A5:**84
Spain **A5:**179
United Kingdom **A5:**168–76
House of Lords Decisions **A5:**172–6
places of detention *see also* **facilitate visits to places of detention by Subcommittee, states' obligation to; preventive visits to places of detention; regional systems of preventive visits to places of detention; systems of preventive visits to places of detention**
access to **OP A20:**16–33
definition of **OP A4:**18–26
information gathering on **OP A20:**32–3
regular examination of **OP A19:**11–16
Poland
mandate of Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
independence of **OP A18:**8
non-refoulement, principle of **A3:**97, 99
opting out of CAT **A28:**14
opting out declaration **OP A24:**9
state reporting procedure **A19:**32
system of preventive visits **OP A1:**39
Portugal
definition of torture **A1:**27, 32, 62, 107
inquiry procedure **A20:**28
mandate of Subcommittee **OP A11:**17
recommendations **OP A22:**9
universal jurisdiction, principle of **A5:**16
powerlessness of victims
definition of torture **A1:**1, 114–21
Preamble *see* **Preamble of CAT; Preamble of the Optional Protocol**
Preamble of CAT **P1**–3
apartheid **P3**
background to **P1**–2
Burgers, Jan Herman **P2**.2
CIDT **P3**
Declaration 1975 **P1**, **P2**.1, **P3**
domestic law obligations **P3**
draft preambular clauses **P2**.2
draft texts, chronology of **P2**.1
ex officio inquiries **P3**
genocide **P3**
hijacking **P3**
human rights: significance of **P3**
IAPL Draft **P3**
International Covenant on Civil and Political Rights (ICCPR) **P2**.2
International Covenants of 1966 **P1**
legal significance **P1**
mandate **P2**.2
natural law **P3**
natural-law origins of human rights **P1**
non-discrimination principle **P2**.2, **P3**
object and purpose of CAT **P1**
Peru **P2**.2
recognition of the inherent dignity **P3**
Red Cross **P3**
slavery **P3**
Swedish Draft 1980 **P1**, **P2**.2, **P3**
terrorism **P3**
travaux préparatoires **P2**.1, 2.2
UDHR 1948 **P3**
UN Charter **P1**, **P2**.2
UN Charter principles **P3**
universal criminal jurisdiction **P3**
victims, powerlessness of **P3**
working group discussions, analysis of **P2**.2
Working Group of the Commission on Human Rights **P1**, **P2**.2
Preamble of the Optional Protocol **OP** P1–31
Basis for Future Work 1999 **OP** P4
Costa Rica Draft 1980 **OP** P2
Costa Rica Draft 1991 **OP** P3
draft texts, chronology of **OP** P2–7
EU Draft 2001 **OP** P6
Mexican Draft 2001 **OP** P5
travaux préparatoires **OP** P2–22
US Draft 2002 **OP** P7
working group discussions **OP** P8–22
presence requirement **A5:**115–50
Affair Javor **A5:**127–8
Al-Duri case **A6:**35–6
Almatov case **A6:**31–3
any territory under its jurisdiction **A5:**116
Arrest Warrant case **A5:**145–7
Bouterse case **A5:**124–6
Congo Beach case **A5:**133–40
continuation of prosecution in cases when suspect absconds **A5:**129–41
custody or other legal measures to ensure presence **A6:**28–36
Ely Ould Dah **A5:**130–2; **A6:**34
examination of available information **A6:**16–27
Habré case **A5:**148–50
have reason to suspect **A5:**115
HBA et al v Canada case **A6:**20–7
irrelevance of purpose and duration of suspect's presence **A5:**117–21
lack of specification **A5:**122
no presence at moment of complaint leads to non-prosecution **A5:**123
only for such time as necessary **A6:**37
permissibility of investigation despite absence of alleged torturer **A5:**141
presence of alleged torturer **A6:**16–37
timing of presence **A5:**122–41

universal jurisdiction *in absentia* **A5:**142–50
prevention *see* **preventive visits to places of detention; state obligation to prevent torture preventive visits to places of detention OP A4:**1–38 *see also* **country missions, obligations of Subcommittee concerning; systems of preventive visits to places of detention**
Basis for Future Work 1999, text of Articles which constitute **OP A4:**6
Costa Rica Draft 1980 **OP A4:**3
Costa Rica Draft 1991 **OP A4:**4
deprivation of liberty, definition of **OP A4:**14–17
draft texts, chronology of **OP A4:**3–9
EU Draft 2001 **OP A4:**8
Mexican Draft 2001 **OP A4:**7
Outcome of First Reading 1996, text of Articles which constitute the **OP A4:**5
places of detention **OP A4:**18–26
travaux préparatoires **OP A4:**3–13
under jurisdiction and control, definition of **OP A4:**27–38
US Draft 2002 **OP A4:**9
working group discussions **A4:**10–13
previous or concurrent international procedure *see* **international procedure, previous or concurrent**
prison rules *see* **review of interrogation and prison rules**
privacy and family life, right to respect for A7:56; **A8:**13
private individuals, acts by A1:106
private interviews with detainees
facilitate visits by national preventive mechanisms, states' obligation to **OP A20:**22–8
facilitate visits to places of detention by Subcommittee, states' obligation to **OP A14:**21–4
private places of detention, visits to OP A4:21
privileges and immunities *see* **immunities; privileges and immunities, CAT and; privileges and immunities, Optional Protocol and**
privileges and immunities, CAT and A23:1–12
Draft Convention submitted by Working Group 1983 **A23:**4
draft texts, chronology of **A23:**3–4
Swedish Proposal for Implementation Provisions 1981 **A23:**3
travaux préparatoires **A23:**3–7
working group discussions **A23:**5–7
privileges and immunities, Optional Protocol and OP A35:1–19
Basis for Future Work 1999 **OP A35:**6
Costa Rica Draft **OP A35:**4
draft texts, chronology of **OP A35:**4–6
Outcome of First Reading 1996, text of Articles which constitute the **OP A35:**5
travaux préparatoires **OP A35:**4–10
working group discussions **OP A35:**7–10
procedural articles *see* **annual reports under CAT; Committee against Torture; Committee against Torture, rules of procedure of; individual complaints procedure; inquiry procedure; inter-state communications; privileges and immunities, CAT and; state reporting procedure**
procedural safeguards during preliminary investigation phase A6:1–53
Al-Duri case (Austria) **A6:**35–6
Almatov case (Germany) **A6:**31–3
application to all forms of jurisdiction **A6:**47
Belgium v Senegal case **A6:**41–5
communication with Representative of the State **A6:**46
custody or other legal measures to ensure presence **A6:**28–36
draft texts, chronology of **A6:**4–6
duty to promptly report findings of preliminary inquiry **A6:**52–3
Ely Ould Dah case **A6:**34
examination of available information **A6:**16–27
Habré case (ICJ) **A6:**41–5
Hague Hijacking Convention 1970 **A6:**4
has taken a person into custody **A6:**48
HBA et al v Canada case **A6:**20–7
immediately notify **A6:**49
nationals of another State **A6:**50–1
notify other states, obligation to **A6:**47–53
only for such time as necessary **A6:**37
preliminary inquiries **A6:**38–45
presence of alleged torturer **A6:**16–37
prosecution or extradition principle **A6:**41–5
Revised Swedish Draft 1979 **A6:**6
travaux préparatoires **A6:**4–15
US Draft 1978 **A6:**5
working group discussions **A6:**7–15
prompt and impartial investigation principle
duty to promptly report findings of preliminary inquiry **A6:**52–3
prompt investigation, definition of **A12:**31–4
promptly and impartially examined by competent authorities, definition of **A13:**25–9
proportionality, principle of A1:71, 120–1; **A11:**36, 40–2; **A14:**101; **A16:**7, 75, 80; **OP A4:**25
prosecutions *see also* **extradite or prosecute principle**
Congo Beach case (France) **A5:**133–40
continuation of prosecution in case of absconding **A5:**129–41
Ely Ould Dah case (France) **A5:**130–2
permissibility of investigation despite absence of alleged torturer **A5:**141
psychiatry, use of A1:27, 32, 107
psychological torture *see* **mental torture**
public floggings A1:139–41; **A2:**30; **A16:**60
public hangings A16:69
public officials, involvement of A1:122–32
acquiescence, definition of **A1:**128–32
consent, definition of **A1:**128–32
instigation, definition of **A1:**128–32
other person acting in an official capacity, definition of **A1:**125–7
public official, definition of **A1:**123–4
purpose, torture for specific *see* **specific purpose, torture for**

Qatar
corporal punishment **A16:**60
Criminal Code **A1:**141
definition of torture **A1:**60, 62, 141
dispute settlement **A30:**18
reservations **I5**; **A1:**60, 62; **A22:**16

racism and xenophobia *see* **discrimination: racial**
ratifications *see* **signature and ratification of CAT; signature, ratification and accessions to Optional Protocol**
reasonable grounds to believe
definition of **A12:**20–30
obligation to proceed to an investigation *ex officio* **A12:**21–2
origin and level of suspicion required **A12:**23–30
rebel, guerrilla or insurgent groups **A1:**125
recommendations *see* **conclusions and recommendations; recommendations of national preventative mechanisms, obligation to examine**
recommendations of national preventative mechanisms, obligation to examine OP **A22:**1–23
competent authorities **OP A22:**7–9
dialogue on implementation **OP A22:**13–23
draft texts, chronology of **OP A22:**3–4
Mexican Draft 2001 **OP A22:**3
proposal by the Chairperson-Rapporteur 2002 **OP A22:**4
recommendations, examination of **OP A22:**10–12
travaux préparatoires **OP A22:**3–5
working group discussions **OP A22:**5
records **A18:**35
Red Cross, Optional Protocol and P3; **OP A32:**1–12
Costa Rica Draft 1980 **OP A32:**3
Costa Rica Draft 1991 **OP A32:**4
draft texts, chronology of **OP A32:**3–5
Outcome of First Reading 1996, text of Articles which constitute the **OP A32:**5
travaux préparatoires **OP A32:**3–8
working group discussions **OP A32:**6–8
Refugee Convention 1951 *see* **asylum seekers**
regional systems of preventive visits to places of detention OP **A31:**1–15
Costa Rica Draft 1991 **OP A31:**2
draft texts, chronology of **OP A31:**2–4
duplication, avoidance of **OP A31:**12–15
Mexican Draft 2001 **OP A31:**3
relevant regional systems **OP A31:**10–11
travaux préparatoires **OP A31:**2–9
US Draft 2001 **OP A31:**4
working group discussions **OP A31:**5–9
registration of complaints **A22:**136–44
rehabilitation **A14:**123–7
remedies *see also* **compensation, right of victims to**; **exhaustion of domestic remedies**; **remedy and adequate reparation, right of victims to**
remedy and adequate reparation, right of victims to **A14:**1–137 *see also* **compensation; rehabilitation**
adequate care and protection **A14:**137
compensation **A14:**117–22
conceptual evolution of the terms **A14:**34–8
cruel, inhuman or degrading treatment or punishment, applicability to **A14:**55–61
Declaration 1975 **A14:**4
declarations **A14:**28–33
dependents, rights in the case of the death of the victim **A14:**51–2
draft texts, chronology of **A14:**4–7
fair and adequate reparations, definition of **A14:**109–13
first aid measures pending proceedings **A14:**137
guarantees of non-repetition **A14:**133–6
IAPL Draft 1978 **A14:**5
indirect victims, recognition of **A14:**43–50
interpretation **A14:**34–137
investigation as precondition for forms of reparation **A14:**70–8
legal and institutional framework for redress **A14:**79–87
Original Swedish Draft 1978 **A14:**6
overview **A14:**1–3
personal scope of application **A14:**39–52
procedural obligations **A14:**62–108
rehabilitation **A14:**123–7
reservations **A14:**28–33
restitution **A14:**114–16
Revised Swedish Draft 1979 **A14:**7
right to truth **A14:**128–32
satisfaction, concept of **A14:**128–32
savings clause, interpretation of **A14:**53–4
scope of application **A14:**34–61
substantive obligations **A14:**109–37
transitional justice processes, reparation mechanisms in overview of **A14:**88–90
travaux préparatoires **A14:**4–33
understandings **A14:**28–33
universal civil jurisdiction for torture **A14:**91–103
victim, definition of **A14:**39–42
victim participation in proceedings **A14:**62–9
victim status, recognition of **A14:**62–9
war on terror, reparations for victims of **A14:**104–8
working group discussions **A14:**8–27
rendition **A3:**97–9
reparation *see* **remedy and adequate reparation, right of victims to**
reports *see* **reports of the Subcommittee; state reporting procedure; summary reports, publication of**
reports of the Subcommittee OP **A16:**1–32
annual reports **OP A16:**31–2
confidentiality of mission reports **OP A16:**22–8
Costa Rica Draft 1980 **OP A16:**5
Costa Rica Draft 1991 **OP A16:**6
draft texts, chronology of **OP A16:**5–10
EU Draft 2001 **OP A16:**9
Mexican Draft 2001 **OP A16:**8
Outcome of First Reading 1996, text of Articles which constitute the **OP A16:**7
sanction, publication as a **OP A16:**29–30
travaux préparatoires **OP A16:**5–21
US Draft **OP A16:**10
working group discussions **OP A16:**11–21

reprisals
individual complaints procedure **A22:**184–7
inquiry procedure **A20:**84–90
state reporting procedure **A19:**106–9
reservations *see* **reservations to CAT; reservations to Optional Protocol**
reservations to CAT App A.3
text of **App** A.4
reservations to Optional Protocol OP A30:1–15
Costa Rica Draft 1991 **OP A30:**3
draft texts, chronology of **OP A30:**3–6
EU Draft 2001 **OP A30:**5
Outcome of First Reading 1996, text of Articles which constitute the **OP A30:**4
proposal by the Chairperson-Rapporteur 2002 **OP A30:**6
travaux préparatoires **OP A30:**3–13
working group discussions **OP A30:**7–13
resolutions *see* **UNGA resolutions**
respondeat superior *see* ***superior orders defence (respondeat superior)***
restraints, use of A11:32, 37, 40–1, 53
retroactivity A5:99, 110
review of interrogation and prison rules A11:1–47
any case of torture, definition of **A11:**9
any territory under its jurisdiction, definition of **A11:**12
custody and treatment of persons deprived of liberty, definition of **A11:**11
deprivation of liberty, obligation to oversee **A11:**16–19
draft texts, chronology of **A11:**4–6
interrogations, definition of **A11:**11
Original Swedish Draft 1978 **A11:**4
related to custody and treatment of persons subjected to arrest, detention or imprisonment **A11:**22–43
relating to interrogations **A11:**44–7
Revised Swedish Draft 1979 **A11:**6
rules, instructions, methods and practices as well as arrangements, definition of **A11:**10
standards of review **A11:**20–47
systematic review, definition of **A11:**13–47
travaux préparatoires **A11:**4–8
US Draft 1978 **A11:**5
working group discussions **A11:**7–8
risk assessment A3:135–218
cart punishment **A3:**124–8
corporal punishment **A3:**124–8
cruel, inhuman and degrading treatment **A3:**115–21
diplomatic assurances **A3:**199–218
general human rights situation in receiving State **A3:**153–68
receiving State and individual situation **A3:**145–52
individuals vulnerable to torture risk, activities and personal factors **A3:**173–83
internal flight alternative **A3:**184–92
lawful sanctions **A3:**122–3
non-state actors, torture by **A3:**129–34
objective test **A3:**145–52
past torture or other ill-treatment **A3:**169–72
refoulement and asylum procedure **A3:**193–8
relevant factors for **A3:**145–83
subjective test **A3:**145–52
substantiation of risk by applicant **A3:**222–37
time of **A3:**138–44
torture, definition of **A3:**115–34
Romania
communist era **A14:**63
national preventive mechanisms **OP A3:**8
obligation to prevent torture **A2:**24
secret detention centres **A3:**97
temporary opting out declaration **OP A24:**15
Russia *see also* **USSR**
country missions **OP A12:**25
Investigate Commission **A12:**55
language and translation issues **A15:**38; **A18:**29; **A20:**30; **OP A4:**2, 28; **OP A24:**14
national preventive mechanism **OP A3:**8
non-refoulement, principle of **A3:**23, 56, 168
obligations of Subcommittee members **OP A36:**13
Red Cross, Optional Protocol and **OP A32:**10
reports of the Subcommittee **OP A16:**25
reservations, prohibition of **OP A30:**9–10, 13
Sergei Kirsanov v Russian Federation case **A1:**76; **A14:**59, 121; **A15:**56; **A16:**22, 27; **A22:**52
signature and ratification of the Optional Protocol **OP A27:**17
Subcommittee on prevention **A2:**17
succession to CAT **A26:**13, 16, 19
system of preventive visits **OP A1:**39
Rwanda
mission to, suspension of **OP A14:**24
obligations to cooperate **OP A12:**29

safe countries concept A3:77
safe havens, principle of no I3; A5:1, 30, 67–8, 140, 143, 178; **A6:**27; **A7:**29, 58, 62; **A8:**1, 14; **A9:**1, 9; **A12:**5
San Marino
entry into force of CAT **A27:**13
sanctions *see* **lawful sanctions clause; sanctions against sources of information, prohibition of**
sanctions against sources of information, prohibition of OP A15:1–21; **OP A21:**1–24
confidential information, protection of **OP A21:**9–15
confidentiality, no duty of **OP A21:**16–23
confidentiality principle **OP A21:**9–24
Costa Rica Draft 1991 **OP A15:**8
data protection legislation **OP A21:**24
draft texts, chronology of **OP A15:**8–9; **A21:**3–4
EU Draft 2001 **OP A21:**4
Mexican Draft 2001 **OP A21:**3
Outcome of the Beginning of the First Reading 1994, text of Articles which constitute the **OP A15:**9
prohibition of sanction **OP A21:**6–8
reports, publication of **OP A21:**16–23
travaux préparatoires **OP A15:**8–12; **OP A21:**3–5
working group discussions **OP A15:**10–12; **OP A21:**5

Saudi Arabia
corporal punishment **A1:**146; **A3:**126; **A16:**60
definition of torture **A1:**139, 146
financing of Subcommittee **OP A25:**22
Jones v Saudi Arabia case and refusal to open investigations **A14:**101
non-refoulement, principle of **A3:**126
obligations of Subcommittee members **OP A36:**6
opting-out declaration **OP A24:**1, 9
Preamble to Optional Protocol **OP P**20
system of preventive visits **OP A1:**39
women judges, appointment of **A2:**45
savings clause
Almatov case **A5:**180
cruel, inhuman or degrading treatment or punishment **A16:**89–92
definition of torture **A1:**153–7
Pinochet case **A5:**179
remedy and adequate reparation, right of victims to **A14:**53–4
universal jurisdiction principle **A5:**178–80
scientific experimentation **A1:**31, 107
searches **A12:**36
body **A11:**37; **A16:**30–1, 49; **OP A35:**15, 17
secrecy *see also* **confidentiality**
security **A16:**30–6
security services **A1:**74; **A14:**24
self-defence, right of **A2:**62; **A10:**16; **A16:**30
Senegal
dispute settlement **A30:**2, 18, 21, 24, 36
entry into force of CAT **A27:**12
Guengueng et al v Senegal case **A5:**102–8; **A7:**50–1, 58
Habré/Belgium v Senegal case **A5:**2, 5, 85, 91–14, 117, 148, 167; **A6:**23, 41–5; **A7:**43, 51–2, 63, 67–77; **A22:**25; **A30:**2, 18, 21, 36
individual complaints **A22:**25, 32–3, 110
inquiry procedure **A20:**25
mandate of Subcommittee **OP A11:**32
non-refoulement, principle of **A3:**52–3, 56, 155
opting out of CAT **A28:**10
people trafficking **A14:**111
remedy and adequate reparation, right of victims to **A14:**137
universal jurisdiction, principle of **A5:**40, 44, 46, 48
sensorial deprivation **A1:**88; **A20:**49
separate offence in criminal law, torture as **A4:**24–9
Serbia and Montenegro
complain, right of victims to **A13:**16
Dragan Dimitrijevic v Serbia and Montenegro case **A22:**154
ex officio investigations **A12:**25
funding NPMs in Montenegro **OP A18:**35
inquiry procedure **I3**; **A20:**37–8, 45–6, 50, 62, 77
Ministry on Human and Minority Rights **A22:**154
opting out declaration in Montenegro **OP A24:**15
Osmani v Serbia case **A22:**82
Protector of Human Rights and Freedoms (PHRF) in Montenegro **OP A18:**31
signature and ratification of the Optional Protocol **A27:**16
Montenegro as a signatory State by means of succession **OP A27:**16, 18
Slobodan and Ljiljana Nikolić v Serbia and Montenegro case **A13:**27; **A14:**46, 73–4
succession to CAT **A26:**13, 19, 21
severe pain or suffering, infliction of **A1:**67–100
definition of 'severe pain and suffering' **A1:**81–100
ill-treatment and torture, distinction between **A1:**1, 67–80
sexual orientation **A1:**110; **A3:**173, 178; **A16:**43, 81
sexual violence **A2:**46–51
Seychelles
state reporting procedure **A19:**98
Shari'a law **A1:**55
ships **A1:**36; **A2:**2, 12, 53–6; **A3:**86, 106, 142; **A5:**3, 18–19, 23–4, 33, 50, 53, 57–8, 61–3, 66; **A7:**1, 20, 38, 41, 44; **A8:**7, 11, 37
Sierra Leone
extradition **A8:**25
mutual judicial assistance **A9:**14
remedy and adequate reparation, right of victims to **A14:**136
Special Court for **A7:**63
signature *see* **signature and ratification of CAT; signature, ratification and accessions to Optional Protocol**
signature and ratification of CAT **A25:**1–11
draft texts, chronology of **A25:**2–4
IAPL Draft 1978 **A25:**2
Proposal for the Preamble and Final provisions of Draft Convention, submitted by Sweden 1980 **A25:**3
Revised Set of Final Clauses Submitted by Chairman-Rapporteur 1983 **A25:**4
travaux préparatoires **A25:**2–8
working group discussions **A25:**5–8
signature, ratification and accessions to Optional Protocol OP **A27:**1–18
Costa Rica Draft 1980 **OP A27:**6
Costa Rica Draft 1991 **OP A27:**7
draft texts, chronology of **OP A27:**6–8
Outcome of First Reading 1996, text of Articles which constitute the **OP A27:**8
travaux préparatoires **OP A27:**6–12
working group discussions **OP A27:**9–12
significance of CAT I3
single acts of torture **A2:**23
size and composition of Subcommittee OP **A5:**1–27
composition **A5:**21–7
Costa Rica Draft 1980 **OP A5:**3
Costa Rica Draft 1991 **OP A5:**4
draft texts, chronology of **OP A5:**3–9
EU Draft 2001 **OP A5:**8
gender balance **OP A5:**26
geographical distribution, equitable nature of **OP A5:**24–5
impartiality **OP A5:**27
independence **OP A5:**27

Mexican Draft 2001 **OP A5:**7
Outcome of First Reading 1996, text of Articles which constitute the **OP A5:**5
Outcome of the Second Reading 1999, text of Articles which constitute the **OP A5:**6
professional experience **OP A5:**21–3
size **A5:**20
travaux préparatoires **OP A5:**3–19
US Draft 2002 **OP A5:**9
working group discussions **OP A5:**10–19
slavery I1; **P3**; **A1:**114; **A14:**132
sleep deprivation **A1:**68, 84, 91; **A11:**46
Slovakia
entry into force of CAT **A27:**14
national preventive mechanism **OP A3:**8
opting out of CAT **A28:**12, 15
succession to CAT **A26:**13
Slovenia
entry into force of CAT **A27:**14
mandate of Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
succession to CAT **A26:**13, 19–20
system of preventive visits **OP A1:**39
solitary confinement **A1:**70, 85, 88, 136, 151; **A11:**38, 46; **A16:**30, 33–6, 55
Somalia
definition of torture **A1:**126
state reporting procedure **A19:**98
widespread violations of human rights, non-refoulement principle and **A3:**168, 183, 186–7
South Africa
cruel, inhuman and degrading treatment and punishment **A15:**57
exclusionary rule **A15:**57
mandate of Subcommittee **OP A11:**17
national preventive mechanisms **OP A3:**9
independence of **OP A18:**8
obligations to cooperate **OP A12:**15
reservations, prohibition of **OP A30:**9–10
Special Fund **OP A26:**8, 15
system of preventive visits **OP A1:**25
UN *ad hoc* investigations **A20:**1, 11
Soviet Union *see* **particular countries (eg Georgia); USSR**
Spain
acts of participation **A4:**7
Blanco Abad v Spain case **A12:**22, 24, 32; **A13:**16
citizenship **A5:**83
definition of torture **A1:**11, 21, 40, 42, 62, 122
entry into force of the Optional Protocol **OP A28:**9
experts on the Subcommittee **OP A8:**9
extradition to **A22:**120
Fatou Sonko v Spain case **A2:**56; **A16:**76
Guatemala Genocide case **A5:**82, 157–8
Guridi v Spain case **A2:**44; **A4:**41, 49–50; **A7:**84; **A14:**35, 118; **A22:**25, 86
individual complaints **A22:**21, 25, 29, 31, 50–1, 79, 86–7, 105, 120
inquiry procedure **A20:**28
inter-state communication **A21:**7
JHA v Spain case **A3:**87; **A22:**29, 31
mandate of the Subcommittee **OP A11:**17
national preventive mechanism **OP A3:**8
independence of **OP A18:**8
non-refoulement, principle of **A3:**14, 19, 51, 87, 116, 141
opting out of CAT **A28:**17
Parot v Spain case **A13:**16; **A22:**79, 105
Pinochet case and **A5:**4–5, 140–1, 168–75, 179
remedy and adequate reparation, right of victims to **A14:**22, 31, 56, 118
Rosenmann v Spain case **A5:**75–8; **A7:**5; **A8:**17; **A9:**15; **A22:**25, 50–1, 87
Sodupe v Spain case **A22:**79
Sonko v Spain case **A22:**31
Special Fund **OP A26:**9, 23
state reporting procedure **A19:**29, 31
system of preventive visits **OP A1:**39
victim, definition of **A5:**79; **A22:**21
Special Fund OP **A26:**1–26
Costa Rica Draft **OP A26:**2
draft texts, chronology of **OP A26:**2–6
EU Draft 2001 **OP A26:**6
Mexican Draft 2001 **OP A26:**5
Outcome of First Reading 1996, text of Articles which constitute the **OP A26:**3
Outcome of Second Reading 1998, text of Articles which constitute the A26 **OP A26:**4
travaux préparatoires **OP A26:**2–17
working group discussions **OP A26:**7–17
specific purpose, torture for **A1:**2, 32, 63, 105, 107; **A16:**18, 26
Sri Lanka
Criminal Code **A1:**95
definition of torture **A1:**95; **A4:**31
inquiry procedure **I3**; **A20:**37, 47, 50–1, 59, 62, 64, 70, 74, 77
non-refoulement, principle of **A3:**132, 158, 168
periodic reports **A19:**98
standing of the applicant **A22:**18–30
individuals, definition of **A22:**18–20
on behalf of individuals, definition of **A22:**26–30
victim, definition of **A22:**21–5
state immunity **A14:**96, 99–102
state obligation to prevent torture **A2:**1–73 *see also* **criminalize torture, state obligation to**
absolute prohibition of torture **A2:**57–9
access to justice **A2:**45
administrative measures **A2:**27–52
any territory under its jurisdiction, definition of **A2:**53–6
asylum procedure **A2:**42
children, violence against **A2:**46–51
criminalization of torture **A2:**29–31
data, collection of disaggregated **A2:**52
Declaration 1975 **A2:**6
detention safeguards **A2:**32–9
detention, independent monitoring of places of **A2:**40–1
disabilities, violence against persons with **A2:**46–51
domestic violence **A2:**46–51
draft texts, chronology of **A2:**6–9
gender-based violence **A2:**46–51
IAPL Draft 1978 **A2:**7
independent judiciary **A2:**45

state obligation to prevent torture (*cont.*)
interrogation safeguards **A2:**32–9
investigations **A2:**43
judicial measures **A2:**27–52
legislative measures **A2:**27–52
non-derogable prohibition of torture **A2:**60–4
non-refoulement **A2:**42
obligation to take effective measures to prevent torture **A2:**16–52
Original Swedish Draft 1978 **A2:**8
prosecution **A2:**43
redress, provision of **A2:**44
Revised Swedish Draft 1979 **A2:**9
scope of application **A2:**16–25
sexual violence **A2:**46–51
superior orders
prohibition of defence of obedience to, in domestic criminal proceedings **A2:**65–71
as a reason for mitigating circumstances **A2:**72–3
trafficking **A2:**46–51
travaux préparatoires **A2:**6–15
vulnerable groups, violence against **A2:**46–51
working group discussions **A2:**10–15
state reporting procedure **A19:**1–109
additional reports of information, request for **A19:**59
additional sources of information **A19:**44–7
analysis of state information by Rapporteur **A19:**82
Committee Members, attendance from **A19:**54–5
Concluding Observations **A19:**60–70
constructive dialogue, procedure of **A19:**50–3
Country Rapporteurs, attendance from **A19:**54–5
development of procedure **A19:**75
Draft Implementation Provisions, Submitted by Chairman-Rapporteur 1982 **A19:**11
Draft Resolution submitted by Netherlands to General Assembly 1984 **A19:**13
draft texts, chronology of **A19:**9–13
follow-up to **A19:**75–86
follow-ups **A19:**75–84
State party's report, submission of **A19:**81
Four Draft Articles on Implementation with Explanatory Note submitted by Chairman-Rapporteur 1982 **A19:**12
general comments
on the provisions of the Convention, definition of **A19:**71–4
on the report, definition of **A19:**60–70
list of issues, drawing up of **A19:**48–9
Original Swedish Draft 1978 **A19:**9
overdue reporting, problem of **A19:**100–5
pre-sessional preparation **A19:**48–9
Rapporteur for follow-up to concluding observations **A19:**79–80
recommendations, criteria for identification and selection of **A19:**76–8
reminders **A19:**101–2
reports on the measures they have taken, definition of **A19:**38
reprisals **A19:**106–9
simplified reporting procedure **A19:**87–9
state reports, submission of **A19:**36–43
States Parties
attendance by **A19:**56–8
communication with **A19:**83–4
supplementary reports, definition of **A19:**39
Swedish Proposal for Implementation Provisions 1981 **A19:**10
traditional reporting procedure **A19:**35–86
travaux préparatoires **A19:**9–34
working group discussions **A19:**14–34
state reports
initial reports **A19:**38
other reports, definition of **A19:**40–1
periodic reports **A19:**39, 42–3
state security *see* **national security**
state sovereignty, principle of I2; **A8:**13, 23; **A19:**2, 26, 64; **A20:**24; **OP A1:**43, 47; **OP A2:**2; **OP A12:**14; **OP A21:**18
sterilization, involuntary **A14:**61
stoning **A1:**139, 141; **A2:**30; **A3:**126; **A16:**68, 71
Subcommittee *see* **country missions, obligations of Subcommittee concerning; facilitate visits to places of detention by Subcommittee, states' obligation to; financing of Subcommittee; mandate of the Subcommittee; size and composition of Subcommittee; Subcommittee members during country missions, obligations of; Subcommittee, obligation to cooperate with; Subcommittee on Prevention of Torture, rules of procedure of**
Subcommittee members during country missions, obligations of OP **A36:**1–13
Basis for Future Work 1999 **OP A36:**2
draft texts, chronology of **OP A36:**2
travaux préparatoires **OP A36:**2–7
working group discussions **OP A36:**3–7
Subcommittee, obligation to cooperate with OP **A12:**1–36
Basis for Future Work after the Second Reading 1999, text of Articles which constitute the **OP A12:**8
controversial issues **OP A12:**24–6
Costa Rica Draft 1980 **OP A12:**5
Costa Rica Draft 1991 **OP A12:**6
country missions **OP A12:**27–9
dialogue with SPT on possible implementation measures **OP A12:**34–6
draft texts, chronology of **OP A12:**5–10
EU Draft **OP A12:**10
information, provision of **OP A12:**30
Mexican Draft 2001 **OP A12:**9
NPMs, facilitation of contact with **OP A12:**31–3
Outcome of First Reading 1996, text of Articles which constitute the **OP A12:**7
travaux préparatoires **OP A12:**5–23
unannounced visits to places of detention **OP A12:**27–9
working group discussions **OP A12:**11–23
Subcommittee on Prevention of Torture **OP A2:**1–28 *see also* **country missions, obligations of Subcommittee concerning; facilitate visits to places of detention by Subcommittee, states' obligation to; filling of vacancies on Subcommittee**

on Prevention of Torture; financing of Subcommittee; mandate of the Subcommittee; size and composition of Subcommittee; Subcommittee members during country missions, obligations of; Subcommittee, obligation to cooperate with; Subcommittee on Prevention of Torture, rules of procedure of
Costa Rica Draft 1980 **OP A2:**3
Costa Rica Draft 1991 **OP A2:**4
draft texts, chronology of **OP A2:**3–9
EU Draft 2001 **OP A2:**8
Members of the Subcommittee since 2007 (2017) **App** B.5
Mexican Draft 2001 **OP A2:**7
Outcome of First Reading, text of Articles which constitute the 1996 **OP A2:**5
Outcome of Second Reading, text of Articles which constitute the 1999 **OP A2:**6
travaux préparatoires **OP A2:**3–20
US Draft 2002 **OP A2:**9
working group discussions **OP A2:**10–20
Subcommittee on Prevention of Torture, rules of procedure of **OP A10:**1–18
Bureau of the SPT **OP A10:**11
conduct of business **OP A10:**12
Costa Rica Draft 1980 **OP A10:**2
Costa Rica Draft 1991 **OP A10:**3
draft texts, chronology of **OP A10:**2–6
meetings in camera **OP A10:**13
Outcome of First Reading 1996, text of Articles which constitute the **OP A10:**4
Outcome of Second Reading 1999, text of Articles which constitute the **OP A10:**5
rules of procedure **OP A10:**14–15
sessions of the SPT **OP A10:**16–18
text of **App** B.4
travaux préparatoires **OP A10:**2–9
US Draft 2002 **OP A10:**6
working group discussions **OP A10:**7–9
substantive articles *see* **complain, right of victims to; cruel, inhuman or degrading treatment or punishment; definition of torture; *ex officio* investigations; extradite or prosecute principle; extradition; mutual judicial assistance; non-admissibility of evidence obtained by torture; *non-refoulement*, principle of; obligation to criminalize torture; presence requirement; procedural safeguards during preliminary investigation phase; remedy and adequate reparation, right of victims to; review of interrogation and prison rules; state obligation to prevent torture; training of personnel; universal jurisdiction, principle of**
succession to CAT **A26:**13–21; **App** A.3
Sudan
obligations of Subcommittee members **OP A36:**6
Preamble to Optional Protocol **OP P**20
reparations measures **A14:**41
suicide
in custody **A11:**43; **A16:**37; **OP A12:**30
watch arrangements **OP A20:**13
summary reports, publication of **App** B.4
superior orders defence (***respondeat superior***)
prohibition of defence of obedience to, in domestic criminal proceedings **A2:**65–71
as a reason for mitigating circumstances **A2:**72–3
Suriname
Bouterse case **A5:**124–6, 141
Sweden
Agiza v Sweden case **A3:**74, 98, 142
AH v Sweden case **A22:**84, 89
AS v Sweden case **A3:**126
Attia v Sweden case **A3:**210
aut dedere aut judicare case **A7:**20, 26, 34
Bakatu-Bia v Sweden case **A3:**132
Committee against Torture **A17:**17, 22
country missions **OP A13:**23, 32, 40
corporal punishment, use of **A16:**58
CT and KM v Sweden case **A1:**83
definition of torture **A1:**62, 83, 136, 151
denunciation, CAT and **A31:**5
dispute settlement **A30:**9
entry into force of CAT **A27:**12
entry into force of Optional Protocol **OP A28:**9
ex officio investigations **A12:**55
extradition **A8:**7, 12
financing of Subcommittee **OP A25:**23
individual complaints **A22:**9, 52, 84, 123
inquiry procedure **A20:**16, 25, 28–9
inter-state communications **A21:**9, 12, 41
mandate of Subcommittee **OP A11:**17
national preventive mechanisms **OP A17:**10
Njamba and Balikosa v Sweden case **A3:**132, 150
non-refoulement, principle of **A3:**2, 33, 74, 74, 98, 126, 132, 142, 150, 180, 210; **A22:**52
obligations to cooperate **OP A12:**15
opting out of CAT **A28:**6
Paez v Sweden case **A3:**180
privileges and immunities **OP A35:**8
Proposal for the Preamble and Final provisions of Draft Convention, submitted by Sweden 1980 **A25:**3; **A27:**5; **A29:**4; **A32:**3; **A33:**2
regional systems of preventive visits **OP A31:**12
remedy and reparations, right of torture victims to **A14:**31, 106
reports of Subcommittee **OP A16:**26
reservations **A16:**12
prohibition of **OP A30:**9
rules of procedure of Optional Protocol **OP A10:**9
savings clause **A1:**153
signature and ratification of Optional Protocol **OP A27:**11, 13, 17
solitary confinement, lawful sanctions and **A1:**136, 151
state reporting procedure **A19:**29, 31
terms of office of Subcommittee members **OP A9:**12, 15
TM v Sweden case **A22:**52
universal jurisdiction **A5:**37
Switzerland
aut dedere aut judicare **A7:**18
CM v Switzerland case **A22:**92
definition of torture **A1:**12, 107, 117

Switzerland (*cont.*)
entry into force of CAT **A27:**12
entry into force of Optional Protocol **OP A28:**9
extradition **A8:**10; **A22:**120
GK v Switzerland case **A3:**141; **A15:**20; **A22:**120
individual complaints **A22:**10, 53, 78, 92, 120
inquiry procedure **A20:**12, 25, 28
inter-state communication **A21:**41
mandate of Subcommittee **OP A11:**17
members of the Subcommittee **OP A5:**1
Mutombo v Switzerland case **A3:**136, 159
Naït-Liman v Switzerland case **A14:**94
national preventive mechanism **OP A3:**8, 10
non-refoulement, principle of **A3:**2, 16, 19, 136, 141, 159, 191
notification by the Secretary-General **A32:**6
obligations to cooperate **OP A12:**15
prior consent, issue of **OP A1:**25
privileges and immunities **A23:**9
ratification of the Optional Protocol **OP A5:**20; **A27:**10
reservations, prohibition of **OP A30:**9
signature and ratification of CAT **A25:**9
Singh Khalsa et al v Switzerland case **A3:**191
Special Fund **OP A26:**15, 23
state reporting procedure **A19:**15, 27, 29
system of preventive visits **OP A1:**25, 39
term of office of Subcommittee members **OP A9:**12, 15
VL v Switzerland case **A1:**117
X v Switzerland case **A22:**78
Z v Switzerland case **A22:**53
Syria
al-Assad regime, crimes committed by **A5:**79
Arar case **A3:**209; **A14:**107
Daesh, *de facto* control by **OP A4:**33
diplomatic assurances **A3:**209, 214
entry into force of Optional Protocol **OP A28:**9
human rights situation in **A3:**168
inquiry procedure **A20:**2, 28
mandate of Subcommittee **OP A11:**17
national preventive mechanisms **OP A3:**9
non-refoulement, principle of **A3:**168, 209, 214
obligations of Subcommittee members **OP A36:**6
Preamble to Optional Protocol **OP P**20
reservations, prohibition of **OP A30:**10
state reporting procedure, special reports and **A19:**29, 40, 57, 104
system of preventive visits **OP A1:**39
systematic practice of torture
definition of **A20:**40–1
systems of preventive visits to places of detention OP A1:1–48 *see also* **regional systems of preventive visits to places of detention**
Basis for Future Work 1999, text of Articles which constitute the **OP A1:**5
Costa Rica Draft 1980 **OP A1:**2
Costa Rica Draft 1980 **OP A1:**3
draft texts, chronology of **OP A1:**2–8
EU Draft 2001 **OP A1:**7
Mexican Draft 2001 **OP A1:**6
Outcome of First Reading 1996, text of Articles which constitute the **OP A1:**4
travaux préparatoires **OP A1:**2–42
US Draft 2002 **OP A1:**8
working group discussions **OP A1:**9–42

'tainted fruit of poisonous tree' theory A15:40
Tajikistan
periodic reports **OP A26:**17
succession to CAT **OP A26:**13
temporary opting-out of the Optional Protocol Declaration OP A24:1–17
Costa Rica Draft 1991 **OP A24:**3
draft texts, chronology of **OP A24:**3–6
EU Draft **OP A24:**5
Outcome of First Reading 1996, text of Articles which constitute **OP A24:**4
postponement
of implementation of obligations **OP A24:**11–14
validity of **OP A24:**15–17
proposal by the Chairperson-Rapporteur 2002 **OP A24:**6
travaux préparatoires **OP A24:**3–10
working group discussions **OP A24:**7–10
terms of office of members of Subcommittee OP A9:1–20
Costa Rica Draft 1980 **OP A9:**2
Costa Rica Draft 1991 **OP A9:**3
draft texts, chronology of **OP A9:**2–7
EU Draft 2001 **OP A9:**7
Mexican Draft 2001 **OP A9:**6
Outcome of First Reading 1996, text of Articles which constitute the **OP A9:**4
Outcome of Second Reading 1999, text of Articles which constitute the **OP A9:**5
travaux préparatoires **OP A9:**2–12
working group discussions **OP A9:**8–12
territoriality and flag principle of jurisdiction
any territory under its jurisdiction, definition of **A5:**58–61
flag principle **A5:**62–4
no hierarchy between different grounds of jurisdiction **A5:**57
territorial jurisdiction **A5:**56–64
territoriality and nationality principles, presumption of equality between **A8:**26–8
terrorism
crime of **P3**
counterterrorism strategies, against global 'war on terror' **I3**; **A2:**4, 30, 59, 64; **A3:**7, 106, 244; **A8:**15; **A9:**20; **A15:**36, 40, 44; **A20:**49
encouragement of **A20:**80
forms of **I2**
investigation techniques **A3:**164
Islamic fundamentalism **A3:**98
suspects, return of **A3:**214, 216
Thailand
Criminal Procedure Code **A5:**54
definition of torture **A1:**60, 62
inquiry procedure **A20:**28
non-refoulement, principle of **A3:**70
state reporting procedure **A19:**29

third parties, complaints on behalf of victims by A15:17; **OP A21:**10
'ticking time bomb' scenario A1:121
time limits A16:36, 54; **A18:**36
Togo
non-refoulement, principle of **A3:**69
state reporting procedure **A19:**57
trafficking A2:46–51
training of personnel A10:1–26
Declaration 1975 **A10:**5
draft texts, chronology of **A10:**5–8
education and information, definition of **A10:**15–20
individual complaints procedure **A10:**23–6
Original Swedish Draft 1978 **A10:**6
personnel, definition of **A10:**12–14
Revised Swedish Draft 1979 **A10:**8
rules or instructions, definition of **A10:**21–2
training, definition of **A10:**15–20
travaux préparatoires **A10:**5–11
US Draft 1978 **A10:**7
working group discussions **A10:**9–11
trans-national corporations OP A26:23
travel documents A6:29
truth drugs A1:28
Tunisia
Abdelli v Tunisia case **A22:**39, 98
Ali Ben Salem v Tunisia case **A2:**23
BM'B v Tunisia case **A22:**141
complain, right of victims to **A13:**16
individual complaints **A22:**39, 93, 110, 141
Khaled Ben M'Barek v Tunisia case **A12:**29, 43
Ltaief v Tunisia case **A22:**39, 98
Mounir Hammouche v Tunisia case **A13:**22
non-refoulement, principle of **A3:**94, 112
Rached Jaïdane v Tunisia case **A22:**110
remedy and adequate reparation, right of victims to **A14:**45, 73, 90, 94
Saadia Ali v Tunisia case **A2:**23; **A22:**93
Thabti v Tunisia case **A22:**39, 98, 103
Turkey
armed conflict with the PKK, denial of **OP A32:**10
Bati and Others v Turkey case **A12:**47
definition of torture **A1:**85
independent medical documentation of torture **A12:**45
individual complaints **A22:**107
inter-state communication **A21:**18
inquiry procedure **I3**; **A20:**37, 42, 44, 62–3, 70, 80
Kurt v Turkey case **A14:**46
military regime of the early 1980s **A21:**18
national preventive mechanisms **OP A3:**8
non-refoulement, principle of **A3:**158, 181
obligation to prevent torture **A2:**33
Öcalan v Turkey case **A16:**66
system of preventive visits **OP A1:**39
systematic practice of torture **A3:**146; **A20:**42, 44
Turkmenistan
succession to CAT **A26:**13, 16–17

Uganda
corporal punishment **A16:**59
entry into force of CAT **A27:**12–13
Ukraine
cruel, inhuman or degrading treatment or punishment **A16:**82
inquiry procedure **A20:**22, 25, 30
obligation to allow preventive visits **OP A4:**34
obligation to facilitate visits **OP A14:**24
obligations to cooperate **OP A12:**29
opting out of CAT **A28:**15
Red Cross, Optional Protocol and **OP A32:**10
regional systems of preventive visits **OP A31:**12
succession to CAT **A26:**13, 16
UN Basic Principles and Guidelines *see* **van Boven/Bassiouni Guidelines and Principles**
UN Charter I1; **P3**; **A23:**1; **A33:**4; **OP A2:**24; **OP A36:**5, 9; **OP A37:**6
UN Code of Conduct for Law Enforcement Officials A10:16; **OP A2:**26
UN GA resolutions P2.2; **A3:**37; **OP A26:**32
UN Global Compact OP A26:23
UN High Commissioner for Human Rights A3:214; **A17:**40; **A20:**85; **A22:**136; **OP A5:**20; **OP A13:**2, 7; **OP A14:**6; **OP A25:**29–30; **OP A35:**13
UN Standard Minimum Rules for the Treatment of Prisoners I1; **A1:**42, 136, 148, 151, 155; **A10:**16; **A11:**21, 32; **A12:**58; **A16:**28; **OP A2:**26
UN Voluntary Fund for Victims of Torture A14:26
unannounced visits
country missions **OP A13:**35–6
facilitation of visits by NPMs **OP A20:**19–21
to places of detention **OP A12:**27–9; **OP A13:**35–6; **OP A20:**19–21
Subcommittee, obligation to cooperate with **OP A12:**27–9
United Arab Emirates (UAE)
lawful sanctions and the 'definition' of torture **A1:**60, 142
United Kingdom (UK)
Al-Adsani v United Kingdom case **A14:**100
aut dedere aut judicare **A7:**20
complain, right of victims to **A13:**13
definition of torture **A1:**25, 27, 31–2, 35, 42–3, 54, 122, 137
Draft 1978 **A7:**10
ex officio investigations **A12:**14
extradition **A8:**12; **A22:**25, 51
individual complaints **A22:**25, 51
Jones and other v United Kingdom case **A14:**101
lawful sanctions **A1:**137
mandate of the Subcommittee **A11:**17
Memoranda of Understanding **A3:**216
mutual judicial assistance **A9:**15, 19–20
national preventive mechanisms **A17:**10
non-admissibility of evidence **A15:**11
Northern Ireland case **A1:**68–9, 75; **A16:**5
ex officio investigations **A12:**36, 56
Police Ombudsman of Northern Ireland **A12:**36
obligation to criminalize torture **A4:**9
Pinochet case **A5:**168–71; **A9:**15; **A22:**25, 51
House of Lords Decisions **A5:**172–6
remedy and reparations, right of torture victims to **A14:**9, 21, 100

United Kingdom (UK) (*cont.*)
signature and ratification of the Optional Protocol **OP A27:**17
Soering v the United Kingdom case **A16:**66
Special Fund **A26:**9, 15
training of personnel **A10:**10
universal jurisdiction, principle of **A5:**4–5, 19, 22, 57, 116–17, 120–1, 126, 141
United States (US) *see also* **Guantánamo Bay**
amendment to CAT **A29:**8, 10
annual reports **A24:**24
aut dedere aut judicare **A7:**16–17, 19
child abuse and neglect, financial costs of **A16:**64
Committee against Torture **A17:**53
Committee members **A24:**24
complain, right of victims to **A13:**13
cruel, inhuman or degrading treatment or punishment **A16:**2, 12, 19, 92
definition of torture **A1:**10, 20, 24, 29, 32, 35, 42, 50, 52, 54, 61–2, 91, 96, 101, 122, 137, 143, 156
denunciations
CAT and **A31:**6–7, 9–10
Optional Protocol and **OP A33:**10
direct contact body-worn electric shock devices **A11:**42
dispute settlement **A30:**16
enforced disappearances **A1:**96
entry into force of Optional Protocol **OP A28:**9–10
ex officio investigations **A12:**13, 42
executions **A1:**143
extradition **A8:**9, 11–12
federal states **OP A29:**6
financing of Subcommittee **OP A25:**17, 22, 25
individual complaints **A22:**106
intention **A1:**101
interrogation techniques **A1:**91
lawful sanctions **A1:**52, 54, 137
mutual judicial assistance **A9:**7, 12, 18–20
national preventive mechanism **OP A3:**9–10
mandate and power of **OP A19:**8
non-admissibility of evidence **A15:**10, 22, 50, 59
obligations
to allow preventive visits **OP A4:**12
to cooperate **A12:**22
to prevent torture **A2:**11, 13–14, 57, 60, 62, 66
of states parties to facilitate visits **OP A20:**7
of Subcommittee members **OP A36:**6
opting out declaration **OP A24:**1–2
political asylum **A14:**97
preliminary investigations, safeguards during **A6:**7
privileges and immunities **OP A35:**8–9
public officials, involvement of **A1:**122
remedy and reparation, right of torture victims to **A14:**8, 21, 30, 56, 97, 104–8
reservations **A14:**30
prohibition of **OP A30:**9–10, 13
rules of procedure of CAT **A18:**7
signature and ratification of Optional Protocol **OP A27:**17
Special Fund **OP A26:**10, 12, 14
system of preventive visits **OP A1:**39, 41–2
Torture Victims Protection Act (TVPA) **A14:**92
training of personnel **A10:**9, 12
understandings **A1:**61–2
universal jurisdiction, principle of **A5:**15, 22, 37, 54, 61–2, 70, 116
US Draft 1978 **A6:**5; **A7:**8; **A8:**5; **A9:**5; **A10:**7; **A11:**5; **A12:**11; **A13:**11; **A15:**8
US Draft 2002 **OP P**7; **OP A1:**8; **OP A2:**9; **OP A3:**5; **OP A4:**9; **OP A5:**9; **OP A7:**8; **OP A10:**6; **OP A11:**9; **OP A16:**10; **OP A19:**5; **OP A25:**9; **OP A31:**4
text of **App** B.2
war on terror **A2:**62; **A14:**104–8
Universal Declaration of Human Rights (UDHR) **A1:**52
universal jurisdiction, principle of **A5:**1–180
Abu Ghraib case **A5:**159–60
active nationality principle of jurisdiction **A5:**65–70
Affair Javor case **A5:**127–8
Almatov case **A5:**180
any territory under its jurisdiction **A5:**116
definition of **A5:**58–61
Arrest Warrant case **A5:**145–7
Bouterse case **A5:**124–6, 165–6
Brazilian Draft 1983 **A5:**13
case before CAT and *Guengueng et al v Senegal* **A5:**102–8
citizenship, change of **A5:**67–8, 83–5
competing claims to jurisdiction **A5:**151–60
Congo Beach case **A5:**133–40
continuation of prosecution in cases when suspect absconds **A5:**129–41
draft texts, chronology of **A5:**7–13
dual citizenship **A5:**67–8
Ely Ould Dah case **A5:**130–2, 177
facultative nature of jurisdiction **A5:**72–8
flag principle **A5:**62–4
General Comment No 2 **A5:**66
Guatemala Genocide case **A5:**157–8
Habré case **A5:**85, 148–50, 167
Hague Aircraft Hijacking Convention 1970 **A5:**7
have reason to suspect **A5:**115
hierarchy of jurisdictions due to practical considerations **A5:**156–60
House of Lords Decisions **A5:**172–6
IAPL Draft 1978 **A5:**9
irrelevance of purpose and duration of suspect's presence **A5:**117–21
is a national of that State, definition of **A5:**81–2
lack of specification **A5:**122
Montreal Civil Aviation Convention 1971 **A5:**8
New York Hostages Convention 1979 **A5:**12
no hierarchy between different grounds of jurisdiction **A5:**57
no legal hierarchy **A5:**152–5
no presence at moment of complaint leads to non-prosecution **A5:**123
obligation to establish jurisdiction **A5:**90–114
OR, MM, and MS v Argentina case **A5:**162–4

Original Swedish Draft 1978 **A5:**9
passive nationality principle of jurisdiction **A5:**71–85
permissibility of investigation despite absence of alleged torturer **A5:**141
Pinochet case **A5:**84, 168–76, 179
presence requirement **A5:**115–50
proceedings against Hissène Habré **A5:**91–14
prosecution or extradition principle **A5:**109–14
relation to Articles 6 and 7 **A5:**87–9
Revised Swedish Draft 1979 **A5:**11
Rosenmann v Spain case **A5:**75–8
savings clause **A5:**178–80
temporal scope of jurisdiction **A5:**161–77
territorial jurisdiction **A5:**56–64
timing of presence **A5:**122–41
torture by non-officials **A5:**69
travaux préparatoires **A5:**7–54
universal jurisdiction **A5:**86–177
in absentia **A5:**142–50
victim, definition of **A5:**79–80
working group discussions **A5:**14–54
universal periodic review (UPR) **A3:**158; **A19:**86; **A22:**183; **A24:**3; **A30:**3; **OP A1:**45
unrestricted access to places of detention
by NPMs **OP A20:**16–18
by Subcommittee **OP A14:**17–20
Uruguay
definition of torture **A1:**54, 137
election to the Committee **A17:**44, 48
entry into force of CAT **A27:**12
Hugo Rodriguez v Uruguay case **A4:**47
individual complaints **A22:**26
inquiry procedure **A20:**25
lawful sanctions clause **A1:**137
non-refoulement, principle of **A3:**51, 67
obligations of Subcommittee members **OP A36:**4
obligations to cooperate **OP A12:**15
state reporting procedure **A19:**27
system of preventive visits **OP A1:**25, 39
universal jurisdiction, principle of **A5:**37, 40, 43, 48
use of force
extra-custodial **A16:**73–82
USSR *see also* **particular countries (eg Georgia); Russia**
definition of torture **A1:**11, 21, 26, 51, 67
inquiry procedure **A20:**21–2, 24–6, 29, 58
opting out of **A28:**1, 7, 9, 12, 15
jurisdiction, types of **A5:**17
non-refoulement, principle of **A3:**24–5, 27, 66, 102, 154
obligation to criminalize torture **A4:**13
remedy and reparation, right of torture victims to **A14:**23, 25
rules of procedure of CAT **A18:**33
state reporting procedure **A19:**23, 27, 30, 32, 62
succession to CAT **A26:**13
USSR Draft 1979 **A3:**13, 220
Uzbekistan
individual complaints **A22:**107
periodic reports **A19:**98
succession to CAT **A26:**13
van Boven/Bassiouni Guidelines and Principles **A4:50**
Venezuela
Hernández Colmenarez and Guerrero Sánchez v Bolivarian Republic of Venezuela case **A1:**96; **A11:**16; **A14:**49
inquiry procedure **A20:**28
state reporting procedure **A19:**29
universal criminal jurisdiction **A5:**54
victims *see* **compensation, right of victims to; complain, right of victims to; remedy and adequate reparation, right of victims to**
Vienna Convention on Law of Treaties (VCLT) **A1:**146; **A5:**105, 113; **A6:**46; **A7:**70, 76; **A25:**9
Vietnam
state reporting procedure **A19:**32
UN Fact- Finding Missions **A20:**35
visits *see* **facilitate visits by national preventive mechanisms, states' obligation to; facilitate visits to places of detention by Subcommittee, states' obligation to; preventive visits to places of detention; regional systems of preventive visits to places of detention; systems of preventive visits to places of detention; unannounced visits**
vulnerable persons
individuals vulnerable to torture risk, activities and personal factors **A3:**173–83
protection against ill-treatment in detention **A16:**41–54
violence against **A2:**46–51

women *see also* **discrimination; female genital mutilation; gender**
abortions and medical care, denial of **A2:**51
deprived of liberty **OP A11:**26–7
female judges, appointment of **A2:**45
gender balance **OP A5:**14, 26; **OP A13:**38
medical examinations **A12:**32
non-custodial measures for treatment of (Bangkok Rules) **A11:**21; **A16:**45, 49; **OP A2:**26
penitentiaries for **A20:**72
pregnant women and mothers **A11:**38; **A16:**35, 71, 80
rights of **OP A18:**56
testimony and redress mechanisms **A14:**84, 87, 112–13
violence against **A2:**46–7, 49; **A3:**132, 150, 173, 179, 183; **A14:**113, 137
sexual violence **A10:**17
Women's International League for Peace and Freedom OP **A1:**25

Yemen
cruel, inhuman or degrading treatment or punishment **A16:**60
definition of torture **A1:**140
election to the Committee **A17:**44
non-refoulement, principle of **A3:**168
Yugoslavia *see also* **Bosnia and Herzegovina; Serbia and Montenegro**
1992–95 conflict in the former **A14:**64

Yugoslavia (*cont.*)
entry into force of CAT **A27:**14
Hajrizi Dzemajl et al v Yugoslavia case **A14:**57, 59; **A16:**22, 83
inquiry procedure **A20:**28, 37
International Criminal Tribunal for the Former (ICTY) **A7:**63
non-refoulement, principle of **A3:**69
opting out of CAT **A28:**12
Ristic v Yugoslavia case **A12:**44; **A14:**46, 73
succession to CAT **A26:**16, 18–19, 21

Zaire
gross, flagrant or mass violations **A3:**159
non-refoulement, principle of **A3:**2, 146, 159
***Zardad* case** **A5:**5, 117, 120–1; **A7:**4; **A9:**19–20