



FIACAT’s contribution to the Questionnaire of the Special Rapporteur on Torture on her thematic report on “The duty to investigate crimes of torture in national law and practice”

November 2022

The International Federation of ACATs (Action by Christians for the Abolition of Torture), FIACAT, is an international non-governmental human rights organisation, created in 1987, which fights for the abolition of torture and the death penalty. It has consultative status with the United Nations. FIACAT has about thirty member organisations, the ACATs, present in four continents. The present contribution is a result of a consultation of its members.

I. Challenges, impediments and obstacles to effective national investigations and prosecutions of acts of torture

II. Regulatory frameworks

In many States where an ACAT is present, the criminalisation of torture as an autonomous offence is either non-existent or unsatisfactory. Several examples are cited below.

Benin

The current Constitution states in its Article 18 that "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*".

The National Assembly adopted a new Criminal Code on 5 June 2018 which was promulgated on 4 January 2019. Article 523 of this new Criminal Code provides that: "*Any public official or any other person acting in an official capacity who in the exercise of his functions or on the occasion of the exercise of his functions has voluntarily inflicted on a person acute pain or suffering, physical or mental, for the purpose, in particular, of obtaining from him or a third person information or a confession, to punish him or her for an act that he or she or a third person has committed or is suspected of having committed, to intimidate or coerce him or her or to intimidate or coerce a third person or for any other reason based on any form of discrimination, shall be punishable by imprisonment for a term of five to ten years.*"¹

No revision of the criminalisation of torture has taken place since 2019. Thus, the definition still does not include the case where the act is committed at the instigation of or with the express or tacit consent of a public official or any other person acting in an official capacity. Furthermore, this

¹ "*Tout agent public ou toute autre personne agissant à titre officiel qui dans l'exercice de ses fonctions ou à l'occasion de l'exercice de ses fonctions a volontairement infligé à une personne des douleurs ou des souffrances aiguës, physiques ou mentales aux fins notamment d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux, de la punir d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis, de l'intimider ou de faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne ou pour tout autre motif fondé sur une forme de discrimination quelle qu'elle soit, est puni de la réclusion criminelle de 5 à 10 ans*"

criminalisation does not provide that there is no statute of limitation for acts of torture. Finally, the new Penal Code does not contain a provision prohibiting the invocation of a superior order as a justification of torture.

Italy

The current criminalization of torture contained in the new article 613 bis of the Criminal Code is not satisfactory. Firstly, the case differs from the Convention against Torture because it lacks any reference to the purpose of the conduct. Secondly, it does not require that the act of torture be committed, instigated, consented or acquiesced by a public official or other person acting in an official capacity. Thirdly, it has a significantly more limited scope than that contained in article 1 of the Convention, since it requires multiple acts of violence or threats in order to be qualified as torture and psychological torture is limited to cases where psychological trauma can be verified.

Niger

The principles of the prohibition of torture and inhuman and degrading treatment are set out in Article 14 of the Constitution of Niger of 25 November 2010, which states that: "No one shall be subjected to torture, slavery or cruel, inhuman or degrading treatment or punishment. Any individual or public official who is guilty of acts of torture, cruel, inhuman or degrading treatment or punishment in the exercise of his or her duties, either on his or her own initiative or on instructions, shall be punished in accordance with the law."².

On 11 May 2020, a law defining and criminalising torture was adopted. Thus, torture is defined, in accordance with Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in Article 232. 4 as follows: "*Any public official, member of the defence and security forces or any other person entrusted with a public service mission or invested with a public or elective mandate, who has tacitly or expressly consented to, ordered or committed any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from that person or from a third person information or a confession, to punish him or her for an act that he or she or a third person has committed or is suspected of having committed, to intimidate or put pressure on him or her or a third person, or for any other reason based on any form of discrimination is guilty of an act of torture and is punishable by imprisonment for one to five years and a fine of one hundred thousand to five hundred thousand francs.*"³.

² « Nul ne sera soumis à la torture, à l'esclavage ni à des sévices ou traitements cruels, inhumains ou dégradants. Tout individu, tout agent de l'État, qui se rendrait coupable d'actes de torture, de sévices ou traitements cruels, inhumains ou dégradants dans l'exercice ou à l'occasion de l'exercice de ses fonctions, soit de sa propre initiative, soit sur instructions, sera puni conformément à la loi. »

³ « Tout fonctionnaire public, tout membre des forces de défense et de sécurité, toute autre personne chargé d'une mission de service public ou investie d'un mandat public ou électif, qui aura consenti tacitement ou expressément, ordonné ou commis tout acte ou omission par lesquels une douleur ou des souffrances aiguës, physiques ou mentales sont intentionnellement infligées à une personne aux fins, notamment d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux, de la punir d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis, de l'intimider ou de faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne, ou pour tout autre motif fondé sur une forme de discrimination quelle qu'elle soit est coupable d'acte de torture et est puni d'un emprisonnement d'un à cinq ans d'emprisonnements et d'une amende de cent mille à cinq cent mille francs. »

Several aggravating circumstances are also detailed in the following articles. Thus, Article 232.5 provides that practices similar to torture, committed voluntarily without the intention of causing death, which nevertheless result in death, carry a prison sentence of 10 to 20 years. In addition, the commission or omission of an act of torture against minors under 18 years of age, against a disabled victim, against a pregnant woman, against persons aged 65 or over, when the act of torture is premeditated, or when it results in the deprivation of the use of limbs, blindness, loss of an eye or other temporary or permanent disabilities, constitutes aggravated torture within the meaning of Article 232. 7. The perpetrator is then liable to a sentence of 2 to 10 years' imprisonment and a fine of 200,000 to 1 million francs.

Article 232.9 condemns the beginning of execution and the attempt in the same way as the execution. The accomplice also incurs the same penalties as the principal perpetrator under the provisions of Article 232.10

Furthermore, the provisions of Article 232.8 totally prohibit the existence of exceptional circumstances and Article 232.11 renders inadmissible any statements obtained through the use of torture.

Finally, the text provides that there is no statute of limitation for the crimes of torture.

Switzerland

In Switzerland, torture is punishable under the Criminal Code (CC) in the context of crimes against humanity (art. 264a CC) and war crimes (art. 264c CC). Outside of these contexts, there is no specific offence that punishes torture. In order to punish an act of torture, the authorities must resort to offences against physical integrity, sexual integrity, honour and freedom. Examples include bodily harm (Art. 123 CC), threats (Art. 180 CC) and coercion (Art. 181 CC).

Most of the offences that the authorities should use to punish torture are punishable by a custodial sentence of at most three years. In contrast, in the context of crimes against humanity or war crimes, torture is punishable by a custodial sentence of at least five years (Art. 264a and 264c CC).

Moreover, the criminal action provided for an act of torture is not imprescriptible outside the framework of crimes against humanity and war crimes.

In order to fill this legal void, National Councillor Beat Flach submitted a parliamentary initiative on December 18, 2020 to criminalise torture autonomously. However, the Committee on Legal Affairs of the National Council may at any time decide not to continue the legislative process and not to draft a bill.

United Kingdom

Torture is criminalised under article 134 of the 1988 Criminal Justice Act. Para 1 to 3 of article 134 provide the definition of torture:

“ A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if—

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence—

(i) of a public official; or

(ii) of a person acting in an official capacity; and

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

(3) It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission. “

Para 4 and 5 of the same article have been regularly criticised for providing a defence to the crime of torture in contradiction with the provisions of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. They provide :

“(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.

(5) For the purposes of this section “lawful authority, justification or excuse” means—

(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(b) in relation to pain or suffering inflicted outside the United Kingdom—

(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and

(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.”

As for the penalties for the perpetrators of acts of torture, these are provided for in paragraph 6 which states

“A person who commits the offence of torture shall be liable on conviction on indictment to imprisonment for life.”

Other examples of criminalisation of torture

- Belgique: Article 417-1 and following of [the Criminal Code](#).
- Burkina Faso: Articles 512-1 and following of the [Criminal Code of 2018](#).
- Burundi : Articles 206 of the [Criminal Code of 2017](#)
- The Republic of Congo does not have any autonomous criminalisation of torture.
- Côte d'Ivoire : Articles 399 and following of the [Criminal Code of 2019](#)
- Cameroon : Article 277-3 of the [Criminal Code of 2016](#)
- France : Articles 222-1 and following of the [Criminal Code](#)
- Madagascar : [Law n°2008-008 against torture and other cruel, inhuman or degrading treatment or punishment](#).

III. Mechanisms / Institutions/ entities involved in complaints, investigations and prosecutions

In many countries, the lack of independence of investigative mechanisms into allegations of torture and ill-treatment has been flagged. For example, the situation in France can be mentioned.

France

In practice, ACAT-France and FIACAT have observed that it is extremely difficult to obtain a fully effective investigation in cases where illegal use of force / ill-treatment is alleged.

In the French judicial system, investigations are in practice delegated to investigation services. In the most serious cases, investigations are entrusted to internal inspectorates: the Inspectorate General of the National Police (IGPN) or of the National Gendarmerie (IGGN). Otherwise, in the vast majority of cases, investigations are entrusted to the police or gendarmerie services themselves.

In both cases, there is no full institutional independence. The IGPN and IGGN are internal inspection bodies made up of police officers or gendarmes under the direct supervision of the national police or gendarmerie directorates, and their impartiality is questioned. The revelations that have appeared in the press about the work of the IGPN confirm the findings of ACAT-France: greater reliance on the word of the officer, lack of willingness to cooperate on the part of hierarchical superiors, lack of willingness to carry out certain investigative acts, etc.

In the second case, the issue of independence is even more problematic, since police or gendarmerie officers may in fact be called upon to investigate facts involving their own colleagues.

IV. Complex investigations

United Kingdom

The case of the abuses committed by British personnel against Iraqi citizens in Iraq between 2003 and 2009 is particularly representative of the issues that can be faced in complex investigations about abuses committed outside of the prosecuting State.

In 2009 the UK government set up a judicial review to examine claims that British soldiers had abused a number of Iraqi captives and unlawfully killed others in 2004. Known as the Al-Sweady inquiry, the review, which was concluded in 2014, found that soldiers were guilty of mistreating some detainees, including depriving them of food and sleep and blindfolding them, in breach of international law and Ministry of Defence rules. The more serious allegations, including those of unlawful killings, were rejected as *'wholly and entirely without merit or justification'*.

Also in 2010 the government set up the Iraq Historic Allegations Team (IHAT) to review and investigate allegations of offences ranging from murder to low-level violence from the start of the military campaign in Iraq (in March 2003) through the major combat operations of April 2003 and the following years spent maintaining security as part of a multi-national force. Alongside its much wider remit IHAT also had powers to prosecute where appropriate and it was hoped this would settle the controversy over abuses once and for all.

Unfortunately, IHAT was bogged down from the outset by disputes over its structure, composition and independence, not to mention the sheer volume of its case workload. Some concerns were referred to the UK High Court, which did, however, confirm that IHAT met the ECHR's requirement of independence.

IHAT was wound down on 30 June 2017. By then it had received 3,400 allegations, decided not to pursue 1,688 after an initial assessment and was closing 700; 34 remained ongoing. Two cases had

been referred for prosecution but were abandoned. Pending investigations were taken over by the Service Police (the military police of the armed forces) although information on this body is limited and most remaining cases seem to have been discontinued. Costing over £50 million, IHAT failed to secure a single prosecution and the prospect of any serious investigation into alleged war crimes is now remote.

The above two inquiries are the most prominent of a variety of legal processes established to address the issue of abuses committed during the Iraq war and occupation. These include investigations by the Royal Military Police, reports conducted by senior military personnel (2008, 2010), a coroner-type, inquest-based process called the Iraq Fatality Investigations (IFI, 2014-2018)⁴, and civil suits. Four courts martial led to the conviction of seven soldiers, with most cases either discontinued or resulting in acquittal. IFI has to date investigated a number of deaths and made recommendations in several cases but is not a prosecutorial body.

⁴ <https://www.gov.uk/government/collections/iraq-fatality-investigations>