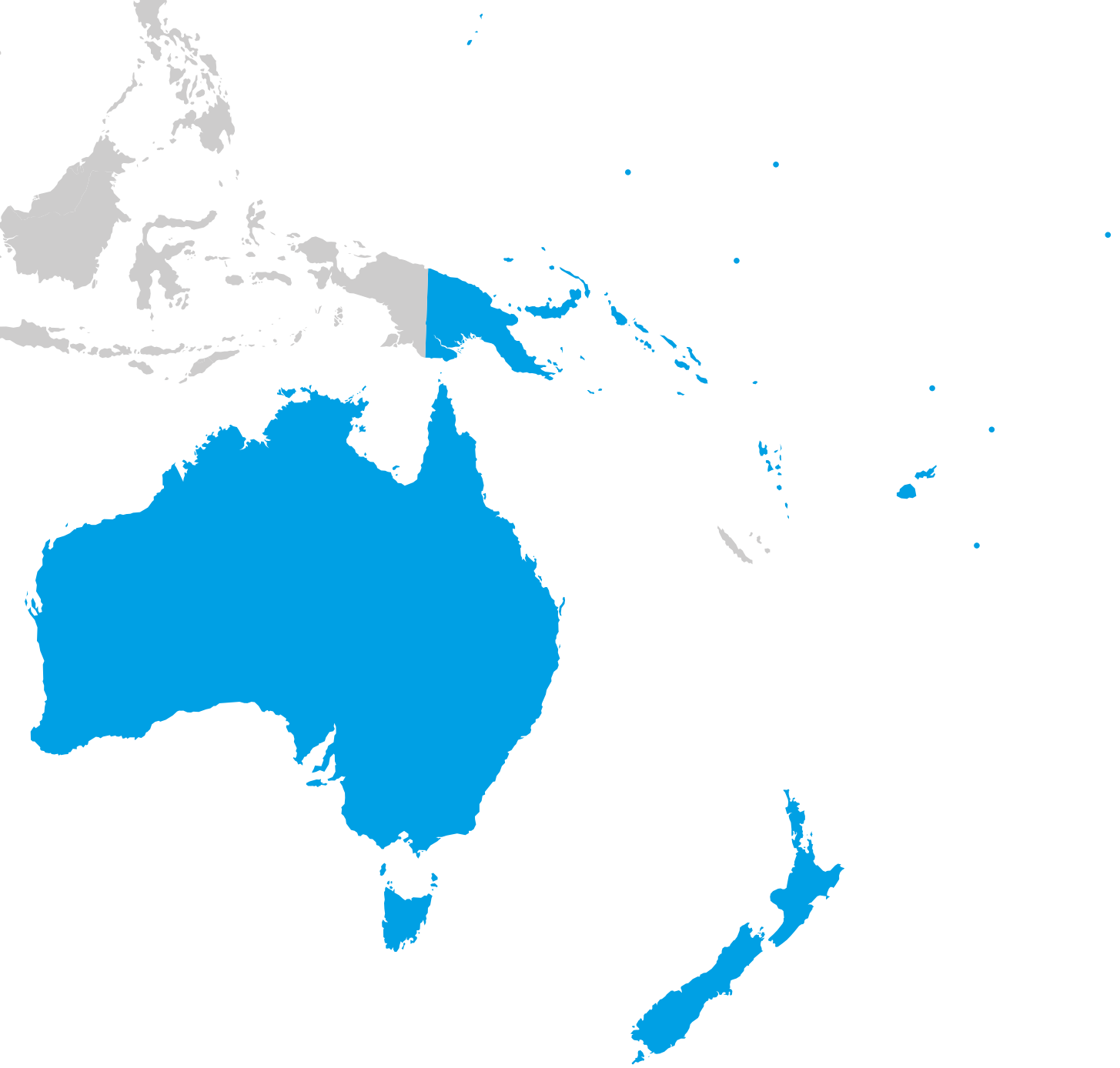

THE UN CONVENTION AGAINST TORTURE IN THE PACIFIC

Overview of the anti-torture legislative and regulatory frameworks in the region

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INTRODUCTION

This comparative Study Paper is the result of an extensive research exercise undertaken over the past three years to inform CTI's work in supporting Pacific Island States to ratify and implement the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). The Study Paper does not aim to offer an exhaustive review of the whole range of States' obligations under UNCAT. It provides an overview of legislative frameworks and relevant jurisprudence in the Pacific related to the following thematic areas: (i) the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "other ill-treatment"); (ii) the criminalisation of torture under domestic law; (iii) criminal jurisdiction; (iv) prohibition/ non-invocation of torture justifications; (v) the prohibition of *refoulement;* (vi) redress and reparation and (vii) the non-admission of torture-tainted evidence (also known as the exclusionary rule) in the following 14 Pacific countries:

- Australia
- Fiji
- Kiribati
- Marshall Islands
- Micronesia
- Nauru
- New Zealand
- Samoa
- Solomon Islands
- Palau
- Papua New Guinea
- Tonga
- Tuvalu
- Vanuatu

This Study Paper is intended to support States, and other stakeholders including National Human Rights Institutions, civil society and intergovernmental organizations, in enhancing the understanding of the status of the implementation of UNCAT in the Pacific region.

The research is based on a comparative analysis and survey of publicly available country-specific information, using as primary sources the State's national Constitution, Criminal Code, Criminal Procedure Code, Evidence Act, Police Act and Prisons or Correctional Services regulations, as well as other relevant pieces of national legislation. Relevant information is used from General Comments of the UN Committee against Torture (CAT) and reports from the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (SRT).

This Study Paper is divided into different thematic chapters that look into how the fourteen reviewed Pacific States have legislated on each of the main State obligations under UNCAT, as provided for and compiled in the APT-CTI Guide on anti-torture legislation.

While every effort has been made to ensure the accuracy of the information contained herein, CTI cannot be held responsible or liable for any errors or omissions. CTI would welcome information on any corrections, amendments, or new legislative changes.

This comparative Study Paper was prepared by Laura Blanco, CTI Legal Officer and reviewed by Gayethri Pillay, Head of the CTI Secretariat. CTI is grateful for the valuable inputs of former members of the CTI Secretariat, namely Stephanie Selg, former CTI Senior Adviser and Dr. Alice Edwards, former Head of Secretariat, in the development of the Study Paper.

The Study Paper also benefited from earlier research conducted by students of the Faculty of Law of the University of Tasmania (UTAS) and of the Helena Kennedy Centre of the Sheffield Hallam University.

The Study Paper and any views contained therein do not necessarily represent the views or institutional policy of the CTI Core States.

1.
THE ABSOLUTE PROHIBITION OF TORTURE

It is widely understood that the prohibition of torture is a norm of customary international law that has attained the status of *jus cogens*, that is, a peremptory norm from which no derogation is permitted by treaty law or other rules of international law.[1] Beyond Article 2(2) of UNCAT, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and other international and regional treaty provisions have recognised the absolute nature of the prohibition of torture and other ill-treatment.

UNCAT provides guidance to States on measures that are to be taken to implement the absolute prohibition of torture, including, among others, the obligation to prevent acts of torture and other ill-treatment (Articles 2(1) and 16, UNCAT), to criminalise torture (Article 4, UNCAT), and to provide redress and rehabilitation to victims (Article 14, UNCAT).

Article 2, UNCAT

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

1.1 Constitutional prohibitions or legislative bills of rights

12 out of 14 Pacific States

Constitutional prohibition of torture provided

In the Pacific region, 12 out of 14 Pacific countries have enshrined an explicit prohibition of torture and other forms of ill-treatment in their respective Constitutions or legislative Bill of Rights.

The Constitutions of **Fiji,**[2] **Kiribati,**[3] **Marshall Islands,**[4] **Nauru,**[5] **Palau,**[6] **Papua New Guinea,**[7] **Samoa,**[8] **Solomon Islands**[9] and **Tuvalu**[10] contain the prohibition of torture and other forms of ill-treatment. It is of note that the Constitutions of Fiji and Papua New Guinea explicitly refer to both physical and mental torture. Fiji's Constitution also includes "emotional" torture and provides for the right to be free from violence as part of the right to security of the person, and to the right to be free from scientific or medical treatment without consent. Papua New Guinea's Constitution refers to treatment inconsistent with respect for the inherent dignity of the human person and further provides that the manner or circumstances of the killing of a person may contravene the prohibition of torture and ill-treatment.

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1 UN Committee against Torture, General Comment No. 2 on the Implementation of article 2 by States parties, CAT/C/GC/2, para. 1.

2 Constitution of the Republic of Fiji of 2013, Chapter 2, Section 11(1).

3 Constitution of Kiribati of 1979, Chapter II, Section 7(1).

4 Constitution of the Republic of the Marshall Islands, Article II, Section 6(3).

5 Constitution of Nauru, Part II, Article 7.

6 Constitution of the Republic of Palau of 1979, Article IV, Section 10.

7 Constitution of Papua New Guinea of 1975, Part III, Division 3, Subdivision A, Section 36 (1).

8 Constitution of the Independent State of Samoa of 1960, Part II, Article 7.

9 Constitution of Solomon Islands of 1978, Chapter II, Section 7.

10 Constitution of Tuvalu of 1978, Part II, Section 19(c)-(d).

Constitution of Fiji

Freedom from cruel and degrading treatment

11. (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

(2) Every person has the right to security of the person, which includes the right to be free from any form of violence from any source, at home, school, work or in any other place.

(3) Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.

Constitution of Papua New Guinea

36. Freedom from inhuman treatment.

(1) No person shall be submitted to torture (whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.

Drawing "almost exclusively upon constitutional principles under United States law", the Constitution of the Federated States of **Micronesia**[11] affords protection against the infliction of "cruel and unusual punishments". The Constitution of **Vanuatu**[12] provides for "freedom from inhuman treatment and forced labour" as part of a broader provision containing the basic fundamental rights and freedoms of the individual, including the right to life, to liberty and to security of the person.

Australia and **Tonga** are the only two countries without a constitutional prohibition against torture in the Pacific. Although Tonga's Constitution does not provide for the prohibition of torture and other ill-treatment, many of its laws are consistent with the prohibition, including the Prisons Act 2010,[13] which prohibits, among other punishments, "subjecting a prisoner to corporal punishment, torture or cruel, inhumane or degrading treatment". **Australia**'s Constitution does not contain a Bill of Rights and as such, there is also no constitutional prohibition of torture. However, the Government reports that torture is a crime or civil wrong in all Australian jurisdictions.[14] In addition, the **Australian Capital Territory (ACT)**,[15] **Victoria**[16] and **Queensland**[17] have incorporated the right to be free from torture and ill-treatment in their respective Human Rights Acts.

Good State practices

Enforcing the constitutional right to be free from cruel, inhuman or degrading treatment or punishment

Palau: The Supreme Court of Palau, in the case of *Kloulubak v. Republic of Palau,*[18] affirmed the decision to award damages to the Plaintiff due to the conditions of solitary confinement endured at the Koror jail, which subjected him to a violation of his constitutional right to be free from cruel, inhuman or degrading treatment.

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11 Constitution of the Federated States of Micronesia of 1979, Article IV, Section 8.

12 Constitution of the Republic of Vanuatu of 1980, Part I, Section 5(1)(e).

13 Tonga, Prisons Act 2010, No. 43 of 2010, Section 66 (b).

14 See, Australia's third periodic report to the Committee against Torture, CAT/C/67/Add.7, 25 May 2005 (last full report submitted, otherwise Australia has opted for the List of Issues Prior to Reporting), Table 1.

15 ACT, Human Rights Act 2004, Part 3, Section 10(1)(a)-(b).

16 Victoria, Charter of Human Rights and Responsibilities Act 2006, Part 2, Section 10.

17 Queensland, Human Rights Act 2019, Part 2, Division 2, Section 17.

18 Palau, *Kloulubak v. Republic of Palau* [2018] PWSC 3 (18 May 2018).

Micronesia: The Supreme Court of Micronesia has interpreted the scope of the constitutional prohibition to inflict cruel and unusual punishment. In the case of *Plais v. Panuelo,*[19] the Supreme Court awarded monetary damages to Mr. Plais due to the physical abuse to which he had been subjected, which included cigarette burn, beatings, inadequate conditions of confinement and denial of access to medical care and to counsel. The Court argued that the constitutional protection against cruel punishment "(...) includes punishments of torture and all unnecessary cruelty" and that "Confinement to jail makes a prisoner dependent upon jail officials to assure that his medical needs are treated. For the same reasons that confining a prisoner to unsanitary conditions is unconstitutional, deliberate indifference to an inmate's medical needs can also amount to cruel and unusual punishment".

1.2 Non-derogability of the prohibition

Six out of 14 Pacific States

Non-derogability of torture

In addition to its absolute nature, the prohibition of torture is non-derogable, as expressly recognised in Article 2(2) of UNCAT, which prohibits the invocation of any exceptional circumstances, such as a war or threat of war, internal political instability or any other public emergency, to justify torture.

This non-derogable character of the prohibition is also set out in Article 4(2) of the ICCPR, which explicitly excludes Article 7 of the Covenant (prohibition of torture and other ill-treatment) from the obligations from which derogation is permitted under the Covenant "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed". Similar to the Human Rights Committee (HRC) in its General Comment No. 29 on Article 4 of the ICCPR,[20] the Committee against Torture (CAT) in its General Comment No. 2 considers the prohibition of other ill-treatment to have a non-derogable character, given that "(...) the conditions that give rise to ill-treatment frequently facilitate torture and therefore measures required to prevent torture must be applied to prevent ill-treatment".

Six out of the 14 Pacific countries provide for the non-derogable character of the prohibition. The Constitutions of **Fiji**[21] and **Vanuatu**[22] explicitly provide for the non-derogation from the right to be free from torture or ill-treatment in the case of a state of emergency. The Constitutions of **Kiribati**,[23] **Solomon Islands**[24] and **Tuvalu**[25] set out certain rights that can be restricted in periods of public emergency if "reasonably justifiable" and all exclude the prohibition of torture and ill-treatment from such list, which may imply that it cannot be derogated from at any time. **Australia**'s Criminal Code Act 1995[26] prohibits the invocation of exceptional circumstances (necessity arising from the existence of a state of war, a threat of war, internal political instability, a public emergency or any other exceptional circumstances) as well as the order of a superior officer or public authority in proceedings for an offence of torture under Division 274.4, in compliance with Article 2(2) of UNCAT.

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19 Micronesia, *Plais v. Panuelo* [1991] FMSC 25; 5 FSM Intrm. 179 (Pon. 1991) (23 September 1991).

20 Human Rights Committee, CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency (2001), CCPR/C/21/Rev.1/Add.11, para. 7.

21 Constitution of Fiji, op. cit. 2, Chapter 2, Section 43(1)(a).

22 Constitution of Vanuatu, op. cit. 12, Chapter 11, Section 71(1)(a).

23 Constitution of Kiribati, op. cit. 3, Chapter II, Section 16(5).

24 Constitution of the Solomon Islands, op. cit. 9, Chapter II, Section 16(7).

25 Constitution of Tuvalu, op. cit. 10, Part II, Section 36.

26 Australia, Criminal Code Act 1995, Section 274.4(a).

2.
CRIMINALISING TORTURE

2.1 Offences of torture in domestic criminal law

Article 4, UNCAT

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 4(1) of UNCAT requires States parties to make torture an offence under their domestic criminal law with appropriate penalties, taking into account the grave nature of the crime of torture. The Committee against Torture has emphasized that naming and criminalising the offence of torture promotes the Convention's aim and alerts perpetrators, victims and the public to the special gravity of the crime of torture.[27] Furthermore, the Committee has recommended States with a prohibition of torture in the Constitution or other relevant national law to specifically name and criminalise torture as a separate offence and incorporate a definition of torture in line with Article 1 of UNCAT.[28]

The importance of criminalising torture as a separate and specific crime has been elaborated by CAT in its General Comment No. 2, expressing that: "By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention's overarching aim of preventing torture and ill-treatment".[29]

Criminalising torture as a specific offence carries several distinct advantages, including to:

- enable the State to specifically recognise, investigate and prosecute this particularly egregious crime;
- enhance the deterrent effect of the prohibition against torture by putting public authorities on notice;
- ease the State's ability to track, report and respond to the occurrence and prevalence of torture and act in response; and
- improve monitoring by independent oversight bodies such as national human rights institutions and civil society actors.

In the Pacific region, three of the 14 reviewed Pacific countries have so far incorporated an explicit crime of torture in national law. **New Zealand** has adopted a stand-alone Act incorporating offences of torture,[30] while **Australia** and **Nauru**[31] amended their Criminal Codes to incorporate an offence of torture. **Australia** adopted the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill in 2010 with the purpose to amend the Criminal Code Act 1995, by incorporating an offence of torture and giving effect to its treaty obligations.[32] At the state-territory level, both **ACT** and **Queensland** have also established offences of torture. ACT has criminalised it in its Crimes Act 1900,[33] providing the same definition of torture as that contained in Article 1 of UNCAT, while

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27 CAT/C/GC/2, op. cit. 1, para. 11.

28 Manfred Nowak et al., The United Nations Convention Against Torture and its Optional Protocol: A Commentary, (2nd edn, OUP 2019), p. 184, para. 28., with reference to the Concluding Observations on the initial report of the Congo, 28 May 2015, CAT/C/COG/CO/1, para. 8 and the Concluding Observations on the initial report of Sierra Leone, 20 June 2014, CAT/C/SLE/CO/1, para. 8.

29 CAT/C/GC/2, op. cit. 1, para. 11.

30 New Zealand, Crimes of Torture Act 1989, Section 3.

31 Nauru, Crimes Act 2016, Section 258.

32 Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2010.

33 Australian Capital Territory, Crimes Act 1900, Section 36(1).

Queensland has criminalised torture in its Criminal Code Act 1899,[34] but without referring to the purposive elements of Article 1 of UNCAT.

Table 2: Approaches to the prohibition against torture and ill-treatment in Pacific national laws

Country	Constitutional/Bill of rights prohibition	Specific anti-torture Act	Criminal Code/other	Other legislation
Australia			Section 274.2 (1) of the federal Criminal Code Act 1995	
Fiji	Section 11, Constitution			
Kiribati	Section 7 (1), Constitution			
Marshall Islands	Section 6 (2), Constitution			
Micronesia	Article IV, Section 8, Constitution			
Nauru	Section 7, Constitution		Section 258 and Section 267 (3) (j) of the Crimes Act 2016	
New Zealand	Section 9 of the Bills of Rights Act 1990	Section 2 of the Crimes of Torture Act 1989		
Samoa	Section 7, Constitution			
Solomon Islands	Section 7, Constitution			
Tonga				Section 66 (b) of the Prison Act 2010
Tuvalu	Section 19, Constitution			
Palau	Section 10 of Article IX, Constitution			
Papua New Guinea	Section 36 (1), Constitution			
Vanuatu	Section 5 (1) (e), Constitution			

[34] Queensland, Criminal Code Act 1899, Section 320A.

Australia – Criminal Code Act 1995 amended by the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill in 2010

274.2 Torture

(1) A person (the perpetrator) commits an offence if the perpetrator:

(a) engages in conduct that inflicts severe physical or mental pain or suffering on a person (the victim); and

(b) the conduct is engaged in:

(i) for the purpose of obtaining from the victim or from a third person information or a confession; or

(ii) for the purpose of punishing the victim for an act which the victim or a third person has committed or is suspected of having committed; or

(iii) for the purpose of intimidating or coercing the victim or a third person; or

(iv) for a purpose related to a purpose mentioned in subparagraph (i), (ii) or (iii); and

(c) the perpetrator engages in the conduct:

(i) in the capacity of a public official; or

(ii) acting in an official capacity; or

(iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Penalty: Imprisonment for 20 years.

(2) A person (the perpetrator) commits an offence if the perpetrator:

(a) engages in conduct that inflicts severe physical or mental pain or suffering on a person; and

(b) the conduct is engaged in for any reason based on discrimination of any kind; and

(c) the perpetrator engages in the conduct:

(i) in the capacity of a public official; or

(ii) acting in an official capacity; or

(iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Penalty: Imprisonment for 20 years.

(3) Absolute liability applies to paragraphs (1)(c) and (2)(c).

New Zealand – Crimes of Torture Act 1989

3 Acts of torture

(1) Every person is liable upon conviction to imprisonment for a term not exceeding 14 years who, being a person to whom this section applies or acting at the instigation or with the consent or acquiescence of such a person, whether in or outside New Zealand, —

(a) commits an act of torture; or

(b) does or omits an act for the purpose of aiding any person to commit an act of torture; or

(c) abets any person in the commission of an act of torture; or

(d) incites, counsels, or procures any person to commit an act of torture.

(2) Every person is liable upon conviction to imprisonment for a term not exceeding 10 years who, being a person to whom this section applies or acting at the instigation or with the consent or acquiescence of such a person, whether in or outside New Zealand, —

(a) attempts to commit an act of torture; or

(b) conspires with any other person to commit an act of torture; or

(c) is an accessory after the fact to an act of torture.

(3) This section applies to any person who is a public official or who is acting in an official capacity.

Nauru – Crimes Act 2016

258 Torture

(1) A person commits an offence if:

(a) the person engages in conduct that inflicts severe physical or mental pain or suffering on another person; and

(b) the person engages in the conduct for the purpose of:

(i) obtaining information or a confession from the other person, or someone else; or

(ii) punishing the other person for conduct that the other person, or someone else, has engaged in or is suspected of having engaged in; or

(iii) intimidating or coercing the other person or someone else; or

(iv) discrimination of any kind; or

(v) any purpose related to a purpose mentioned in subparagraphs (i) to (iv); and

(c) the person is:

(i) a public official or public official of another jurisdiction; or

(ii) acting in an official capacity; or

(iii) acting at the instigation, or with the consent or acquiescence, of a person mentioned in subparagraph (i) or (ii).

Penalty: 25 years imprisonment.

(2) Absolute liability applies to subsection (1)(c).

(3) This section does not apply to conduct engaged in by a person if:

(a) the conduct is, or is an inherent or incidental part of, a lawful sanction; and

(b) the lawful sanction is consistent with the Constitution.

(4) This section applies:

(a) whether or not the conduct constituting the offence happens in Nauru; and

(b) whether or not a result of the conduct constituting the offence happens in Nauru.

The remaining 11 Pacific countries under review have not criminalised torture as a separate offence under criminal law. Nonetheless, acts of torture and other ill-treatment can still be prosecuted under several ordinary offences that criminalise acts causing bodily injury, such as:

- acts or assaults causing bodily harm or injury;
- grievous bodily harm or acts intended to cause grievous harm;
- if bodily harm results in death, the offences of murder, manslaughter, intentional homicide;
- the crime of rape and several modalities of sexual assault; and
- the crimes of abuse of office or official oppression.

Under Section 273 of **Nauru**'s Crimes Act 2016, in the instance the defendant is tried and not found guilty of an offence under column 1 (first offence) of the Schedule, the Court may proceed to find the defendant guilty of an offence under column 2 (alternative offence), provided that the evidentiary standard is satisfied beyond reasonable doubt. Schedule 1 of the Act provides for two alternative verdicts to the offence of torture, namely, the offences of "intentionally causing serious harm" and "intentionally causing harm", as regulated in Sections 71 and 74 of the Act.

Subsuming acts of torture under other crimes under common law may make it more difficult for States to compile statistical data on the occurrence of acts of torture, criminal prosecution and proceedings initiated, and court sentences handed down, as well as to collate information that is needed to devise torture prevention strategies. Such data is essential for monitoring mechanisms and is often requested by CAT, other UN Human Rights Treaty Bodies and UN Special Procedures. Lack of a separate offence of torture makes it equally difficult for States to ensure that no amnesties, immunities or statutes of limitations are granted for the commission of acts of torture. This approach also fails to recognize the particular gravity of the offence of torture and may result in sentences that fall short of appropriate punishment.

Even in the absence of a specific crime of torture, courts in various Pacific countries have been instrumental in developing jurisprudence which affirms that torture is strictly prohibited, and must be prosecuted and punished, with effective remedies awarded to victims.

Good State practice

Enforcing the prohibition of torture in prisons

Tonga: In the case of *Tapa'atoutai v Police,*[35] the Supreme Court of Tonga quashed the convictions and sentences that had been imposed to the two appellants for their escape from Hu'atolitoli Prison on grounds of duress of circumstances. This was because their escape from prison was due to the fact that: "They suffered and were tortured by the pain of the hand and leg cuffs, the bite and sting of the mosquitoes, the absence of sleep, the heat of the sun and the cold and dew of the night, and of the wet of the rain. The Chief Gaoler, Moleni Taufa (the Superintendent of Prisons) had ordered and had intended that these two prisoners be so punished and tortured in order that they would learn to obey and comply with the prison rules", adding that: "No such punishment and no torture is allowed under the Prison Act or Prison Rules. The punishment was unlawful".

2.2 Criminalising torture as crime against humanity, genocide or war crime

The Rome Statute establishing the International Criminal Court sets out the crimes over which the Court can exercise its jurisdiction, such as the international crimes of genocide, crimes against humanity and war crimes. Under Article 6 of the Rome Statute, genocide involves acts committed to destroy a national, ethnical, racial or religious group, which include, among others, those causing serious bodily or mental harm to members of the group. Article 6(b) of the Elements of Crimes provides that serious bodily or mental harm includes, among others, acts of torture, rape, sexual violence or inhuman or degrading treatment. Under Article 7(1)(f) and (k) of the Rome Statute, crimes against humanity include acts committed as part of a *widespread or systemic* attack against civilian population, including, among others, torture and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. Similarly, Article 8(2)(ii) of the Rome Statute provides for torture or inhuman treatment as part of the acts qualifying as war crimes, when committed as part of a plan or policy or as part of a large-scale commission.

In the Pacific region, **Australia, Fiji, Kiribati, Marshall Islands, Nauru, Samoa** and **Vanuatu** are States parties to the Rome Statute. Among them **Fiji**[36] has criminalised torture when committed as part of the international crimes of genocide and of crimes against humanity. **Australia**[37] has explicitly provided for the crime of genocide by causing serious bodily or mental harm, which includes, among others, acts of torture, as well as for the crime against humanity of torture and the war crime of torture. **New Zealand**[38] has enacted legislation on the crimes of genocide, crimes against humanity and war crimes, and defers to the definitions of such crimes as provided for in the Rome Statute of the International Criminal Court, which explicitly provides for acts of torture as one of the elements of the above-referred crimes. Similarly, **Samoa**'s International Crimes Court Act 2007[39] covers the offences of genocide, crimes against humanity and war crimes, and – like New Zealand – refers to the definitions of such crimes as provided for in the Rome Statute, which incorporate torture. **Kiribati**'s Geneva Conventions Act 1993[40] includes "torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" as part of the acts that can constitute a grave breach of the Geneva Conventions when committed against protected persons.

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35 Tonga, *Tapa'atoutai v Police* [2004] TOLawRp 15; [2004] Tonga LR 108 (9 June 2004).

36 Fiji, Crimes Act 2009, Sections 78(2) and 87.

37 Australia, op. cit. 27, Sections 268.4, 268.13 and 268.25.

38 New Zealand, International Crimes and International Criminal Court Act 2000, Sections 9-11.

39 Samoa, International Criminal Court Act 2007, Sections 5-7.

40 Kiribati, Geneva Conventions Act 1993, Section 3(1)(i)(aa).

2.3 Criminalising other forms of ill-treatment

Article 16, UNCAT

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, 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.

Article 16 of UNCAT requires States to take measures to also prevent other acts of cruel, inhuman or degrading treatment which do not amount to torture as defined in Article 1 of UNCAT. Although not specifically required by Article 4(1) UNCAT, criminalising other ill-treatment as a separate offence under domestic criminal law can be an important preventive measure.

Unlike torture, the Convention does not define 'other ill-treatment' and CAT has recognised that "[i]n practice, the definitional threshold between ill-treatment and torture is often not clear".[41] The UN Special Rapporteur on Torture as well as jurisprudence or recommendations of international and regional human rights bodies have contributed to defining the scope of Article 16 of UNCAT and to distinguish acts of ill-treatment from acts of torture.[42]

Some States have chosen to specifically criminalise other ill-treatment as a separate offence. This approach would be in line with the interpretation of CAT and the HRC. Both Committees have stated that States are required to not only penalize torture but also equally other forms of ill-treatment, with CAT considering the obligations under Articles 3 to 15 of UNCAT to be also applicable to other ill-treatment falling short of torture.[43] If States choose to do so, penalties should be of a lighter nature than those provided for the crime of torture, reflecting the lesser gravity of the crime, although the pain or suffering might reach the same severity threshold. Where such acts are not criminalised, they should still be prosecuted under other offences of assault or other relevant provisions in national criminal law.

Of the three Pacific States with a specific crime of torture in their national law (**Australia, Nauru** and **New Zealand**), none have criminalised other ill-treatment as a separate offence. However, **Australia**'s Criminal Code Act 1995 includes 'cruel, inhuman or degrading treatment' as one of the elements of the crime in the aggravated offence of people smuggling. Additionally, the Criminal Code Act 1995 enshrines the right to humane treatment of persons taken into custody or detained under a preventative detention order, providing that such persons "(b) must not be subjected to cruel, inhuman or degrading treatment".[44] The Act, however, does not define 'cruel, inhuman or degrading treatment'. **Australia**'s Crimes Act 1914 provides for the right of persons under arrest or protected suspects to not be subjected to cruel, inhuman, or degrading treatment.[45] Similarly to Australia, **New Zealand**'s Crimes Act 1961[46] includes 'inhuman or degrading treatment' as an aggravating factor in the commission of the offences of smuggling migrants and trafficking in persons.[47]

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41 CAT/C/GC/2, op. cit. 1, para. 3.

42 See e.g. Report of the Special Rapporteur on the question of torture, Manfred Nowak, Civil and political rights, including the questions of torture and detention, 23 December 2005, E/CN.4/2006/6, para. 35, para. 60; see also CAT, Concluding Observations on the initial report of the Democratic Republic of the Congo, CAT/C/DRC/CO/1, 1 April 2006, para. 11; CAT, Concluding Observations on the fourth periodic reports of Turkey, CAT/C/TUR/CO/4, 2 June 2016, para. 32 (d); HRC, Uchetov v. Turkmenistan, Communication No. 2226/2012, 15 July 2016, CCPR/C/117/D/2226/2012, para. 7.4.

43 CAT/C/GC/2, op. cit. 1, para. 6; UN Human Rights Committee (HRC), HRC, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 13.

44 Australia, op. cit. 27, Sections 73.2(1)(b) and 105.33(b).

45 Australia, Crimes Act 1914, Section 23Q.

46 New Zealand, Crimes Act 1961, Section 98E(c).

47 Under the Crimes Act 1961, 'Inhuman or degrading treatment' is an aggravating factor in the commission of the offence of smuggling migrants (Section 98C) and trafficking (Section 98D).

That said, as mentioned above, the Constitutions of 11 Pacific States (**Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tuvalu** and **Vanuatu**) prohibit ill-treatment and **New Zealand**'s Bill of Rights Act 1990 also recognises "the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment".[48] Also, as previously indicated, **Tonga**'s Prisons Act 2010 prohibits subjecting a prisoner to "cruel, inhumane or degrading treatment". At Australian state-territory level, **ACT**'s Human Rights Act 2004, **Victoria**'s Charter of Human Rights and Responsibilities Act 2006 and **Queensland**'s Human Rights Act 2019 also provide for the right of persons not to be "treated or punished in a cruel, inhuman or degrading way".[49]

In several Pacific States without a separate offence for other ill-treatment, the remedy sought has been through an exercise of constitutional rights, such as in **Fiji, Micronesia, Papua New Guinea** and **Samoa**.

Good State practices

Remedying other ill-treatment through the constitutional prohibition of torture and other ill-treatment

Fiji: In the case of *Naba v. State*,[50] concerning an application for bail by five persons who were held on remand on a charge of murder at the Natabua Prison Remand block for one and half years and complaints of inhumane conditions of detention, the High Court of Fiji considered whether the conditions in which three of the prisoners who were kept while awaiting trial amounted to cruel, inhuman or degrading treatment. Three of the applicants were held in the same cell, with only one window and insufficient natural light to read and no table and chairs, and were only allowed two hours a day out of their cells. In this regard, the Court took into account the Universal Declaration of Human Rights (UDHR), ICCPR and UNCAT (even before Fiji was an UNCAT State party) to conclude that the conditions of detention were inhumane as they were not in compliance with the UN Standard Minimum Rules for the Treatment of Prisoners and thus, breached their constitutional right to be free from cruel, inhuman or degrading treatment. The Court further found that the length of time that they had been kept in custody awaiting trial further aggravates their inhumane treatment and that their treatment amounted to punishment before they were tried by a Court of law. In its ruling, the Court recommended the closure of the Natabua Prison complex remand block and granted bail to the applicants.

Micronesia: In the case of *Plais v. Panuelo*[51] referred to below, the Supreme Court of Micronesia held that "[c]onfining a prisoner in dangerously unsanitary conditions, which represent a broader government-wide policy of deliberate indifference to dignity and well-being of prisoners, is a failure to provide civilized treatment or punishment, in violation of prisoners' protection against cruel and unusual punishment, and renders the state liable under 11 FSMC 701(3)". It further held that "deliberate indifference to an inmate's medical needs can amount to cruel and unusual punishment".

Papua New Guinea: The National Court of Justice has expressed that for treatment to be "inhuman", it needs to satisfy two criteria: a) the conduct needs to be committed without the consent of the recipient; and b) the conduct must be done with the intent and effect of treating the recipient as less than human.[52]

- *In the Matter of Enforcement of Basic Rights Under the Constitution Section 57,*[53] the National Court delivered a judgment, on its own initiative, following Justice Canning's official inspection visit to the Beon Correctional Institution to assess conditions of detention and enforce basic constitutional rights. The National Court of Justice found that the conditions of detention in the so-called "dark cells", which exposed prisoners to their own waste because of a lack of proper toilet facilities, amounted to "(...) physical and mental torture and treatment that is cruel and inhuman. Their treatment is inconsistent with respect for the inherent dignity of the human person (...)", in breach of Sections 36(1), 37(1) and 37(17) of the Constitution.
- In the case of *Amaiu v. Commissioner of Corrective Institutions,*[54] concerning an application by an inmate of the Bomana Corrective Institution seeking enforcement of constitutional rights and damages for the treatment in detention, the National Court of Justice awarded compensatory and exemplary damages to the plaintiff for being wrongly denied his right to receive visitors and the privileges of sport, radio, newspapers and magazines, in addition to the periods he spent in solitary confinement in day and night cells. The Court considered "the anguish and distress Amaiu suffered in this period" and held that "the 24-hour cellular confinement in B Division with no amenities whatsoever is "inhumane, harsh and oppressive", in breach of his "constitutional right to be treated in a way which is not cruel, inhuman, harsh or oppressive and which respects the inherent dignity of the human person, etc".

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48 New Zealand, Bill of Rights Act 1990, Part 2, Section 9.

49 ACT, op. cit. 15, Section 10(1)(b); Victoria, op. cit. 16, Section 10(b); Queensland, op. cit. 17, Section 17(b).

50 Fiji, *Naba v. State* [2001] 2 FLR 187 (4 July 2001).

51 Micronesia, *Plais v Panuelo* [1991] FMSC 25; 5 FSM Intrm. 179 (Pon. 1991) (23 September 1991).

52 Papua New Guinea, *Konori v Jant* Ltd [2015] PGNC 9; N5868 (17 February 2015).

53 Papua New Guinea, National Court of Justice, *In the Matter of Enforcement of Basic Rights Under the Constitution Section 57* [2006] PGNC 29; N2969 (2 February 2006).

54 Papua New Guinea, National Court of Justice, *Amaiu v Commissioner of Corrective Institutions and The State* [1983] PGLawRp 488; [1983] PNGLR 87 (15 April 1983).

Samoa: In the case of *Nnamdi v. Attorney General,*[55] the Supreme Court considered the case of an immigrant detained in barracks, unable to exercise outside, given minimal food and not provided on-going medical treatment. The Supreme Court awarded damages for assault, false imprisonment and inhuman treatment, concluding that the Plaintiff had been "treated in an inhumane manner" and that "Prison Officers failed in their duty of care to a detainee under the provisions of the Immigration Act 2004 (...)".

2.4 Elements of the offence of torture

Article 1(1) of UNCAT provides the most widely accepted definition of torture, which is to be read in conjunction with Article 16, requiring States parties to also prevent other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1. Although not strictly legal requirement, CAT has recommended States parties to fully incorporate the definition of Article 1(1) of UNCAT in national criminal law, without the need to refer to the 'lawful sanctions' clause. Article 4 does not explicitly require States to replicate verbatim the definition of torture under Article 1 in their national criminal law.[56] However, CAT has expressed that when States criminalise acts of torture in their domestic legislation, it should correspond "(...) at a minimum, with the elements of torture as defined in Article 1 of the Convention (...)", given that "[s]erious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity".[57] That said, the Committee has acknowledged, in line with Article 1(2) of UNCAT, States' interest in adopting broader definitions of torture to encompass a wider array of acts or actors, which can "also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum".[58]

Article 1, UNCAT

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

The UNCAT definition of torture contains the following four cumulative elements that need to be present for an act to qualify as torture:

- severe physical or mental pain or suffering;
- the intentional infliction of such pain or suffering by an act or omission;
- that the severe pain or suffering is inflicted for a particular purpose; and
- the involvement of public officials or others acting in an official capacity.

2.4.1 First Element: Severe physical or mental suffering

Under Article 1(1) of UNCAT, physical or mental pain or suffering must be of a severe nature to amount to torture. In interpreting the severity threshold, it is useful to consider the jurisprudence of regional human rights bodies and courts, particularly how they have assessed the particular intensity of relevant acts in determining whether they reach the threshold of 'severity' to amount to torture. In its decisions on individual communications, CAT

[55] Samoa, *Nnamdi v Attorney General* [2011] WSSC 91 (3 September 2011), para. 201.

[56] Manfred Nowak *et al.*, op. cit. 29, p. 184, para. 30.

[57] CAT/C/GC/2, op. cit. 1, paras. 8-9.

[58] *ibid*, para. 9.

has decided based on the specific circumstances of the case but has not delved into the legal qualification and justification of why the treatment in question amounts to 'severe pain and suffering' under Article 1 of UNCAT.

The jurisprudence of regional human rights bodies and courts has stated that to determine whether conduct attains a minimum level of severity depends on all the circumstances of the case, as there is no objective measurement of the level of pain and suffering caused and a relative case-by-case assessment needs to be made. The following factors have been particularly considered:[59]

- the duration of the treatment;
- its physical and mental effects on the victim; and
- the sex, age, and state of health of the victim.

In the European Court's case of *Selmouni v. France*,[60] the Court found that "The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance". The Court concluded that such conduct should be regarded as torture for the purposes of Article 3 of the European Convention on Human Rights as "(...) the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel".[61]

Good State practice

Including both physical and mental pain and suffering as part of the definition of torture

Both physical and mental torture are acts of torture under international law. The Pacific countries that have criminalised torture as a separate offence in national law, **Australia,**[62] **Nauru**[63] and **New Zealand**[64] define torture as referring to both severe physical and mental pain and suffering, in line with the definition provided in Article 1 of UNCAT.

2.4.2 Second Element: Intentional infliction of an act or omission

Article 1 of UNCAT requires severe pain and suffering to be intentionally inflicted on the victim in order to qualify as torture. Although the definition of torture under Article 1(1) of UNCAT only refers to "acts", it has been generally interpreted broadly as also referring to omissions. In its General Comment No. 3, CAT has referred to the infliction of pain and suffering through both acts and omissions as constitutive of violations of the Convention.[65] This means that intentional omissions, for example, depriving a detainee of medicine or food on purpose, would also qualify as torture under Article 1(1) of UNCAT. However, purely negligent conduct, even if causing severe pain or suffering does not amount to torture under Article 1 of UNCAT and may likely qualify instead as cruel and/or inhuman treatment under Article 16 of UNCAT.

CAT and several commentators have put forward that the intent of the perpetrator is not required to extend to the infliction of severe pain and suffering. Rather, it is sufficient that the perpetrator intended (i.e. knowingly inflicted) the conduct in which he consequently inflicted severe pain or suffering and at least took into consideration that the treatment could inflict pain or suffering.[66]

Regarding the proof of the intentionality of the perpetration of an act or omission, in its General Comment No. 2, CAT has expressed that "(...) the elements of intent and purpose do not involve a subjective inquiry into the motivation

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[59] European Court of Human Rights, *Ireland v. the United Kingdom*, Application No. 5310/71, Judgment, 18 January 1978, para. 162. See also, among others: Inter-American Court of Human Rights, *Gómez-Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004, para. 113; African Commission on Human and Peoples' Rights, *Huri-Laws v. Nigeria*, Communication No. 225/1998, 6 November 2000, para. 41.

[60] ECtHR, *Selmouni v. France*, Application No. 25083/94, Judgment of 28 July 1999.

[61] *Ibid*, paras. 99 and 105.

[62] Australia, op. cit. 27, Section 274.2(1)(a).

[63] Nauru, op. cit. 32, Section 258(1)(a).

[64] New Zealand, op. cit. 31, Section 2(1).

[65] CAT, General Comment No. 3 (2012): Implementation of article 14 by States parties, 13 December 2012, CAT/C/GC/3, paras. 3, 23 and 37.

[66] Manfred Nowak *et al.*, op. cit. 29, p. 54, para. 105.

of the perpetrators, but rather must be objective determinations under the circumstances".[67] Commentators have argued that – where intent is in dispute or unclear – proof of such intent can be inferred from the totality of facts and the circumstances of the case that demonstrate that pain and suffering was inflicted knowingly for such a purpose as stated in Article 1.[68]

Australia's Criminal Code Act 1995, Nauru's Crimes Act 2016, and New Zealand's Crimes of Torture Act provide that "intention" is the fault element for their respective offences of torture. For Nauru and Australia, their Acts set out that in the absence of a fault element specified in the offence, it is "intention" and this applies to their respective provisions for the offence of torture.

2.4.3 Third Element: For a particular purpose

Article 1(1) of UNCAT requires that an act of torture must be perpetrated for such purposes as:

- obtaining information or a confession from the person or a third person;
- punishment for an act that the person or a third person has committed or is suspected of having committed;
- intimidation or coercion; or
- for any reason based on discrimination of any kind.

The requirement of a specific purpose for acts to constitute torture draws the distinction between acts amounting to torture from other cruel, inhuman or degrading treatment or punishment, as these other forms of ill-treatment do not have a purposive requirement. It is generally understood that the list of purposes in Article 1(1) of UNCAT is not exhaustive, as also underlined by the phrase "for such purposes as".[69] However, commentators have argued that not every purpose is sufficient and to qualify, it must have sufficient commonalities with the purposes expressly listed in Article 1(1) of UNCAT.[70]

Good State practice

Incorporating all UNCAT's prohibited purposes and other related purposes in national law

Australia,[71] **Nauru**[72] and **New Zealand**[73] have criminalised torture committed for any of the four purposive elements contained in Article 1(1) of UNCAT.

Australia: The Criminal Code Act 1995 regulates the first three above-referred prohibited purposes under the same sub-section and regulates conduct engaged in "for any reason based on discrimination of any kind" in a separate sub-section.[74]

Nauru: The Crimes Act 2016 regulates the commission of the offence of torture for any purpose related to the other four above-referred purposes, including the discriminatory purpose.[75]

New Zealand: The Crimes of Torture Act 1989 definition of torture refers to all four prohibited purposes by including the phrase "for such purposes as", modelling UNCAT's language in Article 1.[76]

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67 Manfred Nowak *et al.*, op. cit. 29, p. 54, para. 105.
68 Manfred Nowak *et al.*, op. cit. 29, p. 53, para. 104.
69 See for instance, *Ibid*, para. 107.
70 *Ibid*, para. 108.
71 Australia, op. cit. 27, Section 274.2(1) and (2)(b).
72 Nauru, op. cit. 32, Section 258(1)(b).
73 New Zealand, op. cit. 31, Section 2(1)(a) and (b).
74 Australia, op. cit. 27, Section 274.2(b).
75 Nauru, op. cit. 32, Section 258(1)(b)(v).
76 New Zealand, op. cit. 31, Section 2(1)(a).

2.4.4 Fourth Element: Public official requirement

Under Article 1(1) of UNCAT, for an act to qualify as torture, it must have been committed:

- by a public official or other person acting in an official capacity;
- at the instigation of a public official or other person acting in an official capacity;
- with the consent of a public official or other person acting in an official capacity; or
- with acquiescence of a public official or other person acting in an official capacity.

CAT considers that the definition of "public official" is broad in scope and in its General Comment No.2 observed that "(...) where State authorities or others acting in an official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts".[77]

Australia,[78] **Nauru**[79] and **New Zealand**[80] provide for the commission of the offence of torture by public officials or at their instigation, or with the consent or acquiescence of a public official or other person acting in an official capacity, in line with Article 1(1) of UNCAT. Australia's Criminal Code Act 1995,[81] Nauru's Crimes Act 2016[82] and New Zealand's Crimes of Torture Act 1989[83] include a list of persons that can be considered a "public official", as part of a list of definitions concerning interpretation of the Act. New Zealand appears to extend it to foreign public officials, providing that public official also means: "any person who may exercise any power, pursuant to any law in force in a foreign state, that would be exercised in New Zealand by any person described in paragraph (a)".

2.5 Modes of criminal liability

Article 4(1), UNCAT

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

Besides the direct commission of torture by a public official or other person acting in an official capacity, Article 4.1 of UNCAT also requires States to criminalise the attempt to commit torture and the complicity and participation in an act of torture. CAT's General Comment No. 2 provides that "(...) States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing or otherwise participating or being complicit in acts of torture as defined by the Convention".[84] UNCAT thus requires States to provide for the commission of the offence of torture under the following modes of criminal liability in national law:

- direct commission;
- attempt to commit torture;
- at the instigation of a public official or other person acting in an official capacity;

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77 CAT/C/GC/2, op. cit. 1, para. 18.

78 Australia, op. cit. 27, Section 274.2(1)(c) and (2)(c).

79 Nauru, op. cit. 32, Section 258(1)(c).

80 New Zealand, op. cit. 31, Section.

81 Australia, op. cit. 27, See Dictionary at the end of the Act.

82 Nauru, op. cit. 32, Section 8.

83 New Zealand, op. cit. 31, Section 2(1).

84 CAT/C/GC/2, op. cit. 1, para. 17.

- with the consent or acquiescence of a public official or other person acting in an official capacity;
- incitement to torture;
- complicity in torture; or
- other forms of participation.

The following table provides a comparative summary of some of the most common modes of liability provided for in the national law of the 14 Pacific States:

Table 3: Modes of criminal liability

Modes of Liability Commission of offence of torture For common law crimes	Commission	Attempt	Complicity/ Aiding and abetting	Instigation	Incitement	Consent or acquiescence	Accessory after the fact
Australia (federal)	✓	✓	✓	✓	✓	✓	
ACT	✓			✓		✓	
Queensland	✓	✓	✓				✓
Fiji	✓	✓	✓		✓		✓
Kiribati	✓	✓	✓		✓		✓
Marshall Islands	✓	✓	✓		✓		
Micronesia	✓	✓	✓	✓			
Nauru	✓	✓	✓	✓	✓	✓	✓
New Zealand	✓	✓	✓	✓	✓	✓	✓
Palau	✓	✓	✓	✓			
Papua New Guinea	✓	✓	✓		✓		✓
Samoa	✓	✓	✓		✓		✓
Solomon Islands	✓	✓	✓		✓		✓
Tonga	✓	✓			✓		
Tuvalu	✓	✓	✓		✓		✓
Vanuatu	✓	✓	✓		✓		✓

As seen in the table above, Pacific domestic criminal laws largely provide for the modes of liability involving attempt, complicity and participation in the commission of offences, which are required under Article 4 of UNCAT for States to effectively prosecute and punish all perpetrators of acts of torture. However, "complicity or participation" as provided for in Article 4(1) of UNCAT is to be read jointly with the definition of torture in Article 1(1), which additionally refers to its commission through instigation, consent or acquiescence. Therefore, the commission of torture is understood as including incitement, instigation, superior orders or instructions, consent, acquiescence and concealment, an expansive interpretation that the Committee against Torture supports.[85] In this light, Pacific States that have not provided for some of the above-referred modes of liability (e.g. instigation, incitement) would be advised to review their laws to ensure that accomplices or indirect perpetrators of the commission of acts of torture are also effectively prosecuted and punished under the law.

[85] Manfred Nowak *et al.*, op. cit. 29, p. 182, para. 23. See also: CAT, Concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia, 5 June 2015, UN Doc. CAT/C/MKD/CO/3*, para. 15.

Good State practice

UNCAT-compliant provisions on criminal liability for torture

Australia – Criminal Code Act 1995

274.2 Torture

(1) A person (the perpetrator) commits an offence if the perpetrator:

(a) engages in conduct that inflicts severe physical or mental pain or suffering on a person (the victim); and

(...)

(c) the perpetrator engages in the conduct:

(i) in the capacity of a public official; or

(ii) acting in an official capacity; or

(iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

(2) A person (the perpetrator) commits an offence if the perpetrator:

(a) engages in conduct that inflicts severe physical or mental pain or suffering on a person; and

(b) the conduct is engaged in for any reason based on discrimination of any kind; and

(c) the perpetrator engages in the conduct:

(i) in the capacity of a public official; or

(ii) acting in an official capacity; or

(iii) acting at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity.

Nauru – Crimes Act 2016

258 Torture

(1) A person commits an offence if:

(...)

(c) the person is: (i) a public official or public official of another jurisdiction; or

(ii) acting in an official capacity; or

(iii) acting at the instigation, or with the consent or acquiescence, of a person mentioned in subparagraph (i) or (ii).

New Zealand – Crimes of Torture Act 1989

3 Acts of torture

(1) Every person is liable upon conviction to imprisonment for a term not exceeding 14 years who, being a person to whom this section applies or acting at the instigation or with the consent or acquiescence of such a person, whether in or outside New Zealand, —

(a) commits an act of torture; or

(b) does or omits an act for the purpose of aiding any person to commit an act of torture; or

(c) abets any person in the commission of an act of torture; or

(d) incites, counsels, or procures any person to commit an act of torture.

(2) Every person is liable upon conviction to imprisonment for a term not exceeding 10 years who, being a person to whom this section applies or acting at the instigation or with the consent or acquiescence of such a person, whether in or outside New Zealand, —

(a) attempts to commit an act of torture; or

(b) conspires with any other person to commit an act of torture; or

(c) is an accessory after the fact to an act of torture.

(3) This section applies to any person who is a public official or who is acting in an official capacity.

2.6 Penalties

Article 4(2), UNCAT

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Torture is one of the most severe human rights violations and as such, it requires a punishment that is severe enough to have a deterrent effect. It is not to be classified as a misdemeanour but instead should be part of the most serious offences under the domestic legal system. However, both UNCAT and the jurisprudence of CAT do not set out a specific penalty or provide for a recommended sentence appropriate to and commensurate with the grave nature of the crime of torture.[86] Since 2002, CAT has recommended that offences of torture are to be punished with sentences of between six and 20 years of imprisonment, without setting down more specific ranges. In its Concluding Observations, CAT has often advised States on whether minimum penalties set are sufficient to comply with the requirements provided for under Article 4(2) of UNCAT. For example, CAT expressed that in the case of an offence of torture punished with sentences of one to 10 years of imprisonment, it would be insufficient to allow judicial discretion to choose the minimum sentence of one year.[87]

Good State practice

Penalties for the offence of torture

Among the three Pacific States that have provided for an offence of torture in national law, penalties provided vary as follows:

Australia: The Criminal Code Act 1995 provides for a penalty of 20 years of imprisonment for the offence of torture.[88] At the state-territory level, ACT sets out a penalty of 10 years of imprisonment for acts committed by public officials or persons acting in an official capacity[89] and Queensland provides for a maximum penalty of 14 years imprisonment.[90] In Australia's Criminal Code Act 1995, the penalty is of 25 years if torture is committed as part of a crime against humanity or as a war crime.[91]

Nauru: The offence of torture under the Crimes Act 2016 is punished with 25 years of imprisonment.[92]

New Zealand: The Crimes of Torture Act 1989 provides for a maximum penalty of 14 years imprisonment for those who commit an act of torture, act at the instigation or with the consent or acquiescence of such a person, or who aide, abet or incite any person to commit an act of torture.[93] A maximum penalty of 10 years imprisonment is foreseen for those who attempt to commit torture or who conspire or are an accessory after the fact to an act of torture.[94]

The remaining 11 Pacific States that have not criminalised torture as a separate offence under domestic criminal law have provided for penalties of a similar range for the different types of offences causing bodily injury (as shown in the table below), under which acts of torture could be prosecuted. In light of CAT's recommendation that an offence of torture be punished with sentences of six to 20 years imprisonment, offences below providing for penalties under six years of imprisonment would not be adequate to reflect the gravity of acts of torture and to punish the perpetrator accordingly.

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86 Manfred Nowak *et al.*, op. cit. 29, p. 187, para. 34.

87 *Ibid*, p. 187, para. 36; CAT, Concluding Observations on the sixth periodic report of Austria, 27 January 2016, CAT/C/AUT/CO/6, para 10.

88 Australia, op. cit. 27, Section 247.2(1) and (2).

89 ACT, op. cit. 34, Section 36(2).

90 Queensland, op. cit. 35, Section 320A(1).

91 Australia, op. cit. 27, Sections 268.13 and 268.25.

92 Nauru, op. cit. 32, Section 258.

93 New Zealand, op. cit. 31, Section 3(1).

94 *Ibid*, Section 3(2).

Table 4: Penalties for the commission of offences involving bodily injury and other related crimes.

Maximum prison terms for the commission of torture and other criminal offences [years]											
Countries	Torture	Assaults causing bodily harm/injury	Acts intended to cause grievous harm	Grievous bodily harm	Abuse of office	Official oppression	Murder	Manslaughter	Intentional homicide	Rape	Sexual assault
Australia	20										
ACT	10										
Queensland	max. 14										
Fiji		5	life	15	10		life	25		life	10
Kiribati		5	life	7	3		life	life		life	5
Marshall Islands		10				10	life	10			25
Micronesia		10				10	life	10			
Nauru	25										
New Zealand	14										
Palau		10					life	25		25	25
Papua New Guinea		3	life	7	2		life	life		15	5
Samoa		7					life	life		14	
Solomon Islands		5	life	14	2		life	life		life	
Tonga		3		10			life	25		15	3
Tuvalu		5	life		2		life	life		life	5
Vanuatu		1 – 5							life	life	

Additionally, out of the 11 Pacific countries that have not criminalised torture as a separate offence under domestic criminal law, nine namely **Fiji,**[95] **Kiribati,**[96] **Marshall Islands,**[97] **Papua New Guinea,**[98] **Samoa,**[99] **Solomon Islands,**[100] **Tonga,**[101] **Tuvalu**[102] and **Vanuatu**[103] have provided for the adoption of disciplinary measures against police officers or prison officials for the commission of criminal offences, including dismissal, or the reduction in rank and/or salary in their respective Criminal Codes, Police Acts and/or Prisons Acts.

[95] Fiji, Police Act 1965, Section 37.

[96] Kiribati, Police Service Act 2008, Sections 41(1)(g) and 42; Kiribati, Prisons Ordinance, Section 29.

[97] Marshall Islands, Criminal Code 2011, Section 6.07(1)-(2).

[98] Papua New Guinea, Police Act 1998, Section 32(1)-(2) and Correctional Service Act 1995, Section 57.

[99] Samoa, Police Service Act 2009, Section 50(2)(b) and 57(1)(d); Samoa, Prisons and Corrections Regulations 2014, Section 39(8).

[100] Solomon Islands, Police Act 2013, Section 122(1) and Correctional Services Regulations 2008, Clause 41.

[101] Tonga, Police Act 2010, Section 57(2) and Prisons Act 2010, Sections 100-101.

[102] Tuvalu, Police Act 2008, Section 39 and Prisons Act 2008, Sections 20-21.

[103] Vanuatu, Police Act [Cap 105], Section 33(1)(b).

3.
CRIMINAL JURISDICTION

Article 5, UNCAT

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

   (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

   (b) When the alleged offender is a national of that State;

   (c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

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

UNCAT establishes the following types of jurisdiction which are to be exercised over cases of torture, including:

- "territoriality and flag principle": acts committed under any territory in its jurisdiction or on board a ship or aircraft registered in the State party (required);
- "active nationality principle": acts committed by a national of the State party (required);
- "passive nationality principle": when the victim of torture is a national, as the State party considers appropriate (recommended); and
- "universal jurisdiction": acts committed by an alleged offender who is present in the territory and who is not extradited (required).

In its General Comment No. 2, CAT explained that territorial jurisdiction is exercised not only over the State's national territory but also on any other territory in which the State party "exercises, directly or indirectly, in whole or in part, de jure or de facto effective control (…)".[104] The three Pacific countries that have criminalised torture as a separate offence establish jurisdiction over the offence of torture under all or some of the above-referred types of jurisdiction contained in Article 5(1) of UNCAT, as provided for below:

- **Australia**'s Criminal Code Act 1995 regulates standard and extended geographical jurisdiction, including when the conduct constituting the alleged offence or its result occur wholly or partly on board an Australian aircraft or an Australian ship,[105] as well as when the conduct occurs wholly outside Australia and the person is either an Australian citizen or a resident.[106] It also specifically provides for the application of the so-called "category D" extended geographical jurisdiction to the offence of torture (i.e. universal jurisdiction), meaning that jurisdiction is exercised over the commission of the offence whether or not the conduct or the result of the conduct occur in Australia and without requirement that the alleged victim or perpetrator be an Australian citizen.[107] However, proceedings for an offence of torture in which the conduct occurs wholly outside Australia require the written consent of the Attorney-General.[108]

[104] CAT/C/GC/2, op. cit. 1, para. 16.

[105] Australia, op. cit. 27, Sections 14.1(2), 15.1(1), 15.2(1)(a)-(b).

[106] *Ibid*, Section 15.2(1)(c)(i)-(ii).

[107] *Ibid*, Sections 274.2(5) and 15.4.

[108] *Ibid*, Section 274.3(1).

- **Nauru**'s Crimes Act 2016 similarly provides for the exercise of standard geographical jurisdiction when all conduct occurs in Nauru, as well as extraterritorial jurisdiction when the conduct is engaged in outside Nauru and takes place on board a Nauruan ship or aircraft, as well as when the person engaging in the conduct is not a citizen of, or ordinarily resident in, Nauru and conduct takes place on a foreign ship or aircraft that arrives in Nauru or passes over Nauru and if the person, and when the person engaging in the conduct is a citizen of, or ordinarily resident in, Nauru and conduct occurs on a foreign ship or aircraft in the territorial jurisdiction of another country.[109] Additionally, jurisdiction over an offence of torture is exercised irrespective of whether the conduct or its result happen in Nauru.[110]

- **New Zealand**'s Crimes of Torture Act 1989 provides for jurisdiction over the offence of torture when the person to be charged is a New Zealand citizen or is present in New Zealand, as well as for acts or omissions constituting the offence which occur on board a ship or an aircraft registered in New Zealand.[111]

In terms of exercise of criminal jurisdiction, all the other Pacific States refer in their national laws to the exercise of the territoriality and flag jurisdiction principle, while **Fiji**[112] and **Samoa**[113] have also made explicit reference to the active nationality principle. Additionally, **Samoa**[114] provides for the exercise of universal jurisdiction for offences with transnational aspects including organised crime, corruption, smuggling and trafficking in persons, among others, and **Tuvalu**[115] establishes universal jurisdiction and jurisdiction under the active nationality principle over offences of terrorism and transnational organised crime.

Additionally, Article 7(1) of UNCAT requires States to prosecute alleged perpetrators of torture when they do not extradite them (known as the principle of *aut dedere*, *aut judicare*), through the establishment of universal jurisdiction to combat impunity for acts of torture. CAT has interpreted the scope of this principle and expressed 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".[116] This means that the choice between prosecuting or extraditing a person only arises when an extradition request is made.[117] Among Pacific States, the national laws of **Fiji,**[118] **Kiribati,**[119] **Marshall Islands,**[120] **Palau,**[121] **Papua New Guinea,**[122] **Samoa,**[123] **Solomon Islands,**[124] **Tuvalu**[125] and **Vanuatu**[126] have provided for the possibility to initiate domestic prosecution if the person is not extradited to another country.

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[109] Nauru, op. cit. 32, Sections 5 and 6(2)(a)-(d).

[110] *Ibid*, Section 258(4)(a).

[111] New Zealand, op. cit. 31, Section 4.

[112] Fiji, op. cit. 37, Section 8(1)(a) and (c).

[113] Samoa, Crimes Act 2013, Sections 7 and 8(a).

[114] *Ibid*, Section 8(1)(c).

[115] Tuvalu, Counter Terrorism and Transnational Organised Crime Act 2009, Section 80(b)(iv).

[116] CAT, Suleymane Guengueng et al. v. Senegal, Communication No. 181/2001, CAT/C/36/D/181/2001, 19 May 2006, para. 9.7.

[117] Manfred Nowak *et al.*, op. cit. 29, p. 197, para. 4.

[118] Fiji, Extradition Act 2003, Section 61.

[119] Kiribati, Extradition Act 2003, Section 57(1).

[120] Marshall Islands, Criminal Extradition Act [32 MIRC Ch 2], Section 221.

[121] Palau, Palau National Code, Criminal Procedure – Title 18, Section 1008.

[122] Papua New Guinea, Extradition Act 2005, Section 51(1).

[123] Samoa, Crimes Act 2013, Section 8(1)(c).

[124] Solomon Islands, Extradition Act 2010, Section 56(1).

[125] Tuvalu, Extradition Act [Cap. 7.24] 2008 Revised Edition, Section 58.

[126] Vanuatu, Extradition Act 2002, Section 60.

Table 5: Types of jurisdiction and obligation to extradite or prosecute in national laws of Pacific States

Types of jurisdiction For the offence of torture For ordinary/some specific crimes	Territoriality and flag	Active nationality	Passive nationality	Universal jurisdiction	Extradite or prosecute
Australia (federal)	✓	✓		✓	
ACT	✓				
Queensland	✓				
Fiji	✓				✓
Kiribati	✓				✓
Marshall Islands	✓				✓
Micronesia	✓				
Nauru	✓	✓		✓	
New Zealand	✓	✓		✓	
Palau	✓				✓
Papua New Guinea	✓				✓
Samoa	✓	✓		✓	✓
Solomon Islands	✓				✓
Tonga	✓				
Tuvalu	✓	✓			✓
Vanuatu	✓				✓

4.
PROHIBITION/NON-INVOCATION OF TORTURE JUSTIFICATIONS

4.1 Exclusion of lawful sanctions

Article 1(1) of UNCAT excludes "pain or suffering arising from, inherent or incidental to lawful sanctions" from being considered as torture. The precursor to UNCAT, the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[127] provides further detail on lawful sanctions, by mentioning that torture "(...) does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners".

Furthermore, the former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Professor Sir Nigel Rodley, expressed in his 1997 report: "the "lawful sanctions" exclusion must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems. Deprivation of liberty, however unpleasant, as long as it comports with basic internationally accepted standards, such as those set forth in the United Nations Standard Minimum Rules for the Treatment of Prisoners, is no doubt a lawful sanction".[128] Commentators have also put forward that the meaning of 'lawful sanctions' should be construed narrowly in order to ensure that persons are only subjected to punishment that is a consequence of the legitimate exercise of State authority, for example, a sentence of imprisonment.[129] Although out of the scope of this Study Paper, both CAT and the HRC have considered that corporal punishment is not a lawful sanction under domestic law and violates the prohibition of torture and other ill-treatment.[130]

Australia[131] and its state-territory **ACT**,[132] **Nauru**[133] and **New Zealand**[134] provide for the non-application of the crime of torture to pain or suffering arising from, inherent in or incidental to lawful sanctions, in line with Article 1 of UNCAT. Australia, ACT and New Zealand's national laws refer to lawful sanctions as those that are not deemed inconsistent "with the Articles of the International Covenant on Civil and Political Rights", while Nauru's Crimes Act 2016 states that the offence of torture does not apply if "the lawful sanction is consistent with the Constitution".

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127 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

128 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment, 10 January 1997, E/CN.4/1997/7, para. 8.

129 APT-CTI Guide on anti-torture legislation (2016), p. 19.

130 Manfred Nowak *et al.*, op. cit. 29, pp. 66-67, para. 146; See also, among others, CAT, Concluding observations on the initial report of Seychelles, 28 September 2018, CAT/C/SYC/CO/1, paras. 34-35; HRC, op. cit. 44, para. 5.

131 Australia, op. cit. 27, Section 274.2(4).

132 ACT, op. cit. 34, Section 36(1).

133 Nauru, op. cit. 32, Section 258(3).

134 New Zealand, op. cit. 31, Section 2(1).

4.2 Non-invocation of the defence of superior orders

Article 2(3), UNCAT

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Under Article 2(3) of UNCAT, defences of superior orders can never be raised in criminal prosecutions as a justification for the commission of acts of torture. In its General Comment No. 2, CAT held that the responsibility of superior officials for any acts of torture committed by their subordinates, either through direct instigation or encouragement of torture or through consent and acquiescence, is to be thoroughly, effectively, independently, and impartially investigated. CAT has further expressed that "(…) subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures".[135]

Similarly, the HRC has also held that the prohibition of torture and ill-treatment under Article 7 of the ICCPR allows for no limitation and observed that "no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority".[136] Although this does not prevent courts from considering applying mitigating circumstances for a perpetrator who is found guilty of torture committed following superior orders at the sentencing stage, commentators have argued that it cannot be used as an excuse and should never lead to the imposition of lenient sentences that do not take into account the serious nature of the offence.[137]

Australia's Criminal Code Act 1995[138] regulates the non-invocation of the defence of superior orders for the offence of torture, stating: "It is not a defence in a proceeding for an offence under this Division that: … (b) in engaging in the conduct constituting the offence the accused acted under orders of a superior or public authority" and adding that such circumstances may be taken into account in determining sentencing if the accused is convicted of the offence. **Nauru**'s Crimes Act 2016[139] contains a very similar provision, while **New Zealand**'s Crimes of Torture Act 1989 is silent on this matter.

Among the other 11 Pacific States that have not criminalised torture as a separate offence, **Fiji**'s Crimes Act 2009[140] provides: "The fact that genocide or a crime against humanity has been committed by a person pursuant to an order of a Government or of a superior (whether military or civilian) does not relieve the person of criminal responsibility". **Vanuatu**'s Penal Code[141] states: "No criminal responsibility shall attach to an act performed on the orders of a superior to whom obedience is lawfully due, unless such order was manifestly unlawful or the accused knew that the superior had no authority to issue such order". Additionally, the Police and/or Prison Acts/Regulations of six Pacific countries (**Fiji,**[142] **Kiribati,**[143] **Marshall Islands,**[144] **Papua New Guinea,**[145] **Solomon Islands**[146] and **Tuvalu**[147]) have regulated as an offence against discipline where subordinate officers wilfully disobey any lawful order or command, but such provisions do not provide further guidance in situations of failure to follow one that is *unlawful*.

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135 CAT/C/GC/2, op. cit. 1, para. 26.

136 HRC, op. cit. 44, para. 3.

137 Manfred Nowak et al., op. cit. 29, pp. 73, 97.

138 Australia, op. cit. 27, Section 274.4(b).

139 Nauru, op. cit. 32, Sections 259(1)(b) and 259(2).

140 Fiji, op. cit. 37, Section 98.

141 Vanuatu, Penal Code, Act 17 of 1981 (Revised Edition 1988), Section 22.

142 Fiji, Police Regulations 1965, Regulation 12(3).

143 Kiribati, op. cit. 94, Section 41(1)(d)(i); Prisons Ordinance, Sections 11 and 23(1)(ii).

144 Marshall Islands, Public Safety Act 1988 [5 MIRC Ch.5], Section 533(1)(a).

145 Papua New Guinea, op. cit. 96, Section 20(1)(a).

146 Solomon Islands, op. cit. 98, Section 118(a).

147 Tuvalu, Police Regulations, Cap. 20.24.1, Regulation 16(b); Prisons Act, Cap. 20.28, Section 19(2).

4.3 Amnesties, immunity and other impediments to prosecution

In recognition of the absolute prohibition against torture, no amnesties, immunities or other impediments are permitted for the offence of torture. CAT has held that amnesties and other impediments are contrary to the absolute prohibition of torture and other ill-treatment, expressing that: "(…) amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability".[148]

Among the Pacific States that have criminalised torture as a separate offence, **Australia**'s Criminal Code Act 1995, **Nauru**'s Crimes Act 2016 and **New Zealand**'s Crimes of Torture Act 1989 are silent on the matter of amnesties, immunities and other impediments to prosecution and do not explicitly exclude them from its application to the offence of torture.

The national law of some of the other Pacific States provide for the power of the President to grant pardons to persons convicted of offences, or for the absolute immunity of Heads of State or government or other significant positions for acts committed while in office. Examples of amnesty provisions can be found in the Constitution of **Fiji**[149] and in **Papua New Guinea**'s Public Prosecutor (Office and Functions Act) 1997.[150] On the other hand, the Constitutions of **Kiribati,**[151] **Marshall Islands,**[152] **Palau,**[153] **Samoa,**[154] **Solomon Islands,**[155] **Tuvalu**[156] and **Vanuatu,**[157] provide for the President's power to grant pardons to persons convicted of offences. Likewise, the Constitution of **Tonga**[158] provides for the King's power to grant royal pardons to persons convicted of breaches of law. Offences against the person under which acts of torture could be prosecuted are not explicitly excluded from these amnesty provisions.

Certain Pacific States provide immunity from criminal prosecution or civil proceedings for police or prison officers for acts done in good faith. Acts of torture cannot be done "in good faith", even if committed by subordinates pursuant to superior orders. Accordingly, in order to be compliant with UNCAT, the below provisions should not be applied to cases of torture:

- **Fiji**'s Corrections Service Act 2006[159] affords immunity from criminal or civil proceedings to officers acting in good faith in the exercise of powers or duties provided for by the Act, or in compliance with an order or directive made by the Commissioner of Prisons under Sections 5(2) and 6(5).
- **Micronesia**'s Revised Criminal Code Act[160] provides for the immunity from prosecution or legal proceedings against the Government or any officer with regard to acts done by or on behalf of such persons with due diligence and good faith in the exercise of powers or the performance of functions under this Act.
- **Marshall Islands**' Public Safety Act[161] provides for immunity from prosecution of police officers or prison officers for acts done or purported to be done in good faith under the Act.
- **Solomon Islands**' Police Act 2013[162] protects police officers from liability for acts or omissions done in good faith in the performance of functions or duties or in the exercise of any powers under the Act.

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148 CAT/C/GC/2, op. cit. 1, para. 5.

149 Fiji, op. cit. 2, Section 157.

150 Papua New Guinea, Public Prosecutor (Office and Functions) Act 1977, Section 5(1).

151 Kiribati, op. cit. 3, Section 50.

152 Marshall Islands, op. cit. 4, Article V, Section 1(3)(f).

153 Palau, op. cit. 6, Article VIII, Section 7(5).

154 Samoa, op. cit. 8, Part IX, Article 110(1).

155 Solomon Islands, op. cit. 9, Chapter V, Section 45(1)(a).

156 Tuvalu, op. cit. 10, Division 5, Section 80(1)(a).

157 Vanuatu, op. cit. 12, Chapter 6, Section 38.

158 Constitution of Tonga, Part II, Section 37.

159 Fiji, Corrections Service Act 2006, Section 9(4).

160 Micronesia, Revised Criminal Code Act, Section 926.

161 Marshall Islands, Public Safety Act 1988 [5 MIRC Ch. 5], Section 539.

162 Solomon Islands, op. cit. 98, Section 212 (b).

- **Tonga**'s Police Act 2010[163] exempts police officers from liability in any proceedings for damage or injury caused by the exercise of their powers, duties or responsibilities when carried out in good faith.

- **Tuvalu**'s Police Powers and Duties Act 2009[164] protects police employees from proceedings brought against the Crown or any police officer for acts done or omitted to be done in carrying out the provisions contained in the Act's Division on Domestic Violence if they acted in good faith and with reasonable care.

4.4 Statutes of limitations

CAT has repeatedly expressed the view that, due to the serious and grave nature of the crime of torture and the fact that victims may take time to come forward and report cases for fear of reprisals, statutes of limitations are not to apply to the offence of torture. It has also expressed that statutes of limitation, amnesties and immunities constitute obstacles to the enforcement of the right to redress and prevent an effective implementation of Article 14 of UNCAT.[165] In this sense, when legislating for an offence of torture, it is key to ensure that acts of torture or the offence of torture are exempted from existing statutes of limitations. For those that do not have an offence of torture under their national laws, this would require an expressed exception for acts of torture from limitations that may apply to crimes involving serious injury.

Regarding the provision of statutes of limitations of the Pacific countries reviewed herein, **Micronesia, Palau** and **Vanuatu** have set out time limitations for the commencement of prosecutions for some of the offences causing bodily injury. This Study Paper is unable to confirm whether acts of torture can be prosecuted under such type of offences and whether time limitations would apply. For the other 11 States, the Study Paper is unable to identify whether status of limitations are provided for in legislation.

[163] Tonga, op. cit. 99, Section 174.

[164] Tuvalu, Police Powers and Duties Act 2009, No. 12 of 2009, Section 51.

[165] CAT/C/GC/3, op. cit. 64, para. 38.

5.
THE PROHIBITION OF *REFOULEMENT*

Article 3, UNCAT

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The prohibition of *refoulement* is a general principle of international law and a peremptory norm of customary international law (*jus cogens*), from which no derogation is permitted, regardless of whether a State is party to UNCAT.[166] The prohibition is explicitly contained in Article 3(1) of UNCAT. CAT's reference source on the principle of *non-refoulement* is the General Comment No. 4 (2017),[167] which provides guidance on the implementation of Article 3 in the context of Article 22 of UNCAT, relating to the individual complaints' procedure. CTI has released UNCAT Implementation Tool 4/2018 on Non-refoulement practices and procedures, compiling examples of constitutional provisions, national procedures, procedural rights and training on the prohibition of *non-refoulement* from across regions.

Under UNCAT, the prohibition is absolute and no person can be excluded from such protection, including those posing a threat to national security or who have committed serious offences.[168] Additionally, unlike under the 1951 Refugee Convention, which applies to refugees and asylum seekers, the prohibition of *refoulement* under Article 3 of UNCAT affords protection to any person regardless of nationality, citizenship or residence status.[169] The prohibition of *refoulement* applies to any form of potential return to a third State where there are substantial grounds for believing that a person is at risk of torture, whether as part of the extradite or prosecute provision (Article 8 of UNCAT), or as a general principle of international law. According to CAT, 'deportation' includes "expulsion, extradition, forcible return, forcible transfer, rendition and rejection at the frontier of, pushback operations (including at sea)" of either an individual or a group of individuals.[170] Collective deportation, without objective examination of individual cases in relation to personal risk, is also to be considered a violation of the principle of *non-refoulement*.[171]

For a State to assess the likelihood of the risk of being subjected to torture, CAT has understood that 'substantial grounds' exist whenever the risk of torture is "foreseeable, personal, present and real".[172] In assessing whether 'substantial grounds' exist, in accordance with Article 3(2) of UNCAT, CAT considers crucial the existence of a pattern of gross, flagrant or mass human rights violations in the receiving State.[173] CAT's General Comment No. 4 (2017) provides an indicative list of examples of personal risk as well as a list of non-exhaustive examples that may constitute an indication of a risk of torture, which States are to take into account when considering the prohibition of *refoulement*.[174] Although Article 3 of UNCAT refers only to 'torture', CAT's General Comment No.4 (2017) does caution that "States parties should consider whether the nature of other forms of ill-treatment that a person facing deportation is at risk of experiencing could likely change so as to constitute torture, before making an assessment

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166 International Law Commission, Fourth report on peremptory norms of general international law (jus cogens), by Dire Tladi, Special Rapporteur, 31 January 2019, UN Doc. A/CN.4/727, paras. 131-133.

167 CAT, General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 4 September 2018, UN Doc. CAT/C/GC/4.

168 Manfred Nowak *et al.*, op. cit. 29, p. 114, para. 72.

169 *Ibid*, p. 123, para. 100.

170 *Ibid*, para. 4.

171 *Ibid*, para. 13.

172 CAT/C/GC/4, op. cit. 168, paras. 11 and 38.

173 *Ibid*, para. 43.

174 *Ibid*, paras. 29 and 45.

on each case relating to the principle of "non-refoulement"".[175] Additionally, CAT further notes that "the infliction of cruel, inhuman or degrading treatment or punishment, whether or not it amounts to torture, to which an individual or the individual's family were exposed in their State of origin or would be exposed in the State to which the individual is being deported, constitutes an indication that the person is in danger of being subjected to torture if deported to one of those States". In its Concluding Observations to States, CAT recommends States to ensure that persons are not deported to a country where they would be at risk of torture or other forms of ill-treatment.[176]

Finally, with regard to extradition or deportation procedures, CAT has cautioned States that offering diplomatic assurances[177] that the person will not be subjected to torture or other ill-treatment does not discharge the sending State of its obligations under Article 3(1) of UNCAT, stating: "(...) diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of *non-refoulement* as set out in article 3 of the Convention, where there are substantial grounds for believing that the person would be in danger of being subjected to torture in that State".[178]

In the Pacific region, the Extradition Acts of **Australia, Fiji, Kiribati, New Zealand, Palau, Papua New Guinea, Solomon Islands, Tuvalu** and **Vanuatu** provide for the possibility to refuse to extradite a person to a country where he or she has been subjected to torture or other forms of ill-treatment or where there is a risk that the person would be subjected to such acts. While the Extradition Acts of **Australia**[179] and **New Zealand**[180] refer to risks of torture, those of **Fiji,**[181] **Kiribati,**[182] **Papua New Guinea,**[183] **Solomon Islands,**[184] **Tuvalu**[185] and **Vanuatu**[186] and the National Code of **Palau,**[187] explicitly refer to "cruel, inhuman or degrading treatment or punishment", in line with CAT's recommendation to extend the prohibition of *refoulement* to risks of other ill-treatment.

Good State practice

Legislative provisions incorporating UNCAT's "substantial grounds" language

Australia – Extradition Act 1988

(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if:

(b) the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture; and

(...)

New Zealand – Extradition Act 1999

30 Minister must determine whether person to be surrendered

(2) The Minister must not determine that the person is to be surrendered –

(b) if it appears to the Minister that there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country; or

(...)

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[175] *Ibid*, para. 16.

[176] Manfred Nowak *et al*., op. cit. 29, p. 129, para. 120.

[177] CAT's General Comment No. 4 (2017) defines 'diplomatic assurances' as "(...) the formal commitment by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State and in accordance with international human rights standards". See, CAT/C/GC/4, op. cit. 168, para. 19.

[178] *Ibid*, para. 20; Manfred Nowak et al., op. cit. 29, p. 100, para. 7., p. 115, para. 76 and p. 158, para. 201.

[179] Australia, Extradition Act 1988, Section 22(3)(b).

[180] New Zealand, Extradition Act 1999, No. 55 of 1999, Section 30(2)(b).

[181] Fiji, op cit. 116, Section 18(2)(h).

[182] Kiribati, op. cit. 117, Section 19(1)(h) and 19(4)(a).

[183] Papua New Guinea, op. cit. 20, No. 21 of 2005, Section 35(2)(h).

[184] Solomon Islands, op. cit. 22, Section 19(2)(h).

[185] Tuvalu, op. cit. 123, Section 19(2)(h).

[186] Vanuatu, op. cit. 124, Section 17(2)(j) and 62(2)(c).

[187] Palau, op. cit. 119, Section 10.104 (m).

Of the above-referred countries, the Extradition Acts of **Fiji,**[188] **Kiribati,**[189] **Solomon Islands,**[190] **Tuvalu**[191] and **Vanuatu**[192] provide that the extradition is not to be refused if both the State and the requesting country have ratified UNCAT or the ICCPR, despite a risk that the person may be subjected to torture or cruel, inhuman, or degrading treatment or punishment in the requesting State. While being a party to UNCAT or other relevant human rights treaties is a relevant factor in determining whether it is safe to extradite a person to another country, Article 3(2) of UNCAT requires competent authorities in the sending State to consider "(…) all relevant considerations, including where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights". Therefore, in addition to considering whether a State is party to UNCAT or ICCPR, the current human rights situation in the receiving State would need to be assessed on a case-by-case basis. In deciding whether to deport persons from their territory, CAT advises States to consider the non-exhaustive list of human rights situations that may constitute an indication of a risk of torture as provided for in CAT's General Comment No. 4 (2017), as well as to assess whether 'substantial grounds' exist.[193]

Among other specific human rights situations that may constitute an indication of a risk of torture under CAT's General Comment No. 4 (2017) is whether the person has been detained or imprisoned or would be detained or imprisoned in conditions amounting to torture or cruel, inhuman or degrading treatment or punishment. Among Pacific States reviewed, the National Code of **Palau**[194] foresees inhumane prison conditions as one of the automatic extradition objections, but mentions that conditions of detention in countries that are parties to UNCAT or the ICCPR "(…) are presumed humane but can be rebutted by clear and convincing evidence". The Extradition Acts of **Fiji,**[195] **Kiribati,**[196] **Solomon Islands**[197] and **Tuvalu**,[198] and **Vanuatu**[199] contain the same language and implicitly refer to other forms of ill-treatment as grounds to refuse extradition if prison conditions are not "substantially equivalent to minimum standards for imprisonment".

Good State practice

Inhumane conditions of detention considered for non-refoulement purposes

Palau – National Code (Criminal Procedure – Title 18)

§ 10.104. Extradition objections.

An extradition objection arises automatically where:

(m) the person is likely to be subjected to torture or cruel and inhumane treatment or punishment, including inhumane prison conditions. Conditions in countries that have acceded to the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment of Punishment adopted on December 10, 1984, or the International Covenant on Civil and Political Rights, adopted on December 16, 1966, are presumed humane, but can be rebutted by clear and convincing evidence.

Tuvalu – Extradition Act

36 Determination whether person should be surrendered

(2) The magistrate shall determine that the person should be surrendered unless he or she is satisfied that:

(e) prison conditions in the requesting country are not substantially equivalent to the minimum standards for imprisonment in Tuvalu.

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[188] Fiji, op. cit. 116, Section 18(4).
[189] Kiribati, op. cit. 117, Section 19(4).
[190] Solomon Islands, op. cit. 122, Section 19(4).
[191] Tuvalu, op. cit. 123, Section 19(4).
[192] Vanuatu, op. cit. 124, Section 17(4).
[193] CAT/C/GC/4, op. cit. 168, para. 29.
[194] Palau, op. cit. 119, Section 10.104 (m).
[195] Fiji, op. cit. 116, Section 36(2)(e).
[196] Kiribati, op. cit. 117, Section 36(2)(d).
[197] Solomon Islands, op. cit. 122, Section 35(2)(e).
[198] Tuvalu, op. cit. 123, Section 36(2)(e).
[199] Vanuatu, op. cit. 124, Section 35(3)(e).

6.
REDRESS AND REPARATIONS

Article 14, UNCAT

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Under Article 14 of UNCAT, State parties are required to ensure that victims of torture have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. CAT, in its General Comment No. 3 on the implementation of article 14, has expressed that Article 14 is applicable to both victims of torture and victims of acts of other cruel, inhuman or degrading treatment or punishment.[200] The right to redress is interpreted as encompassing a substantive aspect, namely, ensuring that victims obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible; and a procedural aspect, by which States are to "(...) enact legislation and establish complaint mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims".[201]

Regarding the substantive aspect, in its General Comment No. 3, CAT explains that 'redress' refers to five forms of reparation to be provided, namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Although restoration of the victim to the situation before the torture or other ill-treatment occurred will not be possible in the majority of cases due to the nature of the violation, the victim is still to be provided with full access to redress, including alternative reparative measures.[202] Depending on the circumstances of the case, it might be possible to, among others, restore the victim's liberty if deprived of it, the enjoyment of human rights, identity, family life and citizenship, as well as provide for their return to their place of residence, the restoration of employment and return of property. These are examples of restitution measures under the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[203]

Regarding the other forms of reparation, CAT has advised that monetary compensation alone is not sufficient to provide redress for victims of torture and other ill-treatment and that it is inadequate for a State party to comply with its obligations under Article 14 of UNCAT.[204] CAT has pointed out that compensation "(...) should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary". Examples of considerations to ensure sufficient compensation include:[205]

- reimbursement of medical expenses paid and provision of funds to cover future medical and rehabilitative needs;
- pecuniary and non-pecuniary damage resulting from the physical and mental harm caused;
- loss of earnings and earning potential due to disabilities caused by the torture or ill-treatment;
- lost opportunities such as employment and education; and
- legal or specialised assistance and other costs associated with bringing a claim for redress.

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[200] CAT/C/GC/3, op. cit. 4, para. 1.

[201] *Ibid*, para. 5.

[202] *Ibid*, para. 8; Manfred Nowak et al., op. cit. 29, p. 407, para. 114.

[203] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of December 2005. See also: Manfred Nowak *et al.*, op. cit. 29, p. 407, para. 114.

[204] CAT/C/GC/3, op. cit. 4, para. 9.

[205] *Ibid*, para. 10.

CAT considers rehabilitation of victims of torture and other ill-treatment to be of a holistic nature, encompassing medical and psychological care and legal and social services with the aim "(…) to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society".[206] While it is good practice for rehabilitation to be provided as soon as possible after the occurrence of the acts of torture or other ill-treatment and following an assessment by a qualified independent health professional,[207] CAT has emphasised that the provision of such initial care does not fulfil the State's obligation to provide for as full a rehabilitation as possible under Article 14 of UNCAT.[208] Referral to regular health services is not sufficient and CAT has recommended States to put in place mechanisms and programmes specialised on the particular needs of torture and other ill-treatment, as well as to "(…) adopt a long-term and integrated approach and ensure that specialised services for the victim of torture or ill-treatment are available, appropriate and promptly accessible". This includes the evaluation of the victim's therapeutic and other needs in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)[209] and a range of other measures and services, as provided for in CAT's General Comment No. 3.[210] Additionally, access to rehabilitation is not to be made dependent on the victim pursuing judicial remedies.[211] For an overview of how States across regions have implemented the right to rehabilitation and redress for victims of torture and other ill-treatment, the CTI/OSCE ODIHR's UNCAT Implementation Tool 5/2018 on "Providing rehabilitation to victims of torture and other ill-treatment compiles 19 promising State practices from around the world on this topic.

Regarding the procedural aspect of the right to redress, CAT has stated that States are to enact legislation that specifically provides victims of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress. In Concluding Observations to States, CAT has emphasised that redress procedures are to be initiated *ex officio* when there are reasonable grounds to believe that torture or other ill-treatment has been committed, in the absence of a complaint and regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.[212] States' obligations under Articles 12 and 13 of UNCAT on complaints and prompt, effective and impartial investigations into allegations of torture and other ill-treatment are inextricably linked with the obligation to provide redress under Article 14, given that "[u]ndue delays in initiating or concluding legal investigations into complaints of torture or ill-treatment compromise victims' rights under article 14 to obtain redress, including fair and adequate compensation".[213] CAT has further indicated that "(…) compensation should not be unduly delayed until criminal liability has been established. Civil liability should be available independently of the criminal proceeding (…). If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence of or undue delay of those criminal proceedings constitute a failure on behalf of the State party to fulfil its obligations under the Convention".[214]

All Pacific States reviewed herein provide for access to civil proceedings to guarantee the right to redress of victims of criminal offences and to redress breaches of constitutional rights such as the right to be free from torture and other ill-treatment. The following are some indicative examples of the types of provisions found:

- **Australia**'s Crimes Act 1914 provides that "[n]othing in this Act shall affect the right of any person aggrieved by any act or omission which is punishable as an offence against this Act to institute civil proceedings in any court in respect of such act or omission".[215]
- **Fiji**'s Sentencing and Penalties Act 2009 refers to compensation orders and provides for the power of courts to make compensation orders for offenders to pay to "persons who suffer any loss, damage or injury as a direct

[206] *Ibid*, para. 11.

[207] *Ibid*, para. 15.

[208] *Ibid*, para. 14.

[209] Office of the United Nations High Commissioner for Human Rights Geneva, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2022 edition), 29 June 2022.

[210] CAT/C/GC/3, op. cit. 168, para. 13. See also: See: CAT, Concluding observations on the sixth periodic report of New Zealand, 2 June 2015, CAT/C/NZL/CO/6, para. 18(f).

[211] *Ibid*, para. 15.

[212] CAT/C/GC/3, para. 27; Manfred Nowak *et al.*, op. cit. 29, p. 388, para. 63.

[213] CAT/C/GC/3, para. 25.

[214] *Ibid*, para. 26.

[215] Australia, op. cit. 46, Section 15F.

result of the offence for which the offender who is found to be guilty or is convicted".[216] The relevant section further provides: "[n]othing in this section or the regulations made under it affect the right of any person to take action to recover damage for losses, damage or injury against an offender by way of civil proceedings".[217]

- **New Zealand**'s Crimes of Torture Act 1989 defers to the Attorney-General the decision to consider whether the Crown shall pay compensation to the person against whom an offence of torture was committed, or to the person's family, and further adds that it does not affect or limit the right of compensation that the person may have under any other enactment.[218]
- **Papua New Guinea**'s Constitution provides for the rights of persons whose rights and freedoms have been infringed to be entitled to "reasonable damages", which are awarded against any person who committed or was responsible for such infringement.[219]
- **Samoa**'s Ombudsman Act 2013 states that if an Ombudsman-initiated inquiry finds evidence of human rights violations, the inquiry report may include, among others, "a recommendation that a person should perform reasonable acts to redress the violation of human rights" and "a recommendation that victims of violations are entitled to compensation for any loss or damage suffered".[220]

CAT has recommended that States review their legislation to set up a specific legal and institutional framework for victims of torture and other ill-treatment, which includes explicit legal provisions on the right of victims of torture and ill-treatment to redress, including fair and adequate compensation and rehabilitation, in line with Article 14 of UNCAT. In this regard, generic provisions allowing for the right to claim compensation for injuries suffered through criminal or civil law do not suffice.[221] In reviewing their legislation, Pacific States should consider the specific information on the implementation of Article 14 of UNCAT, which CAT recommends that States provide as part of periodic State reporting.[222] Additionally, in Concluding Observations to States, CAT has recommended that States ensure that the right to rehabilitation of victims of torture is included in stand-alone anti-torture laws and that sufficient resources are allocated for effective rehabilitation treatment and programmes.[223]

Finally, among the current Pacific States parties to UNCAT, three have entered reservations to the scope of the right to redress under Article 14 of UNCAT,[224] as follows:

- **Fiji**'s reservation provides: "The Government of the Republic of Fiji recognizes the article 14 of the Convention only to the extent that the right to award compensation to victims of an act of torture shall be subject to the determination of a Court of law".
- **New Zealand**'s reservation states: "The Government of New Zealand reserves the right to award compensation to torture victims referred to in article 14 of the Convention Against Torture only at the discretion of the Attorney-General of New Zealand".
- **Samoa**'s reservation mentions: "The Government of the Independent State of Samoa reserves the right to award compensation to torture victims or their families and the question of adequate compensation referred to in Article 14, at the discretion of the Courts of Samoa'".

CAT has stated that reservations seeking to limit the application of Article 14 are incompatible with the object and purpose of the Convention and has encouraged States parties to consider withdrawing them.[225]

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[216] Fiji, Sentencing and Penalties Act 2009 (No. 42 of 2009), Section 51(1).

[217] *Ibid*, Section 51(4).

[218] New Zealand, op. cit. 31, Section 5.

[219] Papua New Guinea, op. cit. 7, Section 58(2) and (3).

[220] Samoa, Ombudsman *(Komesina o Sulufaiga)* Act 2013, Section 36(1)(b)-(c).

[221] Manfred Nowak *et al.*, op. cit. 29, p. 394, para. 80.

[222] CAT/C/GC/3, op. cit. 4, para. 46.

[223] Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013), 19 June 2013, UN Doc. CAT/C/KEN/CO/2. See also: Manfred Nowak et al., op. cit. 29, p. 395, para. 81.

[224] See full list here: https://bit.ly/3C1wJNL.

[225] CAT/C/GC/3, op. cit. 4, para. 43; CAT/C/NZL/CO/6, op cit. 210, para. 20.

7.
NON-ADMISSION / EXCLUSION OF TORTURE-TAINTED EVIDENCE

Article 15, UNCAT

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, except against a person accused of torture as evidence that the statement was made.

States' obligation to exclude any evidence obtained through torture from any proceedings constitutes an important legal safeguard for arrested and detained persons. The non-admission of torture-tainted evidence also has a preventive or deterrent effect to the commission of future acts of torture, removing incentives for perpetrators to use torture as they cannot benefit from such acts and the evidence obtained as a result. Moreover, the exclusionary rule guarantees the correct functioning of the criminal justice system and is also non-derogable under any circumstances. Former Special Rapporteur on Torture, Juan E. Méndez in his 2014 report dedicated to the exclusionary rule pointed out that the rule is "fundamental for upholding the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment) by providing a disincentive to carry out such acts" and that it is a norm of customary international law.[226] In its General Comment No. 2, CAT has explicitly referred to the absolute and non-derogable nature of the exclusionary rule as one of UNCAT's provisions that are to be observed in all circumstances.[227]

CAT's jurisprudence on individual complaints and Concluding Observations to States as part of the State periodic reporting process has offered some clarification as to the scope of States' obligation to exclude torture-tainted evidence under Article 15 of UNCAT. The obligation to exclude 'statements' as provided for in Article 15 of UNCAT has been interpreted broadly to extend to any type of evidence or information (not only to confessions), whether provided orally or in writing by the defendant or third parties.[228] Although CAT has not given its views as to whether the exclusionary rule extends without limitations to 'derivative evidence', that is, evidence found as a result of the use of information obtained by torture, the European Court of Human Rights and academic doctrine have found that if admitted, it would taint and render unfair the criminal proceedings and go against the absolute prohibition of torture and other ill-treatment. It is thus recommended to interpret Article 15 of UNCAT so as to extend to derivative or secondary evidence.[229]

In its General Comment No. 2, CAT has considered that the obligation to exclude torture-tainted evidence also extends to other forms of ill-treatment since "(...) articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment", despite the fact that Article 15 only refers to statements obtained by "torture".[230] This has also been the view taken by the HRC in its General Comment No. 20, which states: "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[231] The referred views of CAT and the HRC on extending the exclusionary rule's application to other forms of ill-treatment are also expressly echoed in the SRT's above-referred report on the exclusionary rule.[232] The African Commission on Human and Peoples' Rights' Robben Islands Guidelines for the Prohibition and Prevention of Torture in Africa also consider the exclusionary rule to be applicable to ill-treatment, which recommends States to "[e]nsure that any statement obtained through

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[226] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, 10 April 2014, A/HRC/25/60, para. 17.

[227] CAT/C/GC/2, op. cit. 1, para. 6.

[228] Manfred Nowak *et al.*, op. cit. 29, p. 421, para. 17.

[229] *Ibid*, pp. 421-423, paras. 18-24; APT-CTI Guide on anti-torture legislation (2016), op cit. 127, p. 30.

[230] *Ibid.*

[231] HRC, op. cit. 44, para. 12.

[232] A/HRC/25/60, para. 26.

the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings (...)".[233]

The obligation under Article 15 of UNCAT to exclude evidence obtained by torture and other forms of ill-treatment has been interpreted to mean that it does not apply only to criminal proceedings but to all proceedings involving an assessment of evidence in a formal procedure that leads to the decision of a court or an administrative body or agency.[234] Examples include proceedings conducted by military commissions, immigration boards, Ombudspersons or other formal procedures.[235] Additionally, concerning the burden of proof, the SRT has considered that in interpreting the scope and meaning of the word "established" in Article 15 of UNCAT, one has to bear in mind the difficulties in proving allegations of torture due to the fact that it is often practiced in secret, interrogators are skilled at ensuring there are no visible marks left on the victim, and sometimes concealment on the part of the authorities who are due to prevent torture and other ill-treatment from taking place. In this regard, although the jurisprudence of CAT does not shed light on the test to be applied in determining the burden of proof, the SRT has determined that the 'real risk' test applies whereby "the applicant is only required to demonstrate that his or her allegations are well founded, thus that there are plausible reasons to believe that there is a real risk of torture or ill-treatment (...)". This would imply a shift in the burden of proof to the prosecution and courts.[236]

Of the Pacific States reviewed, **Australia, Fiji, Marshall Islands, Micronesia, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga** and **Tuvalu**, have included provisions on the non-admission of evidence obtained under torture or other coercive means in their national law; whereas **Kiribati, Nauru** and **Vanuatu** have enforced the non-admissibility of torture-tainted evidence through jurisprudence.

Table 6: Overview of the incorporation of the exclusionary rule in the Pacific

Exclusionary rule	In the Constitution	In legislation	Addressed through jurisprudence
Australia (federal)		✓	
Fiji	✓		
Kiribati			✓
Marshall Islands	✓		
Micronesia		✓	
Nauru			✓
New Zealand		✓	
Palau	✓		
Papua New Guinea		✓	
Samoa		✓	
Solomon Islands		✓	
Tonga		✓	
Tuvalu		✓	
Vanuatu			✓

[233] African Commission on Human and Peoples' Rights, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines), 2nd Edition, Article 29.

[234] A/HRC/25/60, para. 30; Manfred Nowak *et al.*, op. cit. 29, pp. 427-428, paras. 37 and 39 and p. 430, para. 43.

[235] *Ibid; Ibid*, p. 4428, para. 39.

[236] A/HRC/25/60, para. 33.

Australia, New Zealand, Papua New Guinea, Samoa, Solomon Islands and **Tonga** have provided for the exclusionary rule in their respective Evidence Acts. Although none have specifically referred to the use of torture in extracting information or a confession, common language used includes reference to violent, oppressive methods, inhuman or degrading conduct, and confessions extracted by inducement, threat or promise. As a comparison:

- **Australia** and **New Zealand**'s Evidence Acts contain a very similar provision. Australia's Evidence Act 1995,[237] which is applicable at the federal level and has been modelled in the Evidence Acts of the states of New South Wales, Victoria, Tasmania, ACT and Northern Territory, provides for the exclusion of admissions that were influenced by "violent, oppressive, inhuman or degrading conduct" as well as by any threat of conduct of such kind, whether towards the person who made the admission or towards another person.[238] There are equivalent provisions in some state and territory Acts and there is also a common law bar on the admissibility of evidence obtained under duress. Similarly, New Zealand's Evidence Act 2006[239] sets out the Judge's obligation to exclude statements influenced by 'oppression' unless satisfied "beyond reasonable doubt" that they were not influenced in such a manner.[240] The said Act defines oppression as "oppressive, violent, inhuman or degrading conduct towards, or treatment of, the defendant or another person; or (…) a threat of conduct or treatment of that kind".[241]
- **Papua New Guinea**'s Evidence Act 1975[242] refers to "confessions induced by threats" and provides that confessions in criminal proceedings are not to be received in evidence "if it has been induced by a threat or promise by a person in authority, and a confession made after any such threat or promise shall be deemed to have been induced by it unless the contrary is shown".[243]
- **Samoa**'s Evidence Act 2015[244] regulates the exclusion of statements influenced by oppression in criminal proceedings, providing for the obligation of the Judge to exclude the statement "unless satisfied beyond reasonable doubt that the statement was not influenced by oppression".[245] Oppression is defined as "the deliberate exercise of violence on or the inhuman or degrading treatment of the defendant by a police officer".[246]
- **Solomon Islands**' Evidence Act 2009[247] provides that courts are mandated to exclude the admission of evidence that is not deemed voluntary "beyond reasonable doubt", taking into account, if the confession was made in response to questioning, the nature of questions and manner in which they were put and "the nature of any threat, promise or other inducement made to the person being questioned".[248]
- **Tonga**'s Evidence Act[249] provides for the obligation to exclude confessions in criminal proceedings if they appear to have been made "by any inducement, threat or promise relating to the charge, and proceeding either from the prosecutor or from some other person having authority over the accused person (…)".[250]
- **Tuvalu**'s Police Powers and Duties Act 2009 sets out that "[a] police officer who is questioning a suspect must not obtain a confession by threat or promise".[251]

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[237] Australia, Evidence Act 1995, No. 2, 1995.

[238] *Ibid*, Section 84(1).

[239] New Zealand, Evidence Act 2006, No 69 of 2006.

[240] *Ibid*, Section 29(2).

[241] *Ibid*, Section 29(5)(a)-(b).

[242] Papua New Guinea, Evidence Act 1975.

[243] *Ibid*, Section 28.

[244] Samoa, Evidence Act 2015, No. 47 of 2015.

[245] *Ibid*, Section 21(1) and (2).

[246] *Ibid*, Section 21(4).

[247] Solomon Islands, Evidence Act 2009, Act No. 11 of 2009.

[248] *Ibid*, Section 168(3)(b).

[249] Tonga, Evidence Act, Cap. 07.21, 2016 Revised Edition.

[250] *Ibid*, Section 21.

[251] Tuvalu, op. cit. 162, Section 127(1).

Fiji,[252] **Marshall Islands**[253] and **Palau**[254] have provided for the exclusionary rule in their Constitutions. **Fiji**, for example, includes the right "not to be compelled to make any confession or admission that could be used in evidence against that person" as part of one of the rights of arrested and detained persons. Fijian courts refer to the Judges' Rules, which predate Code C of the Police and Criminal Evidence Act 1984 (PACE) in England and Wales. The Fiji Magistrates Bench Book[255] provides that the admissibility of evidence can sometimes be determined through a *voir dire* procedure, a special hearing, separate from the main proceeding conducted in trials for indictable offences, which can be used to determine, among others, the admissibility of a confession.[256] Fijian courts have determined the scope for the admissibility of confessions into evidence. In the *voir dire* ruling of 2016, *State v. Nandan*,[257] the High Court of Fiji echoed an earlier judgment of the Fiji Court of Appeal establishing the two grounds to be considered for the exclusion of a confession, namely: a) to establish beyond reasonable doubt that the statements were voluntary, that is, "not procured by improper practices such as the use of force, threats or prejudice or inducement by offer of some advantage"; and b) "even if such voluntariness is established there is also a need to consider (…) whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges' rules falling short of overbearing will, by trickery or by unfair treatment".[258] The High Court further added that "[i]f a confession is made as a result of oppression or if it is obtained in an unfair manner, such confession is not admissible and should be excluded".[259]

Finally, although the exclusionary rule does not appear to be expressly provided for in national law, courts in **Kiribati, Nauru** and **Vanuatu** have also ruled on the admissibility of evidence during so-called *voir dire* procedures. As examples:

- The High Court of **Kiribati**, in the case of *Republic v. Mouata*,[260] ruled as inadmissible a statement delivered by the accused, who had been detained in police custody, given that "there was a deliberate attempt made by the investigating officer in this case to hold the accused in such circumstances and in such condition whereby his will would be overborne and that he would crack and give a confession and that conduct on the part of the investigating officer is completely inexcusable". To assess the voluntariness of the confession, the Court considered the conditions of detention of the accused, who had been removed of his clothes and kept in his underwear for five days in detention, which was considered 'degrading'.
- The Supreme Court of **Vanuatu** excluded from evidence a statement obtained from the accused in the case of *Public Prosecutor v. Atuary*.[261] The Supreme Court considered that "experience shows that admissions or confessions that have been given as a result of being assaulted by the police cannot be relied upon as truthful. Persons will do or say whatever is necessary to stop being beaten up". It further held that, even if the confession was true, accepting them as evidence "would simply be an encouragement to the Police to obtain confessions by use of assault and other unacceptable methods".[262]

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[252] Fiji, op. cit. 2, Section 13(1)(d).

[253] Marshall Islands, op. cit. 7, Section 4 (8).

[254] Palau, op. cit. 6, Section 7.

[255] Fiji Magistrates Bench Book, April 2004.

[256] *Ibid*, 8.4. Admissibility of Evidence – hearings on the *voir dire*.

[257] Fiji, *State v. Nandan*, [2016] FJHC 125; HAC031.2012 (11 February 2016).

[258] *Ibid*, para.5.

[259] *Ibid*, para. 6.

[260] Kiribati, *Republic v. Mouata* [2001] KIHC 4; Criminal Case 11 of 2000 (10 January 2001).

[261] Vanuatu, *Public Prosecutor v. Atuary*, Ruling 1 [2007] VUSC 86; Criminal Case 26 of 2007 (11 September 2007).

[262] *Ibid*, para. 4.

CONCLUSION

This comparative Study Paper shows how the national laws of Pacific countries contain strong provisions that domesticate some of the main elements of the anti-torture legal framework that States are required to legislate under UNCAT. It also demonstrates how courts in several countries have enforced and interpreted the prohibition of torture and other ill-treatment by determining whether acts perpetrated amount to torture or other ill-treatment. This has been considered by courts in various contexts and in a variety of cases, ranging from civil proceedings, constitutional redress, *voir dire* in criminal proceedings, prosecutions, appeals, sentencing, and in deciding on complaints of poor conditions of detention in prison.

The existence of compatible anti-torture legal provisions and frameworks can provide an important starting point for both States parties and non-States-parties to UNCAT to conduct legislative review with a view to identifying existing gaps, as well as opportunities for legislative reform, in support of ongoing UNCAT implementation efforts. For existing Pacific non-States-parties to UNCAT, it is hoped the Study Paper offers a comparative overview of existing anti-torture legal frameworks in the region and an incentive to consider moving towards UNCAT ratification.

The Study Paper can assist States in the preparation of Cabinet submission papers outlining the rationale for becoming party to UNCAT and the obligations arising thereunder, as well as to identify priority areas on anti-torture legislative reform both ahead of and after UNCAT ratification or accession. The good practices highlighted suggest that Pacific States that are considering UNCAT ratification already have good frameworks in place to proceed with ratification and these can be further developed post-ratification.

CTI remains available to continue providing technical assistance and advice to all Pacific States considering becoming parties to UNCAT, as well as to those wishing to improve its domestic compliance and implementation.

ANNEX 1:
REFERENCE LIST

International human rights treaties

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at: https://bit.ly/3WH8f66

- International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, available at: https://bit.ly/42exduA

United Nations and regional soft law principles and guidelines

- Office of the United Nations High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2022 edition), 29 June 2022, available at: https://bit.ly/43odLg6

- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, available at: https://bit.ly/3ILPLM0

- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, available at: https://bit.ly/3IM8Cqk

- African Commission on Human and Peoples' Rights, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines), available at: https://bit.ly/3NaCwqX

United Nations human rights Treaty Bodies: General Comments

- Committee against Torture, General comment No. 2 (2007) on the implementation of article 2 by States parties, 24 January 2008, CAT/C/GC/2, available at: https://undocs.org/CAT/C/GC/2

- Committee against Torture, General comment No. 3 (2012) on the implementation of article 14 by States parties, 19 November 2012, CAT/C/GC/3, available at: https://undocs.org/CAT/C/GC/3

- Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 4 September 2018, CAT/C/GC/4, available at: https://undocs.org/en/CAT/C/GC/4

- Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), available at: https://bit.ly/43d9tZi

United Nations human rights treaty bodies: Concluding observations

- CAT, Concluding observations on the sixth periodic report of Austria, 27 January 2016, CAT/C/AUT/CO/6, available at: https://undocs.org/en/CAT/C/AUT/CO/6

- CAT, Concluding observations on the initial report of the Congo, 28 May 2015, CAT/C/COG/CO/1, available at: https://undocs.org/CAT/C/COG/CO/1

- CAT, Concluding observations on the initial report of Seychelles, 28 September 2018, CAT/C/SYC/CO/1, available at: https://undocs.org/en/CAT/C/SYC/CO/1

- CAT, Concluding observations on the initial report of Sierra Leone, 20 June 2014, CAT/C/SLE/CO/1, available at: https://undocs.org/CAT/C/SLE/CO/1

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- CAT, Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013), 19 June 2013, UN Doc. CAT/C/KEN/CO/2, available at: https://undocs.org/en/CAT/C/KEN/CO/2

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