

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

Thematic report of the Special Rapporteur on Torture

52nd Session of the Human Rights Council

Concept Note & Questionnaire

I. Background and purpose of the report

The Special Rapporteur’s forthcoming (and second) report¹ aims to study and share a range of domestic legislative, investigative and prosecutorial practices in order to address multiple challenges, impediments and obstacles standing in the way of effective accountability and justice for victims and survivors, and to allow societies to heal and recover. Notwithstanding the growth in the types and range of international venues providing justice to victims of crimes of torture,² justice, accountability and reconciliation will only be a meaningful reality when national systems operate and are capacitated to act as the first – or primary – responder. The Special Rapporteur’s report will hone in on the duty to investigate crimes of torture at the national level, which starts from establishing all acts of torture as indictable offences in national law, and proceeds through a process of complaints and investigations, and concludes only when a prosecution is completed to final judgment and a punishment is imposed that is commensurate with the gravity of the offence, and victims benefit from a just remedy; or the case is dismissed after an independent and fair procedure.

The widespread and persistent use of torture and other inhuman treatment or punishment is well documented, yet investigations and prosecutions are rare and the collection of statistics remains problematic. A first challenge is that while a growing number of countries have established an explicit crime of torture in national laws, many others still have not legislated to outlaw torture, or their laws do not adequately capture the globally accepted understanding of torture. An absence of a legislative foundation is a problem not just theoretically but very practically, as all else flows from making a clear statement that torture is not tolerated and that all acts of torture will be investigated and prosecuted and perpetrators sentenced in accordance with the law and commensurate with the gravity of the offence. Many countries grant immunities or amnesties for this egregious crime and perpetuate cultures of impunity, others permit statutes of limitations, or have not clearly outlawed defences of superior orders.

Even where laws are in place, there are practical obstacles to launching investigations and prosecutions; meanwhile there are widely inconsistent sentencing laws and practices. Assuring victims’ participation and protection in domestic criminal proceedings is a vital ingredient to a successful investigation and prosecution, especially relevant given the imbalance of power in such criminal cases. The report is interested to learn about a wide range of good practices, including good practices in respect of witness and victim protection schemes, as well as legislation that protects whistleblowers and against reprisals.

¹ To be presented to the 52nd session of the Human Rights Council.

² Most notable has been the development of international criminal law and the associated International Criminal Court, other ad hoc and hybrid tribunals. These venues, however significant, have their limitations, in particular their focus has been on prosecuting the most senior perpetrators, leaving victims of rank-and-file soldiers or public officers without a remedy.

On the positive side, the exercise of universal jurisdiction has grown as an important mechanism, alongside developments in evidence documentation and interviewing, mutual legal assistance, and new technologies. The report is interested to learn about good practices in investigations in complex situations, such as evidence gathering during ongoing armed conflict, extraterritorial offences, and the relationship between domestic and international investigations. Key themes throughout the report will include independence and impartiality, promptness, adequacy and effectiveness, accessibility and safety, public scrutiny and transparency and rights and remedies for victims and survivors.

Previous Special Rapporteurs have prepared reports on accountability and impunity³, forensic aspects of investigations⁴, and extraterritorial application of the prohibition of torture referring also to investigations⁵, which remain informative, albeit they generally canvassed macro-level challenges and solutions. In contrast, the Special Rapporteur's forthcoming (and second) report aims to tackle legal, political, institutional, practical and other challenges and obstacles hindering national investigations and prosecutions, gather and share good practices in addressing those challenges, and develop a set of concrete and implementable recommendations.

II. Questionnaire

In order to inform work on this report, the Special Rapporteur seeks inputs and submissions to her report. She would welcome information pertaining to:

- (i) **Challenges, impediments and obstacles to effective national investigations and prosecutions of acts of torture:** What are the main impediments preventing full and prompt investigations into allegations of torture – consider matters such as gaps in legal and regulatory frameworks, political-cultural-leadership, institutional, practical and other challenges?
- (ii) **Regulatory frameworks:** How is torture (and other forms of cruel, inhuman or degrading treatment or punishment, as applicable) criminalized in your national legislation? Please provide examples (and copies) of national laws that criminalize torture (and other forms of cruel, inhuman or degrading treatment or punishment, as applicable), and approaches to questions such as immunities, amnesties, statutes of limitations, defences of superior orders, and sentencing.
- (iii) **Elements of human rights-compliant investigations and prosecutions:** Please provide concrete examples of laws, regulations or practices that ensure that torture investigations and prosecutions are:
 - a. independent and impartial,
 - b. prompt,
 - c. adequate and effective,
 - d. accessible and safe,
 - e. open to public scrutiny and transparent, and
 - f. secure rights and remedies for victims and survivors.

³ On Impunity A/76/168; A/65/273; on Universal Jurisdiction A/HRC/4/33, and on Reparations A/58/120, paras 29-35.

⁴ A/69/387

⁵ A/70/303

- (iv) **Mechanisms/institutions/entities involved in complaints, investigations and prosecution:** What are the institutional arrangements in place to secure independent and effective investigations and prosecutions of allegations of torture (and other forms of cruel, inhuman or degrading treatment or punishment, as applicable)? How are complaints initiated? Please elaborate on competence, composition and expertise, working methods, legal and regulatory framework, etc.
- (v) **Victim participation and protection:** What measures are in place to secure victim participation in proceedings involving allegations of torture, and how are their rights and safety secured? Are there special arrangements and protections available for victims of sexual and gender based violence? Please give consideration also to witness protection schemes, as well as whistleblower legislation and protection and other measures taken to ensure protection of complainants against reprisals.
- (vi) **Complex investigations:** Please share concrete examples of handling complex investigations and prosecutions, including those where the crime was committed outside the territory of the prosecuting state (extradite or prosecute), during ongoing armed conflict or occupation or ongoing public emergency. Do you have experience of mutual legal assistance in torture cases, or universal jurisdiction? Also please share information about handling situations where both domestic and international investigations and prosecutions are occurring simultaneously.
- (vii) **Evidence collection and innovation:** Please provide examples of innovative practices to secure evidence collection and any associated challenges around use of new technologies, open source documentation, application of the Istanbul Protocol⁶, or other innovative practices and developments.

In responding to the questionnaire, please consider national criminal as well as military-security laws, as well as applicable jurisprudence of national courts.

Please share in annex copies of legal provisions referenced in one of the following UN languages (English, French, Spanish or Arabic)

Short on time?

If you have limited time, the Special Rapporteur would still like to hear from you. Instead of completing the full questionnaire, you may choose instead to:

- Send us with copies of relevant laws or provisions, in English, French, Spanish, or Arabic;
- Pick and choose the parts of the questionnaire you wish to contribute to that are most relevant to your context; or
- Provide a summary of how your (civilian or military) criminal justice system works to tackle the crime of torture and your experience in investigating and prosecuting actual cases, explaining the main types of cases (e.g. war crimes, non-state crimes, or police misconduct, etc.), and identifying some of the outstanding challenges to holding accused accountable. The Special Rapporteur would like to hear what has worked particularly well and where challenges remain.

⁶ The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

- You may also choose to engage with the questionnaire only in regards to ordinary criminal law, or alternatively, military law.

We will take care of the rest.

Kindly send your contributions to: hrc-sr-torture@un.org, mentioning in the subject line “Input to the Report of the Special Rapporteur on Torture”, by **25 November 2022**. Please note that responses should be 2500 words maximum.

Thank you in advance for your valuable contribution to the work of the mandate.