

Article 5: The Anti-Torture Provision

Appendix E to the Report of the
Global Citizenship Commission¹

GLOBAL INSTITUTE FOR
ADVANCED STUDY



OpenBook
Publishers 

The logo for OpenBook Publishers, consisting of the text "OpenBook" in a blue, sans-serif font above the text "Publishers" in a smaller, blue, sans-serif font. To the right of the text is a blue icon of an open book with its pages fanning out.

1 This memorandum has been prepared by the UCSD Center on Global Justice for the Global Citizenship Commission.



<https://www.openbookpublishers.com>

© 2016 NYU Global Institute for Advanced Study.



This work is licensed under a Creative Commons Attribution 4.0 International license (CC BY 4.0). This license allows you to share, copy, distribute and transmit the text; to adapt the text and to make commercial use of the text providing attribution is made to the authors (but not in any way that suggests that they endorse you or your use of the work). Attribution should include the following information:

NYU Global Institute for Advanced Study, *Article 5: The Anti-Torture Provision. Appendix E to the Report of the Global Citizenship Commission*. Cambridge, UK: Open Book Publishers, 2016. <http://dx.doi.org/10.11647/OBP.0091.15>

Further details about CC BY licenses are available at <http://creativecommons.org/licenses/by/4.0/>

All the external links were active on 13/4/2016 unless otherwise stated and have been archived via the Internet Archive Wayback Machine at <https://archive.org/web>

1. Introduction

Torture has enduring effects on the physical, mental, and emotional well-being of its survivors, crippling or destroying their capacity to pursue fulfillment and happiness. In many countries, torture is used to extract confessions from alleged criminals or political prisoners. Yet the use of torture to obtain evidence undermines a government's capacity to apply justice impartially and effectively. Torture is utterly inconsistent with basic human rights.

Article 5 of the UDHR states: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."² As torture has devastating consequences for its victims, the international prohibition against it is absolute.

2 United Nations Office of the High Commission for Human Rights. 1948. "Universal Declaration of Human Rights." <http://www.ohchr.org/EN/Library/Pages/UDHR.aspx>

2. Evolution of the legal framework

Since 1948, a large corpus of international law has developed aimed at eradicating torture throughout the world. Article 7 of the ICCPR reaffirms the UDHR's proscription of torture, and expressly bans non-consensual medical or scientific experimentation.

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*CAT*) entered into force in 1987 and currently has 158 state parties. Article 1 of 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."³

The Convention Against Torture obliges states to take effective legislative, administrative, and judicial measures to prevent torture in any territory under its jurisdiction (Article 2.1), and forbids states from sending a person to another state where they would be in danger of being tortured (Article 3). States are also required to ban the use of evidence obtained through torture in their courts (Article 15). In addition, CAT provides that all state parties must ensure "education

3 United Nations General Assembly. 1984. "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." <http://www.refworld.org/docid/3ae6b3a94.html>

and information regarding the prohibition against torture are fully included in the training of law enforcement personnel,"⁴ or any other persons who are involved in interrogations of those arrested, detained or imprisoned (Article 10.1). Since CAT's entry into force, the absolute prohibition against torture and other acts of cruel, inhuman or degrading treatment or punishment has become accepted as a principle of customary international law.

The repudiation of torture is supposed to be realized in international law through three primary mechanisms. First, CAT establishes a Committee against Torture that reviews reports submitted by state parties on the measures they have taken to fulfill their obligations under the Convention. The Committee also initiates inquiries concerning allegations of systematic torture by a state party. Second, the Optional Protocol to CAT (*OPCAT*) establishes an international inspection system for places of detention with the objective of preventing torture, modeled on the system that has existed in Europe since 1987 (the Committee for the Prevention of Torture). Third, in 1985 the UN Commission on Human Rights established the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment. This position is currently held by Mr. Juan Méndez.⁵ The Special Rapporteur examines relevant questions in all countries, regardless of whether a state has ratified CAT or OPCAT.

4 United Nations General Assembly. 1984. "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." <http://www.refworld.org/docid/3ae6b3a94.html>

5 Office of the High Commissioner for Human Rights. 2016. "Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment." <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx>

3. Progress in implementing the right

These legal and institutional developments represent a critical first step toward the eradication of torture. Recent academic evidence suggests that the ratification of anti-torture laws is likely to improve countries' respect for human rights, particularly for physical integrity, which is vital to the right to be free from torture.⁶ Moreover, internationally sanctioned monitoring and reporting may prompt countries to undertake reforms. By way of illustration, increased monitoring efforts by the UN Special Rapporteur on torture in the Republic of Georgia have coincided with the near abolition of corporal punishment and forced confessions in that country.⁷

Despite this progress, however, torture remains a shamefully common practice throughout the world. Amnesty International reported that torture occurred in 144 countries—scattered across all continents—between January 2009 and May 2013.⁸ Additionally, in 2014, Amnesty International conducted a survey of over 21,000 respondents in 21 countries, of which 44 percent responded they would fear torture if taken into government custody.⁹ Concern about torture was particularly

6 Fariss, Christopher. 2014. "Respect for Human Rights Has Improved Over Time: Modeling the Changing Standard of Accountability." *American Political Science Review* 108(2): 297-318; Hill Jr., Daniel W., and Zachary M. Jones. 2014. "An Empirical Evaluation of Explanations for State Repression." *American Political Science Review* 108(3): 661-687.

7 Reichelt, Jason D. 2007. "The Republic of Georgia's Fight Against Torture: A Model for Emerging Democracies." *The Comparative and International Law Journal of Southern Africa* 40(1): 57-75.

8 Amnesty International. 2014. "Torture in 2014: 30 Years of Broken Promises." <https://www.amnestyusa.org/sites/default/files/act400042014en.pdf>

9 Amnesty International 2014b. "Attitudes To Torture." <http://www.amnestyusa.org/pdfs/GlobalSurveyAttitudesToTorture2014.pdf>

high among respondents in Brazil (80 percent), Mexico (64 percent), Turkey (58 percent), Pakistan (58 percent), and Kenya (58 percent). Overall, existing data suggests torture remains widespread throughout the globe—even in countries that have signed international anti-torture accords. Amnesty International has recorded incidents of torture in states that have ratified CAT—including Mexico, Morocco, Nigeria, the Philippines, and Uzbekistan, its 2014 campaign focus countries.¹⁰

Torture takes on many forms. In 2013 to 2014 alone, Amnesty International documented over 27 variants of torture worldwide, the most common of which were beatings, electric shocks, stress positions, extended isolation, and whipping.¹¹

10 Amnesty International. 2014. "Torture in 2014: 30 Years of Broken Promises." <https://www.amnestyusa.org/sites/default/files/act400042014en.pdf>

11 Ibid.

4. Current outlook and challenges

The international community faces a number of specific challenges in combatting torture.

First, many countries, particularly in Africa and Asia, have not adopted domestic laws criminalizing torture. Some countries even condone the practice of torture. In Mauritania, for example, confessions made under torture are admissible as evidence in court, even if they are subsequently retracted,¹² in direct contravention of Article 15 of CAT. Other states follow policies that encourage torture even as it remains illegal. By way of illustration, in some countries of the former Soviet Union, law enforcement agencies are evaluated by the number of confessions obtained and cases cleared. As such, some law enforcement officers have incentives to force confessions through torture regardless of legal prohibitions.¹³

Second, even where there are laws against torture, real steps to bar it are often not taken. In many countries, government and law enforcement officials enjoy impunity from torture investigations and prosecution. When formally prosecuted, they are frequently subject to legal procedures that may be biased in their favor. In Chile, for example, human rights violations conducted by security forces are prosecuted through the military—outside of the jurisdiction of civil courts—which enables officials to continue to carry out torture without repercussions.¹⁴

Third, while the victims of torture are diverse in age, gender, ethnicity, religion, and political orientation, they frequently come from the ranks

12 Ibid.

13 Ibid.

14 Ibid.

of the marginal and the vulnerable such as minority groups, the poor, and opposition parties and movements. Such individuals often lack the financial resources, contacts, and knowledge to report their torturers. In many countries, women possess a lower legal status than men and are less able to denounce those exploiting them. Ethnic and religious minorities also lack legal protections. These individuals may perceive that their complaints or claims of torture will be ignored, increasing their reluctance to seek redress.

Fourth, international efforts to combat torture are limited by a lack of cross-country data identifying where violations occur most and who suffers them most. Existing data sources on torture rely on reports produced by NGOs and by the U.S. government. Such reports tend to overemphasize torture of political opposition members and prisoners, and underemphasize police brutality. Furthermore, these reports are likely to represent only the most egregious cases of torture—those that attracted the attention of outside observers. Ultimately, it is extremely difficult to objectively measure torture on the basis of government and NGO reports alone.

Finally, anti-torture efforts are undermined by the widespread misconception that torture is an efficient and reliable shortcut to establish guilt and secure justice. A survey conducted in 2013-2014 by Amnesty International across 21 countries and 21,000 respondents found that over a third of them agreed that torture is sometimes “necessary and acceptable.”¹⁵ Over 50 percent of respondents surveyed in China, India, Nigeria, Kenya, and Pakistan expressed a degree of support for torture. Support was also high among Americans (45 percent). Support for torture at any level of government or law enforcement—and, indeed, within society—stymies the progress of anti-torture initiatives.

In assessing the current outlook and challenges for realizing Article 5 of the UDHR’s prohibition against torture, the research team undertook three case studies—on Georgia, Sri Lanka, and the United States, all signatories of CAT.

Both Georgia and Sri Lanka have faced significant pressure from the international community in recent years to step up anti-torture efforts. In Georgia, international pressure and monitoring, combined with

15 Amnesty International 2014b. “Attitudes To Torture.” <http://www.amnestyusa.org/pdfs/GlobalSurveyAttitudesToTorture2014.pdf>

pressure from domestic NGOs, spurred the government to take anti-torture reforms. These reforms were recently lauded by Juan Méndez, the current UN Special Rapporteur on Torture. In Sri Lanka, by contrast, a lack of monitoring allows torture to persist despite mounting international pressure. The success of Georgia's anti-torture initiatives relative to Sri Lanka highlights the importance of data collection as a mechanism to promote accountability, as well as the crucial role of domestic civil society in eliciting change. Meanwhile, the U.S. case study provides a troubling example of government officials in an established democracy committing torture with impunity.

Georgia

The Georgian Government has taken significant steps to combat torture over the last 10 years. In the aftermath of the "Rose Revolution" in 2004, the newly installed Saakashvili government arrested many top officials from the former government. When the former state audit chief, Sulkhan Molashvili, was arrested on charges of embezzlement, the Parliamentary Assembly of the Council of Europe (*PACE*) sent monitoring teams to investigate allegations of torture. On this occasion, Matyas Eorsi, the chair of PACE, warned the Georgian Government that "it was in danger of repeating the mistakes of the previous government with respect to human rights."¹⁶

Despite Georgia's status as a signatory of the Convention against Torture, allegations of torture mounted over the course of 2004.¹⁷ As torture cases spiked, the international community increasingly pressed the Georgian Government for change. In July 2004, the International Federation for Human Rights and the Human Rights Information and Documentation Center published an open letter to the Secretary General of the Council of the European Union. This letter described several cases of individuals allegedly beaten and tortured by Georgian law enforcement since the installation of the Saakashvili regime. The

16 Reichelt, Jason D. 2007. "The Republic of Georgia's Fight Against Torture: A Model for Emerging Democracies." *The Comparative and International Law Journal of Southern Africa* 40(1): 57-75.

17 Ibid.

letter urged the European Union to pressure Georgia to comply with the Convention against Torture.

In October 2004, the Liberty Institute, a Georgian NGO, released a report showing torture had become more prevalent in Georgia since the “Rose Revolution.” In the wake of this memo’s publication, Georgia’s Prosecutor General, Zurab Adeishvili, charged fourteen law enforcement officials with torture and with the planting of evidence. Pressure on the Georgian Government continued, culminating in a second report by the Human Rights Information and Documentation Center. In the wake of increasing scrutiny, the Georgian Government banned all anti-torture broadcasts from Europe, citing them as an embarrassment to law enforcement.¹⁸

The Council of Europe and the U.S. Department of State issued another series of reports criticizing the Georgian Government in early 2005. The U.S. report detailed cases of law enforcement officials torturing and otherwise abusing detainees. Furthermore, Manfred Nowak, the then UN Special Rapporteur on Torture, visited Georgia in February 2005 to tour detention centers and meet with government officials and NGO representatives. His report accused Georgia of violating the Convention against Torture and he called upon officials to ratify the Optional Protocol Against Torture and strengthen domestic anti-torture laws.¹⁹

In response to mounting international pressure, the Georgian Government instituted a number of reforms. It created a Government-sponsored monitoring body comprised of NGOs, enacted measures to facilitate the investigation of prisoner injuries, and enhanced the jurisdiction of the Ministry of Justice.²⁰ The Government also took steps to professionalize its police force, implementing new screening procedures and training programs. In June 2005, Saakashvili signed a bill criminalizing torture and the threat thereof and sentencing violators to up to 15 years in prison. In August 2005, the Government ratified the Optional Protocol to the Convention against Torture.

Since 2007, Georgia’s record on torture has gradually improved. Visiting Tbilisi in March 2015, Juan Méndez, the current UN Special

18 Ibid.

19 Ibid.

20 Ibid.

Rapporteur on Torture, declared that the use of corporal punishment and forced confessions in Georgia has effectively been abolished. He also praised Georgia for taking steps to guarantee prisoners acceptable cell conditions, medical care, and family visitation rights. However, he called upon Georgia to improve accountability for torture and ill-treatment, investigate past cases, and provide support and reparations to victims.²¹

Sri Lanka

In 2008, the then UN Special Rapporteur on Torture, Manfred Nowak, found that despite legal safeguards against torture in Sri Lanka, the practice was common. The Special Rapporteur found that the lack of an obligation on law enforcement to investigate cases of torture perpetuated its practice, and that poor witness and victim protection services hindered the effective restoration of justice to those whose rights had been violated. The conditions of detention centers and prisons were also found to be wanting, as they were severely overcrowded and in various states of disrepair. The Special Rapporteur provided recommendations for the Sri Lanka Government to implement.²²

In October 2009, the Special Rapporteur requested a report from the Sri Lankan Government on the follow-up measures it had taken. No response had been received by 2010, when the Special Rapporteur issued a report that noted the Sri Lankan Government's reliance on the conflict with the Liberation Tigers of Tamil Eelam (*LTTE*) as an excuse to enact emergency laws that permitted arbitrary arrest and detention, increasing the likelihood of torture. In 2012, the new Special Rapporteur on Torture, Juan Méndez, reported he had received a communication from the Sri Lankan Government on the steps they had taken in response to Mr. Nowak's recommendations. However, many of the

21 Méndez, Juan. 2015. "Georgia has come a long way, but more needs to be done." <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15724&LangID=E>

22 Nowak, Manfred. 2008. "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Mission to Sri Lanka."

Government's responses directly contradicted information that the Special Rapporteur received from local NGOs.²³

Today, the use of torture in Sri Lanka by police, military, and intelligence services remains common, despite international condemnation. Freedom from Torture, a UK-based charity for torture survivors, has compiled a report with data from the period immediately after the civil war ended, from 2009 to 2013. Medical reports of 148 survivors form the basis of the report. The survivors were tortured in different state facilities in 15 districts and in 7 of the 9 provinces in Sri Lanka. Over 90 percent of the survivors reported being targeted for torture because of their Tamil ethnicity and/or real or perceived links to LTTE.²⁴

Freedom from Torture's medical reports demonstrated that all of the 148 cases included

brutal beatings, 78 percent included burning, 71 percent included sexual torture, 70 percent included solitary confinement, 45 percent included suspension and other forced positioning, and 38 percent included asphyxiation techniques. While the effects of physical torture are often more readily visible, the doctors at Freedom from Torture explain that the survivors suffered from severe psychological symptoms as well, including those associated with depression and post-traumatic stress disorder, such as nightmares, flashbacks, feelings of worthlessness, thoughts of self-harm, and suicide attempts.²⁵

Disturbingly, the report found that more than one-third of the 148 individuals had been tortured after returning to Sri Lanka from the UK. The majority of these had been students in the UK, "but three had claimed asylum and were forcibly removed after their asylum claims were rejected."²⁶ As such, Freedom from Torture warns countries hosting asylum-seekers from Sri Lanka to be careful when considering their protection claims, as a risk still exists to those with ties to LTTE.

23 UN Human Rights Council. 2012. A/HRC/19/61/Add.3. "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez; Sri Lanka: Follow-up to the recommendations made by the Special Rapporteur (Manfred Nowak) in the report of his visit to Sri Lanka from 1 to 8 October 2007 (A/HRC/7/3/Add.6)." pp. 457-483.

24 Freedom from Torture. 2015. "Tainted Peace: Torture in Sri Lanka since May 2009."

25 Ibid.

26 Ibid., pp.10.

International Truth and Justice Project Sri Lanka (*ITJPSL*), administered by the Foundation for Human Rights in South Africa, also released a report in 2015 on the use of torture on Tamils. ITJPSL focused on cases of torture that were perpetrated by “illegal state-organised abduction in ‘white vans’ by the security forces.”²⁷ The report stresses the ongoing use of sexual torture and violence against those captured.

In January 2015, Sri Lanka elected a new president and in August 2015, new parliamentary members were elected. Freedom from Torture calls on the new political leadership to “put in place a credible plan to prevent torture in the future.”²⁸ While the ITJPSL report finds that the security forces in Sri Lanka are “seemingly unaffected by the change of politicians at the helm,”²⁹ it argues that “politicians have simply not tried to curb [those conducting torture]. Nor have international initiatives thus far, including the UN Investigation into Sri Lanka, been successful in stopping the on-going serious violations against Tamils by the security forces.”³⁰ The UN Special Rapporteur on Torture continues to work with the Sri Lankan government to eradicate the practice of torture and improve overall conditions in detention centers. However, lack of firm government action against torture, impunity for perpetrators, and a fearful civil society continues to prevent Sri Lanka from eliminating torture.

The United States

In the case of the U.S., documented evidence shows systematic use of torture, across multiple institutions, during the Bush administration. This was conducted against detainees at “black sites”—undisclosed locations where highly classified military and/or defense projects are undertaken—including Bagram, Guantanamo Bay, and Abu Ghraib.³¹

27 International Truth and Justice Project Sri Lanka. 2015. “A Still Unfinished War: Sri Lanka’s Survivors of Torture and Sexual Violence 2009-2015.”

28 Freedom from Torture. 2015. “Tainted Peace: Torture in Sri Lanka since May 2009.”

29 International Truth and Justice Project Sri Lanka. 2015. “A Still Unfinished War: Sri Lanka’s Survivors of Torture and Sexual Violence 2009-2015.” pp. 5.

30 Ibid.

31 Senate Select Committee on Intelligence. 2014. “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program.”

In December 2014, the U.S. Senate Select Committee on Intelligence released their Study of the Central Intelligence Agency's Detention and Interrogation Program. The study was initiated in March 2009, prompted in part by an investigation of the CIA's destruction of videotapes recording details of their "enhanced interrogation techniques." The Senate report provides 20 findings and conclusions, based on an extensive study from 2009 to 2012 of more than six million pages of CIA material, including operational cables, intelligence reports, internal memoranda, emails, briefing materials, interview transcripts, contracts, and other records.³² The Senate report documents the use of torture on at least 39 detainees. At least 21 of the 119 CIA detainees identified in the Senate study were wrongfully detained.³³

The Senate report itself refers to the use of torture by the CIA as "enhanced interrogation techniques," as did the CIA and Bush administration at the time. However, NGOs such as Human Rights Watch and Amnesty International are unequivocal that the CIA's actions amounted to torture. Certainly, a focus on the actual practices, rather than on the linguistics, makes it clear that torture was committed. The Senate report shows how the CIA's treatment included: slapping and ramming detainees against a wall; sustained sleep deprivation; forced nudity; waterboarding; prioritizing the interrogation of detainees over their medical care; medically unnecessary rectal rehydration and rectal feeding; submerging detainees in ice water; and verbal threats to detainees and their families. These practices continued with significant repetition for days or weeks at a time.³⁴

In 2009, President Barack Obama signed Executive Order 13491, *Ensuring Lawful Interrogations*, in which he instructed the CIA to hold detainees only on a "short-term, transitory basis" and limited permissible interrogation techniques to those contained in the Army Field Manual. Yet, justice has not been attained with respect to the CIA's Detention and Interrogation Program. Despite the Senate report's conclusions, the responsible government officials have not been investigated or prosecuted. At the 29th Session of the UN Human Rights Council, over 100 international rights groups and UN Member States called for

32 Ibid.

33 Ibid., pp. 16.

34 Ibid., pp. 3-4.

U.S. accountability for the CIA torture program.³⁵ Special Rapporteur, Juan Méndez, has warned that the impunity of torturers in the U.S. is providing abusive regimes with a ready-made excuse for rejecting the international community's concerns about their own records of torture.³⁶ This highlights the need for international organizations, civil society groups, and domestic governments to continue to press for justice.

35 UN Human Rights Council. 2015. "New call from national and international rights groups on the need to ensure accountability for the U.S. CIA Torture Program."

36 Méndez, Juan. 2015. "I Was Tortured. I Know How Important It Is to Hold the CIA Accountable." *Politico Magazine*. <http://www.politico.com/magazine/story/2015/06/cia-torturers-should-be-held-accountable-119345>

5. Realizing the prohibition against torture in the 21st Century³⁷

It is vital that all countries ratify CAT and OPCAT, and adopt domestic laws criminalizing torture. Governments should stipulate clear sanctions for those who violate anti-torture laws, and promptly and impartially investigate and prosecute perpetrators.

The international community should support the enactment of formal procedures through which victims of torture can report violations to national governments and international bodies. NGOs should be granted the power to report violations on behalf of victims who may lack the knowledge or resources to seek redress. And when no domestic recourse is available, NGOs should be encouraged to request visits from international monitors, which would investigate the facilities, agencies, or officials under question.

The international community should also support the implementation of population surveys—in addition to the continued publication of qualitative reports—to better measure the prevalence of torture and patterns of victimization. Governments should be encouraged to maintain clear records of incidents of torture—and be provided with financial support for such efforts where necessary.

Efforts to eradicate torture may ultimately be most effective when they originate from within society. To this end, international organizations should support domestic anti-torture NGOs through the provision of

³⁷ The suggestions outlined in this section are illustrative and non-exhaustive proposals for promoting and protecting the right to be free from torture in the 21st Century.

resources and training. International organizations should also seek to empower diaspora groups living abroad. Moreover, the international community should establish training courses on interrogation for law enforcement personnel, and to enable lawyers, doctors, and nurses to identify potential cases of torture and report them to domestic agencies or NGOs. In countries where capacity is an issue, the international community should provide financial and personnel support for such training.

Finally, international organizations should develop procedures to assess whether asylum seekers are being returned to countries where they may be at risk of torture.