

4431

IN THE SUPREME COURT OF INDIA

Civil Original Jurisdiction

Writ Petition (Civil) 738 of 2016

In the matter of:

Dr Ashwani Kumar

...Petitioner

Versus

Union of India & Anr.

separate law summary

...Respondents

① law not means for ratification — 100, 102, 103, 104 (D)  
 ② good faith ratification — 105 (107) ✓  
 ③ other countries Pakistan etc — 109

Signing

④ OMCT - Benefits of ratification — 117 (121) ✓  
 Bhagwati J — 123  
 new policies — 123

consultative  
 status

India: only law democracy that stays away (124)  
 Paper Book

⑤ Select Committee: All Ministry's agree — 104 (D) (E)  
 Volume II

⑥ Colins note on the consequences of torture — 126  
 (for index please see inside) — also types 7 torture

⑦ Timeline — 129 →  
 Documents filed by the Amicus Curiae (Mr Colin Gonsalves, Sr. Adv.)

⑧ Art 141/142 to look — 141

→ Oledge — 130  
 UPR — 129 →

# INDEX

## RECORD OF PROCEEDINGS

S. No.	DATE OF PROCEEDINGS	PAGES NO.
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		

## **Index**

<b>Sn.</b>	<b>Particulars</b>	<b>Page</b>
1.	Ratification of International Treaties: Added Value for the Pacific Region, by Office of the UN High Commissioner for Human Rights, and by Pacific Islands Forum Secretariat, dated 2009	99 – 104
2.	Report of the Select Committee (Rajya Sabha) on the Prevention of Torture Bill, 2010, dated 6.12.2010	104A – 104E
3.	Convention Against Torture Initiative 2014-2024, Press Release, dated 3.9.2014	105 – 107
4.	UN Convention Against Torture Ratification Tool, dated 2014	108 – 112
5.	Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Volume 1465, dated 2016	113 – 116
6.	OMCT (World Organisations Against Torture) briefing on the ratification of the United Nations Convention Against Torture, dated 7.2.2017	117 – 125
7.	Consequences of Ratification of CAT Obligations of Ratifying States Advantages Accruing to the Ratifying States	126 – 128
8.	Ratification of UN Convention Against Torture: India's Process	129 – 131

9. Should ratification of CAT come only after enactment of enabling legislation? 132 – 134
10. Indian Ratification of the United Nations Convention Against Torture - Additional Notes, dated 6.2.2017 135 – 142



**UNITED NATIONS OFFICE OF THE  
HIGH COMMISSIONER  
FOR HUMAN RIGHTS (OHCHR)**  
Regional Office for the Pacific



**PACIFIC ISLANDS FORUM SECRETARIAT**



ICESCR  
ICCPR  
ICERD  
CAT  
CEDAW  
CRC  
CRPD  
ICRMW

**RATIFICATION OF INTERNATIONAL  
HUMAN RIGHTS TREATIES:  
ADDED VALUE FOR THE PACIFIC REGION**





First published in 2009 by

**Office of the United Nations High Commissioner for Human Rights (OHCHR) -  
Regional Office for the Pacific, Suva, Republic of the Fiji Islands**

**Pacific Islands Forum Secretariat (PIFS), Suva, Republic of the Fiji Islands**

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ISBN: 978-982-9106-02-5



## The Added Value of Ratification and Implementation

The link between human rights—and the international human rights framework—and development should now be clear. But there are also some less obvious benefits, or added value, for Pacific Island States in ratifying these core human rights treaties:

- **Ratification provides a legal regime of accountability**

International human rights treaties set a legal regime of obligation and accountability that can complement and reinforce the implementation of national and regional plans while, at the same time, help to measure progress in development. The mechanism of treaty monitoring and reporting allows for the periodic review of national policies and practices that are then measured against international standards. Ratification of a treaty enables a State Party to ask for assistance in complying with its treaty obligations.

- **Ratification enables the realization of human rights and strengthens adherence to the rule of law**

Ratification and implementation of human rights treaties indicates a commitment to strengthening the protection and promotion of human rights nationally and to promoting respect for social justice, the rule of law and democracy. International human rights treaties offer a common language and a clear set of norms and standards. Using the language of rights as a common language allows for broad international consensus and international collaboration. It helps to demonstrate the strong international consensus defending certain rights or combating certain abuses.

- **Ratification provides an opportunity to strengthen intra-government cooperation**

With the commitment to promote and protect human rights implied in ratification and implementation, government agencies are more likely to work together on cross-cutting issues. Greater cooperation between national and local authorities can mean more effective implementation of the Pacific Plan. Through lessons-learned and model legislation, cooperation can be exported not just from agency to agency, but also from country to country within the region.

- **Ratification improves the public profile of Pacific Island countries and their governments**

Ratification and implementation of these treaties demonstrates good will and the political intention of the ratifying State to comply with international norms and standards. It also shows international solidarity and cooperation and, for Pacific Island countries, a willingness to improve the lives of their populations.

- **Ratification involves meaningful participation of civil society in the development process**

The provisions contained in human rights treaties assume that their beneficiaries are not passive recipients, but active rights-holders who can claim their rights. Thus, civil society becomes a partner of the State in implementing the treaty. The treaty-reporting process, in particular, encourages constructive collaboration between State entities and members of civil society. These efforts can, in turn, lead to greater participation by and support from civil society in the development activities elaborated in the Pacific Plan.



- **Ratification encourages a fairer system of aid, technical support and global justice**

In recent years, a significant number of donor agencies, including many that are active in the Pacific region, have mainstreamed human rights into their aid policies. **Ratification and implementation of international human rights treaties reassures donors that the State Party will use donor funds toward equitable and just practices, thus building mutual confidence** that could perhaps lead to greater support. In addition, development agencies often use the treaty-reporting process as an opportunity to assess national strengths and weakness and to discuss with State officials, national human rights institutions, civil societies and United Nations entities possible new or continued programming. Ratification and implementation thus open possible channels for international aid and technical support.

## Overcoming Perceived Obstacles to Ratification

Some States argue that they are, in one way or another, ill equipped to assume the legal obligations imposed by international human rights treaties. They cite lack of financial resources, the existence of customary practices that might conflict with human rights principles, the **(erroneous) idea that the State must be in full compliance with the treaty before it can ratify the treaty**, and the demands of the treaty-reporting process.

In fact, these concerns can be allayed with the assistance of civil society, the support of the international community and political will of governments.

## Resource implications

Most Pacific Island countries believe that they do not have sufficient resources to implement human rights treaties. According to an unpublished UNDP paper (*Baseline Survey on the Status of Pacific Island Countries: Ratification of main human rights instruments and their possible reservations, traditional governance practices that could support human rights, and the work of other agencies and organizations in promoting human rights in the Pacific*, by Elise Huffer), their priorities tend to be limited to issues of primary concern to their own countries and to the region, in general, such as sustainable development, fisheries, global warming, security and anti-terrorism policies.

But as detailed above, most of these issues are directly linked to human rights and without the implementation of human rights standards, it is unlikely that countries of the region will see sustainable improvements in such areas as human development and security.

## Custom and human rights

Customary practices do not necessarily conflict with human rights principles. However, it is important to be aware of those practices in the region, such as Melanesian kustom and fa'a Samoa, understand how they might differ from international human rights standards, and try to reconcile the two. Public discussion and debate, through the media, academia, civil society organizations and development programmes can be an essential step towards such reconciliation.





## The fallacy of pre-ratification compliance

There is a common misperception, in the Pacific region and elsewhere, that full compliance with treaty provisions is a pre-requisite for ratification. This is not true. In fact, no country in the world manages full compliance. There is always room for improvement. Ratification should signal the beginning of a process to amend national legislation so that it conforms to international human rights standards. States should not regard their current domestic human rights situation as a barrier to treaty ratification. Instead, ratification should be seen as an opportunity to effect change.

States are not required to ratify all of the core international human rights treaties at once. In fact, States Parties that have ratified all or most of the core treaties have usually done so over an extended period of time. Treaties may be gradually ratified and implemented, with the assistance of the United Nations and other partners, if necessary.

## Reporting

United Nations treaty bodies monitor States Parties' compliance with these treaties through various procedures, the most important of which is the reporting process. States Parties are required to submit periodic reports to these treaty bodies on the implementation of the treaty. After the treaty bodies review reports and discuss them with the government concerned, they issue recommendations aimed at assisting States in implementing the treaties.

Pacific Island countries generally perceive reporting requirements as an obstacle to ratification. Most of the States in the region that have ratified international human rights treaties have difficulty in complying with the accompanying reporting obligations—as do many other countries in other regions of the world—because of insufficient human and financial resources.

However, national reporting capacity can be strengthened over time with assistance from donors and United Nations agencies. In addition, gathering information for treaty reporting can often be linked to reporting on progress toward the Millennium Development Goals and the Universal Periodic Review, thus consolidating efforts and reducing costs.

## The Role of National Human Rights Institutions

In recent years, many countries have established independent, legally constituted bodies to promote and protect human rights, known generally as National Human Rights Institutions (NHRIs), and regulated by the so called "Paris Principles" (i.e. the "Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights", approved by UN General Assembly Resolution 48/1993).<sup>1</sup> Currently, there are over 100 NHRIs established worldwide; 60 of which have been recognized as in compliance with the Paris Principles.<sup>2</sup>

Within the Pacific only Australia, Fiji and New Zealand have established NHRIs. While the New

<sup>1</sup> These Principles set the minimum standards that such institutions should comply with in order to function effectively; including independence, pluralism, a broad mandate to protect and promote human rights, accessibility, functional and structural autonomy, interaction with civil society, and ideally, powers to handle cases of human rights violations.

<sup>2</sup> In the Asia Pacific context, the establishment of mechanisms in compliance with the Paris Principles is one of the four pillars of the Asia Pacific Framework on Regional Cooperation for the Promotion and Protection of Human Rights.



Zealand Human Rights Commission and Australian Human Rights Commission are accredited as Paris Principles compliant by the International Coordinating Committee (ICC) and the Asia Pacific Forum of NHRIs (APF), the Fiji Human Rights Commission, despite having a long history of active involvement on human rights promotion and protection, resigned from the ICC of NHRIs in April 2007.<sup>3</sup>

As a bridge between civil society and government, as well as between the international human rights system and the national system, NHRIs can play a vital role in relation to the UN Treaty Body process. They can raise public awareness about the meaning and value of international human rights treaties and the need to ratify them; advise national authorities on the ratification and implementation of treaties; and follow up on the adequate implementation of human rights standards at the national level. In recent years, NHRIs have become increasingly engaged with treaty bodies, both formally and informally. They can interact with treaty bodies by providing information on the human rights situation in their country, intervene during the pre-sessional working groups or the working sessions of the treaty bodies, provide input on the list of issues considered by the treaty bodies and interact with treaty bodies when the state report is examined. Each treaty body determines its own relationship with NHRIs. The Committee on the Rights of the Child, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination have all issued general comments emphasizing the importance of NHRIs in protecting human rights. OHCHR is advocating for a harmonized approach on the interaction between NHRIs and Treaty Bodies.

## Toward a Regional Institution

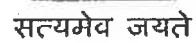
Asia and the Pacific are the only regions in the world that do not have their own regional human rights institutions or mechanisms to assist States in ratifying, implementing and reporting on international human rights treaties. Intergovernmental discussions, launched in 1992 through the United Nations Asia-Pacific Framework on Regional Cooperation for the Promotion and Protection of Human Rights, have promoted the idea of creating such an institution. The Pacific Plan also supports “the establishment of a regional ombudsman and human rights mechanisms to support the implementation of Forum Principles of Good Leadership and Accountability...” Some regional organizations such as the Association of Southeast Asian Nations (ASEAN) are establishing their own regional human rights bodies.

There are some in the Pacific region who believe that there must first be regional consensus on human rights priorities before any such mechanism is established.

In the absence of a regional mechanism, many United Nations agencies and organizations provide support for human rights treaty ratification, implementation and reporting, including, the OHCHR, UNESCAP, ILO, UNDP, UNESCO, UNHCR, UNAIDS, UNICEF, UNIFEM, and the UNFPA.

<sup>3</sup> See NHRIs status chart at [http://www.nhri.net/2009/Chart%20of%20the%20status%20of%20NHRIs%20\(6%20January%202009\).pdf](http://www.nhri.net/2009/Chart%20of%20the%20status%20of%20NHRIs%20(6%20January%202009).pdf)

C



December, 2010

**MINUTES OF THE MEETING OF THE  
SELECT COMMITTEE OF THE RAJYA SABHA ON THE  
PREVENTION OF TORTURE BILL, 2010**

## II SECOND MEETING

The Committee met at 10.30 A.M. on Thursday, the 16<sup>th</sup> September, 2010 in Committee Room 'A', Parliament House Annexe, New Delhi to have the oral evidence of the Ministry of Home Affairs, Ministry of External Affairs and the Ministry of Law & Justice on the provisions of the Prevention of Torture Bill, 2010.

## PRESENT

- 1. Shri Ashwani Kumar**                 :-                 *Chairman*

## MEMBERS

2. Dr E.M.Sudarsana Natchiappan
3. Dr Vijaylaxmi Sadho
4. Shri S.S.Ahluwalia
5. Shri Kalraj Mishra
6. Shri Naresh Gujral
7. Shri Satish Chandra Misra
8. Shri Ahmad Saeed Mahliabadi

SECRETARIAT

1. Shri N.K. Singh, Joint Secretary
2. Shri Mahesh Tiwari, Joint Director
3. Shri Sameer Suryapani, Deputy Director
4. Shri R.P.Shukla, Assistant Director
5. Smt. Monica Baa, Assistant Director

## LIST OF WITNESSES

## Ministry of Home Affairs

1. Shri G.K.Pillai, Home Secretary
2. Shri K.C.Jain, Joint Secretary

## Ministry of External Affairs

**Shri Vivek Katju, Secretary (West)**

**Ministry of Law & Justice (Department of Legal Affairs)**

Shri D.R.Meena, Law Secretary

## Ministry of Law &amp; Justice (Legislative Department)

Shri D.K.Bhasin, Secretary, Legislative Department



2. At the outset, the Chairman welcomed the Members of the Committee and the Home Secretary, along with his team. The Chairman, in his opening remarks, requested the Home Secretary to dwell upon what he considered are the salient features of the Bill, particularly the background in which the Bill, as a stand alone legislation, has been proposed.

3. The Home Secretary stated that though the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the UN General Assembly in 1975, India adopted the Convention only in 1997. On whether there was a need for separate legislation or the existing provisions of the Indian Penal Code were sufficient to meet the provisions of the Convention, he stated that the Law Ministry had taken a stand that there was no need for a separate legislation. The Chairman of the Law Commission also

opined at that time that no specific amendments were necessary in the IPC as Sections 44, 166, 330, 331, 357 and 503 of the IPC, by and large, meet the provisions of the Torture Convention. <sup>injury to</sup> <sup>Public servant causing injury</sup>

<sup>not for amendment</sup> Subsequently, the matter was referred to the Attorney General who pointed out that there were some provisions which were not covered under the IPC. Therefore, it was felt that a separate legislation would be useful if these specific provisions cannot be brought into the IPC itself. The Home Secretary further stated that ratification of an international convention by the Government would also extend it to Jammu & Kashmir and therefore, a separate legislation would automatically apply to Jammu & Kashmir.

4. The Home Secretary suggested that the definition of torture should be broad-based to include torture not only by public servants, but also by any other person as the UN Conventions itself talks of torture by any person. But at the same time, the definition should not be made so broad-based that every single person could file complaints against police officers just to escape and harass the police officers.

5. The Chairman of the Committee expressed his view to harmonise the provisions of the law to serve the twin purposes of effective and purposive investigation into acts of torture on the one side and, most definitively, to prevent the debasement of human rights and denigration of dignity of the individuals on the other. The Chairman pointed out that in line with Article 4

of the UN Convention, 'attempt to torture' should also be included in the definition of torture. Otherwise, the bill will fall short of the UN Convention. He also stated that the words **mental and physical pain** should be incorporated in order to satisfy the UN Convention have not been added in at right place. But at the same time, there is a need to ensure that the genre of mental pain and suffering is not so broadly defined as to enable anybody to invoke mental pain and suffering in the abstract and lodge a complaint against a functionary. So there has to be some definition of how and in what circumstances an act of interrogation would cause mental pain and suffering. The Committee pointed out that there is a provision for compensation to the victims of torture in the UN Convention and that this should be reflected in the proposed legislation. The Committee also agreed that frivolous cases must be avoided so that the police forces do not get demoralized. The Committee also agreed that mental torture should be included in the provisions of the bill. The Committee is also of the opinion that minimum punishment for torture should be prescribed.

6. The Committee thereafter heard the views of Shri Vivek Katju, Secretary (West), Shri V.K. Bhasin, Secretary, Legislative Department and Shri D.R.Meena, Law Secretary on the provisions of the bill. **The Chairman asked the Law Secretary as to why the Ministry of Law finally recommended a stand alone legislation in the matter. The Law Secretary stated that the Ministry of External Affairs is of the opinion that implementation of the UN Convention through stand alone legislation will give our country a greater visibility and mileage in the internal arena instead of incorporating suitable provision in the IPC, and that the Law Ministry have no objection to this.** Further, with respect to Jammu & Kashmir, the IPC and Code of Criminal Procedure, 1973 do not apply by virtue of special provisions contained in the Constitution. However, any law enacted by Parliament under Article 253 of the Constitution to give effect to an international convention, treaty, etc. will apply to the State of Jammu and Kashmir also.

7. The Committee took note of the fact that after the stand alone legislation comes into place, corresponding provisions in the IPC, Cr.PC and Evidence Act have to be amended suitably in line with the legislation. The Secretary (West), Ministry of External Affairs allayed the fears of the Committee that passing the Torture Bill and ratifying the Torture Convention

104-E

will attract Article 20 of the Convention by stating that if we ratify the Convention it will be open to us, as a member-State, to decide whether we want to apply Article 20 of the Convention or not. The Secretary (West) submitted to the Committee that whatever route the Committee adopted to ratify the Convention, it should be such that it would enable ratification at an early date. He also submitted that the draft legislation, as it stands, meets the requirements from the international law point of view of enabling us to ratify the Convention.

8. A verbatim record of the proceedings of the meeting was kept.
9. The Committee adjourned at 12.50 P.M.

New Delhi  
16<sup>th</sup> September, 2010

MAHESH TIWARI  
JOINT DIRECTOR

# Convention against Torture Initiative 2014-2024



## PRESS RELEASE

### First CTI Forum confirms Governments' commitment to end torture

*No State stands alone in the fight against torture. When the Convention against Torture Initiative today concluded its first annual Forum, the message from Government representatives from all parts of the world was clear: Through a new concerted approach of inter-State cooperation, the CTI is likely to achieve its goal of universal ratification of the UN Convention against Torture and see a significant reduction to the use of torture within the next ten years.*

**Geneva 3 September 2014.** The first Forum of the Convention against Torture Initiative (CTI), held today in Chavannes de Bogis, on the outskirts of Geneva, brought together high level government representatives of 18 countries from all regions of the world and leading UN experts to discuss solutions to Governments' challenges in the fight against torture.

The Forum was opened by the Secretary General of the Ministerial Delegation on Human Rights of Morocco, Mr Rouwane Abderrazak and the UN Deputy High Commissioner for Human Rights, Ms Flavia Pansieri.

The Convention against Torture Initiative, launched earlier this year to mark the 30<sup>th</sup> anniversary of the UN Convention against Torture (UNCAT), focuses on long term support, regional and inter-state cooperation as the way ahead for achieving its ambition of universal ratification and implementation of the Convention within the next 10 years.

Today's constructive and forward-looking interaction between participating governments and UN experts strongly confirmed the added value and the future potential of the initiative as:

- A forum for government and experts facilitating new connections, knowledge sharing, exchange of best practices and expertise across regions.
- A vehicle to publicly highlight the good work and progress being achieved by individual governments on torture prevention.
- A knowledge hub, collecting and developing best practices, guidelines etc. to facilitate government efforts to ratify and implement UNCAT.
- A facilitator of technical assistance to governments in relation to ratification and implementation of UNCAT.



The five countries spearheading the initiative – Chile, Denmark, Ghana, Indonesia and Morocco – attribute the positive reception to a number of factors. The Secretary General of the Ministerial Delegation on Human Rights of Morocco, Mr Rouwane Abderrazak, explains:

"A unique feature of this Initiative is that it is driven by Governments and for Governments with a truly collaborative approach. Our idea is to support each other, finding solutions to challenges we share, but that we right now tend to deal with on a national basis without seeking experience and advice from our peers."

The Permanent Representative of Denmark to the UN in Geneva, Ambassador Carsten Staur, stresses the pragmatic and constructive approach to the daunting task of abolishing the practice of torture:

"None of us pretend that we have no homework to do when it comes to implementing the Convention against Torture. We recognize that this is hard and sometimes difficult work. And that we rarely get very far by just pointing at each other's shortcomings. With this initiative, we take a constructive approach and ask: what can we do to help each other?"

The Permanent Representative of Ghana to the UN in Geneva, Ambassador Sammie Eddico, points to the importance of the cross-regional nature of the initiative:

"We have many examples in the Human Rights Council of progress being stalled by conflicting issues. It is through cross-regional initiatives like this that we can really hope to push the agenda. It is uplifting to see how, through CTI, governments from all parts of the world come together to find ways of cooperating towards a shared vision of abolishing the practice of torture."

Both Chile and Indonesia highlight CTI as a link between the normative and monitoring work being done in Geneva and the actual work of governments at national and regional levels to improve human rights conditions in their own countries and regions.

"CTI creates a direct line between our promises and declarations in Geneva to the more concrete and more important legal and implementation work in our own countries and regions. Ratification is a necessary step; espousing our commitment is a must." (Permanent Representative of Chile to the UN in Geneva, Ambassador Marta Maurás)

"Each of the five countries behind the CTI will enhance cooperation with countries in their own region to promote ideas and concepts of CTI taking into consideration the specific needs of each region. This is how we will achieve real impact." (Deputy Permanent Representative of Indonesia to the UN in Geneva, Ambassador Edi Yusup)

Alongside government representatives, key UN experts such as the Deputy High Commissioner for Human Rights, the Special Rapporteur on Torture and the chairs of the Committee against Torture and the Subcommittee on Prevention of Torture, participated in the Forum discussions.

"States should see ratification as the start of a process which brings them into compliance with obligations over time, through the mechanisms described in the Convention, and the CTI is an excellent platform to assist States take the necessary steps to join in and to achieve universal ratification of the Convention", said Claudio Grossman, chairperson of the UN Committee against Torture.

The Forum discussions focused on identifying not just the obstacles to ratification, but also to the practical implementation of the Convention, how governments can help each other to overcome these challenges, and on strategies to move the CTI forward.

Chile, Denmark, Ghana, Indonesia and Morocco will brief all UN member states, relevant experts and NGO's about the *Convention against Torture Initiative* during the upcoming 27<sup>th</sup> session of the Human Rights Council in Geneva. A high level CTI side event will also be organized in New York during the 69<sup>th</sup> session of the UN General Assembly.

*The Convention against Torture Initiative was launched in March 2014 by the Governments of Chile, Denmark, Ghana, Indonesia and Morocco. The objective is to have universal ratification of the UN Convention against Torture by 2024. More information, and pictures from the 2014 Forum, is available from [www.apt.ch](http://www.apt.ch)*

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CONVENTION AGAINST TORTURE INITIATIVE  
**CTI2024.ORG**

# UNCAT Ratification Tool

Constructive • Twinning • Inspirational

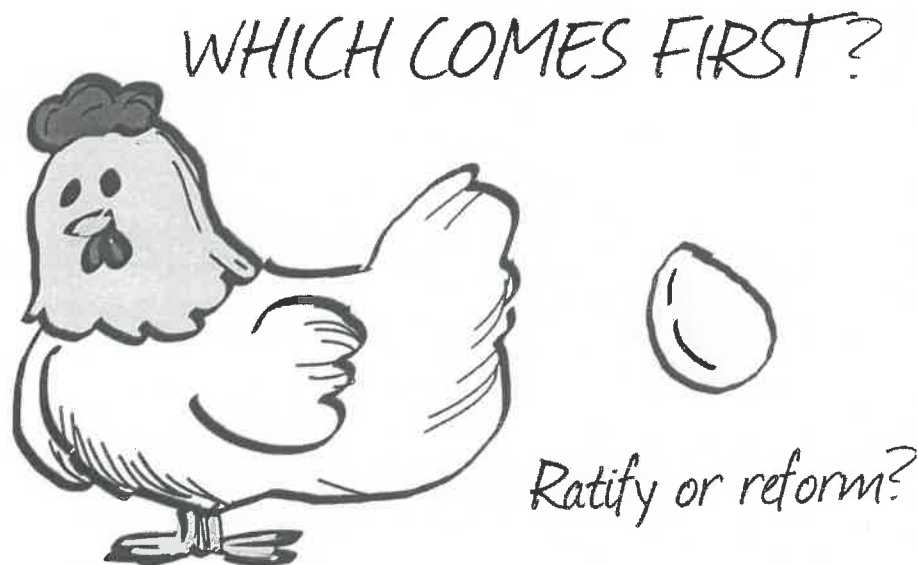
Prepared by the Association for the Prevention of Torture - APT

## Annex 1: When to ratify UNCAT and OPCAT?

There is no requirement to fully comply with the UN Convention against Torture or its Optional Protocol prior to ratification or accession. Nevertheless, States have typically been wary to ratify or accede before they can demonstrate that they have fulfilled many, if not all, of their obligations. Experience has shown that this belief is common to States seeking to adopt various human rights treaties.

*"There is a common misconception, in the Pacific region and elsewhere, that full compliance with treaty provisions is a pre-requisite for ratification. This is not true. In fact, no country in the world manages full compliance. There is always room for improvement. Ratification should signal the beginning of a process to amend national legislation so that it conforms to international human rights standards. States should not regard their current domestic human rights situation as a barrier to treaty ratification. Instead, ratification should be seen as an opportunity to effect change."<sup>5</sup>*

At the first Forum of the Convention against Torture Initiative (CTI), held in September 2014, participants asked UN experts whether States should ratify immediately, or wait until after they have overcome implementation challenges. UN experts, including members of the UN Committee against Torture, explained that the Convention does not expect States to be in full compliance with its provisions prior to ratification.



During the process of periodic review with States parties, the Committee against Torture does not expect full compliance from States under review, but rather that a process is being undertaken towards satisfying those obligations. Indeed, it is often only after ratification, through cooperative

<sup>5</sup> OHCHR Regional Office for the Pacific, *Ratification of International Human Rights Treaties: Added value for the Pacific Region* (OHCHR/PIFS, 2009).



dialogue with the Committee against Torture, that laws or policies may be identified as needing revisions to. Ratification or accession is therefore just the start of a process of incremental implementation.

*"States should see ratification as the start of a process which brings them into compliance with obligations over time, through the mechanisms described in the Convention"*

*Claudio Grossman, former chairperson of the UN Committee against Torture<sup>6</sup>*

States that wait to ratify or accede until certain steps have been taken risk missing key issues which could have been raised through early dialogue with the Committee against Torture. This process is a constructive dialogue, and OHCHR (or other UN agencies) and various international partners are better able to assist States with particular national challenges to implementation after the State has committed itself to the fulfilment of the treaty.

## First Steps

In many States, the act of treaty ratification or accession is an executive act. Thus a government may ratify or accede to the UNCAT and its Optional Protocol without parliamentary endorsement. However, even if UNCAT and OPCAT ratification or accession can be undertaken immediately, if it is to lead to meaningful improvements in human rights compliance, it should only be undertaken when the implications are fully understood and when the State feels comfortable in accepting the obligations described in each of its provisions. If ratification or accession is undertaken without preparation, it could lead to promises being left unfulfilled.

It is therefore generally advised that ratification follows after consultations with government departments, parliament, civil society and other stakeholders. In many small island States, community leaders play a key role in governance, hence a full process of consultation which seeks the consent of key stakeholders will encourage better public support and likely lead to better understanding and fulfilment of Convention obligations.

UN experts have always been very open in discussing the opportunities and challenges associated with treaty membership. Members of the Committee against Torture and Subcommittee on Prevention of Torture have offered to begin discussions with States even before ratification or accession. The Special Rapporteur on torture, whose mandate is not limited to States parties of the treaties, has also offered to hear from interested States and share ideas on best ways to proceed.

Beginning the constructive dialogue with UN experts prior to ratification could allow key stakeholders to initiate a deep national dialogue to understand how each obligation applies in their unique national context.

## Signature, Accession, or ratification

Following the decision to adopt the treaty, the actual physical act of signature, accession or ratification is very straightforward. See the **'Model Instrument of Ratification' resource for more information**. Ratification of the UNCAT and the OPCAT follows the same procedure as all other treaties registered with the UN, so all States have already completed the requirements when adopting other UN treaties. Consent to be bound by the UN Convention against Torture and its Optional Protocol may be expressed by ratification or accession.

<sup>6</sup> CTI, *First CTI Forum confirms Governments' commitment to end torture*, Press Release, Geneva 3 September 2014.

For States that ratify, rather than accede to international treaties, the first stage is for a State representative with full powers of authority to sign the treaty. After a period of time, the representative may deposit an instrument of ratification with the UN Secretary General in New York to complete the process. Other States accede to treaties in a single step, by depositing an instrument of accession instead.

Signing a treaty creates a good faith expectation that the State will take steps towards full ratification. However, it is only after a State ratifies or accedes to the treaty will it become a State party and become subject to its obligations. The period between signing the UNCAT and ratification may be used for decisions to be taken at the national level or for consultations with relevant stakeholders.

Where a State cannot accept one or two provisions of the UNCAT due to inconsistent domestic legislation or other objections, it might consider whether ratification or accession subject to reservations is appropriate. *See briefing on 'Reservations and Declarations' for more information.* Reservations to treaties exclude or modify the legal effect of certain provisions in their application to that State. Reservations to the Convention should seek to be withdrawn when domestic changes overcome the objection or bring the law in line with the international obligation.

### Optional Protocol before the UNCAT?

The OPCAT provides that a State may sign or ratify the Optional Protocol at the same time as, or at any time after, signing or ratifying the UNCAT. As with the UNCAT, its core obligations may be undertaken at any time prior to ratification.

### Chicken or egg; implementation before treaty adoption

Though the UNCAT does not require fulfilment of its obligations prior to ratification or accession, some States prefer to take some concrete steps towards implementation before the adoption of legal obligations. For instance, New Zealand enacted its Crimes of Torture Act 1989 to coincide with its ratification of the UNCAT, on 10 December 1989. New Zealand later amended the law in 2007, to coincide with its ratification of the Optional Protocol in March 2007. In this way, New Zealand was able to demonstrate respect for obligations of the UNCAT on ratification, and move quickly to fulfil the requirement of establishing its National Preventive Mechanism within a few months of OPCAT ratification.

As an alternative model, Vanuatu ratified the UNCAT in August 2011, and was the first Pacific Island State party to the Convention. Thereafter, it undertook to fulfil the rights associated with its accession:

*The Government of Vanuatu took a practical approach to accession of [the Convention], not requiring full compliance with the provisions of the [Convention] before its accession, rightly seeing accession as the first step in the process.<sup>7</sup>*

The OHCHR has reported that membership of the UNCAT provided Vanuatu with the framework through which their law enforcement bodies have been able to consider their internal practices, and initiate institutional reform in line with the Convention:

<sup>7</sup> OHCHR, *Torture Prevention in the Pacific: Sharing Good Practices and Lessons Learnt* (OHCHR, Dec. 2011), p.6.

## Conclusion

Ratification or accession of the UN Convention against Torture and its Optional Protocol may be undertaken by States **before** they have achieved obligations contained in its provisions. Membership of both treaties may be understood as the **start of an incremental process** towards the fulfilment of the absolute prohibition against torture, supported by an ongoing process of dialogue with treaty body experts.

States which ratify treaties may choose to sign the UNCAT or OPCAT as a preliminary step towards full ratification, while consulting with national stakeholders.

Membership of all human rights treaties incurs legal obligations, and States should only ratify or accede when they fully understand the obligations and are ready to begin the process of implementation. If ratification of the Convention is undertaken without adequate preparation, it could lead to its promises being left unfulfilled.



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New York, 1996



# 9. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

New York, 10 December 1984

ENTRY INTO FORCE: 26 June 1987, in accordance with article 27(1).<sup>1</sup>  
 REGISTRATION: 26 June 1987, No. 24841.  
 STATUS: Signatories: 83. Parties: 161.  
 TEXT: United Nations, *Treaty Series*, vol. 1465, p. 85.

*Note:* The Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, was adopted by /doc/source/docs/A\_RES\_39\_46-Eng.pdf of 10 December 1984 at the thirty-ninth session of the General Assembly of the United Nations. The Convention is open for signature by all States, in accordance with its article 25.

Participant <sup>3</sup>	Signature	Accession(a), Succession(d), Ratification	Participant <sup>3</sup>	Signature	Accession(a), Succession(d), Ratification
Afghanistan.....	4 Feb 1985	1 Apr 1987	Republic.....		
Albania.....		11 May 1994 a	Chad.....		9 Jun 1995 a
Algeria.....	26 Nov 1985	12 Sep 1989	Chile.....	23 Sep 1987	30 Sep 1988
Andorra.....	5 Aug 2002	22 Sep 2006	China <sup>5,6</sup> .....	12 Dec 1986	4 Oct 1988
Angola.....	24 Sep 2013		Colombia.....	10 Apr 1985	8 Dec 1987
Antigua and Barbuda.....		19 Jul 1993 a	Comoros.....	22 Sep 2000	
Argentina.....	4 Feb 1985	24 Sep 1986	Congo.....		30 Jul 2003 a
Armenia.....		13 Sep 1993 a	Costa Rica.....	4 Feb 1985	11 Nov 1993
Australia.....	10 Dec 1985	8 Aug 1989	Côte d'Ivoire.....		18 Dec 1995 a
Austria.....	14 Mar 1985	29 Jul 1987	Croatia <sup>4</sup> .....		12 Oct 1992 d
Azerbaijan.....		16 Aug 1996 a	Cuba.....	27 Jan 1986	17 May 1995
Bahamas.....	16 Dec 2008		Cyprus.....	9 Oct 1985	18 Jul 1991
Bahrain.....		6 Mar 1998 a	Czech Republic <sup>7</sup> .....		22 Feb 1993 d
Bangladesh.....		5 Oct 1998 a	Democratic Republic of the Congo.....		18 Mar 1996 a
Belarus.....	19 Dec 1985	13 Mar 1987	Denmark.....	4 Feb 1985	27 May 1987
Belgium.....	4 Feb 1985	25 Jun 1999	Djibouti.....		5 Nov 2002 a
Belize.....		17 Mar 1986 a	Dominican Republic.....	4 Feb 1985	24 Jan 2012
Benin.....		12 Mar 1992 a	Ecuador.....	4 Feb 1985	30 Mar 1988
Bolivia (Plurinational State of).....	4 Feb 1985	12 Apr 1999	Egypt.....		25 Jun 1986 a
Bosnia and Herzegovina <sup>4</sup> .....		1 Sep 1993 d	El Salvador.....		17 Jun 1996 a
Botswana.....	8 Sep 2000	8 Sep 2000	Equatorial Guinea.....		8 Oct 2002 a
Brazil.....	23 Sep 1985	28 Sep 1989	Eritrea .....		25 Sep 2014 a
Brunei Darussalam.....	22 Sep 2015		Estonia.....		21 Oct 1991 a
Bulgaria.....	10 Jun 1986	16 Dec 1986	Ethiopia.....		14 Mar 1994 a
Burkina Faso.....		4 Jan 1999 a	Fiji.....	1 Mar 2016	14 Mar 2016
Burundi.....		18 Feb 1993 a	Finland.....	4 Feb 1985	30 Aug 1989
Cabo Verde.....		4 Jun 1992 a	France.....	4 Feb 1985	18 Feb 1986
Cambodia.....		15 Oct 1992 a	Gabon.....	21 Jan 1986	8 Sep 2000
Cameroon.....		19 Dec 1986 a	Gambia.....	23 Oct 1985	
Canada.....	23 Aug 1985	24 Jun 1987	Georgia .....		26 Oct 1994 a
Central African		11 Oct 2016 a	Germany <sup>1</sup> .....	13 Oct 1986	1 Oct 1990
			Ghana.....	7 Sep 2000	7 Sep 2000

<i>Participant<sup>3</sup></i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>	<i>Participant<sup>3</sup></i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>
Greece <sup>8</sup> .....	4 Feb 1985	6 Oct 1988	Mozambique.....		14 Sep 1999 a
Guatemala.....		5 Jan 1990 a	Namibia.....		28 Nov 1994 a
Guinea.....	30 May 1986	10 Oct 1989	Nauru.....	12 Nov 2001	26 Sep 2012
Guinea-Bissau.....	12 Sep 2000	24 Sep 2013	Nepal.....		14 May 1991 a
Guyana.....	25 Jan 1988	19 May 1988	Netherlands <sup>10</sup> .....	4 Feb 1985	21 Dec 1988
Haiti.....	16 Aug 2013		New Zealand.....	14 Jan 1986	10 Dec 1989
Holy See.....		26 Jun 2002 a	Nicaragua.....	15 Apr 1985	5 Jul 2005
Honduras.....		5 Dec 1996 a	Niger.....		5 Oct 1998 a
Hungary.....	28 Nov 1986	15 Apr 1987	Nigeria.....	28 Jul 1988	28 Jun 2001
Iceland.....	4 Feb 1985	23 Oct 1996	Norway.....	4 Feb 1985	9 Jul 1986
India.....	14 Oct 1997		Pakistan.....	17 Apr 2008	23 Jun 2010
Indonesia.....	23 Oct 1985	28 Oct 1998	Palau.....	20 Sep 2011	
Iraq.....		7 Jul 2011 a	Panama.....	22 Feb 1985	24 Aug 1987
Ireland.....	28 Sep 1992	11 Apr 2002	Paraguay.....	23 Oct 1989	12 Mar 1990
Israel.....	22 Oct 1986	3 Oct 1991	Peru.....	29 May 1985	7 Jul 1988
Italy.....	4 Feb 1985	12 Jan 1989	Philippines.....		18 Jun 1986 a
Japan.....		29 Jun 1999 a	Poland.....	13 Jan 1986	26 Jul 1989
Jordan.....		13 Nov 1991 a	Portugal <sup>5</sup> .....	4 Feb 1985	9 Feb 1989
Kazakhstan.....		26 Aug 1998 a	Qatar.....		11 Jan 2000 a
Kenya.....		21 Feb 1997 a	Republic of Korea.....		9 Jan 1995 a
Kuwait.....		8 Mar 1996 a	Republic of Moldova.....		28 Nov 1995 a
Kyrgyzstan.....		5 Sep 1997 a	Romania.....		18 Dec 1990 a
Lao People's Democratic Republic.....	21 Sep 2010	26 Sep 2012	Russian Federation.....	10 Dec 1985	3 Mar 1987
Latvia.....		14 Apr 1992 a	Rwanda.....		15 Dec 2008 a
Lebanon.....		5 Oct 2000 a	San Marino.....	18 Sep 2002	27 Nov 2006
Lesotho.....		12 Nov 2001 a	Sao Tome and Principe..	6 Sep 2000	10 Jan 2017
Liberia.....		22 Sep 2004 a	Saudi Arabia.....		23 Sep 1997 a
Libya.....		16 May 1989 a	Senegal.....	4 Feb 1985	21 Aug 1986
Liechtenstein.....	27 Jun 1985	2 Nov 1990	Serbia <sup>4</sup> .....		12 Mar 2001 d
Lithuania.....		1 Feb 1996 a	Seychelles.....		5 May 1992 a
Luxembourg.....	22 Feb 1985	29 Sep 1987	Sierra Leone.....	18 Mar 1985	25 Apr 2001
Madagascar.....	1 Oct 2001	13 Dec 2005	Slovakia <sup>7</sup> .....		28 May 1993 d
Malawi.....		11 Jun 1996 a	Slovenia.....		16 Jul 1993 a
Maldives.....		20 Apr 2004 a	Somalia.....		24 Jan 1990 a
Mali.....		26 Feb 1999 a	South Africa.....	29 Jan 1993	10 Dec 1998
Malta.....		13 Sep 1990 a	South Sudan.....		30 Apr 2015 a
Mauritania.....		17 Nov 2004 a	Spain.....	4 Feb 1985	21 Oct 1987
Mauritius.....		9 Dec 1992 a	Sri Lanka.....		3 Jan 1994 a
Mexico.....	18 Mar 1985	23 Jan 1986	St. Vincent and the Grenadines.....		1 Aug 2001 a
Monaco.....		6 Dec 1991 a	State of Palestine.....		2 Apr 2014 a
Mongolia.....		24 Jan 2002 a	Sudan.....	4 Jun 1986	
Montenegro <sup>9</sup> .....		23 Oct 2006 d	Swaziland.....		26 Mar 2004 a
Morocco.....	8 Jan 1986	21 Jun 1993	Sweden.....	4 Feb 1985	8 Jan 1986

<i>Participant<sup>3</sup></i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>	<i>Participant<sup>3</sup></i>	<i>Signature</i>	<i>Accession(a), Succession(d), Ratification</i>
Switzerland .....	4 Feb 1985	2 Dec 1986	United Arab Emirates ....		19 Jul 2012 a
Syrian Arab Republic ....		19 Aug 2004 a	United Kingdom of Great Britain and Northern Ireland <sup>6,12</sup> ..	15 Mar 1985	8 Dec 1988
Tajikistan .....		11 Jan 1995 a	United States of America <sup>13</sup> .....	18 Apr 1988	21 Oct 1994
Thailand .....		2 Oct 2007 a	Uruguay .....	4 Feb 1985	24 Oct 1986
The former Yugoslav Republic of Macedonia <sup>4</sup> .....		12 Dec 1994 d	Uzbekistan .....		28 Sep 1995 a
Timor-Leste .....		16 Apr 2003 a	Vanuatu .....		12 Jul 2011 a
Togo .....	25 Mar 1987	18 Nov 1987	Venezuela (Bolivarian Republic of) .....	15 Feb 1985	29 Jul 1991
Tunisia .....	26 Aug 1987	23 Sep 1988	Viet Nam .....	7 Nov 2013	5 Feb 2015
Turkey .....	25 Jan 1988	2 Aug 1988	Yemen .....		5 Nov 1991 a
Turkmenistan .....		25 Jun 1999 a	Zambia .....		7 Oct 1998 a
Uganda .....		3 Nov 1986 a			
Ukraine <sup>11</sup> .....	27 Feb 1986	24 Feb 1987			

**Declarations and Reservations**  
*(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession.)*

**AFGHANISTAN**

While ratifying the above-mentioned Convention, the Democratic Republic of Afghanistan, invoking paragraph 1 of the article 28, of the Convention, does not recognize the authority of the committee as foreseen in the article 20 of the Convention.

Also according to paragraph 2 of the article 30, the Democratic Republic of Afghanistan, will not be bound to honour the provisions of paragraph 1 of the same article since according to that paragraph 1 the compulsory submission of disputes in connection with interpretation or the implementation of the provisions of this Convention by one of the parties concerned to the International Court of Justice is deemed possible. Concerning to this matter, it declares that the settlement of disputes between the States Parties, such disputes may be referred to arbitration or to the International Court of Justice with the consent of all the Parties concerned and not by one of the Parties.

**AUSTRIA**

"1. Austria will establish its jurisdiction in accordance with article 5 of the Convention irrespective of the laws applying to the place where the offence occurred, but in respect of paragraph 1 (c) only if prosecution by a State having jurisdiction under paragraph 1 (a) or paragraph 1 (b) is not to be expected.

"2. Austria regards article 15 as the legal basis for the inadmissibility provided for therein of the use of statements which are established to have been made as a result of torture."

**BAHRAIN<sup>14</sup>**

2. The State of Bahrain does not consider itself bound by paragraph 1 of article 30 of the Convention.

**BANGLADESH<sup>15</sup>**

"The Government of the People's Republic of Bangladesh will apply article 14 para 1 in consonance with the existing laws and legislation in the country."

**BELARUS<sup>16</sup>**

**BOTSWANA**

"The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention to the extent that 'torture' means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana."

**BRUNEI DARUSSALAM**

"The Government of Brunei Darussalam reserves the right to formulate and communicate, upon ratification, such reservations, interpretative understandings, and/or declarations which it might consider necessary."

**BULGARIA<sup>17</sup>**

**CHILE<sup>18</sup>**

2. The Government of Chile does not consider itself bound by the provisions of article 30, paragraph 1, of the Convention.

3. The Government of Chile reserve the right to formulate, upon ratifying the Convention, any declarations or reservations it may deem necessary in the light of its domestic law.

The Government of Chile declares that in its relations with American States that are Parties to the Inter-American Convention to Prevent and Punish Torture, it will apply that Convention in cases where its provisions are incompatible with those of the present Convention.

117

# OMCT

SOS-Torture Network

World Organization Against Torture



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**PROTECTING AGAINST TORTURE**

MOBILISING TO USE THE UN CONVENTION AGAINST TORTURE

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**OMCT BRIEFING  
ON THE RATIFICATION OF THE UNITED NATIONS CONVENTION  
AGAINST TORTURE**

**DONE IN  
GENEVA, 07.02.2017**

## About OMCT

118

Created in 1986, the World Organisation against Torture (OMCT) is the principal coalition of non-governmental organizations fighting against torture, summary executions, enforced disappearance and other cruel, inhuman or degrading treatment.

The OMCT has 297 affiliated organizations in its SOS-Torture Network and many tens of thousands correspondents in all regions of the world. Based in Geneva, OMCT's International Secretariat provides personalized medical, legal and /or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity.

Specific programs allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. In the framework of its activities, OMCT also submits individual communications and alternative reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights. The OMCT also operates as part of a consortium of human rights defenders protection organizations the EU Human Rights Defenders Protection Mechanism ([protect.defenders.eu](http://protect.defenders.eu)).

Since 2014 the OMCT acts as formal civil society coordinator at the request of the UN Committee Against Torture, facilitating access and input of civil society actors from more than 20 countries per year, and conducting in depth work on the implementation of the Convention across the world in countries of all legal traditions.

The OMCT entertains physical offices in Geneva, Brussels and Tunis. The OMCT enjoys consultative status with ECOSOC and with the regional organizations, including the Council of Europe, the Inter-American Commission on Human Rights and the African Union.



## I. PURPOSE OF THIS NOTE

119

This note provides a summary of some of the reasons for States to ratify the United Nations Convention Against Torture (UNCAT). They are based on the experiences of the OMCT as a global civil society network fighting torture across the world, in all regions and legal cultures, and based on our experience as formal civil society coordinator with the UN Committee Against Torture since 2014. The note gives a summary of reasons that States, including democracies such as India, may consider for the ratification of the United Nations Convention Against Torture (UNCAT).

The OMCT avails itself to provide further and more detailed information on any particular point of this note upon request.

## II. Synopsis of reasons for ratification:

The main line of reasoning is that ratification contributes to better prevention of and protection from torture and cruel inhuman or degrading treatment or punishment, including in countries with a strong rule of law and judicial tradition.

The torture prohibition has a special status as ius cogens norm under international law that explains the drafting of a comprehensive document, the UN Convention Against Torture in 1984. Torture is not just 'any' human rights violations. It carries inherent implementation challenges as it is typically practiced by the state outside the eye of the public. The impact of torture is considerable both for the life of the victim as well as to the fabric of society, the corruption of state institutions and as an impediment to the rule of law. The UN Convention Against Torture provides a holistic and comprehensive framework to eradicate torture commensurate to the special status of torture under international law, its destructive impact on victims, societies and institutions, and the practical implementation challenges.

The Convention also provides an important review mechanism (state reporting) as a framework with continuous review for the prevention of and protection from torture. This complements domestic mechanism and is built on the idea of ongoing and dynamic evaluation by States on their policies, laws and practices in place to prevent torture.

There are also important foreign policy arguments that accompany ratification and the important aspect of how the Convention and adherence to it fosters the universality of the torture prohibition as some governments seek to lower the bar.

## III. Ten specific ways how the Convention increases protection:

### 1) The status of the torture prohibition requires a special mechanism

The prohibition of torture and cruel, inhuman or degrading treatment is not just 'another right' or legal provision. It enjoys very special status under international law.

It is a norm of customary international law, is contained both in major global and regional

human rights treaties, and it is firmly enshrined under international humanitarian law. Torture is also considered as a crime under international law, can form part of a crime against humanity if part of a widespread and systematic attack, or a war crime or grave breach of the Geneva Conventions.

The prohibition of torture (and cruel, inhuman or degrading treatment is non-derogable in times of war or internal conflict under international law (see article 4 ICCPR, General Comment on Article 4 of the UN Human Rights Committee).

More than that it is recognized as one of the very few norms considered as a mandatory rule that cannot be abrogated (*ius cogens*), similar to only to very few such as slavery.

It is commensurate with the special status under international law of the absolute prohibition of torture, cruel and inhuman or degrading treatment to ratify the Convention Against Torture as a comprehensive blueprint for its implementation.

## 2) Torture poses challenges to the rule of law requiring special protection

Torture is typically used in secret, outside public scrutiny and by state organs that operate with hierarchical systems and strong 'corps spirits' by police, prison or military agents.

For individuals to prove torture, to provide sufficient evidence is often close to impossible. Victims and witnesses will often feel threatened to complain or may feel shame in going public on the treatment they suffer or address the investigative authorities or a national human rights institution for help. Typically torture victims often belong to vulnerable parts of the community, including the poor, marginalized less likely to resort to and impose the full breath of legal remedies that may be available.

It is an experience across the world that torture cases are a serious challenge and litmus test to any system of the rule of law. 'A business as usual' response, including by legal systems, typically fails torture victims around the world. This is why the Convention is so important.

It is only through a comprehensive system of safeguards and guarantees that torture can be prevented, and in case of violation to be effectively repaired. The value of ratification is that states commit to a comprehensive and continuous system of review for an effective prevention of torture, and the provision of effective remedies and reparation of violations.

A consolidated commitment to end torture is also in line with the gravity of torture and cruel, inhuman or degrading treatment. Far more than leaving physical traces it destroys the lives of individuals, scatters the life of their families and the fabric of society. Beyond these individual implications, torture corrupts state institutions and the faith of the public in them, it destroys the rule of law and ~~impedes effective development if not repressed fully.~~

## 3) The prohibition of torture is already part of Indian law but it needs implementation

The prohibition of torture and cruel, inhuman or degrading treatment is itself already binding on states including on India, both as a result of treaty law (see article 7, 10 ICCPR, or

the provisions of the Geneva Conventions and its Protocols).

It is firmly part of customary international law. Ratification thus does not entail a new recognition of a new right (which may not be the role of the courts). In that sense the judiciary is not interfering into the prerogatives of the executive and legislative. The main purpose of the Convention was to provide a comprehensive blueprint or framework to eradicate torture in law and practice.

#### 4) The Torture Convention provides 'a more' on legal protection

Unlike any other treaty, it contains a blueprint of the obligation to prevent, protect and fulfil the absolute prohibition of torture and also cruel, inhuman or degrading treatment (article 1, 16 CAT). It includes the obligation not only not to torture or ill-treat, but to take effective steps to prevent torture (see article 2 CAT – containing the concept of preventive safeguards), to criminalize and investigate torture in order to bring those responsible to justice (see article 1, 4, 12 CAT) and to secure the right to remedy and reparation under international law including compensation and access to rehabilitation (see article 13, 14 CAT), as well as a set of additional guarantees such as interrogation standards to be reviewed, training of state officials and the obligation not to send anybody to any countries where there is a real risk of torture (see non-refoulement – Article 3). Other key principles include the rule not to admit torture evidence into legal proceedings (article 15).

The Convention also provides 'a more' on protection in making torture a distinct crime as opposed to just 'a public order' or 'general bodily injury' provision that fails to capture the gravity of torture. A practical point observed in our practice around the world is that states will not have any reliable information on torture, nor on its repression through the legal system if it is not defined separately and in line with the UN Convention Against Torture.

The definition is also central for procedural safeguards such as the exclusion of evidence or others. In its absence a State may claim to comply with the prohibition of torture without real means to know.

None of these provisions should a priori cause elements alien to Indian judicial theory and thinking, and have in fact been found perfectly in line with common law traditions. They underline essential safeguards, and to render the response to incidents of torture effective, and to ensure the victims rights to an effective remedy and reparation, including compensation.

#### 5) The Torture Convention ratification will open up protection by the judiciary

The experience around the world is that ratification and incorporation of the Convention opens up for the legal invocation of the Convention domestically before the judiciary. This is one of the most important positive effects of ratification, and the implementation of the right to an effective remedy.

The extent and level of invocation may depend on the domestic reception of international human rights system, but irrespective of the national doctrine and system, it should open up

some influence on the effectiveness of legal remedies. Especially in Asia, and most notably the Indian Supreme Court, have shown effective ways to give meaning to documents ratified by their countries (see also Bangalore Principles on Domestic Application of International Human rights law).

The Convention - as well as general human rights law - requires 'effective remedies and reparation' for any violation of treaty rights. Logically the ratification and integration into domestic law makes this remedy more effective, and is in itself a way towards implementation.

#### 6) The Convention provides guidance to officials, including in the penitentiary or law enforcement

It gives a 'more' in guidance about what effective prevention and protection and rehabilitation entails. This in our experience means crucial guidance to lawmakers, officials and the security apparatus in implementing the absolute prohibition. It provides the normative, visible and practical reference to key institutions that keep persons in custody or for the questioning of individuals.

It counters ambiguity and is a reference point for practionner's seeking the implementation of the absolute prohibition. In OMCT's global experience this is one of the most positive effects of the Convention, and contrary to common belief it is seen not only as a human rights but a professional standard. It is often appreciated by prison services or law enforcement agencies as a tool of clarity and guidance that may have been missing. With this argument goes that law enforcement that works without human rights abuses tends to be generally more professional and disciplined. The provisions in the Convention on training and the review of interrogation rules underline the importance of a guidance document for those who are in charge of custody situations.

Importantly, in a country governed by the rule of law, it then gives the judiciary the role and ability to clarify what the law is and expectation exists vis-à-vis state authorities behaviour. Contrary to common arguments compliance with the Convention fosters an institutional culture of the respect for the rule of law and accountability principles protecting best 'the morale of the security actors'.

#### 7) Continuous enforcement and reporting process

With ratifying the Convention, a State engages to comply with its obligations. This is an obligation of results. In which way the Convention is domestically incorporated is for the state to decide - yet direct applicability and incorporation is encouraged (see General Comment on Article 2 CAT which sheds more light on what the UN Committee Against Torture have qualified as 'effective means' of implementation) as the most effective way for implementation.

An important part plays the mandatory reporting procedure as a tool to help governments to implement the Convention. The procedure is based on the idea of a regular self-review to adjust implementation challenges, identify more clearly legal changes, such as the



criminalization of torture, etc.

123

In our experience at the World Organization of Torture, we recognize that ratification and continuous state reporting has impacted positive changes on multiple levels:

Legal changes, such as the criminalization of torture, the introduction of new or more explicit safeguards, such as in custody (lawyer, medical personal);

Major reform processes, such as penitentiary reforms and others, the creation of visiting boards by national human rights bodies or civil society mechanisms;

Better victim or witness protection system, lifting of statutory limitations or an acceptance of medical examinations following the so-called Istanbul Protocol process;

The establishment of national preventive mechanism but also more effective and independent remedies and reparation for victims of torture, including of those marginal;

The Convention and its reporting process allows a regular review to identify shortcomings, but also a document on which civil society can align itself as a legitimate framework, similar to CEDAW for women rights or the new Disability Convention, and it gives important transparency to a governments action against torture. It also helps in this way to foster

The regular nature of reviewing also recognizes that the eradicating torture is a continuous task, and that it can require new learning and experiences. It is thus a dynamic responsibility for states and a living instrument as a legal instrument.

An important value of the Convention is that the review is conducted not by political appointees but by an independent expert committee. For example, Justice Baghwati served for more than a decade in the UN Human Rights Committee, the sister structure of the UN Committee Against Torture, thus ensuring that the review and recommendation process is merit based and not subject to political scrutiny.

Selective recent examples:

New anti-torture laws: Togo, Ivory Coast, Pakistan (draft), Kenya or Bangladesh; New policy position: US changed its position on the applicability of human rights law in places like Guantanamo Bay; Prison closures: Philippines, Uruguay. Germany: upgrading its national preventive mechanisms.

The Convention requires compliance by states with ratification but it does not prescribe the particular technique of reception in domestic law, such as an anti-torture law. While integrating the Convention comprehensively into domestic law is a preferred option, some countries accepted the jurisdiction of the Convention and then legislated areas of concern subsequently. Often the law making process is targeted to the regular reporting process.

The idea of continuous reporting is precisely to keep the issue under review, develop better safeguards, responding to implementation challenges. It is not based on the idea that



compliance is ensured once, but that it needs to be subject to continuous scrutiny. The Committee's recommendations, however, provide crucial information on what effective implementation entails reflected in individual decisions, concluding observations and so-called General Comments.

Of particular relevance is in this regard GC on article 2 – the nature of state obligations.

### 8) Individual petitions and Optional Protocol as further options

The Convention provides two additional mechanisms with the prospect of increasing considerably the effectiveness of the absolute prohibition of torture. The first being the individual communication procedures in states that have ratified and opted into this procedures through separate declaration.

The second is the idea of national visiting mechanisms with oversight from the Sub-Committee for the Prevention of Torture (SPT), which is a key tool to increase transparency and oversight over custody. As with the complaint procedure, this requires separate ratification from the Convention itself. States have ratifying this additional protocol commit to the creation of such mechanism in the years following ratification.

### 9) The trend to universal ratification

Today, only 34 countries are not party to the Convention against Torture. Only seven countries have not ratified in Asia, while of these 2 have expressed their commitment to do so through signature. Recent ratifications in Asia included Pakistan (reporting in 2017 to the UN Committee Against Torture) and Vietnam. Seven countries have ratified in the last three years, and a global initiative has set the target to achieve universal ratification by 2024; already in January 2017, one country has ratified.

The demonstration of political will is made at an international level and further demonstrates a State's willingness to be considered a leader in international norms and standards. The reason why some countries have not yet ratified/acceded is NOT because they consider that torture is acceptable or even effective, but rather for reasons of resources, awareness and capacity. Over 50% of the non-States parties are small Island developing States in the Caribbean and the Pacific.

There is a global process led by the Convention Against Torture Initiative (CTI) seeking universal ratification by 2024. Anti-torture experts have endorsed the initiative led by the Governments of Denmark, Ghana, Morocco, Chile and Indonesia broadly globally ([www.cti.org](http://www.cti.org)).

### 10) India's role as leading democracy and commitment to the rule of law

India is today the only major democracy that has stayed away from the Convention though having been involved pro-actively in its drafting process (see for multiple pro-active reference on the Indian delegation Manfred Nowak, the United Nations Convention Against Torture – a commentary, Oxford University Press, 2008).

125

India has also played on numerous occasions greatly impacted the development of the treaty body system through the members elected to the expert committee's. Being part of the system allows the proposal of candidates and the ability to shape pro-actively the progressive development of human rights law on torture.

Those vulnerable to torture in India would come under the effective protection of the torture Convention. For the State of India it would mean – rather than staying as a rare outsider to this universal system – becoming an engine in the protection from torture.

The signature to the Convention has raised a political expectation of ratification and a legal obligation not to frustrate the object and purpose of the Convention. After years of awaiting ratification the government should be in a position to confirm its stated commitment.

As a democracy with rule of law traditions, and as country that already accepted the prohibition of torture and cruel, inhuman or degrading treatment it is only logical to adhere to this system of values and laws.

It would have also the effect to boosting universal ratification, and greatly facilitate the present global ratification initiative seeking full universal adherence.

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Done by Gerald Staberock  
Secretary General  
World Organisation Against Torture  
Geneva, 07.02.2017

## Consequences of Ratification of CAT

### Obligations of the Ratifying States

#### Advantages Accruing to the Ratifying States

1. A state, such as India, intending to change their criminal law to include the offence of torture and to comprehensively provide for the prevention of torture, the provision of effective remedies and reparation of violations, could benefit in many ways by ratification of CAT.
2. There is a common misconception that full compliance with CAT is a prerequisite for ratification. This is untrue. Ratification is the beginning of a process to amend national legislation, policies and practices so that it conforms to international human rights standards.(see UNCAT Ratification Tool prepared by the Association for the Prevention of Torture).
3. Where countries have signed the Treaty (such as India) a good faith expectation is created in the UN and the international community that the State will take steps towards full ratification. (see UNCAT Ratification Tool prepared by the Association for the Prevention of Torture)
4. Ratification contributes to improved prevention of and protection from torture. This is particularly true for countries with strong rule of law and judicial tradition where national human rights jurisprudence is receptive to absorbing contemporary developments in international human rights law.

5. Ratification of CAT strengthens the resolve of a nation to the absolute prohibition of torture.
6. Ratification done by nations that already have in their national jurisprudence an obligation not to torture, takes the nation several steps ahead by moving towards:
  - a. The taking of steps to effectively prevent torture. (for example, the provision of free legal aid from the point of arrest, the mandatory independent inspection of detention centres is today not part of any criminal law statute).
  - b. An absolute prohibition against torture where torture is defined in accordance with Article 1 of CAT. This definition includes severe mental pain or mental suffering. It includes torture inflicted on a person to get information from a third party. It includes punishing a person for an act committed by a third party. It includes intimidation or coercion of a third party. It is wider than "hurt" or "grievous hurt" which in Indian law is restricted to specifically defined physical injuries and does not take note of the process by which severe pain or suffering is caused without necessarily resulting in the physical disfigurement as defined in section 320 IPC. Sleep deprivation is not recognised in the IPC as grievous hurt although it is a common form of torture. Bombarding persons with high decibel levels of sound is also not recognized in Indian law. Similarly putting a person's face under water, or water boarding does not come within

grievous hurt. Exposing persons to extreme cold without clothes is another example.

- c. Substantial levels of compensation for violations statutorily introduced in the Penal Codes.
- d. Rehabilitation of the victims of torture (missing in Indian law).
- e. Statutorily defined interrogation standards that are in keeping with international standards and guidelines (missing in Indian law).
- f. Incorporating an obligation not to send any person within the territory of India back to any country where there is a real risk of torture.
- g. The collection of reliable information on torture.
- h. Introduction or improvement of a victim and witness protection systems.
- i. The improvement of medical examinations and post-mortems to bring them up to international standards such as the Istanbul Protocol Process.



## Ratification of UN Convention Against Torture: India's Process

### A Timeline

Year	Major Developments
1948	<p><i>Universal Declaration of Human Rights</i> adopted by General Assembly, Article 5 prohibits torture.</p> <p>India actively participated in the drafting.</p>
1949	<p>4 <i>Geneva Conventions</i> on Humanitarian Law adopted by the Diplomatic Conference held at Geneva. Common Article 3 prohibits torture during armed conflict.</p> <p>India ratified all the four Conventions.</p>
1966	<p><i>International Covenant on Civil and Political Rights</i> adopted by General Assembly. Article 7 prohibits torture. No derogation allowed even during states of emergency (Article 4).</p> <p>India ratified the Covenant.</p>
1976	<p><i>Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment</i> adopted by the General Assembly.</p> <p>(Annexure P-1 of the Petition)</p>
1984	<p><b>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</b> unanimously adopted by General Assembly resolution no.39/46 of 10 December 1984.</p> <p>Resolution also calls upon all the Governments to consider signing and ratifying the Convention as a matter of priority.</p> <p>(Annexure P-2 of the Petition)</p>
1987	CAT came into force on 26 June 1987.
1997	<b>Government of India (GoI) signed CAT on 14 October 1997.</b>
2008	<p>During the 1st Universal Periodic Review of the UN Human Rights Council (UPR), Governments of United Kingdom, France, Mexico, Nigeria, Italy, Switzerland and Sweden recommendation to GoI:</p> <p><b>Expedite ratification of CAT.</b></p> <p>Response of India: The ratification of CAT is being processed by Government of India</p>

	(Compilation I, page 2)
2010	<p>Prevention of Torture Bill passed by the Lok Sabha on 6 May 2010. (Annexure P-3 of Petition)</p> <p>Rajya Sabha referred the Bill to a 13 member <b>Select Committee</b>, the Select Committee on the Prevention of Torture Bill, presented its report along with a revised draft bill to the Rajya Sabha on 6 December 2010. (Annexure P-4 of Petition)</p>
2011	<p>While presenting its candidature to the Human Rights Council for the term 2011-2014, Gol presented a <b>voluntary pledge</b> and commitment of India to the UN in accordance to resolution 60/251 of the General Assembly and stated:</p> <p>5. Indian has been a consistent supporter of the United Nations human rights system, and commitment to the promotion and protection of human rights is ingrained in its domestic and foreign policies. India actively participated in the drafting and adoption of the Universal Declaration of Human Rights in 1948, during which Dr. Hansa Mehta, a Gandhian social worker who had led the Indian delegation, made important contributions. Ever since, India has been a keen participant in the deliberations on human rights in international forums and in the development of widely accepted international norms. Indian is party to most core international human rights instruments and served two consecutive terms during 2006-2007 and 2007-2010, as an active and constructive member of the human rights Council.</p> <p>6. Against this backdrop, India <b>voluntarily</b> make the following pledges and commitments:</p> <p><b><u>(xi) India remains committed to ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which it is a signatory:</u></b></p> <p>(Compilation I, page 9)</p>
2012	<p>During the <b>2nd UPR</b>, Governments of Spain, Sweden, Switzerland, Timor-Leste, United Kingdom, USA, Australia, Austria, Botswana, Brazil, Czech Republic, Indonesia, Iraq, Italy, Maldives, Portugal, Republic of Korea recommended to Gol:</p> <p><b>Finalise the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.</b></p> <p>Position of Gol: <b>Supported</b></p> <p>(Compilation I. Pages 18 to 29)</p>

• expatriation in  
unity of nation  
• All States in favour  
• PC chgs not enough

2017 The 3rd UPR, where the peer review of Gol's human rights record will take place is scheduled to be conducted on 17 May 2017 during the Working Group on UPR at Geneva. Gol's National Report submitted to this effect dated 18 January 2017, states:

## II. Civil and Political Rights

### Right to Life, Liberty and Security of the Person

#### a. Torture

**32. India committed to ratify the Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment.**

**33. India remains committed to ratifying the Convention. The Law Commission of India is examining the changes required to domestic law prior to ratification. The Government has requested the Law Commission to examine and give a comprehensive report covering all aspects of criminal law as the comprehensive amendments can be made in Indian Penal Code (IPC), Code of Criminal Procedures (CrPC) and Indian Evidence Act etc. In the meantime, acts of torture remain punishable under various provisions of the Indian Penal Code. The higher judiciary also serves as a bulwark against such violations.**

(Compilation I, pages 74 & 75)

161 states have acceded to or ratified and become party to CAT. Among the neighbouring countries Afghanistan, Bangladesh, China, Maldives, Nepal, Pakistan, Sri Lanka have ratified CAT. **Today, India remains the only major democracy in the world that has not ratified CAT.**

(Compilation II, page 114-115)

Should ratification of CAT come only after enactment of an enabling legislation?

Source	Content
<p>Ratification of International Human Rights Treaties: Added Value for the Pacific Region</p> <p>OHCHR Regional Office for the Pacific, 2009</p>	<p><b>The fallacy of pre-ratification compliance</b></p> <p>There is a common misperception, in the Pacific region and elsewhere, that full compliance with treaty provisions is a pre-requisite for ratification. This is not true. In fact, no country in the world manages full compliance. There is always room for improvement. Ratification should signal the beginning of a process to amend national legislation so that it conforms to international human rights standards. States should not regard their current domestic human rights situation as a barrier to treaty ratification. Instead, ratification should be seen as an opportunity to effect change.</p> <p>(Compilation II, page 103)</p>
<p>Claudio Grossman, chairperson of the UN Committee against Torture</p>	<p>" States should see ratification as the start of a process which brings them into compliance, with obligations over time, through the mechanism described in the Convention, ..."</p> <p>(Press Release, First CTI Forum confirms Governments' commitment to end torture, 2014)</p> <p>(Compilation II page 107)</p>
<p><b>UNCAT Ratification Tool</b></p> <p>Prepared by the Association for the Prevention of Torture - APT, 2016</p>	<p>At the first Forum of the Convention against Torture Initiative (CTI), held in September 2014, participants asked UN experts whether States should ratify immediately, or wait until after they have overcome implementation challenges. UN experts, including members of the UN Committee against Torture, explained that the Convention does not expect States to be in full compliance with its provisions prior to ratification.</p> <p>During the process of periodic review with States parties, the Committee against Torture does not expect full compliance from States under review, but rather that a process is being undertaken towards satisfying those obligations. Indeed, it is often only after ratification, through cooperative dialogue with the Committee against Torture that laws or policies may be identified as needing revisions to. <b>Ratification or accession is therefore just the start of a process of incremental implementation.</b></p> <p>(Compilation II page 109)</p>

Chicken or egg; implementation before treaty adoption

Though the UNCAT does not require fulfilment of its obligations prior to ratification or accession, some States prefer to take some concrete steps towards implementation before the adoption of legal obligations. For instance, New Zealand enacted its Crimes of Torture Act 1989 to coincide with its ratification of the UNCAT, on 10 December 1989. New Zealand later amended the law in 2007, to coincide with its ratification of the Optional Protocol in March 2007. In this way, New Zealand was able to demonstrate respect for obligations of the UNCAT on ratification, and move quickly to fulfil the requirement of establishing its National Preventive Mechanism within a few months of OPCAT ratification.

As an alternative model, Vanuatu ratified the UNCAT in August 2011, and was the first Pacific Island State party to the Convention. Thereafter, it undertook to fulfil the rights associated with its accession: The Government of Vanuatu took a practical approach to accession of [the Convention], not requiring full compliance with the provisions of the [Convention] before its accession, rightly seeing accession as the first step in the process.

The OHCHR has reported that membership of the UNCAT provided Vanuatu with the framework through which their law enforcement bodies have been able to consider their internal practices, and initiate institutional reform in line with the Convention.

(Compilation II, page 111)



**Is it sufficient to make piecemeal amendments in the IPC?**

**Position of the Ministries before the Select Committee in 2010**

Attorney General	Some provisions of CAT are not covered under IPC
Ministry of Home Affairs	A separate legislation may be useful if the specific provisions of CAT cannot be brought into the IPC
Ministry of External Affairs	<p>Implementation of the UN Convention through standalone legislation will give our country a greater visibility and mileage in the international arena instead of incorporating suitable provision in the IPC.</p> <p>Whatever route the Committee adopted to ratify the Convention, it should be such that it would enable ratification at an early date. The bill passed by the Lok Sabha meets the requirement from the international law point of view.</p>
Ministry of Law and Justice	No objection to separate legislation

**Select Committee Position:**

After the stand alone legislation comes into place, corresponding provisions in the IPC, Cr.PC and Evidence Act have to be amended suitably in line with the legislation.

### ***Background: India standing alone\****

India was one of the founding signatories of the *Convention Against Torture* (CAT) on 14 October 1997 and is a State party of other core human rights treaties which prohibit torture.<sup>1</sup>

India's ratification of CAT has attracted protracted debate and initiatives. The Indian government has argued that Indian legislation already complies with CAT'S provisions, while indirectly acknowledging its inadequacy through different initiatives seeking to adjust domestic normative frameworks to facilitate CAT's ratification. This was particularly visible in 2008 through the differing views of the Minister of Home Affairs and the Ministry of External Affairs over the best way to proceed to incorporate CAT's normative framework into domestic law. The Minister of External Affairs supported the need of a stand-alone legislation while the Minister of Home Affairs believed it sufficient to amend of the Code of Criminal Procedure and the Indian Penal Code.<sup>2</sup>

India remains one of only 6 countries in the world that having signed CAT, have not proceeded to ratify it. No other influential State of the international community has failed to ratify the Convention. The other signatory states that India keeps company with are Angola, Bahamas, Brunei Darussalam, Palau and Haiti. Only 22 other states, broadly characterised by poor human rights records, weaknesses in the rule of law, or the absence of robust legal institutions, have neither signed nor ratified CAT: Barbados, Bhutan, Iran, Jamaica, Kiribati, Malaysia, Marshall Islands, Micronesia, Myanmar, Niue, Oman, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Samoa, Singapore, Solomon Islands, Tonga, Trinidad and Tobago, Tuvalu, Tanzania, Zimbabwe.

### ***Indian domestic framework on torture***

India maintains that its primary reason for not ratifying CAT is that its legislation already complies with its provisions. For instance, in the context of the second cycle of review under the Human Rights Council Universal Periodic Review, India stated that:

Although India has not yet ratified the Convention, Article 21 and other Articles of the Constitution of India and the relevant provisions under the Indian Penal Code, 1860, provide for adequate safeguards. The Supreme

\* Prepared by Dr. Elvira Dominguez Redondo, Associate Professor of International Law, Middlesex University, London, at the request of Mr. Colin Gonsalves, Senior Legal Counsel and Supreme Court of India appointed Amicus. All websites were last accessed on 4 February 2017.

<sup>1</sup> Article 7, International Covenant on Civil and Political Rights; Article 39 Convention on the Rights of the Child.

<sup>2</sup> See DNA, '19 years after signing UN Torture Convention India yet to ratify it', (21 March 2016) available at: <http://www.dnaiIndia.com/India/report-19-years-after-signing-un-torture-convention-india-yet-to-ratify-it-2191876>

Court of India, through its judgements, has also laid down exacting standards on this issue.<sup>3</sup>

Two sections of the Indian Penal Code allow the prosecution of crimes of torture: Section 330 typifying "Voluntarily causing hurt to extort confession, or to compel restoration of property"; and S.331 covering, "voluntarily causing grievous hurt to extort confession, or to compel restoration of property." The scope of both provisions has been interpreted as covering any police presence at the time of torture, whether or not they participated in the events.<sup>4</sup> With the caveat of Section 27, commented below, Section 24 of the 1972 Evidence Act also prohibits the use of a confession as evidence if obtained through torture by the police.

Articles 14 and 21 of the Indian Constitution as well as relevant international legal instruments, have been invoked as the basis for the prohibition of torture by the Supreme Court in *Mullin v Union Territory, New Delhi*:

[...] Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Therefore, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruelty, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Article 14 and 21. [529 B-F]

(7) There is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the international Covenant on Civil and Political Rights (...).<sup>5</sup>

In another relevant *obiter dictum*, the Supreme Court relied also on article 19 of the Constitution to reach similar conclusions:

(...) If a whole atmosphere of constant fear of violence, frequent torture

<sup>3</sup> National report submitted in accordance with paragraph 5 f the annex of the Human Rights Council resolution 16/21, UN doc. A/HRC/WG.6/13/IND/1 (2012) paragraph 29.

<sup>4</sup> See Aiman Singh Kler, 'Prohibition Against Torture; An International and Indian Perspective' SSRN Papers (25 November 2014) available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2627746](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627746)

<sup>5</sup> *Francis Coralie Mullin vs The Administrator, Union Territory, New Delhi*, 13 January 1981, 981 AIR 746, 1981 SCR (2) 516, paragraphs 6-7

and denial of opportunity to improve oneself is created or if medical facilities and basic elements of care and comfort necessary to sustain life are refused, then also the humane jurisdiction of the Court will become based on Art. 19 [516 G-H D-E]<sup>6</sup>

In the 1996 landmark case *Baku v West Bengal* the Supreme Court, after referring to article 5 of the Universal Declaration on Human Rights, confirmed in the strongest terms that any form of torture and cruel, inhuman or degrading treatment falls within the scope of article 21 of the Constitution.<sup>7</sup>

Arguably, the Protection of Human Rights Act of 1993 establishing the Human Rights Commissions in India with powers to monitor police actions has been the most salient outcome in the efforts to tackle practices amounting to torture. However, it lacks teeth and though theoretically independent, depends on government for resources. In addition, the Commissions have no competence to monitor the 'Armed Forces' actions which includes the army, navy & air force as well as various central armed police organizations such as the Border Security Forces (BSF).<sup>8</sup>

### ***Prevention of Torture Bill 2016***

The Minister of External Affairs' position eventually prevailed and a *Prevention of Torture Bill*<sup>9</sup> was introduced in the *Lok Sabha* and passed by the House on 6 May 2010. The Bill's preamble specifically states its purpose as compliance with CAT, therefore implicitly acknowledging the need to overcome the deficit of Indian legislation. It remained pending in *Rajya Sabha* and lapsed with the dissolution of the 15th *Lok Sabha* in May 2014.

The *Prevention of Torture Bill* has been criticised for failing to fully adapt the definition of torture enshrined in CAT, for the limitations in prosecution and the lack of clarity over punishment. On the definition, the Bill only covers acts causing grievous hurt or acts that endangered life, limb or health rather than any act causing 'severe pain and suffering' as established in CAT. The Bill limits the complainant's deadline to six month from the occurrence of the alleged torture, and establishes a maximum of 10 years imprisonment for the perpetrators of torture. It fails to fulfil the obligation of *non-refoulement*.<sup>10</sup>

<sup>6</sup> *Charles Sobraj vs The Suptd, Central Jail, Thihar*, 31 August 1978 AIR 1978 SC 1594 as cited at <https://indiankanoon.org/doc/1518037/>

<sup>7</sup> *Shri D.K. Basu, Ashok K. Johri vs State Of West Bengal, State Of U.P.*, 18 December, 1996, as available at <https://indiankanoon.org/doc/501198/>.

<sup>8</sup> Kler (2014) above n 4. See also . Mark Weisburd, 'Customary International Law and Torture: the Case of India' 2(1) *Chicago Journal of International Law* (2001) Article 6 available at <http://chicagounbound.uchicago.edu/cjil/vol2/iss1/6>

<sup>9</sup> Information about the Bill, including full text, can be found at the Website of PRS legislative research at: <http://www.prsindia.org/billtrack/the-prevention-of-torture-bill-2010-1129/>

<sup>10</sup> International Commission of Justist, 'The ICJ Legal Opinion on the Revised Prevention of Torture Bill Currently Before India's Parliament' (November 2011) available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/India-opinion-prevention-torture-legal-submission-2012.pdf>. See also Aiman Singh Kler, 'Prohibition Against Torture; An



In May 2016, the Ministry of Home Affairs announced that a new amended Bill had been sent to the Law Ministry and reforms of Section 330 and 331 of the Indian Penal Code were also under consideration.<sup>11</sup>

Irrespective of the best approach for the Indian government, or the best legislative apparatus in adhering to international standards, the current normative framework would need immediate reform as it remains below the standard adequate for the ratification of the Convention against Torture, and thereby Indians citizens are less well protected in comparison to their counterparts globally.<sup>12</sup>

### India international obligations and gaps in domestic legislation

The prohibition of torture is probably the most universally accepted principle of international law as reflected in treaties and customary law. While the practice remains widespread, most States deny any involvement with practices of torture because it is generally accepted as an especially abhorrent crime and a peremptory norm of international law, admitting no exceptions.<sup>13</sup>

The prohibition encompasses the obligation to codify explicitly offences of torture under criminal law, to actively investigate all acts of torture *motu proprio* even if a formal complaint has not been brought before the authorities, and to prosecute the perpetrators. The prohibition also includes the obligation of *non-refoulement*, that is, the obligation on States of not returning persons to a country where they may be at risk to be subjected to torture.

Many provisions enshrined in CAT codify customary international law that is already binding on India. This includes its article 1 which provides the most authoritative and recognised definition of torture as:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence

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International and Indian Perspective' SSRN Papers (25 November 2014) available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2627746](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627746)

<sup>11</sup> 'Amended Draft of Antitorture Bill Ready', The Hindu, 11 May 2016, available at <http://www.thehindu.com/news/national/amended-draft-of-antitorture-bill-ready-govt/article8585596.ece>

<sup>12</sup> See Aiman Singh Kler, 'Prohibition Against Torture: An International and Indian Perspective' SSRN Papers (25 November 2014) available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2627746](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2627746)

<sup>13</sup> On this special status see General Comment 24 of the Human Rights Committee, UN doc. CCPR/C/21/Rev.1/Add.6 (1994) para 10; *Prosecutor v Delalic and Others*, International Criminal Tribunal for the former Yugoslavia (ICTY) (Case IT-96-21-T, 1998); *Prosecutor v Furundzija* (ICTY Case IT-95-17/1-T, 1998).



## INDIAN RATIFICATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE

of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions

Whether or not the Indian government is bound by the Convention Against Torture, it remains bound by customary law to adapt its legislation to internationally accepted standards. With the exception of the clauses on 'universal jurisdiction',<sup>14</sup> the ratification will not add substantive international obligations for India. Rather it will bring an authoritative and reliable body to facilitate India's technical compliance with existing obligations.

The most significant advantages that ratification of CAT will bring its monitoring mechanism through the work of the Committee Against Torture. The submission of reports to this Committee and the discussions that precede the final evaluation of the Committee regarding the performance of States in complying with CAT, would assist the government in bringing its legislative framework, administrative practices and policies in line with an international provision which is core to any human rights abiding democracy.

Contrary to India's arguments and despite the judicial pronouncements, its current legislative framework is at odds with the customary international law governing torture as reiterated by CAT.

International obligations freely accepted by India as well as international customary law, partly enshrine in CAT reveal specific gaps in the domestic framework. First, India has not explicitly typified the crime of torture. Section 197 and 45 of the Criminal Procedural Code require prior sanction of the executive to prosecute members of the law enforcement bodies. Second, the prosecution of crimes of torture is restricted to actions related to the extraction of confessions and restoration of property, narrowing the scope of the obligation to prevent, prosecute and punish acts of torture to a level incompatible with international obligations. Internationally, the scope of the prohibition encompasses all cases of serious harm caused by representatives of the State. Therefore, cases of torture can occur in other institutions not related to criminal prosecutions and, particularly, where individuals are deprived of their liberty (e.g. health care-settings).<sup>15</sup> Third, the limited scope of the Indian legislation is even more problematic when read in conjunction with Section 27 of the 1972 Indian Evidence Act that allows, the possibility to use evidence that has been obtained by torture (the so-called 'fruit of the poisonous tree'). While confessions obtained by torture are inadmissible under Section 24, other forms of evidence - arguably more widely used and relevant in current times - can 'heal' the first wrong-doing and corroborate a crime that would have not been known without the use of torture.

<sup>14</sup> Article 5 of CAT requires States to establish their jurisdiction over torture cases where the alleged offenders are not extradited to face prosecution in another state, regardless of the state in which the torture was committed, or the nationality of the perpetrator of the victim. In other words, CAT requires States to extradite or to prosecute not leaving margin for impunity.

<sup>15</sup> See Report of the UN Special Rapporteur on Torture, UN doc. A/HRC/22/53 (February 2013).

## INDIAN RATIFICATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE

As an outcome of the review of the country's performance on human rights before the UN Human Rights Council, India committed itself to finalise the ratification of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, following the recommendation made in this regard by Spain, Sweden, Switzerland, Timor-Leste, UK and Northern Ireland, USA, Australia, Austria, Botswana, Brazil, Czech Republic, France, Indonesia, Iraq, Italy, Maldives, Portugal, Republic of Korea.<sup>16</sup>

India should honour this freely assumed promise, not only to preserve its own reputation but for legal reasons. It is possible to make an argument in international law, that this promise at the highest inter-governmental level constitutes a unilateral act capable of creating legal obligations for India. (*Nuclear Tests* case, Judgment of 20 December 1974, *I.C.J. Reports* 1974, p. 267, para. 43, and p. 472, para. 46; see also *Conclusions of the International Law Commission Relating to Unilateral Acts of States*, UN doc. A/CN.4/L.703, 2006). At a political level, it is worth highlighting that, on May 2017 India will be monitored by every other State of the world, before the Human Rights Council, on its compliance with this commitment, so putting a process in train would offset potential criticism.

The failure to adhere to the obligation concerning the principle of *non-refoulement* will also have likely implications in cases of extradition, including in national security related cases.<sup>17</sup> While the principle of *non-refoulement* basically requires that a State not send an individual to a country whether they are likely to be tortured, it has been shown to have a direct impact recently English law in the case concerning Abu-Qatada, a Jordanian national, sought by his home country for crimes relating to terrorism, where evidence had been acquired through torture. The UK Supreme Court prevented extradition to Jordan due to the lack of a certainty that the state would not use torture,<sup>18</sup> a decision subsequently upheld by the European Court of Human Rights, when the government sought to overrule the Court.<sup>19</sup> The matter was finally resolved through a complex bilateral and lengthy decade long negotiations and the agreement of a special extradition treaty between the UK and Jordan. The guarantees written into the treaty against the use of torture provided grounds for the Court to finally authorize the extradition.<sup>20</sup>

There is already case law to show that the ratification of CAT and

<sup>16</sup> See UN doc. A/HRC/21/10/Add.1 (2012).

<sup>17</sup> Michaelson, C., 'The Renaissance of Non-Refoulement - The Othman (Abu Qatada) Decision of the European Court of Human Rights' 61(3) *International & Comparative Law Quarterly* (July 2012) 750-766

<sup>18</sup> Garrod, M., 'Deportation of Suspected Terrorists with Real Risk of Torture: The House of Lords Decision in Abu Qatada' 73(4) *Modern Law Review* (July 2010) 631-646.

<sup>19</sup> Zagaris, B., 'Introductory Note to the European Court of Human Rights: Othman (Abu Qatada) v. the United Kingdom' 52(2) *International Legal Materials* (2013) 496-557

<sup>20</sup> Simon Jenkins, 'Abu Qatada's Deportation is a victory for the British judicial process' *The Guardian*, Monday July 8, 2013. Available at: <https://www.theguardian.com/commentisfree/2013/jul/08/abu-qatada-british-judicial-system>

## INDIAN RATIFICATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE

adaptation of Indian legislation will facilitate extraditions requested by India. The Committee Against Torture has prevented States party of CAT to extradite individuals (particularly terrorist suspects) who, being prosecuted in India, would be considered at risk of being subjected to torture, since India is not a party of CAT. The Committee concluded, in 2011 that:

...in view of the fact that India is not a party to the Convention, the complainants would be in danger, in the event of expulsion to India not only of being subjected to torture but of no longer having the legal possibility of applying to the Committee for protection [citing a similar conclusion reached in Communication No. 13/1993, *Mutombo v. Switzerland*, decision adopted on 27 April 1994, paragraph 9.6].<sup>21</sup>

Reports by UN organs about the widespread practice of torture in India formed the basis for the Committee Against Torture to conclude that Canada should not have extradited Bachan Singh Sogi to India in 2007.<sup>22</sup> Similarly in *Chahal v United Kingdom* (15 November 1996) the European Court of Human Rights established the standards followed to reach conclusions on *non-refoulement* cases. In this high-profile case the Court was unconvinced by assurances provided by India as enough in believing that individuals would not be subject to torture or ill-treatment.<sup>23</sup>

If India was party to CAT, and particularly if it accepted its competence on individual cases, it is likely that these bodies would allow extraditions since individuals would still be covered by the protection granted by the Committee Against Torture.

### Conclusion

In summary, the argument for ratification of CAT can be made along the following grounds:

(a) Deficits in Law: Indian law prohibiting torture falls short of international standards in key areas and as a consequence, the state would be considered to have lower standards of protection, especially in protecting some of the most vulnerable people who may face cruel, human and degrading punishment in situations of deprivation of liberty.

(b) International Obligations: India is already bound through customary law to adhere to the international standard on the prevention of torture and this deficit constitutes a failure to fulfil an existing legal obligation. Ratification of CAT and the necessity for making reforms would enhance protection levels in line with

<sup>21</sup> CAT Communication 336/2008, *Harminder Singh Khalsa et al v Switzerland*, decision adopted on 26 May 2011, paragraph 11.7, UN doc. CAT/C/46/D/336/2008.

<sup>22</sup> CAT Communication 297/2006, *Bachan Singh Sogi v Canada*, adopted on 16 November 2007, UN doc. CAT/C/39/D/297/2006.

<sup>23</sup> European Court on Human Rights, Application 22414/93.

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international standards. Arguably, India is now bound to ratify CAT through the promise made to the international community.

(c) Reputation: As a founding member of CAT, the world's largest democracy with a positive international reputation, the failure to adhere to one of the most fundamental of human rights norms reflect India in poor light.

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In

Civil /Criminal Appeal /~~Transfer~~/Writ Petition No. 738 of 2016

Dr. Ashwini Kumar Petitioner's/Appellant's

Union of India & Ans Respondent's/ Caveater's

# INDEX OF FILING

Stamp: R & I Unit CAS  
Date Received 2/23/37  
Supreme Court Conf. New Delhi

CODE No.1852

29. № 4853

Total Rs.

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I.A. (Crl. /Civil ) No.....Of 2012

In

Special Leave Petition (Crl. /Civil ) No.....Of 20

Civil /Criminal Appeal /Transfer/Writ Petition No. 738 of 20/6

IN THE MATTER OF:

Dr. Ashwini Kumar Petitioner's/Appellant's

Versus

Union of India & m Respondent's/ Caveater's**INDEX OF FILING**

S.No.	Particular	Copies	Court fees
1	Document filed as to the A.C.	2	nil
	Dr. ASHWINI KUMAR		
		Total Rs.	nil

Filed On

CODE No.1852

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