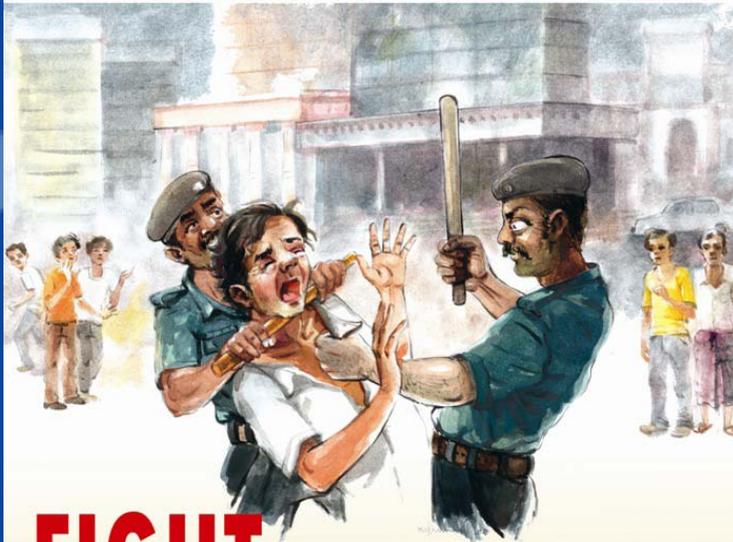


IS TORTURE PUNISHED IN YOUR COUNTRY?



**FIGHT
AGAINST TORTURE
MAKE IT A
CRIME**

UN International Day in Support of the Victims of Torture, 26 June.

Lesson Series 61

The right to be free from torture

Summary

While international principles endorse an absolute prohibition against torture, the practice is prevalent throughout Asia. This lesson discusses the act of torture, its relationship to other human rights and international provisions against it. The lesson also examines the situation regarding torture in 10 Asian countries.

In this way, the lesson is an attempt to increase public awareness and debate on the nature of torture and its consequences for society as a whole, for democracy and the rule of law.



Theme: The right to be free from torture

The Issue

The right to be free from torture is absolute and constitutes a non-derogable state obligation. Despite this, countries throughout Asia continue to see widespread acts of torture committed by police and military officers. In many countries, policing systems are inextricably bound to the practice of torture. The direct or indirect state sponsorship of torture, violence and ill treatment towards its citizens has grave implications for state-societal relations, as well as for individual well being. In fact, the majority of countries where torture is prevalent are facing numerous political and social crises, including ineffective rule of law, instability and poor realization of basic human rights.

Despite the prevalence and gravity of torture, there is a lack of effective action and debate on the issue. Awareness on how the practice of torture is fundamentally detrimental to the realization of ALL human rights is also missing. It is crucial for public authorities, civil society groups, professionals, academics and ordinary citizens to understand the radical nature of the fight against torture, if other social ills are to be effectively addressed.

The Lessons

Lesson 1 discusses torture and its relationship to other human rights.

Lesson 2 profiles the practice of torture and relevant legal provisions in 10 Asian countries.

Lesson 3 provides an outline of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Cover illustration: Asian Human Rights Commission (AHRC) poster, 2009.

Lesson 1

This lesson will discuss the definition of torture and how it affects the realization of other human rights.

A. What constitutes torture?

Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT or ‘the Convention’) defines ‘torture’ as

“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.”

According to this definition, the following three elements make up an act of torture:

- Causing physical or mental pain and suffering;
- Carried out by a state officer or someone acting in official capacity, or anyone else with the consent/acquiescence of a state official;
- With the purpose of obtaining information, intimidation or discrimination.

The gravity of the act of torture stems from it being committed by state officers, officers whose duty is to serve and protect citizens. It is this aspect that distinguishes torture from other violence crimes such as domestic violence and grievous hurt.

Arguments are sometimes made that existing legal provisions relating to assault, wrongful detention/confinement are enough to address acts of torture. This is incorrect; such provisions do not include the following aspects:

- The act of torture is specifically carried out by state officers (or those acting in official capacity or with their acquiescence);
- The act of torture is not limited to a specific purpose, such as obtaining confessions;

- Torture includes both physical and mental pain or suffering;
- Torture is a punishable offence with grave penalties.

It is therefore essential that a specific law with a comprehensive definition of torture is enacted, as required by article 4 of the Convention.

Another important element in understanding torture is that there can be no justification for it, no derogation from its absolute prohibition. Innocent or guilty, all individuals have the right not to be tortured.

Differentiating between torture and other crimes:

Torture & ill treatment	Other crimes
Police violence towards demonstrators	Civilians assaulting individuals
Public officials assaulting individuals	Wife beating
Teachers hitting students	Parents hitting children
Individuals beating someone in view or with the knowledge of police/ public officials	
Law enforcement officers assaulting suspected criminals	

Cases of torture documented by the Asian Human Rights Commission in 2009:

On July 12 **Sushan Limbu** was arrested and detained by **police officers** from Morang, **Nepal** on charges relating to an earlier dispute with a hotel owner. The next day, July 13, Limbu and another detainee, **Bhakta Rai**, were beaten for several hours by the police, first in their cells and later in public, in front of a large crowd. Both detainees were forced to strip down to their underwear and to crawl on their knees and elbows on a pebbled and concrete surface for an hour, severely injuring their knees and elbows. They were beaten with iron rods and bamboo sticks, punched, and kicked by officers wearing boots. Several witnesses were able to record the abuse on their mobile phones.

Subsequently, the officers reportedly pressured several people, including members of political parties, to issue statements blaming the public for the beating, and not the police. One officer forcibly erased video evidence of the beatings from the mobile phones of witnesses. Moreover, several human rights defenders who visited Limbu in hospital received threatening phone calls warning them against pursuing this case. It is also alleged that police are continuing to torture Limbu and threatening to frame him for the possession of a weapon [See AHRC-UAC-086-2009 for more details].

Torture or not?

- √ Carried out by state officers
- √ Causing physical or mental pain and suffering
- √ With the purpose of obtaining information, intimidation

Mansur Utto Salih, 32 years, was abducted on January 9 and taken to the headquarters of the 6th Infantry Division of the **Philippines Army**. There, soldiers applied electric shocks to his sex organs, his body and behind his ears several times, in an attempt to secure his confession to masterminding the bombing in Kidapawan City and burning of houses in Midsayap, North Cotabato in 2008. For seven consecutive days, Salih was tortured in the same manner in three different interrogation rooms. He was only given food and water on two occasions. Salih was kept in detention until April 7 [See AHRC-UAC-081-2009 for more details].

Torture or not?

- √ Carried out by state officers
- √ Causing physical or mental pain and suffering
- √ With the purpose of obtaining information, intimidation

After arresting **Sadiq Ali** from a roadside hotel on June 17, **Pakistani police officers** took him to the Gilgit Judicial Magistrate with a First Information Report (FIR) regarding the murder of a government worker. Even though Ali's name was not in the FIR and he had not been in Gilgit on the date of the murder (June 13-14), the magistrate still granted remand.

On June 24, without registering the case or asking permission of a magistrate as required by law, intelligence agents took Ali from the police station for investigation into anti-state activities. He was brought back to the Gilgit police station on June 26, unconscious and bleeding, in critical condition. He died at around 4am on June 27, reportedly with deep open wounds near his kidneys and around his hips, and with bloody fingernails and toenails [See AHRC-UAC-069-2009 for more details].

Torture or not?

- √ Carried out by state officers
- √ Causing physical or mental pain and suffering
- √ With the purpose of obtaining information, intimidation

On April 29, **Zaenal M Latif** was arrested by a group of **Indonesian police officers** who repeatedly assaulted him around his head. He was taken into an interrogation room and punched in the face and back, with the purpose of forcing him to confess to being a drug dealer. One officer burned Latif's left hand with a cigarette. He was then unexpectedly released. Less than an hour later, the police officers arrived at Latif's room and subjected him to further physical abuse in an attempt to force a confession out of him. They punched his face and body and trampled on his hands. When the officers were unable to find any evidence to prove Latif as a drug dealer, they took him back to the police station. There he was told that if he did not confess by 5am the next morning, he would be killed.

On April 30 Latif was told to clean up and change his bloodstained clothes, before being released. He was warned not to tell anyone about what had happened to him [See AHRC-UAC-065-2009 for more details].

Torture or not?

- √ Carried out by state officers
- √ Causing physical or mental pain and suffering
- √ With the purpose of obtaining information, intimidation

Upul Palitha Mawalag, a taxi driver in **Sri Lanka**, was stopped by **police officers** for a routine search of his vehicle on May 7. It was alleged that his two passengers were found to be carrying drugs. The three were taken to Bluemendhal Police Station but the passengers were released, allegedly after paying a bribe. Mawalag reports having been stripped naked, tied to a chair and beaten severely with a stick by officers in a bid to force a confession. He was charged with transporting drugs, and is currently in remand at Welikada prison [See AHRC-UAC-093-2009 for more details].

Torture or not?

- √ Carried out by state officers
- √ Causing physical or mental pain and suffering
- √ With the purpose of obtaining information, intimidation

Punishable crime

The above cases indicate the routine and widespread nature of torture within law enforcement agencies throughout Asia. Over many years of work, the AHRC has built up a considerable amount of torture documentation, which can be found at <http://notorture.ahrchk.net>. In most countries, including Nepal, Indonesia and Pakistan, there is no law prohibiting or punishing torture, which means that victims have no means of redress. A first step in eliminating the practice and providing justice to the victims is to enact a specific law against torture.

Such a law should incorporate a broad definition of torture as found in the Convention and provide serious punishment to the perpetrators.

B. The importance of working against torture

There has not been any significant global or regional campaign against torture in recent years. In fact, particularly after the ‘war on terror’, countries have begun to erode the absolute prohibition against torture, and its status as a crime against humanity. Government officials, academics, professionals and even civil rights activists throughout Asia are blinded to the perversity of torture and its affect on society, democracy and rule of law. Instead, the mention of torture raises eyebrows and queries involving the (in)frequency of the acts and the nature of the offence resulting in torture.

By the use of torture, the state is sanctioning violence and ill treatment for the purposes of confession, punishment, intimidation and personal gain. Inevitably, this practice permeates into all levels of society; from a police officer assaulting a suspect of drug trafficking, police officers begin to assault or threaten to assault (in exchange for bribes for instance) petty criminals or complainants of other crimes. As the practice widens and spreads, the propaganda accompanying it suggests that torture is necessary for effective criminal investigations, and that those being tortured are deserving of such brutality.

Such propaganda is blatantly false. It has long been accepted that torture is a crude and inaccurate method of criminal investigation; torturing an individual to extract information cannot guarantee that the information is valid. Most persons will confess to anything while undergoing severe pain. Similarly, torture as punishment is disproportionate and ineffective. The purpose of punishment is not just retribution for the crime committed, but also deterrence to future crimes. It is not the severity of punishment that deters persons from committing crimes however, but the certainty of punishment. These principles were clearly elucidated by the 18th century Italian philosopher Cesare Beccaria in his treatise *On Crimes and Punishment*, and were quickly adopted throughout Europe and many of its colonies.

Torture and other human rights

Torture affects the enjoyment of all other rights. If you voice your opinion regarding government education policies, or the suspicious expenses incurred by a local politician and you are subsequently beaten up and put in prison, your freedom of expression and opinion is curtailed. In the same manner, if you are assaulted and evicted from your home/land by the police under the influence of wealthy developers, your rights to housing, land and/or food are violated. Severe and brutal torture—together with a lack of medical attention, food and water—can result in death, thereby depriving individuals of their right to life.

Torture thus prevents you from enjoying your fundamental rights. It is used by state officers to punish you, be it for a crime committed or for doing anything that inconveniences them. It serves a dual purpose—as punishment for an act, as well as deterrence to future acts. Corruption and personal gain are common reasons for torture as well. In fact, the practice of torture can be a lucrative business for many state officials.

In several Asian countries, torture is also used as a means of criminal investigation. Criminal charges are filed based on ‘confession’ statements made by victims of severe torture and assault. When this occurs, it impinges on the right to fair trial.

Fair trial

The litmus test of the enjoyment of basic rights is the realization of the right to a fair trial. Fair trial is the means by which justice is served for the abuse of any rights, as well as how future such abuse can be deterred. Without the possibility of a fair trial, there is no way to guarantee basic human rights. Apart from serving as a

remedy to the victim, fair trial serves as a legitimate and rational way to determine punishment for the accused. Both of these aspects are equally important for a functioning and harmonious society.

There are several conditions necessary for the guarantee of fair trial, including:

Background requirements	Pre-trial rights
Independence of judges and lawyers Right to effective remedy	Right to liberty and security Rights upon arrest (including freedom from torture and inhuman treatment) Right to habeas corpus Presumption of innocence Proper investigations
Access to lawyers and legal services Independent and competent tribunals	

The importance of these elements is to eliminate any possibility of arbitrary or biased punishment imposed by the state, on its citizens. If the judge is politically motivated for instance, the individual expressing dissent with government education policies is unlikely to get a fair hearing; the judge may decide on a harsher punishment than prescribed in law. On the other hand, if the right to habeas corpus does not exist, the police may imprison the individual indefinitely, with no recourse to judicial proceedings. For the person evicted from her home, the lack of effective remedies may mean she has no way to complain against the violation of her right to housing. In all three cases, the crime and punishment are decided arbitrarily, outside the purview of a fair trial.

The pretrial rights also ensure that torture is not used at any point during arrest and investigation, which would compromise the rights to liberty and security, to presumption of innocence and to impartial and proper investigations. If these rights are compromised, so is the right to a fair trial. Without a fair trial, no other human rights can be realized, including the rights to due process and effective remedies.

If the above preconditions to a fair trial were met, the individual imprisoned for his views on state education policies would be freed, while the responsible police officers would be prosecuted and punished for illegal assault and detention. Similarly, the victim of forced eviction would have a channel through which to complain. It is therefore essential that elements needed for an effective fair trial are first established, in order for punishment to be certain, swift and proportionate to the crime. This is necessary for the harmonious functioning of society. As mentioned before, it is widely accepted that true deterrence of crime comes from the certainty of punishment, rather than its severity.

Rational punishment

Any punishment outside the sphere of fair trial is not only illegal, but unnecessary. Fair trial is crucial in determining appropriate punishments for crimes committed, and to eliminate the possibility of arbitrary punishments imposed by the state, including torture and inhuman treatment. The use of violence and torture as a punishment or a mode of social control by the state has repercussions on various levels. First, it is impossible to draw a line between when torture is to be used and when not. Invariably, violence will become the solution for everything, leading to a conflicted and perhaps even militarized society. Second, when violence becomes the norm, it replaces other modes of social control, such as public discussion and rule of law. In turn, this will displace the ideals of democracy and human rights, for which public participation and supremacy of the law are crucial.

C. The social impact of torture

Torture has an impact on individuals as well as on the society at large. It has a profound impact on an individual's physical and psychological health, which can impair economic and social productivity. It can also result in social problems such as domestic violence, robbery, and other criminal activities. Furthermore, the impact of torture can also be transferred from one generation to another (parents to children), termed 'secondary trauma'.

Individual level

- It has a profound, immediate and long-term impact on physical and psychological health. Research indicates that the psychological effects of torture can often be worse than the physical effects. Some of these include:
 - Lack of self confidence, inability to trust;
 - Anger, fear, anxiety and restlessness;
 - Insomnia, nightmares;
 - Recurring and intrusive memories;
 - Breakdown in family and personal relationships;
 - Breakdown in wider social and community relations.

Physical symptoms of the psychological effects can be a lack of energy & appetite, heart palpitations, headaches, depression.
- The economic and social productivity of the individual and perhaps even her family is affected.
- The individual's home/family life is disturbed. The family may have to leave their community due to discrimination, resulting in further economic problems. This can affect the education of children as well.

- The individual/family's relationship with the state becomes influenced by hate, fear and distance from the law enforcement agencies. Their relationship with society may also be thus affected.
- Individual perpetrators of torture and violence become brutalized by their acts, which will also affect their family and social relationships.

Societal level

- A society composed of traumatized torture victims and family members as well as brutalized state officers is far from healthy. Such an environment can lead to a rise in anti-social and criminal behaviour, as well as poor economic performance.
- Torture makes human rights, democracy and rule of law irrelevant. This means that society is now based on irrational means. Corruption and violence will then increase, particularly against marginalized and vulnerable groups. In turn, this will shrink the social space for dialogue and compromise.
- An increase of violence in the public sphere will encourage violence in the private sphere.
- There will be a widespread climate of fear and distrust, which is detrimental to growth and development. If torture and violence become a way of social control, pockets of resistance may develop, some of which will invariably be violent.
- At the extreme end of the spectrum, society will descend into chaos and violence, with gross human rights violations taking place.

Questions For Discussion

1. Do you know of any cases of torture? Discuss the elements making up an act of torture and how it differs from other crimes.
2. What makes torture a heinous crime? Why should the right to be free from torture be non-derogable?
3. Think of reasons for and against using torture as punishment.
3. Discuss the links between torture, human rights, democracy, rule of law and fair trial.

Lesson 2

This lesson provides country overviews regarding the practice of torture and domestic law in 10 Asian countries.

1. Bangladesh

Legal framework regarding torture:

On the Convention against torture:

Bangladesh ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 5 October 1998, but a decade later, the country still does not have any specific law criminalizing torture. Bangladesh has not ratified the Convention's Optional Protocol.

A draft bill criminalizing torture and custodial death, prepared in accordance with CAT obligations, was submitted to parliament as a Private Member's Bill by Mr Saber Hossain Chowdhury on 5 March 2009. The bill has primarily been reviewed by the Private Member's Bill Review Committee led by former law minister Mr Abdul Matin Khasru, a supreme court lawyer.

Existing domestic law:

To be free from torture is a fundamental right under article 35 (5) of Bangladesh's constitution: "*No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.*" In reality however, torture is not a punishable crime in Bangladesh. While the Penal Code of 1860 (sections 330, 331 and 348) penalizes offences relating to causing hurt or wrongful confinement for the purpose of extracting confessions, these provisions do not define torture as a crime or meet the standards of the CAT.

Meanwhile, section 46 of the constitution empowers the government to extend immunity from prosecution to any state officer on any grounds: "*... Parliament may by the law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or restoration or order in any area in Bangladesh*". This provision is used to protect police and joint operations units from prosecution for human rights abuses. In a similar manner, sections 132 and 197 of the Code of Criminal Procedure, 1898 protect public servants from prosecution unless prior government approval is obtained. Under current interpretation of these provisions, courts refuse to take cognizance of crimes committed by state agents without the prior approval of the state. This reflects the country's moral and jurisprudential deficit.

Furthermore, until recently, the lower courts—Magistrates’ and Sessions Judges’ courts—had been under the control of the Ministry of Home Affairs and the Ministry of Law, Justice and Parliamentary Affairs. The courts were subjugated to the extent that even now, they behave as if they are not accountable to a superior court, but to a government officer; their allegiance lies in the executive, not the judiciary. Additionally, the process for complaints, investigation and prosecution of cases involving allegations against state agents is largely non-functional.

Compensation:

Since torture is not criminalized, torture victims cannot get any compensation in Bangladesh at all. Despite the fact that the right against torture is a fundamental constitutional right, there is no specific law providing compensation for victims.

Witness protection:

Bangladesh has no specific law concerning witness protection, and nor does it have any provisions protecting witnesses in other laws, including its criminal procedure code. Although courts may impose relevant conditions when granting bail to the accused, these are often violated with impunity. The lack of judicial commitment in addressing witness protection has been demonstrated through years of neglect. In these circumstances, witnesses in torture cases remain beyond legal protection, resulting in further threats, intimidation and even the possibility of having fabricated charges filed against them.

The magnitude of the problem:

The endless practice of torture practiced with impunity has entrenched fear within Bangladeshi society. People have lost faith in the criminal justice system. Victims refrain from complaining about torture due to the fear of further persecution. Even if they were not afraid of making complaints, they would not be able to afford the bribes and huge litigation expenses that make up the complaint process. Ninety per cent of the Bangladeshi population belongs to the less affluent class of society, and they are the victims of violence committed by state agencies.

The country’s law-enforcement officials and policymakers see torture as an effective tool for criminal investigation, particularly due to poor infrastructural facilities.

Bangladesh has 629 police stations. Torture is routinely practiced in all of these police stations, whether to maintain law and order, as a means of investigation, or to extort money for personal gain. Even if only a single person is assumed to be tortured per day per station, an alarming number of 229,585 persons are being tortured in Bangladesh every year. This figure excludes victims tortured outside police stations and detention centers.

The country's police force is not the only state agency practicing torture. Paramilitary forces like the Rapid Action Battalion, the armed forces, the border security forces, intelligence agencies such as the Directorate General of Forces Intelligence (DGFI) and special cells such as the Task Force for Interrogation and the Joint Interrogation Cell also practice torture. The latter two agencies, by the very nature of their mandate, are professionally trained to extract confessions from detainees, for which torture is the most common tool.

2. Burma

Legal framework regarding torture:

Convention against Torture:

Burma has neither signed nor ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, nor for that matter the International Covenant on Civil and Political Rights. It has not expressed any intent to do so nor to bring any international standards on torture into the domestic law.

Existing domestic law:

Torture is not criminalized in law as a separate or special offense. It has the same provisions in its Penal Code as in the Indian Penal Code, 1860 (sections 330 & 348), which penalize acts that can also be considered as torture, with seven and three years of imprisonment respectively if proven guilty, but as in India the offence attracts no particular relevance if the crime is committed by a police officer and the two provisions also fall short of covering all aspects of torture, as defined in the Convention against Torture.

In any event, as the courts are under executive control, cases involving executive officers, including police or military officers accused of torture, are not conducted independently or according to fair trial procedures. For this reason, any provisions of law whether they exist or not, are meaningless.

Compensation:

There are no provisions for compensation of victims of torture.

Witness protection:

There are no provisions for protection of witnesses in criminal cases.

The magnitude of the problem:

Anecdotal evidence is that torture is endemic although it is not possible to document and report systematically due to prevailing conditions in the country. Torture and cruel and inhuman treatment or punishment occurs in both political and ordinary criminal cases as well as in other settings, and is practiced by the police, military

intelligence officers, soldiers, prisons officers, and executive officers (such as council officials) acting in a policing capacity.

Military intelligence officers and police investigating political cases are known to commit extreme forms of torture on detainees. Methods include electrocution, water torture and standing for extended periods in positions intended to cause serious stress to the body. Since 1991 military intelligence officers have been able to submit confessions obtained from detainees directly to court and the burden of proof has been placed on the detainee to show that he or she hadn't been tortured (as decided in the U Ye Naung case, before the Supreme Court Special Appellate Bench). Some political detainees have been tortured to death during interrogation.

Torture is also widespread in ordinary criminal inquiries and in crime control, where it most commonly takes the form of beatings and other blunt methods intended to cause pain and obtain a confession, such as twisting and bending of limbs into unnatural positions and burning of limbs. Police investigators and council officials working in a quasi-investigative capacity torture people of all ages and both genders, from young girls accused of theft to elderly relatives of absconding accused. Some victims of torture retract their confessions in court but the non-independent character of the courts makes obtaining an acquittal where a confession has been obtained through torture extremely difficult.

Prior to the military assumption of full power in 1962, the courts in Burma entertained many allegations of torture and abuse against police officers, but often as a defence of an accused rather than in a case of prosecution of the alleged perpetrators. Since then there have been very few such cases reported, although defendants still cite use of torture as cause for confession.

In remote parts of the country where armed conflict persists or in ceasefire areas, soldiers torture people to obtain information about rebel movements, and more commonly as a method of punishment and to set an example for villagers' failure to comply with their demands for food, labour, and to relocate away from areas of rebel activity.

Cruel and inhuman treatment is also endemic in the country's prisons, where the majority of prisoners, both political and ordinary, contract serious contagious diseases as a consequence of the extremely poor living conditions, food and lack of health facilities. Many of them die from a combination of abuse and neglect. Since 2006 the International Committee of the Red Cross, which has a presence in the country, has been denied access to the prisons in accordance with the terms of its internationally recognized mandate.

3. India

Legal framework regarding torture:

Convention against Torture:

India signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 October 1997, but has yet to ratify it. A draft bill against torture is in consideration by the government at present.

Existing domestic law:

Torture is not criminalized in law as a separate or special offense. Provisions in the Indian Penal Code, 1860 (sections 330 & 348) penalize acts that can also be considered as torture, with seven and three years of imprisonment respectively if proven guilty. But the offense attracts no particular relevance if the crime is committed by a police officer. The two provisions also fall short of covering all aspects of torture as defined in the Convention.

In addition, the reduced possibility of a proper forensic medical examination of a victim and the complete absence of a witness protection mechanism facilitates easy acquittal of the criminal. The Indian Evidence Act, 1872 also does not have any provisions in dealing with torture.

Compensation:

An act of torture, if proved, does not require the perpetrator to pay compensation to the victim. The right against torture is not a fundamental right and Indian courts have thus far taken a minimalistic view on compensatory claims concerning it. Compensation claims are dealt with in the realm of personal injury claims. Awards of compensation vary widely from court to court throughout the country.

Witness protection:

There is no specific law concerning witness protection in India. The only possible measure is for the court to impose a condition at the time of considering a bail application, for instance, the accused shall not interfere with the witness or the evidence in the case. But there is no safe and watertight framework within which compliance to these conditions can be guaranteed. It is common practice in India for the accused to try to threaten the witnesses and/or tamper with evidence.

The magnitude of the problem:

Torture is practiced as a routine and accepted means of investigation. Most police and other law enforcement officers consider torture as an essential investigative tool, rather than unscientific or crude. Policy makers and bureaucrats believe there is nothing wrong in punishing a criminal in custody, not realizing, first that a person

under investigation is only an accused, not a convict, and second, that torture is a criminal act, not a method of punishment. There is a lack of societal awareness about torture, its nature and gravity. This allows torture to be practiced by all sections of law enforcement agencies, as well as paramilitary and military units. In fact, torture and violence are used in the country as methods of social control.

Trauma from torture affects an individual's capacity to act and respond prudently to ordinary incidents. Torture—both mental and physical—is practiced in every police station in India (12,441 police stations in total). Given that both victims and witnesses of torture suffer from trauma, and that perpetrators are also witnesses, it can be argued that Indian police stations are staffed with individuals suffering from trauma.

Concern regarding the widespread use of torture in India has been expressed by domestic as well as international experts, particularly thematic mandate holders under the United Nations framework. As early as 1997, the UN Human Rights Committee expressed its concern about the widespread use of torture by the law enforcement agencies in India [CCPR/C/79/Add.81]. Similar concerns were expressed by the Committee on the Elimination of Racial Discrimination [CERD/C/IND/CO/19] in 2007 and the Committee on Economic, Social and Cultural Rights [E/C.12/IND/CO/5] in 2008.

India's National Human Rights Commission has repeatedly recommended that the Indian government ratify the Convention against Torture and criminalize torture in the country. As early as 1981, the Supreme Court of India stated that “[n]othing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wounds on our constitutional culture than a state official running berserk regardless of human rights” [Kishore Singh v. State of Rajasthan (AIR 1981 SC 625)].

4. Indonesia

Legal framework regarding torture:

Convention against Torture:

The Indonesian Government ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 28 September 1998. Ratification means that the Convention is now part of Indonesian domestic law and should be effectively implemented. In reality however, the Indonesian government has made no commitment to eradicate the institutionalized practice of torture in the country. Without enacting any corresponding domestic law to criminalize torture, ratification of the Convention is futile. Indonesia has yet to ratify the Optional Protocol to the Convention against Torture, which contains further provisions regarding the prevention of torture.

Existing domestic law:

According to article 28G, paragraph 2 of Indonesia's 1945 constitution, "everyone is entitled of the right not to be tortured and to be treated with dignity". Apart from this principle, more than 10 years after ratifying the Convention, Indonesia has no law criminalizing torture as a special and/or separate offence. The government's explanation is that the draft penal code under revision will incorporate all necessary definitions and sanctions; unfortunately, it has been under revision for more than 20 years.

Despite the lack of legislation criminalizing torture, there have been attempts to safeguard human rights in the country, and facilitate the implementation of the Convention. A law concerning witness protection for instance, contains provisions regarding the protection of victims and witnesses from the practice of torture. The new police regulations passed in June 2009 prohibit police from using torture and cruel or inhuman treatment or punishment on suspects or detainees.

Witness protection:

The country's witness protection law, Law No. 13 of 2006, aims to secure the rights of witnesses and accord them with protection while giving their testimony. While the law has been in place since 2006, its effective implementation depends upon the establishment of a Witness Protection Agency with the necessary human and material resources. Without this, victims and witnesses are fearful of coming forward to voice their complaints of torture, particularly as there is no law punishing torture perpetrators.

The magnitude of the problem:

The practice of torture in Indonesia is institutionalized. One reason for this is that police officers see torture as a source of income; individuals will bribe officers to prevent worse/additional torture and ill treatment. For

officers with low salaries, torture is therefore a means to increase their income. Another reason, as mentioned by the UN Special Rapporteur on Torture in 2008, is the policy of using torture as a method of interrogation. In some cases, victims either died or suffered permanent injuries due to severe torture.

The reluctance of victims to come forward and file complaints makes the struggle to eliminate torture in the country even harder.

5. Nepal

Legal framework regarding torture:

Convention against Torture:

Nepal acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 May 1991. The domestic law addressing the question of torture is limited to the Torture Compensation Act, 1996, which fails to meet normative standards on torture prevention. The law's key objective is to compensate torture victims, not prosecute the perpetrators.

Existing domestic law:

Torture is not criminalized in Nepal. While article 14(4) of Nepal's constitution guarantees the right against torture, the realization of this right is problematic owing to the failure of the country's justice system and the lack of jurisprudence relating to torture. Nepal's legislative framework does not have any additional provisions to prevent torture; the country's existing criminal law also makes no mention of it.

Compensation:

The Torture Compensation Act, 1996 mandates the payment of compensation as a state responsibility and not that of the perpetrator. The legislative framework on compensation is based upon the notion of vicarious liability of the state for an act done by a state agent than that of a crime. Time limits prescribed for filing a complaint also defeat the purpose of the law. Section 5(1) provides a statutory limit of 35 days for filing torture compensation from the date of release from detention or from the date of infliction of torture. In addition, the amount of compensation awarded so far under this law is also negligible. The lack of understanding about the concept of torture by the legislators is visible in the statute since in a prosecution under this law, the defence counsel for the perpetrator is the state prosecutor.

Witness protection:

There is no witness protection law in Nepal. To make matters worse, it is neither a practice of the courts in the country to ensure any form of protection to the witnesses or to the victims when an accused is released on bail

in a criminal case. It is common practice in Nepal for the accused in crimes, to intimidate and threaten witnesses and victims.

The magnitude of the problem:

Please see the detailed report concerning torture and its magnitude by the Advocacy Forum, a network partner of the AHRC: <http://nepal.ahrchk.net/pdf/AHRC-FP-011-2007-Nepal.pdf>.

6. Pakistan

Legal framework regarding torture:

Convention against Torture:

Pakistan has not yet ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which it signed on 17 April 2008. It has also not signed the Convention's Optional protocol. No steps have been taken to make the Convention part of the domestic law.

Existing domestic law:

Pakistan does not have any specific law relating to torture, although article 14(2) of the Constitution expressly prohibits the use of torture for extracting evidence. While many jurists and academics maintain that certain provisions in the country's penal code (in particular sections 339, 340 and 349) cover torture, these provisions do not meet the definition of the act as given in the Convention against Torture, and nor do they criminalize torture.

Domestic jurisprudence concerning torture is underdeveloped in Pakistan, and the constitutional right not to be tortured under article 14(2) has rarely been exercised. In any claim of torture, the burden of proof is on the victims, and there are no independent investigating agencies empowered to look into such a claim.

Compensation:

According to Pakistan's existing legal framework, a compensation claim for torture can be settled under the Shari'ah law, an opportunity that is often misused. Existing circumstances allow this procedure to mostly benefit the perpetrator. The terms of the compensation for instance, are usually decided by the perpetrator, given that law enforcement officers enjoy a high degree of authority in the society. By and large, Pakistan's courts have avoided dealing with the question of torture. Additionally, compensation proceedings in a civil court require a police report to substantiate the torture claim, which further deters victims from initiating such proceedings.

Witness protection:

There is no specific law concerning witness protection in Pakistan. Due to this—and the overall failure of the country’s justice system—it is common for witnesses to be threatened or even murdered. Such murders have even taken place within court premises.

The magnitude of the problem:

Torture in custody is a serious problem affecting the rule of law in Pakistan. It is commonly used as a means to obtain ‘confessions’. There has as yet been no serious effort by the government to make torture a crime in the country. Instead, impunity is provided to the perpetrators, who are either policemen or members of the armed forces. Furthermore, the lack of protection discourages victims and witnesses from making complaints. While international jurisprudence regarding torture has developed significantly, Pakistan’s legal framework remains far behind.

In spite of the constitutional prohibition of torture, the army is running detention and torture cells in almost every city in Pakistan. An AHRC report identified 52 such cells, where arrested or disappeared individuals are kept incommunicado and tortured for several months to extract confessions.

Pakistan being a signatory to the Convention against Torture has provided little relief to ordinary citizens, largely because no attempts have been made by the government to enact corresponding domestic legislation. During the past year, more than 1300 cases of torture were reported from the country, not to mention the several hundred unreported cases. There are no independent investigation procedures in Pakistan to investigate torture. There is an additionally alarming level of insensitivity among the country’s legal professionals regarding torture, including the judiciary.

It is in the everyday work of the lower judiciary that this insensitivity is mostly visible. A clear example of this is allowing detainees to be put in remand custody despite it being well known that anyone detained will be subjected to torture. The criminal procedure code allows for judges to require a reason for the investigating agency to remand an accused rather than transferring them into judicial custody. Even this minimum leegroom is not made use of by the courts to protect individual human rights.

7. Philippines

Legal framework regarding torture:

Convention against Torture:

The Philippine government ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in June 1986. When the 1987 Philippine Constitution was passed, it adopted the right against torture under article 3 of the Bill of Rights, unlike the previous 1973 and 1935 Constitutions, and the Malolos Constitution. The end of decades of dictatorial rule in February 1986 had tremendous influence in the drafting of the present constitution; during martial rule, torture was practiced as a policy by the security forces against dissenters.

The government has also expressed its intention to ratify the Convention’s Optional Protocol, although no steps have been taken towards this yet.

Existing domestic law:

Apart from the constitutional provision against torture, the Philippine government has failed to ensure the enactment of a domestic law corresponding to the standards of the Convention against Torture. Proposed legislation to make torture a criminal offense has not been seen as a priority. At present, the proposed bills—the Senate Bill 1978 and the House Bill 5709—though already in the process of being reviewed by the two chambers of Congress, have not been made into law. They have undergone numerous revisions and have been submitted to the legislature time and again, without successfully being passed as law.

Due to the absence of a domestic law on torture, torture victims have had to invoke provisions of the Revised Penal Code and the Rights of Persons Arrested, Detained or under Custodial Investigation amongst others, in filing complaints of illegal arrest, detention and torture. These provisions however, are not in full compliance with the norms and principles of the Convention against Torture.

Further limitations to making use of these provisions is that the prosecution routinely overlooks abuse by the police and military on the “presumption of regularity”—when the acts are committed in performance of their duties—or “justifiable degree of force”—police are allowed to use force against the person during arrest and in custody.

Witness protection:

Even though the Philippines has a Witness Protection Security and Benefit Act, it is only applicable to those whose cases are filed in court. While this limits its effectiveness, it is in particular useless to victims of torture, as the lack of a specific law means they cannot file cases in court.

Compensation:

Laws such as the Board of Claims for victims of unjust imprisonment or detention and victims of violent crimes provide compensation for victims of torture and violent crimes. However, the maximum compensation a victim can get is a mere P10,000 (USD 209), while the application is only accepted if made within six months of the incident. This time limitation is impractical for emotionally and psychologically unstable victims, depriving them from seeking compensation.

Moreover, the tedious and complicated process and requirements to apply for compensation discourages victims, as does the lack of information on how to apply. Even worse, the burden of proving illegal arrest, detention and torture rests heavily on the applicant.

The magnitude of the problem:

In May 2009, the Committee Against Torture, the body responsible for the monitoring of state parties to the Convention, noted that it was “deeply concerned about the numerous, ongoing, credible and consistent allegations, corroborated by a number of Filipino and international sources, of routine and widespread use of torture and ill-treatment of suspects”.

There are few remedies available for the widespread use of torture within the Philippines. Apart from the lack of a domestic law on torture, investigations into allegations of torture against the security forces are not taken seriously. The prevailing attitude of police investigators receiving torture complaints is that complainants wish to exonerate themselves from the charges against them. Furthermore, police investigators lack sufficient skills, training and equipment for forensic and scientific methods of investigation.

Delays in the investigation and in the filing of charges in court are another obstacle victims of torture must face. In the case of five detainees who were illegally arrested and tortured to confess responsibility to the murder of influential police colonel, Rolando Abadilla in June 1996, their complaints have to date—13 years later—still not been filed in court. On the small chance that complaints are investigated, any complaints connected to charges laid against the victim cannot be filed in court on the pretexts of contempt of court or sub judice (under judicial deliberation).

For these reasons, there have been very few torture cases filed in courts. Complaints of torture, in particular those involving political detainees, are recorded widely by local groups, while police and custodial torture are commonly reported on televisions and in newspaper tabloids; none of these cases however, have found their way to the courts for prosecution.

8. South Korea

Legal framework regarding torture:

On the Convention against Torture:

The Republic of Korea ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 9 January 1995, with the Convention coming into effect on February 8. Korea has not yet ratified the Optional Protocol to the Convention.

Existing domestic law:

According to the country's constitution, the right to be free from torture is a fundamental right. Article 7 of the constitution notes that any confession deemed to be made under torture or intimidation shall not be admitted as evidence. Article 12(2) further states that, "*No citizen shall be tortured or be compelled to testify against himself in criminal cases.*"

Article 309 of the Criminal Procedure Act also stipulates that confessions made under certain circumstances—torture, violence, threat, prolonged arrest or detention, or through fraudulent means—shall not be admitted as evidence of guilt.

With regard to the punishment of those committing torture, article 125 of the Criminal Act states that those who commit "*an act of violence or cruelty against a criminal suspect or against another person while in the performance of his duties shall be punished by imprisonment of not more than five years and suspension of qualifications for not more than ten years*". The Act on the Aggravated Punishment etc. of Specific Crimes further punishes public officials for acts of illegal arrest, detention, violence and cruelty.

None of these laws however, clearly define torture or cover the broad meaning of torture as found in the Convention.

Prescription of public prosecution

The law stipulates that offences under articles 124 and 125 of the Criminal Act (relating to illegal arrest, detention, violence or cruelty) have a five year limit for prosecution, while offences under article 4(2)(1) of the Act on the Aggravated Punishment etc. of Specific Crimes have a seven year limit, and offences under article 4(2)(2) of the same Act have a 10-year limit. These prosecution time limits mean that victims of torture or ill-treatment during the military regime were not able to obtain justice.

Compensation:

Article 29 (1) of the country's constitution provides just compensation for any "sustained damages by an unlawful act committed by a public official in the course of official duties" as prescribed by the State Compensation Act. Under this law, the amount of compensation is not fixed, but considered with other factors such as salary at the time damage was caused, the level of physical injuries and the loss of future labour. Compensation can also be claimed for psychological damages, in consideration with the victim's social and economic status and the level of damages.

The statute of limitations to claim compensation—for known damages/perpetrators—is three years as stipulated under article 766 (1) of the Civil Act. Article 96 of the State Finance Act stipulates that a person may claim compensation within five years from the date of knowing about an unlawful act perpetuated by a public official.

Witness protection:

Korea has no specific law regarding witness protection. Provisions in the Criminal Procedure Act stipulating protection for witnesses are limited to court proceedings. Similarly, the Crime Victim Protection Act provides protection only to victims who have sustained damages committed by other individuals.

The magnitude of the problem:

Despite several provisions to criminalize the act of torture or ill treatment, Korea does not have a clear definition of torture in accordance with article 1 of the Convention against Torture. Police officers are therefore punished not for committing torture or ill treatment, but for 'violence' or abusing their official powers.

During its periodic country review in May 2006, the Committee Against Torture questioned the Korean government on this lack in its Criminal Procedure Act. In response, the Korean delegation admitted that, "We did not fulfill the sufficient condition of this issue. So upon returning home, we will make positive review on revision of Criminal Act in cooperating provisions on the definition of torture based on article 1 of the Convention." Even though the Criminal Procedure Act was amended in December 2007, there is still no definition regarding torture in the law.

Another significant problem in the country is related to redress for victims convicted through forced confessions by torture and fabricated evidence by the Korean Central Information Agency and its various successors throughout the country's rule by authoritarian regimes (1961-1992). Although the Truth and Reconciliation Commission established at the end of 2005 was to examine such cases so that victims could bring the findings to court for review, the cases were largely reviewed on the basis of prolonged detention rather than on forced confessions and torture. Furthermore, victims of fabricated espionage cases simply wanted to be

proved innocent; they had little interest in punishing the state officers responsible for their torture and ill treatment. While some victims were in fact found innocent through the review, the government has failed to investigate the acts of torture committed by state officials, or to provide comprehensive programmes for the treatment and rehabilitation (both physical and mental) of victims, including the right to fair and adequate compensation. Concerns regarding this were also expressed by the Committee Against Torture [CAT/C/KOR/CO/2]. In fact, the lack of government efforts at rehabilitation led to an NGO initiative to provide trauma counseling to torture victims in 2008.

Cases of ill treatment now occur in more sophisticated ways. For instance, during conflicts regarding redevelopment or labor issues, the police practice is to wait while the laborers or residents are beaten by security guards (hired by the relevant developers or corporations) and then arrest them. The police seldom investigate such violence, but take legal action against the arrestees for obstruction of business or obstruction of official duties.

South Korea needs not only a clear definition of torture, but also legal reforms to eliminate the practice. In particular, statutes of limitation on both public prosecution and claiming compensation must be lifted.

9. Sri Lanka

Legal framework regarding torture:

Convention against Torture:

Sri Lanka ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1993. The following year, a domestic law entitled the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 was passed.

The country has also ratified the Optional Protocol of the International Covenant on Civil and Political Rights, allowing individual complaints to be filed to the Human Rights Committee. The Human Rights Committee has decided many cases against Sri Lanka.

Existing domestic law:

Sri Lanka's constitution recognizes freedom against torture as a fundamental right. Under article 126, any person whose right against torture is violated may petition the Supreme Court under its fundamental rights jurisdiction. The court has the power to hear and determine such petitions and to declare if, in fact, the rights have been violated. The court also has the right to grant awards of compensation for torture. Hundreds of cases have been heard by the Supreme Court on this basis, holding that torture is a non-derogable right and that even

the most hardened criminal is entitled to freedom against torture. In these judgments the court has also made many directions to the police and other authorities to institute proper investigations into allegations of torture and to have proper monitoring mechanisms to prevent torture. These directives have not been respected by the government and the relevant authorities however.

Act No. 22 of 1994 makes torture and other cruel, inhuman or degrading treatment or punishment a criminal offence in Sri Lanka, punishable with a mandatory sentence of seven years of rigorous imprisonment and a fine of Rs 10,000. There have been many cases filed against police officers and others under this law, and in three of them the officers have been found guilty and sentenced accordingly. The majority of cases have resulted in acquittals however. The usual reason for this is either poor investigation or the attitude of the judges, who unlike towards accused persons in other cases, are sympathetic towards the police.

Compensation:

Under Sri Lanka's fundamental rights jurisdiction, the courts may grant compensation to victims of torture. While this has been done in a large number of cases, the judgments indicate that there are no clear guidelines on this issue. The compensation varies greatly, and the variation is not based on merit. Often, the compensation awarded is not proportionate to the gravity of the offence. The awarding of paltry sums can carry the wrong message to society as well as law enforcement officers.

Witness protection:

Sri Lanka has no witness protection law, which is detrimental to torture victims. Several victims who had brought torture cases before the courts have been killed by/at the behest of their perpetrators (usually police officers). Almost all victims face severe threats over a prolonged period, while the cases are ongoing.

Although a relevant law has been introduced, largely due to international pressure, it has not been pursued in parliament. There seems to be a grave reluctance towards the passing of a witness protection law, mainly due to political requirements of impunity for government officials.

The magnitude of the problem:

The practice of torture is endemic in Sri Lanka. It occurs at every police station and detention centre in the country, including those kept under the Terrorism Investigating Unit. Torture is the mode by which crimes and offences are investigated. Torture is also used to implicate innocent persons, particularly from low income backgrounds, in cases where the police have failed to find the actual culprits. Torture is therefore often accompanied with the filing of fabricated charges.

The AHRC has a considerable body of documentation on torture in Sri Lanka, including:

[A Baseline study on torture in Sri Lanka](#) (2009)

[An X-ray of the Sri Lankan policing system & torture of the poor](#) (2005)

10. Thailand

Legal framework regarding torture:

Convention against Torture:

Thailand acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 2 October 2007. The accession obligates Thailand to submit an initial report to the Committee against Torture within one year. As of yet however, the government has not submitted any report.

Existing domestic law:

Thailand's constitution of 2007 prohibits torture under article 32(1). However, the absence of an enabling law in accordance with the definition of torture under the Convention is a serious impediment to the realization of the right to be free from torture.

Compensation:

There is no specific law in Thailand that provides for compensation in cases of torture. The existing possibility is to claim vicarious liability upon the government for an act of torture committed by a state agent. This proposition has inherent problems since it does not address the crime committed by the perpetrator, but limits the jurisprudence to a mere state responsibility to provide compensation.

Witness protection:

Thailand does not have a good and functioning witness protection framework. Although a law was promulgated in 2003, it is not properly enforced.

The magnitude of the problem:

Please see 'Understanding and Practice of Torture in the Thai Context' for detailed information regarding the situation of torture in Thailand (http://wgjp.org/wpcontent/uploads/2009/02/torture_aea_eng.pdf).

Questions For Discussion

1. With regard to your country, describe—
 - a. The prevalence of torture;
 - b. The legal framework against torture;
 - c. Social attitudes towards torture.
2. In your opinion, how does torture affect your society? What steps need to be taken to eliminate torture?

Lesson 3

This lesson will examine the provisions of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supplemented by the Committee Against Torture's General Comment No 2 (2007). In this, the Committee elaborates on certain provisions.

Torture, ill treatment and non-derogability

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.

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 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 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 prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.*

Non-derogable means that under no exceptional circumstances whatsoever can this right be denied by the state. Such circumstances include a state of war or threat thereof, internal political instability, any public emergency, any threat of terrorist acts, violent crime or armed conflict. Furthermore, in its General Comment No 2, the Committee Against Torture noted that the scope of “any territory under its jurisdiction” must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over facilities or persons in detention.

Just as the prohibition of torture is non-derogable, the Committee holds that the prohibition of ill-treatment must also be considered non-derogable. This is because the definitional threshold between ill-treatment and torture is often not clear, and experience indicates that conditions giving rise to ill-treatment frequently facilitate torture. Measures required to prevent torture must therefore also be applied to prevent ill-treatment.

The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill treatment where the elements of torture are also present.

Punishing torture

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 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

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.

Despite these provisions, the Committee Against Torture noted that there are serious discrepancies between the Convention's definition and that incorporated into domestic law, which create actual or potential loopholes for impunity. It is particularly important that countries define the offence of torture as distinct from common assault or other crimes. Only then will the need for appropriate punishment that takes into account the gravity of the offence be realized, as well as the deterrent effect of the prohibition itself be strengthened, thereby enhancing the ability of responsible officials to track the specific crime of torture.

Torture complaints and investigations

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.

Measures to prevent torture

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.

The Committee emphasizes that the obligation to take effective preventive measures is of utmost priority. State Parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. This involves the continual review and improvement of national laws and performance

under the Convention, as well as revision or introduction of new laws should the measures adopted by the State Party fail to accomplish the purpose of eradicating acts of torture.

Preventive measure may range from specific measures, for example, having same sex guards when privacy is involved, to more general measures aimed to improve the overall social environment, such as educating the general population on the history, scope, and necessity of the non-derogable prohibition of torture and ill-treatment, as well as that law enforcement and other personnel receive education on recognizing and preventing torture and ill-treatment.

Vulnerable groups

The 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. According to the Committee, State parties should “ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection”. This protection extends to all persons, including persons accused of political offences or terrorist acts, asylum seekers, refugees or others under international protection, or any other status or adverse distinction.

The Committee has outlined that each State Party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.

Furthermore, it has been identified that eliminating employment discrimination and conducting on-going sensitization training in contexts where torture or ill-treatment is likely to be committed is also key to preventing such violations against and building a culture of respect for women and minorities. As such, States are encouraged to promote the hiring of persons belonging to minority groups and women, particularly in the medical, educational, prison/detention, law enforcement, judicial and legal fields, within state institutions as well as the private sector.

Specifically in relation to women, gender has been illuminated as a key factor, which intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women are subject to or at risk of torture or ill-treatment and the consequences thereof. Women are at risk in contexts relating to deprivation of liberty, medical treatment, particularly those involving reproductive decisions, and violence by private actors in communities and homes.

Scope of state obligation and responsibility

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 1 of this article.*

3. *This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.*

The Convention imposes obligations on State Parties and not on individuals. The Committee specifies that States bear international responsibility for the acts and omissions of their officials and others acting in official capacity or on behalf of the State. Moreover, this obligation on State Parties extends to acts of torture or ill-treatment committed by non-State officials or private actors. As such, State Parties have an obligation to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture.

The Committee emphasizes that elements of intent and purpose in article 1 do not involve a “subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances”. As such, it is imperative to investigate and establish the responsibility of the “chain of command” as well as that of the direct perpetrator(s).

This responsibility on the part of the State also extends to a situation whereby a person is transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards. The State and its officials are subject to punishment for ordering, permitting or participating in such a transfer, as it is contrary to the State’s obligation to take effective measures to prevent torture.

An order of a superior or public authority can never be invoked as a justification of torture. The Committee explains that a subordinate may not escape accountability by seeking refuge in superior authority and should be held to account individually. Simultaneously, those exercising superior authority cannot avoid accountability or

criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known about acts, or possible acts, of torture, and they took no reasonable and necessary steps of prevention.

The Committee expresses the fact that persons who resist perceivably unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by superior officials, should be protected against retaliation of any kind.

Questions For Discussion

1. Has your country ratified the Convention against Torture?
 - a. If yes, is there a domestic law in accordance with the Convention provisions?
 - b. If no, is there a campaign to pressure the government to do so?
2. Discuss the Convention's provisions to prohibit and punish torture. What are the strengths and weaknesses?
3. Discuss how you can use the Convention to increase public awareness and debate regarding the issue of torture.