Progress on the Development of the Universal Protocol on Investigative Interviewing and Associated Safeguards

73rd Session of the UN General Assembly

Side-Event on Universal Protocol for Non-Coercive Interviewing and Attendant Legal Safeguards

October 15, 2018
United Nations Headquarters
New York

Ms. Vanessa Drummond, Assistant Project Director, Anti-Torture Initiative

• On behalf of ATI and co-sponsors, the Association for the Prevention of Torture and the Representatives of Human Rights and the office of the High Commissioner for Human Rights and the Permanent Mission of Denmark, welcomes the panel.

• Conducting interviews is one of law-enforcement key competencies and the information gathered at these interviews affects results, credibility and liabilities of criminal procedures.

• Despite its absolute prohibition under international law, the use of torture persists, particularly during the first hours of custody and in the context of questioning by law enforcement.

• The manner by which law enforcement officials and other investigative bodies carry out these interviews must reflect fundamental principles such as the absolute prohibition of torture and ill-treatment under international law and core human rights standards including the interviewee’s right to dignity and physical and mental integrity.

• Although international law mandates that due process guarantees and attendant procedural safeguards, including the right of access to counsel and the right to remain silent, be provided during questioning in order to counter the risks of torture and ill-treatment, such safeguards are often absent or denied.

• In October 2016 thematic report, former Rapporteur on Torture Juan E. Mendez, called for the development of a universal protocol for non-coercive interviewing and procedural safeguards aiming to ensure that no person is subjected to torture, ill-treatment, coercion, violence, duress or threat during an investigative interview of any kind.

• Following the publishing of the report, there has been tremendous interest in the developing this protocol.

• The protocol envisioned is evidence- and research-based, empirically founded and thrives to move away from accusatory, manipulative and confession-driven techniques and debates the principles of innocence and the pursuit of the truth.

• We hope this event will provide member states with further insight into the substance of the protocol construction process.

Ambassador Peter Lehmann Nielsen Danish, Deputy Permanent Representative of Denmark to the United Nations in New York
• This is an important discussion to carry forward the call from special Rapporteur on Torture Juan E. Mendez to make progress
• From the Danish side, we are certainly keen to engage in this discussion and overall to engage in combating torture
• Denmark was elected as member of the Human Rights Council on Friday and this certainly represents a key priority in the work of the upcoming two years in Geneva and he is actively involved in carrying this forward in New York as well

Mr. Andrew Gilmour, Assistant Secretary-General for Human Rights and Moderator of the Discussion
• This is the second year running that this discussion was carried out
• This is a very delicate time because the human rights movement is suffering a backlash in general, it is important to have this discussion about this protocol
• States keep on attacking the human rights office
• Believes that security and human rights are complementary to each other and officials of human rights and security should work together

Ms. Rebecca Shaffer, Senior Legal and Policy Officer, Fair Trials Americas
• Fair Trials is an international organization which focuses on criminal rights
• They have been involved in drafting the universal protocol for non-coercive interviewing and procedural safeguards, transforming it from an idea to reality
• The security committee consists of a diverse group of experts, 15 people from 13 countries with different expertise, from law to psychology
• All of them have observed that investigative methods and practices around the world today involves questioning the individual as if he’s guilty until proven innocent and not the other way around
• These models are accusatorial, based on psychological manipulation and coercion which produces unreliable evidence, violating international law and the rights of justice of innocents and they destroy lives
• They focus on developing alternatives, an instrument that institutionalizes the right of the innocents, by providing a model that respects and prohibits torture
• Application for all the member states to comply with their obligations to review their practices to prevent torture
• They acknowledge that officers frequently work in difficult environments and are not often adequately trained to effectively respond to the situation they encounter, therefore they resolve to torture in their investigation practices
• This protocol would be an effective tool to provide clear guidance to officials
• The protocol will consolidate different standards and practices of questioning and this will lead to investigations being more effective
• Torture around the world is allowed to exist and incentivized to exist
• Particularly during the first hour of custody
• It will be an important tool to change mind sets and institutional culture that relies excessively on confessions as a cheap way to resolve crimes
The protocol will also clarify why coercive methods are ineffective which lead to unreliable information and to miscarriages of justice.

In May this year they had their first meeting on the drafting of this document, scope and substance of the guidelines.

The draft requires two separate sub-working groups. One focuses on the substance of investigative interviewing, the guide for interviewers and the other on the legal and procedural safeguards so these are the two main sections of the instrument.

They also have an advisory council to provide support and assistance with questions and challenges.

Last month, they had their first meeting in Geneva.

Group achieved consensus on key questions on substance and the goal of the protocol and created an extensive guideline of what the protocol is going to look like.

Preparing a draft of the protocol which the committee will review in December.

The drafting process of this protocol is moving quickly.

A timeline and a work plan were made so that a draft can be presented by Autumn 2019.

Drafting and advocacy is needed in order for this protocol to be effective.

So that by the time the protocol is published, countries are ready to implement it.

Advocating and promoting the protocol is a collective effort for all the stakeholders, including civil societies, academia and professional organizations.

Workshops and conferences are needed to spread advocacy.

Once compiled, this protocol will contain a set of non-binding but highly authoritative guidelines on the conduct of investigators in interviews which demonstrate that intimidation, ill-treatment and torture do not work.

The protocol brings an understanding that can be implemented in every setting, and moves closer to full prohibition of torture.

Mr. Nils Melzer, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- Ill-treatment and torture are still common practices around the world.
- Coercive interviewing does not function. It is counter-productive and goes against the rule of law.
- In order to prevent these practices, it is important that states have mechanisms that implement and protect safeguards such as medical care.
- Important initiative that states will adopt this protocol.
- In terms of applicability of this protocol: this protocol is based on criminal investigation but there are also other investigative-like contexts in which this application is also relevant.
- Two possible contexts in which this protocol could be used are:
  1. Situation of carry-law conflicts: human rights law continues to be applied in conflicts.
  2. Coercive treatment is prohibited also by the law of armed conflicts.
  3. Humanitarian law prohibits any derogation from that prohibition under all circumstances.
  4. Torture-like treatment carried out for reasons related to armed conflicts classifies as a war crime.
5. Prohibition of torture treatment is recognized as a rule of law and to some extent by the rule of law to prevent torture treatment, its prevention is necessary also in situations of armed conflicts so that does not exclude the applicability of this protocol.

6. Based on his latest report at the human rights council, the practical importance to apply the protocol also in this context, it is important to remember that given the big migration problem spread across the world, migrants are treated aggressively and with hostility, sometimes violating their human rights, especially when migrants are held in administrative detentions outside the criminal justice system, they often do not benefit from legal counseling or human rights.

- The universal protocol could provide protection to people such as migrants in a vulnerable position
- Today we know that the only reason why coercive practices are carried out provokes physical and psychological destruction of the victims and their families
- Scientific research shows that coercive torture and ill-treatment are counter-productive for the investigation of crimes based on facts, truth and the law. Does not produce tangible results
- Stability and security are instead undermined. Now we have certainty of the ineffectiveness of these practices
- We now have human and acceptable alternative measures and this protocol will set the standards it will then be up to states to look at the facts
- Economic, social and human cost of criminality, insecurity and corruption
- Establish facts to combat criminality and respect the rule of law
- The international community should support the protocol
- Convinced that the protocol represents is a giant leap of mankind towards prohibiting torture

Mr. Jens Modvig, Chairperson, Subcommittee on the Prevention of Torture

- Encounter culture based on confession only
- This culture is conducive to torture
- Brutal practices and threatening the interviewee may often solve the case and provide the desired confession, produces a high rate of “solved cases”
- Provision obliges counties that all people who are deprived of liberty are interviewed in a way that prohibits the use of torture
- Article 15: each state party shall ensure that any statement made as a result of torture shall not be used as evidence in the trial
- Convention against torture provides two state obligations to counter-act the use of torture in interrogations: ensures instructions to those interrogating the suspect not to use torture as part of the interrogation and ensuring that judges do not make decisions based on confessions made using torture treatments
- The causes of the dysfunction of the criminal system are multifactorial: state parties need to be told more precisely what they need to do. In this respect the protocol will be a very useful tool, provided with training in investigative interviewing
- Tangible protocol to refer to
- Community will benefit considerably from the existence of the protocol to be adopted in the training and the procedures
Committee can play a key role in securing awareness and use of protocol to state parties
Protocol included in specific recommendations to state parties

Sir Malcom Evans, Chairperson, Subcommittee on the Prevention of Torture
Committee against torture receives reports that countries have produced, scrutinizes them and gives them recommendations while the committee on the prevention of torture conducts on-site visits and makes its own reports to then present to countries and give them recommendations based on their own reports
Focuses entirely on preventive work
First hour when a person is taken to detention is when a person is more at risk of torture and ill-treatment
Safeguards are well-known: the right to inform a person of detention, the right to a lawyer, the right to know what the rights are
The needs to repeat what is well-understood
On the other hand, the need to change institutional practices and beliefs against torture treatments
Effective safeguard must be in place during that first-hour period of detention
Safeguards alone are not enough: they must be related to the entire process
importance of difficulties of investigation
people investigating crimes have an important and difficult role in the society
Improper and unfair investigation leads to an improper and unfair trial and undermining the very point of the arrest and the investigation itself
Confession used to be described as the “queen of proofs”, the best way of getting evidence was through confession
Myopia to ill treatment when people have been ill-treated, to corruption, to violence, effective safeguards require an effective criminal justice
Having safeguard for a flawed process is only little progress, what is needed is a more holistic approach and the protocol serves this purpose
Safeguards further into operational practices and change nature of interviewing and investigation, respecting the integrity of the convicted person
Conducting visits to detentions around the world, one of the striking things is the lack and faith in the integrity of the criminal justice process which exists in so many places
Many times, we have run into and spoken face to face with detainees who had been subjected to physical ill treatment but when speaking to them, they do not see it as ill treatment at all, for them it is what they expected to happen. Quite shockingly many may say that they have been well treated
In far too many countries, the fundamental legal safeguards do not exist at all or exist only on paper
No legal aid schemes, no lawyers, no medical staff available, no interpretation, no information available in other languages etc.
Twin track approach could be a solution: to formulate expectations on how the detainees should be treated and this protocol is hugely important for this reason
Mr. Gisle Kvanvig, Programme Director for ASEAN/Vietnam at the Norwegian Center for Human Rights, Faculty of Law, University of Oslo

- Working with the Norwegian police on implementing investigative interviewing in a number of different countries, started in Vietnam, continued in Indonesia, Thailand, Brazil and China
- Key lessons learnt from working with the police, intelligence and military in these different countries and contexts
- Investigative interviewing is expensive and controversial
- Investigation differs depending on the political and criminal context
- Interviewing is when the citizen comes face to face with monopoly of violence and with the state
- And for governments, investigative interviewing because police violence undermines legitimacy
- Started to work with Norwegian police because looking at their interviewing method that was a way to do fair trials
- Countries’ penal law and penal codes have been integrated in human rights obligations through treaties
- Investigative interviewing provides a mean for domestic officers to uphold domestic law, in that way we can also engage legal scholars in these countries in terms of the training they provide, law enforcement and security to personnel
- We can now tell officers what to do, not only what not to do
- Law enforcement officers are very receptive because these practices are part of their jobs even though they do not like to use violence, therefore they will listen if there are alternative ways
- Investigative interviewing methods can be changed: instead of starting with an accusation, they can start with an open question. These interviews work better, lead to better results
- Policy and security officers, their training and education is not well structured
- They need more of an education than training
- Regarding how much time they spend learning how to interview victims, suspects etc., they spent almost no time on this, they will spend weeks on marching, shooting, driving fast but in some countries, during 5-year education, they spent almost 3 hours learning how to talk to people. They received no training in how to do a core task
- In other countries, they spent a lot of money training officials
- Corruption also prevents fair trials to happen. For example, when judges buy their positions instead of studying law
- Rule of law: it is hard for people to know how to do the rule of law, much like fair trials or human rights
- Investigative interviewing can be a way to do fair trials, to uphold to human rights and a way to do the rule of law
Q&A SESSION

Mr. Andrew Gilmour, Assistant Secretary-General for Human Rights and Moderator of the Discussion
- Asks for IDEAS FOR ADVICACY: HOW DO WE ENSURE THAT PEOPLE ADOPT THE PROTOCOL?

Journalist in New York
- Monitoring the human rights violations in Turkey and around the world
- Many people died under torture
- Torture happened only during first hour of detention, but this torture is ongoing
- 10 years of giving forced confessions and confessions are used as evidence in proceedings, this is not being done by judges and convicted people get changed with 10 years or more
- There should be convention on interrogation, standards must be set up to ensure torture is made unattractive by police officers
- And how can his organization and civil societies contribute to this protocol in ensuring that it is implemented by member states

Ms. Rebecca Shaffer, Senior Legal and Policy Officer, Fair Trials Americas
- In terms of making sure that the instrument is responsive to these situations and to the applicability of this instrument, the methodology and the standards that the protocol is going to set up should be applicable to every context, every testimony
- Planning workshops around the world to engage with law enforcement and civil societies around the world and educate countries on how to use this instrument

Mr. Nils Melzer, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Talks about his visit in Turkey: there was a calm atmosphere in terms of abuse, no confessions, important that law enforcement establish facts in finding the truth, that is not always the case
- Important is also that we presume that law enforcement would like to establish facts and the truth but that is not always the case
- Establishing a protocol will help to de-mask the real intention of coercive interviewing
- This is because officials will have access to non-coercive methods, more effective practices through this protocol
- If coercive methods will still be used, that will signal that that country’s justice system is not interested in finding the truth, but it is interested in improving the statistics of “solved cases”, creating false evidence, protecting corruption schemes etc.
- Everyone knows that that kind of interviewing is ineffective in finding true evidence

Mr. Jens Modvig, Chairperson, Subcommittee on the Prevention of Torture
- One of the challenges that the committee against torture identified is on the de-facto level which applies to implementation of the right safeguards
• How do we know that these safeguards are enjoyed by everybody deprived of liberty?
• This is the real challenge here

LUNA from the Anti-Torture Initiative
• There are many training programmes that should look at the protocol and integrate it as an effective tool but then we should look on the ground
• We face this in our work in Jordan when Danish police officers talk to Jordanian police officers, this is a much more than a human right problem
• When you worked in Vietnam and China with Norwegian police officers, did you encounter these problems too? Did Norwegian police officers see how things were implemented on the ground?

Mr. Gisle Kvanvig, Programme Director for ASEAN/Vietnam at the Norwegian Center for Human Rights, Faculty of Law, University of Oslo
• It varies from country to country how they open up about they teach at the academy and what methods they use, but they do open up about what they have and most times we find that they do not have much
• This was the case in Norway a decade or two ago, and this is the case in most European country. What they teach in academies is very weak
• We have requests from another 30/40 countries and we are only 5 people so there is a limit to how much we can do
• If you are able to have peer to peer training with officers on this method, they will welcome it and implement it, it is not very hard to implement new practices

CAITLYN from UNICEF
• You mentioned the importance of the protocol applying also to armed conflicts and to other situations, has there been any resistance from member states who would like a protocol more focused in law enforcement contexts but necessarily implemented in military and other contexts?

Ms. Rebecca Shaffer, Senior Legal and Policy Officer, Fair Trials Americas
• Challenging issue: push back is not so much from member states but even within our constituent body we would like to have an instrument that responsive to every legal context and that it becomes so broad that it is useful in a particular setting
• We are trying to make it as broad as we can because we believe that the methodology is applicable to any kind of context

Mr. Nils Melzer, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
• We are trying to replace traditional interrogation which makes use of torture, forcing someone to confess
• We need to take a step back, this is about having a scientific approach to establish facts in the military or in any other forms of the criminal justice system
• How do we look at this? Do we look at prisons as a garbage part of the society or do we look at prisons as a recycling bin since some/most detainees come back out?
• We must invest in that/prisons and correcting the criminal law and the justice system

Sir Malcom Evans, Chairperson, Subcommittee on the Prevention of Torture
• Not all investigations will lead to a trial, so it is not just policing
• It takes a very long time for these cultures to change
• It takes a huge amount of education to re-educate people and correct the entire infrastructure around it, the people connected around it must be re-educated
• Needing to map the entire terrain that needs to be addressed for this to be implemented effectively

Mr. Andrew Gilmour, Assistant Secretary-General for Human Rights and Moderator of the Discussion
Concluding Remarks
• How do we get people to adopt it? Otherwise, the protocol will be just another unobserved UN document. We need diplomatic strategy
• Peer to peer review
• As we are in the part of the human rights side, people are getting fed up of being told what to do. Therefore, our approach needs persuasion, more so now than in the past
• Countries are now associating human rights to terrorism and the office of human rights is under attacked by countries
• There are going to be a lot of push-backs
• As we are moving towards migration compact, we have in many countries treatments towards migrants is becoming more and more hostiles, from local officials too
• Therefore, this protocol could indeed be a giant leap towards fixing other humanitarian problems
• We need more people on board to persuade countries to fully implement this protocol
• We need very good ideas on how to sell this to people