



COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE (CHRAJ)

ADVISORY ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

1. Background

The Commission on Human Rights and Administrative Justice (CHRAJ) has followed recent media reports of alleged torture and other cruel, inhuman or degrading treatment or punishment (hereinafter generally referred to as “torture”) meted out to two journalists of an online media platform in Ghana, ModernGhana, for their alleged involvement in cyber-crimes. These media reports come on the heels of the incident that took place during the Ayawaso West Wuogon by-election, which led to the setting up of the Commission of Inquiry chaired by Emile Francis Short.

2. Competencies of CHRAJ

Even though the Commission did not independently authenticate the allegations and has also seen a copy of a press release issued by the National Security Council Secretariat on 1st July, 2019, refuting the allegations, the Commission hereby issues this Advisory in line with its constitutional and statutory mandate as spelled out as follows:

Article 218(f) of the Constitution and section 7(1) (g) of CHRAJ’s enabling legislation, Act 456 (1993), provide that:

*“The functions of the Commission shall be defined and prescribed by Act of Parliament and shall include the duty –
to educate the public as to human rights and freedoms by such means as the Commissioner may decide, including publications, lectures and symposia”*

As Ghana’s Ombudsman, CHRAJ is an oversight body responsible for ensuring good governance by scrutinizing or holding the executive, and indeed, administrative officials of all public institutions, including the security services, accountable so as to avoid abuse of power occasioned by bad governance or maladministration (i.e. bias, arbitrariness, ineptitude, neglect, delay, etc.) practices by such officials. Specifically, section 7(1) (b) of Act 456 empowers CHRAJ thus:

“to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the offices of the Regional Coordinating Council and the District Assembly, the Armed Forces, the Police Service and Prison Service in so far as the complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those services”

Furthermore, this Advisory is grounded on the additional competencies and responsibilities vested in CHRAJ as a national human rights institution (NHRI) under the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles).

In furtherance of its mandate, CHRAJ provides remedy or redress as stipulated under section 18(1) (a - f) of Act 456 by determining, after its investigations, what:

- (a) amounts to a breach of any of the fundamental human rights and freedoms provided in the Constitution; or
- (b) appears to have been contrary to law; or
- (c) was unreasonable, unjust, oppressive, discriminatory or was in accordance with a rule of law or a provision of any Act or practice that is unreasonable, unjust, oppressive, or discriminatory;
- (d) was based wholly or partly on a mistake of law and fact; or
- (e) was based on irrelevant grounds or made for an improper purpose; or
- (f) was made in the exercise of discretionary power and reasons should have been given for the decision.

3. National and international legal context

The 1992 Constitution of the Republic of Ghana per Article 15 states as follows:

- 1) *The dignity of all persons shall be inviolable;*
- 2) *No persons shall, whether or not he is arrested, restricted or detained, be subjected to-*
 - a) *Torture or other cruel, inhuman or degrading treatment or punishment;*
 - b) *Any other condition that detracts or is likely to detract from his dignity and worth as a human being.*

The 1981 African Charter on Human and Peoples' Rights (ACHPR) in Article 5 calls for respect of the dignity inherent in a human being and the recognition of his legal status and the prohibition of all forms of torture, cruel, inhuman or degrading punishment. The 1948 Universal Declaration of Human Rights (UDHR) in Article 5 also expressly abhors torture. Similarly, the 1966

International Covenant on Civil and Political Rights (ICCPR) in Article 7 also condemns torture. In addition, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) frowns strongly on torture and calls on all State Parties to take effective measures to prevent acts of torture in any territory under its jurisdiction.

Poignantly, Article 1 of CAT defines the term torture as:

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

Article 2 (2), (3) of CAT stipulates that there can be no justification for torture. Furthermore, Article 4 of CAT calls on State Parties to make all acts of torture offences under criminal law.

The United Nations Human Rights Committee (HRC), the treaty-body created under the ICCPR per its General Comment No. 20 adopted on 10th March 1992 in respect of Article 7 of CAT concludes that, the text of Article 7 of the ICCPR allows of no limitation or derogation as enunciated under international customary law. Thus, even in situations of public emergency, no derogation from the provision of Article 7 of the CAT is permissible. The Committee opined that:

“No justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority”.

4. International normative and programmatic context

It is also worthy of note that, Ghana having committed to the Sustainable Development Goals (SDGs), is bound to take steps to curb all forms of torture in its jurisdiction. Torture is captured in SDG 16 which aims to:

“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.

The targets set under SDG 16 relative to torture include the following:

- 16.2 End abuse, exploitations, trafficking and all forms of violence against and torture of children.
- 16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all.
- 16.6 Develop effective, accountable and transparent institutions at all levels.
- 16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.
- 16.a Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime.
- 16.b Promote and enforce non-discriminatory laws and policies for sustainable development.

It is against the above backdrop that CHRAJ finds it appropriate to issue this Advisory in accordance with the Paris Principles which vest National Human

Rights Institutions (NHRIs) with general responsibility to advise Government, Parliament and other authorities by giving and issuing “opinions, recommendations, proposals and reports”.

Ghana, having ratified the ICCPR and CAT, which have all found expression in its domestic laws and regulations, the commitment to the SDGs coupled with the goodwill that the country enjoys as a beacon of democracy and rule of law, it is important that, at all times, steps are taken to deal with any acts of torture or the perception of torture being meted out to citizens or non-citizens alike. In this connection, security operatives in particular must be made to understand the extent of their mandate, and the need to exercise circumspection when carrying out their lawful duties. No acts of torture, brutalities, and the like should be tolerated in any true democracy that is truly human rights compliant.

It would be recalled that in October 2015, Mr. Juan E. Mendez, the United Nations Special Rapporteur on Torture, Cruel, Inhuman or Degrading Treatment or Punishment reported to the UN Human Rights Council that he welcomed steps taken by the Government of Ghana in its fight against torture and other ill-treatment in the country, but intimated that much remains to be done. He mentioned that:

“I am concerned that instances of torture and ill-treatment continue to occur with some frequency during the apprehension, arrest, and interrogation stages by police and intelligence services. I received troubling reports of forced confessions, despite the existence of legal guarantees intended to protect persons upon arrest and in police custody.”

It is also noteworthy that, barely a few months ago (26th May to 1st June, 2019), the UN Sub-Committee on Prevention of Torture (SPT) led by Sir Malcolm D. Evans in line with its mandate under Articles 11 and 12 of the Optional

Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), paid a visit to Ghana to independently assess for themselves the kind of treatment meted out to especially persons deprived of their liberty.

Even though preliminary findings from their visit were communicated during their closing meeting held at the Ambassador Daniel Chapman Nyaho Conference Room at the Ministry of Foreign Affairs and Regional Integration (MoFARI), pending the issuance of a formal report, reports of allegations of torture as in the case of the ModernGhana journalists, Ayawaso West Wuogon By-Election and the like goes to strengthen the perception that, torture is constantly employed as a tool by some security operatives in the course of their work.

5. Steps taken by Government and inherent limitations

In making the above call, CHRAJ notes and lauds the step taken by the Government in setting up the Commission of Inquiry (Commission) under the Chairmanship of Emile Francis Short to make a full, faithful and impartial inquiry into the circumstances of, and establish the facts leading to, the events and associated violence during the Ayawaso West Wuogon by-election on 31st January, 2019. Nevertheless, in line with standard practice as per the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment (The Istanbul Protocol), and consistent with the tenets of transparent and accountable governance, the State (Government) issue a public report based on findings of the investigations of the Commission as stipulated under Article 280(3) (4) of the Constitution.

Significantly, paragraph 118 of the Istanbul Protocol states that:

“The [Commission of Inquiry] should issue a public report within a reasonable period of time. Furthermore, when the Commission is not

unanimous in its findings, the minority Commissioners should file a dissenting opinion”.

Also, paragraph 119 of the Istanbul Protocol states that:

“The State should reply publicly to the Commission’s report and, where appropriate, indicate which steps it intends to take in response to the report”.

6. Conclusion and advice

6.1 By this Advisory, CHRAJ is calling on all state actors, particularly the Security Agencies, to respect Ghana’s obligations under international law and to take steps to rid its operations of the use of torture and, where state officials are found to have employed torture in the performance of their work, should be dealt with swiftly under the laws of Ghana.

6.2 CHRAJ is also calling on all persons who may at any given point time suffer any form of torture by any person or group of persons whether acting in a private capacity or official capacity to report to the appropriate authorities, including CHRAJ, for investigations to be conducted and the matter dealt with appropriately.

6.3 CHRAJ notes that the Government is not oblivious of Article 280(3) of the Constitution, which obligates His Excellency, the President, to publish the report of the Commission together with a White Paper within six months after the date of its submission by the Commission. In the same vein, CHRAJ further notes that notwithstanding the obligation as per Article 280(3) of the Constitution, the President can resort to Article 280(4) of the Constitution, which vests him with the discretionary power to issue a statement other than a report on the Commission’s findings. CHRAJ wishes to advise His Excellency,

the President, in exercising his executive or administrative power under Article 280(3)(4) of the Constitution, he should be guided by ethos of good governance as articulated under the Constitution. Respectively, Articles 23 and 296(a) (b) of the Constitution state:

Article 23 –

“Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal”

Article 296(a) (b) -

“Where discretionary power is vested in any person or authority –

(a) That discretionary power shall be deemed to imply a duty to be fair and candid;

(b) The exercise of the discretionary power shall not be arbitrary, capricious or biased whether by resentment, prejudice or personal dislike and shall be done in accordance with due process”

6.4 It is worthy of note that in accordance with the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa (Robben Island Guidelines), the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) and the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), the State must always endeavour to promptly take steps to prohibit and prevent torture, by conducting independent, impartial and effective investigations into all allegations of torture or ill-treatment, and also ensure continuous training of law enforcement officials and other relevant personnel on human rights standards, among others, in fighting and investigating allegations of torture.

6.5 CHRAJ reminds all state and non-state actors to respect Ghana’s obligation under Articles 12(1) (2), 15(1) (2) (3), 33(5), 35(4) and 40(c) (d) of the 1992 Constitution, SDG 16 and its relevant targets, as well as those stipulated under international law, particularly the ACHPR, ICCPR, CAT and OPCAT by avoiding acts and omissions that may impugn Ghana’s strides towards human rights compliance.

6.6 Essentially, CHRAJ calls on the Government in conjunction with the Office of the Attorney-General to commit to Article 40(c) (d) of the Constitution as well as relevant its relevant provisions relating to torture by implementing, in particular, paragraph 22 of the HRC’s Concluding Observations on the Initial Reports of Ghana of the ICCPR (CCPR/C/GHA/CO/1, 9th August 2016), which concluded that:

“The State Party [Ghana] should adopt criminal legislation that defines and criminalizes torture in accordance with international standards and provides for penalties commensurate with the gravity of the act”

In other words, CHRAJ calls on the Office of the Attorney, as chief legal adviser to the Government, as well as Parliament, and consistent with international best practice, to take the necessary steps towards enactment of a separate law on torture so as to cure the gap in the existing criminal jurisprudence.

**Dated at the Commission on Human Rights and Administrative Justice,
Old Parliament House, Accra, this 12 Day of September, 2019.**

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