



INTERNATIONAL
COMMISSION
OF JURISTS

THE INTERNATIONAL COMMISSION OF JURISTS
SOUTH ASIA RULE OF LAW PROGRAMME

THE ICJ LEGAL OPINION ON THE
REVISED PREVENTION OF TORTURE BILL
CURRENTLY BEFORE INDIA'S PARLIAMENT

NOVEMBER 2011

TABLE OF CONTENTS

I. INTRODUCTION	3
PART A: IMPROVEMENTS ON THE REVISED PREVENTION OF TORTURE BILL.....	4
(1) SECTION 3 – THE DEFINITION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT	4
(2) SECTION 3 - GENDER-BASED VIOLENCE AS A FORM OF TORTURE	4
(3) SECTION 8(A) – NO DEFENCE OF JUSTIFICATION IN TIMES OF WAR OR EMERGENCY	5
(4) SECTION 8(B) – NO DEFENCE OF SUPERIOR ORDERS	5
(5) SECTION 4 - MINIMUM SENTENCE FOR ACTS OF TORTURE	5
(6) SECTION 9 - WITNESS PROTECTION	5
(7) SECTION 9(5) – MEDICAL EXAMINATION OF EVERY PERSON REMANDED.....	5
(8) SECTION 4(3) TO 4(6) – COMPENSATION	6
PART B: AREAS OF CONCERN IN THE REVISED PREVENTION OF TORTURE BILL.	6
SECTION I: INDIA’S OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW.....	6
(1) <i>Section 4(2) - Death Penalty</i>	6
SECTION II: STATE OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT	7
(1) <i>Definition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment</i>	7
(2) <i>Reparations and Remedies</i>	12
(3) <i>Non-Refoulement</i>	14
(4) <i>The obligation to extradite or prosecute</i>	15
(5) <i>Preventative Measures</i>	15
(6) <i>Due Diligence – Torture Committed by Private Actors</i>	16
(7) <i>Excluding information obtained by torture, cruel, inhuman or degrading treatment in legal proceedings</i>	17
(8) <i>The prohibition of detention incommunicado or secret detention</i>	18
SECTION III: THE OBJECT AND PURPOSE OF THE CAT	18
(1) <i>Section 6 of the Revised PTB</i>	18
(2) <i>Section 7 of the Revised PTB</i>	19
PART C: RECOMMENDATIONS	20
(1) SECTIONS TO BE AMENDED OR REVISED IN THE PTB.....	20
(2) SECTIONS TO BE INSERTED INTO THE PTB.....	21
APPENDIX I: THE REVISED PREVENTION OF TORTURE BILL, 2010	23
APPENDIX II: THE PREVENTION OF TORTURE BILL, 2010 (ORIGINAL VERSION). 29	

Contact:
Vrinda Grover, Senior Legal Advocate in ICJ South Asia Programme
vrindagrover@gmail.com or +91 981 0806 181

I. INTRODUCTION

The revised Prevention of Torture Bill (revised PTB) cures many deficiencies in the 2010 Prevention of Torture Bill (2010 PTB), bringing India closer to fulfilling its obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)¹ and the *International Covenant on Civil and Political Rights* (ICCPR)² and upholding its general obligation to prohibit torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) under international law.³ The revised PTB specifically improves eight areas of the 2010 PTB draft: (1) it revises the definition of torture, bringing it more in line with the article 1 definition in the CAT; (2) it includes rape and gender-based violence as a form of torture; (3) it eliminates the defence of justification in times of war or emergency as per article 2, paragraph 2; (4) it eliminates the defence of superior orders as per article 2, paragraph 3; (5) it establishes a minimum sentence for torture; (6) it establishes a protection mechanism for complainants and witnesses as per article 13; (7) it imposes a mandatory medical exam for all persons remanded in custody; (8) it provides compensation for victims of torture as per article 14. These revisions represent significant progress and are welcomed by the International Commission of Jurists.

Despite these improvements, there remain several areas of concern in the revised PTB. First, as a State Party to the ICCPR, India must ensure that any proposed domestic legislation relating to the prevention and prohibition of torture and CIDTP complies not only with the CAT but also with the provisions of the ICCPR, specifically: article 7, prohibiting torture and CIDTP, article 10(1) requiring all persons deprived of their liberty to be treated with humanity as well as article 2, paragraph 3 requiring an effective legal remedy and redress for violations. The prohibition of torture and CIDTP under the ICCPR is wider than the provisions of the CAT in several respects, most notably in prohibiting *both* torture and CIDTP and requiring State parties take legislative, administrative, judicial and other measures to prevent and punish both torture and CIDTP.⁴ The ICJ is concerned that the revised PTB does not fulfil India's obligations under the ICCPR.

¹ Convention Against Torture, 10 December 1984, 1465 U.N.T.S. 85, entered into force 26 June 1987, India signed on 14 October 1997 [CAT].

² International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976, acceded by India on 10 April 1979 [ICCPR].

³ United Nations General Assembly resolution 65/205 of 28 March 2011, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/65/205 [UNGA resolution 65/205]; United Nations General Assembly resolution 64/153 of 26 March 2010, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/64/153 [UNGA resolution 64/153]; United Nations General Assembly resolution 63/166 of 19 February 2009, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/63/166 [UNGA resolution 63/166]; United Nations General Assembly resolution 62/148 of 4 March 2008, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/62/148 [UNGA resolution 62/148]; United Nations General Assembly resolution 61/153 of 14 February 2007, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/61/153 [UNGA resolution 61/153]; United Nations General Assembly resolution 59/182 of 8 March 2005, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/59/182 [UNGA resolution 59/182]; United Nations General Assembly resolution 57/200 of 16 January 2003, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/57/200 [UNGA resolution 57/200]; United Nations General Assembly resolution 54/156 of 4 February 2000, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/RES/54/156 [UNGA resolution 54/156].

⁴ Human Rights Committee, General Comment 20, "Article 7" (Forty-fourth session, 1992), UN Doc. HRI/GEN/1/Rev.1 (1994) [HRC General Comment 20].

The remainder of ICJ's concerns will be examined in three sections. The first section focuses on India's general obligations under international human rights law, noting that the presence of the death penalty under section 4 of the revised PTB violates the right to life under article 6 of the ICCPR and constitutes a form of cruel, inhuman or degrading treatment. The second section focuses on State obligations under the CAT, outlining the shortcomings of certain provisions as well as highlighting the CAT obligations which are altogether missing from the revised PTB. The third section focuses on provisions in the revised PTB which are incompatible with the absolute nature of the prohibition of torture and other cruel, inhuman and degrading treatment – specifically the statute of limitations clause and the limited immunity clause.

The final section sets out nineteen ICJ recommendations for the revised PTB that, if followed, would largely bring India in compliance with its obligations under the CAT and the ICCPR.

PART A: IMPROVEMENTS ON THE REVISED PREVENTION OF TORTURE BILL

(1) Section 3 – the Definition of Torture, Cruel, Inhuman or Degrading Treatment

Section 3 of the revised PTB brings the definition of torture closer to the article 1 definition under the CAT.

The revised PTB definition introduces three additional purposive elements into the definition of torture, two of which are enumerated in article 1 of the CAT. The 2010 PTB enumerated only one purposive element in its definition of torture. Further, the 2010 PTB only punished acts of torture where two purposive elements were present conjunctively: (1) obtaining information or a confession; *and* (2) discriminating against a person on the ground of religion, race, sex, place of residence, birth, language, caste, sect, colour or community. The revised PTB definition adds the two missing purposive elements enumerated in article 1 of the CAT: (1) punishing a person for an act committed or suspected of committing; (2) intimidating or coercing a person which may lead to the detention for an offence or misconduct. As well, the revised PTB enumerates the purposive elements disjunctively, bringing the definition more in line with the CAT definition.

The revised PTB further adds a fifth purposive element, “for any other purpose.” This residual category creates a wider definition of torture. National legislation which widens the definition of torture is not contrary to the CAT, permitted under article 1, paragraph 2 of the CAT. While there are still some concerns with the section 3 definition, as noted below, the ICJ welcomes these revisions, viewing them as significant progress.

(2) Section 3 - Gender-based Violence as a Form of Torture

Under Explanation II of section 3, the revised PTB provides a non-exhaustive list of acts classified as torture. Included in this list is “rape or threat thereof and sexual abuse of any kind.” In the most recent consensus based United Nations General Assembly (UNGA) resolution for which India joined as well as in previous

resolutions, States were called upon “to adopt a gender-sensitive approach in the fight against torture and other cruel, inhuman or degrading treatment or punishment, paying special attention to gender-based violence.”⁵ The ICJ welcomes the recognition of rape and other forms of gender-based violence as torture in the revised PTB.

(3) Section 8(a) – No defence of justification in times of war or emergency

Section 8(a) of the revised PTB removes the defence of justification in times of war or a state of emergency. This provision complies with article 2, paragraph 2 of the CAT. This revision is also in accordance with the UNGA’s most recent resolution of which India joined, that called upon States to eliminate any justification for torture on the basis of national security.⁶

(4) Section 8(b) – No defence of superior orders

Section 8(b) of the revised PTB removes the defence of superior orders. This provision is in accordance with article 2, paragraph 3 of the CAT. It is a welcomed amendment in the revised PTB, and again brings India closer to fulfilling its obligations under the CAT.

(5) Section 4 - Minimum Sentence for Acts of Torture

Section 4 imposes a minimum sentence of three years and a maximum sentence of ten years for public servants convicted of committing or attempting to commit torture. This is an improvement from the 2010 PTB which did not include a minimum sentence and did not punish attempts to commit torture. The ICJ welcomes this revision. The ICJ, however, suggests extending the maximum sentence beyond ten years to cover more serious and particular egregious instances of torture.

(6) Section 9 - Witness Protection

Section 9 introduces a scheme to protect witnesses and complainants of torture or ill-treatment. Section 9 is in accordance with article 13 of the CAT: “steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of [their] complaint or any evidence given.”⁷ These provisions also assist victims obtain redress as per article 14. The more protection afforded to complainants and witnesses, the more likely victims of torture are to come forward and access the justice system.

(7) Section 9(5) – Medical examination of every person remanded

Section 9(5) of the revised PTB imposes a mandatory medical examination on every person remanded in custody. And it further requires the medical report to be transmitted to the concerned trial court. The section 9(5) provision provides a

⁵ UNGA resolution 65/205, para 10; UNGA resolution 64/153 para 9; UNGA resolution 63/166, para 9; UNGA resolution 62/148, para 2; UNGA resolution 61/153, para 2; UNGA resolution 59/182, para 3; UNGA resolution 57/200, para 4; UNGA resolution 54/156, para 13.

⁶ UNGA resolution 65/205, para 5.

⁷ Article 13, CAT.

limited form of monitoring and thus contributes to the obligation to prevent as per article 2 of the CAT. Although not fully comprehensive, section 9(5) is a good start in monitoring and preventing torture and other cruel, inhuman or degrading treatment.

(8) Section 4(3) to 4(6) – Compensation

The revised PTB provides compensation for victims of torture as well as families of victims (where the victim dies as a result of torture) under section 4(3) to 4(6). The compensation scheme awards compensation to the victim “as necessary for rehabilitation” taking into account “(a) the gravity of the physical and mental harm and suffering inflicted;” “(b) lost opportunities, including employment, education and social benefits;” “(c) material damages and loss of earnings including loss of earning potential;” “(d) cost required for legal...assistance, medicine and medical services and psychological and social services;” “[e] the age, family responsibilities and material condition of the dependents of the victim.”

The different heads of compensation largely follow the guidelines set out in 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*.⁸ The compensation scheme is significant progress towards meeting State obligations under article 14 of the CAT. It is also progress towards meeting the requirements of article 2 of the ICCPR, for which India is a party. As noted in UNGA resolutions, redress is a key element in the international obligation to prevent and prohibit torture and other cruel, inhuman and degrading treatment.⁹ The inclusion of the compensation scheme in the revised PTB is a welcome amendment.

PART B: AREAS OF CONCERN IN THE REVISED PREVENTION OF TORTURE BILL

SECTION I: India’s obligations under international human rights law

(1) Section 4(2) - Death Penalty

The death penalty is contrary to the right to life enshrined in the Universal Declaration of Human Rights and article 6 of the ICCPR.¹⁰ It is also considered a form of cruel, inhuman or degrading treatment prohibited under article 7 of the ICCPR and the CAT. The UNGA adopted a series of resolutions calling on retentionist States to place a moratorium on the death penalty in 2009 and 2008. United Nations GA resolution 62/149 called on all States still maintaining the death penalty to establish a moratorium on executions with a view to abolishing the death penalty as well to progressively restrict its use, reducing the number of offences for

⁸ Adopted and proclaimed by United Nations General Assembly Resolution 60/147 of 21 March 2006, *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*, UN Doc A/Res/60/147 at Annex, para 20 [Basic Principles on the Right to a Remedy].

⁹ UNGA resolution 65/205, para 19; UNGA resolution 64/153, para 18; UNGA resolution 63/166 para 18; UNGA resolution 62/148 para 13; UNGA resolution 61/153 para 10; UNGA resolution 59/182 para 9; UNGA resolution 57/200, para 4.

¹⁰ Article 3, United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, UNGA resolution 217A (III); Article 6, ICCPR.

which it may be imposed.¹¹ The United Nations Commission on Human Rights in Human Rights Resolution 2005/59 called upon States to stop extending the death penalty to new offences.¹²

The Revised PTB introduces the death penalty under section 4(2) stating that “[w]here death of any person is caused due to torture, the person committing the offence shall be punishable with *death* or life imprisonment.” [emphasis added]

Imposing the death penalty as a punishment for torture is contrary to the international moratorium on the death penalty and violates the right to life. The ICJ cannot support the revised PTB on this basis and would strongly recommend the removal of the death penalty from the bill.

SECTION II: State obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The revised PTB, while adhering to many of the obligations under the CAT, falls short of others and in some instances altogether misses obligations in the CAT. The section below examines eight areas which require revision or amendment: (1) Section 3 – the definition of torture and cruel, inhuman or degrading treatment or punishment; (2) Section 4 (4) – (6) – reparations and remedies; (3) The principle of non-refoulement; (4) Jurisdiction and the obligation to extradite or prosecute; (5) Preventative measures; (6) Due diligence – the obligation to prevent torture committed by private individuals; (7) The exclusion of evidence obtained by torture; (8) The prohibition of detention incommunicado or detention in secret places.

(1) Definition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

As noted above, the definition of torture under the revised PTB is an improvement from the definition in the 2010 PTB. Notwithstanding, the revised PTB definition is problematic in four respects: (1) it fails to criminalize complicity in or instigation of acts of torture; (2) it uses a stricter definition of cruel, inhuman or degrading treatment rather than “severe pain and suffering, whether physical or mental” as per article 1 of the CAT; (3) it fails to criminalize cruel, inhuman or degrading treatment; (4) it potentially allows corporal punishment as well as punishment that constitutes cruel, inhuman or degrading punishment to be carried out where it is in accordance with procedures established by the law.

(a) Modalities of Criminal Responsibility

First, the revised PTB does not impose criminal responsibility for complicity or instigation of an act of torture or other cruel, inhuman and degrading treatment. Section 3 criminalizes acts committed intentionally by a public servant, abetted by a public servant, with the consent of a public servant or the acquiescence of a public servant.¹³ It does not include acts committed at the instigation of a public official or

¹¹ United Nations General Assembly resolution 62/149 of 26 February 2008, *Moratorium on the use of the death penalty*, UN Doc. A/RES/62/149, para 2(c)(d) [UNGA resolution 62/149].

¹² United Nations Commission for Human Rights, resolution 2005/59, para 5(b).

¹³ Article 1, CAT.

another person acting in an official capacity. Equally there is no criminalization of persons complicit in the commission of torture.

Complicity in the commission of torture can include a range of actions. For example, the State sending a detainee to a detention centre or facility that is known to have engaged in torture may amount to complicity in the commission of torture. Equally the State's failure to take adequate and reasonable steps to prevent non-state actors from committing acts of torture also constitutes a form of complicity in torture.

The ICJ recognizes that Section 107 of the Indian Penal Code criminalizes instigation and complicity through the crime of abetment. The ICJ remains concerned, however that relying on section 107 alone will not capture all of the modalities of criminal responsibility required by the CAT and article 7 of the ICCPR.

The Committee against Torture defines complicity with a much lower threshold than what is set out in section 107 of the Indian Penal Code. According to General Comment 2 of the Committee against Torture,

The Committee has made clear that where State authorities or others acting in official capacity or under color 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...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.¹⁴

According to General Comment 20 of the Human Rights Committee, “[t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.”¹⁵ Again the use of the word “tolerating” implies a much lower threshold of intent than the “dominant intent” requirement for a crime of abetment under section 107 of the Indian Penal Code.

The Committee against Torture in General Comment 2 requires States to criminalize acts which instigate, incite, encourage or otherwise participate in the commission of torture; failure to do so violates the CAT obligations.¹⁶

The ICJ is concerned that relying exclusively on section 107 of the IPC, without any further amendments in the revised PTB would not capture complicity or “tolerating” as set out by the Committee Against Torture in General Comment 2 and the Human Rights Committee in General Comment 20.

To bring the revised PTB in line with India's obligations under the CAT and the ICCPR, the ICJ recommends that a provision be inserted to include criminal liability for public officials or superior or commanding officers complicit in torture or CIDTP.

¹⁴ The Committee Against Torture, General Comment 2, *Implementation of article 2 by States Parties*, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), para 18 [CAT General Comment 2].

¹⁵ HRC General Comment 20, para 13.

¹⁶ CAT General Comment 2, para 17.

(b) Defining Cruel, Inhuman and Degrading Treatment or Punishment

The obligation to prevent torture includes the obligation to prevent cruel, inhuman and degrading treatment. General Comment 2 collapses any distinction between torture and other cruel, inhuman and degrading treatment: the obligation to prevent torture and other cruel, inhuman or degrading treatment are interdependent, indivisible and interrelated.¹⁷ In a series of UNGA resolutions of which India joined, “all forms of torture **and other cruel, inhuman or degrading treatment or punishment**” were condemned, and “all States [were required] to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment.”¹⁸

The relationship between torture and cruel, inhuman or degrading treatment is fluid. As noted in General Comment 2

*In practice, the definitional threshold between ill-treatment and torture is not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.*¹⁹

The current definition of torture under section 3 of the revised PTB does not properly define cruel, inhuman or degrading treatment. The definition adopts a more narrow characterization of pain and suffering than what is articulated under article 1 of the CAT. The definition is listed disjunctively under section 3 of the revised PTB

...commits any other act for any other purpose and such act causes –

- (i) grievous hurt to any person; or*
- (ii) danger to life, limb or health ***of any person; or*
- (iii) severe mental pain, agony, trauma or suffering caused to any person by cruel, inhuman and degrading treatment*

is said to inflict torture.

Section (i), “grievous hurt to any person” is linked directly to section 320 of the Indian Penal Code, where grievous hurt is defined as follows

S. 320. The following kinds of hurt are designated as “grievous”:

First – Emasculation

Secondly – Permanent privation of the sight of either eye.

Thirdly – Permanent privation of the hearing of either ear.

Fourthly – Privation of any member or joint.

Fifthly – Destruction or permanent impairing of the powers of any member or joint.

Sixthly – Permanent disfiguration of the head or face.

Seventhly – Fracture or dislocation of a bone or tooth.

¹⁷ CAT General Comment 2, para 3.

¹⁸ UNGA resolution 65/205 para 1; UNGA resolution 64/153 para 1; UNGA resolution 63/166 para 1; UNGA resolution 62/148 para 1; UNGA resolution 61/153 para 1; UNGA resolution 59/182 para 1.

¹⁹ CAT General Comment 2, para 3.

Eighthly – Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits.

The definition for “grievous hurt” deviates considerably from article 1 of the CAT, imposing a higher standard of physical injury and not accounting for non-physical acts of cruel, inhuman or degrading treatment. Section (i) on its own is not consistent with the CAT and thus violates State obligations under article 2 and 4.

Section (ii) defines torture as “danger to life, limb or health of any person.” There is no explanation of this term, leaving it open to judicial interpretation. It is conceivable that this provision could be interpreted in a broad manner in line with the article 1 definition of torture and CIDPT.

Section (iii) is problematic for two reasons. First, it conflates torture with cruel, inhuman, degrading treatment or punishment. Cruel, inhuman or degrading treatment or punishment is not a constitutive element of an act of torture. It is conceivable that an act not caused by cruel, inhuman or degrading treatment could constitute torture. To require that torture be caused by cruel, inhuman or degrading treatment introduces a higher threshold than what is required in the CAT. It also introduces a layer of confusion by intimating that CIDTP is somehow related to or a lesser offence of torture which is not necessarily the case.

Second, section 3(iii) only refers to “mental” pain, agony, trauma or suffering with “physical” pain explicitly excluded. To infer or assume “severe physical pain” is subsumed in “agony, trauma or suffering” is outside the scope of a plain reading of the provision. Also to conflate severe physical pain with suffering introduces confusion as not all acts of suffering involve severe physical pain.

The ICJ recommends that India amend section 3 of the revised PTB by deleting 3(i), (ii) and (iii) and replacing them with “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”

Explanation II annexed to section 3 provides a non-exhaustive list of different acts that are defined as “torture”. The relationship between Section 3 and Explanation II is not clear. Specifically, it is not clear whether Explanation II supplants section 3(i), 3(ii) and 3(iii) or informs section three. Assuming Explanation II informs or illustrates what is meant by torture, it is still problematic for three reasons. First, the Explanation II chapeau defines the acts as “torture” when they should be defined as “torture and other cruel, inhuman or degrading treatment”. The ICJ recommends that the Explanation II chapeau be edited to read, “torture and other cruel, inhuman or degrading treatment may include the following acts.”

Second, section (c) states, “ other analogous acts of mental or psychological torture.” It is not clear what is meant by “psychological torture” and there is no link to the article 1 definition of “severe pain and suffering, mental or physical.” The ICJ recommends deleting section (c) as it offers very little by way of illustrative example.

Third, section (d) states “torture of children in any form.” As a State Party to the *Convention on the Rights of the Child*,²⁰ the ICJ recommends that India incorporate the language used in article 37 of that convention which prohibits torture and other cruel, inhuman and degrading treatment of children.

(c) Criminalizing Cruel, Inhuman and Degrading Treatment

The revised PTB does not criminalize cruel, inhuman or degrading treatment as an offence under domestic law. In a consensus resolution of the UNGA for which India joined and in previous resolutions, States were called upon “to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment” and “to prohibit under domestic law acts constituting cruel, inhuman or degrading treatment or punishment.”²¹

The revised PTB currently criminalizes acts of torture. There is, unfortunately, no other provision in the revised PTB criminalizing actions causing of CIDTP – acts causing severe pain or suffering, mental or physical, to a person, in the absence of purpose or specific intent. Imposing the requirement “for any other purpose” is a higher standard than what is prescribed in the definition of cruel, inhuman or degrading treatment as per article 16 and excludes situations where cruel, inhuman or degrading treatment occurs as a result of negligence (i.e. poor conditions or overcrowding in a prison).

The ICJ recommends inserting a provision that criminalizes cruel, inhuman or degrading treatment as an offence under national law.

(d) Corporal Punishment and Pain and Suffering as part of lawful sanctions

Article 1 of the CAT has a caveat that “pain or suffering arising from, inherent in or incidental to lawful sanctions” is not included in the definition of torture. Section 3 of the revised PTB has a similar caveat, “nothing contained in this section [criminalization of torture] shall apply to any hurt, danger or pain as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law.” The revised PTB uses “any procedure established by law” whereas the wording in the CAT is “lawful sanctions.” The difference is critical as “lawful sanctions” extend beyond procedure, arguably still prohibiting punishment that is cruel, inhuman or degrading. The use of “any procedure established by law” introduces the possibility that a punishment which would otherwise constitute cruel, inhuman or degrading treatment could be inflicted so long as the procedure for administering such punishment was established under Indian law.

The use of the words “hurt, danger or pain...caused by any act, which is inflicted in accordance with any procedure established by law” specifically intimates a corporal element in the punishment. Corporal punishment, administered in any form, is unlawful and violates the prohibition of torture and other cruel, inhuman or degrading treatment. The ICJ adopts the position taken by Sir Nigel Rodley and Manfred Nowak during their tenure as UN Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment or Punishment. In his report to the General Assembly in 2005, Manfred Nowak stated

²⁰ Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, entered into force 2 September 1990, India acceded on 11 December 1992. [CRC]

²¹ UNGA resolution 65/205, para 1-2; UNGA resolution 64/153, para 2.

[T]he Special Rapporteur endorses the view taken by his predecessor, Sir Nigel Rodley, that corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Special Rapporteur points out that the term 'lawful sanctions' in article 1, paragraph 1, of the Convention against Torture must be interpreted as referring both to domestic and international law...It follows from the international and regional case law...that corporal punishment is in violation of international law...It therefore cannot be considered a 'lawful sanction' in accordance with article 1, paragraph 1 of the Convention against Torture.

[...]

[T]he Special Rapporteur concludes that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment...[and] calls upon States to abolish all forms of judicial and administrative corporal punishment without delay.²²

The ICJ remains concerned that the revised PTB in its current form allows a possibility for corporal punishment, which is otherwise prohibited as cruel, inhuman or degrading punishment, to be inflicted on persons in India. On this basis, the ICJ recommends that the revised PTB be reworded to explicitly prohibit all forms of corporal punishment.

(2) Reparations and Remedies

Article 14 of the CAT obligates State Parties to ensure victims of torture obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.²³ According to UNGA resolution 65/205, issued in March 2011 and previous resolutions of which India joined, “national legal systems *must ensure that victims...receive appropriate social, psychological, medical or other relevant specialized rehabilitation.*”²⁴ [emphasis added]

Under Article 2, paragraph 3 of the ICCPR, State parties undertake to provide effective remedy for violations of the Covenant of which the prohibition of torture is included under article 7. The Human Rights Committee in General Comment 31 explains that “reparations can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition

²² Manfred Nowak, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/60/316, 30 August 2005, para 26 – 28.

²³ Article 14, CAT.

²⁴ UNGA resolution 65/205, para 19; UNGA resolution 64/153, para 18; UNGA resolution 63/166, para 18; UNGA resolution 62/148, para 13; UNGA resolution 61/153, para 10; UNGA resolution 59/182, para 9; UNGA resolution 57/200, para 4.

and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”²⁵

The UNGA in resolution 60/147 adopted the *Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. The Basic Principles constitute persuasive authority on the content of the obligation to provide redress and compensation under article 14 of the CAT. Under article VII of the Basic Principles and Guidelines on the Right to a Remedy, redress involves: (a) equal and effective access to justice; and (b) adequate, effective and prompt reparation for harm suffered.

(a) Access to Justice – Statute of Limitations

The obligation to secure equal and effective justice is fourfold: (1) the State must take measures to minimize the inconvenience to victims, protecting them from intimidation as well as upholding their right to privacy; (2) the State must disseminate information on all available remedies; (3) the State must provide assistance to victims seeking to access justice; (4) the State must make available all appropriate means to ensure that victims can exercise their right to a remedy.

The revised PTB takes measures to protect complainants from intimidation or threats under section 9, as noted above. The ICJ welcomed this revision and sees it as a step towards securing access to justice for victims and witnesses.

Section 6, on the other hand, imposes a two-year statute of limitation on investigations and prosecutions of torture. If a complaint is not filed within two years from the date on which the offence was committed, victims are barred from accessing justice. Notwithstanding the other concerns with this provision, as discussed below, section 6 significantly interferes with the victim’s right to access justice and thus violates the obligation to provide redress under article 14 of the CAT. The ICJ recommends removing the statute of limitations under section 6 from the revised PTB.

(b) Adequate, effective and prompt reparations for harm suffered

Reparations include both procedural and substantive mechanisms. At the procedural level, States must establish a suitable judicial mechanism that enables victims to obtain redress. Criminal courts and civil courts as well as national human rights commissions or special human rights courts can serve as avenues for victims to obtain redress.

At the substantive level, redress means fair and adequate reparations for the pain, indignity and humiliation suffered by the victim. Reparations include restitution, rehabilitation, satisfaction and guarantees of non-repetition. Restitution is generally not given in torture cases as the suffering and humiliation inflicted on the victim cannot be undone or taken away. Rehabilitation and satisfaction are the primary means of reparations.

The revised PTB provides a mechanism for rehabilitation under section 4. As noted above, it takes into account; “gravity of physical and mental harm,” “lost

²⁵ Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 16 [HRC General Comment 31].

opportunities,” “material damages and loss of earning,” “cost required for legal or expert assistance,” “age, family responsibilities and material condition of dependents.” It also provides compensation to the families of victims when the victim dies. The mechanism comes close to meeting the obligations under article 14 and article 2, paragraph 3 of the ICCPR, falling short in just one respect: the compensation scheme does not include moral damage, as noted by the Basic Principles and Guidelines on the Right to a Remedy.

Satisfaction can include any of the following: (1) effective measures aimed at the cessation of the violation; (2) verification of the facts and full and public disclosure of the truth; (3) an official declaration or judicial decision restoring dignity; (4) public apology; (5) judicial sanctions against persons liable; (6) commemorations or tribute to victims; (7) accurate account of the violations in international human rights law.²⁶

Whilst it is possible that such mechanisms exist in other domestic legislation, the revised PTB does not have any specific measures with respect to satisfaction nor does it reference other legislation that contain such measures. Equally there are no measures guaranteeing the non-repetition of acts of torture and other cruel, inhuman or degrading treatment.

At the procedural level, there are barriers to redress, specifically accessing courts and obtaining judicial sanctions against persons liable. Section 6 imposes a time limitation on filing a complaint and section 7 requires approval (sanction) to initiate proceedings against public officials.

The ICJ recommends that additional provisions be inserted into the revised PTB to provide for more mechanisms to ensure redress and reparations – both at the procedural and substantive level.

(3) Non-Refoulement

The principle of non-refoulement is codified under article 3 of the CAT. The principle of non-refoulement is part of the prohibition of torture, existing independently under international human rights law. It is recognized as part of a State’s obligation under article 7 and article 2 of the ICCPR.²⁷ The Human Rights Committee in General Comment 31 reaffirms this,

[T]he article 2 obligation...entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article 6 and 7 of the Covenant.²⁸

The UNGA in its most recent resolution and in previous resolutions of which India joined, urged “States not to expel, return (‘refouler’), extradite or in any other way

²⁶ UNGA resolution 60/147 (21 March 2006), *Annex: 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*, UN Doc. A/Res/60/147, para 22.

²⁷ HRC General Comment 20, para 9; see also *A v The Netherlands*, (Application no. 4900/06, European Court of Human Rights); *Saudi v Italy* (Application no. 37201/06, Judgment 28 February 2008, European Court of Human Rights); *N v Sweden* (Application no. 23505/09, European Court of Human Rights).

²⁸ HRC General Comment 31, para 12.

transfer a person to another State where there are substantial grounds for believing that person would be in danger of being subject to torture.²⁹ The Committee against Torture in its concluding observations to Canada stated that “a State party should unconditionally undertake to respect the absolute nature of article 3 in all circumstances and fully incorporate the provision of article 3 into the State party’s domestic law.”³⁰

The revised PTB does not contain a provision or in fact any reference at all to the issue of non-refoulement. The principle of non-refoulement is absolute and non-derogable. The principle of non-refoulement is a basic component of the prohibition of torture and must be included in the implementing legislation. It is imperative that a person who faces a risk of torture or ill-treatment in a third country not be forcibly transferred there. The ICJ recommends that the revised PTB be amended to include a provision on non-refoulement.

(4) The obligation to extradite or prosecute

Article 5 of the CAT requires State parties to take measures to establish jurisdiction over offences of torture. The UNGA in its most recent resolution and in previous resolutions called upon, “States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to fulfil their obligation to submit for prosecution or extradite those alleged to have committed acts of torture.”³¹

In the *Habre* case against Senegal, the Committee against Torture commented that, “the failure of legislative power to establish universal jurisdiction [the rule of extraditing or prosecuting a perpetrator of torture, cruel, inhuman or degrading treatment] constitutes a violation of Article 5.”³²

There are no provisions establishing that perpetrators of torture and ill-treatment must be prosecuted or extradited. Equally, there are no provisions establishing jurisdiction over acts of torture and ill-treatment committed aboard sea or air vessels or acts of torture committed extraterritorially by Indian nationals.

The ICJ recommends the revised PTB be amended to include jurisdiction over acts of torture and ill-treatment committed aboard air and sea vessels and committed by Indian nationals. As well, the ICJ recommends the revised PTB be amended to include a section codifying the rule that an alleged perpetrator of torture and ill-treatment be prosecuted or extradited.

(5) Preventative Measures

A key aspect of the Article 2 obligation is that State parties take “effective legislative, administrative, judicial or other measures to *prevent* acts of torture...under [their] jurisdiction.” The UNGA in its most recent resolution of which India joined, and in

²⁹ UNGA resolution 65/205, para 16-17; UNGA resolution 64/153, para 15-16; UNGA resolution 63/166, para 15-16; UNGA resolution 62/148, para 12; UNGA resolution 61/153, para 9; UNGA resolution 59/182, para 8.

³⁰ Conclusions and recommendations of the Committee against Torture, Canada UN Doc. CAT/C/CO/34/CAN (2005), para 5.

³¹ UNGA Resolution 65/205 (March 2011), para 18; UNGA Resolution 64/153 (March 2010), para 17; UNGA Resolution 63/166 (February 2009), para 17; UNGA Resolution 62/148 (March 2008), para 7.

³² United Nations Committee Against Torture, *Suleymane Guengueng et al. v. Senegal (Habre case)*, Case. No 181/2001.

previous resolutions, emphasized that “States must take *persistent, determined and effective measures to prevent and combat all acts of torture and other cruel, inhuman or degrading treatment or punishment*” and welcomed the establishment of preventive mechanisms to prevent torture and other cruel, inhuman or degrading treatment or punishment.³³ The Committee against Torture views preventive measures as paramount, transcending the items enumerated specifically in the Convention or the demands of its General Comment.³⁴

Article 10 and 11 impose specific obligations on State parties to prevent torture by enacting provisions to promote education and training as well as a systematic review of interrogation rules, instructions, methods and practices relating to custody and treatment of persons in custody. Other preventive mechanisms include: (1) signing and ratifying the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT);³⁵ (2) Signing and ratifying the *International Convention for the Protection of All Persons from Enforced Disappearance*;³⁶ (3) furthering training or education of trained staff involved in custody;³⁷ (4) ensuring that persons who report allegations of torture are not punished;³⁸ (5) ensuring that persons who are convicted of torture are prevented from working in custody, interrogation or imprisonment or anything else relating to the deprivation of liberty;³⁹ (6) ensuring that persons are brought before a judge or other independent judicial officer regularly and allowed visits from family;⁴⁰ (7) providing for an effective monitoring mechanism, if not the OPCAT then a National Human Rights Institution.⁴¹

Under the revised PTB, there are no specific preventive measures codified in the bill. Rules may be drafted which include mechanisms for prevention and monitoring, including monitoring police custody, training law enforcement and other steps required for prevention of cases of torture. There are, however, no other provisions explicitly establishing monitoring mechanisms.

Moreover, India has not signed or ratified the OPCAT. Likewise, after having signed the *International Convention for the Protection of All Persons from Enforced Disappearance*, India has made no movement towards ratification. There is no provision specifically engaging the national human rights institution in India to monitor, investigate or play any other role in the prevention of torture or CIDTP. There is no mechanism to prevent persons who are convicted of torture and CIDTP from having subsequent involvement in the custody, interrogation or treatment of any person under arrest, detention or any other deprivation of liberty.

(6) Due Diligence – Torture Committed by Private Actors

The Committee against Torture as well as the Human Rights Committee require States to implement measures to prevent acts of torture and other cruel, inhuman or

³³ UNGA Resolution 65/205, para 2-3.

³⁴ CAT General Comment 2, para 25.

³⁵ UNGA resolution 65/205 para 2-3.

³⁶ UNGA resolution 65/205, preamble.

³⁷ UNGA Resolution 65/205, para 8.

³⁸ UNGA Resolution 65/205, para 15.

³⁹ UNGA Resolution 65/205, para 12.

⁴⁰ UNGA Resolution 65/205, para 20.

⁴¹ UNGA Resolution 65/205, para 24.

degrading treatment committed by private individuals. The Committee against Torture states

[It is] clear that where State authorities or others acting in 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. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.⁴²

Under article 7 of the ICCPR, there is an obligation on India to provide mechanisms to protect individuals from torture and other cruel, inhuman or degrading treatment committed by private individuals. The Human Rights Committee clearly states that it is "implicit in Article 7 [the prohibition of torture, cruel, inhuman or degrading treatment] that State Parties have to take positive measures to ensure that *private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power*."⁴³ The revised PTB is silent on the issue of acts of torture or other cruel, inhuman or degrading treatment committed by private individuals. The ICJ recommends that the revised PTB be amended to recognize State responsibility to prevent torture and other cruel, inhuman or degrading treatment committed by private individuals.

(7) Excluding information obtained by torture, cruel, inhuman or degrading treatment in legal proceedings

Under article 15 of the CAT, States parties must exclude information obtained by torture and other cruel, inhuman or degrading treatment from legal proceedings. Such information may be admitted as evidence where it is used as proof that a statement was made, not tendered for the truth of its contents.⁴⁴ The UNGA in its most recent resolution and in previous resolutions of which India joined, "strongly urged States to ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings" and "calls upon States to consider extending that prohibition to statements made as a result of cruel, inhuman or degrading treatment or punishment."⁴⁵

While there is no explicit prohibition in the revised PTB on this issue, article 20(3) of the Constitution of India prohibits compelling a person to testify against him or herself. The article 20(3) prohibition has been read to include compelled evidence or

⁴² CAT General Comment 2, para 18.

⁴³ HRC General Comment 31, para 8.

⁴⁴ Article 15, CAT.

⁴⁵ UNGA resolution 65/205, para 14; UNGA resolution 64/153, para 13; UNGA resolution 63/166, para 13; UNGA resolution 62/148, para 10; UNGA resolution 61/53, para 7; UNGA resolution 59/182, para 6.

evidence obtained through torture, cruel, inhuman or degrading treatment.⁴⁶ “Compelled testimony” is read to include evidence procured not only by physical threats or violence but also “by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative, overbearing and intimidatory methods and the like.”⁴⁷ Despite this constitutional protection, the ICJ recommends inserting a section that explicitly prohibits the admission of information obtained by torture or ill-treatment in legal proceedings.

(8) The prohibition of detention incommunicado or secret detention

Detaining persons in secret places or “incommunicado” is a contributing factor to the commission of torture. The ICJ considers the practice of prolonged detention or secret detention to itself constitute a form of cruel, inhuman or degrading treatment or punishment. The UNGA in its most recent resolution and in previous resolutions stresses that “prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment.”⁴⁸ The UNGA resolution calls on States to “ensure that secret places of detention and interrogation are abolished.”⁴⁹ The UNGA also recommends that States sign, ratify or accede to the *International Convention for the Protection of All Persons from Enforced Disappearance*.

It is recommended that a section be inserted into the revised PTB which expressly prohibits incommunicado detention or detaining persons in secret places. It is also recommended that India ratify the *International Convention for the Protection of All Persons from Enforced Disappearance*.

SECTION III: The object and purpose of the CAT

The ICJ has serious concerns with respect to section 6 and section 7 of the revised PTB. These provisions are not compatible with the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment. Section 6 and 7 also undermine victims’ right to reparations, interfering with access to justice and the procedural right to reparations.

(1) Section 6 of the Revised PTB

Section 6 of the PTB states

6. (1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of an offence under this Act unless the complaint is made within a period of two years from the date on which the offence is alleged to have been committed.*

⁴⁶ Ratanlal & Dhirajlal, *The Indian Penal Code*, 32nd Edition, (Lexis, Butterworth, Haryana, India, 2010) at 1895.

⁴⁷ Ibid.

⁴⁸ UNGA Resolution 65/205, para 21; UNGA resolution 64/153, para 20; UNGA resolution 63/166, para 20; UNGA resolution 62/148, para 15; UNGA resolution 61/153, para 12.

⁴⁹ Ibid.

Provided that the Court may on sufficient grounds being shown condone the delay in filing the complaint beyond the said period of twelve months.

If a complaint is not made within the requisite time period, the victim is precluded from receiving effective legal remedy, compensation or reparation for torture. And the accused is immune from prosecution. Section 6 is a serious impediment to the eradication, prevention, prosecution and punishment of torture. As noted above, section 6 also interferes with a victim's access to justice. The Committee considers... "impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment [to be] in violation of the principles of non-derogability."⁵⁰ The Basic Principles on the Right to a Remedy also call for the removal of statute of limitations in cases of gross violations of human rights law.⁵¹ The ICJ recommends that Section 6 be removed from the revised PTB.

(2) Section 7 of the Revised PTB

Section 7 of the PTB states

7.(1) No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant while acting or purporting to act in the discharge of his official duty, except with the previous sanction of

-
- (a) in the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government by an officer in the rank of Secretary to the Government of India;*
[...]

Provided that the decision regarding the grant of sanction to prosecute the offending public servant shall be taken not later than three months from the date of application therefore, failing which the sanction to prosecute shall be deemed to have been granted.

Provided further that the sanction for prosecution shall not be refused by the Government or the competent authority, as the case may be, except for reasons to be recorded in writing.

Section 7 provides a limited immunity clause for public officials. A public official acting or purporting to act in the discharge of an official duty is ostensibly immune from prosecution unless permission (sanction) is obtained from a higher officer in the Central or State Government. There are two caveats to this section. First, a decision to deny sanction (permission) to prosecute can only be taken in the first three months from the date the application is made. If no decision is taken within three months, sanction is deemed granted and the civil servant is subject to prosecution. Second, where the Government or competent authority denies sanction, there must be written reasons justifying the decision. And the complainant is entitled to appeal that decision to the High Court within 90 days.

⁵⁰ CAT General Comment 2, para 11.

⁵¹ Basic Principles on the Right to a Remedy, para 6.

Despite these caveats under Section 7, it is still conceivable that a public servant could be immune from prosecution and punishment for an act of torture if an application for sanction is made to the Government of India (or a competent authority) and such application is denied within the first three months with written reasons.

Section 7 is problematic for three reasons. First, it does not effectively prevent, eradicate, prosecute or punish torture as it introduces the possibility that a public official could commit torture and be immune from prosecution. Second, it interferes with and potentially denies the victim's right to an effective legal remedy and reparations. Third, it allows the possibility of a superior officer to shield him or herself from criminal responsibility for torture. The prohibition of torture is absolute. Section 7 is not compatible with the object and purpose of the CAT and as such cannot be in the enabling legislation ratifying the treaty. The ICJ recommends that Section 7 be removed from the revised PTB.

PART C: RECOMMENDATIONS

The ICJ makes the following recommendations:

(1) Sections to be amended or revised in the PTB

Section 3

1. The ICJ recommends that a section be inserted to recognize the criminal liability of public officials and/or superior or commanding officers complicit in or instigating acts of torture and other cruel, inhuman or degrading treatment or punishment.
2. The ICJ recommends deleting 3(i), (ii) and (iii) and replacing them with "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."
3. The ICJ recommends criminalizing acts of cruel, inhuman or degrading treatment or punishment as a separate offence in the revised PTB.
4. The ICJ recommends inserting a section that explicitly prohibits corporal punishment in the revised PTB.

Section 3 – Explanation II

5. The ICJ recommends editing "Explanation II Chapeau" to include "torture and other cruel, inhuman or degrading treatment."
6. The ICJ recommends deleting section (c) of Explanation II, "other analogous acts of mental or psychological torture" as there is no link to CAT definition of torture and it is unclear what is meant by "psychological torture."
7. The ICJ recommends editing Section (d) to incorporate the exact language of article 37 of the *Convention on the Rights of the Child*, of which India is a State party.

Section 4(1)

8. The ICJ recommends extending the maximum sentence of ten years to cover particularly egregious instances of torture and ill-treatment.

Section 4(2)

9. The ICJ recommends removing the death penalty as punishment and replacing it with a lengthy term of imprisonment.

Section 6

10. The ICJ recommends that Section 6 be removed from the revised PTB as it is incompatible with the object and purpose of the CAT and significantly impedes the eradication, prevention, prosecution and punishment of torture.

Section 7

11. The ICJ recommends that Section 7 be removed from the revised PTB as it is incompatible with the object and purpose of the CAT and significantly impedes the eradication, prevention, prosecution and punishment of torture.

(2) Sections to be inserted into the PTB

Reparations and Remedies

1. The ICJ recommends inserting a section into the revised PTB that provides redress and reparations to victims of torture, specifically ensuring non-repetition of torture and CIDTP and providing satisfaction to victims.

Non-Refoulement

2. The ICJ recommends inserting a section to prohibit persons from being transferred to any State where there is a risk of torture or other cruel, inhuman or degrading treatment or punishment.

Obligation to Extradite or Prosecute

3. The ICJ recommends inserting a section to codify the rule that all persons suspected of committing torture and ill-treatment are prosecuted or extradited to another jurisdiction to face prosecution.

Extraterritorial Jurisdiction

4. The ICJ recommends inserting a section to establish jurisdiction over acts of torture and ill-treatment committed aboard Indian sea or air vessels as well as acts of torture committed extraterritorially by Indian nationals.

Preventative Measures

5. The ICJ recommends that India adopt the following preventative measures:
 - 1) Sign and ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*;
 - 2) Ratify the *International Convention for the Protection of All Persons from Enforced Disappearance*;
 - (3) Increase training and education of staff involved in custody;

- (4) Ensure that persons who are convicted of torture are prevented from working in custody, interrogation or imprisonment or anything else relating to the deprivation of liberty;
- (5) Guarantee that detained persons are brought before a judge or other independent judicial officer regularly and allowed visits from family;
- (6) Establish an effective monitoring mechanism, if not through the OPCAT then through the National Human Rights Institution.

Recognize Torture Committed by Private Actors

6. The ICJ recommends inserting a section to recognize State responsibility for preventing torture and other cruel, inhuman or degrading treatment or punishment committed by private actors.

Excluding Information Obtained by Torture and other Cruel, Inhuman or Degrading Treatment in Legal Proceedings

7. The ICJ recommends inserting a section to explicitly prohibit admitting information obtained by torture or cruel, inhuman or degrading treatment as evidence in legal proceedings.

Prohibition of Detention Incommunicado or Secret Detention

8. The ICJ recommends inserting a section to expressly prohibit detention incommunicado or detaining persons in secret places. The ICJ also recommends that India ratify the *International Convention for the Protection of All Persons from Enforced Disappearance*.

APPENDIX I: The Revised Prevention of Torture Bill, 2010

To Provide punishment for torture inflicted by public servants or any person inflicting torture with the consent or acquiescence of any public servant and for matters connected therewith or incidental thereto.

WHEREAS India is a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

AND WHEREAS it is considered necessary to ratify the said Convention and to provide more effective implementation.

Be it enacted by Parliament in the Sixty-first Year of the Republic of India as follows:
--

1.(1) This Act may be called the Prevention of Torture Act, 2010.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, **appoint or on the one hundred and twentieth day of its enactment, whichever is earlier.**

2. In this Act, unless the context otherwise requires, --

- (a) any reference *** to any enactment or any provision thereof shall in any area in which such enactment or provision is not in force be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area;
- (b) “prescribed” means prescribed by rules made under this Act; and
- (c) words and expressions used in this Act shall have the same meanings respectively assigned to them in the Indian Penal Code.

3. Whoever, being a public servant or being abetted by a public servant, including a superior officer or with the consent or acquiescence of such public servant, including the superior officer intentionally commits or is suspected to have committed any act for the purpose of obtaining information or confession from any persons or punish such person for any act committed or is suspected to have been committed by him or intimidating or coercing such person which may lead to the detention of an offence or misconduct or discriminates on the ground of religion, race, sex, place of residence, birth, language, caste, sect, colour or community or commits any other act for any other purpose and such act causes –

- (i) grievous hurt to any person; or
- (ii) danger to life, limb or health *** of any person or
- (iii) severe mental pain, agony, trauma or suffering caused to any person by cruel, inhuman and degrading treatment,
is said to inflict torture:

Provided that nothing contained in this section shall apply to any hurt, danger or pain as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law:

Provided further that where torture in custody of a public servant is proved, the burden of proving that the torture was not intentionally caused or abetted by, or was not with the consent or acquiescence of, such public servant, shall shift to the public servant.

Explanation I – For the purposes of this section, ‘public servant’ shall, without prejudice to section 21 of the Indian Penal Code, 1860 also include any person acting in his official capacity under the Central Government or the State Government or employed in any Government company as defined in section 617 of the Companies Act. In 1956 or in any institution or organization including an educational institution under the control of the Central Government or State Government.

Explanation II – For the purposes of this section, ‘torture’ includes but is not limited to the following, namely: -

- (a) causing disability or dysfunction of one or more part of the body, by acts, such as –
- (i) systematic beating, headbanging, punching, kicking, striking with truncheon or rifle butt or other similar objects, and jumping on the stomach;
 - (ii) food deprivation or forcible feeding with spoiled food, animal or human excreta and other stuff or substances not normally eaten;
 - (iii) electric shock;
 - (iv) cigarette burning, burning by heated rods, hot oil or acid; by the rubbing of pepper or other chemical substances including spices or acids on mucous membranes, or on the wounds;
 - (v) submersion of the head in water or water polluted with excrement, urine, vomit or blood;
 - (vi) rape or threat thereof and sexual abuse of any kind, including sodomy, insertion of foreign objects into the sex organs or rectum, or electrical shock to the genitals;
 - (vii) mutilation or amputation or any part of the body such as the genitalia, ear or tongue;
 - (viii) the use of plastic bag and other materials placed over the head to the point of asphyxiation;
 - (ix) the use of psychoactive drugs to change the perception, memory, alertness or will of a person including the administration of drugs to induce confession or reduce a mental competency and the use of drugs to induce extreme pain or symptoms of a disease;
- (b) maltreating members of the family of a person and [why make this conjunctive] inflicting shame upon the victim or any one by such act as stripping the person naked, parading him in public places, shaving the victims head or putting marks on his body against his will;
- (c) other analogous acts of mental or psychological torture;
- (d) torture of children in any form.

4. (1) Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures or attempts to torture any person such public servant or person shall be punishable with

imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine which shall not be less than one lakh rupees.

(2) Where death of any person is caused due to torture, the person committing the offence shall be punishable with death or imprisonment for life and shall also be liable to fine.

(3) Any public servant or other person committing torture or attempting to commit torture shall also be liable to fine which shall be payable to the affected person.

(4) Notwithstanding the fine imposed under this section, the State may award such compensation including interim compensation to the victim of torture as may be considered necessary for rehabilitation of the victim.

(5) Compensation by the State to the victim of torture for the purpose of his rehabilitation shall be awarded taking into consideration amongst others, the following factors, namely: --

- (a) the gravity of the physical and mental harm and suffering inflicted, including death if caused as a result of torture;
- (b) lost opportunities, including employment, education and social benefits;
- (c) material damages and loss of earning including loss of earning potential;
- (d) cost required for legal or expert assistance, medicine and medical services and psychological and social services;
- (d) the age, family responsibilities and material condition of the dependants of the victim.

(6) In case of death due to torture, the dependants of the deceased person shall be entitled to compensation including interim compensation under this Act

5. Every offence under this Act shall be tried as expeditiously as possible on a day to day basis and endeavour shall be made to conclude the trial within a period of one year from the date of cognizance of the offence by the Court of Session.

6. (1) Notwithstanding anything continued in the Code of Criminal Procedure, 1973, no court shall take cognizance of any offence under this Act unless the complaint is made within a period of two years from the date on which the offence is alleged to have been committed.

Provided that the Court may on sufficient grounds being shown condone the delay in filing the complaint beyond the said period of twelve months

(2) Where the victim of torture is disabled for reasons of health, financial incapacity or otherwise, he may cause a complaint to be filed by a duly authorized representative.

(3) Every complaint under this Act shall be registered by the police in accordance with law.

(4) A complaint against torture shall be investigated by such officer not below the rank of superintendent of police or the corresponding rank in any other organization or investigative agency as would ensure independent investigation.

(5) The investigation shall be completed within a period of six months from the date of making the complaint.

7. (1) No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant while acting or purporting to act in the discharge of his official duty, except with the previous sanction of –

- (a) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government by an officer in the rank of Secretary to the State Government
- (b) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government by an officer in the rank of Secretary to the State Government
- (c) in the case of any other person, the authority competent to remove him from his office

Provided that the decision regarding the grant of sanction to prosecute the offending public servant shall be taken not later than three months from the date of application therefore, failing which the sanction to prosecute shall be deemed to have been granted:

Provided further that the sanction for prosecution shall not be refused by the Government or the competent authority, as the case may be, except for reasons to be recorded in writing.

(2) Any person aggrieved by the decision of the Government or the competent authority, as the case may be, under this section may prefer an appeal to the High Court within ninety days from the date of the decision in such form and manner and accompanied by such fee as may be prescribed.

(3) The High Court shall endeavour to dispose of the appeal within six months from the date of its filing.

8. For the avoidance of doubts, it is hereby declared that the fact that any act constituting an offence under this Act was committed –

- (a) at a time when there was a State of war, threat of war or where a proclamation of emergency was in operation; or
- (b) on an order of a superior officer or public authority,

shall not be a defence to such offence.

9. (1) It shall be the duty and responsibility of the State Government to make arrangements for the protection of victims of torture, complainants and witnesses against all kinds of ill-treatment, violence, threats of violence, or physical harm or mental trauma.

(2) The protection under sub-section (1) shall be provided from the time of submission of the complaint to the conclusion of the trial and thereafter till such time as the State Government is reasonably satisfied that such protection is no longer required.

(3) The protection under sub-section (1) shall include necessary provision for providing physical security to the victims, complainants and witnesses.

(4) The State Government shall inform the concerned Court about the protection provided to any victim, complainant or witness under this section and the court shall periodically review the need of protection being offered to the complainants, victims and witnesses under this section and pass appropriate orders in this behalf.

(5) The State shall ensure proper medical examination of every person remanded to custody in jail and the report of such medical examination shall be transmitted to the concerned trial court.

10. (1) The provisions of this Act shall be in addition to and not in derogation of any other law for the time being enforce.

(2) The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

11. (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act:

Provided that the first set of such rules shall be made within six months from the date of commencement of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

- (a) steps required for prevention of cases of torture;
- (b) involvement of civil society and steps for ensuring civil treatment to prisoners consistent with their human rights;
- (c) manner of training to the law enforcement personnel, civil or military or medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subject to any form of arrest, detention or imprisonment;
- (d) monitoring of police custody;
- (e) impartial and prompt investigation procedures;
- (f) the form and manner in which an appeal may be preferred and the fee which shall accompany such memorandum of appeal under sub-section (2) of section 7;
- (g) assistance, where necessary, in filing complaints of torture;
- (h) procedure relating to payment of compensation to victims;
- (i) any other matter in respect of which rules are required to be made under this Act to effectuate its purposes.
- (j)

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form and be of no effect, as the case

may be; so however, that such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

APPENDIX II: The Prevention of Torture Bill, 2010 (Original Version)

A

BILL

to provide punishment for torture inflicted by public servants or any person inflicting torture with the consent or acquiescence of any public servant, and for matters connected therewith or incidental thereto.

WHEREAS India is a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

AND WHEREAS it is considered necessary to ratify the said Convention and to provide for more effective implementation.

BE it enacted by Parliament in the Sixty-first Year of the Republic of India as follows: --

1. (1) This Act may be called the Prevention of Torture Act, 2010.
(2) It extends to the whole of India.
(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
2. In this Act, unless the context otherwise requires, --
 - (a) words and expressions used in this Act shall have the same meanings respectively assigned to them in the Indian Penal Code; and
 - (b) any reference in this Act to any enactment or any provision thereof shall in any area in which such enactment or provision is not in force be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.
3. Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes, --
 - (i) grievous hurt to any person; or
 - (ii) danger to life, limb or health (whether mental or physical) of any person,

is said to inflict torture:

Provided that nothing contained in this section shall apply to any pain, hurt or danger as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law or justified by law.

Explanation – For the purposes of this section, “public servant” shall, without prejudice to section 21 of the Indian Penal Code, also include any person acting in his official capacity under the Central Government or the State Government.

4. Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, torture any person—
 - (a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detention of an offence or misconduct; and
 - (b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever.

shall be punishment with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

5. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of an offence under this Act unless the complaint is made within six months from the date on which the offence is alleged to have been committed.
6. No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction, --
 - a. In the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
 - b. In the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government of that Government;
 - c. In the case of any other person, of the authority competent to remove him from office.

STATEMENT OF OBJECTS AND REASONS

The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment was adopted by the United Nations General Assembly on 9th December, 1975 [Resolution 3452 (XXX)]. India signed the Convention on 14th October, 1997. Ratification of the Convention requires enabling legislation to reflect the definition and punishment for 'torture.' Although some provisions relating to the matter exist in the Indian Penal Code yet they neither define 'torture' as clearly as in Article 1 of the said Convention nor make it a criminal offence as called for by Article 4 of the said Convention. In the circumstances, it is necessary for the ratification of the Convention that domestic laws of our country are brought in conformity with the Convention. This would necessitate either amendment of the existing laws such as Indian Penal Code or bringing in a new legislation.

2. The matter was examined at length in consultation with the Law Commission of India and the then Learned Attorney General of India. After considerable deliberations on the issue, it was decided to bring in a stand alone legislation so that the aforesaid Convention can be ratified. The proposed legislation, *inter alia*, defined the expression 'torture', provides for punishment to those involved in the incidents of torture and specifies the time limit for taking cognizance of the offence of torture.

3. The Bill seeks to achieve the above objects.

NEW DELHI
The 19th April, 2010

P. CHIDAMARAM