8. TORTURE AND ENFORCED DISAPPEARANCE

Manfred Nowak

1. INTRODUCTION

Torture and enforced disappearance are among the most brutal and horrendous human rights violations, constituting a direct attack on the core of human dignity. Like slavery, they are absolutely prohibited under international law but are nevertheless widely practised in all regions of the world. While torture and slavery were lawful in the domestic system of many states until the age of Enlightenment, enforced disappearance has never been lawful and emerged in practice only during the twentieth century. Although many scholars allege that with the legal prohibition of torture in the eighteenth and nineteenth centuries, above all in Europe, torture was in fact eradicated,¹ this unfortunately does not reflect reality. Torture ceased to be practised as a lawful method of extracting confessions for the purpose of collecting evidence in criminal proceedings, but this does not mean that this terrible manifestation of state suppression was no longer practised against political opponents, minorities or criminal suspects. In fact, Amnesty International wrote in its first Report on Torture in 1973 that torture ‘is a world-wide phenomenon which is on the increase’² and the twentieth century can be characterized as the century of torture. This assessment does not only apply to some of the worst totalitarian regimes in history, such as National Socialism and Stalinism, but also to the practice of European powers during colonialism and against liberation movements; to military dictatorships in Latin America; and similar regimes in Africa, Asia, the Arab World and elsewhere.

Torture can be defined as the intentional infliction of severe pain or suffering on a powerless victim, usually a detainee, for a specific purpose, such as extraction of a confession or information, intimidation or punishment. Enforced disappearances became first known as a practice of the Nazis in the occupied territories against the political elites as a means of creating fear and terror among the population. The victims were brought under the ‘Night and Fog Decree’ to Germany where they were usually tortured and then disappeared. This practice re-emerged during the national security ideology of Latin American military dictatorships in the late 1960s, first in Brazil and Guatemala. During the 1970s and early 1980s, the practice of enforced disappearances was a common feature in many countries of this region, most notably in Chile, Argentina, Uruguay, Peru, Colombia and El Salvador. Political opponents are taken from their homes in the middle of the night by members of the police,


military or paramilitary units, usually without uniforms, and driven away by cars without number plates to secret places of detention, where they are often subjected to torture and summary executions. When family members inquire about the fate and whereabouts of their loved ones, the authorities deny any knowledge and responsibility for such crimes. Family members often continue to search for their disappeared relatives for many years, being torn between hope and despair, unable to go through a process of mourning and re-organization of their lives. In some cases, such as in Morocco during the early 1990s, disappeared persons who were held for more than ten years in secret places of detention in the Sahara, re-appeared again and nurtured the hope all around the world that victims of enforced disappearance might still remain alive. In addition to Latin America, the highest numbers of enforced disappearances were reported to be from Iraq, Sri Lanka and the former Yugoslavia.

The international community has taken a number of steps to combat torture and enforced disappearance. In addition to the absolute prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment in general universal and regional human rights treaties, the United Nations, the Council of Europe and the Organization of American States have adopted various treaties which established specific obligations of states to prevent torture and ill-treatment, to bring the individual perpetrators of torture to justice before domestic or international courts, and to provide victims of torture with a right to an effective remedy and reparation for the pain suffered. These efforts include the adoption of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984) and its Optional Protocol of 2002 (OPCAT), the Inter-American Convention to Prevent and Punish Torture (1985) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT, 1987). In the context of international criminal law, the Rome Statute of the International Criminal Court (ICC) of 1998 established torture as one of the crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population. The United Nations also established Charter-based mechanisms, such as the Special Rapporteur on Torture (SRT) in 1985 and the Voluntary Fund for Victims of Torture in 1981.

With respect to enforced disappearances, the UN Commission on Human Rights established its first thematic special procedure as early as 1980 — the UN Working Group on Enforced or Involuntary Disappearances (WGEID). In 1992, the General Assembly adopted the UN Declaration on Enforced Disappearance, which was followed by the Inter-American Convention on the Forced Disappearance of Persons (1994) and the UN Convention for the Protection of All Persons from Enforced Disappearance of 2006 (CED).

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4 See Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the European Convention on Human Rights (ECHR), Article 5 of the American Convention on Human Rights (ACHR) and Article 5 of the African Charter on Human and Peoples’ Rights (ACHPR). As far as international humanitarian law in concerned, see also common Article 3 of the 1949 Geneva Conventions, Article 17 of the Third Geneva Convention relative to the Treatment of Prisoners of War (1949) and Article 75 of Additional Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (1977).
In addition, the ICC Statute also contains enforced disappearance as a manifestation of a crime against humanity, when committed as part of a widespread or systematic attack.

In the following, we will primarily focus on the various provisions and obligations of States Parties deriving from the UN Convention against Torture and its Optional Protocol. The discussion also includes the practice of the Committee against Torture, established by the CAT with the task of supervising the implementation of the Convention by means of periodic state reports, individual and interstate complaints as well as by means of an inquiry procedure. The chapter is concluded by an analysis of the UN Convention against Enforced Disappearance.

2. DEFINITION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Article 1 of the CAT 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.

While the substantive provisions of Articles 2 to 15 of the CAT explicitly refer to torture only, Article 16 contains an obligation of any State Party:

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.

Although all forms of torture as well as other cruel, inhuman or degrading treatment or punishment (CIDT) are absolutely prohibited under international law, even in times of emergency, it follows from a combined reading of Articles 1 and 16 that only some obligations under the CAT, in particular the purely preventive obligations under Articles 10 to 13 and the right of victims to reparation under Article 14, apply to all forms of ill-treatment. Most

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provisions of the Convention, above all the obligation to criminalize torture and to bring the perpetrators to justice under various forms of jurisdiction including universal jurisdiction, as contained in Articles 4 to 9, only apply to torture as defined in Article 1. A closer interpretation shows that also the principle of non-refoulement in Article 3 and the prohibition of using evidence extracted by torture in Article 15 apply exclusively to torture. It is, therefore, necessary to draw a legal distinction between torture and other forms of CIDT in the application of the CAT.

Torture constitutes an aggravated and, without doubt, the most serious form of ill-treatment with a particular stigma attached which means that this term should not be used in any inflationary manner. While the European Court of Human Rights and some commentators are of the opinion that the intensity of pain or suffering inflicted on the victim is the decisive criterion distinguishing torture from CIDT, others, including the present author, identify the intention of the perpetrator, the purpose of the act and the powerlessness of the victim, who is usually a detained person, as the essential distinguishing features. According to the latter opinion, the essential elements of torture are the following: involvement of public official; infliction of severe pain or suffering; intention of the perpetrator and a specific purpose; and powerlessness of the victim.

According to the wording of both Articles 1 and 16, torture and CIDT must be committed by or at least with the acquiescence of a public official. If a private individual, without any involvement from a public official, applies electroshock or similar treatment to a victim, no obligation of states would arise under the Convention. In practice, this traditional state-centred understanding of torture and CIDT has been eroded to a great extent. Under international criminal law, the involvement of a public official has been eliminated from the definition of torture. But also in the field of human rights law, on the basis of the due diligence test, states are increasingly held accountable for acts of ill-treatment committed by non-state actors. Domestic violence against women and children, female genital mutilation and other traditional practices are typical examples of torture or CIDT committed with state acquiescence if governments fail to take effective measures to prevent such practices.

Infliction of severe pain or suffering is a requirement for both torture and cruel or inhuman treatment or punishment. Only degrading treatment or punishment, which refers to particularly humiliating behaviour directed towards the victim, requires a lower threshold of

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8 The due diligence test was originally developed by the Inter-American Court of Human Rights in the Velásquez-Rodríguez case, judgment of 29 July 1988, Ser. C no. 4.

9 Cf., e.g., the report of the Special Rapporteur on Torture (SRT) to the UN Human Rights Council, UN doc. A/HRC/7/3, 15 January 2008.
pain or suffering. Any use of physical or mental force on a detainee, such as pulling, pushing or verbal abuse, if committed in a particularly humiliating manner, may constitute degrading treatment. *Corporal punishment* amounts at the least to degrading punishment.

If a particular treatment inflicts *severe pain or suffering*, it qualifies as cruel or inhuman treatment and, if the additional requirements of powerlessness of the victim, intent and purpose are fulfilled, also as torture. Whether the pain or suffering is 'severe' or not depends on both objective and subjective criteria, such as the physical and mental effect of the treatment on the particular victim, including his or her age, gender, religion, sexual orientation, state of health or membership in a particular group.  

Typical forms of torture used in many countries of the world to extract a confession or information from a detainee during interrogation include systematic beatings, electric shocks, burnings, extended hanging in a stress position like *strappado* or ‘Palestinian hanging’, water torture and immersion in a mixture of blood, urine, vomit and excrements (*submarnio*), amputations, death threats and simulated executions. Rape of a female detainee and similar forms of sexual violence is always discriminatory and inflicts pain or suffering of an intensity to be qualified as torture. If a detainee is, however, simply forgotten in his or her cell for a prolonged period of time, the victim certainly experiences severe anguish and suffering, being afraid of slowly starving to death, but in the absence of any intention or purpose, this treatment cannot be qualified as torture. The same applies to severely overcrowded and unhygienic *prison conditions*, lacking sufficient access to natural light, clean air, food, medical assistance and other basic needs. If such conditions lead to severe suffering of the detainees, they must be qualified as *cruel or inhuman treatment*. The threshold of torture is only reached if such conditions are deliberately inflicted on a particular group of detainees for the purpose of punishment (inhuman punishment cells), intimidation, discrimination or the extraction of information. Severe forms of *corporal punishment*, such as stoning a person to death or amputation of limbs, necessarily inflict severe pain or suffering and amount to torture on the ground that punishment is explicitly cited as one of the purposes in Article 1 of the CAT.

The requirement of *powerlessness* means that the victim is under the direct power or control of the torturer. Such a situation usually amounts to deprivation of personal liberty. According to international criminal law, the definition of torture explicitly requires that the
victim is ‘in the custody or under the control of the accused’. In almost all cases, torture takes place behind closed doors in situations in which the victim cannot defend himself or herself, and the perpetrator uses these positions of superiority and inferiority to humiliate and intimidate the victim, to extract a confession or information or for a similar purpose. The typical situation in which torture occurs is in a closed interrogation room when the victim is handcuffed and shackled to a chair, perhaps even naked and blindfolded. If he or she is held incommunicado or even in a situation of enforced disappearance, where nobody apart from the tormentors knows where the victim is held and whether or not the victim is still alive, the situation of powerlessness is worsened — by the knowledge that nobody is able to help the victim and that nobody will ever find out what happened to the victim, who is often killed after the extraction of the information needed. It is the use of force and coercion against a powerless victim which makes torture so horrible and immoral, which dehumanizes the victim and which constitutes a direct attack on human dignity. It is for this reason that torture is absolutely prohibited under international law in all circumstances, that torture constitutes a crime against humanity subject to universal jurisdiction, that the torturer, like the pirate, the slave trader and the terrorist, is regarded as ‘hostis humani generis, an enemy of all mankind’.  

Aside from detention or a situation of direct control, law enforcement officials may use force for legitimate purposes, such as in defence of any person from unlawful violence, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, or in action lawfully taken for the purpose of dissolving a violent assembly or quelling a riot or insurrection. However, such use of force is only legitimate if it is no more than absolutely necessary to achieve the respective purpose and is proportional in the particular circumstances of the case. The application of the principle of proportionality is, therefore, necessary in order to establish the scope of application of the right not to be subjected to torture or CIDT, i.e., the right to personal integrity. If the police force, for example, uses excessive force in its efforts to arrest a person suspected of having committed an offence, this treatment may qualify as CIDT, but never as torture, because the requirement of powerlessness is missing. Borderline cases occur when the person to be arrested was knocked down and can no longer defend himself or herself, but the police officers nevertheless continue to beat him or her for the purpose of intimidation, discrimination or punishment. Although, strictly speaking, this is not yet a situation of detention in the formal sense, the person is powerless and the treatment, if inflicting severe pain or suffering, might qualify as torture.

The ‘lawful sanctions’ clause in the last sentence of Article 1(1) of the CAT was inserted on the insistence of certain Islamic states and the US delegation, and is regularly used by certain states to justify corporal or capital punishment. A more thorough interpretation leads to the conclusion that it has no meaningful scope of application. Minor interferences, such

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13 Article 7(2)(e) of the ICC Statute.  
15 Under the ECHR, use of force resulting to death in these cases does not amount to a violation of the right to life under Article 2 when such use of force is ‘no more than absolutely necessary’.  
as imprisonment after a conviction by a competent court or certain forms of solitary confinement never reach the level of torture and are, therefore, not in need of such an exemption. Corporal punishment amounts in any case to degrading punishment and is, therefore, absolutely prohibited under the provisions of Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 16 of the CAT, which do not provide for any exception.\(^\text{17}\)

3. THE ABSOLUTE AND NON-DEROGABLE NATURE OF THE PROHIBITION OF TORTURE

As stated above, the prohibition of torture and CIDT is *absolute*, *i.e.*, protected without any explicit limitations. This means that neither torture nor any other form of CIDT can ever be justified. As we have just seen in the context of the discussion on the use of legitimate and excessive use of force by the police, we must, however, make a distinction between torture on the one hand, and CIDT on the other. Outside detention and a situation of direct control over the victim, law enforcement officials may, and sometimes even are under an obligation to use force against a person who, for instance, uses violence against a child. If this use of force is excessive and humiliating, it amounts to degrading treatment. If it is excessive and inflicts severe pain or suffering, it amounts to cruel or inhuman treatment. If it is, however, proportional it does not reach the threshold of CIDT, even if it inflicts severe pain or suffering. In other words, such treatment is simply not included in the scope of application of the right not to be subjected to CIDT. The principle of proportionality must, however, not be applied to a situation of powerlessness and never in relation to torture.

The absolute nature of the prohibition of torture and CIDT must be distinguished from its *non-derogable* character. Even in times of war, terrorism, natural disaster and other emergency situations, States Parties to the respective general human rights treaties are prevented from derogating from their obligations in relation to this right.\(^\text{18}\) Only very few other human rights, such as the prohibition of slavery, slave trade, servitude and of the retroactive application of criminal law, enjoy this privileged status as both absolute and non-derogable rights, and the prohibition of torture is also regarded as customary international law and even *jus cogens*.\(^\text{19}\)

Article 2(2) of the CAT underlines this specific status as follows: ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture’. Although Article 3 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture

\(^{17}\) For the respective case law of the UN Human Rights Committee, see Nowak, *supra* (note 11), pp. 167–177. See also the report of the SRT to the General Assembly, UN doc. A/60/316, 30 August 2005, paras. 18–28.

\(^{18}\) *Cf.*, *e.g.*, ICCPR, Article 4(2) in conjunction with Article 7; ECHR, Article 15(2) in conjunction with Article 3; ACHR, Article 27(2) in conjunction with Article 5.

of 1975 and Article 2 of the original Swedish draft of 1978 referred in this respect to both torture and CIDT, the US delegation succeeded in deleting the reference to CIDT during the drafting in the Working Group of the Commission on Human Rights. In retrospect, one might wonder whether the US delegation had already foreseen a situation such as its ‘global war against terror’ which has undermined the absolute and non-derogable prohibition of torture and CIDT to a greater extent than anything else. In addition to speculations about legitimizing the use of torture, or at least CIDT, in the ‘tickling bomb scenario’, the Bush Administration attempted to restrict the legal definition of torture to a bare minimum and at the same time emphasized the relative character of CIDT which allegedly legitimized the practice of using harsh interrogation methods, sensory deprivation, water boarding and similar methods of torture and/or CIDT against suspected terrorists by the CIA and others. This is a deliberate policy of the US and other governments to circumvent the absolute and non-derogable prohibition of torture and CIDT by, for example, denying the application of international human rights law in situations of armed conflict, by creating detention camps for suspected terrorists outside their own territory, such as in Guantánamo Bay, by holding suspected terrorists in secret places of detention, by circumventing the principle of non-refoulement by sending such persons in so-called ‘extraordinary rendition flights’ to countries known for their practice of torture, often on the basis of diplomatic assurances from such states to refrain from torture, and by outsourcing torture to non-state actors, such as in Iraq.

It is no surprise that this policy led to practices of torture and ill-treatment against suspected terrorists and many other detainees, as witnessed in Abu Ghraib, Guantánamo Bay and other places of detention. It also seriously undermined the efforts and credibility of many

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22 See the report of five holders of mandates of special procedures of the UN Commission on Human Rights, Situation of detainees at Guantánamo Bay, UN doc. E/CN.4/2006/120, 27 February 2006.


democratic states, including those in the European Union, to combat torture and ill-treatment worldwide. The legal response to such practices always remains the same. Torture and CIDT are absolutely prohibited under international law, and the principle of proportionality only applies outside detention and direct control over a victim for the sole purpose of defining the scope of application of the prohibition of CIDT. Notwithstanding any political interests to the contrary, the principle of proportionality can never legitimately be applied to justify torture or any other use of physical or mental force and coercion against a detainee.

4. THE PRINCIPLE OF NON-REFOULEMENT

The prohibition of refoulement in Article 3 of the CAT codifies an important principle of general international law, based partly on the case law of human rights treaty bodies, namely that a state violates the absolute prohibition of torture not only if its own authorities subject a person to torture, but also if its authorities send a person to another state where there are substantial grounds for believing that the person would be in danger of being subjected to torture. The vast majority of individual complaints decided by the Committee against Torture concern Article 3, and most violations found by the Committee were actually not directed against states practising torture themselves, but against asylum states where the authorities had rejected asylum requests and then decided to return the asylum-seeker to his or her country of origin.

In contrast to the principle of non-refoulement as developed by the European Court of Human Rights and the UN Human Rights Committee on the basis of Article 3 of the ECHR and Article 7 of the ICCPR, Article 3 of the CAT only applies to torture in the sense of Article 1, but, owing to the insistence of the United States during the drafting, not to other forms of CIDT. The state-centred definition of torture also leads to the conclusion that the CAT does not prohibit — albeit other human rights treaties may do so — states from sending a person to another state if the risk of torture solely emanates from non-state actors.


26 Out of less than 200 individual complaints decided by the Committee up to the end of 2006, more than 75 per cent related to Article 3. Of these 155 complaints, 40 were declared inadmissible, 90 were decided on the merits without finding a violation, and in 25 cases the Committee found a violation of Article 3. Almost half of these violations (12) concern Sweden. The countries of origin most often found to present a real risk of torture are Iran, Turkey, Peru, Tunisia and Zaire (DRC). For these statistics in detail, see Nowak and McArthur, supra (note 5), pp. 166–167 and 1394–1410.

Only in so-called failed states such as Somalia has the Committee accepted a somewhat broader interpretation.\textsuperscript{28}

Although the text of Article 3 speaks only of expulsion, \textit{refoulement} and extradition, this provision covers all forms of obligatory departure of a human being (aliens as well as citizens) from one jurisdiction to another, including forms of ordinary or extraordinary ‘rendition’, as practised by the United States in the fight against global terrorism. Requesting \textit{diplomatic assurances} from governments with a known record of torture, as practised by the United States and certain European countries, is nothing but an attempt to circumvent the absolute prohibition of \textit{refoulement} and, therefore, does not relieve the respective governments from their obligations under Article 3 of the CAT.\textsuperscript{29}

The \textit{refoulement} procedure must be distinguished from the asylum procedure. In particular, States Parties to the Geneva Refugee Convention of 1951 have the right to refuse asylum to persons who have committed serious crimes. Moreover, under the \textit{non-refoulement} principle in Article 33 of the Refugee Convention, a refugee may even be returned to his or her country of origin if there are reasonable grounds for regarding him or her as a danger to the security of the host country. In contrast, Article 3 of the CAT guarantees an \textit{absolute right} which is not subject to any exclusion or limitation clause. In other words, even if the host state where a dangerous terrorist is seeking protection against persecution refuses to grant him or her asylum, the authorities are prevented from returning him or her to the country of origin or any other country where there exists a serious risk of torture.\textsuperscript{30}

In assessing the \textit{risk of torture in the home country}, the domestic authorities in the host state as well as international monitoring bodies must apply both an \textit{objective and a subjective test}. The applicant bears the burden of establishing a \textit{prima facie} case by providing substantial grounds going beyond mere theory and suspicion that torture is objectively being practised in the country of return and that he or she runs a personal risk of being subjected to torture upon return. If there actually does exist a ‘consistent pattern of gross, flagrant or mass violations of human rights’ as outlined in Article 3(2) of the CAT, above all a \textit{systematic practice of torture}, in the home country, it is up to the government of the host state to provide evidence why the applicant would not be at risk of torture.\textsuperscript{31}

\begin{footnotesize}
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\item \textsuperscript{29} See the judgment of the European Court of Human Rights of 15 November 1996 in \textit{Chahal v. the United Kingdom}, Reports of Judgments and Decisions 1996–V; the decision of the Committee against Torture in \textit{Agiza v. Sweden}, supra (note 24); the decision of the Human Rights Committee in \textit{Alzery v. Sweden}, supra (note 24).
\item \textsuperscript{30} Cf., e.g., the decision of the Committee against Torture of 28 April 1997 in \textit{Tapia Paez v. Sweden} (Communication no. 39/1996; Report of the Committee against Torture, GAOR, Fifty-second session, Suppl. no. 44 (A/52/44), pp. 86–94), which concerned an active member of the Sendero Luminoso who had handed out leaflets and handmade bombs during a demonstration in Peru in 1989.
\item \textsuperscript{31} This phrase in Article 3(2) of the CAT is based on both ECOSOC Resolution 1503 (XLVIII) of 1967 and General Assembly Resolution 32/130 of 1977 and represents a compromise between Socialist and Western states in the UN Commission on Human Rights. Paragraph 2 was actually introduced on the basis
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the Committee against Torture makes use of a variety of fact-finding procedures, above all special procedures of the former Commission on Human Rights and present Human Rights Council and its own inquiry procedure under Article 20 of the CAT.\textsuperscript{32} In its decision of 1996 in \textit{Alan v. Switzerland},\textsuperscript{33} the Committee based its findings of a systematic practice of torture in Turkey on its earlier inquiry procedure, in which it had defined a practice of torture as \textit{systematic} if ‘the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question’.\textsuperscript{34} According to this practice, which is similar to that followed by the Special Rapporteur on Torture, torture may in fact be of a systematic character without resulting from the direct intention of the government. It may also result from factors which the government has difficulty in controlling.

If such a systematic practice does not exist in the country of return, there is a stronger burden on the applicant to provide evidence about such personal and present risk. However, the risk does not have to meet the test of being highly probable because the overarching aim of the \textit{non-refoulement} principle is to ensure that the security of the applicant is not endangered. Since the domestic authorities take their decision on the basis of all information available at the time of deciding on the expulsion, extradition or actual deportation of the applicant, the Committee against Torture, when deciding on a possible violation of Article 3 by the host state, must also base its risk assessment on all the facts which the domestic authorities knew or should have known at that time. If the applicant was, however, deported to the home country before the final decision of the Committee (often in violation of a request for interim measures of protection), it also takes evidence into account which relates to the treatment of the applicant after return. But this evidence only serves the purpose of assessing what the authorities knew or should have known at the time of deportation.\textsuperscript{35}

5. OBLIGATION TO CRIMINALIZE TORTURE AND TO ESTABLISH COMPREHENSIVE JURISDICTION

One of the most innovative features of the Convention against Torture is the obligation of States Parties under Article 4 to criminalize torture under their domestic laws with appropriate penalties and to eliminate safe havens for perpetrators of torture by establishing various types of jurisdiction, including universal criminal jurisdiction in accordance with the

\textsuperscript{32} Cf. the consistent case law of the Committee since one of its first decisions of 27 April 1994 in \textit{Mutombo v. Switzerland} (Communication no. 13/1993), Report of the Committee against Torture, GAOR, Forty-ninth session, Suppl. no. 44 (A/49/44), pp. 45–53.

\textsuperscript{33} Decision of the Committee against Torture of 8 May 1996 in \textit{Alan v. Switzerland} (Communication no. 21/1995), Report of the Committee against Torture, GAOR, Fifty-first session, Suppl. no. 44 (A/51/44), pp. 68–75.

\textsuperscript{34} UN doc. A/48/44/Add.1, para. 39.

\textsuperscript{35} Cf., e.g., the decision of the Committee against Torture of 17 May 2005 in \textit{Brada v. France} (Communication no. 195/2002), Report of the Committee against Torture, GAOR, Sixtieth session, Suppl. no. 44 (A/60/44), pp. 127–141, and in \textit{Agiza v. Sweden, supra} (note 24).
detailed provisions in Articles 5 to 9. This central object and purpose of the Convention, which is modelled on earlier treaties combating terrorism, is based on the experience that impunity for perpetrators of torture is one of the main reasons that torture continues to be widely practised in many countries of the world despite its absolute prohibition under international human rights and humanitarian law.

The obligation to use criminal law for the purpose of fighting impunity only applies to torture, not to CIDT. The term ‘torture’ must be interpreted in accordance with the definition in Article 1, which means that not only the act of torture as such, but also that the attempt, instigation, incitement, superior order and instruction, consent and acquiescence, concealment and other forms of complicity and participation, shall be criminalized. Although not a strict legal requirement, it is advisable that States Parties fully incorporate the definition of torture given in Article 1, without the sentence on ‘lawful sanctions’, into their domestic criminal code. In practice, only a minority of all States Parties has actually complied with this requirement.  

Article 4(2) provides that States Parties shall make the offences of torture ‘punishable by appropriate penalties which take into account their grave nature’. According to the practice of the Committee against Torture in the state reporting procedure, only a prison sentence of at least a few years can be considered as an appropriate penalty. Although international human rights law, in principle, does not recognize a subjective right of victims to have perpetrators of human rights violations punished by criminal law, Article 4 can also be invoked by victims of torture in the individual complaints procedure before the Committee against Torture under Article 22 of the CAT. In the landmark decision in Guridi v. Spain, the Committee ruled that pardoning civil guards, who had been found guilty of torture by an independent court, violated the victim’s rights under Article 4(2).

Article 5 places an obligation on States Parties to establish their jurisdiction over the crime of torture in a comprehensive manner in order to avoid safe havens for perpetrators of torture. In addition to the territoriality and flag principle, as well as the active and passive nationality principle laid down in Article 5(1), Article 5(2) — for the first time in a human rights treaty — contains the explicit obligation of States Parties to establish universal jurisdiction in all cases.

36 See in general the practice of the Committee against Torture in the state reporting procedure and the experience of the SRT on the basis of his country missions. See Nowak and McArthur, supra (note 5), pp. 233–242.

37 According to Ingelse, supra (note 5), p. 342, a ‘custodial sentence of between six and twenty years would best correspond to the Committee’s interpretation of the requirements of Article 4(2)’.


39 See the decision of the Committee against Torture of 17 May 2005 in Guridi v. Spain (Communication no. 212/2002), Report of the Committee against Torture, GAOR, Sixtieth session, Suppl. no. 44 (A/60/44), pp. 147–152, para. 6.7: ‘in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the Civil Guards are incompatible with the duty to impose appropriate punishment’. See also below, section 6.
where a suspected torturer is present in any territory under their jurisdiction. The provisions of Articles 6 to 9 are closely related to Article 5 and further define the various steps which states need to take in order to bring suspected torturers to justice.

First of all, states must take the necessary legislative measures to establish jurisdiction in their respective domestic criminal codes in accordance with the various principles laid down in Article 5. Only in respect of the passive nationality principle in Article 5(1)(c) — *i.e.*, if the victim is a national but the act of torture was performed by others in a foreign country — do states enjoy the discretionary power to decide whether or not to apply it. But with respect to the active nationality, territoriality, flag and universal jurisdiction principles, the obligation of States Parties to entrust their courts with full jurisdiction is unambiguous. In the landmark case of *Guenguen et al. v. Senegal*, which concerns the former dictator of Chad, Hissène Habré, who is accused of the systematic practice of torture in Chad during the 1980s and who found protection in Senegal where he has resided since having been overthrown in 1990 by the current President, Idris Déby, the Committee against Torture held that the failure of the legislative power of Senegal to establish universal jurisdiction (or any other type of jurisdiction envisaged in Article 5) constitutes a violation of this provision.

Secondly, the administrative and judicial authorities of States Parties must also take specific practical steps in order to bring suspected torturers to justice. Under the territoriality, flag and nationality principles in Article 5(1), *criminal investigations* shall be initiated as soon as the authorities of a State Party have sufficient information to assume that an act of torture has been committed in any territory under its jurisdiction, on board a ship or aircraft registered in that state, by one of its nationals or against one of its nationals (if the domestic law provides for jurisdiction under the passive nationality principle). Such investigations need to be conducted even if the suspected torturer is not present in the territory of the respective state or when the identity of the torturer is not yet known to the authorities. For the territorial state, the obligation to conduct prompt and impartial investigations, either *ex officio* or on the basis of a complaint by the victim, is also underlined by Articles 12 and 13 of the CAT. If the suspected torturer is outside the territory of the state which initiated criminal investigations,

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the state’s authorities may request extradition from another state where this person is present, in accordance with Article 8. For torture cases, the Convention may even be considered as the legal basis for such extradition procedures.

In contrast to the territoriality, flag and nationality principles, the obligation to exercise universal jurisdiction only arises if the alleged offender is present in any territory under the jurisdiction of a State Party. This is, however, the only condition for exercising universal jurisdiction in accordance with the clear wording of Article 5(2). Other conditions, such as an extradition request by a third state, have clearly been rejected during the drafting of Articles 5 to 9, as was confirmed by the Committee in the Habré case. In other words, if the authorities of a State Party have reasonable grounds to believe that an act of torture has been committed by a person present on its territory (the so-called forum state), they have an obligation under Article 6 to take him or her into custody (or to take other measures to ensure his or her presence) and to make a preliminary inquiry into the facts. In addition, the forum state shall notify the territorial, flag and/or national states of its actions and the outcome of its preliminary inquiry. If any of these states request extradition, the forum state has the choice of either extraditing the suspected torturer or of prosecuting the person before its domestic criminal courts (aut dedere aut iudicare in accordance with Article 7). If no state requests extradition within a reasonable time, the forum state has no choice but to prosecute the alleged offender. While other States Parties have no obligation under the Convention to request extradition, as was confirmed by the Committee against Torture in the Roitman Rosenmann case concerning the extradition of General Pinochet from the United Kingdom to Spain, all other States Parties have an obligation under Article 9 to provide judicial assistance to the forum state by, for example, supplying all evidence at their disposal.

In practice, for political reasons, States Parties are extremely reluctant to exercise universal jurisdiction in torture cases. One case of a successful prosecution is the conviction

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42 See Nowak and McArthur, supra (note 5), pp. 261–274; Burgers and Danelius, supra (note 5), p. 130.
43 Guengueng et al. v. Senegal, supra (note 41), para. 9.7. The Committee noted that ‘the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition’.
44 But see the case of Ely Ould Dah, a Mauritian army lieutenant who was in France to participate in a training course and was arrested in July 1999 under the universal jurisdiction principle on suspicion of having tortured and killed several black Mauritian soldiers. Under pressure from Mauritania, Ould Dah was released under judicial supervision in September 1999 but absconded and fled to Mauritania. He was later tried in absentia and sentenced in July 2005 to ten years imprisonment. See <http://www.fidh.org>.
45 Decision of the Committee against Torture of 30 April 2002 in Marcos Roitman Rosenmann v. Spain (Communication no. 176/2000), Report of the Committee against Torture, GAOR, Fifty-seventh session, Suppl. no. 44 (A/57/44), pp. 210–218. The case concerns a Spanish citizen of Chilean origin residing in Madrid who was tortured in Chile following the coup d’etat of 1973. In 1996, together with a group of other torture victims, he filed a complaint before Spanish authorities requesting that criminal proceedings be opened against the former junta chief, General Augusto Pinochet. Pursuant to a warrant issued on the proceedings opened in Spain, the UK police authorities in 1998 placed General Pinochet, who had travelled from Chile to the UK for medical treatment and was convalescing in London, under detention. Although the British courts decided that General Pinochet could be extradited to Spain and the Spanish judicial authorities vigorously pursued his extradition, the Spanish Ministry of Foreign Affairs and the Spanish Embassy in London obstructed these efforts and Pinochet was finally transferred in 2001 back to Chile. See Nowak and McArthur, supra (note 5), pp. 292–295.
of the former Afghan warlord Faryadi Sarwar Zardad in July 2005 by the London Central Criminal Court (Old Bailey) for conspiring to torture and take hostages in Afghanistan between 1991 and 1996, contrary to section 1(1) of the British Criminal Law Act 1977. Zardad had been running a checkpoint between Jalalabad and Kabul, at which travellers were frequently abducted and subjected to torture and ill-treatment. In 1998, he arrived in the United Kingdom to seek asylum. After his crimes came to light in the British media, Attorney General Lord Goldsmith announced that Britain had decided to try the case on the basis that his crimes were so ‘merciless’ and such ‘an affront to justice’ that they should be tried in any country. But the investigations turned out to be difficult and British officials went to Afghanistan on nine occasions. In total, the trial was estimated to have cost over GBP 3 million.

Other states are less willing to take their obligation to try suspected torturers under the universal jurisdiction principle seriously. When Izzat Ibrahim Khalil Al Duri, the Deputy of former Iraqi dictator Saddam Hussein, who was held responsible for many cases of systematic torture in Iraq, travelled to Austria in 1999 to undergo medical treatment in Vienna and a complaint was filed by the Green Party with the Public Prosecutor in Vienna to arrange his arrest and commence a criminal investigation, the Austrian authorities pretended that they lacked jurisdiction, failed to arrest him and permitted him to leave the country. Today, Al Duri ranks among the top men wanted by the allied forces for crimes against humanity. Similarly, the German authorities were not very eager to take the necessary steps to arrest and prosecute Zokirjon Almatov, then Minister of Interior of Uzbekistan and held responsible for systematic practices of torture in his country and for the Andijan massacre in May 2005, who travelled to Germany in November 2005 to receive medical treatment for cancer. Although the present Special Rapporteur on Torture explicitly requested Germany to take action, and his predecessor, Theo van Boven, who had established that torture was practised systematically in Uzbekistan, after a fact-finding mission in 2002, had offered to provide testimony, Germany’s Attorney General, Kay Nehm, decided in March 2006 not to open an investigation, and Almatov returned safely to his home country. The case of Ould Dah cited above shows that alternative measures to custody, such as judicial control orders, might fail to ensure the presence of suspected torturers. Even if the authorities of the forum state arrest a suspected torturer, as in the case of General Pinochet before the British authorities, the extradition request by the Spanish judge Baltasar Garzón was obstructed by his own government, and Pinochet was transferred to Chile, where he died before the judicial proceedings were completed. In the Habré case, the Government of Senegal even referred the case to the


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African Union for the purpose of evading its responsibilities under the Convention and for a long time failed to enact the necessary legislative reforms to establish universal jurisdiction.

The Pinochet, Habré and other cases\(^{51}\) illustrate that even former heads of state or government are not immune from prosecution for acts of torture before domestic courts.\(^{52}\) The most important judgment in this respect is the Decision of the British House of Lords of March 1999 in the Pinochet case.\(^{53}\) Despite the highly divergent and partly confusing legal analysis of the different Law Lords, they were able to agree on some ground-breaking legal conclusions with regard to immunity and universal jurisdiction. Six of the seven Lords found that a former head of state did not enjoy immunity from extradition and prosecution for torture and conspiracy to commit torture. Importantly, four of the Lords relied on the Convention against Torture to abrogate Pinochet’s immunity. Secondly, the majority of the Lords agreed that he could be extradited for crimes allegedly committed after 8 December 1988, the date of the entry into force of the CAT in the United Kingdom.

In February 2002, the International Court of Justice delivered a controversial judgment in the well-known Arrest Warrant Case of the Democratic Republic of the Congo v. Belgium.\(^{54}\) On the basis of the equally controversial Belgian law concerning the punishment

\(^{51}\) See, e.g., the case of Desiré Delano Bouterse, the former military dictator of Suriname, against whom proceedings were opened before Dutch courts. Although the Amsterdam Court of Appeals concluded that Dutch courts could exercise jurisdiction over torture committed in December 1982 in Suriname (decision of the 5th chamber of 20 November 2000, Petitions nos. R/97/163/12 Sv and R/97/176/12 Sv), the Dutch Supreme Court (judgment of 18 September 2001, no. 00749/01, CW 2323) finally ruled that Mr Bouterse could not be tried in absentia and that the Dutch Act implementing the CAT could not be applied retroactively. But the fact that Bouterse was a former head of state did not play any role. See also Nowak and McArthur, supra (note 5), pp. 298–299.

\(^{52}\) Before International Criminal Tribunals, even incumbent heads of state or government may be prosecuted. Cf., e.g., the cases of Kambanda before the ICTR (Kambanda ICTR–97–23), Milošević before the ICTY (Milošević IT–02–54) and Taylor before the Special Court for Sierra Leone (SCSL), respectively. See also Article 27 of the ICC Statute.


The principles and guidelines include various types of reparation, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.56

The corresponding provisions in the Convention against Torture are Articles 13 and 14. Article 13 contains the right of every victim of torture to ‘complain to, and have his case promptly and impartially examined’ by the competent authorities in the State Party. In addition, 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’. Both parts of this provision are extremely important and must be distinguished from the respective obligations of states in Articles 12 and 4 to 9 of the Convention. Whereas Article 12 requires States Parties to carry out ex officio investigations whenever there is a suspicion of torture or ill-treatment (on the basis of allegations by NGOs or national human rights institutions, prison doctors, prison chaplains or observations made by senior police officials or prison personnel), Article 13 requires such investigation in response to a complaint by the victim. Such a duty presupposes, of course, that every victim of torture and ill-treatment, above all persons in detention, enjoys an effective right to complain to a competent body without fear of reprisals. This is only possible if the State Party takes the necessary measures to protect both the complainant and possible witnesses (often fellow detainees) against ill-treatment and intimidation as a consequence of such complaint or witness testimony.

In the experience of the Special Rapporteur on Torture, most detainees who have experienced torture or CIDT during detention are extremely afraid to report these experiences at all, or only after they have received full assurances that their reports will be treated with absolute confidentiality. If a government or high prison and police officials ensure the SRT that there is no practice of torture in their country because they have never received any single complaint of torture, this usually is not an indication of the absence of torture but, to the contrary, fairly strong evidence that torture is widespread and that the victims do not enjoy any effective remedy to complain to an independent body without fear of reprisals. Often, the SRT during one prison inspection receives more credible allegations of torture by detainees, which are corroborated by forensic experts accompanying him on country missions, than the competent authorities in the country have received in years.

Article 13, therefore, constitutes the most important remedy for torture victims, and is aimed solely at having the facts established as quickly as possible by a competent and independent authority. This does not have to be a court. It is more important that, in the first place, these allegations are immediately investigated by a body with full police investigation powers, assisted by independent forensic experts, and that this body is at the same time fully independent from the police or prison personnel suspected of having committed the act of torture (a so-called ‘police-police’). Depending on the facts established in accordance with Article 13, further action may or shall be taken with a view to bringing the individual perpetrators to justice under criminal law (Articles 4 to 9)58 and/or providing the victim with reparation under civil law pursuant to Article 14.

56 Chapter IX, paras. 15–23 of the van Boven/Bassiouni Principles and Guidelines, supra (note 55).
57 According to the CAT, Article 16, the right of victims to a remedy under Article 13 also applies to CIDT.
58 See supra, section 5.
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According to Article 14, 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’. For torture victims, the most important remedy for human rights violations — restitution (restitution in integrum) — is not possible because the pain and suffering can never be taken away. But victims of torture, whether they have suffered long term physical injuries or not, are in need of medical, psychological and often social rehabilitation, usually for a considerable period of time. Most victims never fully recover from the traumatic experience of torture. In many countries of the world, special rehabilitation centres for torture victims have been established, but usually such centres are not available in countries where torture is most systematic. Often, victims have no alternative than fleeing their home country and seeking asylum abroad, but usually they cannot provide witnesses or other evidence to prove what actually happened to them. The recognition of the truth, criminal justice, an apology or similar symbolic act by those who bear direct or indirect responsibility for the practice of torture often means more to the victims than money. On the other hand, medical and psychological treatment leading to full recovery and rehabilitation is highly expensive. If the individual perpetrators of torture were to be required to pay the life long rehabilitation costs for their victims, this might have a stronger deterrent effect than criminal or disciplinary punishments. Monetary compensation, both for the material (rehabilitation) costs and damages, and for the pain and suffering inflicted, therefore often remains as only effective means of reparation (redress) actually available to the victim.

Who is the duty bearer in relation to the right of torture victims to reparation, including compensation and rehabilitation? From a classical human rights point of view, the state where the act of torture occurred must provide reparation. From the perspective of civil law, the individual perpetrator of torture is the main duty bearer, and the state only bears subsidiary responsibility. Article 14 seems to combine both approaches. As soon as an investigation conducted in accordance with Articles 12 and/or 13 establishes that an act of torture or CIDT has occurred, the state has an obligation ex officio to provide the victim with rehabilitation and other forms of adequate redress. Although the words ‘committed in any territory under its jurisdiction’ after the word ‘torture’ were deleted from the text of Article 14 during the drafting in the Working Group of the Commission on Human Rights, there can be no doubt that the obligation to provide reparation ex officio can only rest with the state which actually bears responsibility for the torture inflicted. If a victim of torture seeks and

59 Both the travaux préparatoires and the object and purpose of this provision indicate that the right to reparation also applies to victims of CIDT in accordance with the words ‘in particular’ in Article 16(1). See Nowak and McArthur, supra (note 5), pp. 455–460, 481–483 and 484–485. See also the decision of the Committee against Torture of 21 November 2002 in the Roma pogrom case of Dzemajl et al. v. Yugoslavia (Serbia and Montenegro) (Communication no. 161/2000), Report of the Committee against Torture, GAOR, Fifty-eighth session, Suppl. no. 44 (A/58/44), pp. 85–97, para. 10.

receives asylum abroad, the asylum state has various obligations under the Geneva Refugee Convention and other general human rights treaties to provide shelter, food and medicine to him or her, but the victim has no right to reparation against the asylum state under Article 14 for the suffering inflicted by the authorities of another state.

But Article 14 also requires that each State Party ensures in its legal system an enforceable right to compensation to victims of torture. Nothing in the text or drafting history indicates that this civil right against the perpetrators of torture shall be restricted to torture committed in the territory of the respective State Party. But any interpretation going beyond the territoriality principle raises difficult and controversial questions of interpretation relating to civil jurisdiction based on the (active and passive) nationality principle as well as on universal civil jurisdiction. In the well-known Filártiga case, a US court in 1980, based on the Alien Tort Claims Act of 1789, accepted the claim of the parents of a torture victim who had been tortured to death in Paraguay, against his torturer who at that time lived in the United States. On the other hand, the British House of Lords in the Jones case in 2006 held that British citizens who claimed that they were subjected to torture in Saudi Arabia could neither sue the Kingdom of Saudi Arabia nor its civil servants before British courts for compensation because the ‘foreign state’s right to immunity cannot be circumvented by suing its servants or agents’. In my opinion, this judgment is not in accordance with the obligation of the United Kingdom under Article 14 of the CAT to provide victims of torture (in this case British citizens) an enforceable right of compensation against the individual perpetrators in Saudi Arabia. As the Court of Appeals had ruled before, the House of Lords should have made a distinction between state immunity and personal immunity which in fact only applies to incumbent heads of state and government, Ministers for Foreign Affairs and diplomats, but not to police and prison staff or the Minister of Interior of Saudi Arabia. Would the House of Lords have decided differently if the individual Saudi Arabian perpetrators of torture resided in the United Kingdom and had property there? If even former heads of state, such as General Pinochet, according to the House of Lords, did not enjoy immunity in the


65 See the judgment of the ICJ in the Arrest Warrant case, supra (note 54).
United Kingdom against universal criminal jurisdiction, why should a Saudi Arabian police officer enjoy immunity against civil jurisdiction based on the principle of passive nationality?

The Committee against Torture has not yet decided any individual case relating to these difficult questions of universal civil jurisdiction and immunity. But in the state reporting procedure, the Committee congratulated the United States on the broad legal recourse to compensation for victims of torture, while it recommended that Canada 'review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture'. This has to do with the case of Bouzari v. Islamic Republic of Iran, in which the Court of Appeal for Ontario had decided in 2004 that immunity was a bar to a civil suit for torture committed outside the state. These cases show that universal civil jurisdiction is still a somewhat fragile mechanism. But in a rapidly globalizing world, international law is in the process of moving towards universal jurisdiction, both in the field of criminal law and torts.

Most individual cases in which the Committee against Torture has found a violation of Article 14 relate to Serbia and Montenegro. The Committee has held that the absence of criminal investigations and proceedings in fact had deprived the victims of the possibility of filing a civil suit for compensation. This does not mean, however, that civil suits for compensation can only be filed after the perpetrators have been found guilty by a criminal court. The landmark case of Garidi v. Spain concerned serious allegations of torture by members of the Spanish civil guard during a 1992 police operation against an ETA combat unit. In 1997, the Vizcaya Provincial Court found three civil guards guilty of torture and sentenced each of them to imprisonment for more than four years. In addition, the civil guards were ordered to pay compensation to the victim. In 1998, the Supreme Court decided to reduce the prison sentence to one year. In 1999, the Council of Ministers granted pardons to the three civil guards and suspended them from any form of public office for only one month and one day. These pardons were finally granted by the King. In addition to finding a violation of Article 4, the Committee found a violation of Article 14 notwithstanding the fact that the perpetrators actually had paid the required amount of compensation to the victim. It considered that compensation should cover all the damages suffered by the victim,

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66 See supra (note 53).
71 See Nowak and McArthur, supra (note 5), pp. 472–480.
72 See Garidi v. Spain, supra (note 39).
which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations. 73

7. OBLIGATION TO PREVENT TORTURE AND CIDT

According to Article 2(1) of the CAT, each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, i.e., also on board ships and aircraft, and in occupied and other territories under its jurisdiction. 74 The corresponding obligation in relation to other forms of CIDT can be found in Article 16(1). The list of measures to prevent torture recommended to states time and again by the Committee against Torture and other treaty monitoring bodies, the UN Special Rapporteur on Torture, the European Committee for the Prevention of Torture (CPT), 75 by NGOs 76 and many others is almost unlimited. If states were to take their obligation to prevent torture and CIDT seriously, this horrible phenomenon could easily be eradicated. But unfortunately, most states, in particular high level civilian and military officials responsible for the security forces, lack the political will to take all measures necessary to prevent torture; and the counter-terrorism practices conducted even by highly democratic states in the aftermath of 11 September 2001 have further contributed to a climate in which torture and CIDT seem to be openly admitted and justified.

The most important measures states should take for the prevention of torture include:

- Prohibition of arbitrary arrest and detention and respect for all rights of detainees in accordance with Articles 9 and 10 of the ICCPR and respective soft law instruments; 77
- Prohibition of incommunicado detention and prolonged solitary confinement;
- Maintaining comprehensive and transparent prison and detention registers;
- Right of detainees to have prompt access to lawyers, doctors and family members;

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73 Guridi v. Spain, supra (note 39), para. 6.8.
74 Contrary to assertions by the US Government, there can be no doubt that the US is under a legal obligation to prevent torture and CIDT at its detention facilities for suspected terrorists at Guantánamo Bay on the island of Cuba. See also Concluding observations of the Committee against Torture, UN doc. CAT/C/USA/CO/2, 25 July 2006; and joint report of five special procedure mandate holders, supra (note 22).
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– Limit of police custody to a maximum of 48 hours and the right of all detainees to be brought before a judge within 48 hours (right to habeas corpus; Article 9(4) of the ICCPR);
– Limit of pre-trial detention for accused detainees to no longer than a few months and consideration of non-custodial measures, such as release on bail;
– Prompt and impartial ex officio investigation by prison directors, police chiefs and other competent bodies with full investigative powers (‘police-police’) wherever there is reasonable ground to believe that an act of torture or CIDT has been committed under their authority (Article 12 of the CAT);
– Prompt and impartial investigation of any allegation of torture by the victim, witnesses, family members and others (Article 13 of the CAT);
– Criminal investigation, prosecution, conviction and punishment with appropriate penalties of all suspected torturers as method of deterrence (Articles 4 to 9 of the CAT);
– Independent medical examination of every detainee at the time of entering and leaving any place of detention, whether a police lock-up, a pre-trial detention facility, a prison, psychiatric hospital, or special detention facilities for minors, aliens, etc.;
– Independent and prompt forensic examination of persons claiming to have been subjected to torture (Istanbul Protocol);
– Human rights education and anti-torture training of law enforcement personnel, including criminal police investigators, prison officials, military and medical personnel (Article 10 of the CAT);
– Systematic review of prison and detention rules, as well as interrogation rules, methods and practices (Article 11 of the CAT);
– Keeping places of detention in conditions which comply with minimum standards of human dignity, by providing adequate space, air, privacy and hygienic standards, food, water, medical and psychological care, strict separation of men and women, adults and juveniles, convicted and pre-trial detainees (Article 10 of the ICCPR);
– Respect of the presumption of innocence for non-convicted detainees (Article 14(2) of the ICCPR);
– Treatment of convicted prisoners aimed at their reformation and social rehabilitation (Article 10 of the ICCPR);
– Prohibition of corporal and capital punishment;
– Prohibition of refoulement (Article 3 of the CAT);
– Prohibition of invoking evidence extracted by torture in any judicial or administrative proceedings (Article 15 of the CAT);
– Preventive and unannounced visits to all places of detention by independent national preventive mechanisms on a regular and ad hoc basis (OPCAT).

Most of these measures and obligations are fairly self-evident and need no further explanation. Some are dealt with in the previous sections of this contribution. In the following, attention will be paid to problems related to the implementation of the theory of the ‘tainted fruits of the poisonous tree’, as provided for in Article 15 of the CAT and to the most important new mechanism available to States Parties of the CAT, the acceptance of preventive visits to all places of detention by the UN Subcommittee on Prevention of Torture
and by so-called national preventive mechanisms to be established in accordance with the Optional Protocol to the Convention.

8. THE PROHIBITION TO USE EVIDENCE EXTRACTED BY TORTURE

Article 15 of the CAT stipulates that each State Party shall ‘ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings’. The purpose of this provision seems to be twofold. Firstly, confessions or other information extracted by torture are usually not reliable enough to be used as a source of evidence in any legal proceedings. Secondly, prohibiting the use of such evidence in legal proceedings removes an important incentive for the use of torture and, therefore, contributes to the prevention of such practice. It should be noted that the Human Rights Committee has held that any evidence obtained by CIDT or coercion in any criminal proceedings is contrary to Article 14(3)(g) of the ICCPR.

Although the ‘theory of the tainted fruits of the poisonous tree’ seems to be firmly established in most legal cultures, the absolute prohibition of using evidence extracted by torture was recently put in question in the context of the fight against terrorism, as was the absolute prohibition of torture as such. The former British Home Secretary Charles Clarke argued, for example, that the Special Immigration Appeals Commission, a British superior court established by statute, may use evidence obtained by torture in another country, such as the United States, as long as this evidence had been extracted without the complicity of the British authorities. This argument was even supported in 2004 by a judgment of the Court of Appeal. Similarly, the Hanseatic Higher Regional Court in Hamburg, in sentencing Mr Mounir El-Motassadeq for his participation in the planning of the 11 September 2001 attacks in the United States, made use of the full summaries of the testimonies given by three Al-Qaeda suspects before US authorities despite the fact that they were held in a secret CIA detention facility and that the testimony probably had been extracted by torture. In Germany and Denmark, another intensive debate arose about the legitimacy of using

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81 Decision of the Hanseatic Higher Regional Court of 14 June 2005 (2005 NJW Heft 32) and judgment of 19 August 2005 (2 StE 4/02–5) sentencing Mr El-Motassadeq to seven years’ imprisonment for membership in a terrorist organization. See Report of the SRT, supra (note 21), paras. 49–56.
information received by foreign intelligence agencies likely to use torture for the mere purpose of preventing terrorist acts.\footnote{See, e.g., a statement made by the German Minister of the Interior, Wolfgang Schäuble, in \textit{Spiegel online} of 16 December 2005. See also the opposite stance adopted by the President of the German Constitutional Court, Mr Papier, in the \textit{Handelsblatt} of 26 December 2005. In \textit{G.K. v. Switzerland}, which concerned a suspected German ETA member extradited by Switzerland to Spain in 2003 who alleged that the Spanish extradition request was based on a statement of another ETA member extracted by torture, the Committee against Torture clearly confirmed that:}

The two central questions of interpretation relate to the words ‘is established’ and ‘in any proceedings’ in Article 15. Although it is of utmost importance that confessions extracted by torture from an accused shall not be used as evidence against him or her before a criminal court, the meaning and preventive effect of this provision goes beyond judicial proceedings. In \textit{G.K. v. Switzerland}, which concerned a suspected German ETA member extradited by Switzerland to Spain in 2003 who alleged that the Spanish extradition request was based on a statement of another ETA member extracted by torture, the Committee against Torture clearly confirmed that:

the broad scope of the prohibition in article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence ‘in any proceedings’, is a function of the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction, including extradition proceedings, have been made as a result of torture.\footnote{\textit{G.K. v. Switzerland}, supra (note 79), para. 6.10. See also the decision of 21 November 2002 in \textit{P.E. v. France} (Communication no. 193/2001), Report of the Committee against Torture, GAOR, Fifty-eighth session, Suppl. no. 44 (A/58/44), pp. 135–152.}

The same applies to expulsion and similar administrative proceedings, i.e., decisions on the basis of a formal procedure regulated by a procedural code, against which an appeal to a higher administrative or judicial authority is possible. Purely preventive measures, such as the evacuation of a building on the basis of information provided by a foreign intelligence service that a bomb had been planted in that building which might soon detonate, do not fall under the scope of application of Article 15. Probably, such information could also be used by the police to detain a person for the purpose of preventing him or her from committing an offence. But as soon as formal administrative or judicial proceedings are initiated against this person, the respective authorities must ensure that their decision is not based on information extracted by torture. Admittedly, it is difficult to draw the exact line between informal measures and formal procedural decisions in the complex contemporary system of fighting organized crime and terrorism.

This leads us to the equally difficult question of what the term ‘established’ means and who has the burden of proof to establish whether or not a confession or information was extracted by torture. In the aforementioned British case, foreign terrorist suspects had been subjected to indefinite preventive detention under broad British anti-terrorism legislation, by an order of the Home Secretary. Ten of them claimed that the Home Secretary had based his decision on statements obtained through torture of detainees held by the United States. Both the Special
Immigration Appeals Commission and the Court of Appeal, by a majority of two to one, dismissed these appeals on the ground that such information from a foreign intelligence service could be used as long as British authorities were not involved in the alleged practices of torture.\textsuperscript{84} This controversial ruling was unanimously overturned by a well-known judgment of the House of Lords in December 2005.\textsuperscript{85} Lord Bingham even stated that ‘the English common law has regarded torture and its fruits with abhorrence for over 500 years’ and that he felt even a little dismayed at the suggestion of the Court of Appeal that this deeply-rooted tradition could simply be overridden by an anti-terrorism statute and procedural rule.\textsuperscript{86}

The Law Lords were, however, less unanimous on the question of the burden of proof in establishing whether or not a statement was actually obtained by torture. By a majority of four against three, the House of Lords held that evidence should only be excluded if the competent British authorities, in this case the Special Immigration Appeals Commission, establish, by means of diligent inquiries into the sources that are practicable to carry out and on a balance of probabilities, that the information relied on by the Home Secretary was obtained by torture.\textsuperscript{87} This seems to be exactly the test which the Hamburg Court applied in the \textit{El-Motassadeq} case cited above,\textsuperscript{88} and which in practice is very difficult to meet. How shall the applicants and/or a British appeals commission establish, without the cooperation of the US authorities, beyond reasonable doubt that the CIA extracted information by torture? If the information was provided by the intelligence services of Egypt or Syria, this is even more difficult, if not impossible. In his dissenting opinion, Lord Bingham rightly concluded that ‘it is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet’.\textsuperscript{89} If, after a respective inquiry, the competent authorities cannot exclude a real risk of torture, the evidence should, therefore, not be admitted in any formal proceedings.

9. PREVENTIVE VISITS TO PLACES OF DETENTION: OPCAT

Some 30 years ago, Jean-Jacques Gautier, a Geneva banker dedicated to the eradication of torture, proposed a universal system of preventive visits to places of detention on the model of the visits carried out by the International Committee of the Red Cross and Red Crescent.\textsuperscript{90}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{supra} (note 80).
\item Judgment of the House of Lords, \textit{supra} (note 85), para. 51.
\item \textit{Ibid.}, para. 121.
\item See \textit{supra} (note 81).
\item See Judgment of the House of Lords, \textit{supra} (note 85), para. 59.
\item \textit{Cf.} for the following Nowak and McArthur, \textit{supra} (note 5), pp. 1–14; Report of the SRT, \textit{supra} (note 21), paras. 66–75; Kerstin Buchinger, \textit{From Repression to Prevention: The Optional Protocol to the International

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In 1980, Costa Rica submitted a text for an optional protocol to the Commission on Human Rights \(^91\) which was based on the Gautier idea as developed by non-governmental organizations such as the International Commission of Jurists and the then Swiss Committee against Torture, the predecessor of the Association for the Prevention of Torture (APT). But the United Nations at that time was more concerned with the drafting and adoption of the Convention against Torture, and the Costa Rica Protocol was taken over by the Council of Europe and developed into the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987.\(^92\) The preventive visits carried out by the \textit{European Committee for the Prevention of Torture} in all Member States of the Council of Europe soon turned out to be so successful that the United Nations decided in the early 1990s to continue the drafting process. On 18 December 2002, the General Assembly finally adopted the \textit{Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)} which entered into force on 22 June 2006.\(^93\) OPCAT contains important innovative elements as compared with its European counterpart.

The rationale for both instruments is based on the experience that torture and ill-treatment usually take place in isolated places of detention, where those who practise torture feel confident that they are outside the reach of effective monitoring and accountability. Since torture is absolutely prohibited under all legal systems and moral codes of conduct worldwide, it can only function as part of a system where the colleagues and superiors of the torturers order, condone, or at least tolerate such practices, and where the torture chambers are effectively shielded from the outside. The victims of torture are either killed or intimidated to the extent that they do not dare to talk about their experiences. If victims nevertheless complain about torture, they face enormous difficulties in proving what happened to them in isolation and, as suspected criminals, outlaws or terrorists, their credibility is routinely undermined by the authorities. Accordingly, the only way of breaking this vicious cycle is to expose places of detention to public scrutiny and to make the entire system in which police, security and intelligence officials operate more transparent and accountable to external monitoring.

Missions of international monitoring bodies to countries and visits to places of detention are usually regarded as a strong interference with state sovereignty. The monitoring procedures before UN treaty bodies are usually limited to the examination of state reports and individual complaints on the basis of written information and an oral discussion with state representatives in the reporting procedure.\(^94\) Country missions are not foreseen.

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\(^91\) UN doc. E./CN.4/1409, 6 March 1980.

\(^92\) CETS no. 126, opened for signature 26 November 1987, entry into force 1 February 1989. See Kriebaum \textit{supra} (note 75); Morgan and Evans, \textit{supra} (note 75).

\(^93\) General Assembly Resolution 57/199.

By introducing the *inquiry procedure* under Article 20, the Convention against Torture took an innovative step which was later followed by the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995\(^95\) and by Article 33 of the Convention on Enforced Disappearances in 2006.\(^96\) The inquiry procedure is initiated by the Committee against Torture *ex officio* on the basis of reliable information containing well-founded indications that torture is being systematically practised in the territory of a State Party. But even the inquiry procedure on the systematic practice of torture, which may be opted out by States Parties by a special reservation in accordance with Article 28, only permits a *fact-finding mission to the country* on the basis of an explicit agreement by the government concerned.\(^97\) So far, the Committee against Torture has concluded seven inquiries to Turkey, Egypt, Peru, Sri Lanka, Mexico, Serbia and Montenegro, and Brazil.\(^98\) With the exception of Egypt, all States Parties agreed to a fact-finding mission on the spot and a systematic practice of torture was found in all cases except Sri Lanka.

Other monitoring bodies, such as the *United Nations Special Rapporteur on Torture*, can conduct fact-finding missions to countries also only on the basis of an explicit invitation by the respective government. This prerogative of state sovereignty was explicitly waived when the Council of Europe adopted the European Convention for the Prevention of Torture. By ratifying this treaty, states accept that the CPT may visit their territory at any time without any further permission and carry out unannounced visits to places of detention. On the universal level, many states objected to such a far-reaching waiver of their sovereignty.

After many years of discussions, the Commission on Human Rights finally accepted a proposal, originally submitted by Mexico in 2001 on behalf of the Latin American and Caribbean Group, for an inspection system created under the Optional Protocol to the CAT.\(^99\) The final compromise led to a *two-pillar system*.

Visits to places of detention are primarily carried out by a so-called *national preventive mechanism*, *i.e.*, an independent national body similar to national human rights institutions to be established in accordance with the Paris Principles.\(^100\) It shall be established by every State Party at the latest one year after the entry into force of OPCAT and has the right to carry out unannounced visits to any place of detention, *i.e.*, police lock-ups, pre-trial detention facilities, prisons, psychiatric hospitals and special detention centres for minors, foreigners, etc. It has unrestricted access to all relevant information and documents and the opportunity to conduct

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96 General Assembly Resolution 61/177 of 20 December 2006. See below, section 10.

97 Article 20(3) of the CAT.

98 See UN docs. A/48/44/Add.1; A/51/44; A/56/44; A/57/44; CAT/C/75; A/59/44; CAT/C/39/2. See Nowak and McArthur, supra (note 5), pp. 684–689.


private interviews with all detainees. On the basis of these visits, the national preventive mechanism makes recommendations to the relevant authorities with the aim of improving conditions of detention and the treatment of detainees and preventing torture and CIDT. In principle, these reports are public documents.\textsuperscript{101}

In addition, a UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Subcommittee on Prevention) was established by the elections of its first ten experts at a meeting of States Parties on 18 December 2006.\textsuperscript{102} It held its first session from 19 to 23 February 2007 in Geneva and elected the British expert and former Chairperson of the CPT, Silvia Casale, as its first Chairperson.\textsuperscript{103} In addition to advising States Parties and cooperating with the respective national preventive mechanisms, the Subcommittee has the same power as its domestic counterparts to carry out country missions and unannounced visits to all places of detention, to have access to all relevant documents and to conduct private interviews with all detainees.\textsuperscript{104} Although the Subcommittee is a subsidiary body of the Committee against Torture, its members are elected by States Parties with no involvement of the Committee, and it acts fairly independently from the Committee. Contrary to the national preventive mechanisms, the Subcommittee is guided by strict rules of confidentiality.\textsuperscript{105} It may publish its reports on country missions only when requested to do so by the State Party concerned. If the State Party refuses to cooperate with the Subcommittee or to take steps to improve the situation in the light of the Subcommittee’s recommendations, the Committee against Torture has the power in accordance with Article 16(4) of OPCAT to make a public statement on the matter or to publish the report of the Subcommittee.

Since the system of regular visits to all places of detention and the effective implementation of the recommendations of both the Subcommittee and its domestic counterparts through means of prison reform and capacity building in the field of the entire police, prison and justice system requires considerable financial resources, Article 26 of OPCAT provides for the establishment of a Special Fund ‘to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms’. The Special Fund shall be financed through voluntary contributions made by governments, intergovernmental and non-governmental organizations and other private or public entities. In addition to the usual sources of funding, this Fund also provides a welcome opportunity for transnational corporations to contribute to improving conditions of detention as part of their corporate social responsibility activities.

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\textsuperscript{101} See OPCAT, Articles 3, 4 and 17–23; Nowak and McArthur, supra (note 5), pp. 1082–1083.
\textsuperscript{102} See UN doc. CAT/OP/SP/SR.1.
\textsuperscript{104} See OPCAT, Articles 2, and 4–16.
\textsuperscript{105} See OPCAT, Articles 2(3) and 16.
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10. UN CONVENTION ON ENFORCED DISAPPEARANCE

The Commission on Human Rights established the UN Working Group on Enforced and Involuntary Disappearances (WGEID) — its first thematic special procedure — in 1980. On the basis of the experience of the Working Group, the General Assembly in 1992 adopted a Declaration on the Protection of All Persons from Enforced Disappearance. In addition to its more humanitarian task of tracing disappeared persons in close cooperation with governments, the Working Group also started to function as a body monitoring states’ compliance with the various provisions of the Declaration. In addition to adopting country-specific observations and recommendations on states with a considerable number of unresolved cases of enforced disappearance, the Working Group also issued general comments on various provisions of the Declaration aimed at guiding and facilitating state compliance. 

Since the Declaration is a non-binding instrument, states did not pay much attention to these monitoring efforts of the Working Group. After the adoption of the Inter-American Convention on the Forced Disappearance of Persons in 1994, the pressure from non-governmental organizations, but also from many states in the Latin American and European region, for a similar treaty at the universal level increased.

In 2001, the Commission on Human Rights entrusted an independent expert with the task of analyzing the existing legal framework (international criminal, humanitarian and human rights law) in respect of the phenomenon of enforced disappearances, of identifying gaps in the protection of persons from enforced disappearance and advising the Commission on the need to draft a binding instrument. On the basis of the report of the independent expert which clearly established the need for a binding instrument, the Commission established an inter-sessional Working Group under the chair of the French Ambassador in Geneva, Bernard Kessedjian who, despite major unresolved problems in the Working Group, submitted a draft to the Commission on Human Rights in 2006. Due to the ongoing reform of the United Nations human rights mechanisms, the Commission had no more opportunity to discuss the draft and the newly created Human Rights Council, at its first session.
session in June 2006, simply referred the draft to the General Assembly which on 20 December 2006 adopted the *International Convention for the Protection of All Persons from Enforced Disappearance* (CED) by a vote of 85 in favour to none against and 89 abstentions.\(^\text{112}\)

The Convention follows the model of the Convention against Torture. Despite highly controversial discussions during the drafting process, it contains in Article 2 a state-centered definition of enforced disappearances similar to the one in Article 1 of the CAT, but Article 3 also requires States Parties to take appropriate measures to investigate acts of enforced disappearance committed by persons or groups acting without the authorization, support or acquiescence of the state and to bring those responsible to justice.\(^\text{113}\) Article 5 reiterates Article 7(1)(i) of the ICC Statute by confirming that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity which shall attract the consequences provided for under such applicable international law.

Article 4 establishes the legal obligation of States Parties, similar to Article 4 of the CAT, to ensure that enforced disappearance constitutes an offence under domestic criminal law, and Article 7(1) adds the need for appropriate penalties taking into account the extreme seriousness of the crime. According to Article 9, States Parties shall take the necessary measures to establish their jurisdiction in accordance with the principles of territoriality, active and passive nationality as well as universal jurisdiction similar to Article 5 of the CAT. The obligations of any state exercising jurisdiction laid down in Articles 10, 11, 13 and 14 correspond by and large to those in Articles 6 to 9 of the CAT. The right to complain about cases of enforced disappearance and the obligation to *ex officio* investigate such cases are brought together in Article 12 and are linked to the criminal investigation provisions, whereas in the Convention against Torture these provisions are separated.

Article 15 contains a specific duty of states to cooperate in the search for disappeared persons. The non-refoulement provision in Article 16 resembles the one in Article 3 of the CAT. Articles 17 to 21 contain specific additional obligations for the prevention of enforced disappearances,\(^\text{114}\) such as the prohibition of secret places of detention, the right of detainees to communicate with and be visited by counsel and family members, the duty to maintain official registers of detainees, and the obligation to provide relatives and counsel with all relevant information about the fate and whereabouts of detainees. According to Article 23, the training of law enforcement and other personnel shall also take into account the need to prevent and investigate enforced disappearances.

Article 24 is a highly innovative provision which was discussed at length during the drafting of the Convention. It provides a broad *'victim' definition* which encompasses both the disappeared person and any individual who has suffered harm as a direct result of an enforced disappearance. Secondly, it establishes for the first time in a human rights treaty the explicit *right of each victim to know the truth* regarding the circumstances of the enforced disappearance,


\(^{113}\) See also the definition of enforced disappearance as a crime against humanity in Article 7(2)(i) of the ICC Statute which refers to ‘a State or a political organization’.

\(^{114}\) Most of the obligations to prevent torture listed above under section 7 also apply to the prevention of enforced disappearances.
the progress and results of the investigation and the fate of the disappeared person.\footnote{115} Furthermore, the right of victims to obtain reparation was adjusted to the terminology of the van Boven/Bassiouni Principles and Guidelines outlined above.\footnote{116} Article 25, which stipulates specific obligations in respect of children, constitutes another important new element of the Convention.

Although many states argued against the further proliferation of UN treaty monitoring bodies and proposed to draft a further Optional Protocol in the area of disappearances to the Covenant on Civil and Political Rights or to the Convention against Torture, the majority decided to deal with enforced disappearances in a separate treaty with a new monitoring body, the\textit{Committee on Enforced Disappearances}, consisting of ten independent experts.\footnote{117} In addition to the mandatory reporting procedure under Article 29, as well as optional individual and interstate complaints procedures in accordance with Articles 31 and 32, the Convention also contains a\textit{tracing procedure} in Article 30 which empowers the Committee to communicate requests for urgent action and interim measures to States Parties, similar to the practice of the WGEID. The\textit{ex officio} inquiry procedure in Article 33 is modelled on Article 20 of the CAT (with a lower threshold of ‘serious’ violations of the Convention) and also permits visits to the territory of States Parties only if the respective government agrees. But in the case of a widespread or systematic practice of enforced disappearances, the Committee, pursuant to Article 34, may also urgently bring the matter to the attention of the General Assembly. Finally, Article 35 clarifies that the Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of the Convention, which will take place after ratification or accession by 20 states.

11. CONCLUSIONS

Torture, CIDT and enforced disappearance are among the most horrible human rights violations. Nevertheless, they are practised on a wide scale in many countries in all world regions. With the CAT, OPCAT and CED, the international community has adopted three powerful specialized human rights treaties with a variety of obligations of states to prevent torture, CIDT and enforced disappearance, to fight impunity and bring the perpetrators of these crimes to justice, as well as to provide the victims of these crimes with an effective remedy and reparation. If governments had the political will to ratify these treaties and complied with all relevant obligations, torture, CIDT and enforced disappearances could easily be eradicated.

\footnote{115}{On the development of the right to know the truth in the jurisprudence of different international treaty monitoring bodies see Nowak,\textit{ supra} (note 109).}
\footnote{116}{See \textit{supra}, section 6.}
\footnote{117}{See Article 26 of the CED.}