

Submission of the World Organisation against Torture (OMCT) ahead of the upcoming report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the 76th Session of the General Assembly in October 2021, on the topic of accountability for torture and ill-treatment

1. The lack of accountability for acts of torture and other ill-treatment remains among the primary obstacles to significant progress in the prevention and eradication of entrenched practices of torture and ill-treatment worldwide. Accountability (or lack thereof) is perhaps the most important indicator for assessing progress in the fight against torture and, hence, the rule of law. A pervasive lack of accountability is due to a myriad of factors, enabled by legal and institutional frameworks which are not tailored to diligently detect and address human rights violations committed by State actors. Across the globe, the victims' pursuit of legal remedies to hold authorities to account is tantamount to an obstacle race where victims rarely arrive to the finish line. Weak legal frameworks and the lack of victim-centred systems and procedures, among others, remain crucial breeding ground for the persistence of the almighty "blue code or wall of silence", along with the systematic denial of the victims' rights to truth, justice and reparation.
2. The lack of transparent, victim-centred and responsive mechanisms to process and sanction claims of torture and other ill-treatment leads to a global underreporting of such acts. As an overarching problem, there is no worldwide index or data source on torture and ill-treatment, and where available it understates their incidence, making accurate assessments of the real magnitude of the problem impossible.

Legal challenges:

3. **Criminalization of torture.** Over the last decades torture has been criminalized as a stand-alone crime in most countries worldwide, with notable exceptions (e.g. Germany, Switzerland, Russia, Belarus, Sudan), however, only a few States have adopted legal definitions of torture which are fully in line with article 1 of the Convention against Torture. OMCT has raised concern over the lack of adequate incorporation of the definition into domestic law in a large number of reports, as it creates "actual or potential loopholes for impunity"¹. Examples vary from States with domestic definitions limiting the range of perpetrators to definitions containing a closed list of purposes excluding some actors. To cite an instance, in Tunisia, OMCT has documented that the fact that the definition of torture in the Tunisian Criminal Code only includes the extraction of confessions/information and the discrimination purposes, leaving out acts aimed at intimidating or punishing the victim, results in a lack of prosecutions or prosecutions for lesser crimes (with only one conviction since 2011 revolution).

¹ CAT, General Comment No. 2, 2008, para. 9; CAT/C/GTM/CO/7, para. 9.

4. **Statutes of limitations and immunities.** In many countries, acts of torture are subject to statutes of limitations, contrary to the UN Committee against Torture's (hereinafter CAT) jurisprudence², which seriously undermines the absolute nature of the obligation to investigate, prosecute and sanction acts of torture and other ill-treatment³. Some legal systems provide for immunities from prosecution to law enforcement officials involved in acts of torture and ill-treatment, including in DRC or Sudan⁴.
5. **Criminalization of CIDTP.** Coupled with deficient definitions and low sanctions for the crime of torture⁵ and statutes of limitation, the lack of criminalization of CIDTP has been identified as a factor contributing to the accountability gap. While CAT has recommended the criminalization of CIDTP on a few occasions⁶, it is vital to elaborate clearer and uniform standards at the international level on the need to distinctively criminalize CIDTP, as it is common for States to misclassify acts of torture and ill-treatment altogether as "bodily injuries", "abuse of authority" or any other lesser offence, in breach of the obligation to prosecute and apply penalties commensurate with the seriousness of these crimes.
6. **Lack of public policies.** Domestic legal frameworks fail to incorporate international standards laid down in CAT General Comment no. 2 on the implementation of article 2 (and the positive obligations therein) by States Parties. Too few States have adopted comprehensive laws against torture and even fewer public policies or plans to eradicate torture and other CIDTP. Mexico has one of the most complete laws against torture, but four years after its adoption, it has failed to adopt the National Programme against Torture, an instrument that is key to articulating and coordinating institutions charged with implementing the law, resulting in lack of real implementation of its provisions⁷.

Institutional challenges:

7. **Lack of observance of procedural safeguards:** Torture and ill-treatment are enabled by the lack of observance of fundamental legal safeguards against abuse from the outset of the deprivation of liberty. Oftentimes there is a significant gap between provisions in criminal procedure codes and consistent reports indicating de facto limitations and obstacles to: the right to receive legal assistance without delay; access to a medical doctor, which is often not guaranteed on a systematic or regular basis, but only in situations of extreme urgency, stymieing prompt detection and documentation⁸; the obligation to promptly record detentions in a register; and the

² E.g. CAT/C/ESP/CO/6, para. 9; CAT/C/GTM/CO/5-6, para. 8; CAT/C/UZB/CO/5, para. 25.

³ CAT, *Sonko v. Spain*, Comm. No. 368/2008, para. 10.6.

⁴ CAT/C/COD/CO/2, para. 22.

⁵ E.g., CAT/C/SEN/CO/4, para. 7

⁶ CAT/C/NAM/CO/2, para. 9.

⁷ CAT/C/MEX/CO/7, para. 13.

⁸ E.g. OMCT, UPR [submission](#) ahead of 3rd review of Honduras; CAT/C/NER/CO/1, para. 9.

right be brought promptly before a judge (in several countries, the first custody hearing is before a prosecutor and not a judge, e.g. Tunisia and Mexico)⁹.

8. **Lack of knowledge of their rights and lack of legal assistance to children deprived of liberty.** In most countries where OMCT works, children deprived of liberty have not been informed that they have rights, both protecting them from torture and ill-treatment or their right to report it to competent authorities, unless civil society organisations (CSOs) assist them. OMCT has documented that in many countries, children do not have access to legal aid services. In Benin, even if some children know that they have a right to a lawyer thanks to the work of non-governmental organisations, legal aid services are very scarce, and very few families can afford a lawyer on their own. Most children see their lawyers only once, or not at all. In the Philippines, children have no access to lawyers except when CSOs provide legal assistance, impacting on their right to file complaints for cases of torture.
9. **Lack of effective and independent complaints and investigative bodies.** While the CAT has repeatedly called on the establishment of independent mechanisms to ensure that complaints and allegations of torture and ill-treatment are promptly investigated in an impartial and effective manner by an independent body¹⁰, too often investigations, if opened at all, are carried out by investigative bodies and agents with an institutional or hierarchical relationship with the suspected perpetrators or agency, and in many instances, prosecutors charged with investigation and activation of criminal proceedings are not independent of the executive branch. A good number of challenges and good practices concerning independent investigative agencies are analysed in a [report](#) recently published by OSJI.
10. **Lack of protection.** Domestic legal remedies are often unavailable, per terms set out by the Human Rights Committee¹¹. That is, the right to complain in safe conditions without fearing reprisals is rarely guaranteed, in clear breach of article 13 of the Convention against Torture. In spite of repeated calls by the CAT to establish a system for the protection of victims and witnesses of acts of torture¹², particularly for those in detention - in a situation of heightened vulnerability and isolation, exacerbated by Covid-19-, with a view to protecting against reprisals, effective systems or mechanisms in place to protect and assist victims of torture are highly conspicuous in their absence. OMCT receives regular reports about victims, relatives of victims and their lawyers who are threatened or retaliated against, often through judicial harassment that can include baseless criminal charges¹³, and only in a very limited

⁹ In Mexico, in 2016, according to a [National Survey](#), 69% of the 187,784 individuals deprived of liberty declared not to have had access to a lawyer during the first days in custody and 68% was not allowed to communicate with the relatives.

¹⁰ E.g. CAT/C/LBN/CO/1, 2017; CAT has also recommended the establishment of an independent judicial police force (e.g. CAT/C/ARG/CO/5-6 2017, para. 30 a)).

¹¹ Human Rights Committee, *Khilal Avadanov v. Azerbaijan*, Comm. No. 1633/2007, para. 6.4. See also, *Traoré v. Côte d'Ivoire*, Comm. No. 1759/2008, para. 6.5.

¹² E.g. CAT/C/ARG/CO/5-6 para. 41.g, CAT/C/LBN/CO/1, 2017, para. 45.

¹³ A recent emblematic case is the criminal prosecution of a man who was shot dead in Brest by the military and his friend (witness) in the context of the August 2020 protests. OMCT [Follow-up report](#) to CAT.

number of cases do such facts trigger the adoption of disciplinary and criminal measures against officials involved or the suspension from their duties.

11. The role of justice operators. OMCT receives reports, on a systematic basis outlining, inadequate judicial investigations, with a generalized tendency of judicial officials to adhere to the official version given by law enforcement officials and to wrongly classify the acts in question as lesser offences. Justice operators often fail to incorporate international standards, including customary international law, even in “monist” legal systems where ratified treaties acquire the force of domestic law and can be relied upon in domestic courts. Among the factors leading to unsatisfactory and often complacent attitudes of justice operators with abusive practices, we highlight: lack of specific knowledge and training on international human rights standards; lack of adequate resources; the lack of security and physical protection for judges and their families in the event of threats and attacks against them; lack of safeguards to perform their work independently without vulnerability to pressures from other branches of government, public opinion and sensationalist and often inaccurate press coverage or corruption; overreliance on confession-based criminal investigations and failure to apply the exclusionary rule; judges appointed on a provisional basis without security of tenure. When judges fail to respond appropriately to allegations of torture raised during judicial proceedings, penalties should be imposed upon them¹⁴.

12. Revictimization and lack of assistance and reparation. It is very rare for survivors of torture of CIDT to have access to psychological support during judicial proceedings, in order to be able to engage effectively and to avoid retraumatization, particularly when being confronted with their perpetrators. They should, at least, be referred to medical and rehabilitation centres (public or private). Survivors and their families often come from underprivileged sectors or remote areas, making their struggle for justice extremely costly and challenging. The five components included in the right to be integrally repaired, following General Comment no. 3 of the CAT, remain a paper tiger and in 99% of the cases judges do not order reparation measures beyond, in the best-case scenario, monetary compensation (usually low). Civil and administrative remedies are often more accessible and less burdensome for victims, who have no choice but to take their cases through to multiple instances with lengthy procedures to pursue any form of recognition of wrongdoing and reparation.

13. Other significant obstacles hampering the adequate progress of criminal investigations include: 1) incomplete (often only focusing on physical traces), biased and/or not available medico-legal examinations, with judges rarely allowing submission of independent evaluations as evidence; 2) obstruction or difficulties of victims, relatives or their legal representation and CSOs to access information contained in the case file and to participate actively in criminal proceedings¹⁵, e.g. as civil party or plaintiff, against the perpetrator(s); 3) unduly prolonged proceedings, rendering remedies ineffective.

¹⁴ CAT/C/MEX/CO/7, para. 21.

¹⁵ https://www.corteidh.or.cr/docs/casos/articulos/seriec_333_esp.pdf paras. 9-24.

14. **Parallel judicial mechanisms.** OMCT has documented out of court settlements and mediation for very serious crimes including torture and femicide. For instance, partner organisations in Afghanistan worked on numerous cases in which judges applied Sharia law and settled gender-based violence cases through mediation, where perpetrators typically go unpunished.
15. **Gender-based violence against women.** Women victims of gender-based violence face particular obstacles when seeking justice, including: victim-blaming and gender bias; social stigma for rape or detention; women seen as less worthy; family honour and integrity seen as more important than justice; certain practices amounting to torture like FGM, child marriage or marital rape are not criminalized; statutory limitations to complain; social and economic dependency on men to access a lawyer, court, or doctor; widespread illiteracy and poverty among women; evidence not properly secured; and lack of social services and shelters for women.¹⁶
16. **Partisan and militarized law enforcement.** Particularly in repressive and autocratic countries, torture is inter alia inflicted for political reasons. This means that torture is an important means for the government to stay in power. Critical voices and dissenters are arbitrarily detained and tortured. Police as well as the judiciary abide by the executive and atrocities by law enforcement are largely ignored in return for political support which renders the criminal justice system dysfunctional. An illustrative example is the situation in Bangladesh where many human rights defenders, journalists and opposition politicians have been detained, tortured or killed by the Rapid Action Battalion (RAB), over the last years¹⁷. Trade-offs between the government and the RAB in order to remain in power are behind the root causes for the lack of accountability, with only one case ever decided under the Anti Torture Act (2013).

Conclusions and recommendations:

17. The use of torture and other CIDTP is the cornerstone of a nefarious system that corrodes the rule of law and confidence in the criminal justice system. Thus, a real zero-tolerance commitment to torture and ill-treatment will only render results if States acknowledge the existence of the problem and adopt, with the participation of a wide array of actors, anti-torture policies that law enforcement officials, justice operator and the legal community are bound to respect and enforce in order to effectively prevent, investigate, prosecute, sanction and repair acts of torture and other ill-treatment. A sea-change is needed in terms of mentality and cultural shift. Conditions to create accountable criminal justice systems and law enforcement bodies will only possible if the three branches of power show a resolute commitment to outlawing and uprooting the use of torture, as well as the incentives to use it,

¹⁶ See e.g. Equality Now and Dignity Alliance International, “Sexual Violence in South Asia: Legal and Other Barriers to Justice for Survivors”, 2021, available [here](#).

¹⁷ OMCT, [Cycle of Fear - Combating Impunity for Torture and Strengthening the Rule of Law in Bangladesh](#) (2019)

including complacent attitudes towards abuse within the criminal justice apparatus and the broader public opinion.

18. Policies need to be backed with the allocation of the adequate resources, guarantees and incentives. Victims and witnesses will only report torture and lodge complaints if conditions to guarantee their safety are secured and if achieving justice is seen as possible; legal professionals and CSOs will only specialize in the legal and psychosocial defence of victims of torture if they have the financial means needed to litigate and pursue accountability on behalf of victims. At the macro-level, States have very little incentives to mobilize large-scale investment in accountability actions in the way they are promoted to invest in other sectors (natural resource exploitation, industrial development, etc.) through their international trade and cooperation relations. International trade and cooperation agreements on law enforcement assistance and equipment should exclude States with records of systematic torture, and should strongly encourage promote human rights based policing practices.
19. Along with pushing forward fundamental legal and institutional reforms, such as the establishment of truly independent investigative and oversight bodies and the need to overhaul the law enforcement and judiciary systems to incorporate a human rights based and torture victim friendly criminal justice systems, CSOs are a crucial actor to prompt increased accountability. Their monitoring role, as well as their efforts to assist victims of torture in their quest for truth, justice and reparation must be preserved against intimidation, detention, attacks and other strategies aimed at obstructing and discouraging their vital work.