



# UNODC

United Nations Office on Drugs and Crime



# Nigeria Training Module on Investigative Interviewing, the Right to Remain Silent and the Prohibition of Torture

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UNITED NATIONS SECURITY COUNCIL  
COUNTER-TERRORISM COMMITTEE  
EXECUTIVE DIRECTORATE (CTED)







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European Union



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The Nigeria Training Module on Investigative Interviewing, the Right to Remain Silent and the Prohibition of Torture is a technical tool developed for training purposes to support national practitioners working on terrorism-related cases in Nigeria.

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## Foreword

### Message from the Director General of the Nigerian Institute of Advanced Legal Studies

The onset of the insurgency in Nigeria and its neighbouring countries has emphasized the need to take cognizance of the importance of criminal investigations in the furtherance of justice, and of the human rights standards underpinning such investigations. The cyclical nature of violent extremism necessitates an enhanced framework for the investigative process in order to inform safer societies and establish trust between communities and agencies engaged in the criminal justice and security spheres.

The Nigeria Training Module on Investigative Interviewing, the Right to Remain Silent and the Prohibition of Torture was developed to place emphasis on the importance of interviewing within the broader framework of investigations. This is particularly relevant given the vital role that successful interviewing strategies can play in contributing to the outcome of criminal proceedings, and consequently to the effectiveness of the Nigerian criminal justice system at large.

It is essential that investigative interviewing is conducted in compliance with human rights standards and that investigators adopt non-coercive and practical measures to obtain reliable and accurate information from suspects, witnesses and victims. The training module aims to serve as a reference guide for legal practitioners, security officials and law enforcement officers on best practices for investigative interviewing, in compliance with international human rights law and other legal and procedural safeguards.

The training module was developed with careful consideration of the legal and policy context in Nigeria, and aims to respond to Nigeria's specific needs, while incorporating international and regional standards and good practices in investigative interviewing. The module has been designed to ensure optimal usability and to encourage Nigerian institutions in the criminal justice sector to integrate the module into their various capacity-building programmes by ensuring that it is practical, interactive, solution oriented and emphasizes participants' needs.

The training module will undoubtedly be a useful tool for criminal justice practitioners in Nigeria.



Professor M. T. **Ladan**, PhD  
Hubert Humphrey Fellow, USA  
Director General, Nigerian Institute of Advanced Legal Studies

## Joint message of the European Union and the United Nations Office on Drugs and Crime

Over the course of the past decade, the United Nations Office on Drugs and Crime (UNODC) and the European Union, in partnership with Nigerian stakeholders and the United Nations Counter-Terrorism Committee Executive Directorate (CTED), have been implementing a multiphased programme of technical assistance to help build the capacity of the Nigerian criminal justice system to effectively investigate and prosecute terrorism offences and to facilitate inter-agency collaboration in counter-terrorism matters.

The present UNODC Nigeria Training Module on Investigative Interviewing, the Right to Remain Silent and the Prohibition of Torture is one of a series of practical tools developed by the Office in conjunction with its Nigerian partners under the skilful leadership of the Nigerian Institute of Advanced Legal Studies (NIALS).

The training module takes note of the most recent legislation relevant to the criminal justice system in Nigeria, including the Nigerian Correctional Service Act, 2019 and other legal and policy developments. Building on the 2019 UNODC Nigeria Training Module on Gender Dimensions of Criminal Justice Responses to Terrorism, the present module also emphasizes the gender dimensions of investigative interviewing, including key safeguards for the prevention of torture.

The training module is designed to serve as a practical tool for the training of practitioners working in the criminal justice sector in Nigeria, including public prosecutors, judges, defence lawyers, investigators, legal advisers and officials of national law enforcement and security agencies. The module provides practical guidance on human rights-compliant best practices for conducting investigative interviews that respect the indivisible rights of suspects. The module focuses on the Nigerian context and the Nigerian legal framework while referring to applicable regional and international law and good practices.

The criminal justice system in Nigeria has made significant progress in bringing suspected members of terrorist organizations to justice, but there is always room for improvement in this complex and rapidly evolving field. It is our earnest hope that the training module will assist Nigerian criminal justice institutions in ensuring the use of effective interviewing techniques while respecting human rights, and thus help to strengthen the effectiveness of criminal justice responses to terrorism and uphold the rule of law.



Oliver **Stolpe**  
UNODC Country  
Representative in Nigeria



Samuela **Isopi**  
Ambassador of the European Union  
to Nigeria and ECOWAS

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## Background

The United Nations Office on Drugs and Crime (UNODC) is mandated by the General Assembly to provide assistance to requesting Member States on the legal and criminal justice aspects of countering terrorism. The UNODC Terrorism Prevention Branch is the leading entity in providing such assistance, hand in hand with UNODC field offices, primarily by supporting the ratification by Member States of the international legal instruments against terrorism and the incorporation of the provisions of such instruments into national legislation, as well as building the capacity of national criminal justice systems to implement such provisions effectively, in accordance with the rule of law, including international human rights law.

At the request of the Government of Nigeria, UNODC has been providing an enhanced programme of specialized counter-terrorism capacity-building and technical assistance to Nigerian authorities since 2012, in close partnership with other concerned United Nations entities. Since November 2013, this assistance has been provided as part of the partnership between Nigeria, the European Union (EU), UNODC and the Counter-Terrorism Committee Executive Directorate (CTED) on strengthening criminal justice responses to terrorism, which is fully funded by the EU. Its objective is to help Nigerian criminal justice entities to strengthen their capacity to effectively bring perpetrators of terrorism to justice.

In 2006, the General Assembly, in adopting resolution 60/288 containing the United Nations Global Counter-Terrorism Strategy, recognized that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing” and that Member States “may require assistance in developing and maintaining ... effective and rule of law-based criminal justice systems”, and encouraged them “to resort to the technical assistance delivered, inter alia, by the United Nations Office on Drugs and Crime” [emphasis added].

In the course of their cooperation, UNODC and Nigerian authorities determined that the effectiveness of capacity-building initiatives on criminal justice responses to counter-terrorism would be significantly enhanced, and would be more sustainable, if customized training modules on human rights aspects of the investigation, prosecution and adjudication of terrorism cases were developed for the Nigerian context and made available to criminal justice training institutions in the country. To that end, UNODC entered into a partnership with one of Nigeria’s premier legal training institutions, the Nigerian Institute of Advanced Legal Studies.

The Nigeria Training Module on Investigative Interviewing, the Right to Remain Silent and the Prohibition of Torture has grown out of an immensely fruitful long-term collaboration between UNODC and the Nigerian Institute of Advanced Legal Studies. It has been updated with the contribution of experts from numerous Nigerian criminal justice sector institutions in 2020–2021 to reflect more recent legislation in Nigeria and other legal and policy developments and to include additional chapters dealing with gender- and child-related issues.

The production of the module was made possible through the financial contribution of the European Union.

## Aims and methodology

### Objective and target audience

The principal objective of the module is to provide tools for training Nigerian judges, public prosecutors, investigators and other law enforcement officials, legal advisers of law enforcement agencies and defence lawyers.

The module can also serve as a manual for self-study and as a reference for practitioners to look up Nigerian, regional and international practice on human rights questions arising within the context of the criminal justice response to terrorism.

### Methodology

The training method envisaged by the training module is designed to empower participants to effectively discharge their professional duties and responsibilities. The methodology uses the following four approaches:

- (a) Practical (as participants learn by doing);
- (b) Interactive (to capitalize on the collective intelligence and expertise of participants);
- (c) Participant-centred (as the entire learning experience is focused on participants' needs and expectations);
- (d) Based on a problem-solving approach (in order to stimulate the interest of participants by immersing them in real-life learning experiences).

These are learning methods that encourage and require participants to play an active role and take responsibility for their learning. Participants will be expected to work both as part of small groups, as well as individually, to explore problems through case studies and discussion platforms and to take initiatives that allow them to acquire the practical knowledge and skills needed in their work. The module offers key learning objectives, lecture material, activities and case studies to enhance discussion and knowledge sharing. The module is not intended to provide abstract or theoretical knowledge of legal concepts but rather to encourage participants to reflect upon the practical application and implications of the norms and principles discussed and to consider the policy and ethical underpinnings of legal principles.

In support of its participant-centred and problem-solving methodology, the module incorporates the following training tools.

These are the symbols used:

<p>Learning objectives</p> 	<p>Contains a brief overview of the key topics on which the respective chapter intends to impart knowledge.</p>
<p>Focus boxes</p> 	<p>A series of boxes present topics of specific interest, providing more in-depth information or examples, allowing a comparative approach to the subject.</p>
<p>Case studies</p> 	<p>Studies of real cases from Nigeria and other jurisdictions are provided to illustrate how legal concepts have been applied in practice by courts and other bodies.</p>
<p>Activities</p> 	<p>Activities boxes present ways to explore how the various topics covered in the module are handled in practice in Nigeria. Participants are encouraged to apply their skills and share their experiences. Some of the activities are discussion points, others hypothetical case studies that can be used to practice drafting an application or a motion on a point of law, or as a basis for a mock hearing. During workshops, trainers may propose an activity to stimulate an initial discussion among participants or to encourage application of the legal concepts to a hypothetical practical case. Individuals studying independently will also be able to use the activity boxes to focus on the practical application of knowledge acquired.</p>
<p>Self-assessment questions</p> 	<p>At the end of each chapter, self-assessment questions test participants on the topics covered. Unlike activities boxes, answers to the questions can be found in the text of the module. Questions, which are primarily intended as a tool for self-assessment by learners using the modules for self-study, may also be used as a preliminary tool to identify further training needs and the level of competence of participants, as discussion points during a training session or to test impact at the end of a training session.</p>
<p>Tools</p> 	<p>Tools boxes offer materials, including practical guides, manuals, treaties and model laws, databases and other sources, to assist criminal justice practitioners. Website links have been added under each tool to enable practitioners to access them with just one click.</p>
<p>Further reading</p> 	<p>Further reading boxes provide references to additional materials, with a view to broadening knowledge and exploring application of the norms and concepts discussed in real cases.</p>
<p>References</p> 	<p>There is inevitably a degree of overlap within the various UNODC training modules. The references symbol is used to inform users of information covering similar or connected topics.</p>

# 1

## Human rights and terrorism investigations



### Learning objectives

By the end of chapter 1, readers will be able to:

- Discuss the relevance and importance of adopting a human rights-based approach to investigative interviewing in terrorism cases.
- Identify the importance of respecting human rights in the interviewing of terrorist victims, witnesses and suspects and explain the implications of violating the human rights of victims.
- Discuss the moral implications of torture and other cruel, inhuman or degrading treatment or punishment and other violations of human rights in the interviewing process.
- Explain the effects of torture and other cruel, inhuman or degrading treatment or punishment and other human rights violations on victims, perpetrators and society as a whole.
- Identify national, regional and international legal and policy frameworks that promote compliance with human rights in the fight against terrorism.
- Discuss the relationship between human rights abuses in the interviewing process and the incidence of violent extremism.
- Explain the effect of human rights violations in the interviewing process on terrorism prevention and investigation work.
- Assess the reliability of evidence obtained through torture and other cruel, inhuman or degrading treatment or punishment or through other oppressive or coercive techniques and identify the implications.
- Explain the effect of human rights abuses during the interviewing process on international cooperation.

“You can chain me, you can torture me, you can even destroy this body, but you will never imprison my mind.”

*Mahatma Gandhi*

The above statement by the civil rights leader Mahatma Gandhi highlights the ultimate futility of torture as a means to address complex challenges, which may require military and law enforcement action but also call for political, legal and social responses. This conviction is reiterated in the Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa promulgated by the African Commission on Human and Peoples’ Rights:

Reiterating in its determination to rid Africa of the scourge of terrorism and violent extremism, terrorism cannot and should not be associated with any religion, nationality, civilization or group and that the curtailment of human rights can create greater unrest; that States must give consideration to the gender dimensions of terrorism and counter-terrorism, that women and children are too often the direct and indirect victims of terrorism and counter-terrorism, and that

human rights must be respected and protected at all times; that the use of children as instruments of terrorism must be condemned; and that States must not use combatting terrorism as a pretext to unlawfully and arbitrarily restrict fundamental freedoms, in particular freedom of assembly, expression, association, religion, and movement, and the right to privacy and property.<sup>1</sup>

Chapter 1 presents an examination of the relevance and importance of respecting human rights in counter-terrorism investigations, and during interviewing processes in particular. As stated in the United Nations Global Counter-Terrorism Strategy, “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”. Respect for human rights in investigative interviewing, including in the treatment of all victims, witnesses and suspects with the utmost respect without resorting to coercive or oppressive interview tactics, ensures the more effective and reliable collection of oral evidence. In addition, having investigators trained in effective human rights-compliant methods for the collection of oral evidence is key to ensuring respect for the rule of law and human rights in terrorism investigations, which, in turn, supports and strengthens the effectiveness of the fight against terrorism. Conversely, the violation of human rights during investigative processes undermines the fight against terrorism and is likely to contribute to its longevity.

Compliance with human rights standards is not the equivalent of “going soft” on terrorists. On the contrary, complying with human rights is essential to the effective, fair and impartial investigation of terrorism cases. It also strengthens accountability for terrorism offences, assists in addressing the conditions conducive to the spread of terrorism, improves the relationship between the investigative authorities and the communities affected by terrorism and strengthens the fundamental pillars of society and democratic values, including respect for human rights and the rule of law, which terrorism seeks to undermine and destroy.

In the National Counter-Terrorism Strategy of Nigeria, adopted in 2014 and revised in 2016, the link between respect for and protection of human rights and the effectiveness of counter-terrorism measures is clearly recognized:

The Government believes that respect for international law and human rights must be an integral part of its efforts to counter terrorism.

The drive for equality, social inclusion, community cohesion and active citizenship will strengthen society and resistance to terrorism.

The need to adopt a human rights-based approach to interviewing was stressed by Juan E. Méndez, the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment as follows:

Law enforcement officials and other investigative bodies, including intelligence and military services, play a vital role in serving communities, preventing crime and protecting human rights. In performing their duties, they are obliged to respect and protect the inherent dignity and physical and mental integrity of all persons under questioning, including suspects, witnesses and victims.<sup>2</sup>

A human rights-compliant approach to interviewing requires that all interviewees, including victims, witnesses and suspects, are treated with utmost dignity and respect in accordance with their specific individual needs

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<sup>1</sup> African Commission on Human and Peoples’ Rights: legal instruments (achpr.org).

<sup>2</sup> A/71/298, para. 5.

and requirements, which involves, inter alia, according full respect and compliance with all applicable human rights, including:

- Absolute prohibition of all forms of torture or cruel, inhuman or degrading treatment or punishment.
- Right to be presumed innocent until proven guilty.
- Right to remain silent and right against compelled self-incrimination.
- Prohibition on secret incommunicado detention and the use of unauthorized places of detention.
- Right that a relative or other appropriate third person is notified of detention.
- Right to an independent medical examination upon admission to detention and right to adequate health care and a healthy environment.
- Right of access to a lawyer.
- Right of persons deprived of their liberty to be informed of the reason for detention and right to be promptly informed of any charges against them.
- Right of all persons deprived of their liberty to be brought promptly before a judicial authority, in accordance with the law.
- Right to challenge the lawfulness of detention.
- Right to manifest religious beliefs, such as observance of prayer times and procedures.
- Right to be free from discrimination.



### Activity 1 Human rights-based approach

- Why is it important to adopt a human rights-based approach to investigative interviewing? What are the advantages and/or disadvantages of adopting such an approach? What will be the effect of violations of human rights during the interview process on the fight against terrorism?
- Identify five human rights that you consider may be of particular significance in relation to investigative interviewing. For each of the identified rights, discuss the effect of a violation of the right on the interviewee, the interviewee's family, the interviewee's community, society as a whole and the terrorist cause.
- Your sister, a breast-feeding mother of a small child, has been arrested on suspicion of being a member of a terrorist organization. She denies the allegation, but senior law enforcement officers explain on television that they have very robust evidence. She has not been allowed to notify any family members of her detention; she has been separated from her baby; she has not received a medical examination since her arrest; her access to a lawyer has been delayed; and she has been interviewed without a lawyer being present. After one of the interviews, a guard tells her that he can obtain her release if she has sex with him. What human rights have been violated? How do the identified violations of your sister's rights make you feel towards the interviewers, the law enforcement agency and the government as a whole? Would it make it more or less likely that you might consider joining a terrorist organization yourself, and why?

Various aspects of the relationship between compliance with human rights and the fight against terrorism are considered in greater detail below, particularly in relation to the interviewing and investigative processes.

## A. Respecting human rights is the right thing to do

Respecting human rights is the right thing to do. It is right to treat all people with basic human dignity and respect, without discrimination: it is morally right at the individual level, and it is a mark of professionalism and integrity in law enforcement and criminal justice systems.

Human rights abuses, particularly torture and other forms of ill-treatment, have devastating effects on the lives of victims, which also spread to the victims' families, communities and society at large. The suffering of victims is not confined to the violation itself, but typically manifests itself in long-term physical and psychological suffering and trauma:

[T]he psychological problems most commonly reported by torture survivors in research studies include: (a) psychological symptoms (anxiety, depression, irritability or aggressiveness, emotional instability, self-isolation or social withdrawal); (b) cognitive symptoms (confusion or disorientation, impaired memory and concentration); and (c) neurovegetative symptoms (insomnia, nightmares, sexual dysfunction). Other findings reported in studies of torture survivors include abnormal sleep patterns...brain damage...and personality changes ... The effects of torture can extend throughout the life of the survivor affecting his or her psychological, familial, and economic functioning ... Such consequences have also been shown to be transmitted across generations in studies of various victim/survivor populations and across trauma types.<sup>3</sup>

In addition to the effects of torture and other human rights violations on victims, such abuses also have an effect on the perpetrators and on society as a whole, as described by the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment:

Torture, ill-treatment and coercion have devastating long-term consequences for individuals, institutions and society as a whole, causing serious and long-lasting harm to victims and often injuring the humanity and mental health of perpetrators. Such practices corrupt the cultures of institutions that perpetrate, participate in, assist in or overlook them. They debase societies that endorse or accept their use, erode public trust in law enforcement and damage its relationships with communities, with negative consequences for future investigations.<sup>4</sup>



### Focus

#### Effects of torture on perpetrators: Sri Lanka\*

Examples of the long-term effects of torture on perpetrators:

Perpetrator 1: [He] worked as an interrogator ... during the 88/89 insurrection period. He used to physically beat the inmates, used to burn them with lighted cigarettes, pushed the genitals of the victims inside the drawer of a table, closed the drawer causing them enormous pain, and sometimes conducted executions... .

From 1992–1993 his mental health started fading. He could hear the voices of his victims, their shouting in pain. [He] had intense rage and as a result of repeated physical abuse, his wife and

3 M. Costanzo, E. Gerrity and M. Brinton Lykes, "The Use of Torture and Other Cruel, Inhumane, or Degrading Treatment as Interrogation Devices", 2006, *Society for the Psychological Study of Social Issues*.

4 A/71/298, para. 20.



### Focus

#### *Effects of torture on perpetrators: Sri Lanka\* (continued)*

children left him. Several times, he tried to commit suicide. In 2002, he was diagnosed with post-traumatic stress disorder after a series of psychological assessments and detailed clinical interviews. [He] had intrusions, nightmares, phobias, ideas of reference, hallucinations and various other trauma-related symptoms. He was severely abusing alcohol in order to forget the events that occurred.

Perpetrator 2: He perpetrated severe acts of torture over a number of years. He has nightmares full of blood, often he sees a bleeding skull ... He has flashbacks of torture, intense rage, suicidal and homicidal ideas, alienation, impulse deregulation, alterations in attention and consciousness, alterations in self-perception, alterations in relationships with others, inability to trust and inability to maintain long-term relationships, or even mere intimacy.

\* R.M. Jayatunge, M.D., "Jaffna, peace and conflict: Psychological effects of torture", 2010, Groundviews – Journalism for Citizens.



### Activity 2

- In what ways do you think torture and other forms of ill-treatment and the violation of human rights are immoral?
- Considering the quotes set out in the above section, how relevant is each quote to the specific context of Nigeria?
- Choose five human rights you consider to be of particular relevance in conducting interviews in terrorism cases. On the assumption that you are an interviewer, what effect do you think the violation of each of the five identified human rights would have on you personally, both in the short and longer term?



## B. Nigerian and international law and policy respect and protect human rights in countering terrorism

Respect for human rights is an integral principle embedded in the legal framework of Nigeria. More particularly, the Constitution of the Federal State of Nigeria sets out fundamental rights in chapter 4 (sects. 33–44).<sup>5</sup> Furthermore, as noted above, the National Counter-Terrorism Strategy of Nigeria highlights the need to respect human rights as integral to its measures to counter terrorism.

International law requires States to comply with human rights law in the measures they adopt to prevent, investigate and punish acts of terrorism. International counter-terrorism treaties typically contain a provision reiterating that measures adopted under the treaty must respect human rights. For example, article 14 of the 1997 International Convention for the Suppression of Terrorist Bombings provides that:

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.

<sup>5</sup> Additional details on laws relevant to specific aspects of the interviewing and investigative processes and the prevention of torture and other forms of ill-treatment are included in subsequent chapters of the present module.

In its resolutions, the Security Council also reaffirms the threat terrorism poses to international peace and security:

[t]he imperative to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations, and also stressing that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee law, and humanitarian law.<sup>6</sup>

## C. Respect for human rights is central to both the United Nations and African Union strategies against terrorism

Both the Security Council and the General Assembly have consistently stressed the importance of the compliance of States with their obligations under international law and that the adoption of measures to combat terrorism should be in accordance with international law, in particular international human rights law, refugee law, and humanitarian law.

On 8 September 2006, States Members of the United Nations, including Nigeria, unanimously adopted, by General Assembly resolution 60/288, the United Nations Global Counter-Terrorism Strategy. The adoption of the strategy was a historical moment – the first time that all Member States had agreed to a common strategic approach to fight terrorism.

The Global Strategy commits States to undertake measures aimed at addressing conditions conducive to the spread of terrorism, including lack of the rule of law and violations of human rights, and to ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.

The same position has consistently been adopted by the African Union. On 2 September 2014, at its meeting in Nairobi, the African Union Peace and Security Council emphasized the imperative need, in the fight against terrorism and violent extremism, to uphold the highest standards of human rights and international humanitarian law.<sup>7</sup>

On 1 June 2014, States Members of the African Union signed the Protocol to the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism, in which they reiterated their “conviction that terrorism constitutes a serious violation of human rights and a threat to peace, security, development, and democracy”. In addition, in the Protocol the States parties also committed themselves to “outlaw torture and other degrading and inhumane treatment, including discriminatory and racist treatment of terrorist suspects, which are inconsistent with international law” (article 3 (1)(k)).

In certain specific circumstances, some human rights can be limited or qualified to a degree. For instance, the right to a public trial, freedom of expression, freedom of movement and the right to respect for privacy can be limited to the extent this is necessary to achieve legitimate aims, which include the protection of lives, property and democratic institutions against terrorism. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment, however, is absolute. It cannot be limited under any circumstances, even in the face of terrorism.

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<sup>6</sup> Security Council resolution 1624 (2005); see also, more recently, Security Council resolution 2178 (2014).

<sup>7</sup> African Union, communiqué issued at the 455th meeting of the Peace and Security Council meeting at the level of Heads of State and Government (PSC/AHG/COMM.(CDLV)), para. 28.



## D. Human rights abuses create conditions conducive to terrorism

Widespread human rights violations, including arbitrary arrest and torture in police or military detention, cannot justify terrorism, and there is little doubt that such abuses are among the conditions that provoke tension, hatred and mistrust of governments. The goal of many terrorist groups is to provoke hatred towards governments. In resorting to torture, inhuman and degrading treatment and other human rights violations, governments facilitate the achievement of that same objective. Reports of human rights violations by government officials, particularly those committed in the name of combating terrorism, can be one of the most effective recruiting tools for terrorist groups.



### Focus

#### Secretary-General's Plan of Action to Prevent Violent Extremism

In December 2015, in his Plan of Action to Prevent Violent Extremism, the Secretary-General stressed the link between good governance, respect for the rule of law and human rights and the prevention of violent extremism:<sup>\*</sup>

Violent extremism tends to thrive in an environment characterized by poor governance, democracy deficits, corruption and a culture of impunity for unlawful behaviour engaged in by the State or its agents. When poor governance is combined with repressive policies and practices which violate human rights and the rule of law, the potency of the lure of violent extremism tends to be heightened. Violations of international human rights law committed in the name of State security can facilitate violent extremism by marginalizing individuals and alienating key constituencies, thus generating community support and sympathy for and complicity in the actions of violent extremists. Violent extremists also actively seek to exploit State repression and other grievances in their fight against the State. Thus, Governments that exhibit repressive and heavy-handed security responses in violation of human rights and the rule of law, such as profiling of certain populations, adoption of intrusive surveillance techniques and prolongation of declared states of emergency, tend to generate more violent extremists. International partners that are complicit in such action by States further corrupt public faith in the legitimacy of the wider international system.

In his 2005 landmark report on the threats facing the world, the Secretary-General made similar observations on the importance of upholding human rights while countering terrorism:<sup>\*\*</sup>

Terrorists are accountable to no one. We, on the other hand, must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so we facilitate achievement of one of the terrorist's objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.

<sup>\*</sup> A/70/674, para. 27.

<sup>\*\*</sup> "In larger freedom: towards development, security and human rights for all" (A/59/2005 and Corr.1), para. 94.

In the African context, a study by the United Nations Development Programme (UNDP) found clear links between human rights violations by State security actors and levels of violent extremism:

These findings throw into stark relief the question of how counter-terrorism and wider security functions of governments in at-risk environments conduct themselves with regard to human rights and due process. State security-actor conduct is revealed as a prominent accelerator

of recruitment, rather than the reverse ... Grievances against government and State security actors are particularly pronounced among those most vulnerable to recruitment ... [to terrorist organizations].<sup>8</sup>



### Activity 3

1. In Nigeria, how do you think the incidence of violent extremism and the level of recruitment to terrorist organizations will be affected by the following? Please give full reasons for your conclusions:
  - Torture of terrorism suspects during interrogations.
  - Conditions of detention that amount to cruel, inhuman or degrading treatment or punishment.
  - Failure to provide adequate health care to a detained terrorism suspect, resulting in serious illness.
  - Failure to notify a suspect's family of their detention.
  - Refusal to allow a suspect in detention access to legal counsel.
2. The UNDP Journey to Extremism in Africa reports that "State security-actor conduct is revealed as a prominent accelerator of recruitment, rather than the reverse":
  - To what extent do you think that this statement is relevant and applicable in Nigeria?
  - What practical steps do you think law enforcement officials, and in particular interviewers, could take to support the reduction in the incidence of violent extremism and the level of terrorist recruitment in Nigeria?

## E. Human rights abuses undermine terrorism prevention and investigation work

In addition to aiding terrorist propaganda and recruitment efforts, the abuse of the human rights of suspects and other persons thought to have information risks alienating those sectors of the population whose grievances terrorist groups claim to represent. Members of these often already marginalized communities are among the most important sources of information for police and security agencies on terrorist activity, including the identities, hiding places and plans of terrorists. When the relationship between the police and those communities is dominated by mistrust or even hatred, serious damage is done to the ability of governments to uncover terrorist plots, disrupt groups, prevent terrorist attacks and investigate acts of terrorism. *Human rights abuses will undermine the willingness of communities to cooperate with police and security agencies, and as such will undermine the fight against terrorism.* As noted in the 2007 report of the Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism:

The lack of trust between the police and communities may be especially disastrous in the counter-terrorism context. The gathering of intelligence is the key to success in largely preventive law enforcement operations.<sup>9</sup>

<sup>8</sup> United Nations Development Programme (UNDP), Regional Bureau for Africa, *Journey to Extremism in Africa – Drivers, Incentives and the Tipping Point for Recruitment*, 2017, pp. 5–6.

<sup>9</sup> A/HRC/4/26, para. 58.



## F. Evidence obtained through torture and other oppressive means is unreliable

Torture is known to consistently produce false confessions and unreliable or misleading information ... Faced with the imminent threat of excruciating pain or anguish, victims simply will say anything – regardless of whether it is true – to make the pain stop and try to stay alive.<sup>10</sup>

*Nils Melzer*

*Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*

Research in the United States of America has verified the link between oppressive interviewing techniques (including torture and other forms of coercion and oppression which do not, in their severity, amount to torture) and the incidence of false confessions, resulting in miscarriages of justice:

[T]here is irrefutable evidence from the civilian criminal justice system that techniques less coercive than torture have produced verifiably false confessions in a surprising number of cases. An analysis of DNA exonerations of innocent but wrongly convicted criminal suspects revealed that false confessions are the second most frequent cause of wrongful convictions, accounting for 24% of the total.<sup>11</sup>

When threatened with or subjected to torture and other human rights abuses, most persons in detention will sooner or later start talking, telling their torturers what they believe will put a halt to the pain and suffering. What a person subjected to torture says may happen to be true, in part or in its entirety, but it is inherently unreliable. Investigations based on information obtained under torture risk wasting precious investigatory resources. Furthermore, and even more worryingly, counter-terrorism operations by security forces based on false information obtained through torture or other oppressive means may have potentially disastrous consequences for both the security forces and the civilian population. This message was also reiterated by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment:

Reliance on inaccurate information obtained through mistreatment has adverse operational consequences, wasting resources better applied to enhance investigative capacity or pursue other leads. Intentional misinformation also sends investigators on distracting wild goose chases.<sup>12</sup>

Moreover, there are people who, even when faced with the most egregious acts of torture, will maintain their silence and will not divulge any information.

<sup>10</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), “Torture is torture, and waterboarding is not an exception – UN expert urges the US not to reinstate it”.

<sup>11</sup> M. Costanzo, E. Gerrity and M. Brinton Lykes, “The Use of Torture and Other Cruel, Inhumane, or Degrading Treatment as Interrogation Devices”, 2006, *Society for the Psychological Study of Social Issues*.

<sup>12</sup> A/71/298, para. 20.



## Case study

### Central Intelligence Agency (CIA): enhanced interrogation techniques

In December 2014, the Senate Select Committee on Intelligence of the United States Government published its *Committee Study on the Central Intelligence Agency's Detention and Interrogation Program*.<sup>\*</sup> The study "documents the abuses and countless mistakes made [by the CIA] between late 2001 and early 2009" in its efforts to obtain information from terrorism suspects through the use of "enhanced interrogation techniques".<sup>\*\*</sup>

The Committee's findings and conclusions include the following statements on the effects of using "enhanced interrogation techniques":

#1: ... The Committee finds, based on a review of CIA interrogation records, that the use of the CIA's enhanced interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation ... While being subjected to the CIA's enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence. Detainees provided fabricated information on critical intelligence issues, including the terrorist threats which the CIA identified as its highest priorities.<sup>\*\*\*</sup>

#20: The CIA's Detention and Interrogation Programme damaged the United States' standing in the world, and resulted in other significant monetary and non-monetary costs.<sup>\*\*\*\*</sup>

<sup>\*</sup> United States Senate Select Committee on Intelligence, *Committee Study on the Central Intelligence Agency's Detention and Interrogation Program*.

<sup>\*\*</sup> *Ibid.*, p. 2.

<sup>\*\*\*</sup> *Ibid.*, p. xi.

<sup>\*\*\*\*</sup> *Ibid.*, p. xxv.

When cases are brought to trial based on statements made under torture, there is a significant risk of the case collapsing in court (see chapter 6 below). If the prosecution is successful, miscarriages of justice may ensue, which, in addition to being an injustice, threaten to seriously undermine respect for and trust in the criminal justice system and the State's response to terrorism. The case of the "Birmingham Six" illustrates this point.



## Case study

### Case of the "Birmingham Six"<sup>\*</sup>

On 21 November 1974, bombs placed in two pubs in Birmingham, England, caused the death of 21 people and nearly 200 others were injured. Six men suspected by the police of being supporters of the Provisional Irish Republican Army (IRA), a terrorist organization, were arrested on the evening of the same day as they were about to board a ferry to Northern Ireland. In police custody some of the men made statements amounting to confessions. At trial, they retracted these statements, claiming that while in detention they had been subjected to various forms of coercion, including beatings, sleep and food deprivation, threats of being shot and threats to harm their families if they did not confess. Evidence of their confessions was admitted at trial. Relying on the expert forensic evidence provided by the prosecution witness (controverted by the defence expert witness) and the evidence of police interviews, which included the confessions provided by the defendants, the jury found the six men guilty. Courts of Appeal upheld the convictions.

In the following years, investigative reporters and lawyers, convinced of the innocence of the six men, uncovered evidence suggesting police fabrication and suppression of evidence casting serious doubt on the version presented by the police of how the interviews and confessions had been obtained. In addition, the forensic evidence given at their trial was shown to have been significantly inaccurate.



### Case study Case of the “Birmingham Six”\* (continued)

In 1990, the Birmingham Six applied to have their cases reopened and their convictions overturned. The prosecution did not oppose this application. The Court of Appeal hearing the case found that the confessions to the police and the forensic evidence were both so unreliable that the convictions were unsafe and unsatisfactory. The six men were released after spending 16 years in prison, and each was awarded compensation in the range of £840,000 to £1.2 million. To this day, the real perpetrators of this terrorist act, one of the worst to take place in the United Kingdom of Great Britain and Northern Ireland, have not been identified.

\* *Regina v. McKenny and Others*, (1991) 93 Crim. App. R. 287, judgment of 27 March 1991.

It is important to note that when innocent individuals are wrongly convicted of an offence that they did not commit, the real perpetrators are also at liberty to carry out further criminal acts, thus placing the public at large at further risk.



### Activity 4 Arrest on suspicion of terrorist offences

B has been arrested on suspicion of committing various terrorist offences. At first, he strongly denied the allegations made against him and rejected the charge of having been a member of or having any association with a terrorist organization. However, after a period of detention without access to the outside world, B admits his involvement in the alleged offences and gives a list of names of other “terrorists” and key locations relevant to the terrorist organization.

What are the possible risks, and the short- and long-term direct and indirect consequences of acting on the information given by B?

What do you think the security forces and/or the law enforcement agencies should do next?



## G. Human rights abuses undermine international counter-terrorism cooperation

In addition to prohibiting States from engaging in serious human rights violations, human rights law also requires them not to become complicit in such acts committed by other States. The most prominent international law obligation in this regard is the non-refoulement principle, which prohibits States from extraditing persons to another State where there are substantial grounds for believing that they could be in danger of being subjected to torture. A government that is reported to have resorted to torture will encounter great difficulties in obtaining the extradition of fugitive terrorism suspects. It may also encounter difficulties obtaining mutual legal assistance to support investigations and trials and other forms of cooperation.

Furthermore, a growing number of States have legislation or policies in place that prohibit the provision of weapons and other military equipment, police equipment and training to States that are reported to engage in torture and other serious human rights violations. A “bad reputation” as a country in which human rights abuses in countering terrorism are widespread can become a significant obstacle in obtaining solid information and technical assistance vital to counter-terrorism efforts.



## Self-assessment questions

1. What is the relevance and importance of adopting a human rights-based approach to investigative interviewing in terrorism cases?
2. Which human rights are of particular relevance in the interviewing of terrorist victims, witnesses and suspects? What are the implications of violating such human rights?
3. What are the effects of torture and other cruel, inhuman or degrading treatment or punishment and other human rights violations on victims, perpetrators and society as a whole?
4. What are the key national, regional and international legal and policy frameworks that promote compliance with human rights in the fight against terrorism?
5. What is the relationship between human rights abuses in the interviewing process and the incidence of violent extremism/level of terrorist threats?
6. What effect, if any, would human rights violations in the interviewing process have on the effectiveness of terrorism prevention and investigation work, and why?
7. How reliable is evidence obtained through torture and other cruel, inhuman or degrading treatment or punishment or through other oppressive or coercive techniques likely to be? What could be the possible legal and practical consequences of relying on such evidence?
8. What are the legal and practical implications of human rights abuses during the interview process on international cooperation?

# 2

## Effective investigative interviewing



### Learning objectives

By the end of chapter 2, readers will be able to:

- Identify the primary aims of interviewing suspects.
- Discuss the rapport-based interviewing approach, including identifying its particular features and advantages, and the practical steps needed to implement the approach effectively in terrorism cases.
- Explain good practices in interviewing terrorism suspects, including interview preparations, key considerations to be taken into account and the effective structuring of interviews.
- Identify practical challenges in interviewing victims, witnesses and suspects in terrorism cases, as well as practical and effective ways to address the challenges.
- Explain why victims and witnesses of terrorist incidents may be reluctant to give evidence.
- Explain why an aggressive or coercive interviewing approach is not likely to be effective.

“Persons interviewed by authorities during investigations may be confronted with the entire repressive machinery of society. Questioning, in particular of suspects, is inherently associated with risks of intimidation, coercion and mistreatment. The risks are heightened for vulnerable persons and for persons questioned in detention.

“Coercive techniques, even when not amounting to torture or ill-treatment, are means to the same ends, administered by State agents to confirm their presumption of guilt. They are likely to produce faulty information and give rise to conditions conducive to the use of torture or ill-treatment. Strengthening protection against coercive questioning methods and championing an interviewing model based on the principle of presumption of innocence are accordingly key to preventing mistreatment during questioning and enhancing authorities’ effectiveness.”<sup>13</sup>

*Juan Méndez*

*Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*

Chapter 2 describes the process of the collection of oral evidence in terrorism cases, particularly the interviewing of victims, witnesses and suspects; considers general principles of interviewing; and discusses the rapport-based approach to interviewing, highlighting good interviewing practices in terrorism cases.

The ability to conduct effective human rights-compliant interviews of suspects, witnesses and victims requires specific and continuous training. Chapter 2 is not intended as a substitute for such training nor as an operational training module on interviewing techniques but is meant rather to reinforce the critical need to ensure that respect for human rights goes hand in hand with good procedural and technical interviewing skills.

13 A/71/298, paras. 8 and 42.

As highlighted in the above quotation, there is a high risk of intimidation, coercion and mistreatment in the interviewing of suspects, witnesses and victims, particularly for vulnerable interviewees, and there are negative consequences in using coercive interview techniques. Central to the discussion in chapter 2 is a recommended shift from guilt-presumptive accusatory interrogation techniques that prioritize eliciting confessions above all else to more professional investigative interviewing approaches that prioritize obtaining accurate information and avoid reliance on untrustworthy evidence obtained through forced confessions.

Chapter 2 examines the interviewing of suspects and witnesses in separate sections. As is widely recognized, in the interviewing of suspects and witnesses there is a considerable overlap of issues, and there may be instances when the decision whether to treat a person as a suspect or a witness (which has both practical and legal consequences) is fraught with difficulty or may even change during the course of the interview. This issue is referenced in the activity box at the end of chapter 2.

Specific matters relating to the interviewing of female victims, witnesses and suspects are set out in chapter 7 and those relating to the interviewing of children are set out in chapter 8. This module does not include specific detailed recommendations on the interviewing of other vulnerable persons, such as people living with a disability. It should be borne in mind, however, that, in interviewing vulnerable persons, approaches should be adapted to take into account the specific needs, risks and vulnerabilities of each interviewee, and that interviewers need specialized sensitivities, skills and training.

Issues relating to the implementation of basic safeguards relevant to the interview process, including requirements for interview records and the audio and visual recording of interviews, are discussed in greater detail in chapter 5.



## Reference

In 2019, the Nigeria Police Force Training and Development Branch and UNODC collaborated on the development of the *Nigeria Handbook on Counter-Terrorism Investigations*,\* which provides practical information and guidance on effective and human rights-compliant approaches to the investigation of terrorism cases.

The Handbook covers all stages and aspects of counter-terrorism investigations and provides detailed guidance on the collection of oral evidence. The following sections of chapter 2 draw heavily on selected passages from the Handbook, highlighting best practices and reinforcing the view that effective investigative interviewing and respect for human rights go hand in hand. The Handbook is recommended reading for anyone wishing to acquire wider knowledge of counter-terrorism investigation practices and procedures.

\* Available upon request from UNODC.

Another extremely useful resource, which is extensively referenced in chapter 2 and is also highly recommended reading, is the Principles on Effective Interviewing for Investigations and Information Gathering (the “Méndez Principles”). The principles, which are applicable in all interviewing situations, whether complex or straightforward, can be categorized as follows:<sup>14</sup>

<sup>14</sup> Principles on Effective Interviewing for Investigations and Information Gathering (the “Méndez Principles”), 2021, para. 19.



## Focus

### Principles on Effective Interviewing for Investigations and Information Gathering (the “Méndez Principles”)

#### Principle 1 – On Foundations

Effective interviewing is instructed by science, law and ethics.

#### Principle 2 – On Practice

Effective interviewing is a comprehensive process for gathering accurate and reliable information while implementing associated legal safeguards.

#### Principle 3 – On Vulnerability

Effective interviewing requires identifying and addressing the needs of interviewees in situations of vulnerability.

#### Principle 4 – On Training

Effective interviewing is a professional undertaking that requires specific training.

#### Principle 5 – On Accountability

Effective interviewing requires transparent and accountable institutions.

#### Principle 6 – On Implementation

The implementation of effective interviewing requires robust national measures.



## A. Introduction

Oral evidence is primarily collected from interviews of eyewitnesses and victims of terrorist incidents. Oral evidence can also come from other types of witnesses, including expert witnesses, as well as from suspects and accused persons.

It should be borne in mind that the greatest evidential value comes from information provided by interviewees that can be tested, validated and corroborated against other available evidence rather than from an interviewer's attempts to assess the truthfulness of a single piece of information based on the appearance, tone or gestures of the interviewee.

Various approaches can be used to interview witnesses and suspects of crime. In general, it is important to allow interviewees to provide their freely given accounts of the events in question at the beginning of the interview process – this initial free account of the events usually tends to be when the most valuable and most reliable information is gathered. This should be followed by clarification, through an open-ended process, starting with broader questions and subsequently narrowing the inquiry to more specific topics. Other best practices include: detailed planning and preparation ahead of the interview; developing a rapport with the interviewee; avoiding leading or suggestive questions, including aggressive questioning; observing and taking body language into account; establishing and maintaining a timeline; and analysing information obtained from witnesses against information already known to the investigator.

Professionally conducted interviews can assist in:

- Gathering relevant material and evidence about a case.
- Making a determination about the prosecution or early release of a person.
- Building a prosecution case, thereby saving time, money and resources.

- Increasing public confidence in law enforcement, particularly on the part of witnesses and victims of crimes who come into direct contact with the police and other law enforcement agencies.

## B. Interviewing witnesses

A terrorism incident is traumatic for everyone involved, including witnesses. This includes those who are physically present at the scene of an attack as well as others who learn about the incident through the media or from other sources. In general, those who are physically present during a terrorist incident experience the greatest trauma, which can have an impact on the quality and accuracy of information they provide to investigators. The typical emotional responses of witnesses to terrorism involve a combination of disbelief, disorientation, fear, feelings of helplessness, feelings of personal responsibility, anger and outrage.

The emotional responses mentioned above, coupled with other factors, determine the degree of cooperation witnesses are willing to undertake with law enforcement agencies during different stages of investigation and trial. One important feeling, common among witnesses, is a reluctance to give information to the police and to testify later in court. This reluctance or unwillingness to cooperate results from a number of factors, including:

- Fear of reprisal from terrorists given their extremely lethal and brutal nature.
- Narration of a terrorist incident can result in further trauma for witnesses, who do not want to relive painful experiences.
- Providing information to police and later testifying in court could be a lengthy, time-consuming and cumbersome process.
- Stigma attached to certain crimes connected to terrorism can be a discouraging factor for witnesses, including when they are victims of sexual and gender-based violence.

## C. Interviewing suspects in terrorism cases

In his report to the General Assembly in 2016, the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment confirmed the primary aim of an investigative interview and its critical components, as follows:

[T]he precise aim of questioning [is] to obtain accurate and reliable information in order to discover the truth of all relevant facts about matters under investigation. The aim of interviews must not be to elicit confessions or other information reinforcing presumptions of guilt or other assumptions held by officers. Interviews are conducted to make the presumption of innocence operational.

*Objectivity, impartiality and fairness are critical components of investigative interviews. They require officers to keep an open mind, even when the evidence against a person is strong. An objective, impartial and fair interviewing process will reduce the risks of resorting to confession-oriented techniques or coercion and of eliciting false admissions or faulty intelligence.*

Depending on their degree, severity, chronicity and type, undue psychological pressure and manipulative practices may themselves amount to inhuman or degrading treatment. This may be the case, among others, when certain techniques are used in combination, over a lengthy period or against vulnerable persons, including children, persons with psychosocial disabilities, persons who do not understand or adequately speak the language of the interviewing officers and other

persons who may be particularly sensitive to coercion owing to their specific needs or physical or emotional development.<sup>15</sup>

The objective outlined above, and the underlying principles of objectivity, impartiality, fairness and lack of coercion, should be the foundation of all investigative interviewing. Such an approach is the most effective way of obtaining accurate information and supporting the fight against terrorism and is in compliance with human rights obligations.

In the highly charged atmosphere following a terrorist incident, when investigators are under a huge amount of pressure, there is a potential risk that in conducting interviews of suspects to get information in the quickest manner they may be tempted to resort to robust and even aggressive interviewing techniques. This type of conduct risks compromising fair and objective procedures, as well as the human rights of the suspects. Such tendencies and practices are likely to prove counterproductive.

It has been demonstrated that the use of coercive interviewing methods is likely to lessen the predisposition of interviewees to cooperate and to create resistance on their part, even if they might otherwise have chosen to answer questions. In cases where interviewees facing mistreatment comply with the demands of interviewers, the information obtained is of dubious reliability; false or misleading information is frequently provided to placate interviewers in order to avoid or stop the threat of abuse. Furthermore, physical mistreatment, including excessively long interviews, deprivation of food or sleep, temperature manipulation and beatings, has also been proven to produce cognitive impairment, including the inability to retrieve information from memory, and as such to produce incorrect information and false confessions.<sup>16</sup>

Biased, leading and manipulative questioning methods have also been shown to affect the interviewee's memory and to corrupt the accounts provided. In addition, when interviewers assume or suspect that an interviewee may have certain types of information relevant to an investigation they may be more likely to develop "confirmation bias" and simply seek validation of information that they believe to be true. In practice, this means that they are more likely to employ suggestive, leading or misleading questioning techniques, as well as coercive, manipulative and pressure-filled tactics, in order to confirm their pre-existing beliefs. Starting from such assumptions regarding suspects is inconsistent with the obligation to respect a person's right to the presumption of innocence and heightens the risk of producing false confessions. Furthermore, interviewees may possess relevant information beyond that which they are suspected of having and may be unwilling to volunteer it under aggressive questioning; by using the wrong approach an interviewer may unknowingly thus miss information that is directly relevant to an investigation.<sup>17</sup>

Aggressive interviewing techniques, more often than not, produce unreliable information and compromise the willingness of suspects to cooperate with investigators.<sup>18</sup> In addition, such techniques damage the legitimacy of law enforcement agencies and negatively affect the investigation process. It is essential that investigators working on terrorism investigations acquire sufficient understanding of the behavioural, social and cultural attributes of terrorism suspects and apply appropriate strategies. To that end, a rapport-based approach is considered to be the most viable interviewing technique for obtaining reliable and accurate information from terrorism suspects.

The ideology, motivations, beliefs and reasons behind the commission of terrorist crimes are often different from other criminal activities. Investigators working on terrorism cases should, therefore, acquire sufficient knowledge about the ideology, commitments, beliefs, expectations, behaviours and motivations of terrorism suspects and their organizations so that they may understand the context and the position of suspects. Lack of such understanding by interviewers may adversely affect the interview process.

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15 A/71/298, paras. 49, 50 and 44.

16 Méndez Principles, para. 23.

17 Ibid., para. 26.

18 Ibid., para. 25.

Investigators should not challenge religious beliefs of suspects under investigation. Oftentimes, suspects suspend critical thinking during the interview process and ignore information that contradicts their beliefs. The strategy of challenging a suspect's belief system is likely to result in a less cooperative interview and can amount to a violation of the suspect's human rights.

As highlighted in the Méndez Principles, an effective interview process will typically involve the following:

- (a) Thorough preparation and planning;
- (b) Ensuring relevant safeguards are applied throughout;
- (c) Keeping an open mind, including avoiding prejudice;
- (d) Creating a non-coercive environment;
- (e) Establishing and maintaining rapport;
- (f) Using lawful and scientifically supported questioning techniques;
- (g) Active listening and enabling the interviewee to speak freely and completely; and
- (h) Assessment and analysis of the information gathered and the interview process.<sup>19</sup>

Another issue key to ensuring effective interviewing is the need to assess the vulnerabilities of interviewees, the impact of those vulnerabilities on the interview process and the practical steps that can be taken to address the vulnerabilities and needs of interviewees that can promote and protect their rights. This is relevant to both suspects and witnesses. Relevant issues impacting the vulnerabilities of interviewees may include:

- (a) Age, sex, gender, gender identity or expression, or sexual orientation;
- (b) Nationality or ethnicity;
- (c) Cultural or religious background;
- (d) Physical, intellectual or psychological disability;
- (e) Difficulties with communication;
- (f) Difficulties in understanding (including language barriers);
- (g) Inability to read and/or write;
- (h) Age-related conditions such as dementia;
- (i) Belonging to a minority group or a marginalized socioeconomic group;
- (j) Health status, such as injury, illness, depression, anxiety, intoxication, post-traumatic stress disorder or other weakened or altered state; and
- (k) Prior traumatic experiences, including having been the subject of or witnessing abuses or human rights violations.<sup>20</sup>

It is also imperative that interviewers observe the highest ethical standards at all times. Interviewers have an ethical duty to adopt the most effective methods available that protect the rights and dignity of interviewees as well as the integrity of the process. Interviewers have a corresponding duty to reject coercive tactics, as they harm interviewees, undermine the objective of gathering accurate information and can amount to human rights violations.<sup>21</sup>

## D. Rapport-based approach

The primary emphasis of a rapport-based approach is that interviewers must develop enough understanding, trust and credibility with suspects that the latter are encouraged to provide accurate and reliable information.

As explained in the Méndez Principles: the development of rapport is essential in supporting effective information-gathering. During the interview, rapport entails establishing and maintaining a relationship characterized by:

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<sup>19</sup> *Ibid.*, para. 57.

<sup>20</sup> *Ibid.*, paras. 135 and 136.

<sup>21</sup> *Ibid.*, paras. 49 and 53.

respect and trust; a non-judgmental mindset; non-aggressive body language; attentiveness; and patience. This reduces the effects of the inherent power imbalance in the interview process.<sup>22</sup>

The rapport-based approach is firmly grounded in scientific research. The Méndez Principles refer to the fact that:

Fundamentally, extensive research shows that rapport-based, non-coercive interviewing:

- (a) Stimulates communication between the interviewer and the interviewee;
- (b) Facilitates memory retrieval;
- (c) Increases the accuracy and reliability of information provided;
- (d) Enables exploration of the veracity of information provided;
- (e) Increases the likelihood of information-rich and genuine admissions; and
- (f) Reduces the risk of eliciting false information or false confessions.<sup>23</sup>

The rapport-based interviewing approach includes tactics for developing cooperation, eliciting accurate and reliable information from an interviewee's memory, strategically presenting evidence or information to an interviewee and assessing the credibility of information received. Together, these methods offer a highly effective suite of techniques that can be successfully applied by trained professionals to gather criminal and intelligence information from interviewees, including criminal suspects, victims, witnesses and intelligence sources. Importantly, these methods also facilitate compliance with ethical and legal standards for the treatment of individuals. These positive effects help investigators in solving cases, gathering information and enhancing outcomes, which, in turn, builds public trust.

To build rapport, interviewers engage in extended conversations with suspects, during which the former identifies and assesses potential motivations, inspirations, drives, interests and vulnerabilities of the latter.

Developing rapport involves more than simply "being nice" to suspects or giving them what they want just to gain information. It requires a series of give-and-take interactions under circumstances controlled by the interviewers. If they are to elicit accurate information, interviewers need to engage suspects in extended conversation and to develop relationships that help to provide insight into the suspects' motivations and, perhaps, their deceptive practices or resistance techniques.<sup>24</sup>

In a rapport-based interviewing process, interviewers shape the relationship using a variety of interpersonal, cognitive and emotional strategies and techniques to gain critical information from their subjects. During the rapport-building process, investigators should avoid asking questions of an investigative nature and focus on building bonds with suspects on matters unrelated to the investigation. Investigators should take the opportunity, where appropriate, to demonstrate their concern for the welfare and well-being of suspects.

Rapport is founded on commonalities (for example, family, spouse, education or adversity), interactions and mutual respect. One useful tactic in rapport-building with terrorist suspects is showing consideration of their cultural and religious practices. For example, allowing Muslim suspects the opportunity to pray at set times, to wash prior to prayer and to receive culturally appropriate meals is a powerful signal that the police are sensitive to their needs and that the interviewers are respectful of them. It should also be noted that failure to accord suspects such respect may also violate their right to manifest their religious beliefs, and may also amount to cruel, inhuman or degrading treatment or punishment.

A major goal of the rapport-based approach is to build relationships with suspects, allowing them to see interviewers as individuals. If suspects see their interviewers as people rather than as instruments of an

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22 Ibid., para. 106.

23 Ibid., para. 35.

24 See S. B. Walters, *Principles of Kinesic Interview and Interrogation* (2nd ed.), 2002, Boca Raton, Florida, Routledge and CRC Press.

“enemy” government, they may be more willing to talk about matters related to their case. Inevitably, even rapport-based approaches may sometimes encompass adversarial arguments, disagreements, admonishments, criticism and challenging questions, but a strength of the rapport-based approach is that these should always be somewhat tempered by the suspects’ knowledge that interviewers are concerned about their future and are behaving in a fair manner.<sup>25</sup>



### Activity 5

A 27-year-old male has been arrested. He is thought to be a member of Boko Haram and is suspected to have made and assembled a number of suicide-bomb vests that have been used in recent terrorist attacks. You have been tasked to conduct the first interview of the suspect.

- What are the five biggest challenges you think you will face in conducting an effective interview with the suspect?
- What is the primary objective of the interview?
- What interviewing approach will you adopt? What will this approach mean in practical terms when interviewing the suspect?
- What preparations will you make prior to the interview?
- What key considerations will you take into account for this suspect?

## E. Good interviewing practices

The Nigeria Handbook on Counter-Terrorism Investigations proposes a set of good practices on interviewing. The purpose of these good practices is to establish a standardized procedure for conducting witness interviews during crime and terrorism investigations performed by officials of law enforcement agencies in Nigeria. These good practices should be applied in strict accordance with the Administration of Criminal Justice Act 2015, the Terrorism (Prevention) Act, 2011 (TPA) (as amended), all other applicable directives, laws, rules, regulations or administrative instructions issued by the Government of Nigeria and/or by the heads of relevant law enforcement agencies, while fully respecting the human rights and dignity of interviewees.

The good practices provide guidance on:

- Initial preparations for the interview.
- Third parties/support persons.
- Key considerations in conducting the interview.
- Structure of the interview.
- Writing the statement.
- Readback and signing of the statement.
- Additional and supplementary statements.
- Disclosure of information.

25 J. Schafer and J. Navarro, *Advanced Interviewing Techniques: Proven Strategies for Law Enforcement*, 2004, Springfield, Illinois, Charles C. Thomas.

- Good practices on conducting electronically recorded interviews.
- Use of interpreters during investigations.

Extracts from the sections of the good practices relating to the initial preparations for the interview, key considerations for conducting the interview and structure of the interview, are set out below.



## Focus

### Good practices on interviewing: initial preparations for the interview

- Investigators must review all relevant information, laws, rules and procedures and other related material before commencing an interview.
- Investigators should prepare a written outline or a questionnaire prior to the start of the interview. This helps in covering salient points and keeping the interview focused and systematic. However, interviewers should be flexible and be prepared to explore new previously unthought of areas if their relevance comes to light during the interview.
- Investigators should try to ensure that interviews are conducted in a language the interviewee can understand and is comfortable with. If required, an interpreter should be used for the purpose.
- Appropriate arrangements about the place of interview should be made. Interviewers should choose a location which is safe, comfortable, culturally appropriate and ensures privacy.
- In the event that an interpreter is to be used, interviewers should read relevant good practices, including the good practices for the use of the interpreter during interviews.
- Investigators should try to acquire basic knowledge about the background, language, behaviour and degree of religious orientation of the witnesses they are interviewing. This helps in establishing and maintaining a rapport with the interviewees.
- Investigators should ensure availability of the necessary logistical requirements prior to the start of the interview.
- Interviews of children, female witnesses and victims of terrorism or sexual and gender-based violence should be conducted at a location where their privacy can be ensured. Moreover, officers having specific knowledge of the impact of violence and trauma on such witness's behaviour and development should be assigned to conduct interviews of such witnesses and victims.
- If more than one investigator is involved in the interview process, they must identify and agree as to who will act as the lead interviewer. The investigator leading the interview must ensure that necessary steps for a smooth and orderly conduct of the interview are in place. The investigator must take all possible precautions for protecting the confidentiality of the witness and the information provided during all stages of the investigation.
- Interviewees should be informed that the information provided may be used for generating further leads for the investigation and may also be used in the trial.
- Interviewees should be advised that full cooperation is expected and that they will be given a range of confidentiality, fairness and due process protections.



## Focus

### Good interviewing practices: key considerations for conducting the interview

- Depending on the circumstances, once a person's name has been identified as possessing information that may be of relevance to an investigation, investigators should try to interview that person as early as practicable. Unnecessary delay in taking a statement could be construed as affecting the credibility of witnesses. It should be borne in mind that the individual vulnerabilities of interviewees must in all circumstances be identified and taken into account, as it may well be that interviewees who have just witnessed a serious crime may, in its immediate aftermath, be in a state of great shock, distress and trauma which may adversely affect their ability to retrieve accurate information from memory.
- The witness should first be asked to provide a free account of their experience.
- The questions then asked to the witness should be focused, purposeful and unambiguous. Therefore, extreme care must be taken in the selection of questions and wording used.
- Plain and simple language should be used during questioning.
- The witness should be asked one question at a time.
- The questioning should be systematic, methodical and unhurried. The witnesses should be given time to understand the question and prepare their responses.
- Witnesses should not be unduly interrupted while answering questions. Such interruptions may disrupt the flow of their thought processes and they may forget valuable information.
- If witnesses are trying to recall an event or memory, they should be given adequate opportunity for such recollection.
- If, in the course of their statements, witnesses depart from the subject at hand, they should be asked to refocus their attention on the matter. It should be noted, however, that there may be circumstances where this may not be appropriate if, for example, interviewees are providing valuable information about another aspect of the investigation.
- Interpreters, if used, should not be allowed to take a dominant role during any stage of the interview. Interviewers must ensure that they maintain full control of the interview during all its stages.
- Depending upon their length, there should be breaks in interviews after a reasonable period of time, for example, every hour, or whenever requested by one of the participants. This should not result in breaking the flow of interviews at critical junctures.
- The statement or the information provided by one witness should not be made available to another witness.
- If the information provided by a witness is ambiguous or contradicts information provided by another witness such ambiguities and contradictions should be resolved through additional questioning or supplementary statements obtained from one or both of the witnesses. Such additional questioning should not consist of leading or closed questions as this may lead to confirmation bias, and to the obtaining of misleading or unreliable information.
- Concerns about the security of witnesses, if any, must be immediately brought to the attention of senior police officers.
- The use of inducements, force or threats of any kind, to elicit information is strictly prohibited.



## Focus

### Good interviewing practices: structure of the interview

- At the beginning of the interview, interviewers should provide witnesses with a brief overview of the investigation. The discussion may cover the areas listed below as well as any other concerns or issues in relation to the investigation brought up by the witnesses.
  - The nature of the investigation.
  - The investigation in relation to which the witness is being interviewed without disclosing any confidential information.
  - A brief overview of the procedure of investigation and the format of the interview.
  - The objectivity and impartiality of the entire process and the fact that no conclusions have been reached before the start of the investigation.
  - Confidentiality issues, for instance, whether witnesses want to keep their names and/or the information provided confidential. However, witnesses must be informed of the scope of the confidentiality.
  - Issues related to witness cooperation.
  - Indication to witnesses that they should tell the truth and confine their statements to things what they have actually seen first-hand; and that hearsay should be clearly distinguished from first-hand information.
  - Notify witnesses that full cooperation is expected.
  - Intimation to witnesses that they may be recalled in order to clarify certain issues or if additional information is required.
- The initial briefing should be followed up by a free account of interviewees, followed by general questions, which may further assist investigators in establishing a cooperative relationship with witnesses. Questions relating to the background of witnesses, their age, address and how they would like to be addressed (by first name, title or surname, etc.) may be asked.
- Background questions should be followed up by open-ended questions. For instance, "Tell me...", "Can you describe...", "What happened next", etc. Open-ended questions generally result in detailed answers and hence help secure more information from the witness than questions that elicit "yes" or "no" answers.
- Follow-up questions on each topic should be asked to clarify issues and concerns. Interviewers should go into depth and spend time to get elaborate answers to key questions.
- Non-response questions should be followed up by additional questioning.
- Strategic disclosure of evidence.
- Extreme care should be taken not to ask suggestive, leading or non-neutral questions, for example, "Did you see X drinking in the bar at 5.30 p.m. on 20 August?".
- Prior to concluding the interview, interviewers should be satisfied that all aspects of the investigation on which the witness may be able to provide information have already been adequately covered.
- Interviewers should conclude by asking closing questions and providing advice to witnesses. Examples of closing questions and relevant advice include:
  - Do you want to add anything that you may feel is relevant to this investigation that we have not discussed?
  - Would you like to elaborate on anything we have discussed during the interview?
  - Do you acknowledge that no threat, promise or inducement has been given to you during the course of the interview?
  - Do you have any objections or reservations as to the way you have been treated by the interviewer?
  - Request witnesses to keep the subject matter confidential in order to protect the integrity of the investigation.



## Further reading

### Convention against Torture Initiative, CTI Training Tools 1/2017: Investigative Interviewing for Criminal Cases\*

Investigative Interviewing for Criminal Cases is a practical interviewing training tool. It is highly recommended reading for all persons involved in conducting interviews in criminal cases. The tool contains many practical examples, covering all stages of the interview process. The recommended interview structure is as follows:

#### Planning and preparation

- Physical preparations.
- Case-related preparations.
- Mental preparations.

#### Introduction and building rapport

- Start recording.
- Engage and explain.
- Legal requirements.
- Reasons and routines.

#### First free account

- Introduction.
- Open “tell, explain and describe” questions.
- Active listening.

#### Clarification and disclosure

- Theme structuring.
- Questioning.
- Strategic disclosure of evidence.

#### Closure of the interview

- Summarize.
- Information.
- Positive closure.
- Stop recording.

#### Evaluation of the interview

- The information.
- The investigation.
- The interview(er).

\* Convention against Torture Initiative, CTI Training Tools 1/2017, Investigative interviewing for criminal cases ([cti2024.org](http://cti2024.org)).



## Activity 6

Law enforcement officers have raided a building in the outskirts of Kano that has been used as a safe house by Boko Haram. Inside the building they found three women and a 17-year-old boy, as well as material to build explosive devices, including suicide belts. The investigation indicates it was intended that two of the women were to be used as suicide bombers, while the third woman was there as a “minder”, to manage the house and guard the suicide bombers.

Law enforcement officers have subsequently arrested T, the husband of the third woman, a middle-ranking Boko Haram member, who appears to have set up and managed the safe house.

The investigation yields the following information on the three women and the boy.

1. A is aged 28. She is the wife of T, a mid-ranking operative in Boko Haram. She is the “minder” of the women in the safe house, that is, she was guarding the other woman and the boy, doing her best to maintain their willingness to act as suicide bombers and keeping the contact with the outside world. There are claims that Boko Haram forced her and her husband into running the safe house by threats against them and the lives of their families. The investigators think that she might have valuable information on who supplied the terrorist safe house with the material to build the explosive devices and food, as well as on the network directing and supporting the operation of the safe house. She would probably be prepared to cooperate with the investigators if she was not charged or offered a substantially reduced sentence. She is also afraid of reprisals against herself and her family if she cooperates with the authorities.
2. B is aged 23. She was in the house to be used as a suicide bomber. Her brother was killed in a counter-terrorism operation, although B claims that he had no connection to Boko Haram. B was motivated by promises from T and A to support her brother’s family with monthly payments, in particular to feed the five children, and by a desire to avenge her brother’s death.
3. C is aged 19. In 2015, the terrorist group came to her village and forced her family to hand her over to be married to a fighter from the terrorist group. She lived with her “husband” for nearly two years, and has a child, born in July 2017. In May 2018, her “husband” was killed in combat. C was moved to the safe house. T and A convinced her that it was best for her to become a “martyr” herself.
4. D is aged 17. He is an orphan. In 2018, he joined the terrorist group together with his uncle and the uncle’s sons. For the first year, he was used as a messenger and spy. He subsequently underwent training in handling firearms and explosives. He states that he took part once in an armed clash with security forces, in which he was wounded. Thereafter, his commander told him that he should become a suicide bomber, and he was taken to the safe house to prepare for a suicide mission.
  - Who should interview the persons found in the safe house? What training should the interviewers have received?
  - As a member of the interview team, what would be your overall objective, and what approach would you adopt when interviewing A, B, C and D? What would this approach mean in practice and how would you develop a rapport with A, B, C and D?
  - As an interviewer, what specific interview preparations would you make, what key considerations would you take into account, and how would you structure each interview?



## Reference

The above scenario requires careful consideration of gender dimensions and training in the interviewing of victims of sexual and gender-based violence and in children's rights and child-sensitive interviewing. These topics are covered in chapters 7 and 8.



## Self-assessment questions

1. What are the five biggest practical challenges in interviewing victims, witnesses and suspects in terrorism cases? What are possible practical ways to address these challenges?
2. Why may victims and witnesses of terrorist incidents be reluctant to give evidence?
3. What is the primary objective of interviewing a suspect?
4. Why is an aggressive or coercive interviewing approach unlikely to be effective in terrorism cases? What do you think the effects of adopting an aggressive or coercive interviewing approach would be in Nigeria?
5. What is the rapport-based interviewing approach? What is its primary emphasis, and what are its particular features, challenges, advantages and disadvantages in the context of investigative interviews in terrorism cases? What preparations, strategies and practical considerations would you take into account when trying to develop a rapport with a terrorist suspect?
6. What are different stages of an effective investigative interview?
7. Identify good practices in interviewing terrorism suspects in the context of interview preparations, key considerations to be taken into account and effective structuring of the interview process.

# 3

## Right to remain silent and right not to be compelled to testify against oneself



### Learning objectives

By the end of chapter 3, readers will be able to:

- Discuss the relationship between the right to remain silent, the right not to be compelled to give evidence at trial and the presumption of innocence.
- Identify the relevant provisions in Nigerian law and the applicable case law guaranteeing the right to remain silent and the right not to be compelled to give evidence at trial.
- Discuss whether, and in what circumstances, guilt can be inferred from silence under Nigerian law.
- Explain the effect of a failure to caution a suspect as to his right to remain silent.
- Explain the effect of a defendant's refusal to give evidence at his trial.

The right not to be compelled to testify against oneself or to confess guilt must be understood more broadly "in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt".<sup>26</sup>

*Human Rights Committee*

The Constitution of the Federal Republic of Nigeria<sup>27</sup> enshrines these rights in two sections, section 35, dealing with the right to personal liberty, and section 36, on the right to a fair hearing. Section 35 (2) reads: "Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice". Section 36 (11) states that: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial".

At the international level, the International Covenant on Civil and Political Rights, article 14 (3)(g), enshrines, as a fundamental guarantee of the right to a fair trial, the right of each individual "not to be compelled to testify against himself or to confess guilt". The African Charter on Human and Peoples' Rights (Banjul Charter) does not expressly mention the right to remain silent. However, the African Commission on Human and Peoples' Rights has given prominence to this right, both in the context of custodial questioning and in the context of trial. The Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, states in part 3, on liberty, arrest and detention (part 3.B (iv)):

*Right to non-self-recrimination:* The right of persons undergoing questioning to remain silent shall be respected at all times. It shall be prohibited to take undue advantage of the situation of a

<sup>26</sup> Human Rights Committee, general comment No. 32 (CCPR/C/GC/32), para. 41.

<sup>27</sup> Constitution of the Federal Republic of Nigeria (1999).

detained person for the purpose of compelling or inducing him or her to confess, to incriminate himself or herself, or to testify against another person;<sup>28</sup>

In addition, in section N, article 6 (d), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission in 2003,<sup>29</sup> state that: “[t]he accused has the right not to be compelled to testify against him or herself or to confess guilt”, adding, significantly, that “[s]ilence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent”.

Moreover, the Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (Luanda Guidelines), adopted by the African Commission in 2017,<sup>30</sup> state, in section 9, concerning questioning and confessions, that “the right of persons undergoing questioning to remain silent shall be respected at all times” and that “no detained person while being questioned shall be subject to torture or other ill-treatment, such as violence, threats, intimidation or methods of questioning which impair his or her capacity of decision or his or her judgment”.



### Activity 7

The right to remain silent when interviewed by criminal investigators and the right not to be compelled to give evidence at trial are closely related. They are both also closely related to the presumption of innocence. Discuss the relationship between presumption of innocence and sections 35 (2) and 36 (11) of the Constitution of the Federal Republic of Nigeria.

## A. Right to remain silent upon arrest or in detention

Any person who is arrested or detained shall have the right to remain silent. Section 35(2) of the Constitution of the Federal Republic of Nigeria provides that: “(a)ny person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice”.

This constitutional right is also captured in section 6 (2) of the Administration of Criminal Justice Act, 2015, which states:

- (2) The police officer or the person making the arrest or the police officer in charge of a police station shall inform the suspect of his rights to:
  - (a) remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice;
  - (b) consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest;
  - (c) free legal representation by the Legal Aid Council of Nigeria where applicable;

At the international level, the scope of the right to silence is accurately reflected in the above-mentioned wording of the Luanda Guidelines, stating that the “right of persons undergoing questioning to remain silent shall be respected at all times”. However, the wording used in section 35 (2) of the Constitution of the Federal

28 African Commission on Human and Peoples’ Rights: legal instruments (achpr.org).

29 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

30 Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (Luanda Guidelines), Participant Manual.

Republic of Nigeria and section 6 (2) of the Administration of Criminal Justice Act, 2015 appears more restrictive in its scope, which raises the following issues:

1. Does the right to remain silent during questioning by the police extend to persons who are not in detention or who have not been formally arrested?
2. Does the right to silence end if suspects consult a “legal practitioner or any other person of his own choice”?
3. Does the right to remain silent extend to persons called in by the police as potential witnesses in the course of an investigation, for example, when such persons may be afraid of making self-incriminating statements or may fear that the police are considering them as suspects?

It appears to be generally accepted by the courts and most practitioners that the right of a suspect to remain silent extends throughout the investigation and trial process without restrictions or limitations. This was confirmed in the case of *Utteh v. State*,<sup>31</sup> in which it was stated that “it is true that an accused person is, under our constitution entitled to remain silent either during investigation or in court”. It is clear from the Constitution of the Federal Republic of Nigeria that all suspects must be treated with dignity and respect,<sup>32</sup> that all suspects are to be presumed innocent until proven guilty<sup>33</sup> and that no suspect can be forced in any way to confess or forced to answer any questions put to him or her at any stage of the investigation process, regardless of whether the suspect has consulted with a legal practitioner, and regardless of the arrest or detention status.

The right against self-incrimination during the trial stage extends to witnesses. This is apparent from section 183 of the Evidence Act, 2011, which provides that: “No one is bound to answer any question if the answer to it would, in the opinion of the court, have a tendency to expose the witness or the wife or husband of the witness to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for”. This right extends to the production of documents by virtue of section 184 of the Evidence Act, which states that “No witness who is not a party to a suit shall be compelled to produce ... any document the production of which might tend to incriminate him”. It would appear to follow logically that the right against self-incrimination for persons initially treated as witnesses would extend throughout the investigation and trial process, and that it would simply be wrong to try to force, pressure or coerce a witness to incriminate themselves at any stage. This view also accords with best practices for interviewing, in particular the Méndez Principles, as discussed in chapter 2.

The *Brusco* case, which was decided by the European Court of Human Rights and is discussed below, dealt with the situation of a suspect heard as a witness.



### Case study

#### *Brusco v. France* case\*

The police suspected Mr. Brusco of having instigated the assault and battery of another man. He was taken into police custody and questioned as a witness (instead of as a suspect, which is how he was actually considered to be by the investigators). French law allows the police to require witnesses to solemnly swear to tell the truth, which is not allowed in the case of suspects. During questioning under oath, Mr. Brusco admitted his role in instigating the intimidation attempt but denied having instigated physical violence. The French courts found that, as the police did not have evidence against Mr. Brusco before the interview, the prohibition in French law against forcing a suspect to make statements under oath had not been violated.

31 See *Sylvester Utteh v. the State*, (1992) 2 NWLR (PT 223) 257.

32 Constitution of the Federal Republic of Nigeria (1999), sect. 34 (1).

33 *Ibid.*, sect. 36 (5).



### Case study *Brusco v. France case\** (continued)

The European Court of Human Rights, however, concluded that Mr. Brusco was not just a witness and should have had the right to remain silent and not to incriminate himself. The situation was aggravated by the fact that Mr. Brusco was not assisted by a lawyer until after he had been held in police custody for over 20 hours. Had a lawyer been present, he would have been able to inform Mr. Brusco of his right to remain silent.

\* European Court of Human Rights, *Brusco v. France*, Application No. 1466/07, Judgment of 14 October 2010.



### Activity 8 Right to remain silent and police questioning of persons who are not suspects

What would be the answer under Nigerian law to the facts in the *Brusco* case?

## (i) Duty of the police to inform suspects of their right to remain silent

The Judges' Rules in Nigeria, which derive from the Judges' Rules set out in English law, were first introduced in Nigeria in 1912. The current version of the Judges' Rules in Nigeria is based upon the Judges' Rules in England of 1964. Historically, the Judges' Rules have not had the force of law but have been administrative rules to guide the police and other investigating agencies on what they should and should not do when questioning a person suspected of committing a crime. In addition to promoting best practices and ensuring the voluntariness of statements, a key concept behind the rules was that they gave the courts a discretionary power to admit or reject statements obtained in violation of the rules. On the issue of the right to remain silent, Rule 2 requires that before putting any questions to a person suspected of committing a criminal offence, a caution must be administered in the following terms: "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence". The Nigerian Supreme Court has also suggested that this caution should be included in the written statement of the suspect.<sup>34</sup> The key importance of the Judges' Rules is that they establish and reinforce the giving and recording of the caution statement as the required best practice.

The schedule to the Criminal Procedure Code, 1960, applicable in the States of Northern Nigeria, required that a caution be given as soon as the police officer has evidence, that is, information that can be presented in court and which would afford reasonable grounds for suspecting that the person interviewed committed an offence. The caution is usually given in the following terms: "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence". When a person is charged with or informed that he may be prosecuted for an offence he should be cautioned as follows: "Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence". The schedule to the Criminal Procedure Code gave legal effect to the administrative requirement to give a caution, as contained in the Judges' Rules, in the relevant States. The schedule to the Criminal Procedure Code gave legal effect to the administrative requirement to give a caution, as contained in the Judges' Rules, in the relevant States.

Prior to the Administration of Criminal Justice Act, 2015 Nigerian courts commended the police for applying the Judges' Rules. They held, however, that where no caution under the Judges' Rules had been given, the court could not vitiate the confessional statement because while the caution rule is a rule of administrative

<sup>34</sup> *Oguda v. the State*, (2011) 18 PWLR (pt. 1278) 1.

procedure it is not a mandatory rule of law. Failure to apply the rule does not, in itself, render confessional statements inadmissible. For example, in *Okeke v. the State*, the Court of Appeal held that the decision to admit in evidence statements extracted during police investigation without administering a caution is at the discretion of the court. Failure to caution the suspect before police interrogation did not render inadmissible evidence received in the process. In the case of the *State v. Edeker* and others, the court held that the admissibility of a statement given in the absence of a caution would depend upon whether or not the lack of a caution suggested that the statement may not have been made voluntarily.<sup>35</sup>

Section 6 (2) of the Administration of Criminal Justice Act, 2015,<sup>36</sup> quoted above, effectively incorporated the codification of the Judges' Rules into national law in the Northern States of Nigeria. There is now a clear legal requirement to give a caution, although there is still a level of ambiguity and consequent inconsistency as to how the courts should interpret the effects of failure to give a caution. While the issue was raised before the Supreme Court in the case of *Fatai Olayinka v. the State*,<sup>37</sup> the Court failed to resolve the issue, deciding the case on other grounds, and the opportunity to rule on the ambiguity was lost. Nonetheless, the requirement to give a caution would appear to be rendered meaningless if there is no sanction for its breach, and furthermore, such an approach may simply encourage failure to comply with the requirement. The bottom line is that a caution should be given in all circumstances: it is a clear requirement in law; it is the right thing to do; and it is in line with recognized best practice. The Human Rights Practice Manual of the Nigerian Police Force, in section 3.6, sets out guidelines when arresting persons on legal grounds, which explicitly state that all police personnel must administer a caution, informing persons arrested, detained or under investigation about their rights under the law.

Furthermore, at the regional level, section 5 (Notification of rights) of the Luanda Guidelines provides that:

At the time of their arrest, all persons shall be informed of the rights set out in section 4, orally and in writing, and in a language and format that is accessible and is understood by the arrested person. Authorities shall provide the arrested person with the necessary facilities to exercise the rights [including the right to silence and freedom from self-incrimination] set out in section 4, above.<sup>38</sup>

Investigators should therefore consider that any incriminating statement obtained without caution runs the risk of being ruled inadmissible or at the very least having the weight of the evidence gained significantly diminished, and any deliberate violation could be construed as coercive or oppressive and could also impinge on the reliability of the information obtained.



### Case study

#### *Miranda v. Arizona* case\*

In the case of *Miranda v. Arizona*, Mr. Miranda was arrested at his home and taken into custody to a police station where he was identified by a complaining witness. He was interrogated by two police officers for two hours, which resulted in a written and signed confession. At trial, the oral and written confessions were presented to the jury. Miranda was found guilty of kidnapping and rape and was sentenced to long-term imprisonment on each count.

Mr. Miranda appealed to the Supreme Court of the United States of America, arguing that his privilege against self-incrimination under the fifth amendment (which protects various rights including the right against self-incrimination) had been violated and that his confession should

35 *The State v. Edeker and others* (1981) 2NCR 335.

36 Administration of Criminal Justice Act, 2015.

37 *Fatai Olayinka v. the State* (2007) 9 NWLR (PT 1040)561.

38 Luanda Guidelines, sect. 5.



### Case study

#### *Miranda v. Arizona case\* (continued)*

not have been admissible at trial. The United States Supreme Court examined whether statements obtained from an individual who is subjected to custodial police interrogation are admissible against him in a criminal trial and whether procedures which seek to assure that the individual is accorded his privilege under the fifth amendment to the Constitution not to be compelled to incriminate himself are necessary. The Supreme Court held that “there can be no doubt that the fifth amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves”.

The United States Supreme Court held that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way”. The Supreme Court further held that “without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would otherwise do so freely”. Therefore, a defendant “must be warned prior to any questioning that he has the right to remain silent; that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires”.

The Supreme Court reversed the judgment of the Supreme Court of Arizona in the case.

\* United States Supreme Court, *Miranda v. Arizona*, 384 U.S. 436 (1996).



### Activity 9

#### **Admissibility of confessional statements obtained in violation of section 6 (2) of the Administration of Criminal Justice Act, 2015**

Consider section 6 (2) of the Administration of Criminal Justice Act, 2015, together with section 35 (2) of the Constitution of the Federal Republic of Nigeria and section 29 (2) of the Evidence Act, 2011 (the latter provision is examined in detail in chapter 5.A below):

Should the admission of confessional statements obtained without the police administering the caution continue to be admissible at the discretion of the court?

Could it be argued that a failure by the police (or other authority questioning a suspect) to inform the suspect of his right to remain silent amounts to “oppression” for purposes of section 29 (2) of the Evidence Act, 2011? If so, what would be the consequence for the admissibility of any statement made?

## **(ii) Transparent detention practices**

Investigating officers should endeavor to make the detention process as transparent as possible so that the whereabouts of suspects are known to family members, as highlighted in the Méndez Principles:

A key safeguard for detainees is their right to promptly notify a family member, friend, or other person of their choice about the fact, place and circumstances of their detention. The detaining

authority is responsible for enabling the communication with the third party and recording who has been notified and when the notification took place. In addition to being a legal obligation, facilitating this contact with the outside world is also an opportunity to build trust and rapport with a detainee.

Authorities may only delay the notification of a third person on an exceptional basis, and only if the delay is provided for by law and necessary to prevent a risk to the investigation (such as to prevent the destruction of evidence or the flight of accomplices). The reasons for the delay should be recorded in a detailed manner, be accessible to counsel and to the person deprived of liberty, be approved by a prosecutor or a judge or other appropriate senior official and be judicially monitored as to the continuing necessity and proportionality of any delay.<sup>39</sup>

Section 6 (2)(c) of the Administration of Justice Act, 2015 provides that: “the authority having custody of the suspect shall have the responsibility of notifying the next of kin or relative of the suspect of the arrest at no cost to the suspect”. This is the basic requirement under Nigerian law applicable to all persons arrested on suspicion of having committed a criminal offence. The provision does not specify the time frame for notifying the suspect’s next of kin or relative. It is suggested that notification should, in the absence of exceptional circumstances, such as the need to prevent the destruction of evidence or the flight of accomplices, take place as soon as possible following the arrest and detention of the suspect as any delay would tend to undermine the very purpose of the requirement and the protection of the suspect’s rights (the right to have a relative or other person notified of the suspect’s arrest is a basic safeguard against torture and other forms of ill-treatment).<sup>40</sup> However, the wording of the requirement, as set out in section 6 (2)(c) of the Administration of Criminal Justice Act, 2015 differs from internationally accepted best practice, as reflected in the Méndez Principles and the Robben Island Guidelines, in that it is limited to notifying the next of kin or relative of the suspect and does not extend to notifying a friend of the suspect or any other appropriate person.

Section 28 (l) of the Nigerian Terrorism (Prevention) Act, 2011 (TPA) as set out in section 13 of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA)<sup>41</sup> envisages the possibility of withholding, for up to 48 hours, an accused person’s access to any person other than a “medical officer of the relevant enforcement or security agency or his counsel”, although the grounds for withholding access to family members is not set out in the law. However, the limitation of contact with friends and family should be carefully considered on a case-by-case basis, taking into account the individual circumstances of the suspect and the perceived risks associated with allowing the suspect to have access to family and friends, including the human rights implications. For example, a female suspect may be more cooperative if she knows that adequate arrangements have been made for the care of her young children; conversely, the inability of a female suspect to make alternative care arrangements for her children may put her children’s rights and welfare at risk and may contribute to uncooperative behaviour.

It should be emphasized that it is clear from section 28 (l) of the Terrorism (Prevention) Act, 2011 (TPA) as set out in section 13 of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA) that the limited possibility of restrictions upon the accused person’s right of access to third parties does not extend to the accused person’s counsel. As confirmed in the Méndez Principles, “All detained persons being interviewed have a right to a lawyer, including through legal aid, before any questioning by authorities – independent of their status or formal designation. This right applies from the outset of deprivation of liberty”.<sup>42</sup> The Méndez Principles further state that “A lawyer present during an interview serves as a legal resource, an eyewitness to the fairness of the process, and a safeguard against misunderstandings, misrepresentations and any attempt to conduct the interview unlawfully. These functions serve to enhance the evidentiary value of the information gathered during the interview”.<sup>43</sup>

39 Méndez Principles, paras. 77 and 78.

40 As set out in section A of the African Commission on Human and Peoples’ Rights Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).

41 UNODC, User’s Guide to the Terrorism (Prevention) Act, 2001 (TPA) as amended by the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA), 2021.

42 Méndez Principles, para. 80.

43 Ibid., para. 108.

## B. Right not to be compelled to give evidence at trial

Section 36 (11) of the Constitution of the Federal Republic of Nigeria states that: “No person who is tried for a criminal offence shall be compelled to give evidence at the trial”.

At the international level, the International Covenant on Civil and Political Rights (article 14 (3)(g)) enshrines, as a fundamental guarantee of the right to a fair trial, the right of each individual “not to be compelled to testify against himself or to confess guilt”. This right is closely aligned with the presumption of innocence, which is guaranteed by article 14 (2) of the International Covenant on Civil and Political Rights and is described by the Human Rights Committee as follows:

According to article 14, paragraph 2, everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.<sup>44</sup>

Under Nigerian criminal procedure law, whenever an accused is arraigned before the court for prosecution, he shall have three options open to him. These options are provided for under section 287 (1)(a)(i), (ii) and (iii) of the Criminal Procedure Act, 1960, as follows:

- (1) At the close of the evidence in support of the charge, it appears to the court that a *prima facie* case made out against the defendant sufficiently to require him to make a defence, the court shall call upon him for his defence and -
  - (a) if the defendant is not represented by a legal practitioner, the court shall inform him that he has three alternatives open to him, namely:
    - (i) he may make a statement, without being sworn, from the place where he then is; in which case he will not be liable to cross-examination; or
    - (ii) he may give evidence in the witness box, after being sworn as a witness; in which case he will be liable to cross-examination; or
    - (iii) he need say nothing at all, if he so wishes;

and in addition the court shall ask him if he has any witness to examine or other evidence to adduce in his defence and the court shall then hear the defendant and his witnesses and other evidence, if any.<sup>45</sup>

In addition, section 236 of the Criminal Procedure Code provides as follows:

- (a) the accused shall not be examined as a witness except at his own request;
- (b) before giving evidence the accused shall be warned by the court that he is not bound to give evidence, and that if he does so, his evidence may be used at the inquiry or trials;
- (c) the failure of the accused to give evidence shall not be made the subject of any comment by the prosecution, but the court may draw such inference as it thinks just;<sup>46</sup>

<sup>44</sup> Human Rights Committee, general comment No. 32 (CCPR/C/GC/32), para. 30.

<sup>45</sup> Government of Nigeria, Criminal Procedures Act.

<sup>46</sup> Government of Nigeria, Criminal Procedure Code.

These sections are consistent with section 180 of the Evidence Act, 2011, which provides that:

Every person charged with an offence shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:

Provided that –

- (a) a person so charged shall not be called as a witness in pursuance of this section except upon his own application;
- (b) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged;
- (c) when the only witness to the facts of the case called by the defence is the person charged he shall be called as a witness immediately after the close of the evidence for the prosecution;
- (d) every accused person called as a witness in pursuance of this section shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence;
- (e) nothing in this section shall affect the right of the person charged to make a statement without being sworn.<sup>47</sup>

The combined effect of the provisions of section 36 (11) of the Constitution of the Federal Republic of Nigeria, section 180 of the Evidence Act, 2011, section 287 of the Criminal Procedure Act and section 236 of the Criminal Procedure Code is to the effect that the defendant has a right to remain silent. A defendant is competent to give evidence but cannot be compelled to do so. A defendant will always have three options, namely, to remain silent, to give an unsworn statement, or to give sworn testimony before the court. If the defendant chooses to give sworn evidence, he can be cross-examined on that evidence. In accordance with the presumption of innocence, it is not incumbent upon the defendant to prove his or her innocence, but rather it is for the prosecution to prove that the defendant is guilty of the offence charged by proving every element of the offence beyond reasonable doubt. While the defendant is under no obligation to assist the prosecution in providing evidence or oral testimony, she/he just needs to show doubt or uncertainty in relation to one or more of the elements of the offence.

Another issue that must be considered is whether any adverse inferences may be drawn from a defendant's exercising his or her lawful right not to give evidence at trial. This point is addressed in section 181 of the Evidence Act, 2011, which states that: "(i)n any criminal proceeding, where a defendant has not given evidence, the court, prosecution or any other party to the proceeding may comment on the failure of the defendant to give evidence but the comment shall not suggest that the defendant failed to do so because he was, or that he is, guilty of the offence charged". This would seem to suggest that guilt cannot be inferred from a defendant exercising the right not to give evidence. There have been a number of cases before the courts in which this issue has been addressed.

In the case of *Igbele v. the State*,<sup>48</sup> Katsina-Alu, the judge of the Supreme Court, remarked that: "I think good sense and indeed common sense demands that the appellant should and must put forward some explanation as to what happened to the deceased. But no explanation was forthcoming. In fact, the appellant called no witness in his defence ... The only irresistible inference from the circumstances presented by this evidence is that the appellant killed the deceased".

<sup>47</sup> Government of Nigeria, Evidence Act, 2011.

<sup>48</sup> *Igbele v. The State* (2006) (SC 233 of 2004) NGSC 7, p. 129.

In the case of *Sugh v. the State*<sup>49</sup> the Court of Appeal held that the right to silence means that no accused person can be compelled to give evidence at his trial but does not prevent a trial court from drawing any necessary inference from the evidence before it, the accused person's failure or refusal to give evidence notwithstanding.

There is clearly a degree of uncertainty as to what inferences may be drawn from defendants exercising their right of silence and their right not to give evidence. It is arguable that it is perfectly possible and reasonable for a court to draw adverse inferences against defendants who have exercised their right of silence based on a practical assessment of all the evidence before the court – in such a situation the inferences would derive from actual evidence before the courts, rather than merely from the silence of the defendants. On the other hand, it is arguable that a stricter approach should be adopted, which would view any inference from silence as a means of compulsion or coercion, and which would both violate the right against self-incrimination and impact upon and tend to shift the burden of proof away from the prosecution. As such, it is arguable that compliance with the Constitution of the Federal Republic of Nigeria is paramount, and no one should ever be penalized in any way for simply exercising their fundamental rights as set out in the Constitution.

As detailed in section 3.A above, the right against self-incrimination under Nigerian law clearly extends to witnesses. This relates to both the giving of oral evidence and the production of documents that may incriminate a witness, as confirmed by sections 183 and 184 of the Evidence Act.

In relation to terrorism cases, section 9 of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA) adds the following subsection to section 15 of the Terrorism (Prevention) Act, 2001 (TPA), reading, "where the Attorney-General has reasonable grounds to suspect that a person has committed, is committing or is likely to commit an act of terrorism or is in possession of terrorist property", he may, for the purposes of an investigation, apply to a Judge in Chambers for the accused person for an order compelling the suspect to deliver to him any document relevant to identifying, locating any property belonging to, or in the possession or control of that person.

It is arguable that the above section, which compels a suspect to produce documents which may well incriminate him or her, is a clear violation of the constitutional right against self-incrimination and the presumption of innocence and would tend to shift the burden of proof away from the prosecution.



### Case study

#### Nigerian case law on the right to remain silent at trial

In *Igbele v. the State*,\* the accused was tried and convicted for the murder of the deceased. At the trial, the accused pleaded not guilty to the charge. The prosecution called nine witnesses. At the end of the prosecution's case, the counsel for the accused entered a "no case" submission and thereafter elected not to testify or call any witnesses and rested his case on that of the prosecution. On appeal to the Supreme Court, the Justice of the Supreme Court held that: " ... an accused person, ... has the constitutional right to remain silent and leave the trial to the prosecution to prove the charge against him. This is because, the citizen's right to remain silent even when arraigned for a criminal offence, is an inviolable one. The prosecution is bound to prove its case, beyond reasonable doubt".

In *Adekunle v. the State*,\*\* the Supreme Court stated: "For the duration of a trial, an accused person, may not utter a word. He is not bound to say anything. It is his constitutional right to remain silent. The duty is on the prosecution, to prove the charge against him beyond reasonable doubt".

In *Utteh v. the State*,\*\*\* on the issue of whether an accused person has the right to remain silent during investigation or in court, it was held that "it is true that an accused person is, under our

<sup>49</sup> *Sugh v. the State* (1988) 2 NWLR (Pt 77), p. 475.



### Case study

#### Nigerian case law on the right to remain silent at trial (continued)

constitution, entitled to remain silent either during investigation or in court. The prosecution is still bound, as the party on which the onus lies – a very high onus at that – to prove its case beyond reasonable doubt. But if at the trial the Prosecution calls credible evidence which in evidence remains unrebutted, the court is entitled to accept it”.

\* *Igbele v. the State* (2006) (SC 233 of 2004) NGSC 7.

\*\* *Adekunle v. the State* (2006) 14 NWLR (Pt 1000) 717.

\*\*\* *Utteh v. the State* (1992) 2 NWLR (PT 223) 257, p. 274.



### Self-assessment questions

1. List the provisions of the Constitution of the Federal Republic of Nigeria relevant to the right to remain silent.
2. List the provisions of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights relevant to the right to remain silent.
3. Discuss the relationship between the right to remain silent, the right not to be compelled to give evidence at trial and the presumption of innocence.
4. What are the relevant provisions in Nigerian law and the applicable case law guaranteeing the right to remain silent and the right not to be compelled to give evidence at trial?
5. What is the effect of a failure to caution a suspect as to his right to remain silent?
6. Under Nigerian law, what choices does a defendant have at trial in relation to the giving of evidence? What is the effect of a defendant's refusal to give evidence at trial?

# 4

## Prohibition of torture and other cruel, inhuman or degrading treatment or punishment



### Learning objectives

By the end of chapter 4, readers will be able to:

- Define torture, identify its elements and provide examples of acts that may constitute torture.
- Identify the key legal provisions on the prohibition of torture in Nigerian law.
- Explain the difference between torture and other cruel, inhuman or degrading treatment or punishment and give examples of acts that may constitute cruel, inhuman or degrading treatment.
- Discuss the responsibility of accessories, accomplices and superiors for acts of torture under Nigerian and international law.
- Explain the obligation to investigate acts of torture under Nigerian law.
- Describe the circumstances in which torture constitutes a crime under international law.

“Torture is known to consistently produce false confessions and unreliable or misleading information ... Faced with the imminent threat of excruciating pain or anguish, victims simply will say anything – regardless of whether it is true – to make the pain stop and try to stay alive.

“[E]ven if torture did work, that does not make it legally or morally acceptable ... Let us be clear: if you are looking for military advantage in war, you can argue that chemical weapons ‘work’, or terrorism ‘works’ as well. However, all civilized peoples of this world have stood together to outlaw such abhorrent practices because, just as torture, they irreparably destroy the humanity and integrity not only of the victim, but also of the perpetrator and, ultimately of society as a whole.

“In my view, the universal recognition of the absolute nature of this prohibition may well constitute the most fundamental achievement of mankind.”<sup>50</sup>

*Nils Melzer  
Special Rapporteur of the Human Rights Council  
on torture and other cruel, inhuman or  
degrading treatment or punishment*

<sup>50</sup> Statement of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, 30 January 2017.

As discussed in chapter 1, and as stressed in the above quotation: torture is inherently wrong; torture is inherently unreliable; torture undermines the authority, legitimacy and credibility of the State; and torture undermines the fight against terrorism.

Chapter 4 addresses what constitutes torture and other cruel, inhuman or degrading treatment or punishment, and considers the absolute prohibition of torture, the responsibility of accessories, accomplices and supervisors, the status of torture as a serious crime and the responsibility to investigate and prosecute allegations of torture.

## A. Definition of torture

### Definition of torture in Nigerian law

The Constitution of the Federal Republic of Nigeria states, in section 34, that:

Every individual is entitled to respect for the dignity of his person, and accordingly –  
(a) no person shall be subject to torture or to inhuman or degrading treatment;<sup>51</sup>

The Anti-Torture Act, 2017<sup>52</sup> defines torture in sections 2 (1) and 2 (2). Section 2 (1) provides a definition of torture based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

**Anti-Torture Act, 2017**  
**Acts of torture**  
**Section 2 (1)**

Torture is deemed committed when an act by which pain or suffering, whether physical or mental, is intentionally inflicted on a person to —

- (a) obtain information or a confession from him or a third person;
- (b) punish him for an act he or a third person has committed or is suspected of having committed;  
or
- (c) intimidate or coerce him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity provided that it does not include pain or suffering in compliance with lawful sanctions.

The definition of torture thus has three elements:

- An act intentionally inflicting severe pain or suffering, whether physical or mental.
- 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 for any reason based on discrimination of any kind.
- When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or another person acting in an official capacity.

51 Constitution of the Federal Republic of Nigeria (1999).

52 Government of Nigeria, Anti-Torture Act, 2017.

Section 2 (2) of Anti-Torture Act, 2011 complements the above definition by providing a list of forms of ill-treatment that are considered torture for the purposes of the Act. The list consists of two parts:

- (a) Physical torture;
- (b) Mental or psychological torture.

### **Anti-Torture Act, 2017**

#### **Acts of torture**

#### **Section 2(2)**

For the purpose of this Act, torture includes —

- (a) physical torture, which refers to such cruel, inhuman or degrading treatment which causes pain, exhaustion, disability or dysfunction of one or more parts of the body, such as -
  - (i) systematic beatings, head-bangings, punching, kicking, striking with rifle butts and jumping on the stomach,
  - (ii) food deprivation or forcible feeding with spoiled food, animal or human excreta or other food not normally eaten,
  - (iii) electric shocks,
  - (iv) cigarette burning, burning by electrically heated rods, hot oil, acid, by the rubbing of pepper or other chemical substances on mucous membranes, or acids or spices directly on the wounds,
  - (v) the submersion of the head in water or water polluted with excrement, urine, vomit or blood,
  - (vi) being tied or forced to assume fixed and stressful bodily positions,
  - (vii) rape and sexual abuse, including the insertion of foreign bodies into the sex organs or rectum or electrical torture of the genitals,
  - (viii) other forms of sexual abuse,
  - (ix) mutilation, such as amputation of the essential parts of the body such as the genitalia, ears or tongue and any other part of the body,
  - (x) dental torture or the forced extraction of the teeth,
  - (xi) harmful exposure to the elements such as sunlight and extreme cold,
  - (xii) the use of plastic bags and other materials placed over the head to the point of asphyxiation,
  - (xiii) the use of psychoactive drugs to change the perception, memory, alertness or will of a person, such as administration of drugs to induce confession or reduce mental competency, or the use of drugs to induce pain or certain symptoms of disease, or
  - (xiv) other forms of aggravated and deliberate cruel, inhuman or degrading physical or pharmacological treatment or punishment; and
- (b) mental or psychological torture, which is understood as referring to such cruel, inhuman or degrading treatment calculated to affect or confuse the mind or undermine a person's dignity and morale, such as -
  - (i) blindfolding,
  - (ii) threatening a person or such persons related or known to him with bodily harm, execution or other wrongful acts,
  - (iii) confinement in solitary cells put up in public places,
  - (iv) confinement in solitary cells against their will or without prejudice to their security,
  - (v) prolonged interrogation to deny normal length of sleep or rest,
  - (vi) causing unscheduled transfer of a person from one place to another, creating the belief that he shall be summarily executed,
  - (vii) maltreating a member of the person's family,

- (viii) causing the torture sessions to be witnessed by the person's family, relatives or any third party,
- (ix) inducing generalized fear among certain sections of the population,
- (x) denial of sleep or rest,
- (xi) inflicting shame by stripping a person naked, parading him in a public place, shaving his head or putting marks on his body against his will, or
- (xii) confinement in jails and prisons under intolerable and inhuman conditions or degrading mental treatment or punishment.

## Definition of torture under international law

The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment contains the following definition of torture in article 1 (1):<sup>53</sup>

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

There are currently 173 States parties to the Convention against Torture. The definition of torture contained in article 1 is widely accepted as reflective of customary international law.

In interpreting the language regarding torture contained in article 5 of the African Charter on Human and Peoples' Right (the "Banjul Charter") adopted by the African Commission on Human and Peoples' Rights, the Commission has adopted the definition of torture contained in article 1 of the Convention against Torture.

Developments in international law since the Convention against Torture was adopted suggest that, under international law, torture can be committed also without the instigation, consent or acquiescence of a public official or other person acting in an official capacity, for instance by perpetrators affiliated with a rebel militia or a private security company. The Rome Statute of the International Criminal Court (articles 7 and 8)<sup>54</sup> and the Elements of Crimes adopted by the Assembly of States Parties to the Rome Statute to assist the Court in the interpretation and application of the Statute<sup>55</sup> (articles 7 (1)(f), 8 (2) (a)(ii)-1 and 8 (2)(c)(i)-4), for example, do not mention the perpetrator's acting in an official capacity as an element of torture.

Similarly, in the 2001 judgment in the *Kunarac et al.* case, the International Tribunal for the Former Yugoslavia concluded that "the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law". In particular, the Tribunal held that "the presence of a State official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law". It defined torture as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground, against the victim or a third person.<sup>56</sup>

53 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

54 Rome Statute of the International Criminal Court.

55 International Criminal Court, *Elements of Crimes*, 2011.

56 International Tribunal for the Former Yugoslavia, Case No. IT-96-23-T & IT-96-23/1-T, Judgment of 22 February 2001, para. 496.



## Focus

### Prohibition of torture and other cruel, inhuman or degrading treatment or punishment in armed conflict

Where a terrorism suspect is apprehended and questioned in the context of an armed conflict, international humanitarian law (“the laws of war”) becomes applicable. In situations of international armed conflict (that is armed conflict between two States parties to the Geneva Conventions of 1949), torture of a prisoner of war or of a protected civilian constitutes a grave breach of Geneva Conventions III and IV (to which Nigeria is a party) and a war crime.

In situations of non-international armed conflict, that is all other armed conflicts, common article 3 of the Geneva Conventions of 1949 is the key provision. It states that:

“the following acts are and shall remain prohibited at any time and in any place whatsoever ... :

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

### Definition of inhuman and degrading treatment or punishment

Article 1 of the Convention against Torture must be read in conjunction with article 16, which requires States parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1”. It follows from a combined reading of both provisions that torture is an aggravated form of cruel, inhuman or degrading treatment or punishment. Therefore, acts falling short of the definition in article 1, particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise cruel or inhuman treatment under article 16 of the Convention while acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.

Conduct not meeting the threshold of torture may nevertheless be regarded as cruel, inhuman or degrading treatment or punishment. In many cases the distinction between torture and inhuman or degrading treatment derives principally from a difference in the intensity of the suffering inflicted.<sup>57</sup>

In the case of *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, the African Commission on Human and Peoples’ Rights posited that incommunicado detention, death threats, denial of access to medical care and adequate toilet facilities, amount to cruel, inhuman and degrading treatment or punishment.<sup>58</sup> For its part, the Committee against Torture has also stated that, just as the prohibition against torture, the prohibition on inhuman and degrading treatment “must be observed in all circumstances”.<sup>59</sup>

57 See European Court of Human Rights, *Ireland v. the United Kingdom* (1978), 5310/71, para. 167.

58 African Commission on Human and Peoples’ Rights, *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, para. 74.

59 Committee against Torture, general comment No. 2 (CAT/C/GC/2), para. 6.

## B. Prohibition of torture and ill-treatment under all circumstances, including in counter-terrorism

The prohibition of torture, inhuman and degrading treatment (and slavery) in section 34 is not among the rights subjected to limitation or derogation under section 45(1) of the Constitution of the Federal Republic of Nigeria.<sup>60</sup> In other words, even where a state of emergency is declared in accordance with the Constitution, no legislation and no other measures derogating from the prohibition of torture, inhuman and degrading treatment can be adopted.

This fundamental principle is reiterated in section 3 (1) of the Anti-Torture Act, 2017:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

The wording of section 3 (1) of the Anti-Torture Act, 2017 is identical to the wording of article 2 (2) of the Convention against Torture.

The African Commission on Human and Peoples' Rights has reaffirmed, in the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, that the absolute prohibition against torture also remains in place in the fight against terrorism:

Prohibition of torture: No individual shall be subject to treatment that violates his or her right to dignity. Torture and cruel, inhuman or degrading treatment or punishment are prohibited. No exceptional circumstances whatsoever may be invoked as a justification for violating these prohibitions. States shall take effective legislative, administrative, judicial, or other measures to prevent all acts of torture, and cruel, inhuman, or degrading treatment by their agents and all such acts that occur in their territory or under their jurisdiction. This includes ensuring that all acts of, and attempts to commit, torture are offences under criminal law. In instances where torture or cruel, inhuman or degrading treatment or punishment occurs, States have a responsibility to act in accordance with Principle 1 (D): Obligation to ensure accountability; Principle 1 (E): Obligation to provide an effective remedy; and Principle 1 (F): Obligation to provide reparation.<sup>61</sup>



### Focus

**Principles of ensuring accountability, providing an effective remedy and providing reparation as set out in the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa**

**Principle 1 (D): Obligation to ensure accountability:** States shall effectively investigate and publicly disclose information about human rights abuses, and bring to justice, including through prosecution, perpetrators of human rights abuses. An order from a superior officer or a public authority may not be invoked as a justification or lawful excuse for a human rights abuse.

**Principle 1 (E): Obligation to provide an effective remedy:** When a State, or any other entity, violates an individual's human rights, the State shall provide an effective remedy that is available, effective, and sufficient. The remedy is considered available if the individual can pursue it without

60 Nothing in sections 37–41 of the Constitution of the Federal Republic of Nigeria invalidates any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons.

61 African Commission on Human and Peoples' Rights: legal instruments (achpr.org).



### Focus

*Principles of ensuring accountability, providing an effective remedy and providing reparation as set out in the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (continued)*

impediment, it is deemed effective if it offers a prospect of success, and it is sufficient if it is capable of redressing the complaint.

**Principle 1 (F): Obligation to provide reparation:** States shall provide full and effective reparation to individuals who have suffered physical or other damage or who have suffered violations of their human rights as a result of an act of terrorism or acts committed in the name of countering terrorism. Full and effective reparation should include, where applicable and in light of the damages, restitution, compensation, rehabilitation,<sup>62</sup> satisfaction and guarantees of non-repetition. To facilitate this responsibility, States are encouraged to, in accordance with regional and international human rights standards, establish a funding mechanism to compensate victims of terrorist acts.

The Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in 1979, also states that “[n]o law enforcement official may [...] invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment”.<sup>63</sup> This provision is in line with article 2 (3) of the Convention against Terrorism, which provides that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture”. This is also reflected in the Nigeria Police Force Human Rights Practice Manual.

### Nigeria Police Force Human Rights Practice Manual

The Nigeria Police Force Human Rights Practice Manual,<sup>\*</sup> in section 3.8, provides guidelines for the humane treatment of all detainees. It states that all detainees must be treated humanely and that no policeman should inflict, instigate or tolerate any act of torture or ill-treatment in any circumstance and should also refuse to obey any order to do so. What this guideline is basically stating is that all members of the police force acting individually or through a third party should treat all detainees humanely and refrain from acts of torture and ill-treatment.

<sup>\*</sup> This policy document/force order is intended to provide police officers with: a statement of policy on the practice of human rights; standard operational procedures for human rights practice by police officers; an understanding of human rights-based policing methods; an understanding of basic human rights standards of good conduct for police officers; a basis for the training of police personnel in matters of human rights; and guidance on the appropriate intervention in human rights issues.

62 “Rehabilitation should include medical and psychological care as well as legal and social services”, see Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, annex, para. 21.

63 General Assembly resolution 34/169, annex, article 5.



### Activity 10

A large demonstration is about to take place in one of the major cities in the country. Intelligence has just been received from a reliable source that a massive bomb attack is planned, targeting the demonstration. If the attack takes place, there are likely to be mass casualties. Demonstrators have started to assemble in the city. B, who has been arrested on suspicion of involvement in the suspected attack, is remaining silent, refusing to answer any questions being put to him.

- On the basis of the perceived risk of high casualties, the lack of time, the imminence of the suspected attack, the fact that B is refusing to speak and the critical urgency of the situation, what level of force, coercion or persuasion do you think would be justified in this case? Please provide detailed reasons for your answer.
- You are a citizen living in the city where the demonstration is to take place. What would your view of the State and the law enforcement authorities be if they were prepared, in the above circumstances, to use torture and/or cruel, inhuman or degrading treatment against B. Would such actions by the State make you feel safer?



### Activity 11

C, an 18-year-old woman, has been raped in detention by D, one of the officers on duty at the detention facility.

- Could D's conduct amount to torture and/or cruel, inhuman or degrading treatment or punishment? Explain your answer with reference to the applicable national laws.
- You have been instructed to act on behalf of C.
  - (a) What do you think are C's specific risks, needs and vulnerabilities?
  - (b) What special considerations would you need to take into account when interviewing C?
  - (c) What actions and applications would you propose on C's behalf, and what would be your arguments and what legal authorities would you draw upon to support them? Please explain how your actions would take account of the obligation to ensure accountability; the obligation to provide an effective remedy; and the obligation to provide reparation.

## C. Torture is a serious crime

### (i) Obligation to criminalize torture in domestic law

Article 4 of the Convention against Torture requires each State party to ensure that all acts of torture are offences under its criminal law and are punishable by appropriate penalties which take into account their grave nature.

This requirement is domesticated in Nigerian law by section 8 of the Anti-Torture Act, 2017, which states:

- (1) A person who contravenes section 2 of this Act commits an offence and is liable on conviction to imprisonment for a term not exceeding 25 years.
- (2) Torture resulting in the loss of life of a person is considered as murder and shall be tried and punished under the relevant laws.

Section 7 (3) of the Anti-Torture Act, 2017 further clarifies that: “An order from a superior officer or from a superior in the office or public authority shall not be invoked as a justification for torture”.

An extremely important element of the prohibition of torture is the responsibility of accessories, accomplices and, particularly, military and civilian superiors. In this regard, section 7 (1), (2) and (4) of the Anti-Torture Act, 2017, provide that:

- (1) A person who actually participated in the infliction of torture or who is present during the commission of the act is liable as the principal.
- (2) A superior military, police or law enforcement officer or a senior government official who issues an order to a lower ranking personnel to torture a victim for whatever purpose is equally liable as the principal.  
[...]
- (4) The immediate commanding officer of the unit concerned of the security or law enforcement agencies is held liable as an accessory to the crime for any act or omission or negligence on his part that may have led to the commission of torture by his subordinates.

### Accessory and command responsibility for torture under the Rome Statute of the International Criminal Court

The International Criminal Court has jurisdiction to hear cases of the utmost gravity amounting to war crimes, crimes against humanity or genocide, alleged to have taken place in the territory of a State party to the Rome Statute of the Court.<sup>64</sup> The Federal Republic of Nigeria deposited its instrument of ratification of the Rome Statute in September 2001, and is thus, as a State party, subject to the jurisdiction of the court in certain circumstances. The International Criminal Court cannot assume jurisdiction over a case which is being, or has been, properly investigated and/or prosecuted by another court (domestic or international). However, in the absence of any such action, it may assert its jurisdiction. The Prosecutor of the International Criminal Court completed a preliminary examination relating to Nigeria in December 2020, concluding that the statutory criteria for opening a formal investigation into a series of incidents in north-eastern Nigeria had been met, and that there was a reasonable basis to believe that members of Boko Haram and its splinter groups, as well as members of the Nigerian Security Forces, had committed acts that might amount to crimes against humanity and war crimes.<sup>65</sup>

Torture can be punished as a war crime or a crime against humanity under the Rome Statute, which ensures that a very broad spectrum of persons who participate in acts of torture can be held to account. Under article 25 (3), not only those who commit the crime shall be criminally responsible and liable for punishment, but also anyone who orders, solicits or induces, aids, abets or otherwise assists, or contributes to the commission of torture by a group of persons acting with a common purpose. Under article 28, military commanders are responsible for acts of torture committed by forces under their effective command and control as a result of their failure to exercise control properly over such forces, and superiors outside military command structures can also be held accountable for acts of torture committed by their subordinates; furthermore, under article 33, superior orders constitute a defence only under very limited circumstances.



#### Activity 12

Discuss the reasons why Nigerian and international law require such broad liability for all those who might be involved in the commission of torture.

<sup>64</sup> Rome Statute of the International Criminal Court.

<sup>65</sup> Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria (icc-cpi.int).

## (ii) Obligation to investigate allegations of torture

Article 12 of the Convention against Torture provides that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”.

Article 13 adds: “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any complaint or evidence given”.

In Nigeria, the right to complain is contained in section 5 (1) of the Anti-Torture Act, 2017, which states – using the language of the Convention against Torture – that any person who alleges to have been subjected to torture has “the right to complain to and to have his case promptly and impartially examined by a competent authority”.



### Activity 13

Discuss: which authorities in Nigeria are competent to receive complaints of torture?

The National Committee on Torture of Nigeria was inaugurated by the Attorney-General on 29 September 2009. The Committee was created as part of the national mechanism established to fulfil the requirements set out in the Convention against Torture. The terms of reference of the Committee include its responsibility to:

1. Receive and consider communications on torture from individuals, civil society organizations and government institutions.
2. Visit all places of detention in Nigeria and promptly and impartially examine any allegation of torture therein.

The scope of the mandate of the National Human Rights Commission of Nigeria includes the power to monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendations to the President for the prosecution and such other actions as it may deem expedient in each circumstance.



### Reference

The mandates of the National Committee against Torture and the National Human Rights Commission are discussed in greater detail in chapter 5 on the prevention of torture.



### Activity 14

Provide an example/examples of cases, preferably from your own organization’s experience, of investigation and prosecution of allegations of torture.

What was the overall outcome?

What do you think are the main lessons learned from these cases?



## Tools

The Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)\* is intended to provide international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body. The conceptualization and preparation of the Istanbul Protocol was a collaborative effort between forensic scientists, physicians, psychologists, human rights monitors and lawyers from 15 countries in all parts of the world.

In its resolution 2000/43, the Commission on Human Rights encouraged “Governments to reflect upon the Principles [on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment] as a useful tool in efforts to combat torture”, which are contained in the annex to the resolution.

\* Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

### (iii) Torture as a crime under international law

Torture and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” can constitute a crime against humanity under the Rome Statute of the International Criminal Court “when committed as part of a widespread or systematic attack directed against any civilian population” (article 7).

Cruel treatment and torture, outrages upon personal dignity, in particular humiliating and degrading treatment, can further constitute war crimes under article 8 of the Rome Statute if committed against “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause”.



#### Activity 15 Arcadia Liberation Army case

Since March 2008, the Arcadia Liberation Army, a violent terrorist organization has been committing deadly attacks aimed at obtaining the independence of Arcadia, a western province of BlueLand, a large country situated in the middle of Africa. The terrorist attacks have resulted, inter alia, in mass killings, abductions and displacements among the civilian population. The atrocities committed by the Arcadia Liberation Army since the beginning of 2014 include:

- On 20 January 2020, the Arcadia Liberation Army attacked two villages, resulting in the killing of 63 people and abduction of 15 others, the majority of whom were women and children. Dozens of houses and some shops were also looted and destroyed.
- On 15 February 2020, members of the Arcadia Liberation Army (ALA) attacked a secondary school and killed 69 teachers and students. They also abducted 105 schoolgirls, who have been missing since that time. The terrorist group also destroyed several school buildings, including the main library.
- On 25 March 2020, ALA gunmen left two bombs in a village. The bomb was detonated a few hours later in the middle of a crowded market, killing 36 people and injuring 45 others.
- On 30 April 2020, ALA used suicide bombers and improvised explosive devices to attack a village, leaving 40 people dead and 32 injured. Several houses, a school and shops were also destroyed.



## Activity 15

### Arcadia Liberation Army case (continued)

The Blueland government has deployed the law enforcement agency (LEA) and the military to Arcadia. The LEA has succeeded in apprehending hundreds of suspected members of ALA. As there is insufficient space in the police jails, suspects have also been detained in makeshift facilities (including an abandoned factory) and military barracks. Due to lack of resources, conditions of detention in the facilities are subpar: there is little water or food, no sanitary installations and the heat is unbearable. Most of the time, the families of the suspects are not informed of their detention. Very few of the suspects arrested have thus far been presented to a judge or provided with the assistance of legal counsel.

The LEA agents interrogate the suspects to obtain information that will allow them to prevent further attacks and to obtain evidence for criminal trials against members of ALA. A report by a non-governmental organization alleges that the LEA agents subject suspects to ill-treatment, including: beatings; forced stress positions; tear gas applied to eyes or genitals; clubbing the soles of the feet; burning with cigarettes, hot irons or a flame; and sleep deprivation. The report also alleges that some of the suspects last seen in LEA detention have gone missing, that their families have not been able to locate them in any of the detention facilities and that the LEA claims it has no knowledge of their apprehension and whereabouts.

As attacks by ALA intensify, the President of Blueland proclaims a state of emergency in Arcadia province. The military engages in armed operations against the terrorist organization camps, and as a result many ALA members are killed or wounded and detained in military detention camps. The above-mentioned report of the non-governmental organization alleges similar mistreatment in military custody as in LEA custody.

As a legal expert, you have been called to a meeting with senior commanders of the Blueland LEA. The commanders are concerned by the report, particularly the allegations that the military and LEA have committed war crimes and crimes against humanity and by the calls for the International Criminal Court to open an investigation. The commanders ask you to advise on the following questions:

1. Considering that there is a state of emergency in Arcadia province, would the alleged treatment of apprehended ALA suspects by LEA agents constitute offences under Blueland's criminal law?
2. Would the alleged treatment of apprehended ALA suspects by LEA agents constitute war crimes or crimes against humanity within the jurisdiction of the International Criminal Court?
3. Do the acts committed by the ALA constitute offences within the jurisdiction of the International Criminal Court?
4. Is it true that, under the Rome Statute of the International Criminal Court, senior LEA commanders could be held responsible for the alleged treatment of apprehended ALA suspects by their agents, even if they have never ordered such treatment and might not even have set foot in any of the detention facilities?
5. What defences are available to LEA agents and commanders? Would it be a defence to argue that the actions alleged were necessary to obtain information about future terrorist attacks, caches of arms and ALA camps and to bring terrorists to justice? Would it be a defence that it had already helped by saving many innocent lives and that a state of emergency had been proclaimed?

Base your analysis on the above-described facts and take into account the following information:

- Nigerian law applies in Blueland to all issues discussed in this case.
- Blueland became a State Party to the Rome Statute of the International Criminal Court on 2 January 2005.
- Blueland is also party to all major regional and international human rights and international humanitarian law treaties.



### Self-assessment questions

1. What is the definition of torture under Nigerian law? What are the elements that constitute torture?
2. What is the difference between torture and cruel, inhuman or degrading treatment?
3. Can torture or cruel, inhuman or degrading treatment ever be justified under Nigerian or international law?
4. Give 10 examples of acts that may constitute cruel, inhuman or degrading treatment or punishment.
5. Under what circumstances can accessories, accomplices and superiors be held responsible for acts of torture under Nigerian law?
6. Describe the circumstances under which torture can constitute a crime under international law.

# 5

## Prevention of torture and other cruel, inhuman or degrading treatment or punishment



### Learning objectives

By the end of chapter 5, readers will be able to:

- Identify the key measures required for the effective prevention of torture and cruel, inhuman or degrading treatment or punishment.
- Explain the basic procedural safeguards and pretrial safeguards for the prevention of torture, including during the interrogation process.
- Discuss the importance and relevance of conditions of detention, monitoring and oversight mechanisms, and of training and education in the prevention of torture.
- Evaluate the role of the individual in the prevention of torture.

“No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”

*Nelson Mandela*

Nelson Mandela, the leader of the anti-apartheid movement in South Africa, and later the first President of the post-apartheid republic, was imprisoned by the apartheid Government for 27 years (including 18 years on Robben Island). His words speak to the very heart of the need to prevent the torture of persons deprived of their liberty and to treat all persons, particularly the most vulnerable and disadvantaged, with utmost dignity and respect and without discrimination of any kind.

Nigeria is a party to the Convention against Torture, article 2 (1) of which states that: “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.

In 2002, the African Commission on Human and Peoples’ Rights adopted the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, better known as the Robben Island Guidelines.<sup>66</sup> The Robben Island Guidelines are designed to assist States in meeting their national, regional and international obligations for the effective enforcement and implementation of measures to ensure the universally recognized prohibition and prevention of torture.

<sup>66</sup> African Commission on Human and Peoples’ Rights, The Robben Island Guidelines.

The Robben Island Guidelines spell out measures for the prevention of torture under six headings:

- A. Basic procedural safeguards for persons deprived of their liberty.
- B. Safeguards during the pretrial process.
- C. Conditions of detention.
- D. Mechanisms of oversight.
- E. Training and empowerment.
- F. Civil society education and empowerment.

The effective prevention of torture requires a holistic approach, in which everybody has an important role to play. In the context of prevention of torture, the Robben Island Guidelines make specific reference to the roles of: the State; the judiciary; legal counsel; law enforcement and security personnel; professional legal and medical bodies; human rights commissions; ombudspersons; commissions of parliamentarians; non-governmental organizations; the media; and the public.

## A. Key safeguards in the prevention of torture

Prevention of torture requires putting in place practical and focused safeguards to address all key areas of potential risk.

The Robben Island Guidelines set out a list of basic procedural safeguards and a list of safeguards during the pretrial process, presented in the boxes below: for each safeguard, the corresponding provisions under Nigerian law have been listed. In addition to using the corresponding provisions under Nigerian law, the Robben Island Guidelines, in particular the procedural safeguards, could be applied pursuant to the Fundamental Rights (Enforcement Procedure) Rules, 2009, which provide, in section 3 (b) of the preamble:

For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware ... Such bills include: (i) the African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system.

Moreover, order II.1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 provides that:

Any person who alleges that any of the Fundamental Rights provided for in the Constitution [of Nigeria] or the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress.



### **Focus** **Robben Island Guidelines** **Basic procedural safeguards for those deprived of their liberty**

All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:

- The right that a relative or other appropriate third person is notified of the detention (sect. 6 (2), Administration of Criminal Justice Act, 2015).



### Focus

#### Robben Island Guidelines

##### Basic procedural safeguards for those deprived of their liberty (continued)

- The right to an independent medical examination (sect. 6, Anti-Torture Act, 2017).
- The right of access to a lawyer (sects. 35 (2) and 36 (6) (c) of the Constitution of the Federal Republic of Nigeria; sects. 6 (2) (c) and 14 (2) of the Administration of Criminal Justice Act, 2015; sect. 28 (1) of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA); and sect. 19 (2) of the Legal Aid Act, 2011).
- Notification of the above rights in a language which the person deprived of their liberty understands (sect. 36 (6) (a) of the Constitution of the Federal Republic of Nigeria; and sect. 14 (1) of the Administration of Criminal Justice Act, 2015).



### Focus

#### Robben Island Guidelines

##### Safeguards during the pretrial process

Establish regulations for the treatment of all persons deprived of their liberty guided by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment\* (establishment of the Anti-Torture Act, 2017; sect. 34 (1) (a) of the Constitution of the Federal Republic of Nigeria; and sect. 8 (1)(a)(b) of the Administration of Criminal Justice Act, 2015).

Ensure that those subject to the relevant codes of criminal procedure conduct criminal investigations.

Prohibit the use of unauthorized places of detention and ensure that it is a punishable offence for any official to hold a person in a secret and/or unofficial place of detention (prohibition under sect. 6 (2) of the Anti-Torture Act, 2014).

Prohibit the use of incommunicado detention.

Ensure that all detained persons are informed immediately of the reasons for their detention (sect. 35 (3) of the Constitution).

Ensure that all persons arrested are promptly informed of any charges against them (sect. 36 (6) of the Constitution).

Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice (sect. 35 (4) of the Constitution; and sect. 8 (3) of the Administration of Criminal Justice Act, 2015).

Ensure that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation and consider the feasibility of the use of videotaped and/or audiotaped recordings of interrogations (sect. 15 (4) of the Administration of Criminal Justice Act, 2015; sect. 9 (3) of the Administration of Criminal Justice Law No. 10 of Lagos State, 2007 (re-enacted in 2011)).

Ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made (sect. 29 (2)(a)(b) Evidence Act, 2011).



*Focus*  
*Robben Island Guidelines*  
*Safeguards during the pretrial process (continued)*

Ensure that comprehensive written records of those deprived of their liberty are kept at each place of detention, detailing, inter alia, the date, time, place and reason for the detention (sects. 15 (1) and (2) of the Administration of Criminal Justice Act, 2015).

Ensure that all persons deprived of their liberty have access to legal and medical services and assistance and have the right to be visited by and correspond with family members (medical Services: sect. 6 of the Anti-Torture Act, 2014; legal services: sects. 35 (2) and 36 (6)(c) of the Constitution; sects. 6 (2)(c) and 14 (2) of the Administration of Criminal Justice Act, 2015; sect. 28 (1) of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA); and sect. 19 (2) of the Legal Aid Act, 2011).

Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention (order II.1, 2 and 3 of the Fundamental Rights (Enforcement Procedure) Rules, 2009).

\* General Assembly resolution 43/173, annex.

If the above safeguards are put in place, the risk of torture, as well as the risk of unfounded allegations of torture, will be reduced.

In preventing torture and ensuring compliance with fundamental safeguards in the counter-terrorism context, the Principles and Guidelines on Human and Peoples' Rights,<sup>67</sup> adopted in 2015 by the African Commission on Human and Peoples' Rights, is an important regional resource. Highly recommended as essential further reading on countering terrorism and preventing torture in Nigeria, the Principles and Guidelines set out to meet four specific objectives:

- Focus on victims: the Principles and Guidelines devote considerable time to the need to prevent and punish acts of terrorism, and to provide assistance to the victims of terrorism.
- Contextualization of the phenomenon of terrorism: the Principles and Guidelines reflect the reality that acts of terrorism and associated human rights abuses do not exist in a vacuum. Rather, an effective strategy requires institutional and structural reforms that address their root causes.
- Responding to emerging issues: the Principles and Guidelines address a broad set of human rights issues, including emerging issues that are unfortunately commonly associated with preventing and combating terrorism and violent extremism. To that end, the Principles and Guidelines contain both general and specific rules that apply to the right to life; deprivation of liberty, humane treatment, and fair trials; rendition and transfers; anti-terrorism laws and "watch lists"; interstate cooperation; private security contractors; statelessness and citizenship; human rights defenders; the right to privacy and access to information; and human security.
- Underlining the importance of cooperation and implementation of the Principles and Guidelines: cooperation amongst African Union institutions to respect human rights while combating terrorism and the need to implement the content of the Principles and Guidelines constitute the last pillar on which the latter are based.<sup>68</sup>

67 African Commission on Human and Peoples' Rights Legal instruments (achpr.org).

68 Ibid., see foreword.

At the international level, the International Convention for the Protection of All Persons from Enforced Disappearance, to which Nigeria acceded in 2009, sets out key obligations and safeguards relating to recordkeeping in places of detention, which seek to prevent serious human rights violations, including torture and other forms of ill-treatment. The extract of the obligations under the Convention, set out in the box below, has been reproduced from the UNODC module *Human Rights and Criminal Justice Responses to Terrorism*.<sup>69</sup>



### Focus

#### Registration of detainees under the International Convention for the Protection of All Persons from Enforced Disappearance\*

The International Convention for the Protection of All Persons from Enforced Disappearance reaffirms the importance of recordkeeping in places of detention as an essential measure to prevent serious human rights violations.

Article 17 (3) of the Convention sets out obligations of registration:

Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

- (a) The identity of the person deprived of liberty;
- (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- (d) The authority responsible for supervising the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Articles 18 to 20 of the Convention provide that each State shall guarantee access to this information (with certain restrictions spelled out in these articles) "to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel".

\* General Assembly resolution 61/177, annex.

At the national level, the Police Act, 1943 and regulations under it provide various detailed safeguards to protect the rights of detainees. On the specific issue of detention records, regulation 250 (d)(ii) imposes a duty on the police to keep and maintain records of detainees, which shall contain the particulars of persons arrested and reasons for the arrest, and regulation 254 (b) further specifies the Register of Arrests as one of the criminal records which every police station is obliged to maintain.

69 UNODC, Counter-Terrorism Legal Training Curriculum, Module 4: *Human Rights and Criminal Justice Responses to Terrorism* (unodc.org).



## Activity 16

Examine the measures to prevent torture set forth in the Robben Island Guidelines. Which of these measures are fully operative in Nigeria? Which are not?

Suggest five measures you believe should be adopted and put into practice as a matter of priority in Nigeria.

## B. Interviewing of suspects

Detainees being held as suspects are at the highest risk of ill-treatment during the interview process. Clear procedures on how to conduct interviews are therefore an essential tool in the prevention of torture, inhuman and degrading treatment. The Convention against Torture (art. 11) requires that: "Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices ...".

At the national level, section 31 of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA) provides that:

- (1) A video recording shall be made and kept in respect of any person, conveyance or property detained under any provision of this Act as may be required by the relevant enforcement or security agency.
- (2) Records in respect of any person, conveyance or property detained under any provision of this Act shall be kept in the custody of the relevant enforcement or security agency.
- (3) A video recording and other forms of electronic evidence shall be admissible in evidence before any court of competent jurisdiction in Nigeria for offences under this Act subject to the provisions of the Evidence Act.
- (4) In this section, "video recording" includes the recording of visual images or sound by electronic or other technological means.

Section 15 (4) of the Administration of Criminal Justice Act, 2015 states that:

Where a suspect who is arrested with or without a warrant volunteers to make a confessional statement, the police officer shall ensure that the making and taking of the statement shall be in writing and may be recorded electronically on a retrievable video compact disc or such other audiovisual means.

At a regional level, in sections 9 (d), (e) and (g) of the Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (Luanda Guidelines) African States are urged to take the following measures:

Confessions should only be taken in the presence of a judicial officer or other officer of the court who is independent of the investigating authority.

The following information about every questioning session shall be recorded by the authority carrying out the questioning:

- i. The duration of any questioning session.
- ii. The intervals between questioning sessions.
- iii. The identity of any officials who conducted the questioning and of any other persons present.
- iv. Confirmation that the detained person was availed the opportunity to seek legal services prior to the questioning, was provided with a medical examination, and had access to an interpreter during

questioning (including sign language for the hearing impaired) and any accommodations necessary to ensure the detainee's understanding of and participation in the process were made.

- v. Details of any statements provided by the detained person, with verification from the detained person that the record accurately recounts the statement he or she provided.

States shall make provision for the audio and audiovisual recording of questioning sessions and the provision of confessions.



## Focus

### European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is a group of experts established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment with a mandate to carry out visits to places of detention in all States members of the European Union and, based on those visits, to make recommendations to governments on how to prevent torture. According to the Committee, guidelines on interrogations should address the following matters:

"The informing of the detainee of the identity (name and/or number) of those present at the interview; the permissible length of an interview; rest periods between interviews and breaks during an interview; places in which interviews may take place; whether the detainee may be required to stand while being questioned; the interviewing of persons who are under the influence of drugs, alcohol, etc."\*

Guidelines, interrogations, rules and training of interrogators should convey that in no way should the objective of an interrogation be to obtain a confession; it should be to obtain reliable information in order to discover the truth about the matter under investigation.\*\*

The Committee also highlights the usefulness of electronic recording of interrogations in at least three respects:

- Reducing the opportunity for defendants to later falsely deny that they have made certain admissions;
- Protecting detainees against ill-treatment; and
- Protecting interrogators against false accusations of ill-treatment.

The Committee's standards provide as follows:

"The electronic (i.e., audio and/or video) recording of police interviews represents an important additional safeguard against the ill-treatment of detainees. ... Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions."\*\*\*

\* Council of Europe, Committee for the Prevention of Torture, CPT standards (CPT/Inf/E (2002) 1 – Rev. 2010), p. 7, para. 39.

\*\* Ibid., p. 9, para. 34.

\*\*\* Ibid., p. 9, para. 36.



## Activity 17

- Are the safeguards relating to the interrogation of suspects contained in the Luanda Guidelines in place in Nigeria? Which safeguards are in place and which are not?
- What practical safeguards do you think should be in place to prevent torture or other ill-treatment during interrogations?

## C. Conditions of detention

Conditions of detention also play an important role in preventing torture and other forms of ill-treatment.

The Constitution of the Federal Republic of Nigeria (sect. 34 (1)) provides that: “Every individual is entitled to respect for the dignity of his person”. The Nigerian Correctional Service Act, 2019 also contains provisions relating to conditions of detention of persons deprived of their liberty, primarily in relation to persons sentenced or remanded in custody by order of the court. One of the stated objectives of the Act is to “ensure compliance with international human rights standards and good correctional practices” (sect. 2 (1) (a)). Section 21(2) of the Act requires that:

Information relating to all places of detention and all persons in detention shall be kept by the Ministry,<sup>70</sup> and steps shall be taken by the Ministry to enhance the process, capacities, human rights compliance and security of all facilities holding detainees and inmates, including those on pretrial detention.

More detailed practical and procedural provisions relating to the condition of detention of persons sentenced or remanded in custody by order of the court can be found in the Nigerian Prisons Service Standing Orders (revised edition) 2011.

At a regional level, in article 33, the Robben Island Guidelines provide that States should:

Take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the United Nations Standard Minimum Rules for the Treatment of Prisoners [the Nelson Mandela Rules].

The Luanda Guidelines confirm, in provision 23, that “Persons deprived of their liberty shall enjoy all fundamental rights and freedoms, except those limitations which are demonstrably necessary by the fact of detention itself.” In addition, in provision 24, the Guidelines state that:

Conditions of detention in police custody and pretrial detention shall conform with all applicable international law and standards. They shall guarantee the right of detainees in police custody and pretrial detention to be treated with respect for their inherent dignity, and to be protected from torture and other cruel, inhumane or degrading treatment or punishment.

The Luanda Guidelines also require States to have in place laws, policies and procedures to, inter alia, reduce overcrowding, limit the use of force, limit the use of firearms, limit the use of restraints, restrict the use of solitary confinement and ensure health screening assessments in police custody and pretrial detention facilities.

At the international level, article 10 of the International Covenant on Civil and Political Rights states that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the

<sup>70</sup> Government of Nigeria, Ministry of Internal Affairs.

human person". International minimum standards for the treatment of persons deprived of their liberty can be found in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.



### Activity 18

- What is the relationship between conditions of detention and the prevention of torture and other forms of ill-treatment?
- Identify 10 examples of conditions of detention which, in your opinion, may be relevant in preventing torture in Nigeria.
- What are the key applicable laws, guidelines and safeguards in place in Nigeria to ensure that conditions of detention do not constitute or contribute to torture or ill-treatment?



## D. Independent monitoring and oversight mechanisms

Independent monitoring and oversight mechanisms are essential tools in the effective prevention of torture, as well as in promoting greater responsibility and accountability. Details of the mandates of Nigeria's National Committee on Torture and National Human Rights Commission are set out in the boxes below.



### Focus National Committee on Torture

The National Committee on Torture was inaugurated in 2009 with a mandate to:<sup>\*</sup>

1. Receive and consider communications on torture from individuals, civil society organizations and government institutions.
2. Visit all places of detention in Nigeria and promptly and impartially examine any allegation of torture therein.
3. Ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
4. Keep under systematic review, interrogation rules instruction, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, with a view to preventing any cases of torture.
5. Prepare quarterly briefings to the Attorney General on cases of torture and propose appropriate administrative and judicial intervention.
6. Propose anti-torture legislation.
7. Further the development of the national anti-torture policy.

Following its inauguration, the National Committee on Torture was immediately tasked to commence an investigation into the deaths that had occurred during the response of security agents to the Boko Haram crises and to review all cases of extrajudicial killings by the police and the allegations made by Amnesty International.

<sup>\*</sup> Mandate of the National Committee on Torture, paras. 2 and 3.



## Focus National Human Rights Commission

The oversight powers of the National Human Rights Commission include the power to “monitor and investigate all alleged cases of human rights violation[s] in Nigeria and make appropriate recommendation[s] to the President for the prosecution and such other actions as it may deem expedient in each circumstance” (sect. 5 (b) of the National Human Rights Commission Act, 2004) and to “visit persons, police cells and other places of detention in order to ascertain the conditions thereof and make recommendations to the appropriate authorities” (sect. 6 (d) of the National Human Rights Commission (Amendment) Act, 2010). The Commission conducts annual audits of detention facilities, and in recent years this has included military detention facilities. As stated in the report submitted to the Committee on Enforced Disappearances by Nigeria under article 29 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance:<sup>\*</sup>

“The commission has established a robust and effective complaint treatment mechanism both at its headquarters and zonal offices for handling all complaints of human rights violations free of charge, including cases of enforced disappearances. The Commission has powers to enforce its decisions and the decisions of the Commission’s Governing Council are registrable as decisions of the High Court. It can institute civil action on any matter it deems fit in relation to the exercise of its functions [and] refer any matter of human rights violation requiring prosecution to the Attorney General of the Federation or of a State, as the case may be”.

<sup>\*</sup> CED/C/NGA/1, para. 39.

In recent years, the Nigerian Government has instigated a number of investigations relating to serious human rights violations. These include investigations into clashes between supporters of the Islamic Movement in Nigeria and soldiers in Zaria (December 2015); the Military Board of Inquiry into allegations of human rights abuses by military personnel as ordered by the President (June 2017); and the Presidential Panel on military compliance with human rights and rules of engagement in local conflicts and insurgencies (established in August 2017).<sup>71</sup> In addition, governments of several States of Nigeria set up panels of inquiry into allegations of police violence in response to the EndSARS protests in 2020, including the Lagos State Judicial Panel of Inquiry on Restitution for Victims of SARS Related Abuses and Other Matters,<sup>72</sup> set up to investigate the shooting of EndSARS protesters at the Lekki toll gate in Lagos on 20 October 2020.

Furthermore, sections 21 and 22 of the Nigerian Correctional Service Act, 2019 establish a system for the independent inspection of custodial centres in Nigeria. The official visitors designated under the Act consist of: persons appointed ex officio by the President (including judges and magistrates, the Chairperson and other council members of the National Human Rights Commission, the Director General of the Legal Aid Council of Nigeria, and the President and other executive members of the National Bar Association); legislative oversight visitors include the presiding officers and members of the relevant committees of the National Assembly and State Houses of Assembly, reputable members of society, non-governmental organizations and other appointed voluntary visitors.

The functions of the Custodial Centre visitors are set out in section 22 (1) of the Correctional Service Act, 2019, as follows:

- (a) Visit the Custodial Centre and inspect the wards, cells, yards and other apartments or divisions of the Custodial Centre;
- (b) Receive the complaint, if any, of the inmates;

<sup>71</sup> CED/C/NGA/1, para. 46.

<sup>72</sup> See Report of Lekki Incident Investigation on 20 October 2020.

- (c) Inspect the journals, registers and books of the Custodial Centre and conditions of treatment of the inmates; and
- (d) Call the attention of the Superintendent to any irregularity in the administration of the Custodial Centre and structural defects which may require urgent attention.

Section 22 (2) of the Correctional Service Act, 2019 also mandates that visits to a custodial centre shall take place at least once in a month.

A custodial centre is defined in the Correctional Service Act as a place where individuals sentenced by the court requiring imprisonment are kept or those remanded in custody by the order of the court are kept.

An additional monitoring mechanism for police stations and other places of detention (other than prisons) is provided for in section 34 of the Administration of Criminal Justice Act, 2015:

- (1) The Chief Magistrate, or where there is no Chief Magistrate within the police division, any Magistrate designated by the Chief Judge for that purpose, shall, at least every month, conduct an inspection of police stations or other places of detention within his territorial jurisdiction other than the prison.
- (2) During a visit, the Magistrate may:
  - (a) call for, and inspect, the record of arrests;
  - (b) direct the arraignment of a suspect;
  - (c) where bail has been refused, grant bail to any suspect where appropriate if the offence for which the suspect is held is within the jurisdiction of the Magistrate.

At the regional level, the Committee for the Prevention of Torture in Africa was established in 2002 to promote, oversee and monitor the effective implementation of the Robben Island Guidelines. The mandate of the Committee is as follows:

- (a) Organizes, with the support of other interested partners, seminars to disseminate the Robben Island Guidelines to national and international actors;
- (b) Develops and proposes to the African Commission strategies to promote and implement the Robben Island Guidelines at the national and regional level;
- (c) Promotes and facilitates the implementation of the Robben Island Guidelines within the member States;
- (d) Reports to the African Commission at each regular session on the status of implementation of the Robben Island Guidelines.<sup>73</sup>

At the international level, the Committee against Torture is a body of 10 independent experts that monitors the implementation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.<sup>74</sup> On 17 November 2021, the Committee concluded its initial dialogue with Nigeria, on the efforts made by Nigeria to implement the provisions of the Convention against Torture. During the dialogue, Committee Experts asked about the ongoing fight against terrorism in Nigeria, and about conditions of detention, including for pre-trial detainees. At the conclusion of the meeting, M.B. Abubakar, Director Public Prosecutions, Federal Ministry of Justice of Nigeria and head of the delegation, thanked the Chair and the members of the Committee for listening to the delegation, and expressed hope that the dialogue opened a new chapter of cooperation going forward. He pledged the commitment of Nigeria to the ideals of the Convention and the cause of the Committee.<sup>75</sup>

73 See Committee for the Prevention of Torture in Africa.

74 OHCHR | Committee against Torture.

75 In initial dialogue with Nigeria, Experts of Committee against Torture Ask about the Fight against Terrorism, and Conditions of Detention (ungeneva.org).

The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has a preventive mandate focused on an innovative, sustained and proactive approach to the prevention of torture and ill-treatment.<sup>76</sup> The Subcommittee concluded a high-level advisory visit to Nigeria on 3 April 2014.



### Activity 19

- Discuss the relevance and importance of monitoring and oversight mechanisms in the prevention of torture.
- In your opinion, how effective are the monitoring and oversight mechanisms in the prevention of torture in Nigeria? Highlight the strengths and weaknesses of the mechanisms and make suggestions as to how the effectiveness of the mechanisms could be practically improved.

## E. Training, education and empowerment

Training, education and empowerment is another important aspect of the prevention of torture.

Section 10 of the Anti-Torture Act, 2017 provides that:

The Attorney-General of the Federation and other concerned parties shall ensure that education and information regarding the prohibition on torture is fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other people who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

The National Committee on Torture has an education mandate, the wording of which is identical to the wording of section 10 of the Anti-Torture Act, 2017 (the full mandate of the National Committee on Torture is set out in section 5.D above).

The National Human Rights Commission has a broader education mandate to:

undertake research and educational programmes and such other programmes for promoting and protecting human rights and co-ordinate any such programme on behalf of the Federal, State or Local Government on its own initiative when so requested by the Federal, State or Local Government..." (section 5 (n) of the National Human Rights Commission (Amendment) Act 2011).

At the regional level, the Robben Island Guidelines urge States to:

### Training and empowerment

45. Establish and support training and awareness-raising programmes which reflect human rights standards and emphasize the concerns of vulnerable groups.
46. Devise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in contact with persons deprived of their liberty such as lawyers and medical personnel.

<sup>76</sup> OHCHR | Optional Protocol to the Convention against Torture.

## Civil society education and empowerment

47. Public education initiatives, awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons shall be encouraged and supported.
48. The work of non-governmental organizations and of the media in public education, the dissemination of information and awareness-raising concerning the prohibition and prevention of torture and other forms of ill-treatment shall be encouraged and supported.



### Reference

The need for training and maintaining skills in the area of investigative interviewing, as emphasized in principle 4 of the Méndez Principles, is of great importance in the prevention of torture and other forms of ill-treatment. This aspect of training is discussed in chapter 2 above.



### Activity 20

Discuss the relevance and importance of training, education and empowerment in the prevention of torture.

Who should be trained and educated on the prevention of torture?

In what ways is public education and awareness important in the prevention of torture?

How would you assess the level of public education and awareness on the prohibition and prevention of torture? On a practical and innovative level, what could be done, and by whom, to increase public education and awareness?



### Tools

In addition to treaty obligations and other legal obligations in respect of torture and other cruel, inhuman and degrading treatment or punishment, there are also a wealth of principles and guidelines, support and guidance to States, public officials, lawyers, medical professionals and others in relation to torture and other forms of proscribed ill-treatment. These include:

- Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines), adopted by the African Commission on Human Rights in its resolution 61 (2002).
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in its resolution 43/173 (1988), annex.
- Code of Conduct for Law Enforcement Officials adopted by the General Assembly in its resolution 34/169 (1979), annex.
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
- Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly in its resolution 37/194 (1982), annex.
- Basic Principles on the Treatment of Prisoners, adopted by the General Assembly in its resolution 45/111 (1990), annex.
- Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT Standards (CPT/Inf/E (2002) 1 – Rev. 2010).



## Self-assessment questions

1. Identify the key measures required for the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment.
2. What are the basic procedural safeguards and the pretrial safeguards for the prevention of torture?
3. What safeguards should be in place to prevent torture and other ill-treatment during the interrogation of a suspect? Which of these safeguards are in place in Nigeria? Identify the legal safeguards in Nigerian law relevant to the prevention of torture during the interrogation process.
4. Discuss the importance and relevance of conditions of detention, monitoring and oversight mechanisms and training and education in the prevention of torture.
5. Evaluate the role of the individual in the prevention of torture.

# 6

## Exclusion of evidence obtained through oppression



### Learning objectives

By the end of chapter 6, readers will be able to:

- Explain the law and principles relating to the admissibility of: confessional statements alleged to have been obtained by torture, inhuman or degrading treatment or other forms of oppression, as defined under section 29 (5) of the Evidence Act, 2011; statements by third persons (not the defendant) alleged to have been obtained by torture, inhuman or degrading treatment or other forms of oppression; other evidence obtained as a result of statements alleged to have been obtained by torture, inhuman or degrading treatment or other forms of oppression.
- Identify the key measures required for the effective prevention of torture, cruel, inhuman or degrading treatment or punishment.
- Discuss the importance, relevance and reasons for excluding evidence obtained through oppression.
- Describe the duties of prosecutors and judges in the handling of evidence suspected to have been obtained unlawfully.
- Explain the law, procedure and practical problems in proving that a confession statement was not given voluntarily.

Torture is fundamentally wrong, and evidence obtained through torture is fundamentally unreliable. In addition, as discussed in chapter 4, torture is a crime of utmost severity and is prohibited, without exception, under all circumstances. Chapter 5 is focused on the treatment of evidence obtained, both directly and indirectly, through torture or other oppressive measures.

The exclusion of evidence obtained through torture or other oppressive measures is a cornerstone of the prohibition of torture and cruel, inhuman or degrading treatment.

Section 4 of the Anti-Torture Act, 2017 states that:

Any confession, admission or statement obtained as a result of torture shall not be invoked as evidence in a proceeding, except against a person accused of torture as evidence that the confession, admission or statement was made.

This provision reflects article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition against confessions extorted by torture being admitted in evidence, except against the torturer, is absolute and inviolable. With regard to the prohibition of torture, no exceptional circumstances whatsoever (state of war, terrorism, internal political instability or any other public emergency)

may be invoked by a State party to the Convention against Torture to justify the admission of statements obtained through torture in any proceedings.<sup>77</sup>

The Committee against Torture clarifies that this prohibition also applies in relation to statements obtained by inhuman and degrading treatment. The same position is set forth in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights, which state, in section N, article 6 (d) (i), that:

Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing.



### Focus

#### Common law rule on the admission of statements by accused persons

In *Musa Sadau & Anor v. the State*,\* the Court held, in the words of Judge Coker of the Supreme Court, that "there is no general rule of law in civil as well as criminal cases that evidence which is relevant is excluded merely by the way in which it has been obtained. This is subject in criminal cases to the discretion of a trial Judge 'to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused' (See per Viscount Simon in *Harris v. DPP* (1952) A.C. 694 at p. 707). This means that the judge can, where the interests of justice demand it, exclude evidence which would otherwise be relevant considering the circumstances of its discovery and production". In this case, the accused was charged with illegal printing and selling of vehicle licences. Upon the execution of a search warrant at the house of the accused, a large quantity of forged documents was recovered. The court held that the incriminating evidence was relevant and admissible, notwithstanding the improper manner in which the search was conducted.

This position reflected the common law rule. In the case of *Kuruma s/o Kaniu v. R*,\*\* the Court was of the view that evidence, which is relevant, is admissible no matter how it was obtained and that in a criminal case the judge always had discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused person.

With regard to statements by an accused person, however, the common law rule is different from the general position regarding evidence improperly obtained. In the well-known words of Lord Sumner in the case of *Ibrahim v. the King* [1914]:

"It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

\* Supreme Court of Nigeria, *Musa Sadau & Anor v. the State* (1968) NMLR, 208.

\*\* Supreme Court of Kenya, *Kuruma s/o Kaniu v. R* (1955) 1 All ER 236, p. 239.

77 Committee against Torture, general comment No. 2 (CAT/C/GC/2), para. 6.



## Activity 21

Nigerian and international law establish that statements obtained by torture may not be admitted as evidence in any proceeding under any circumstances (except against the person accused of torture). This is different from the position regarding evidence obtained in violation of other human rights, for example, a search without warrant or an unlawful interception of a communication obtained in violation of the right to private life. In such cases, Nigerian and most international case law allows judges to balance the probative value of the evidence against the gravity of the human rights violation or other unlawfulness.

- Why does international law take this inflexible stance regarding “torture statements”?
- Discuss the policy reasons behind this legal rule.

The following sections present an examination of the exclusionary rule in Nigerian law regarding evidence obtained as a result of torture and cruel, inhuman or degrading treatment or other forms of oppression in three steps:

- A. Admissibility of confessional statements alleged to have been obtained by torture or other cruel, inhuman or degrading treatment or punishment or other forms of oppression;
- B. Admissibility of statements by third parties [not the defendant] alleged to have been obtained by torture or cruel, inhuman or degrading treatment or punishment or other forms of oppression;
- C. Admissibility of other evidence obtained as a result of statements alleged to have been obtained by torture or cruel, inhuman or degrading treatment or punishment or other forms of oppression.

## A. Admissibility of confessional statements alleged to have been obtained by torture or other cruel, inhuman or degrading treatment or punishment or other forms of oppression

As discussed above, under international law the rule is that any statement which is established to have been made as a result of torture or cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence in any proceedings.

The Nigeria Evidence Act, 2011 states, in section 29 (1), that “a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section”.<sup>78</sup> In other words, to be admissible, a confession must fulfil two conditions: being relevant and not being excluded under the remainder of section 29.

Section 29 (2) reads, in full:

- If, in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained —
- (a) by oppression of the person who made it; or
  - (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him

<sup>78</sup> A confession is defined in section 28 of the Evidence Act, 2011, as “an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime”.

except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.

Section 29 (3) of the Evidence Act, 2011 adds that where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution to prove that the confession was not obtained as mentioned in either subsection (2)(a) or (b) of section 29. Oppression is defined in section 29 (5) as “torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture”.

Section 29 therefore means that confessional statements must be voluntarily made without any form of oppression in order to be admissible in evidence. Section 29 affirms the common law rule that oppression or inducement goes to the admissibility of a confession, not to its weight. A confessional statement obtained by torture, inhuman or degrading treatment or the use or threat of violence must not be admitted into evidence, no matter how relevant it may otherwise be considered, and no matter whether it is corroborated by other evidence.



### Activity 22

Section 29 of the Evidence Act, 2011 requires the prosecution to prove to the court “beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained” by oppression.

Discuss by what means the prosecution can prove the absence of oppression?

## Burden of proof regarding voluntariness of a confession and a trial within a trial

Section 29 (2) of the Evidence Act, 2011 places on the prosecution the burden to prove to the court that the confession obtained was not through oppression or inducement. The standard of proof here is “beyond reasonable doubt” and the process of proving this requires a trial within a trial (*voir dire*), as detailed in section 29 (2).

In *George v. the State*,<sup>79</sup> it was held that once there is doubt as to whether a confessional statement is voluntary or not, a trial within a trial needs to be conducted by the court to determine if such a statement can be admitted in evidence. Indeed, the exclusion of evidence obtained through oppression is a consequence of the prohibition of torture and inhuman or degrading treatment in section 34 of the Constitution of the Federal Republic of Nigeria, which is not subject to any derogation.

### Nature of a trial within a trial

A trial within a trial can arise when the accused, through his counsel, informs the court that the confession the prosecution is relying on was obtained by fraud, duress or undue influence. Judge Obaseki of the Supreme Court, in the case of *Corporal Jonah Dawa & Anor v. the State*,<sup>80</sup> found “it has long been established as a positive rule of law which has found a healthy place in our statutes that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement ...”. A trial within a trial, as in the case of *Daniel Nsofor v. the State*, is only resorted to in order to test the voluntariness of an accused confession where that has become an issue in the case.

79 Supreme Court of Nigeria, *George v. the State* (2009) 1 NWLR Pt 1122.

80 Supreme Court of Nigeria, *Corporal Jonah Dawa v. the State* (1980) 8-11 SC 236, p. 258.

The burden of proving that a confession was voluntarily made rests on the prosecution in criminal proceedings. The burden involves the same standard as the proof of guilt, that is, beyond reasonable doubt.<sup>81</sup>

### Procedure for a trial within a trial

- (a) An objection should be raised by the accused person through his/her defence counsel when the confession is tendered;
- (b) The statement is regularly tendered by the prosecutor as required by section 231 of the Criminal Procedure Code and the Evidence Act, 2011. The prosecutor will give evidence on the manner in which the statement was taken, detailing all the questions asked;
- (c) There will be a re-examination of the question in court;
- (d) The court may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness, or may recall and re-examine any person already examined; and the court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential for the purpose of arriving at a just decision of the case;
- (e) In a criminal trial, the prosecution must prove the case against the accused beyond reasonable doubt; the accused must have a fair trial; and justice must be done. The rationale behind allowing the judge to review a wrong ruling on admissibility of evidence is the control, which the judge should have in conducting the case in the interest of justice;
- (f) Finally, the judge will give his or her ruling.



#### Case study

#### *Harrison Owzoruke v. Commissioner of Police (2015) 15 NWLR (Pt. 1483) 557 SC*

In this case, the Supreme Court highlighted concerns as to the reliability of confession statements and gave clear guidance that, in the absence of procedural safeguards, confessional statements should be rejected by the court:

“The Appellant did not have the service of a legal practitioner when he wrote exhibit E. a day after the incident. It must be noted that most crimes are committed by people with little or no education, consequently they are easily led along by the investigating Police Officer to write incriminating statements which legal minds find almost impossible to unravel and resolve. Confessional statements are most times beaten out of suspects, and the courts usually admit such statements as counsel and the accused are unable to prove that the statement was not made voluntarily. A fair trial presupposes that police investigation of the crime for which the accused person stands trial was transparent. In that regard it is time for safeguards to be put in place to guarantee transparency. It is seriously recommended that confessional statements should only be taken from a suspect if, and only if his counsel is present, or in the presence of a legal practitioner. Where this is not done such a confessional statement should be rejected by the court.”



#### Activity 23

- In the above case of *Harrison Owzoruke v. Commissioner of Police*, do you agree with the Supreme Court’s assessment of the practical difficulties in Nigeria that “Confessional statements are most times beaten out of suspects, and the courts usually admit such statements as counsel and the accused are unable to prove that the statement was not made voluntarily”?

81 Supreme Court of Nigeria, *Demo Oseni v. the State* (2012), JELR 34747 (SC); and Supreme Court of Nigeria, *R v. Sapele & Anor* (1952) 2 FSC 74.



### Activity 23 (continued)

- Assuming the correctness of the Supreme Court's assessment of the problem, and on the basis that it is for the prosecution to prove beyond reasonable doubt that a confession statement is made voluntarily/without oppression, why are so many disputed confession statements admitted as evidence before the courts? Is this a serious practical problem, and if so, what should be done to mitigate the problem?
- Do you agree, in law and/or in practice, with the Supreme Court's guidance that in the absence of a defence counsel/legal practitioner a confessional statement should be rejected by the court? Please give reasons for your answer.

In international law, where a plausible claim is made that a statement was obtained under torture or cruel, inhuman or degrading treatment, the burden is similarly on the prosecution or other authority seeking the admission in evidence of the statement to show that it was made voluntarily. In the *Taba* case, summarized below, the African Court on Human and Peoples' Rights stated that "once a victim raises doubt as to whether particular evidence has been procured by torture or other ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment". In the *Nallaratnam Singarasa v. Sri Lanka* case (also summarized below), the Human Rights Committee similarly stated that "it is implicit in the principle [that an individual should not be compelled to self-incriminate] that the prosecution must prove that the confession was made without duress".



### Case study Exclusion of evidence in violation of human rights law *Taba case*\*

On 6 October 2004, bomb attacks in the *Taba* and *Nouweiba* tourist resorts on the Sinai Peninsula led to the death of 34 and injury of more than 100 Egyptians and foreigners. The Egyptian security forces arrested a large number of persons in the aftermath of the attacks, among them Mohamed Gayez Sabbah, Osama Mohamed Abdel-Ghani Al-Nakhlawi and Younis Mohamed Abu-Gareer. They were detained incommunicado (including without access to a lawyer) for about half a year, then tried by the Supreme State Security Court of Egypt, found guilty primarily based on confessions they made while in detention and sentenced to death.

Two human rights organizations brought applications on their behalf before the African Commission on Human and Peoples' Rights. The African Commission found that the three men made their confessions after having been subjected repeatedly to torture (para. 189). The three men were detained without access to the outside world for six to nine months. They complained about the ill-treatment for the first time when they were brought before a prosecutor. The public prosecution had them medically examined and determined that they were free from external injuries. The defendants then complained to the trial court, which ordered a medical examination. In spite of the long time elapsed, the medical examination showed unexplained injuries compatible with the torture complained of by the three men, but the court did not investigate the matter further. Instead, it sentenced the defendants to death relying on their confessions made to the security forces.

In its decision, the African Commission reiterated several very important principles also contained in the jurisprudence of the other international human rights bodies:\*\*

- When a person is injured in detention or while under the control of the security forces, there is a strong presumption that the person was subjected to torture or ill-treatment (para. 168).



*Case study:  
Exclusion of evidence in violation of human rights law  
Taba case\* (continued)*

- If the prosecution wishes to rely on evidence which an individual claims was obtained through torture or ill-treatment, the burden falls on the prosecution to establish that evidence has not been obtained through torture or inhuman and degrading treatment. The African Commission stated that “once a victim raises doubt as to whether particular evidence has been procured by torture or other ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment” (para. 218).
- Moreover, where a confession is obtained during incommunicado detention, it should be considered to have been obtained by coercion and not be admitted as evidence (para. 212).
- Access to a lawyer is one of the necessary safeguards against abuse during the pretrial process (para. 179).
- Prompt recourse to a judicial authority, independent of the authorities detaining, interrogating and ultimately prosecuting, constitutes a vital aspect of the prevention and deterrence of torture and other ill-treatment (para. 183). Appearance of the detainees before a prosecutor is not sufficient to satisfy this requirement.

Among other remedies, the Commission recommended that Egypt not carry out the death sentences, release the three men and adequately compensate them. In February 2012 the Egyptian Government repealed the death sentences.

***Nallaratnam Singarasa v. Sri Lanka case\*\*\****

Mr. Singarasa was arrested on suspicion of involvement in activities of the Liberation Tigers of Tamil Eelam, including attacks against camps of the Sri Lankan army. He was held in police custody for many months without access to a lawyer and allegedly beaten. About six months after his arrest, he was produced before a senior police officer and asked to sign a statement, which later on became the basis for his conviction at trial and sentencing to 35 years in prison. According to Mr. Singarasa, he was unable to understand the statement (as it was written in Sinhalese and he only spoke and read Tamil) and he had refused to sign it, but the police officer forcibly put his thumbprint on the typed statement.

At the time of the facts, under Sri Lankan law of evidence a statement made to a police officer was inadmissible. The Prevention of Terrorism Act, however, made an exception to this rule, providing that a confession made to a senior police officer was admissible. The voluntariness of such a statement or confession could be challenged, but the burden of proving that a confession was not made voluntarily lay with the person claiming it. At trial, Mr. Singarasa claimed that his “confession” had been coerced. The court, however, applied the provision of the Prevention of Terrorism Act and admitted the statement (basing the guilty finding and sentence on it) as Mr. Singarasa was unable to prove that the statement was not voluntary.

The Human Rights Committee was seized of the case. It maintained “that it is implicit in the principle [that an individual should not be compelled to self-incriminate] that the prosecution must prove that the confession was made without duress” (para.7.4). If a court (whether at the pretrial or trial stage) finds that the prosecution has failed to show that an incriminating statement was not extracted through compulsion, where this issue is raised by the defence, then the evidence must be excluded in order that the trial is fair.

\* *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Merits, Communication No. 334/06, p. 185, 1 March 2011.

\*\* The African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, equally state (sect. N, para. 6 (d) (i)): “Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion”.

\*\*\* Human Rights Committee, *Nallaratnam Singarasa v. Sri Lanka*, Communication No. 1033/2001 (CCPR/C/81/D/1033/2001), 21 July 2004.



## Focus

### Under the Luanda Guidelines, confessions are only to be taken by a judicial officer

The Luanda Guidelines, in section 9 (d) state: “Confessions should only be taken in the presence of a judicial officer or other officer of the court who is independent of the investigating authority. The burden of proof lies with the prosecution to prove that confessions were obtained without duress, intimidation or inducements. Confessions by children are to be recorded in the presence of a judicial officer, and their parent, guardian or independent advocate, lawyer or other legal services provider”.

An obvious and frequently relied on means of proving the voluntariness of a confessional statement is to seek to get the suspect to repeat or confirm the confession before a different officer and/or under circumstances that cannot be impugned, such as when, by way of example, a suspect who made a confession during police custody is asked to confirm his statement before a prosecutor. It is, in any event, best practice to record electronically, wherever possible, all initial and follow-up interviews in order to provide a safeguard to assess and ensure the voluntariness of any confessional statements made.

In relation to confession statements made in subsequent interviews, it is important to stress that, where there is reason to believe that an initial confession was made under duress, investigators, prosecutors and judges should be extremely cautious in assuming that subsequent statements confirming the confession are free from coercion. For instance, in the *Harutyunyan v. Armenia* case, the European Court of Human Rights made this same point, stating that: “where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed — or confirmed a coerced confession in his later statements — to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter”.<sup>82</sup>



## Activity 24

### Aminu Jaffar case

As a result of information, officers of the Law Enforcement Agency (LEA) pay a call at a house at 101 High Crescent, Abuja. Officers have reason to believe that the occupants of the house have been making bombs. Officers force entry and find one person at the address. He refuses to give his name. He is arrested on suspicion of making preparations to carry out an act of terrorism.

Three officers take the arrested person to LEA detention facilities. Four officers remain at the address and begin to search the premises. The Senior Investigating Officer, mindful of the obligation to place the arrested before a court the next day, decides that the officers should conduct an interview with the arrested person without delay. The interview is audio recorded (LEA subsequently makes a copy of the audio files available to the Ministry of Justice prosecution team assigned to the case).

The audio recording starts with the arrested person refusing to provide his name, stating that he will not be giving any responses to questions and asking to be assisted by a lawyer (during the remainder of the interview, this request is neither taken up by LEA nor reiterated by the suspect). At no point during the interview do the law enforcement officers mention to the suspect his right to remain silent.

<sup>82</sup> European Court of Human Rights, *Harutyunyan v. Armenia*, Application No. 36549/03, Judgement of 28 June 2007, para. 65.



## Activity 24

### Aminu Jaffar case (continued)

While the interview is in progress (that is, the arrested person continues to refuse to answer any questions), the officers searching the house at 101 High Crescent find a large package. The package is underneath clothing in the bottom drawer in a chest of drawers. It measures approximately 30 cm x 20 cm x 10 cm, is covered with masking tape and has wires protruding from it. Some of the wires are connected to a device that looks like an electronic timer. The officers suspect it is a bomb. They immediately contact their colleagues who are conducting the interview with the arrested person.

The interviewing officers inform the arrested person of the discovery and request that the arrested person break his silence. Officers state that a number of officers and residents in the area could be at risk if he maintains his silence. They demand to know if the bomb is real and if the timer is activated. The arrested person maintains his silence. Officers become increasingly frustrated; they raise their voices. At this point, loud banging, possibly on the interview table, can be heard on the recording. Officers state that there will be “dire consequences” if the arrested person remains silent. The arrested person eventually states that it is a bomb, but that the timer has not been activated. He also states that he did not make the bomb; his role was simply to look after the bomb until others took it away for eventual use. He did not know the intended target or when the bomb was to be deployed. He states that his name is Aminu Jaffar.

As a result of this information, the authorities evacuate the area, take the device to a place of safety, where it is photographed, analysed and destroyed in a controlled explosion. It was a bomb containing sufficient explosives to have caused serious injury or loss of life. The timer had not been activated. On the following day, LEA officers take Jaffar to magistrate court and file an *ex parte* application to the court under article 27 of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA), seeking 90 days of detention. The court grants the application and Jaffar is taken back into LEA detention.

After 60 days of detention, Jaffar is allowed a visit by his family. On the 65th day, he receives a visit from a lawyer retained by his family, who takes over his defence. After 85 days of detention, the case is eventually brought before the Federal High Court. At the arraignment and case management hearing Jaffar pleads not guilty. In his statement of defence, he claims that he was at the address in all innocence and did not know that there was a bomb at the address.

His counsel contends that the manner of the interview constituted a breach of Jaffar’s fundamental rights as enshrined in chapter IV of the Constitution of the Federal Republic of Nigeria. He further contends that, as a consequence, the statements made by Jaffar to the LEA officers are not admissible as evidence.

- Did LEA officers act in accordance with Nigerian law?
- What, if anything, should LEA officers have done differently?
- Draft the motion for Aminu Jaffar’s counsel.
- Draft a motion in reply for the prosecution.

## Duties of prosecutors and judges

The Guidelines on the Role of Prosecutors<sup>83</sup> (Guideline 16) state that: “[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall

83 Guidelines on the Role of Prosecutors, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice”.

The same principle is expressed (in the same words) in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples’ Rights (sect. F (I)).

The role and obligations of judges in relation to torture have also been highlighted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment as follows:

A judiciary that is independent and impartial is essential for the fulfilment of the most important obligations regarding torture and cruel, inhuman or degrading treatment or punishment in international law, including to order ex officio inquiries into allegations of torture or coercion and to ensure all safeguards are upheld. Both the judiciary and the Attorney General’s Office have a dual obligation of prevention and accountability.

[...]

It would be important for judges and prosecutors to take it upon themselves, under a sense of legal obligation, to consider bail for lesser and non-violent offences; to order medical examinations by forensic doctors properly trained by the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Istanbul Protocol) as soon as any suspicion of mistreatment arises; to initiate prosecutions against whomever may be responsible for torture or mistreatment, including the superiors who may have tolerated or condoned that act; and more generally to ensure that all aspects of the chain of criminal justice (investigation, detention, interrogation, arrest and conditions of incarceration) comply with the rule of law.<sup>84</sup>

Judges have an obligation to take practical steps to follow up on any evidence or suspicions of torture to include reporting evidence of torture to the relevant authorities. It is suggested that it would be in accordance with international best practice for the judiciary to, at the very least, refer all evidence and suspicions of torture to the Attorney-General of the Federation, and, in order to ensure a level of independent oversight, to provide simultaneous notification of the referral to the National Committee against Torture and the National Human Rights Commission.



### Activity 25

Identify comparable principles in policy documents governing the conduct of judges and prosecutors in Nigeria.

<sup>84</sup> Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on the official joint visit to Sri Lanka, 2016.



## B. Admissibility of statements by third parties alleged to have been obtained by torture or other cruel, inhuman or degrading treatment or punishment or other forms of oppression

The term “third-party torture evidence” is sometimes used to refer to information or evidence obtained by torture or cruel, inhuman or degrading treatment of a person who is not the suspect or the accused in the proceedings at hand. For instance: investigators suspect that A might have information regarding supporters of a terrorist group in his village. They threaten to subject A to severe pain if he does not reveal their names. As a result, A names B and C as members of the terrorist group.

For the purposes of international law, in particular article 15 of the Convention against Torture, any statement made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence in any proceedings (except against a person accused of torture as evidence that the statement was made). It does not matter whether the statement was obtained by torturing an accused, a suspect or a witness, or whether it is self-incriminating or accuses others.



### Case study

#### *A and others v. Secretary of State for the Home Department case\**

The issue of admissibility of “third-party torture evidence” arose before the House of Lords in the United Kingdom in 2005 in the case of *A and others v. Secretary of State for the Home Department*. Specifically, the issue in this case was whether a court hearing an appeal by a person certified as an international terrorist under domestic anti-terrorism legislation may receive evidence which has or may have been procured by torture. The torture in question was alleged to have been inflicted without the complicity of the British authorities against other terrorism suspects detained outside the United Kingdom.

Lord Bingham of Cornhill stated that:

“51. ... It trivializes the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.

52. ... The principles of the common law, standing alone, in my opinion compel the exclusion of third-party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.”

[Lord Bingham also stated that the international obligations of the United Kingdom reinforce the common law exclusion of third-party torture evidence.]

\* House of Lords, Opinions of the Lords of Appeal for Judgment in the case of *A and others v. Secretary of State for the Home Department* of 8 December 2005.

Regarding Nigerian law, section 29 of the Evidence Act, 2011 deals only with confessional statements, that is, an admission made by a person suspected of or charged with a crime. On its face, it does not apply to third-party torture evidence.

In the above-cited hypothetical case of A, B and C, A's statement would not be excluded by section 29 of the Evidence Act, 2011 as he is not charged with a crime and has not said anything that would suggest his involvement with the crime. In this case, the general rules regarding improperly obtained evidence in sections 14 and 15 of the Evidence Act, 2011 would apply. Under those rules, the court shall admit the evidence unless it is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting it. In essence, section 14 above gives the Court the discretion to exclude improperly obtained evidence, while section 15 states the matters the court should take into consideration in exercising its discretion under section 14.

One way of giving effect to the exclusion of third-party torture evidence within the framework of sections 14 and 15 of the Evidence Act, 2011 is to consider that, in the case of torture, "the gravity of the impropriety or contravention" (sect. 15 (d)) is always such as to outweigh all factors in favour of admitting the evidence, such as its importance to the proceedings or the gravity of the offence charged. Moreover, in the case of evidence obtained by torture, the "impropriety or contravention" will always have been deliberate (sect. 15 (e)).

## C. Admissibility of other evidence obtained as a result of statements alleged to have been obtained by torture or other cruel, inhuman or degrading treatment or punishment or other forms of oppression

A further, different, scenario arises where reliable evidence is found as a result of involuntary statements extorted either from the suspect or a third person. In the *Gaeffgen* case, for instance, German police arrested a man (Mr. Gaeffgen) whom they had reason to believe was involved in the kidnapping for ransom of a boy. Out of concern for the child's life and wanting to find him as quickly as possible, police threatened the man with torture unless he revealed the child's whereabouts. As a result of the threats, the man showed the police the place where he had hidden the child's corpse (he had killed the child soon after the kidnapping). At the location, police secured other evidence incriminating Mr. Gaeffgen, such as the tracks of his car's tyres. At trial, the prosecution sought to have this "real evidence" admitted. The term "real evidence" refers to physical or material objects which can usually be produced for inspection, for example vehicles, items of clothing, explosives and weapons.

From a policy point of view, the question whether "real evidence" obtained as a result of torture or cruel, inhuman or degrading treatment (or threats of such treatment) should be admissible poses difficult issues. On the one hand, the argument that coerced statements should not be admitted as they are inherently unreliable does not apply in a scenario such as the *Gaeffgen* case. The reliability of evidence relating to the forensic analysis of the kidnapped child's corpse or the tire tracks found at the site is not diminished by the way the police were led to find it.

On the other hand, the dissuasion from using torture will be more effective if "real evidence" found as a result of torture is not admissible. In his 2014 report to the Human Rights Council, focusing on the scope and objective of the exclusionary rule, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that:

The exclusionary rule extends not only to confessions and other statements obtained under torture, but also to all other pieces of evidence subsequently obtained through legal means but which originated in an act of torture. In some jurisdictions, this approach is called the "fruit of the poisonous tree" doctrine. There is no doubt that this includes real evidence obtained as a result of ill-treatment but falling short of torture.

The admission of evidence, including real evidence obtained through a violation of the absolute prohibition of torture and other ill-treatment in any proceedings, constitutes an incentive for law-enforcement officers to use investigative methods that breach these absolute prohibitions. It indirectly legitimizes such conduct and objectively dilutes the absolute nature of the prohibition. [internal footnotes omitted]<sup>85</sup>

The *Mthembu* and *Ghailani* cases, summarized in the box below, are further examples of courts in common law jurisdictions taking this approach.

Section 30 of the Evidence Act, 2011, cited below, allows any fact discovered as a result of information provided by a person accused of an offence to be given in evidence also where the statement that leads to the discovery of the facts would not be admissible, for example, because it was obtained by oppression:

Where information is received from a person who is accused of an offence, whether such person is in custody or not, and as a consequence of such information any fact is discovered, the discovery of that fact, together with evidence that such discovery was made in consequence of the information received from the defendant, may be given in evidence where such information itself would not be admissible in evidence.

Sections 14 and 15 of the Evidence Act, 2011, cited below, would also be applicable in such a case, as well as to cases where information is improperly obtained through oppression not from the accused, but from a third person (as in the *Mthembu* case discussed in the box below).

#### **Improperly obtained evidence**

14. Evidence obtained –

- (a) improperly or in contravention of a law; or
- (b) in consequence of an impropriety or of a contravention of a law;

shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

15. For the purposes of section 14, the matters that the court shall take into account include –

- (a) the probative value of the evidence;
- (b) the importance of the evidence in the proceeding;
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
- (d) the gravity of the impropriety or contravention;
- (e) whether the impropriety or contravention was deliberate or reckless;
- (f) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.

Sections 14 and 15 of the Evidence Act, 2011 do not adopt a “fruit-of-the-poisonous tree” approach. Where evidence is found as a result of torture or inhuman or degrading treatment, however, “the impropriety or contravention” will be particularly serious (sect. 15 (d)). The principle of constitutionalism demands that the courts be absolutely intolerant to infringement of the fundamental right of citizens and other violations of the

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85 A/HRC/25/60, paras. 29–30.

constitution. Admitting evidence obtained through such infringement, even in a seeming bid to do justice, condones such infringement.



### Case study

#### *Mthembu and Ghailani cases*

##### *Mthembu case\**

Mr. Mthembu, a former police officer, was charged with the theft of two vehicles and of robbing a post office, where he took a steel box containing a substantial amount of cash. The prosecution case relied in large part on the statements of an accomplice, a Mr. Ramseroop, and on the fact that one of the vehicles and the steel box had been found at Mr. Ramseroop's home, where he had been concealing them on behalf of the accused. The second stolen vehicle was found independently.

The case went to trial four years later. Mr. Ramseroop testified that the accused, Mr. Mthembu, had handed him the car and the steel box for hiding. It also emerged, however, that the investigators had tortured Mr. Ramseroop (including through the use of electric shocks) at the police station before he showed them where the vehicle and the steel box were hidden. The trial court found Mr. Mthembu guilty on all counts and sentenced him to 23 years in prison. The court reasoned that the vehicle and the steel box existed independently of the accomplice's coerced statements, and that they therefore constituted relevant and reliable evidence.

On appeal, the Supreme Court of Appeal distinguished between a confession extorted by improper means, which was not admissible as evidence, and the so-called "real evidence", that is, objects which were found as a result of information obtained improperly. The Supreme Court noted that traditionally real evidence was not excluded as its reliability was not influenced by the means used to find it. The Supreme Court noted, however, that this had changed with the entry into force of the Bill of Rights in the Constitution of the Republic of South Africa in 1996, which provides, in article 35 (5):

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

The Supreme Court reasoned that "to admit Ramseroop's testimony regarding the [car] and the metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest ... demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial".

The Supreme Court quashed the convictions for the theft of the vehicle found at Ramseroop's home and for the robbery of the post office. It upheld the conviction for the theft of the other vehicle and reduced the sentence to four years.

In conclusion, the Supreme Court noted that Mr. Mthembu, "who ought to have been convicted and appropriately punished for having committed serious crimes, will escape the full consequences of his criminal acts. The police officers who carried the responsibility of investigating these crimes have ... by torturing Ramseroop ... themselves committed crimes of a most egregious kind. They have treated the law with contempt and must be held accountable for their actions". The Supreme Court therefore transmitted its judgement to the minister competent for the police, to the national police commissioner, to the South African Human Rights Commission and to the National Director of Public Prosecutions for follow-up action.



Case study  
*Mthembu and Ghailani cases*  
*Mthembu case\* (continued)*

***Ghailani case\*\****

Ahmed Khalfan Ghailani was on trial in the United States Federal Court in New York City charged with murder, conspiracy to commit terrorist offences and other offences for his suspected involvement (he was accused of playing a key logistical role) in the terrorist bombings in 1998 of the United States Embassies in Kenya and the United Republic of Tanzania, in which 224 people were killed.

Mr. Ghailani had been captured in Pakistan in 2004 and had been detained at a secret detention facility of the United States Central Intelligence Agency (CIA) (a so-called black site) and at the naval base in Guantánamo for five years before being put on trial in a civilian court. Under interrogation during his detention at the CIA black site, Mr. Ghailani made statements that reportedly amounted to a confession of his role in the bombings. The prosecution made no attempt to introduce these statements as evidence at trial. Mr. Ghailani also made statements to the CIA investigators that led them to a man called Hussein Abebe. Mr. Abebe subsequently told the investigators that he had sold Mr. Ghailani the explosives used in the attacks.

The prosecution considered Mr. Abebe to be a key witness, but Mr. Ghailani's defence objected to his being called to testify at trial on the ground that the information leading to the identification of Mr. Abebe as a witness had, allegedly, been extorted from Mr. Ghailani under torture. The United States Government declined to provide information to the judge on the circumstances under which Mr. Ghailani had been interrogated and accepted that the judge would, as a consequence, assume that Mr. Ghailani's statements had been coerced.

To decide on the question of the admissibility of Mr. Abebe's testimony, the judge held closed hearings at which he heard as witnesses persons who were present when Mr. Abebe was persuaded to confess his role, to implicate the accused and to cooperate with the authorities. The judge subsequently ruled that the United States Constitution did not allow Mr. Abebe to take the stand as a witness because "the Government has failed to prove that Abebe's testimony is sufficiently attenuated from Ghailani's coerced statements to permit its receipt in evidence". The judge added:

"The Court has not reached this conclusion lightly. It is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand."

The jury subsequently acquitted Mr. Ghailani on all but one of the more than 280 charges against him, including on charges of murder and conspiracy to use weapons of mass destruction. He was, however, found guilty on one count of conspiracy to destroy government buildings and property. The judge imposed a life sentence for this conviction.

\* Supreme Court of Appeal of South Africa, *Mthembu v. the State*, Case No. 379/07, Judgement of 10 April 2008.

\*\* United States District Court, Southern District of New York, *United States of America v. Ahmed Khalfan Ghailani*, Case No. S10 98 Crim. 1023 (LAK), 12 July 2010.



## Activity 26

If you were a judge in Nigeria faced with cases comparable to the *Mthembu* and *Ghailani* cases, how would you decide the issues of: (a) the admissibility of Ramseroop's statements; (b) the items found at Ramseroop's home; and (c) calling Abebe as a witness?



## Activity 27

Law enforcement officers have reason to believe that A from village V is a member of the terrorist group T.

They carry out a raid on the village. A cannot be found. The law enforcement officers, however, find his father F in his hut. F tells them that his son A is indeed an armed member of the terrorist group. He signs a statement to this effect. F also leads the law enforcement officers to a place outside the village where they recover a large cache of military weapons. Forensic analysis of some military assault rifles reveals A's fingerprints on the weapons and that some of the rifles had in all likelihood been used in an attack by the terrorist group.

Two weeks later, A is captured. He is charged with numerous counts under the Terrorist (Prevention) Act, 2011 (TPA), as amended by the Terrorist (Prevention) (Amendment) Act, 2013 (TPAA). The prosecution's case is based to a very large extent on F's statement and on the forensic evidence relating to the weapons recovered from the cache.

At trial, A's defence calls F as a witness. He testifies convincingly that when they found him in his hut and he told them that he did not know the whereabouts of A, the law enforcement officers beat him with an iron rod until he led them to the weapons cache. A's defence also adduces medical evidence compatible with the ill-treatment narrated by F. No other explanation of F's injuries is proffered.

A's defence moves to have the signed statement by F ruled inadmissible on the ground that it was obtained under torture. A's defence further moves to have the weapons and the forensic evidence linking the weapons to A excluded.

The prosecution argues that the weapons and the connected forensic evidence are objective and reliable facts independent of the way in which they were obtained. The prosecution further argues that the weapons and the connected forensic evidence prove that F's statement was reliable.

- Write the motion for the defence.
- Write the motion in reply for the prosecution.



## Self-assessment questions

1. Explain the law and principles relating to the admissibility of:
  - (a) Confessional statements alleged to have been obtained by torture or cruel, inhuman or degrading treatment or other forms of oppression;
  - (b) Statements by third persons (not the defendant) alleged to have been obtained by torture or cruel, inhuman or degrading treatment or other forms of oppression;
  - (c) Other evidence obtained as a result of statements alleged to have been obtained by torture or cruel, inhuman or degrading treatment or other forms of oppression. Identify the key measures required for the effective prevention of torture or cruel, inhuman or degrading treatment or punishment.
2. If a confession allegedly obtained by torture or other ill-treatment is subsequently repeated and confirmed before another law enforcement officer in circumstances where there is no suspicion of any ill-treatment or wrongdoing, should that confession be admitted into evidence? Explain the reason for your answer, giving full details of all applicable Nigerian laws.
3. Discuss the importance and relevance of excluding evidence obtained through oppression.
4. Describe the duties of prosecutors and judges in the handling of evidence suspected to have been obtained unlawfully.
5. Explain the law, procedure, burden of proof and practical problems in proving whether or not a confession statement was given voluntarily.

# 7

## Gender dimensions of investigative interviewing in terrorism cases



### Learning objectives

By the end of chapter 7, readers will be able to:

- Explain the meaning and relevance of gender mainstreaming in the context of their own work.
- Identify best practices for the interviewing of female victims, witnesses and suspects in terrorism cases.
- Recognize the specific vulnerabilities of women deprived of their liberty.
- Discuss the gender dimensions of the basic procedural and pretrial safeguards for the prevention of torture.
- Explain the relationship between conditions of detention and the risk of torture for women deprived of their liberty and identify measures to respond to the specific risks they face.
- Discuss the risk of custodial rape and other forms of sexual and gender-based violence as a form of torture, identify the applicable Nigerian and international laws and standards and consider practical measures to reduce the risk of this form of torture.
- Discuss the practical ways in which gender dimensions can be mainstreamed in monitoring and oversight mechanisms and in training, education and empowerment programmes in the context of the prevention of torture.

### A. Gender dimensions of terrorism and counter-terrorism

Gender dimensions permeate every aspect of terrorism and counter-terrorism activities, including all aspects of the criminal justice responses to terrorism. Chapter 7 focuses on the gender dimensions of:

- (a) Interviewing victims, witnesses and suspects; and
- (b) Prevention of torture and other forms of ill-treatment.

Chapter 7 examines how women experience and are impacted by the response of the justice system to terrorism, in particular in the course of being interviewed as witnesses, as well as other gender-specific issues relevant for the prevention of torture. It should be emphasized, nevertheless, that the gender-related issues discussed herein also have an impact on the needs and vulnerabilities of men and boys. Gender-related needs and vulnerabilities for women and men, girls and boys must be fully taken into account in all counter-terrorism responses in order to ensure that such responses are both effective and in compliance with human rights.

The role of masculinity and male identity in terrorism can be critical in understanding motivations for engaging in violent extremism or terrorism and how appeals to traditional masculine ideals are often employed in recruitment tactics. As observed by the current Special Rapporteur of the Human Rights Council on the promotion and protection of human rights while countering terrorism in a publication in 2018:

... men who cannot meet traditional expectations of masculinity – such as breadwinner, respect and honour, wealth, access to sexual partners of choice – may precisely find that radical or extremist political mobilization offers a compelling substitute for regular masculinity authentication. It is therefore not accidental that terrorist/violent extremist groups manipulate gender stereotypes to recruit men and women, ISIS notably employs hypermasculine images to portray its fighters, as well as promised access to sexual gratification, marriage and guaranteed income as a reward for the glory of fighting. These motifs have proven indisputably alluring to marginalized men whose capacity to access any similar social capital or status in their own communities will be extremely limited.<sup>86</sup>

Furthermore, there is a clear overlap between the gender-related issues discussed in this chapter and the child-related issues examined in chapter 8, for example, the way in which male adolescent suspects in terrorism cases tend to be denied child status and to be treated as adults. This issue was analysed by the Special Rapporteur of the Human Rights Council in her report on the human rights of adolescents/juveniles being detained in the north-eastern part of the Syrian Arab Republic:

States must always undertake individualized assessments pertaining to the specific situation where gender harms are identified. This principle is broadly understood in respect of women and girls but should be fully practiced in relation to boys. States must be conscious of the gender-specific traumas that can be experienced by boys, as well as the various human rights violations that they are subjected to in the context of their detention and the impact of those conditions on their mental and physical health.<sup>87</sup>



## Tool

Chapter 7 draws on other UNODC resource materials, namely:

- UNODC: *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism*
- UNODC: *Nigeria Training Module on Gender Dimensions of Criminal Justice Responses to Terrorism*
- UNODC: *Nigeria Handbook on Counter-Terrorism Investigations*\*

These resources are more comprehensive in their scope and are recommended as further reading for anyone who wishes to further explore and increase their understanding of the gender dimensions of criminal justice responses to terrorism.

\* Available upon request from UNODC.

## What is the relevance of gender dimensions of criminal justice responses to terrorism?

An effective criminal justice response to terrorism must include a gender perspective, adopt an approach based on gender mainstreaming and human rights, and take into account the multifaceted and distinct ways that women and men are involved in and impacted by terrorist acts and counter-terrorism responses. Adopting such

86 Fionnuala Ní Aoláin, “The complexity and challenges of addressing conditions conducive to terrorism”, in *Using Human Rights to Counter Terrorism*, 2018, Manfred Nowak and Anne Charbord, eds. (Cheltenham, United Kingdom, Edward Elgar Publishing Limited), p. 190.

87 See OHCHR, “Position of the United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism on the human rights of adolescents/juveniles being detained in North-East Syria”, May 2021.

an approach will strengthen both the effectiveness of the criminal justice response to terrorism and respect for women's rights.

Mainstreaming gender into every aspect of the criminal justice response to terrorism is the right thing to do, it is the most effective approach, it promotes peace, security and empowerment and accords with Nigeria's national, regional and international policy commitments and obligations.<sup>88</sup>



### Focus

#### What is gender mainstreaming?

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a way to make women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal is to achieve gender equality".\*

\* United Nations Office at Vienna and UNODC, Strategy for Gender Equality and the Empowerment of Women (2018–2021).



### Focus

#### How are women affected by conflict in Nigeria?

History has shown that whenever there are social upheavals or conflicts of any kind, women and children suffer abuses and human rights violations. Glaring examples of rape and killing of women and children abound during insurgencies. Women who survive these atrocities are traumatized and often live with memories of rape, war and death for the rest of their lives. These women suffer psychological trauma, sexually transmitted diseases, stigmatization and almost always unwanted pregnancies. They are faced with the daunting task of keeping families together after displacement and destruction of infrastructure and at the same time are expected to provide food, clothing and shelter. Even in the absence of violent conflict, women and girls live in fear of kidnappers, ravaging effect of drought, flooding and environmental insecurity that constitute threats to human survival and meaningful development in their communities.\*

\* Extract from the preface by the Permanent Secretary of the Federal Ministry of Women's Affairs and Social Development to the National Action Plan for the Implementation of UNSCR 1325 [Security Council resolution 1325 (2000)] and Related Resolutions on Women, Peace and Security in Nigeria (2017–2020).

88 Examples include: the National Gender Policy of the Federal Republic of Nigeria; the National Action Plan for the Implementation of UNSCR 1325 [Security Council resolution 1325 (2000)] and Related Resolutions on Women, Peace and Security in Nigeria (2017–2020); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); and Convention on the Elimination of All Forms of Discrimination against Women.



## Focus

### Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa

The Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, adopted by the African Commission on Human and Peoples' Rights, underlines, in part 1.H, that:

... States shall ensure that legislation, procedures, policies and practices are designed to respect and protect the rights and special status and distinct needs of women and children who are victims of terrorism or subject to counter-terrorism measures, including but not limited to searches and investigations, all forms of detention, trials, and sentencing.



## Activity 28

In the context of your own work, what is the practical relevance, importance and meaning of gender mainstreaming? Please provide examples.

## B. Interviewing female victims, witnesses and suspects

Chapter 2, which provides information on interviewing, including the details of interviewing techniques, the rapport-based approach and good practices on interviewing, is applicable to both women and men. However, when interviewing women, special practices, procedures and safeguards need to be put in place to protect their rights and distinct needs.

Integrating a gender perspective into the interviewing of victims, witnesses and suspects is important in order, first, to increase the likelihood that women cooperate with law enforcement and justice authorities in the investigation and prosecution of terrorism offences, and, second, to protect women who are victims or witnesses of acts of terrorism from re-traumatization through their contact with the justice system, to prevent stigmatization by their family or community and to prevent retaliation.

Interviewers must be aware of factors that may prevent victims and witnesses from coming forward or from cooperating with authorities. Most of the following factors are relevant to both women and men, but – in the socioeconomic circumstances of Nigeria – may apply to women in particular:

- Illiteracy.
- Limited understanding of legal procedures.
- Sociocultural norms that may prevent female victims and witnesses from coming voluntarily to police stations or other places where witness statements are normally taken.
- A feeling of powerlessness and lack of trust in the ability to obtain justice.

- Fear of violence from the authorities, from the initial perpetrators, from the community or from the very people who are supposed to help them.
- Underrepresentation of women in criminal justice, legal and counter-terrorism professions.

There are a number of measures that law enforcement and justice authorities can adopt to overcome or at least mitigate these challenges:

- Raise women's awareness, through public education programmes, both of their rights to access justice and their duties to collaborate in the investigation of offences.
- Raise awareness of measures to protect women against negative repercussions of collaborating with the authorities.
- Consider the use of local languages in awareness-raising programmes.
- Consider whether it is possible to conduct interviews in locations other than police stations, where victims, witnesses and suspects will feel safer and more at ease.
- Partner with community leaders, religious and traditional authorities and women in leadership positions in the community.

## **(i) Interviewing female witnesses**

In interviewing female witnesses, the following general guidelines should be observed:

- Witnesses are likely to be more confident and helpful if they are assured of their safety prior to interviews or testimony. Failure to adequately protect witnesses or to assure them of protection prior to, during and after interviews may adversely affect the quality and quantity of evidence gathered from witnesses, particularly female witnesses who may have a greater fear of social stigma and reprisals.
- Investigators should inform witnesses in plain language of the existing mechanisms to protect them, including possible mechanisms to ensure the confidentiality of their statements. They must not, however, make promises of protection that cannot be maintained.
- In the case of the victims of Boko Haram, female witnesses may require a greater level of physical and emotional safety before feeling ready to cooperate fully. Investigators should be aware that the presence of a psychologist or other mental health professional can often be conducive to healthy and effective questioning.
- Investigators should seek to supplement all witness/victim testimony with physical documentation of injuries or trauma. Every statement should be recorded.
- The recruitment, training and retention of female law officers and female counter-terrorism practitioners is an essential element in providing support for the interviewing of female witnesses.

Additional considerations and safeguards will be required when interviewing victims of sexual and gender-based violence. The box below contains an extract from the Nigeria Handbook on Counter-Terrorism Investigations, which provides practical guidance on this issue. Much of the guidance is equally applicable in interviewing other vulnerable witnesses and victims.

## (ii) Interviewing female suspects

In the course of interviewing female suspects, investigators should be aware of the importance of the following:

- (a) Avoid gender stereotypes: there is often a stereotype that women become involved with terrorist groups because they have been coerced, or for more emotional and less logical reasons than men. Many women are in fact often driven by the same factors as men;
- (b) In societies where women face discrimination in accessing education, financial resources, legal assistance and redress, and are less aware of their rights and legal support, female interviewees may be more likely than men to be intimidated by the interview situation and lack the confidence to speak openly;
- (c) With female suspects linked to Boko Haram, it may be difficult to separate involvement with the organization into categories of “forced” and “voluntary” assistance, or support for the organization. Specific considerations should be taken into account when interviewing female suspects who may themselves have been victims of terrorist groups, including of sexual and gender-based violence, in order to avoid secondary victimization. Where possible, interviewers trained in working with vulnerable witnesses should be used to interview suspects who may also be victims, and the duration of the questioning should be adjusted accordingly;
- (d) In spite of the stereotype that women become associated with terrorist groups against their will, female suspects are often more likely to face social stigma arising from their links to such organizations and are at risk of isolating and alienating themselves and their children. Unless they can be assured of measures to protect them against these consequences, female suspects and witnesses are less likely to be forthcoming in interviews and less cooperative with the investigators;
- (e) It is possible that women suspected of involvement with Boko Haram may have been indoctrinated over a long period of time, including through physical and sexual abuse, making it more difficult and/or dangerous for them to cooperate with terrorism investigations;
- (f) Male interviewers may create a greater sense of intimidation and vulnerability for female suspects compared with male suspects, particularly in contexts in which women have limited contact with men in public life and may also create a perceived or actual threat of sexual abuse. The presence of female officers and practitioners is encouraged – both to create an environment in which female suspects feel safer and to reduce the risk of sexual violence.



### Focus

#### Additional special considerations when interviewing female suspects/preliminary assessment of female suspects\*

While interviewing female suspects in terrorism cases, it is appropriate to take the following factors into consideration:

- Women’s disadvantages and vulnerabilities due to their reduced access to education and to financial institutions and consequent inability to access redressal mechanisms.
- Ability to talk freely in an alien environment.
- Their being in police custody and fear of being sexually assaulted.
- Fear of revictimization, in case they had already been sexually assaulted.
- Privacy issues arising from the environment in which the interview is being conducted.
- Potential support mechanisms, including the presence of a support person.
- Emotional needs of female suspects.
- Special emphasis on the willingness and consent of the person to be interviewed.
- Investigators should make an early assessment of female suspects in the following areas (among others):
  - Level of association with the terrorist organization.



### Focus

*Additional special considerations when interviewing female suspects/preliminary assessment of female suspects\* (continued)*

- Level of religious commitment and possible observance of purdah.
- Whether the woman was forced into the terrorist organization or was indoctrinated and driven by radical ideologies or other factors.
- Whether the woman has been sexually assaulted or abused.
- The level of fear, if any, from the terrorist groups she belongs to.
- Any feeling of regret, social stigma or guilt.
- Level of confidence in law enforcement authorities.
- The importance of confidentiality.
- Duration of questioning in view of vulnerability assessment.
- Availability of psychological support on a need basis.

\* UNODC, *Nigeria Handbook on Counter-Terrorism Investigations* (2019).



### Activity 29

Read the scenario of the terrorist safe house given in chapter 2 of the present module. Considering what you have learned in chapter 7 regarding gender dimensions, discuss:

- Who should conduct the interview of the suspects, and who else should be present during the interview?
- Should the suspects be detained? If so, what would be appropriate places of detention?
- In order to guide and inform the interview process, which factors do the interviewers need to assess and take into consideration?
- What is the best way for the interviewer to ensure full cooperation from the suspects prior to, during, and after the interview?

Consider also the specific legal and policy framework related to children discussed in chapter 8.



### Tools

The *UNODC Handbook on effective prosecution responses to violence against women and girls* provides advice on interviewing female victims, protecting and supporting them throughout the criminal justice process and preparing them for trial.

## C. Preventing torture and other cruel, inhuman or degrading treatment or punishment of women deprived of their liberty

Chapter 5 addresses the prevention of torture and other cruel, inhuman or degrading treatment or punishment in the context of criminal justice responses to terrorism, with a focus on basic and pretrial safeguards, the interrogation of suspects, conditions of detention, monitoring and oversight mechanisms, and training, education and empowerment. The contents of chapter 6, on the exclusion of evidence obtained through

oppression, are fully applicable to both women and men, although additional policies, practices and safeguards are required to respond to the distinct rights and needs of women in this area.

While contexts of imprisonment and deprivation of liberty expose all individuals to a higher risk of mistreatment and abuse, gender plays a key factor in vulnerability to torture in these contexts.

Women are at a particular risk of torture and ill-treatment when deprived of liberty, “both within criminal justice systems and other, non-penal settings”.<sup>89</sup>



### Focus

#### Vulnerability of women deprived of their liberty in Africa

The Special Rapporteur on Prisons and Conditions of Detention in Africa, appointed by the African Commission on Human and Peoples’ Rights, notes that women are particularly vulnerable in contexts of imprisonment as the result of discrimination in society generally, in the criminal justice system, and in imprisonment specifically:

There are several critical problems faced by women in prison – most are unmet in the prison environment. Women in prison have experienced victimization, unstable family life, school and work failure, and substance abuse and mental health problems.

Vocational and recreational programmes are more often than not inadequate.

Prisons often lack appropriate supplies to accommodate menstruating women.

While some prison systems provide separate facilities for the incarceration of women, in most countries, women are imprisoned in the same facilities as men. Even in cases where women are incarcerated separately, these facilities experience violence and abuse akin to that found in male facilities. Moreover, women prisoners are particularly vulnerable to sexual abuse by prison guards whether in female or mixed prisons.\*

\* Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, presented by the Honorable Commissioner Med S.K. Kagawa at the 52nd Ordinary Session of the African Commission on Human and Peoples’ Rights, p. 12.

## (i) Key safeguards to prevent torture

With reference to the Robben Island Guidelines, the basic procedural safeguards and the safeguards during the pretrial process for the prevention of torture are set out in chapter 5.A of the module. These safeguards apply equally to men and women. However, in relation to women deprived of their liberty, each safeguard must be put in place with full regard for the specific needs, requirements and circumstances of the female detainees in question.



### Activity 30

Referring to the Robben Island Guidelines basic procedural safeguards for those deprived of their liberty and safeguards during the pretrial process, set out in chapter 5.A of this module:

For each of the safeguards, identify any possible gender-specific special needs, requirements or considerations which may be relevant for women deprived of their liberty.

89 A/HRC/31/57, para. 13.

## (ii) Conditions of detention

While conditions of detention may not outwardly discriminate against women deprived of their liberty, failing to take women's particular needs into account has a discriminatory impact on women. This requires that affirmative action be taken to ensure that women deprived of their liberty have equal access to all services and rights that male detainees and prisoners enjoy, as well as being accorded additional rights and given access to other services and facilities that respond to their gender-specific needs.

Section 34 of the Nigerian Correctional Service Act, 2019, includes specific provisions to address the special needs of female inmates:

1. There shall be a provision of separate facilities for female inmates in all States of the Federation.
2. The Correctional Service shall provide all necessary facilities to address the special needs of women, such as medical and nutritional needs of female inmates, including pregnant women, nursing mothers and babies in custody.
3. Subsection (2) includes the provision of a crèche in every female Custodial Centre for the well-being of babies in custody with their mothers, and prenatal, antenatal health care and sanitary provisions for female inmates.

The Act defines "inmate" as "any person lawfully committed to custody" and includes persons sentenced and remanded in custody by order of the court.

At the regional level, the Plan of Action for the Kampala Declaration on Prison Conditions in Africa (1996), in paragraph 5(d), calls upon States to adopt "urgent and concrete measures...[to] improve conditions for vulnerable groups in prisons and other places of detention; such as: ... women, mothers and babies ... Procedures that take into account their special needs and adequate treatment during their arrest, trial and detention, must be applied to these groups".

At the international level, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)<sup>90</sup> provide guidance to meet the specific needs of women deprived of their liberty.

The following paragraphs address a number of specific areas and conditions of detention for which the special needs of women deprived of their liberty are of particular importance in the prevention of torture and other forms of ill-treatment.

### Admission and registration

Women deprived of their liberty can feel particularly vulnerable upon admission to custodial centres or places of detention due to the trauma of separation from children and families, past victimization or low educational and economic status. All persons deprived of their liberty should be provided with facilities to contact relatives, including access to legal advice and information about prison/detention facility rules and regulations.

Women with children should be allowed to make arrangements for the care of those children, and records should be kept of the details of the children of women deprived of their liberty.<sup>91</sup> Under the Nigerian Correctional Services Act, a child of a female inmate may be permitted to reside in a Custodial Centre with its mother if the child is breastfeeding and under 18 months old.<sup>92</sup>

90 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), General Assembly resolution 65/229, annex.

91 *Ibid.*, rule 2 (2).

92 Correctional Service Act (2019), sect. 34 (6).

## Separation and classification

Appropriately separating women deprived of their liberty according to their gender, legal status and age is integral to respecting the rights of women and minimizing the risk of their exposure to violence, sexual abuse and torture. As stated above, section 34 (1) of the Correctional Service Act, 2019 makes mandatory the “provision of separate facilities for female inmates in all States of the Federation”.

Authorities of the Custodial Centre should integrate gender perspectives into decisions as to whether to separate, disperse or integrate violent extremist prisoners from the general custodial centre/detention facility population. Where there is a small number of female violent extremist prisoners, special consideration must be given to the question of separation in order to avoid creating a situation of de facto isolation.<sup>93</sup>

Effective and gender-sensitive risks and needs assessments are central to ensuring that violent extremist prisoners are appropriately classified and categorized and take into account the gender-specific needs of women. If a gender assessment is not carried out, women may be placed in higher security settings than appropriate to the level of risk they represent. Gender-sensitive risk assessments should avoid stereotypes regarding women associated with terrorist groups, for example, that such women lack agency and do not pose a significant risk but should also take into account the generally lower risk that women pose to others; the effects of high-security measures and increased levels of isolation on women; women’s backgrounds and caretaking responsibilities; and opportunities for gender-sensitive rehabilitation programmes.<sup>94</sup>

## Health care and hygiene

The right of all persons deprived of their liberty to health is a fundamental right, which requires policies and measures to protect their physical and mental health and well-being.<sup>95</sup> This may require specific interventions to ensure that women’s specific needs are met. Women deprived of their liberty should be confidentially screened on admission to determine their physical and mental health-care needs, including for HIV and sexual abuse and violence.<sup>96</sup> Facilities and materials should be made available to meet women’s specific hygiene needs, including sanitary towels, provided free of charge.<sup>97</sup>

An important safeguard in preventing abuse is the availability of female medical practitioners, or, at least, the presence of female staff members during health visits.<sup>98</sup> Basic training should be provided to staff working in women’s custodial centres and detention facilities on issues relating to women’s health, and children’s development; HIV prevention, treatment, care and support; and the detection of mental health care needs, self-harm and suicide risks.<sup>99</sup>

The health-care facilities in many custodial centres and places of detention are not designed to meet women’s physical and psychological health-care needs. The absence of gender-specific health care in detention can amount to ill-treatment or, when imposed intentionally and for a prohibited purpose, to torture. States’ failure to ensure adequate hygiene and sanitation and to provide appropriate facilities and materials can also amount to ill-treatment or to torture.<sup>100</sup>

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93 Under rule 37 of the Nelson Mandela Rules, any form of involuntary separation from the general prison population, such as isolation or segregation, including for the maintenance of order and security, should be subject to authorization by law or by the regulation of the competent administrative authority.

94 Bangkok Rules, rules 40 and 41.

95 See International Covenant on Civil and Political Rights, art. 12; Convention on the Elimination of All Forms of Discrimination against Women, art. 12; and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 9.

96 Bangkok Rules, rules 6 to 8.

97 *Ibid.*, rule 5.

98 *Ibid.*, rule 10.

99 *Ibid.*, rules 33 to 35.

100 A/HRC/31/57, para. 26.

## Pregnant women and mothers with young children

All efforts should be made to ensure that pregnant women and women with children are not deprived of their liberty unless absolutely necessary, taking into account the gravity of the offence, the risk posed by the offender and the best interests of the child.<sup>101</sup> Pregnant women who are imprisoned should be held in special accommodation, and should be entitled to access health care and childcare facilities.<sup>102</sup>

Mothers with children in custodial centres or detention facilities should be provided with the maximum possible opportunities to spend time with their children, and provisions should be made for internal/external childcare facilities and child-specific health-care services. Children are not to be treated as prisoners.<sup>103</sup>

## Contact with outside world

The Standing Orders Custodial governing the administration of prisons by the Nigerian Correctional Service, most recently revised in 2020,<sup>104</sup> provide that inmates are entitled to: receive visits from friends and family members in the presence of a custodial centre officer; communicate with individuals outside the prison via letters at the discretion of the superintendent-in-charge; and send and receive letters and parcels.

As a result of the limited number of female custodial centres, women may be imprisoned far from their homes and may therefore find it difficult to maintain family links. In such cases, assisting with transportation of family members, extending the length of visits, granting prison leave and facilitating increased phone privileges are good practices that enable women to maintain contact with family members.

Contact between women inmates and their families and children should be encouraged and facilitated by all reasonable means, and steps should be taken to counterbalance disadvantages faced by women detained in facilities far from their homes.<sup>105</sup>

## Access to legal counsel

The right of access to a lawyer from the initial stage of custody is a fundamental safeguard against ill-treatment and is key in ensuring fundamental fairness and public trust in the criminal justice process. Contact between women detainees and legal representatives should be encouraged and facilitated by all reasonable means. Law enforcement and custodial centre authorities have a crucial role to play in reducing the vulnerability of female detainees in the criminal justice system by providing them with information about their legal rights, enabling their access to lawyers or paralegal services, providing facilities for meetings with lawyers and, if required, interpretation services.<sup>106</sup> This applies both in pretrial detention, and once women have been convicted.

## Supervision/search procedures

Abuse of women deprived of their liberty, including through more explicit physical forms of assault or more subtle abuses such as threats to deny access to their entitlements in exchange for sexual favours, is higher where women are supervised by male personnel.<sup>107</sup> As such, women inmates should be supervised only by women staff under a female warden,<sup>108</sup> including during transportation.

101 UNODC, *Handbook on Women and Imprisonment* (2nd ed.), 2014, p. 119; Bangkok Rules, rule 64; African Charter on the Rights and Welfare of the Child, art. 30; and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. XXIV (b).

102 Nelson Mandela Rules, rule 28; and Bangkok Rules, rules 42 and 48.

103 Nelson Mandela Rules, rule 29; and Bangkok Rules, rules 49 to 52.

104 Nigerian Correctional Service—Standing Orders Custodial (Revised Edition) 2020.

105 Bangkok Rules, rule 26.

106 UNODC, *Handbook on Women and Imprisonment* (2nd ed.), 2014, p. 71.

107 A/HCR/31/57, para. 20.

108 Nelson Mandela Rules, rule 81.

Personal searches, including invasive body and strip searches, present a risk of ill-treatment for all persons deprived of their liberty, but can have a disproportionately traumatizing effect on women when conducted by men. Searches of detainees or inmates on admission must only be conducted by persons of their own sex, separate from all other prisoners.<sup>109</sup>

### (iii) Custodial rape and other forms of sexual and gender-based violence as torture

Sexual violence is among the gravest forms of violence to which persons deprived of their liberty are subject. The Anti-Torture Act, 2017 specifically prohibits rape and other forms of sexual abuse as forms of torture in section 2 (2). Rape and other forms of gender-based violence can be used as a form of torture against both male and female terrorism suspects.<sup>110</sup>

In addition, section 34 (4) and (5) of the Nigerian Correctional Service Act, 2019 include the following practical provisions relevant to the identification, investigation and prosecution of custodial rape:

All female inmates shall undergo pregnancy tests on the first day of admission or as soon as possible but not exceeding 14 days from the date of admission, and where the test is positive, the inmate shall be provided with the necessary medical care and support.

Where a female inmate is found to be pregnant while in custody, an investigation, including DNA analysis, where needed, shall be conducted to ascertain who is responsible and the perpetrator shall be prosecuted.



#### Focus Custodial rape as a form of torture\*

The European Court of Human Rights has held, in connection with a case concerning custodial rape of a female terrorism suspect, that:

Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim...the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture ... .

\* European Court of Human Rights, *Aydin v. Turkey*, Case No. 57/1996/676/866, 25 September 1997, paras. 83 and 86.

Circumstances in which prisoners or persons otherwise deprived of liberty do not receive sufficient food or cannot obtain other basic necessities also raise the question as to whether any genuine consent to sexual acts is possible. This includes circumstances in which a prisoner “consents” to sexual acts with a prison official in exchange for basic necessities or favours.

109 Ibid., rule 52.

110 A/64/211, para. 44.



## Focus

### Consent under coercive circumstances

Under general criminal law, the prosecution will generally have to prove lack of consent as an element of sexual violence crimes. International criminal practice, however, has drawn attention to the question of whether in detention settings, particularly in conflict zones, genuine consent to sexual intercourse is possible.

In a case related to alleged rape and sexual enslavement of women in de facto military headquarters and detention centres during the armed conflict in the former Yugoslavia, the United Nations Tribunal for the Former Yugoslavia held that “such detentions amount to circumstances that were so coercive as to negate any possibility of consent.”\*

The International Criminal Tribunal for Rwanda held more broadly that “threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence...”\*\*

\* *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-97-23&IT-96-23/1-A, 2002, para. 132.*

\*\* *Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 1998), para. 688.*

Conduct amounting to torture and outrages upon personal dignity against persons in custody is also prohibited by international humanitarian law and can amount to war crimes and crimes against humanity. Regarding persons held in military custody on terrorism-related grounds, sexual violence by members of the Nigerian Armed Forces is criminalized under Nigerian law in the Armed Forces Act, 2004 (sect. 77). Under international humanitarian law, such conduct can constitute a war crime.



## Case study

### Command responsibility – the *Sepur Zarco* judgment\*

In 2016, a Guatemalan tribunal convicted two senior military leaders on the basis of command responsibility of crimes against humanity (including rape and sexual and domestic enslavement) that were committed by soldiers under their command during Guatemala’s 36-year civil war.\*\* The Tribunal found a former commander of a military base and a military commissioner in charge of the area in which the base was located criminally responsible for the acts of soldiers who perpetrated sexual violence on the basis of support, awareness and failure to prevent the offences.

In rejecting the defendants’ claims of ignorance, the Tribunal found that the frequency of the acts over a period of time made such behaviour impossible to ignore by those responsible for the base. The Tribunal further held that in any case, the defendants would also be responsible for those acts due to their negligence and failure to exercise necessary control over their subordinates. This judgment was upheld on appeal.

\* *Guatemala v. Estelmer Francisco Reyes Girón, Heriberto Valdez Asig, Case No. C-01076-2012-00021, 26 February 2016.*

\*\* Guatemala has incorporated crimes against humanity as a domestic offence in its Penal Code.



### Activity 31

W is imprisoned awaiting completion of an investigation and trial on terrorism charges. Due to the large number of arrests of persons associated with a local terrorist group and the limited capacity of the criminal justice system, the custodial centre is holding two times the number of inmates it was built for. In spite of the valiant efforts of the custodial centre administration, inmates do not receive sufficient food, while other basic services, such as health care, are in practice unattainable for many prisoners.

1. G works as a custodial centre warden. He proposes to W that she will receive extra portions of food if, in exchange, she will agree to have sexual intercourse with him. W agrees.
  - (a) Has G committed a sexual violence-related offence under the Penal Code, or the Violence against Persons (Prohibition) Act, 2015?
  - (b) Does G's conduct amount to torture under the Anti-Torture Act, 2017?
  - (c) Does G's conduct violate any other applicable criminal law?
2. Assume the same scenario as in question 1. Instead of G, the proposal of extra food in exchange for sex is made by L, who works for a non-governmental organization that is contracted by the custodial centre administration to provide services to the inmates. Does L's conduct violate the above-mentioned laws?
3. Assume that, in addition to looking after herself, W also needs to feed her baby detained with her. Would this change your legal assessment to the above questions?
4. C is the director of the custodial centre. It emerges that an official of the Ministry of Women's Affairs and a representative of a non-governmental organization had reported to him that sexual exploitation in exchange for food was taking place in the custodial centre and that C had not acted on those reports. Has C committed an offence?

Apart from the questions pertaining to criminal law, would the facts described above constitute a violation of W's human rights as protected by the Constitution of the Federal Republic of Nigeria and international law binding on Nigeria? If so, which human rights have been violated?

### (iv) Independent monitoring and oversight

The independent monitoring and oversight mechanisms and their respective mandates discussed in chapter 5.D of this module are equally applicable to both men and women.

Due to the acute stigma surrounding sexual violence and the resulting reluctance of some victims to make a complaint about sexual violence, complaint mechanisms must ensure confidentiality and staff should be trained to receive complaints in a victim-centred and gender-sensitive manner.

Another important consideration is that the monitoring, oversight and investigation mechanisms of places of detention should have personnel that are highly trained in the understanding and identification of gender-specific special needs and requirements, including female staff, forensic doctors and inspectors trained in detecting torture and ill-treatment.



### Activity 32

Assume that, following allegations of rape and sexual exploitation of female prisoners associated with a terrorist group at a high security prison, you have been tasked to write a policy paper and standard operating procedures for a gender-sensitive complaints and oversight mechanism for the prison in order to ensure prevention and accountability for sexual violence in custody.

Write down, in bullet form, the main points of the policy paper, and what the standard operating procedures should address.

Discuss which authorities in Nigeria would have the responsibility and mandate to order the development and adoption of such documents.

## (v) Training, education and empowerment

The need for training and education, public education and awareness-raising on the prevention of torture and other cruel, inhuman or degrading treatment was discussed in chapter 5.E of the present module. In order to protect and safeguard the rights of women in the fight to prevent torture, a gender dimension should be mainstreamed in all aspects of such training, education and empowerment programmes, highlighting the gender-specific needs, requirements and risks relevant to the prevention of torture.

As discussed in chapter 5, the effective prevention of torture requires a holistic approach in which all members of the criminal justice system, state authorities, civil society and the general public have a vital role to play. As such, the scope of training, education and empowerment initiatives focusing on gender dimensions of torture prevention must be equally as wide, reaching out to every corner of the criminal justice system and society as a whole.

The recruitment, retention and promotion of women in custodial centres and other places of detention are important means of ensuring gender-sensitive management of such facilities and of preventing the ill-treatment of women deprived of their liberty. Specific efforts may be required to ensure the placement of female staff where female violent extremist prisoners are held in separate facilities or are dispersed within high-risk custodial centres.

Female staff members should have equal opportunities for training and development, enabling them to work with violent extremist prisoners and to carry out gender-sensitive interventions. This includes training in recognizing signs of radicalization to violence, anti-conditioning or manipulation training, assessment of intelligence and other information about violent extremist prisoners, and, where offered by the custodial centre, the establishment and discharge of disengagement programmes.

At a community level, lack of knowledge and awareness of basic rights and lack of understanding of the role and function of the criminal justice system tend to increase vulnerabilities, undermine empowerment and reduce access to justice – these effects are likely to be particularly notable among women. It is therefore particularly important that public torture-prevention and awareness-raising initiatives be gender sensitive in order to reach women at the grassroots level.



## Self-assessment questions

1. Identify the gender-specific risks and vulnerabilities when interviewing victims, witnesses and suspects in terrorism cases. As an interviewer, what specific preparations and considerations should be taken into account, what safeguards would you put in place, what interviewing approach would you adopt, and what other measures would you take to mitigate the identified risks?
2. Detail five grounds of vulnerability of women deprived of their liberty.
3. What is the relationship between conditions of detention and the risk of torture? Identify five aspects of conditions of detention where women's specific needs are of particular relevance. For each aspect identify the gender-specific needs and risks of torture and provide practical examples of ways in which the risks can be mitigated.
4. Explain the risk of custodial rape and other forms of sexual and gender-based violence as a form of torture; identify the applicable Nigerian and international laws and standards; and consider practical measures to reduce the risk of this form of torture.
5. In what practical ways can gender dimensions be mainstreamed in monitoring and oversight mechanisms in the context of the prevention of torture?
6. How would you assess the need and relevance of gender-specific training, education and empowerment in the prevention of torture? Who needs to be trained and educated on these issues? Identify three key overarching messages to be included in training and education programmes.

# 8

## Child victims and witnesses and children associated with terrorist groups and the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment of children in terrorism-related cases



### Learning objectives

By the end of chapter 8, readers will be able to:

- Explain the relevance and importance of safeguarding and protecting child rights in your work.
- Identify the applicable Nigerian, regional and international legal frameworks relevant to children associated with terrorist groups and the prevention of torture and other forms of ill-treatment of children in terrorism cases.
- Discuss the key principles on justice for children and explain their significance in the counter-terrorism context.
- Identify best practices for the interviewing of child victims and witnesses involved in terrorism-related cases and children alleged as having or accused of having committed terrorism-related offences.
- Recognize the specific needs of children deprived of their liberty.
- Discuss the importance and practical application of the basic procedural and pretrial safeguards for the prevention of torture of children.
- Explain the relationship between conditions of detention and the risk of torture and other forms of ill-treatment for children deprived of their liberty and identify measures to respond to the specific risks.
- Discuss the practical ways in which monitoring and oversight mechanisms and training, education and empowerment programmes can assist in the prevention of torture and ill-treatment of children associated with terrorist groups.

“Safety and security don’t just happen, they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear.”

*Nelson Mandela*

“If we are to teach real peace in this world, and if we are to carry on a real war against war, we shall have to begin with the children.”

*Mahatma Gandhi*

According to section 277 of the Nigerian Child's Rights Act, 2003 a child is defined as a person under the age of 18. This is in line with article 1 of the Convention on the Rights of the Child,<sup>111</sup> which states that a child means every human being below the age of 18.

Children are gravely and disproportionately affected by conflict and war. Violations of the rights of children in terrorism and counter-terrorism contexts not only impact the lives of affected children, but also have far-reaching short-term and long-lasting adverse implications for the development of measures to address safety, security and the rule of law at the family, community and societal levels. Adopting an approach that both respects and safeguards the rights of children while taking their special needs and requirements fully into account must be an essential cross-cutting component of all counter-terrorism responses in the country.

The protection of child rights is relevant to every aspect of the fight against terrorism: the present chapter is focused on respect for children's rights in the following specific contexts:

- (a) Interviewing child victims and witnesses of terrorist acts, and children alleged to have or accused of having committed terrorism-related offenses;
- (b) Prevention of torture and other forms of ill-treatment against children.



### Further reading

Chapter 8 draws on the following UNODC resource materials:

- UNODC: *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups*.
- UNODC: *Justice for Children in the Context of Counter-terrorism*.\*
- UNODC: *Nigeria Handbook on Counter-terrorism Investigations*.\*

These resources are comprehensive in their scope and are recommended further reading for anyone who wishes to continue to explore and increase their understanding of child rights issues of criminal justice responses to terrorism.

\* Available upon request from UNODC.



### Focus

#### How are children affected by conflict in Nigeria?\*

"For children coming out of Boko Haram-controlled areas of northeast Nigeria, violations build on abuses, with devastating consequences both immediate and long-term. Whether abducted or recruited into Boko Haram, or just living in an area the group contests, boys and girls face an assault on their childhood—unable to obtain an education and often forcibly targeted to be "wives" or soldiers. After escaping Boko Haram, they face further violations by the Nigerian authorities. At best, they end up displaced, struggling for survival and with even primary school often inaccessible. At worst, they are arbitrarily detained by the military for years, in conditions amounting to torture or other ill-treatment; many have died in custody."

\* Extract from the 2020 report of Amnesty International, "We dried our tears", addressing the toll on children of northeast Nigeria's conflict.

111 Convention on the Rights of the Child, General Assembly resolution 44/25, 1989.

## A. Applicable legal framework

At the national level, section 17 (3)(f) of the Constitution of the Federal Republic of Nigeria provides that the State shall direct its policy towards ensuring that children and young persons are protected against any exploitation whatsoever, and against moral and material neglect. Even though children are not expressly mentioned in chapter IV of the Constitution, which sets out fundamental rights, these rights should nevertheless be applied to them, in particular the right to life (section 33), the right to dignity of human persons (section 34 (1)), the prohibition of torture or inhuman or degrading treatment (section 34 (1)(a)), the prohibition of slavery or servitude (article 34(1) (b)), the prohibition of forced or compulsory labour (section 34 (1)(c)), the right to personal liberty (section 35) and the right to a fair hearing (section 36).

The Child's Rights Act, 2003, enacted in 2003, is wide-ranging in scope, incorporating international standards contained in the Convention on the Rights of the Child and other international instruments. Section 149 of the Act provides for the establishment of a Family Court in every State of the country and in the Federal Capital Territory, which, pursuant to section 151 (1)(b) of the Act, have unlimited jurisdiction to hear and determine "any criminal proceeding involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by a child, against a child or against the interest of a child". The Act also provides for the establishment of the Specialized Children Police Unit, the function of which is set out in section 207 (2) of the Act and includes "(a) the prevention and control of child offences (b) the apprehension of child offenders; (c) the investigation of child offences".

At present 25 of the 36 States in Nigeria have passed legislation to "domesticate" the Child's Rights Act, 2003 at the State level. In the other 11 States, the principal applicable child rights legislation remains the Children and Young Persons Act of 1958. While, commendably, the Child's Rights Act seeks to establish a comprehensive institutional framework in compliance with international child rights standards, issues remain as to the capacity and extent of the implementation of the law and its institutional framework at a practical level.

Section 452 (1) of the Administration of Criminal Justice Act, 2015 stipulates that "where a child is alleged to have committed an offence, the provisions of the Child's Rights Act shall apply". Section 452 (2) states that "notwithstanding subsection (1) of this section, the provisions of this Act relating to bail shall apply to bail proceedings of a child offender".

At the regional level, the African Charter on the Rights and Welfare of the Child incorporates international child rights standards and provides that "Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter". In the preamble to the Charter, member States noted with concern "that the situation of most African children, remains critical due to the unique factors of their socioeconomic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care".

In June 2019, the Government of Nigeria endorsed the Economic Community of West African States (ECOWAS) Child Policy and Strategic Plan of Action 2019–2030, the ECOWAS Roadmap on Prevention and Response to Child Marriage and the ECOWAS political declaration and common position against child marriage.

At the international level, the principal instrument on child rights is the Convention on the Rights of the Child. Nigeria is a party to the Convention and its two optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography. Under article 19 of the Convention, States Parties are required to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation". There are also numerous international instruments setting out best practices and minimum standards relating to justice for children, examples of which are set out in the box below.



## Focus International instruments

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985 (General Assembly resolution 40/33, annex).
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), 1990 (General Assembly resolution 45/113, annex).
- United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), 1990 (General Assembly resolution 45/112, annex).
- Guidelines for Action on Children in the Criminal Justice System (Economic and Social Council resolution 1997/30, annex).
- Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex).
- United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 69/194, annex).
- Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles).

In addition, Committee on the Rights of the Child, general comment No. 24, on children's rights in juvenile justice, provides useful information on the practical applicability and interpretation of some of the key provisions within the Convention on the Rights of the Child.



## Activity 33

- For the 11 States that have not passed legislation to “domesticate” the Child’s Rights Act, 2003 at the State level, what are the practical implications for the rights of child victims, witnesses and children alleged as having or accused of having committed terrorism-related offenses in terrorism cases?
- What particular practical challenges, if any, are posed by the absence of “domestication” of the Child’s Rights Act at the State level for: (a) investigators; (b) prosecutors; and (c) defence counsel?
- By virtue of section 32 (1) of the Terrorism (Prevention) Act, 2011 (TPA) as set out in section 15 of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA), the Federal High Court is vested with jurisdiction to try offences and hear and determine proceedings under the TPA as amended by the TPAA. However, section 149 of the Child’s Rights Act, 2003 provides for the establishment of a Family Court in every State in the country and the Federal Capital Territory, which, pursuant to section 151 (1)(b) of the Act, have unlimited jurisdiction to hear and determine “any criminal proceeding involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by a child, against a child or against the interest of a child”.
  - Consider how these apparently contradictory sections can be reconciled.
  - Which court has jurisdiction to hear terrorism cases involving children?
  - For terrorism cases involving children that are currently proceeding before the Federal High Court, consider how the Family Court principles under the Child’s Rights Act could be applied.
  - What would be the position in the 11 States which have not yet passed legislation to “domesticate” the Child’s Rights Act?



## **B. Justice for children: key principles**

### **Best interests of the child**

As set out in section 1 of the Child's Rights Act, 2003: "In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration". In the context of investigations, section 211 (1)(c)(ii) of the Act further provides that "contacts between the police and the child shall be managed in such a way as to promote the best interest and well-being of the child". Section 214 (2)(b) of the Act imposes a similar obligation to "promote the best interest and well-being of the child" in relation to "the trial of the child offender". At the international level, article 3 (1) of the Convention on the Rights of the Child provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". In all interactions with children, the best interest of the child must be identified and taken into account as a primary consideration.

### **Avoid harm (including mitigating the risk of secondary victimization and re-traumatization)**

This principle is highlighted in section 211 (1)(c)(iii) of the Child's Rights Act, 2003, which provides that "contacts between the police and the child shall be managed in such a way as to (iii) avoid harm to the child, having due regard to the situation of the child and the circumstances of the case". Section 211 (2) of the Act specifies that "harm" includes the use of harsh language, physical violence, exposure to the environment and any consequential physical, psychological or emotional injury or hurt". Section 214 (2)(b) imposes a similar obligation to avoid harm in relation to "the trial of the child offender". The principle of avoiding harm requires that the particular situation and circumstances of the child in question are taken into consideration in all interactions with the child.

### **Respect for the dignity of the child**

Section 11 of the Child's Rights Act, 2003 provides that "every child is entitled to respect for the dignity of his person, and accordingly, no child shall be: (a) subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse; (b) subjected to torture, inhuman or degrading treatment or punishment; (c) subjected to attacks upon his honour or reputation; or (d) held in slavery or servitude...". The concept of respect for the dignity of the child is described in article 40, paragraph 1, of the Convention on the Rights of the Child as "the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

### **Right of the child to be heard**

This right is expressed in paragraphs 1 and 2 of article 12 of the Convention on the Rights of the Child, as follows:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child;

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>112</sup>

## Right of the child to survival and development

Section 4 of the Child's Rights Act, 2003 provides that "Every child has a right to survival and development". This reflects article 6, paragraph 2, of the Convention on the Rights of the Child, which states that "States Parties shall ensure to the maximum extent possible the survival and development of the child". This right will continue through periods of detention and will require that there be consideration of the future development of the child at all times and during all actions in the criminal justice process.

## Non-discrimination

Section 10 (1) of the Child's Rights Act, 2003 provides that "A child shall not be subjected to any form of discrimination merely by reason of his belonging to a particular community or ethnic group or by reason of his place of origin, sex, religion or political opinion". At the international level, article 2, paragraph 1, of the Convention on the Rights of the Child provides that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".

## Detention of children shall be a measure of last resort and shall be limited to the shortest possible time

This principle applies to both pretrial and post-conviction detention, in line with article 37 of the Convention on the Rights of the Child. Section 212 (1)(a) of the Child's Rights Act, 2003 provides that detention pending trial shall "be used only as a measure of last resort and for the shortest possible period of time." The guiding principles in relation to the deprivation of liberty of children post-conviction are set out in section 215 of the Child's Rights Act.

## Applicability of all fundamental human rights

All fundamental human rights are equally applicable to children. This is confirmed in section 3 (1) of the Child's Rights Act, 2003, which states that: "The provisions in chapter IV of the Constitution of the Federal Republic of Nigeria 1999, or any successive constitutional provisions relating to Fundamental Rights, shall apply as if those provisions are expressly stated in this Act". However, due to the particular vulnerabilities and risks faced by children, it is essential that proactive measures and extra protections are put in place to deal effectively with the identified risks and vulnerabilities in order to safeguard the fundamental rights and freedoms of children.

## Principle of non-punishment of victims of trafficking in persons

This principle, which is well established under international law, is incorporated in section 62 of the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015, which provides that: "where the circumstances so justify, trafficked persons shall not be detained or prosecuted for offences relating to being a victim of trafficking, including non-possession of valid travel stay or use of a false travel or other document". This "non-punishment clause" may bar the prosecution of children who have been forced to participate in or to support terrorist activities if they are recognized as victims of trafficking. Section 13 (6) of the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 provides that "the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons, even if this does not involve any of the means set forth in the definition of trafficking in persons in

<sup>112</sup> Convention on the Rights of the Child (General Assembly resolution 44/25, 20 November 1989).

this Act". In addition to forms of exploitation such as sexual exploitation and forced labour, exploitation is likely to encompass the actions of terrorist groups in forcing children to be involved in criminal/terrorist activities as perpetrators or accomplices or in support roles.<sup>113</sup>



### Activity 34 Key justice principles for children

For each of the principles on key justice for children listed above, explain their practical importance, relevance and applicability in your day-to-day work.

## C. Interviewing child victims, witnesses and children alleged to have or accused of having committed terrorism-related offenses

The contents of chapter 2 on the collection of oral evidence, including the details of interviewing techniques, the rapport-based approach and good practices on interviewing, are equally applicable to both adults and children. However, when interviewing children, special practices, procedures and safeguards need to be put in place to protect the rights and distinct needs of children.

Child victims, witnesses and children alleged as having or accused of having committed terrorism-related offenses are particularly vulnerable due to their age, levels of trauma and the suffering they have experienced, including short- and long-term harm resulting from their interaction with the criminal justice process, in particular the interviewing process. It is essential that child-appropriate and child-sensitive measures are put in place to address and minimize the specific risks and vulnerabilities of children and to safeguard their rights.

### (i) Interviewing children associated in terrorism-related cases

The UNODC *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups* sets out the following key challenges related to interviewing children in terrorism-related cases:

- Enhanced risks of victimization and retaliation by terrorist and violent extremist groups.
- Resistance of the child and mistrust of public authorities.
- Inability of the child to recall events in detail and chronological order.
- Intimidating attitudes of practitioners and disregard of child-appropriate language.
- Biological, personal or loyalty relationship between the child and the accused.
- Insufficient coordination leading to repeated interviewing of children.
- Lack of mechanisms to ensure that information is provided to the child concerning his or her rights procedures and requirements.

<sup>113</sup> For details of international provisions relating to trafficking in persons, reference is made to the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol), which contains a definition of trafficking in persons in article 3, available at [ProtocolonTrafficking.pdf \(ohchr.org\)](https://www.unhcr.org/ohchr.org).

- Delays in the proceedings.
- Lack of an environment such as an interview room or court setting adapted to the needs of the child.
- Lack of coordination with child protection and welfare actors to ensure appropriate supervision and assistance when dealing with child victims.

Relevant considerations and suggested approaches for the interviewing of all children associated in terrorist cases (including child victims, child witnesses and children alleged as having or accused of having committed terrorism-related offences) include:

- (a) At the outset, prior to the commencement of any interview, an assessment should be made of the individual needs, risks and vulnerabilities of the child in question, focusing on the safety and security of the child, including a psychosocial assessment encompassing both positive and negative attributes. The adopted approach should respect and seek to address and safeguard against the identified risks, needs and vulnerabilities and should take into account all of the positive and negative aspects of the psychosocial assessment, resulting in an approach specifically tailored to the individual child. Preparation is important;
- (b) Children should receive psychological support before, during and after the interview. Before an interview, children should be provided with the benefit of psychological preparation to mitigate the risk of retraumatization. It is much more difficult to mitigate the risk of retraumatization if there is no preparation before interviewing begins;
- (c) The primary consideration when interviewing children must be to ensure and safeguard their safety – it is therefore essential to conduct a thorough risk assessment, as referred to in subparagraph (a) above. This is of particular importance for children who may have been associated with terrorist groups, whose safety and security may be at greater risk. The protection measures must be tailored to the risks and needs of the individual child. In this regard, section 33 of the Terrorist (Prevention) Act, 2011 (TPA) as substituted by section 13 of the Terrorist (Prevention) (Amendment) Act, 2013 (TPAA) provides, in relation to all witnesses/informants, that “[w]here a person volunteers to the relevant law enforcement or security agency any information that may be useful in the investigation or prosecution of an offence under this Act, the agency shall take all reasonable measures to protect the identity and life of that person and the information so volunteered shall be treated as confidential”;
- (d) Interviews can be a particularly stressful and traumatic experience for children who have experienced violence or abuse at the hands of a terrorist group. If the interview process is not handled in a child-appropriate and age-sensitive manner, which recognizes and addresses the needs of the child, there is a high risk of secondary victimization and retraumatization, which is likely to impact the reliability, accuracy and consistency of the evidence provided;
- (e) When interviewing and preparing for the interview of any child, all of the factors set out in the UNODC Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups must be taken into account. In particular, it must be ensured that the approach treats the child with dignity and compassion and without discrimination of any kind, and that the process is adapted to the needs of the individual child;
- (f) Children have the right to participate in all processes affecting them. In this regard, all children associated in terrorist cases must be informed of the details of the investigation and interviewing processes, must be kept informed of the progress of the case and must be consulted and informed of available and proposed support services and measures;
- (g) While it is understood that there is often a high degree of urgency in the investigation of terrorism offences, nevertheless, no child should ever be coerced, pressured or intimidated in any way, as this will be harmful to the child and will also undermine the reliability, accuracy and legitimacy of the evidence obtained;
- (h) Another important consideration is how to ensure protection of the child’s right to privacy and confidentiality. This is of particular importance as breaches of these rights in terrorism cases may seriously put the safety and security of the child at risk;

- (i) In responding to the various needs of the child, a multisectoral approach is the most effective. For example, there may be physical or psychological health needs, child protection needs, developmental needs or needs relating to the rehabilitation or reintegration of the child. It is essential that systems are put in place to ensure that the support is effectively coordinated in a way that reduces the risks to the child and takes account of the child's specific needs;
- (j) Multiple interviews pose the risk of exacerbating psychological trauma, including increased risks of secondary victimization and retraumatization, leading to increased harm to the child, as well as impacting the reliability and consistency of the evidence provided. Every effort should be made to ensure that the number of interviews with the child is kept to an absolute minimum;
- (k) Delays can be particularly harmful for children in heightening and extending levels of anxiety and trauma. Every effort should be made to keep delays to a minimum, as well to respond to the resulting trauma;
- (l) In investigations involving children associated in terrorist cases, it is advisable to appoint a support person to act as the focal point for all interactions with the child and to look out for and safeguard the rights and needs of the child throughout the investigation process as a whole. In practice, the role of the support person may include assessing the fitness of the child to be interviewed and being responsible for preparing the child before the interview;
- (m) The child's parents should be fully involved in the interview process, unless their involvement is considered to be contrary to the best interest of the child. Parents should be informed of the details of the investigation process and the progress of the case and should be allowed to be present during the interview in a support role;
- (n) Interviewers and all other persons who have direct dealings with children should have specialized training. This approach is emphasized in the Child's Rights Act, 2003, including in section 207 which provides for the establishment and training of members of the Specialized Children Police Unit;
- (o) Girls face particular risks and have different needs and vulnerabilities that must be specifically identified and addressed in all interactions.



## Focus

### Guidelines for interviewing and questioning children\*

- Children should be provided with relevant information on their rights, the conduct of criminal proceedings and their role, as well as the development and outcome of the proceedings.
- Interviews with children should always be conducted by skilled, trained professionals, in a thorough and sensitive manner. Professionals interviewing children who have been associated with terrorist and violent extremist groups should have specific knowledge of the impact of extreme violence and trauma on children's behaviour and development.
- Interviewers should avoid a generalized approach to children and adapt each interview to the level of development, needs and situation of the individual child.
- Children should always be interviewed in the presence of a support person, who should be a qualified professional with specific experience and expertise in this regard. This person should be selected in the initial stages of the proceedings and accompany the child throughout the justice process. It should also be borne in mind that asking a child to recount traumatic events in the presence of someone they know may, in itself, lead to increased levels of retraumatization.
- Specialized counter-terrorism investigations often require cooperation among different sectors. However, limiting the number of persons in the room is conducive to a more child-sensitive environment and contributes to preventing intimidation.
- Video recording can be especially helpful in minimizing the number of interviews and, at the same time, ensuring that the conduct of the interview respects the right of children to be treated with dignity and compassion.



## Focus

### Guidelines for interviewing and questioning children\* (continued)

- The environment of the interview should be adapted to the child. Interviews with children can take place in special rooms, even during court proceedings, and be transmitted via video link in the courtroom.
- Any contact between the child and the alleged perpetrators should be carefully avoided, including while waiting for the interviews and during court proceedings.
- Questions should be carefully prepared, and interviewers may want to coordinate with the professional support person on the appropriate way to address the child.
- Children and their caregivers should be provided with the appropriate information and give their informed consent to the conduct of the interview.
- Interviews should be carefully structured. In this context, the key phases usually include: rapport-building; asking questions; and closing the interview.
- The ground rules of the interview process should be explained. Children should understand that there is no “right” or “wrong” answer and should be encouraged to ask for clarifications when necessary. The safety concerns of the child should be addressed.
- Leading questions should be avoided, and free narrative accounts should be encouraged, prior to asking for clarification, when necessary.
- Questioning should not go on for too long, and appropriate breaks should be ensured.
- Before closing the interview, the child should be read a summary of his or her statement and provided with an opportunity to add further elements.
- Possible follow-up should be discussed, and relevant information should be provided on services available to the child and to the parents or legal guardians.
- The measures that will be adopted to ensure the safety of the child should be explained.
- The rules of confidentiality should be repeated.
- The child should be thanked for his or her cooperation.

\* UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups*.

## (ii) Additional considerations when interviewing children alleged to have or accused of having committed terrorism-related offences

### Status of children accused of committing terrorist offences

The recruitment of children by a terrorist group is illegal under section 10 of the Terrorism (Prevention) Act, 2011 (TPA) as substituted by section 3 of the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA). It is also illegal under section 26 of the Child’s Rights Act, 2003, which provides that “No person shall employ, use or involve a child in any activity involving or leading to the commission of any other offence not already specified in this Part of the Act”. The victims of such offences are the recruited children. The circumstances of the recruitment of children into terrorist groups varies widely. However, the recruitment of children into terrorist groups can never be considered to be truly voluntary on the part of the child, given the age, status and understanding of the child and the varying levels of force, coercion or influence exerted by the terrorist groups in their recruitment practices. Furthermore, children recruited to terrorist groups are invariably subjected to varying forms of physical, psychological and emotional abuse and exploitation – the very act of recruitment amounts to child exploitation. The primary status of a child recruited by a terrorist group must therefore be as a victim. As such, all the issues, measures and safeguards set out in section (a) above must be applied equally to children alleged as having or accused of having committed terrorism-related offences. It is important to note, however, that this does not exonerate the child from all responsibility for the commission of terrorist offences and the child can still be held to account subject to the necessary safeguards based on age and individual circumstances.

## Investigation/detention as a last resort

Arrest and detention are likely to have a profound effect on children, while also significantly increasing their levels of risk and vulnerability. Vulnerability is likely to be heightened if the children have already been traumatized through contact with a terrorist group. For this reason, the investigation, arrest and detention of children should be the last resort, when no other options are available. This principle is embedded in three sections of the Child's Rights Act, 2003, as follows:

- 209 (3) Police investigation and adjudication before the court shall be used only as measures of last resort.
- 211 (1)(b) The Court or police, as the case may be, shall, without delay, consider the issue of release.
- 212 (1) Detention pending trial shall: (a) be used only as a measure of last resort and for the shortest possible period of time; (b) wherever possible, be replaced by alternative measures, including close supervision, care by and placement with a family or in an educational setting or home.

## Consideration of diversion measures

As stated in article 40 (3)(b) of the Convention on the Rights of the Child, States parties shall promote "[w]henver appropriate and desirable, measures for dealing with such children [children alleged as, accused of, or recognized as having infringed the penal law] without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected".<sup>114</sup>

## Overall purpose

Any child alleged as, accused of, or recognized as having committed a terrorism-related offence has the right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.<sup>115</sup> In this regard, the principles set out in section B above should be fully taken into account and respected. Section 211 (1)(c) of the Child's Rights Act, 2003 provides that:

- (c) contacts between the police and the child shall be managed in such a way as to:
  - (i) respect the legal status of the child;
  - (ii) promote the best interest and well-being of the child;
  - (iii) avoid harm to the child, having due regard to the situation of the child and the circumstances of the case.

## Interviewing best practices

The best practices and suggested approaches for interviewing terrorism suspects set out in chapter 2 are applicable to the interviewing of children alleged as, accused of, or recognized as having committed terrorism-related offences, subject to their adaptation to take into account the age and understanding and individual circumstances of the child, and subject also to addressing the identified special needs, risks and vulnerabilities of each individual child.

<sup>114</sup> Diversionary measures are also referred to in: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (General Assembly resolution 40/33, annex, rule 11); Guidelines for Action on Children in the Criminal Justice System (Economic and Social Council resolution 1997/30, annex, paras. 15 and 42); and United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly 45/110, annex, rule 2.5).

<sup>115</sup> See article 40, para. 1, of the Convention on the Rights of the Child and article 17, para. 1, of the African Charter on the Rights and Welfare of the Child.

## Right to legal representation/presence of a defence counsel

The rights to legal representation and free legal aid are provided for in section 210 of the Child's Rights Act, 2003:

The legal status and fundamental rights of the child, set out in part II of this Act, and in particular:

- (a) the presumption of innocence;
- (b) the right to be notified of the charges;
- (c) the right to remain silent;
- (d) the right to the presence of a parent or guardian;
- (e) the right to legal representation and free legal aid;

shall be respected in the administration of the child justice system set out in this Act.

At the international level, this right is set out in article 37 (d) of the Convention on the Rights of the Child which provides that "[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action".

It is essential that the right to legal representation is observed during the interview process to protect and safeguard the individual child's rights in accordance with his or her needs and best interests. In addition, the presence of legal counsel is an important safeguard against the use of torture or other forms of ill-treatment or coercion during the interview process.

## Presence of parent/guardian

This right is guaranteed by section 210 (d) of the Child's Rights Act, 2003. The presence of a parent or guardian may put the child at greater ease, tends to promote the well-being of the child and safeguards against torture and other forms of ill-treatment during the interview process. This right, however, is subject to the parent or guardian's presence being in the best interests of the child. In situations where the presence of a parent or guardian is assessed to be contrary to the best interests of the child, the presence of a legal representative and a professional support person are of even greater relevance, importance and necessity.



### Activity 35

#### Arrest of a 15-year-old boy

Law enforcement have arrested A, a 15-year-old boy who is alleged to have been a member of a terrorist group. He is accused of carrying out support activities for the group, including acting as a look-out and messenger. He had apparently been persuaded to join the group by his uncle, who he had always looked up to and admired, and who had been a member of the terrorist group for a number of years. You are an investigator and have been instructed to interview A.

- How do you think A's arrest has impacted him psychologically?
- What challenges do you expect to experience in interviewing A?
- Will you interview A as a child alleged as, or accused of, a terrorism-related offence? Please explain your answer.
- What do you think will be A's particular needs, risks and vulnerabilities in relation to the interview process? What practical steps would you take to try to address these identified needs, risks and vulnerabilities in order to maintain the well-being of the child during the interview?



### Activity 35 Arrest of a 15-year-old boy (continued)

- Who should be present during the interview?
- Would you consider reaching out to other State, civil society or community institutions or organizations at this stage of the investigation process? Explain your answer.
- What steps would you take to plan and prepare in advance of the interview?
- How would you try to build a relationship of trust with A prior to, during and after the interview?
- Refer to the key justice for children principles set out in section 8.B above. Explain how each of the principles would affect how you prepare for and conduct the interview with A.
- Assuming that you are in one of the States of Nigeria that has “domesticated” the Child’s Rights Act, 2003, into State law, identify the legal frameworks and specific legal provisions that would be relevant in conducting the interview and explain any particular measures that you would take to ensure compliance.
- What do you think may be the particular risks and vulnerabilities faced by A while in detention? What steps would you take to reduce the identified risks? Do you think that A’s continued detention is justified, and what would you do in practice? Explain your answer with reference to the applicable legal provisions.

## D. Preventing torture and other cruel, inhuman or degrading treatment or punishment of children deprived of their liberty

Chapter 5 addresses the prevention of torture in the context of criminal justice responses to terrorism with a focus on basic and pretrial safeguards, interrogation of suspects, conditions of detention, monitoring and oversight mechanisms and training, education and empowerment. The contents of chapter 5 are fully applicable to children, although additional policies, practices and safeguards are required to respond to the distinct rights and needs of children in this area.

Children deprived of their liberty face significant risks and vulnerabilities to torture and other forms of ill-treatment arising, inter alia, from conditions of detention and susceptibility to violence. The risk levels may be significantly higher for children alleged as or accused of having committed terrorism-related offenses due to the stigma associated with crimes of terrorism. As stated in the 2015 OHCHR report, *Prevention of and responses to violence against children within the juvenile justice system*:

Whether in pretrial detention, administrative detention or detention as a sentence, there is a significant risk of violence that arises simply from being deprived of one’s liberty. The more overcrowded the facility, and the lower the staff-to-child ratio, the greater the risk becomes. The possible sources of violence in institutional settings are numerous. Violence occurs at the hands of staff working in the institutions, adult detainees where children are not separated, other child detainees, and also in the form of self-harm.<sup>116</sup>

<sup>116</sup> OHCHR, *Prevention of and responses to violence against children within the juvenile justice system*, 2015, sect. 4.9.

Girls in detention face additional risk factors such as “rape and other forms of sexual violence such as threats of rape, touching, ‘virginity testing’, being stripped naked, invasive body searches, insults and humiliations of a sexual nature”.<sup>117</sup>

## (i) Key safeguards to prevent torture

Chapter 5.A of the module sets out, with reference to the Robben Island Guidelines, the basic procedural safeguards and the safeguards during the pretrial process for the prevention of torture. These safeguards apply equally to children, subject to ensuring that the safeguards are put in place with full regard for the specific needs, requirements and circumstances of children deprived of liberty.

Another essential safeguard specific to child detainees is the requirement to notify the child’s parents or guardians immediately upon the arrest of a child. This requirement is set out in section 211 (1)(a) of the Child’s Rights Act, 2003, which states:

- (1) On the apprehension of a child -
  - (a) the parents or guardian of the child shall -
    - (i) be immediately notified, or
    - (ii) where immediate notification is not possible, be notified within the shortest time possible after the apprehension, of the apprehension;

Maintaining the connection between the child and his or her parents through visits and other forms of communication during the child’s detention and allowing a parent to be present during the interview process will help to reduce the likelihood of torture and other forms of ill-treatment, as well as providing much needed emotional support to the child.



### Activity 36 Robben Island Guidelines safeguards

Please refer to the Robben Island Guidelines basic procedural safeguards and safeguards during the pretrial process set out in chapter 5.A of this module.

For each of the safeguards, identify any possible special needs, requirements or considerations that may be relevant for children deprived of their liberty.

## (ii) Conditions of detention

Conditions of detention for children deprived of their liberty must take into account children’s particular needs, risks and vulnerabilities. Conditions that may be acceptable in an adult detention facility may well amount to torture, cruel, inhuman or degrading treatment for a child deprived of liberty. Adequate conditions of detention are likely to reduce the risk of violence and psychological harm to the child.

Section 35 of the Correctional Service Act, 2019 includes specific provisions to address the special needs of juvenile offenders:

1. Young offenders shall not be kept in adult custodial facilities.
2. The Correctional Service shall establish separate male and female borstal training institutions for juvenile offenders in all the States of the Federation and their treatment, including rehabilitation, shall be the underlying principle for the custody.

<sup>117</sup> A/HRC/7/3, para. 34.

3. The facilities established under subsection (2) shall serve as rehabilitation and correctional centres for the purpose of processing, confinement and treatment of juveniles and young offenders.

The Correctional Service Act, 2019 defines “juvenile offender” as “an offender below the age of 18”.

In addition, section 248 (1) of the Child’s Rights Act, 2003 empowers the Minister with responsibility for matters relating to children to:

- (a) establish, in any part of the Federation, or any part of a State, the following institutions to be known as approved children institutions:
  - (i) a Children Attendance Centre,
  - (ii) a Children Centre,
  - (iii) a Children Residential Centre,
  - (iv) a Children Correctional Centre,
  - (v) a Special Children Correction Centre,
  - (vi) is correct as it stands

At the regional level, the preamble to the Kampala Declaration on Prison Conditions in Africa states that “some groups of prisoners, including juveniles ... are especially vulnerable and require particular attention” and that “juveniles must be separated from adult prisoners and that they must be treated in a manner appropriate to their age”.

At the international level, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), set out minimum standards to safeguard the rights of children deprived of their liberty, covering detention both pretrial and post-conviction, including:

3. The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.

12. The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

13. Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.

28. The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations.

The following paragraphs address a number of specific areas and conditions of detention for which the special needs of children deprived of their liberty are of particular importance in the prevention of torture and other forms of ill-treatment.

## Separation

Children deprived of their liberty should be separated from adults. According to the Committee on the Rights of the Child, there is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, their well-being and their ability to remain free of crime and to reintegrate into society in future years.<sup>118</sup> As stated in article 37 (c) of the Convention on the Rights of the Child, “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”. The Committee on the Rights of the Child has stressed that this exception to the separation of adults and children “should be interpreted narrowly”.<sup>119</sup> The case of children deprived of their liberty with their parents is a possible exception to this rule.

In addition, boys and girls should be separated. The Havana Rules make it clear that “[t]he principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being”.<sup>120</sup>

## Maintaining family connections

Every means should be provided to ensure that children have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society.<sup>121</sup> This includes maintaining communication with the child’s parents or guardians and/or other family members by visits, correspondence and telephone calls.

## Health care

Every child deprived of his or her liberty is entitled to adequate medical care appropriate to the child’s needs. Children who have been detained on suspicion of committing terrorist offences are likely to be suffering from trauma resulting from both their detention and their treatment and interactions with the terrorist organization. Medical care should extend to psychological assessments, treatment and support, where required.

## Education and vocational training

Every child of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society.<sup>122</sup> Children above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.<sup>123</sup> Every child should have the right to receive vocational training in occupations likely to prepare him or her for future employment.<sup>124</sup>

## Recreation

Every child should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided.<sup>125</sup>

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118 A/63/41, annex IV, para. 85.

119 Committee on the Rights of the Child, general comment No. 24 (CRC/C/GC/24), para. 92.

120 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/112, annex), para. 28.

121 *Ibid.*, para. 59.

122 *Ibid.*, para. 38.

123 *Ibid.*, para. 39.

124 *Ibid.*, para. 42.

125 *Ibid.*, para. 47.

## Other conditions of detention

Other important issues relating to the conditions of detention of children include the right to make requests or complaints in an age-sensitive manner (which is linked to the issue of monitoring and oversight discussed in the next subsection of this module below), as well as prohibited measures such as: placement in solitary confinement; corporal punishment; and the use of restraint or force where no imminent threat of injury is posed or where other means of control have not been exhausted.

### (iii) Monitoring and oversight

The monitoring and oversight mechanisms and their respective mandates discussed in chapter 5.D of this module are equally applicable to both adults and children.

Given the increased risks and vulnerabilities experienced by children deprived of their liberty, it is extremely important that there are effective monitoring and oversight mechanisms in place in relation to all facilities in which children are deprived of liberty. It is also important that such mechanisms are able to function independently, ensure accountability and comprise members who have specialized expertise in all aspects of the safeguarding and protection of the rights of children deprived of their liberty.

Section 253 (1) of the Child's Rights Act, 2003 empowers the Minister with responsibility for matters relating to children or the Minister for Internal Affairs to "appoint such persons as he may think fit to be visitors in relation to such approved [children] institutions" and section 253 (2) states that: "(a) the President and the Justice of the Court of Appeal; (b) the Chief Judge of the State or of the Federal Capital Territory, Abuja, as the case may be; (c) Judges of the Court at the High Court-level; and (d) members of the Court at the Magisterial level" shall be *ex officio* visitors to all approved children institutions. Section 253 (3) provides for the constitution of visiting committees and section 254 provides for the appointment of voluntary visitors for approved children institutions and states that the visitors, visiting committees and voluntary visitors shall carry out "such functions and duties in relation to approved institutions as may be prescribed".

Sections 260, 264 and 268 of the Child's Rights Act, 2003, provide for the establishment and membership of National, State and Local Child Rights Implementation Committees. Due to funding constraints the National Child Rights Implementation Committee ceased to function in 2010 but was re-inaugurated in 2018.<sup>126</sup> The functions of the Committee are set out in the box below.



#### Focus

#### Functions of the National Child Rights Implementation Committee (Section 261 (1) of the Child's Rights Act, 2003)

The functions of the National Committee are to:

- (a) Initiate actions that shall ensure the observance and popularization of the rights and welfare of a child as provided for in:
  - (i) this Act;
  - (ii) the United Nations Convention on the Rights of the Child;
  - (iii) the Organization of African Unity Charter on the Rights and Welfare of the Child;
  - (iv) the Declaration of the World Summit for Children;
  - (v) the Dakar Consensus and National Programme of Action;

<sup>126</sup> Nigerian Television Authority, "NRIC Re-inaugurated to Boost Child Rights".



### Focus

#### Functions of the National Child Rights Implementation Committee (Section 261 (1) of the Child's Rights Act, 2003) (continued)

- (vi) Such other international conventions, charters and declarations relating to children to which Nigeria is or becomes a signatory;
- (b) Continually keep under review the state of implementation of the rights of a child;
- (c) Develop and recommend to the Federal Government and to the State and Local Government, through their respective State and Local Government Committees, specific programmes and projects that shall enhance the implementation of the rights of a child;
- (d) Collect and document information on all matters relating to the rights and welfare of a child;
- (e) Commission interdisciplinary assessments of the problems relating to the rights and welfare of a child in the State;
- (f) Encourage and coordinate the activities of International, Federal, State and Local Government institutions, organizations and other bodies concerned with the rights and welfare of a child;
- (g) Organize meetings, conferences, symposia and other enlightenment forums on the rights and welfare of a child;
- (h) Coordinate the activities of and collaborate with the State Committee;
- (i) Prepare and submit periodic reports on the state of implementation of a rights of the child for the submission to the Federal Government, African Union and the United Nations; and
- (j) Perform such other functions relating to the rights of a child as may, from time to time, be assigned to it.

## (iv) Training, education and empowerment

The importance of the need for training, public education and awareness-raising on the prevention of torture and other forms of ill-treatment were set out in chapter 5.E of this module. In order to protect and safeguard the rights of children in the fight to prevent torture, specialized training in child rights and child protection should be included in all aspects of such training, education and empowerment programmes, which highlights the specific needs, requirements and risks of children relevant to the prevention of torture.

The need for such training is emphasized in the Child's Rights Act, 2003. Section 206 (1) of the Act provides that "[p]rofessional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilized to establish and maintain the necessary professional competence of all persons, including Judges, Magistrates, officers of the Specialized Children Police Unit, supervisors and child development officers, dealing with child offenders". Section 206 (2) of the Act provides that "[e]very Judge, Magistrate and other judicial officer appointed to the Court shall be trained in sociology and behavioural sciences to ensure effective administration of the child justice system" and section 207 (3) provides for continuous training and instruction for members of the Specialized Children Police Unit.

Two other key features highlighted in the Child's Rights Act, 2003 are the need for specialization/specialized institutions within a dedicated child justice system (through the establishment of the Specialized Children Police Unit, specialized courts and approved children's institutions), and the need for diversity among the personnel working within all areas of the child justice system. In relation to diversity, section 206 (3) of the Act provides that "[p]ersons employed in the child justice system shall reflect the diversity of children who come into contact with the child justice system and efforts shall be made by those concerned with the appointment of those persons to ensure the fair representation of women and minorities in the appointment".

As previously discussed, a key requirement to ensure the effective protection of children in the criminal justice process and in particular to the prevention of torture, is a coordinated multisectoral approach that includes the involvement of actors in various fields, including health care, psychosocial support, education, rehabilitation and reintegration, as well as the involvement of other key actors, such as civil society and community representatives. It is important that specialized training and education programmes reach out to include everyone involved with any aspect of the juvenile justice system.



### Self-assessment questions

1. Identify specific risks and vulnerabilities and challenges when interviewing children in terrorism cases. As an interviewer, what specific preparations and considerations should be taken into account, what safeguards would you put in place, what interviewing approach would you adopt, and what other measures would you take to mitigate the identified risks?
2. Detail the key principles on justice for children and explain their relevance and importance in the context of interviewing children in terrorism cases.
3. What are the practical implications of the absence of “domestication” of the Child’s Rights Act, 2003, into the law of the States of Nigeria in the context of: (a) interviewing children in terrorism cases; and (b) the detention of children suspected of committing terrorist offences?
4. What is the relationship between conditions of detention and the risk of torture for children deprived of their liberty? Identify five aspects of conditions of detention where children’s specific needs and vulnerabilities are of particular relevance and provide practical examples of ways in which the risks can be mitigated.
5. How would you assess the need and relevance of specialized child rights training, education and empowerment in the prevention of torture of children? Who needs to be trained and educated on these issues? Identify three key overarching messages to be included in all training and education programmes.





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