



NATIONAL COMMISSION
FOR HUMAN RIGHTS

Gap Analysis

Torture and Custodial Death (Prevention and Punishment) Act, 2022

Justice Project Pakistan

National Commission for Human Rights

Executive Summary

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) binds State parties to enact and implement legislation addressing torture and inhumane treatment. Pakistan ratified the UNCAT in 2010, and in compliance, enacted the Torture and Custodial Death (Prevention and Punishment) Act, 2022 (the "Act"). While the Act's promulgation marks a significant milestone towards criminalising torture, much work lies ahead to bring this law into implementation.

Compliance with International Standards

- The Act falls short of full compliance with international standards on torture laid down by the UNCAT and other international instruments and jurisprudence in some respects, the most prominent of them being the omission of psychological pain and suffering. Other glaring shortcomings include vagueness in complaint and investigation procedures, incoherence with international law in medical examination procedures, absence of provisions for non-refoulement, lack of suo moto investigation initiation, and inadequate remedies. Moreover, the Act does not mention the Istanbul Protocol, the Minnesota Protocol or the Mendez Principles, which should be explicitly referenced to ensure their use in understanding and application of the law.

Penalties under the Act

- Although the Act defines cruel, inhuman, and degrading treatment (CIDT), it does not include any provision for preventing or penalising such acts.
- The Act does not provide punishments for torture and custodial death itself but falls back on already stipulated punishments in Pakistan Penal Code, 1860 (PPC) which do not correspond completely with the nature or gravity of the crime of torture and custodial death.
- Additionally, the prescribed punishments for offences under the PPC are not in line with the UNCAT and international standards because they lack specificity and do not punish the specific crime of torture.

Scope of Definitions

- The Act defines several key terms: "complaint" signifies allegations made to the Federal Investigation Agency (FIA), orally or in writing, regarding the commission of an offense under the Act by a public official or person working in an official capacity; a "complainant" is an individual filing such a complaint or their representative based on reliable information; "custody" encompasses all situations of detention or deprivation of liberty, including judicial custody and various forms of restraint; "cruel," "inhuman," or "degrading treatment" encompasses deliberate or aggravated mistreatment causing suffering or humiliation by a public official or their agents; "custodial death" refers to a death occurring while in custody, directly or indirectly caused by torture; "custodial rape" involves sexual abuse by a person in custody or a subordinate public official; "Government" refers to the Federal or Provincial Government; "malafide complaint" denotes a complaint filed with malicious intent; "person" adopts the definition from the Pakistan Penal Code; "public official" includes individuals empowered to detain or prevent offences; "torture" refers to intentional infliction of severe physical pain or suffering for various purposes by or with the consent of a public official or person acting officially.

Malafide Complaint

- By penalising malafide complaints, the Act violates Article 13 of the UNCAT which states that any individual who alleges he has been subjected to torture has the right to complain to, and to have his case examined by, its competent authorities. It requires states to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of their complaint. Penalising “malafide” complaints may discourage victims from lodging complaints and be detrimental to the objectives of the Act.

The Role of FIA and NCHR

- The Federal Investigation Agency (FIA) holds exclusive jurisdiction to investigate complaints against public officials, supervised by the National Commission for Human Rights (NCHR). However, the nature of this supervision is unclear, as the Act does not delineate the distribution of responsibilities between the two bodies. More than a year since the passage of the Act, no functional wing dedicated to investigating custodial torture been established, and there is no complaint mechanism for such cases on FIA's official website, unlike for all other federal offences falling under its ambit.
- The Act gives NCHR the strong mandate to supervise torture investigations conducted by FIA, but it is silent as to the specifics of the supervisory mandate and the terms of cooperation between the NCHR and FIA.

The Punishment for Custodial Death

- The Act prescribes the death penalty for the offence of causing custodial death under Section 302 of the PPC. In practice, this may lead to fewer convictions, as the investigating body and judges might be reluctant to impose death sentences on police officers. Research has shown that there is no clear deterrent effect of the death penalty.

Overlap with the Anti-Rape (Investigation and Trial) Act, 2021

- It remains unclear how custodial rape will interact with the procedure laid out in the 2021 Act. It must be ensured that cases of custodial rape are also covered by the investigation and trial procedure set out in the 2021 Act.

Way forward

- Despite these deficiencies, the Act is a historic milestone in Pakistan's legislative history. Addressing the deficiencies by ensuring better alignment with the UNCAT and international standards, and immediate operationalisation of the Act would further enhance its positive impact on Pakistan's criminal justice and human rights landscape. The next and most crucial step is framing enabling rules that establish investigation procedures and complaint mechanisms, and delineate the roles of the NCHR and FIA.

Gap Analysis

The analysis below highlights the incongruities between the provisions of the Act and the standards outlined in the UNCAT, other international instruments and judicial precedent.

| | TORTURE AND CUSTODIAL DEATH (PREVENTION & PUNISHMENT) ACT, 2022 | COMPLIANCE WITH THE UNCAT | OTHER INTERNATIONAL STANDARDS | ANALYSIS |
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| A | 2(c) “Complaint” means allegations made orally or in writing to the Agency that a public official or a person working in an official capacity has committed an offence under this Act. | Partially Compliant The UNCAT places significant emphasis on the “impartiality” of the investigation process. However, the FIA, as a law enforcement agency, cannot be considered impartial. | The Istanbul Protocol suggests that even in the absence of a complaint, the State is obligated to investigate if there are reasonable indications that an act of torture has taken place. | The Act designates the FIA as the sole authority to receive complaints and leaves some ambiguity as to the procedure of filing complaints. Nonetheless, the National Commission for Human Rights (Complaint) Rules, 2015 mandate the NCHR to receive complaints of human rights violations and lodge enquiries. |
| B | 2(g) “Cruel” or “inhuman” or “degrading treatment” means and includes any deliberate or aggravated treatment inflicted by a public official or a person acting on his behalf against a person under their custody, causing suffering, gross humiliation or degradation of the person in custody. | Compliant The UNCAT does not define CIDT. Under Article 16, each State Party is obliged to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1. | In its General Comment No. 2, the Committee Against Torture (the “Committee”) states that it does not consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose, and severity of the treatment applied. ¹ | <p>Pakistan’s superior judiciary has upheld the standards laid down in the UNCAT, while defining conduct that amounts to its violation, placing emphasis on Pakistan’s responsibility to enforce it.²</p> <p>Although the Act defines CIDT, it does not include any provision for preventing or penalising such acts. The Act’s sole reference to punishment for CIDT is limited to cases where a public official knowingly uses statements, information, or confessions obtained through torture or CIDT against the victim.</p> |

1. Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies, see: <https://www.ohchr.org/sites/default/files/Documents/>

2. 2023 PCrLJ 78: “no person in whatever capacity is allowed to detract, defame or disgrace any other person, thereby diminishing, decreasing and degrading the dignity, respect, reputation and value of life in more particularly the officials of the NAB, who are entrusted the sacred duty to investigate white collar crimes. The inhuman treatment meted out to the NAB victim violates not only the Convention Against Torture and other cruel, inhuman or degrading treatment or punishment rectified by the government of Pakistan, but also Article 14(1) of the Constitution and directions issued time and again by the superior courts of the country. The Hon’ble Chief Justice of Pakistan has also admonished the National Accountability Bureau on being informed that a citizen in its custody was made to bark like a dog and crawl on the floor, in addition to being subjected to the standard procedures used during interrogation through violence. It is alarming to observe that the right to dignity of person is the only right of Pakistani citizens that is not subject to the law and is perhaps most commonly abused, particularly by the State functionaries.”

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| | | | <p>The Inter-American Court of Human Rights has held that “determinations of whether a form of treatment amounts to torture or other ill-treatment must be made on a case-by-case basis, taking into account the peculiarities of the case, the duration of the suffering, the physical and mental effects on the victim, and the personal circumstances of the victim.”³</p> | |
| C | <p>2(n) “Torture” means an act committed by which severe physical pain or physical suffering, 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.</p> | <p>Partially Compliant</p> <p>The definition of torture under Article 1 comprises of 4 cumulative elements, which are:</p> <ol style="list-style-type: none"> 1. Severe mental or physical suffering; 2. Intentional act or omission; 3. For a specific purpose; 4. By a public official or with the consent or acquiescence of a public official. | <p>The Committee recommends that States define the crime of torture in line with the UNCAT or ensure their definition encompasses all elements of Article 1.</p> <p>The Human Rights Committee extends the prohibition of torture under Article 7 of the ICCPR to mental suffering.⁴</p> | <p>Judicial precedent affirms that inflicting psychological suffering amounts to torture, however, the definition of torture under the Act excludes the same.</p> <p>The Lahore High Court has established that blindfolding, confinement in dark, underground cells, and incommunicado detention amount to mental torture and are violative of Article 14(2) of the Constitution.⁵ Moreover, in many instances, confessions have been discarded because psychological torture was inflicted upon the defendant.⁶</p> <p>The Act also excludes suffering arising from lawful sanctions from the definition of torture. A clear definition of “lawful sanction” is needed to prevent misuse, and ensure consistency with the absolute prohibition of torture, as has also been emphasized by the APT guide on torture jurisprudence.⁷</p> |

3. Lizardo Cabrera v Dominican Republic, Case 10832, Report No. 35/96, 17 Feb. 1998, at para. 76.

4. Human Rights Committee, General Comment No. 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/R2. Lizardo Cabrera v Dominican Republic, Case 10832, Report No. 35/96, 17 Feb. 1998, at para. 76

5. Saifuddin Saif v the Federation of Pakistan. PLD 1977 Lahore 1174.

6. PLD 1977 Lahore 1174.

7. APT Torture in International Law - A guide to jurisprudence (2008). See: <https://www.apr.ch/sites/default/files/publications/jurisprudenceguide.pdf>

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| D | <p>2(i) “Custodial rape” means and includes any person taking advantage of his position and committing rape or sexual abuse on a person in his custody or in custody of a public official subordinate to him.</p> | NOT ADDRESSED | <p>The Committee issued a decision against the State of Bosnia and Herzegovina, finding that rape and other acts of sexual violence constitute torture under the UNCAT, and ordered the State to pay “fair and adequate compensation” and provide free medical and psychological care to the victim.</p> <p>The Special Rapporteur on Torture (“Special Rapporteur”) recognize rape as an act of torture.⁸</p> <p>The Inter-American Commission on Human Rights, in the 1996 case <i>Martí de Mejía v Peru</i>, recognised that rape could constitute torture.⁹The following year, the European Court followed suit in <i>Aydin v Turkey</i>.¹⁰</p> | <p>The definition of rape in the PPC exclusively pertains to acts perpetrated by a man against a woman and does not account for rape committed against men. Consequently, there is ambiguity regarding the reconciliation of offences under the Act with those that fall outside the restrictive definition of rape provided in the PPC.</p> <p>When the victim of rape is a man, the offence is prosecuted under Section 377 of the PPC, “Unnatural Offence,” which is not encompassed by the Act’s provisions for the punishment of rape. Therefore, the Act fails to address and prosecute rape committed against men.</p> <p>Additionally, the Act does not provide a distinct definition for sexual abuse separate from the offence of rape, nor does it make explicit reference to provisions of the PPC. It is noteworthy that the PPC does not define ‘sexual abuse’.</p> |
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8. See, for example, the 1986 report of the Special Rapporteur on Torture, UN Doc. E/ CN.4/1986/15, §119; or his 1992 statement to the Commission on Human Rights explicitly stating that rape constitutes torture; Summary Record of the 21st meeting of the Commission on Human Rights, UN Doc. E/CN.4/1992/SR.21, §35.

9. *Martí de Mejía v Peru*, IACommHR, Case 10970, Report No. 5/96, 28 February 1996.

10. *Aydin v Turkey*, no. 23178/94, Rep. 1997-VI, ECHR, judgement of 25 September 1997.

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| E | <p>3. Inadmissibility of statement extracted through torture</p> <p>(1) Any statement, information, or confession obtained by a public official as a result of torture or cruel, inhuman or degrading treatment shall be inadmissible evidence in any proceedings against the person making it.</p> <p>(2) A public official who knowingly uses such information under sub-section (1) shall be liable for imprisonment which may not exceed one year or with fine which may not exceed hundred thousand rupees of both.</p> <p>(3) Notwithstanding anything contained in sub-sections (1) and (2), any information or confession obtained as a result of torture or cruel, inhuman or degrading treatment shall be admitted as evidence against a person accused of committing the offence of torture. These provisions shall be in addition to the provisions of section 37 and 38 of the Qanoon- e- Shahadat, Order 1984 (P.O. No. X of 1984).</p> | <p>Compliant</p> <p>Article 15 states that any statement obtained through torture cannot be used as evidence in legal proceedings, except if the statement is being used against someone accused of torture as evidence that the statement was made.</p> | <p>The Committee recommends that state legislation explicitly provide that statements obtained as a result of torture may not be used or invoked as evidence in any proceedings.¹¹</p> <p>The European Court of Human Rights maintains that no legal system based upon the rule of law can countenance the admission of evidence obtained through torture. This is because the trial process is a cornerstone of the rule of law and it is irreparably damaged by the use of torture.¹²</p> | <p>Article 14(2) of the Constitution of Pakistan states that, "No person shall be subjected to torture for the purpose of extracting evidence."</p> <p>Moreover, Article 37 of the Qanoon-E-Shahadat Order, 1984 incorporates the exclusionary rule that renders confessions obtained through inducement, threat, or promise, inadmissible.</p> <p>Pakistan's judicial precedent has reiterated the same principle in many instances, holding confessions obtained through torture and coercion inadmissible.¹³</p> |
| F | <p>4. Custody of females</p> <p>(1) No female shall be detained in order to extract information regarding the whereabouts of a person accused of any offence or to extract evidence from such female.</p> | <p>NOT ADDRESSED</p> | <p>NOT ADDRESSED</p> | <p>This section inadequately addresses the problem of illegal detention because it is limited to females. The practice of detaining male relatives of an accused individual to extract</p> |

11. See examples in the Report of the Committee against Torture 47th-48th sessions (2011-2012).

12. *Ćwik v. Poland*, no. 31454/10, Judgement European Court of Human Rights (ECtHR), 5 November 2020.

13. In *Asfandiyar Wali v. the State*, Peshawar High Court held that confessions made by the accused appellants in this case were extorted from them under duress and would thus have no evidentiary value whatsoever. See PLD 1978 Peshawar 38.

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| | (2) No female shall be taken or held in custody by a male except by a female public official lawfully authorised to do so. | | evidence or determine their whereabouts is common and has been recognized and condemned by higher courts. ¹⁴ |
| G | <p>5. Investigation of offences</p> <p>(1) Notwithstanding anything contained in any other law for the time being in force, the Federal Investigation Agency shall have the exclusive jurisdiction to investigate the complaints against any public officials who have committed offence under this Act: Provided that the Agency shall investigate the complaints under the supervision of National Commission for Human Rights.</p> <p>(2) If at any time, including during the grant of physical remand under the Code, the Magistrate has reasonable grounds to believe that the offence under this Act is committed or a complaint of torture is lodged by the person in custody, he shall order a medical examination and if the results of such examination reveal infliction of torture, he shall notify the Agency to investigate such offence.</p> <p>(3) The Agency, while investigating the offences under this Act, shall have the same powers and shall follow the same procedure as prescribed in the Federal Investigation Agency Act, 1974 (Act VIII of 1975) and the rules made thereunder.</p> | <p>Partially Compliant</p> <p>Article 12 states that each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there's reason to believe that an act of torture has been committed.</p> <p>Article 13 obliges States to ensure that any individual who alleges being subjected to torture has the right to complain and to have his case promptly and impartially examined by competent authorities.</p> | <p>Rule 57 of the Mandela Rules states that allegations of torture or other cruel, inhuman or degrading treatment or punishment of prisoners are to be dealt with immediately and investigated by an independent national authority.</p> <p>The Special Rapporteur states that there cannot be effective torture prevention if the authorities are investigating their peers, subordinates, or superiors against whom allegations are being made. If investigators are not hierarchically, administratively, and financially independent of the authorities they are investigating, there is an inherent conflict of interest.</p> <p>The Istanbul Protocol states that an independent medical examination should take place without delay, if the detainee so requests, or where there is a suspicion or indication, that they have been subjected to torture or other ill-treatment.¹⁵</p> <p>The Mendez Principles¹⁶ provide that the medical professional conducting the examination should not belong to or be functionally dependent upon the detaining authorities or to a law-enforcement agency.¹⁷</p> <p>The Federal Investigation Agency (Inquiries and Investigations) Rules, 2002 stipulate that upon receipt of a complaint against a public servant, the FIA requires the prior approval of an authority which may be the Director, Director General, Secretary, to initiate the investigation. Similarly, prior permission is required for registration of a criminal case against a public officer. The FIA also has the power to dismiss cases and recommend departmental proceedings instead of criminal proceedings. These rules allow torture allegations to be dismissed even before the trial has begun.</p> <p>The FIA's investigation of torture allegations raises concerns due to its police-like powers of search, arrest, detention, seizure of property etc., and FIA's officers derive these powers and their duties from the Code of Criminal Procedure. FIA's exclusive jurisdiction over investigations of torture complaints creates a conflict of interest. Many FIA members are also former police officers, which may hinder impartial investigations.</p> |

14. Mahazullah vs. The State. PCR/LJ 2000 Lahore 534.

15. UN Office of the High-Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 2004, HR/P/PT/8/Rev.1. The Istanbul Protocol outlines international legal standards and sets out specific guidelines on how to document and conduct effective legal and medical investigations into allegations of torture and ill-treatment.

16. Principles on Effective Interviewing for Investigations and Information Gathering (the Mendez Principles).

17. The Robben Island Guidelines state that, the effectiveness of complaints and investigation procedures presupposes the existence of a strong and independent judicial system, including an independent Bar. The guidelines establish that, to this end, States must carry out legal and institutional reforms. See: Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa.

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| H | <p>7. Intimation to the concerned Government department and transfer or suspension of public official</p> <p>(1) The Agency, while investigating a public official who is accused of an offence under this Act, shall within twenty-four hours of arrest, inform the competent authority to which the public official is accountable, of the nature of the proceedings against him.</p> <p>(2) Notwithstanding anything contained in any other law for the time being in force, a public official when accused of an offence under this Act shall forthwith be suspended or transferred to a different location from the location in which the alleged offence was committed, after completion of a departmental enquiry within 7 days, giving a finding that there is prima facie evidence of commission of offence under this Act by the public official.</p> <p>3) Notwithstanding anything contained in any other law for the time being in force, a public official when convicted of an offence under this Act shall not perform any public duty unless acquitted by the appellate court.</p> | NOT ADDRESSED | <p>Rule 73 of the Mandela Rules states that the officials potentially implicated in torture or ill-treatment should be removed from any position of control or power over complainants, witnesses or their families, as well as those conducting the investigation.¹⁸</p> | <p>The conclusion of a departmental enquiry being the sole ground upon which a public official may be suspended or transferred may be counterproductive, as Government departments can often be unwilling to punish their own. In this case, the FIA, with the NCHR's supervision, should be allowed to directly recommend suspension or removal.</p> <p>Explanation II appears to significantly weaken Section 7(2). If a departmental enquiry's prima facie finding can only result in suspension or transfer if a court comes to the same finding, action can only be taken against the accused at a much later stage, after the trial has begun.</p> |
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18. Rule 71(3), The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

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| | <p>Explanation II.- It is clarified that this section, except sub-section (3), shall only apply when a court of law finds a strong prima facie evidence against a public official with regard to the commission of an offence under this Act.</p> | | | |
| I | <p>8. Punishment for torture Any public official who commits or abets or conspires to commit torture shall be punished with the same punishment as prescribed for the type of harm provided in Chapter XVI of the Pakistan Penal Code.</p> <p>Explanation.- The offence under this section shall be cognizable, non-compoundable and non-bailable within the meaning of the Code.</p> | <p>Non-Compliant Article 4(2) requires State parties to penalise torture with punishments commensurate to the gravity of the crime.¹⁹</p> | <p>The Committee recommends that States penalise torture with punishments ranging from a minimum of six years of imprisonment. In 2002, the Committee recommended sentences of between 6 and 20 years.²⁰</p> | <p>The Act does not provide punishments itself but falls back on punishments stipulated for harm in the PPC. Torture is not an offense in the PPC, causing confusion in punishment for different degrees of torture</p> <p>The PPC has varying punishments for different kinds of hurt, instead of an overarching punishment for the crime of 'torture'. A separate schedule of punishments should be added to the Act for specificity and ease of interpretation. Section 302 of the PPC prescribes the death penalty as maximum punishment for intentional killing. An Act aligned with ICCPR, UNCAT, and International Human Rights Law should not impose the death penalty as punishment. In practice, it is foreseeable that the death penalty may result in fewer convictions as judges may be reluctant to sentence public officials to death.</p> |

19. "Each state party shall make these offences punishable by appropriate penalties which take into account their grave nature." UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, P. 85. Available at: <https://www.refworld.org/docid/3ae6b3a94.html>

20. CAT, Summary Report of the 93rd Meeting of the Committee, UN Doc. CAT/C/SR.93

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| | <p>Explanation II.- It is clarified that this section, except sub-section (3), shall only apply when a court of law finds a strong prima facie evidence against a public official with regard to the commission of an offence under this Act.</p> | | | <p>Severity of the punishment may also deter victims' families from coming forward, and expose them to intimidation and external pressure to stay silent.</p> <p>Moreover, research has shown that there is no clear deterrent effect of the death penalty.</p> |
| J | <p>9. Punishment for custodial death</p> <p>Whoever commits or abets or conspires to commit the offence of custodial death, shall be punished with the same punishment as prescribed in section 302 of the Pakistan Penal Code. Explanation. The offence under this section shall be cognizable, compoundable and non-bailable within the meaning of the Code.</p> | <p>Non-Compliant</p> <p>Article 4(2) of the Convention requires State parties to penalise torture with punishments commensurate to the gravity of the crime.²¹</p> <p>Article 14(1) of the UNCAT states: "In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."</p> <p>The Act does not provide for compensation for the victim's heirs.</p> | <p>The ICCPR restricts the death penalty to the 'most serious crimes', however, other international instruments prohibit the use of the death penalty entirely. These include: the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Protocol No. 3 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.</p> | <p>Section 302 of the PPC prescribes the death penalty as the maximum punishment for intentional killing.</p> <p>An Act aligned with ICCPR, UNCAT, and International Human Rights Law should not impose the death penalty as punishment.</p> <p>In practice, it is foreseeable that the death penalty may result in fewer convictions as judges may be reluctant to sentence public officials to death. The severity of the punishment may also deter victims' families from coming forward, and expose them to intimidation and external pressure to stay silent.</p> <p>Moreover, research has shown that there is no clear deterrent effect of the death penalty.²²</p> |

21. "Each state party shall make these offences punishable by appropriate penalties which take into account their grave nature." UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3a6b3a94.html>.

22. For some studies in the North American context, see: Lester, D. (1993). The Deterrent Effect of the Death Penalty in Canada. *Perceptual and Motor Skills*, 77, 186. and Cohen-Cole, Durlauf, S., & Nagin, D. (2006). Reevaluating the Deterrent Effect of Capital Punishment: Model and Data Uncertainty. 39.

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| K | <p>10. Punishment for custodial rape Whoever commits or abets the offence of custodial rape, shall be dealt with and punished under the law and procedure for rape, and the provisions of this Act shall also be applicable to the accused, mutatis mutandis. Explanation.- The offences under this section shall be cognizable, compoundable and non-bailable within the meaning of the Code.</p> | NOT ADDRESSED | <p>The Committee issued its first decision against the State of Bosnia and Herzegovina, finding that rape and other acts of sexual violence constitute torture under the UNCAT, and ordered the State to pay “fair and adequate compensation” and provide free medical and psychological care to the victim. This case demonstrates that penalties awarded for custodial rape must take into account the gravity of the crime that is being committed.²³</p> | <p>Section 376 of the PPC makes the offence of rape punishable by death or imprisonment ranging from 10 to 25 years, along with a fine.</p> <p>The Anti-Rape (Investigation and Trial) Act, 2021 sets out the procedure for the investigation and trial of sexual offences listed in the PPC. It establishes an Anti-Rape Crisis Cell which is tasked to conduct medico-legal examinations and gather evidence as well as provide legal assistance and witness protection to rape victims. It remains unclear how custodial rape will interact with the Anti-Rape Act, but it must be ensured that custodial rape is covered by its investigation and trial procedures.</p> <p>Moreover, research has shown that there is no clear deterrent effect of the death penalty.</p> |
| L | <p>11. Punishment for filing malafide complaints Whoever files a malafide complaint shall, after it is established that the complaint was malafide, be punished with the same punishment as is prescribed under section 8 for the perpetrators under this Act.</p> | <p>Non-Compliant Article 13 requires States to take steps to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.</p> | <p>The Istanbul Protocol states that any person should be able to come forward with allegations of torture or ill-treatment, without the risk of being exposed to adverse consequences as a result of making and pursuing a complaint.²⁴</p> <p>The Special Rapporteur also monitors if measures of retaliation are taken or threatened against victims of torture, their relatives,</p> | <p>Harsh penalties for malafide complaints may prevent people from complaining, given the fear that their complaint may be construed as malafide.</p> |

23. IJRC. (2020, September 29). Committee against torture decides first complaint on sexual violence in conflict. International Justice Resource Center. See: <https://ijrcenter.org/2019/09/05/committee-against-torture-decides-first-complaint-on-sexual-violence-in-conflict/22>. For some studies in the North American context, see: Lester, D. (1993).

24. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol") HR/P/PT/8/Rev.1.

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| | | | <p>members of civil society, lawyers working on torture complaints, and medical or other experts acting on behalf of torture victims.²⁵</p> <p>The Special Rapporteur further recommends that any complaint procedure for allegations of torture should be designed to allow anyone to safely and conveniently file a complaint without fear of intimidation or reprisals.</p> | |
| M | <p>13. Time limit for investigation, trial and appeal</p> <p>(1) The investigation of the offences under this Act shall be completed within thirty days from the date of submission of the complaint.</p> <p>(2) If the investigation of an offence under this Act is not completed within thirty days, the Agency shall call for a report for explaining the delay in completion of the investigation and if satisfied with the causes of delay, may grant maximum five days for completion of the investigation or if the Agency is not satisfied with the causes of delay, may transfer the investigation to another investigating officer who shall take up and complete the investigation from the same stage where it was left by his predecessor.</p> | NOT ADDRESSED | <p>The Istanbul Protocol states that investigations should commence within hours, or at most, a few days after suspicion of torture or CIDT has arisen.</p> <p>When considering the admissibility of a communication on torture, the Human Rights Committee decided that a period of 3 years for the adjudication of a case at first instance constituted an unreasonable prolongment.</p> <p>The Special Rapporteur's report suggests that investigation must commence within the first few hours, and no later than 24-48 hours after receiving a complaint. Furthermore, it stresses the need for judicial oversight of any delays in the investigative process.</p> | <p>Removing the discretion awarded to the Court of Session can ensure that the court initiates a trial of the alleged offence within a reasonable time and without undue delay due to investigations left incomplete deliberately.</p> <p>The Act is silent as to the contents of the report that the FIA is to file before the court. The written report must include the scope of the inquiry, procedures, and methods used to evaluate evidence. The report must also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified.²⁶</p> |

25. In particular, the Special Rapporteur on Torture takes into account Article 13 of the Convention against Torture and paragraph 2(b) of the Istanbul Protocol (see under "Pertinent international instruments"). Article 13 of the Convention states: "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 evidence given."

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

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| | <p>(3) If investigation of an offence is not completed within thirty days, the Agency shall also file an interim report before the Court of Session and the court may decide to initiate the trial on the basis of such information.</p> <p>(4) The trial of offences under this Act shall be completed within three weeks from the date of submission of challan before the relevant court.</p> <p>(5) The appeal against the offences under this Act shall be decided within thirty days from the date of filing of such appeal.</p> | | | |
| N | <p>14. Special protection.</p> <p>(1) Any person, including the victim or complainant or any witnesses, who allege that he requires protection from a person accused of having committed an offence under this Act or from any of his associates, shall file a petition to the Court of Session in this regard.</p> <p>(2) The court receiving the petition, after giving notice to the concerned parties, shall hear the matter and pass an order on the petition within three days.</p> <p>(3) The court while disposing of such a petition as mentioned in sub-section (1) shall make</p> | <p>Compliant</p> <p>Article 13 states that steps should 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 evidence given.</p> | <p>The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power²⁷ highlight the manner in which victims of crime are to be treated, and the support and compensation that must be extended to them, with Principle 6(d) stating that victims and their families and witnesses on their behalf, must be kept safe from intimidation and retaliation.</p> <p>Rule 25 of the Bangkok Rules states that women prisoners who report abuse shall be provided with immediate protection, support and counselling.</p> <p>The Special Rapporteur recommends that any complaint procedure for</p> | <p>The Supreme Court of Pakistan has held that safeguarding vulnerable witnesses is the state's responsibility.²⁸</p> |

27. UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution adopted by the General Assembly, 29 November 1985, A/RES/40/34, available at: <https://www.refworld.org/docid/3b00f2275b.html>.

28. 2020 SCMR 1262. "for effective and meaningful administration of criminal justice, witness protection is a sine qua non and as such a binding responsibility is cast upon the State to be discharged through its functionaries to safeguard vulnerable witnesses in order to ensure that stream of justice ran pure and clean with scales strictly held in balance".

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| | such orders as deemed necessary and appropriate according to the facts and circumstances of the case. | | allegations of torture should be designed in a way to allow anyone to safely and conveniently file a complaint without fear of intimidation or reprisals. | |
| O | 15. Act not to prejudice civil remedies Nothing in this Act shall prejudice the civil remedies available to the victim by virtue of any other law for the time being in force. | Compliant Article 14(2) states: "Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law". | NOT ADDRESSED | NOT ADDRESSED |
| P | 18. Duties of the Government The Government shall take all measures to ensure that the provisions of this Act are given wide publicity through media at regular intervals and; the relevant public officials are given periodic sensitization and awareness training on the issues addressed in this Act. | Compliant Article 10 UNCAT: 1. Each State Party shall 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. 2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person. | NOT ADDRESSED | NOT ADDRESSED |

| OTHER GAPS | | | | |
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| | DEFICIENCY | UNCAT | OTHER INTERNATIONAL STANDARDS | ANALYSIS |
| 1 | Independent investigation body | Article 12 states that each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there's reason to believe that an act of torture has been committed. | The Istanbul Protocol obliges States to ensure that any investigation of torture is carried out by an independent and impartial body, which has no institutional links to the alleged perpetrator(s) and is free from bias. | <p>Article 10-A of the Constitution guarantees the right to fair trial. Additionally, the superior courts of Pakistan have repeatedly asserted the importance of a fair and independent investigation vis-a-vis meeting the aims of justice and conducting a fair trial. They have also stressed that investigations should be conducted as early as possible and without any influence from an agency who might be potentially involved in the case.²⁹</p> <p>International best practices dictate that an independent body be empowered to investigate allegations of torture to ensure oversight and impartiality. By appointing the FIA as the sole body authorized to investigate complaints of torture, the Act replicates existing systemic flaws, increasing the chances of less successful prosecutions for torture or CIDT.</p> |
| 2 | Medical Examination | NOT ADDRESSED | The Minnesota Protocol establishes that a State's duty to investigate is triggered where it knows or should have known of any potentially unlawful death, regardless of a formal complaint. | The Act sets up no compulsory medical examination mechanisms for victims who allege torture. Under the Act, once the investigation has begun, the magistrate may order a medical examination if he has reason to believe acts amounting to torture have been carried out. |

29. See: 2022 PCrLJ 961, 2022 YLR 112, 2014 SCMR 515, 2014 CLD 941, 2010 YLR 2617, 2007 PCrLJ 1103 and 2006 PLD 434.

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| 3 | Lack of guidance on investigating custodial death | NOT ADDRESSED | <p>The Minnesota Protocol establishes that a State's duty to investigate is triggered where it knows or should have known of any potentially unlawful death, regardless of a formal complaint.³⁰</p> <p>The Mandela Rules state that any custodial death should be reported to a judicial or other independent authority to conduct prompt, impartial and effective investigations into the circumstances and causes of such cases.³¹</p> | <p>There is a lack of clarity as to how deaths in custody will be reported and how investigations will be carried out. There are no provisions for obligation to report deaths in custody or to conduct post-mortem in the event of custodial death.</p> <p>The FIA must possess the full range of investigatory capacity and competence, such as the power to order an autopsy and the power to identify alleged perpetrators and to oblige them to appear and testify. This can only be facilitated by the way of a coded regulatory framework in the form of rules, drafted in line with the Istanbul Protocol.</p> |
| 4 | Non-refoulement | Article 3 states that no State Party shall expel, return ("refouler") or extradite a person to another State where they face a risk of being subjected to torture. But, the Act contains no provision for non-refoulement. | The principle of non-refoulement is well established in international judgements. ³² | The Act does not prohibit, nor makes any mention of, the principle of non-refoulement. |
| 5 | Suo moto investigation | Article 12 of the UNCAT provides that a State must ensure a prompt and impartial investigation where there is a reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction. This provision is distinct from the victim's right to complaint. | The Istanbul Protocol provides that even in the absence of an express complaint, an investigation should be carried out wherever there is reasonable ground to believe that an act of torture or ill-treatment has been committed. It further states that makes it incumbent upon judges to use their judicial authority and power to initiate investigations or inform | |

30. The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. The Minnesota Protocol guides investigations into suspicious deaths, particularly those occurring when the deceased is in State custody, laying out principles for States to follow as well as forensic investigation techniques.

31. UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) : resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175, available at: <https://www.refworld.org/docid/5698a3a44.html>.

32. ECtHR, Soering v United Kingdom, No. 14038/88, 7 July 1989, para 111, ECtHR, Othman (Abu Qatada) v United Kingdom, No. 8139/09, 17 January 2012, para 235, 258, Human Rights Committee, General Comment No. 31, para 12, Inter American Convention on Human Rights, art. 22(8). IACtHR, Pacheco Tineo Family v. Bolivia, Judgment of November 25, 2013, para 135.

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| | | | prosecutors to enable them to intervene when they suspect that a person may have been subjected to torture or ill-treatment. | |
| 6 | Inadequate remedy | Article 14 states: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation." | <p>The Committee considers that the right to an effective remedy is paramount because in its absence, the protections afforded by the UNCAT would be rendered illusory.³³</p> <p>In the opinion of the UN Human Rights Committee, the victims have "the right to an effective remedy, including compensation and such full rehabilitation as may be possible."³⁴</p> <p>The Mendez Principles state that redress must include a combination of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.</p> <p>The Robben Island Guidelines indicate the extent of this obligation; it exists independently of whether a criminal prosecution has or can be brought, extends to victims and their dependents, and covers medical care, social and medical rehabilitation, compensation and support.</p> | The Act only provides for criminal proceedings against perpetrators of torture, but fails to offer any compensation or rehabilitation services for the victim. |
| 7 | No Penalties | NOT ADDRESSED | NOT ADDRESSED | The Act does not prescribe any penalties itself but falls back on the Pakistan Penal Code for prescription of punishments which creates ambiguity and confusion. |

32. ECtHR, Soering v United Kingdom, No. 14038/88, 7 July 1989, para 111, ECtHR, Othman (Abu Qatada) v United Kingdom, No. 8139/09, 17 January 2012, para 235, 258, Human Rights Committee, General Comment No. 31, para 12, Inter American Convention on Human Rights, art. 22(8). IACtHR, Pacheco Tineo Family v. Bolivia, Judgment of November 25, 2013, para 135.

33. Agiza v Sweden, CAT Communication No. 233/2003, 20 May 2005, §13.6.

34. General Comment No. 20 of the Human Rights Committee, The right not to be subjected to torture and cruel, inhuman or degrading treatment or punishment, Article 7, June 1982.

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| 8 | International Standards | Article 3 states that no State Party shall expel, return ("refouler") or extradite a person to another State where they face a risk of being subjected to torture. But, the Act contains no provision for non-refoulement. | NOT ADDRESSED | <p>The Act makes no mention of the international standards and stays silent as to the extent of its compatibility with international instruments such as Mandela Rules, Istanbul Protocol, and Minnesota Protocol.</p> <p>This lacuna can be supplemented through rule-making. When the rules are framed under the Act, they must fully reflect the principles established in the Mandela Rules, Istanbul Protocol, Mendez Principles and Minnesota Protocol.</p> |
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Justice Project Pakistan is a non-profit organization based in Lahore that represents the most vulnerable Pakistani prisoners facing the harshest punishments, at home and abroad. JPP investigates, litigates, educates, and advocates on their behalf. In recognition of our work, in December 2016, JPP was awarded with the National Human Rights Award, presented by the President of Pakistan.

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