



Awareness Raising and Training Measures for the Istanbul Protocol in Europe

## The Role of Lawyers in the Prevention of Torture and Ill-Treatment

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## TABLE OF CONTENT

<b>1.</b>	<b>Introduction.....</b>	<b>6</b>
<b>2.</b>	<b>Legal Framework .....</b>	<b>6</b>
<b>3.</b>	<b>Representation of Detainees .....</b>	<b>7</b>
<b>4.</b>	<b>Right to Remedy and Reparations .....</b>	<b>8</b>
<b>5.</b>	<b>Documentation and Investigation .....</b>	<b>9</b>
<b>6.</b>	<b>Preventive Monitoring .....</b>	<b>10</b>
<b>7.</b>	<b>Advocacy and Policy Making .....</b>	<b>11</b>
<b>8.</b>	<b>Capacity Strengthening .....</b>	<b>12</b>
<b>9.</b>	<b>Litigation Role.....</b>	<b>13</b>
<b>10.</b>	<b>Conclusion .....</b>	<b>13</b>
<b>11.</b>	<b>Literature .....</b>	<b>14</b>

## 1. Introduction

The Istanbul Protocol highlights the importance of documenting and investigating cases of torture and ill-treatment in court proceedings as well as claims for remedy and reparation, or asylum applications. The following section provides information on the role of lawyers in that regard. With their expertise of the domestic legal framework paired with direct and privileged access to their clients, lawyers play a fundamental role in the area of compliance to the rule of law, and, as elaborated throughout the following chapter, in the prohibition and prevention of torture and ill-treatment.

The chapter will analyse the functions of lawyers in regard to the establishment and implementation of the national legal framework, the representation of detainees and torture survivors, the investigation and documentation of cases of torture and ill-treatment, preventive monitoring of places of detention, advocacy and policy making, as well as capacity strengthening and litigation.

The central role of legal professions in the promotion and protection of human rights, and especially in the prohibition of torture and ill-treatment, is highlighted by numerous treaties, soft law instruments, and jurisprudence.

The privileged access to detainees can be instrumental in preventing acts of torture and ill-treatment, especially in the moments immediately following arrest, during which detainees are most at risk to be abused. In that regard, lawyers should not only defend their clients relatively to the criminal charges filed against them, but also represent them in cases where they are victims of acts of torture and ill-treatment.

The unique expertise of lawyers enables them, besides a most obvious role in establishing and operating an effective legal framework, to have a considerable impact in social and political fields, e.g. through advocacy activities to government officials, or when their action is coordinated and strengthened by a strong link with civil society actors. Subsequently, we will illustrate the different roles they can take in the fight against torture and ill-treatment.

## 2. Legal Framework

The occurrence of acts of torture and ill-treatment can first be prevented by a strong domestic legal framework, implementing the international human rights treaties the country ratified. Lawyers can greatly contribute to drafting laws and regulations and may complement Governments' proposals with substantive suggestions derived from their education and professional experience. Legal professionals may also act as advisors in the implementing process of provisions and safeguards against torture and ill-treatment.

The incorporation of the crime of torture into national legislation together

📖 See: *"Istanbul Protocol, chapter III."*

📖 See also: *"The role of lawyers in the prevention of torture, APT, 2008"*

📖 See also: *"Preventing Torture – An Operational Guide for National Human Rights Institutions"; 2010; OHCHR, APT, APF*

with appropriate sanctions, an obligation that derives from Article 4 of the United Nations Convention against Torture (UNCAT), is a fundamental step towards the criminalisation of torture that lawyers should advocate for. When such a process starts, lawyers should then ensure that the definition of torture is in line with Article 1 UNCAT by advising the drafting body or by commenting the draft during the evaluation procedure. Lawyers can conduct comparative analyses of international and regional standards in other regions of the world (e.g. European Convention on Human Rights (ECHR), African Charter on Human and People's Rights (ACHPR) or the American Convention on Human Rights (ACHR)) and help improving the content and quality of national provisions.


In connection with a complete and well-functioning legal framework, lawyers should also always observe whether essential common principles in the field of torture prevention, such as the principles of universal jurisdiction and non-refoulement, exist and are respected, and otherwise advocate for their introduction into the domestic legislation (see section 7 of this chapter for more details on this).

### 3. Representation of Detainees

Procedural safeguards, e.g. the right to a fair trial, protect persons detained from the moment of their arrest, and are contained in several international instruments. These safeguards constitute, together with the national legislation, the basis for lawyers in their work of representing detainees. Inter alia, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees and protects the right to justice and a fair trial. Similar rights are included in the Basic Principles on the Role of Lawyers, the European Prison Rules (Rule 23), and the Standard Minimum Rules for the Treatment of Prisoners (Rule 93), as well as in regional conventions such as the ECHR (Article 6), the ACHR (Article 8) and the ACHPR (Article 7).

The international, regional and national obligations guaranteeing the right to access to justice and to a fair trial define a number of essential principles to reduce the prevalence of torture and ill-treatment, such as the right not to testify against oneself, the interdiction to use forced confessions in trials, or the right to defend oneself or through legal the assistance.

From the very first moment of deprivation of liberty, detainees are particularly susceptible to violations of their fundamental rights and their inherent dignity, a fact that lawyers should always bear in mind and integrate into their efforts to prevent torture and ill-treatment at all stages of detention. Pre-trial detainees are particularly at risk of being abused in reason of the higher prevalence of torture and coercion during the investigation stage of the criminal justice process. Indeed, following their arrest, pre-trial detainees are completely in the power of detaining authorities, who often perceive torture as the fastest way to obtain

 See more on obligations deriving from the UNCAT in the unit on the relevant international legal standards

information or extract confession.

In that regard, the access of a lawyer to the detainee should be granted immediately upon arrest. Access to lawyers must be direct, prompt, regular and confidential. Lawyers should make sure that the detainees enjoy all legal safeguards against torture, that they have been informed of the reasons of their arrest in a language they understand and of their particular rights, including the right to lawyer at all procedural stages, to independent medical examinations or to inform relatives about the detention. The increased risk of torture and ill-treatment in police custody may require lawyers to make an application for the transfer of a detainee from police custody to a prison facility. Furthermore, lawyers should make sure that their clients undergo a medical examination by an independent doctor and help them, when relevant, in the application for a writ of habeas corpus, i.e. the possibility to challenge the legality of their detention before a judge (Article 9(4) ICCPR).

Further to informing their clients on their rights, lawyers should also explain to them the existing complaints mechanisms and guide them through lodging a complaint, when acts of torture and ill-treatment have occurred.

In the absence of an effective complaints mechanism, lawyers should instigate the creation or the improvement of an existing system with the government (*see below: 7. Advocacy and Policy Making*). Similarly, when not all such procedural safeguards exist in a State, lawyers and bar associations can be decisive actors in the process of advocating for their creation.


#### **4. Right to Remedy and Reparations**

The Convention against Torture (UNCAT) requires its State Parties to assist victims of torture and grant them adequate reparation, including compensation and rehabilitation. These rights are entailed in Articles 13 and 14 UNCAT.

The right to lodge a complaint with a competent authority and the right to a subsequent impartial and prompt investigation as well as the protection against reprisals is spelled out in Article 13, as a complement to the obligation to initiate an *ex officio* investigation under Article 12.

Article 14 comprises the right of victims of torture or ill-treatment to obtain redress and an adequate compensation as well as to be as fully rehabilitated as possible. The provision also grants these rights to the dependants of the victim in the event of death as a result of such an act of torture.

Lawyers are key interlocutors for survivors of torture and ill-treatment seeking justice and other forms of reparation. They can explain the rights incorporated in the above-mentioned two articles to persons that have

 See: “UN Docs, CAT Committee, General Comment No. 3, CAT/C/GC/3, 2012, on the implementation of Article 14 UNCAT”



been tortured and assist them during all stages of lodging a complaint and the procedure of obtaining reparation, on an administrative level, under criminal law as well as through civil law. Reparation can be granted by a number of means such as the proper investigation of the truth, an official recognition of the act of torture committed as well as an apology by the responsible authorities. Additionally, monetary compensation can complement the other forms of reparation but lawyers should be aware that both the Committee Against Torture and the Inter-American Court of Human Rights have clearly confirmed that financial reparation is not sufficient for the crime of torture.

On a broader basis, reparation and rehabilitation also constitute an important part for the society in which torture and ill-treatment occurred. In case of widespread or systematic torture, reparation can also include the amendment of relevant laws, the fight against impunity and the introduction of preventive measures. Lawyers should always advocate such changes in addition to their primary role of helping victims of torture to receive adequate compensation.

## 5. Documentation and Investigation

The effective investigation and documentation of torture and ill-treatment are necessary for the exposure and eradication of such acts as well as for possible reparation claims of torture victims.

The Istanbul Protocol explicitly highlights the crucial role of legal professions in documenting and investigating allegation of torture and ill-treatment, due to their often exclusive proximity to detainees in successive stages of the criminal procedure, which allow them to support investigations of acts of torture and ill-treatment, or enable the opening of future proceedings. The collected evidence is also indispensable for reparation claims at both domestic and/or international level before judicial or administrative bodies. Properly documented torture allegations can also be submitted as allegation letters, urgent appeals or reports to international monitoring bodies, such as the UN Special Rapporteur on Torture (UNSRT), or the UN Committee against Torture.

Investigations on the basis of evidence of torture and ill-treatment collected by lawyers must be prompt, impartial and thorough. Moreover, all involved parties (the victims and their families, witnesses, lawyers, etc.) must be protected against possible reprisals. The utmost objective of not putting the detainee at risk also requires confidentiality in the communication between lawyers and detainees in order to document possible allegations of torture and ill-treatment. In that regard, it is crucial for legal representatives to be able to carry out interviews without any public officials present with their clients. Also, the allegations should only be forwarded to a competent

📖 See:  
*Guridi vs. Spain*, CAT,  
212/2002, 17 May 2005  
*Vargas Areco v.*  
*Paraguay*, IACtHR, 26  
September 2006

authority with the express consent of the detainee.

It is important for lawyers working with torture survivors to know how torture can be medically documented and how to detect physical and psychological traces of torture and ill-treatment. With this knowledge, lawyers are able to document the cases profoundly for subsequent complaints and investigations, and under these circumstances it can be highly beneficial for the lawyers to have a certain basic medical expertise.

In that regard, the close cooperation and knowledge-sharing between medical doctors and the legal professions is extremely important for the conduction of interviews with possible torture victims. In particular, complaints on behalf of their clients receive a much stronger fundament if supported by an account as precise as possible regarding the type of torture or ill-treatment that was endured by the victim. In addition to their own conclusions, lawyers should always arrange for the independent medical examination of an allegedly tortured detainee and use the doctor's medical expertise to bolster their position in the process of lodging a complaint and during the consecutive trial. These rules are therefore fundamental steps to guarantee lawyers' ability to fulfil their essential role in documenting and investigating allegations of torture and ill-treatment.

## 6. Preventive Monitoring

The protection of the dignity of the particularly vulnerable persons deprived of their liberty can be helped through an effective monitoring of all places of detention. As the UN Special Rapporteur on Torture stated in 2002: *“regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture.”*<sup>1</sup>

Places of deprivation of liberty have to be understood as any places where persons are not permitted to leave at will<sup>2</sup>, and therefore also include psychiatric facilities, military barracks, homes for elderly people as well as long-term care facilities.

Given their detailed knowledge of international, regional and national standards and norms, bar associations and lawyers occupy a key role in the lobbying for and the establishment of regular, systematic and independent preventive monitoring of places of detention. A close cooperation between lawyers and experts from other fields, such as medical and forensic doctors, human rights experts or social workers, is indispensable for a broad and well-functioning monitoring body. A preventive mechanism consisting of a delegation with diverse professional experience is better positioned to bring in expertise from different angles and detect systemic and other existing

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<sup>1</sup> E/CN.4/2003/68, 17 December 2002, para. 26. lit. (f)

<sup>2</sup> See art. 4, para. 2 Optional Protocol to the Convention Against Torture (OPCAT)

issues in a holistic way.

The role of lawyers in connection with preventive monitoring includes, as a very fundamental precondition for an effective system, the assistance in the implementation of the OPCAT once the State has ratified it, as well as in the establishment of a National Preventive Mechanism (NPM), as requested by the Protocol. Notwithstanding the existence of an NPM in the country or even the OPCAT's ratification, lawyers can take part to monitoring bodies visiting places of detention, e.g. bar associations' or public defenders office's monitoring unit, inter-institutional commissions, etc. Lawyers, through their knowledge of international norms with regard to the prevention of torture and ill-treatment, can provide lawmakers and authorities with monitoring visits' reports containing precise references to international requirements and suggestions on how to improve the domestic framework. Their expertise enables them also to point at violation of the legislation by officials in practice. Lawyers can then expose patterns of institutional failures in specific detention facilities.

The effectiveness of monitoring visits can be increased by the establishment of standardised checklists, particularly tailored to the expertise of lawyers regarding national and international norms and standards. However, the interview of torture survivors should not simply follow a regular checklist, but should be effectuated with much sensitivity and empathy, taking into consideration the trauma of the interviewee and the difficulties to restore accounts of abuse.

Furthermore, lawyers are a fundamental connector to the public and to relevant international preventive mechanisms when authorities fail to act upon allegations of torture or obstruct an investigation.

In order to cover all aspects of torture and ill-treatment, and uncover the systemic issues allowing for such abuse, legal professionals should work in an interdisciplinary manner with other professionals during monitoring visits in a complementary and holistic approach.

## **7. Advocacy and Policy Making**

The role of lawyers in pushing for the establishment of an effective and complete legal framework in the prevention of torture cannot be underestimated. As experts of national and international legislation, lawyers are vital in campaigning for the ratification and complete implementation of the UNCAT and the OPCAT, as well as regional human rights instruments prohibiting torture and ill-treatment.

Lawyers should be able to identify gaps in national laws and ensure the criminalisation of acts of torture, including complicity or participation. They should also elaborate drafts on legislation against torture and ill-treatment when indicated, as well as propose specific provisions to improve the

effectiveness of the investigation and prosecution of torture and ill-treatment. Lawyers can contribute to a well-founded legislation by commenting on reforms in the fields of human rights, access to justice and torture prevention.

Advocating at the government for improved procedural safeguards, such as an effective complaints procedure, reforms to national legal aid structures and awareness-raising of the problem of torture and ill-treatment in places of deprivation of liberty may have a substantial impact on the positive development of a country's human rights record and specifically reduce incidents of torture as well as to improve the society's perception of law enforcement officials.


Lawyers may also encourage judges to interpret and apply domestic law in the light of international and national human rights standards to contribute to a consistent jurisprudence guaranteeing the equal protection of torture survivors and all persons subjected to human rights violations.

## **8. Capacity Strengthening**

Capacity strengthening is one of the crucial tasks for lawyers and bar associations to raise awareness, promote policy initiatives and increase the transparency of the criminal justice system to target the prevention and prohibition of torture and ill-treatment. Awareness-raising campaigns are important because they can influence stakeholders and decision makers and contribute to a community-wide attitudinal change. By means of trainings, expert conferences and seminars, lawyers can reach a broad audience and, thus, enhance the existing capacities or strengthen the various authorities, institutions and civil society actors that are engaged in the field of torture prevention.

Lawyers should develop a variety of measures to facilitate the access of the society to information on reported cases of torture, investigations, prosecutions and reparation, e.g. by creating databases. Helping develop networks of lawyers, social workers, NGOs, church groups or law clinics with appropriate coordination mechanisms to encourage the diversification of legal aid delivery are also effective measures in the prevention of torture. A country may profit strongly from the cooperation with experts on the issue of torture prohibition and prevention from other countries that have first-hand experience in the establishment of preventive measures, the preparation of legal texts and provisions and the improvement of the criminal justice system.

The training component is an essential tool for lawyers to share their knowledge and experiences in the prevention of torture and ill-treatment with other fellow lawyers, developing methods for prevention as well as an ethical work code and creating networks of legal professionals. Furthermore

 See the UN Basic Principles on the Role of Lawyers, 1990

it is a crucial tool to share their substantiated legal knowledge with other actors from civil society and State. In that regard, lawyers should also promote training sessions together with prosecutors and other legal professionals on the absolute prohibition of torture and the importance of safeguards against torture and ill-treatment.

## **9. Litigation Role**

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Lawyers can have an enormous impact on the legal framework by setting or setting precedents. In countries without jurisprudence on torture and ill-treatment, one successful conviction of a perpetrator of torture can – particularly in common law systems - trigger a series of further trials and, thus, may have a large impact on the decrease of impunity, and the raise of awareness in the general population regarding the need to prohibit and prevent torture and ill-treatment.

Their privileged access to persons detained allows lawyers to document allegations of torture and enables them to subsequently file charges against the alleged perpetrators and their commanders who ordered such acts to be carried out, or knew about them.

The use of strategic litigation can lead to the establishment of judicial precedents which can be particularly useful in relation to reparations for torture victims and may, thus, facilitate civil proceedings to obtain financial compensation.

In all stages of litigation, lawyers have to ensure that any coerced evidence be excluded from the trial. The only exception from this fundamental principle is the use of such evidence in proceedings against the alleged perpetrator of torture or ill-treatment. Also, very importantly, the burden of proof must not be with the victim.

Lawyers should also observe that the litigation strategy before includes the consideration of a submission of the case to an international or regional human rights body or court, in case of exhaustion of all stages of appeal on the national level.

## **10. Conclusion**

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Lawyers are key actors in the prohibition and prevention of torture and ill-treatment. Due to their educational knowledge and professional experience, lawyers are particularly qualified to encourage and support governments to include comprehensive legal provisions in the field of torture prevention or amend and improve the existing legal framework.

The privileged access to detainees at all stages of the deprivation of liberty by legal professionals is crucial for the protection against possible acts of torture and ill-treatment and enables the detainees to raise allegations of

torture confidentially, and thus, reduces the risk of possible reprisals. The proximity to detainees also facilitates the investigation and documentation of torture and ill-treatment, which is of crucial importance during court proceedings.

Moreover, lawyers are fundamental in helping victims of torture assert their rights and obtain adequate reparation including rehabilitation and compensation. Legal professionals can also substantially contribute to the prevention of torture as members of interdisciplinary monitoring bodies that periodically visit places of deprivation of liberty. Finally, lawyers occupy an essential role in strengthening the capacity of authorities, institutions and civil society actors by means of awareness-raising campaigns, trainings for non-governmental organisations (NGOs), judges and other civil servants, and creating synergies with relevant actors in the field of torture prevention.

Therefore, it is important to strengthen lawyer's knowledge of and commitment for the prevention of torture and ill-treatment and promote professional networks so they can fully exercise their key preventive and protective role.

## **11. Literature**

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1. *The role of lawyers in the prevention of torture*, APT, 2008
2. *Action against torture: A practical guide to the Istanbul Protocol – for lawyers*, IRCT, 2009
3. *Preventing Torture: An Operational Guide for National Human Rights Institutions*, APT, OHCHR, APF, 2010
4. *Pretrial Detainees and Torture: Why Pretrial Detainees Face the Greatest Risk*, Open Society Foundations, Ludwig Boltzmann Institute of Human Rights, University of Bristol, 2011
5. *General Comment No. 3 on the implementation of Article 14 UNCAT*, UN Docs, UN Committee Against Torture, CAT/C/GC/3, 2012
6. *The Role of Independent Monitoring in Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Penal Reform International, 2010